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NO. 66276-7-1

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

STATE OF WASHINGTON

Respondent

v.

BUD M. FRASER,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. The State to introduced evidence that, several months before the defendant murdered the victim, the victim reported to police that the defendant was harassing him and that he feared for his and his girlfriend's life.

a. Was the defendant's right to confrontation violated when the statement was introduced for a non-hearsay purpose?

b. If it was error to introduce the statement, was it harmless?

2. Phone records from the defendant's cell phone were authenticated by a different custodian of records than the custodian who pulled the records and compiled them into two documents. The defense acknowledged that the records had been authenticated, but objected on the basis that they were more prejudicial than probative under ER 403. The defendant argues for the first time on appeal that his confrontation rights were violated.

a. Has the defendant preserved the confrontation issue for review?

b. Was admission of the phone records under these circumstances a manifest error involving a constitutional right?

c. Were the defendant's confrontation rights violated?

d. If the defendant's confrontation rights were violated was any error harmless?

3. The Court permitted the State to introduce one autopsy photo which showed the trajectory of the bullet through the victim's head. Was that an abuse of discretion where the photo was offered to explain the medical examiner's testimony, and the trajectory of the bullet was relevant to the issues of intent and premeditation?

II. STATEMENT OF THE CASE

The defendant, Bud Fraser, and Danielle Sigmond dated from 2006 to the fall of 2008. During their relationship they broke up and made up about four or five times. The relationship finally ended for good in the fall of 2008 when Ms. Sigmond struck the defendant. She went to jail for the assault, and the court issued a no contact order against her in favor of the defendant. 3 RP 65-66, 94-96.

Ms. Sigmond moved on from her relationship with the defendant, and in April or May of 2009 she began dating the victim, Colin Cross. Despite being the protected party in the no contact order, the defendant did not move on so easily. He continued to call Ms. Sigmond. She took his calls because he held the threat of going back to jail for violating the no contact over her head. The

defendant also used that threat to get Ms. Sigmond to agree to pay for damage to his car which he said she caused. Ms. Sigmond denied causing the damage, but did not want to go back to jail so she agreed to make payments to the defendant. 3 RP 98, 103.

Ms. Sigmond worked at an espresso stand in south Everett from 4:45 a.m. to noon. The defendant visited her there occasionally when she first started working there, but with increased frequency as the months went on. The defendant often asked Ms. Sigmond to spend time with him when he visited. 3 RP 77-79.

The defendant was aware that Ms. Sigmond had a new boyfriend which made him angry. Mr. Cross was also aware that Ms. Sigmond had contact with the defendant. While Mr. Cross was not happy about that, he did not threaten the defendant in any way. 3 RP 68-74.

The defendant made efforts to get Ms. Sigmond to leave Mr. Cross and come back to him. On May 23, 2009 the defendant text messaged Ms. Sigmond's mother saying "Please tell Danny to get away from Colin. He not good. I love her and want her for the rest of my life. If that not possible, at least she not with that piece of shit. Please. PL." 4 RP 288-291.

The defendant also threatened Mr. Cross, both directly and indirectly. In July 2009 Mr. Cross and his friend Sam Wene went to Ms. Sigmond's apartment in Marysville to pick up some of Ms. Sigmond's belongings. While Mr. Wene waited he saw the defendant and his cousin run around the corner of the building and try to attack Mr. Cross. Mr. Cross ran into the house and locked the door. The defendant and his cousin then approached Mr. Wene, threatening him because he was with Mr. Cross. As Mr. Wene walked away the defendant and his cousin went back to the apartment and tried to get in by kicking and shouldering the door. Mr. Cross armed himself with a knife and opened the door. At the sight of the knife the defendant and his cousin ran away. About four weeks later the defendant ran into Mr. Wene again. After they talked for a few minutes Mr. Wene started to walk away. While he walked away the defendant called out "Colin better watch his back because he's going to be blasted." 4 RP 447-454, 461-463.

The defendant also made threats to Mr. Cross through Ms. Sigmond. When Ms. Sigmond and Mr. Cross began dating the defendant told her that he was going to kill her boyfriend. He repeated that threat to Ms. Sigmond twice more. Although Mr. Cross knew that Ms. Sigmond had contact with the defendant and

was not happy about that, Ms. Sigmond never heard Mr. Cross threaten the defendant. 3 RP 72-75.

The defendant also sent threatening text messages to Mr. Cross. On June 1, 2009 the defendant text messaged Mr. Cross “She mine n u bes pak that gun whereva u go cuz I will get u or sumbudi I no.” Later that day the defendant text messaged Mr. Cross “Best get me befor I get u cuz I got bounty out 4 un bes havd a big gun n a armi...” He again text messaged Mr. Cross saying “I will end this wit mi everi last breath us bes run fast I get mi info 2moro n gimi bak mi girl n I wont hurt u 2 bad...” Ex. 54; 5 RP 515-520.¹

During the two weeks leading up to September 14, 2009 the defendant's efforts to see Ms. Sigmond intensified. His visits to Ms. Sigmond at the coffee stand where she worked increased to four or five times per week. The defendant repeatedly pleaded with Ms. Sigmond to go out with him. On the Friday before September 14 the defendant stopped by Ms. Sigmond's work once in the morning

¹ Exhibit 54 includes 23 text messages from the defendant to Mr. Cross out of a total 250 messages retrieved from Mr. Cross' cell phone. The quoted text messages are numbered 3, 17, and 29. The other text messages from the defendant to Mr. Cross are numbered 5, 8, 27, 58, 64, 77, 93, 96, 141, 146, 160, 175, 181, 182, 184, 187, 218, 228, 229, and 238. The other messages to Mr. Cross from the defendant were primarily harassing.

and once in the afternoon. When he stopped by in the afternoon the defendant became distraught when Ms. Sigmond was not there and the employee who was working could not tell him where she was. 3 RP 75-80; 4 RP 294-295.

The defendant also made repeated calls and text messages to Ms. Sigmond. Between September 6 and 14 the defendant text messaged Ms. Sigmond 379 times. The number of the defendant's text messages to her increased from 33 messages to over 60 messages per day. In his messages the defendant pleaded with Ms. Sigmond. The defendant also made threats to Mr. Cross in several of his messages. Ms. Sigmond responded far less frequently. As the days went on her responses became fewer until she stopped responding on September 13. 3 RP 75; 5 RP 537-545; Ex. 1.

From September 11 to 14 the defendant called Ms. Sigmond 54 times. He called her 17 times on September 11 and 10 times on September 13. Ms. Sigmond called the defendant once on September 11. She made no calls to him on September 13. The last call the defendant made to Ms. Sigmond was at 3:45 a.m. on September 14. 3 RP 75; 5 RP 534-535; Ex. 45.

Around the time of his last call to Ms. Sigmond the defendant left his home in Marysville. He drove to Ms. Sigmond's work place where he arrived sometime before 4:40 a.m. The defendant parked nearby the coffee stand. Mr. Wood was on his way to go fishing when he pulled up next to the defendant while the defendant was seated in his car. The defendant gave Mr. Wood a look which scared Mr. Wood enough to cause him to drive off. 4 RP 297-306, 313-314.

Mr. Cross drove Ms. Sigmond to work on September 14. They arrived at 4:54 a.m. Ms. Sigmond paused to pet the puppy they had bought that weekend. She got out of the car and went into the coffee stand while Mr. Cross drove over to some bushes to let their puppy relieve himself. 3 RP 85-87; 4 RP 342-43.

While Ms. Sigmond was dropped off the defendant got out of his car and approached Mr. Cross. He was armed with an AK-47 assault rifle. 36 seconds after Ms. Sigmond got out of the car the defendant shot Mr. Cross in the face. Mr. Cross collapsed and died almost instantly as a result of the shot to his head. When Ms. Sigmond and others in the area heard the gunshot blast they ran to Mr. Cross. Upon discovering him they called the police. 3 RP 87-89, 139-146, 211; 4 RP 343-344, 423.

The defendant immediately ran from the area to the Target store across the street. On the way he dropped off his gun in his car and took off the sweatshirt he had worn. He jumped in some bushes behind the store. A security guard in the parking lot saw the defendant and asked him if he was alright. The defendant told him that he was being chased. 3 RP 142-147, 159-162; 4 RP 254-258, 262-264; 6 RP 678.

The defendant called his friend Mr. Wold after the shooting. He told Mr. Wold where his car was and asked him to pick it up and bring it back to Mr. Wold's house. The defendant warned Mr. Wold to be careful because there were a bunch of police in the area and there was a gun in his car. Before doing so Mr. Wold saw the morning news on television. He heard about the shooting and saw the defendant's car in the background. As a result of what he learned Mr. Wold decided not to pick up the defendant's car. 3 RP 126-130.

The defendant then called his dad. His dad picked him up at the Target and brought him home to Marysville. The defendant's dad told the defendant to turn himself in. The defendant refused to do that because he knew he would go to jail. The defendant then

left his dad's home and began hitchhiking to Idaho to visit his grandpa. 6 RP 680-682.

Within minutes of the shooting police were on the scene. Officer Gordon contacted Ms. Sigmond. She was covered in blood, cradling her puppy, and crying hysterically. She told the officer that she recognized the defendant's car that was parked nearby. She identified the defendant as the one who killed Mr. Cross. 3 RP 180-182.

Police searched the area with a K-9. The dog was able to track the defendant to the Target, where it lost the scent. Police also canvassed the area for evidence. They located a shell casing and a bullet jacket near where Mr. Cross was killed. They also located the defendant's AK-47 rifle in the back of his car. Out of the 30 rounds the weapon was capable of holding there were 28 rounds in the magazine and 1 round in the chamber. Police also found several cigarette butts located next to the defendant's car. 3 RP 185, 199-209, 211- 220, 232-238; 4 RP 352, 368.

Police sent the rifle, shell casing, and bullet jacket to the crime lab for comparison and testing. The rifle was a semi-automatic weapon with a six pound trigger pull. In order to load the weapon the safety had to be off. In order to fire the weapon the

safety had to be off, the action had to be pulled back, and the trigger had to be pulled. The firearm automatically loaded a cartridge into the chamber after it was fired it and the trigger was released. The crime lab determined the shell casing and bullet jacket had been shot from the rifle. Testing also revealed that the firearm was functioning properly, did not have a “hair trigger,” and would not accidentally discharge. 3 RP 238; 4 RP 351-370.

Police also sent the cigarette butts to the lab for DNA testing. The lab found DNA on the butts that matched the defendant’s. The probability that a random person would match this profile was one in three quadrillion. 3 RP 239; 4 RP 281-282.

At the autopsy the medical examiner noted that Mr. Cross had stippling in his left eye and stippling primarily on the left side of his face with a small amount on the right side of his face. The stippling indicated that Mr. Cross was between one and three feet from the defendant’s gun when it was fired. Mr. Cross’s eyes were open at the time he was shot. 4 RP 375-381, 421-422.

Police located the defendant with the aid of his cell phone carrier. The cell phone company “pinged” the defendant’s cell phone several times to find a GPS location. On September 15 they

were able to locate the defendant at the Flying J truck stop in Ellensburg. 3 RP 187-188, 221-224; 5 RP 508-509.

Sgt. Scott Willis from the Ellensburg Police Department responded to the Everett Police request to locate the defendant. Sgt. Willis found the defendant coming from the area around the bathrooms in the truck stop. When the defendant confirmed his identity Sgt. Willis took him into custody. 3 RP 187-190.

Later that day Everett Police Detectives Erickson and Gill interviewed the defendant at the Ellensburg police station. The defendant agreed to talk to the detectives. He claimed that he left home on September 13 and hitchhiked to Ellensburg. The defendant said he had a dispute with Mr. Cross because he claimed Mr. Cross threatened his family. The defendant did not specify what threat Mr. Cross made. The defendant denied being jealous of Mr. Cross's relationship with Ms. Sigmond. He denied that he would kill for Ms. Sigmond, but he said he would kill for his family. When asked what he knew about the homicide the defendant said a lot of people wanted Mr. Cross dead. 3 RP 227-231.

The defendant was charged with First Degree Murder while armed with a firearm. 1 CP 141-142.

At trial the defendant testified that he lived in Marysville and was working in Lake Stevens the week before September 14. He worked from 7:00 a.m. to 4:30 or 5:00 p.m. every day. Each day he would drive to Ms. Sigmond's coffee stand to see her and get coffee before work. The coffee stand was about 30 miles from his home, and it took about 30 minutes to get there. 6 RP 614-617, 635.

On September 11 when he went to Ms. Sigmond's work he talked to her about getting a payment for the money she owed him. He said Ms. Sigmond agreed to give him some money after her shift. He went back to the coffee stand in the early afternoon after he bought Ms. Sigmond some roses, but she was not there. Throughout the weekend he tried to get in contact with Ms. Sigmond in order to get the money she promised him. 6 RP 618-627.

On September 14 the defendant awoke early and called Ms. Sigmond. She did not respond so he went to the espresso stand where she worked. He arrived before it opened. While waiting he smoked cigarettes and listened to music. When Ms. Sigmond arrived he noticed that Mr. Cross was driving her. The defendant had never seen Mr. Cross drop Ms. Sigmond off for work before,

and he wondered what Mr. Cross was doing there. 6 RP 633-636, 650-652.

The defendant watched Mr. Cross drop Ms. Sigmond off and then drive away out of the defendant's sight. He wanted to find out why Mr. Cross was there. He was afraid for his safety so he grabbed his rifle and a blanket from the back seat floorboards of his car. He did not check to see if it was loaded, or if the safety was on. He then got out of his car with the gun and walked toward Mr. Cross. 6 RP 655-661.

The defendant thought Mr. Cross might be waiting for him, since it was close to the time that the defendant normally arrived for coffee. As he walked toward Mr. Cross's car he held the rifle pointed down. When the defendant got to the back of Mr. Cross's car the driver side door opened. Given the timing of that event the defendant thought Mr. Cross knew he was there. He wanted to get closer to Mr. Cross before Mr. Cross got out of the car. Mr. Cross got out of the car, stood up, and faced the defendant. The defendant then postured toward Mr. Cross to let Mr. Cross know he had a gun. Mr. Cross appeared to be grabbing for the defendant or his gun with his left arm. He was startled and jumped backwards.

As he jumped his arm raised and the rifle went off. Mr. Cross collapsed at that point. 6 RP 663-673.

The jury rejected the defendant's claim of accident. He was convicted of first degree murder as charged. The jury returned a special verdict finding that he was armed with a firearm at the time of the commission of the crime. 1 CP 63, 67.

III. ARGUMENT

A. THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS NOT VIOLATED WHEN THE COURT ADMITTED THE VICTIM'S EARLIER STATEMENT FOR A NON-HEARSAY PURPOSE. ALTERNATIVELY ANY ERROR IN ADMITTING A LIMITED STATEMENT FROM THE VICTIM WAS HARMLESS.

The State offered evidence that Colin Cross had made an earlier report to police regarding the defendant harassing him and Ms. Sigmond. Specifically the State sought to introduce a single line from a witness statement Mr. Cross had written during a harassment complaint. The defendant objected arguing that the statement would violate his right to confrontation. The Court admitted the statement under two theories; (1) the statement was admissible pursuant to the doctrine of waiver by forfeiture, and (2) because the State offered the statement to establish the victim's state of mind and rebut any defense of accident. 2 RP 44-45; 5 RP

470-482; 3 CP ____ (sub 40, State's Trial Memorandum and Motions in Limine, page 14).

Before the statement was admitted the court gave the following limiting instruction:

This testimony, this evidence, is being allowed for Mr. Cross's state of mind that he made a statement to the police officer. And you would consider it for what his state of mind was, but not for the truth of the matter.

5 RP 486.

Thereafter the officer who took the statement testified that in a portion of the statement the victim wrote: "I am constantly being harassed, and fear for my and my girlfriend's life." 5 RP 486.²

The defendant argues that this statement violated his right to confrontation, and therefore he is entitled to a new trial. Because it was admitted for a non-hearsay purpose, the trial court did not err.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ...to be confronted with the witnesses against him..." Where "testimonial" statements are at issue the Sixth Amendment requires that before the evidence may be admitted the witness must be unavailable and the defendant must have had a prior opportunity for cross-examination.

Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Court did not define which statements were “testimonial” but did state that it included police interrogations. Id. at 68.

The Court accepted the doctrine of forfeiture by wrongdoing as an exception to the rule on the grounds of equity. Crawford, 541 U.S. at 62. The Court later addressed the parameters of that doctrine in Giles v. California, 554 U.S. 353, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008). The Court concluded that doctrine applied only when the defendant acted to prevent the witness from testifying. Id. at 366.

Here there was no evidence the defendant killed Mr. Cross in order to prevent him from testifying. No formal action was taken after Mr. Cross gave his statement to police. 5 RP 487. Instead, the evidence shows the defendant killed Mr. Cross because he was uncontrollably jealous of Mr. Cross’s relationship with Ms. Sigmond. The evidence was not admissible under the first theory the court relied on.

² Contrary to the defendant’s representations, this portion of the statement was the only part of the exhibit admitted. The written statement (exhibit 56) was not admitted into evidence. 2 CP 172.

However the second justification for admitting the evidence was proper. Crawford specifically exempted from the Confrontation Clause those statements that were admitted for non-hearsay purposes. “The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985). Crawford, 541 U.S. at 59, n. 9. In Street the State was permitted to introduce a co-defendant’s confession in order to rebut the defendant’s testimony. The defendant had testified that he only confessed after the investigating officer read him the co-defendant’s statement and told the defendant to repeat that confession in his own statement. Street, 471 U.S. at 411-12. The Court held the non-hearsay purpose of the co-defendant’s confession did not raise any Confrontation concerns. Id. at 414.

The Washington Supreme Court acknowledged this exception in State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005), aff’d, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). [E]ven testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted.” Id. at 301.

This court recognized that exception to the rule in In re Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005), review denied, 156 Wn.2d 1031, 137 P.3d 864 (2006). There the defendant had been charged as an accomplice to an attempted murder. During the investigation the police questioned both Theders and his co-defendant Graves, who gave nearly identical accounts of their activities on the date of the crime. Later they both admitted their statements were false. The trial court admitted the statement to show collusion between Theders and Graves on the story they would give if later questioned. Id. at 431. This Court found no error where the statements were which were admitted were not offered for the truth of the matter asserted. Id. at 433.

Other post-Crawford cases have similarly recognized that the United States Supreme Court specifically approved its earlier decision, holding “testimonial” statements do not offend the Confrontation clause when admitted for non-hearsay purposes. In one case in which an officer testified to statements made to him by a witness the court found no Confrontation violation even though the statements were testimonial. This is because the statements were not offered for the truth of those statements but to explain the course of the officer’s investigation. State v. James, 138 Wn. App.

628, 639-641, 158 P.3d 102 (2007), review denied, 163 Wn.2d 1013, 180 P.3d 1291 (2008). See also People v. Ervine, 47 Cal.4th 475, 775-76, 220 P.3d 820, 847 (2009), cert. denied, 131 S.Ct. 96, 178 L.Ed.2d 60 (2010). (witness statement to police preceding a shootout wherein an officer was killed held admissible because it was introduced to explain why the officers were at the defendant's home and to prove police were there on official business); Weems v. State, 673 S.E.2d 50, 53 (Ga. 2009) (introduction of a receipt found at the defendant's home showing he purchased a lock did not violate the Confrontation Clause where it was introduced to circumstantially tie the defendant to the home where a marijuana grow operation was located); Proffit v. State, 191 P.3d 974 (Wyo. 2008, cert. denied, 129 S.Ct. 1048, 178 L.Ed.2d 477 (2009) (introduction of the co-defendant's statements to show the effect of those statements on the defendant did not violate the Confrontation clause); United States v. Matera, 489 F.3d 115 (2nd Cir. 2007), cert. denied, 552 U.S. 969, 128 S.Ct. 424, 169 L.Ed.2d 298 (2007) (same); Commonwealth v. Pelletier, 879 N.E.2d 125, review denied, 884 N.E.2d 523 (Mass. 2008) (wife's report that she fell down the stairs when police responded to a report of domestic violence did not violate the Confrontation Clause where it was

introduced to set the context of the police investigation), United States v. Jimenez, 419 F.3d 34 (5th Cir. 2005) cert. denied, 546 U.S. 1189, 126 S.Ct. 1373, 165 L.Ed.2d 81 (2006), United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007), cert denied, 553 U.S. 1094, 128 S.Ct. 2902, 171 L.Ed.2d 843 (2008) (no confrontation violation where informant's report to police introduced to explain the officer's actions), United States v. Holmes, 406 F.3d 337, 349 (5th Cir. 2005), cert. denied, 546 U.S. 817, 126 S.Ct. 375, 163 L.Ed.2d 163 (2005)(no Confrontation Clause violation where co-defendant's testimony from related civil suit was admitted to show it was false and to prove an overt act charged in the indictment).

Statements taken by police officers in the course of interrogations are "testimonial" statements. Crawford, 541 U.S. at 52. The statement at issue here was part of a written statement taken by an officer in response to Cross's call to report the defendant was harassing him. 5 RP 484-486.

The statement falls within Crawford's definition of "testimonial." Even so, the trial court did not err in admitting it. Consistent with Street, Crawford, and other cases which have followed, the statement did not violate the defendant's confrontation

rights because it was not offered for the truth of the matter asserted. Rather it was admitted to show the victim's state of mind.

The victim's state of mind is relevant when the defense is that the victim's death occurred by accident because it is probative of whether the victim acted as the defendant claimed he did. State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980). Here, because the defendant claimed the gun went off by accident the victim's state of mind as it related to the defendant was relevant. The defendant presented evidence that the victim lunged at him as he approached, thereby causing the defendant to stumble backwards, lifting the gun and accidentally discharging it into the victim's face. Whether the victim was afraid of the defendant or not bore on whether the victim would have taken that kind of aggressive action upon seeing the defendant when the defendant appeared unexpectedly and was armed with an assault rifle.

The defendant argues that the evidence violated his confrontation rights because the trial court admitted Cross's entire statement made to the police. He argues the statement was only relevant for the truth of the matter asserted, and admission of the statement for purported non-hearsay purposes was simply a "backdoor" means to violate his confrontation rights. He seeks to

rely on State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008).

In Mason the Court analyzed the admissibility of a murder victim's prior statements to police on the same two bases the trial court admitted Mr. Cross's statements here. There Santoso reported to police the defendant had strangled him, bound him, and demanded money. The defendant was released pending trial and later murdered Santoso. The trial court admitted Santos's statements to police to explain the police investigation into the earlier crime. The Mason court upheld the admission of the victim's statements on the theory that the defendant waived his confrontation rights under the forfeiture by wrongdoing theory. Id. In dicta the Court stated it was debatable whether the United States Supreme Court would have approved admission of Santos' statements to police for the non-hearsay purpose relied on by the trial court. Id. at 921.

In Mason the Court was concerned that the non-hearsay purpose for the evidence used to justify its admission was not the real reason it was admitted. Here the record is clear that the justification and use of the victim's statement to police were the

same. Because the defendant asserted the defense of accident, the victim's state of mind was relevant. As discussed above, whether Mr. Cross feared the defendant bore directly on the credibility of the defendant's claim that Mr. Cross's actions cause the gun to go off accidentally.

The United States Supreme Court specifically endorsed its earlier decision in Street permitting otherwise testimonial statements for non-hearsay purposes. Crawford, 541 U.S. at 59, n. 9. That Court is the final authority when interpreting the federal constitution. State v. Radcliffe, 139 Wn. App. 214, 224, 159 P.3d 486 (2007), aff'd, 164 Wn.2d 900, 194 P.3d 250 (2008). Unless and until the United States Supreme Court reverses its position on this point, it remains good law.³ The trial court did not err in admitting Mr. Cross's statement to the police for a non-hearsay purpose.

³ The defendant suggests that this may come to pass, noting the Supreme Court recently accepted certiorari in People v. Williams, 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S.Ct. 3090 (2011). The Court's decision to accept review obviously does not foretell a reversal of the Court's earlier decision. Additionally, Williams dealt with different facts than those presented here which may or may not impact whatever the Court's ultimate decision is on the kinds of circumstances presented in this case.

1. Even If It Was Error To Admit Mr. Cross's Statement It Was Harmless.

“Constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Id. The Court will look to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426.

The statement the court admitted conveyed two facts; (1) Mr. Cross was constantly being harassed, and (2) he was in fear for his and his girlfriend's life. Each of these facts was either evident or reasonably inferred from other evidence admitted. Even without Mr. Cross's statement, the jury would have found the defendant guilty of the crime.

Evidence the defendant made multiple threats to injure or kill Mr. Cross, both directly to Mr. Cross and indirectly through Ms. Sigmond and Mr. Wene would lead a rational juror to conclude that

Mr. Cross had reason to fear the defendant.⁴ The defendant testified that when he saw Mr. Cross at Ms. Sigmond's Marysville apartment Mr. Cross called the police and armed himself with a knife after the defendant tried to kick the door in. 6 RP 716-717. Mr. Wene's description of the event was a premeditated, unprovoked, ambush on Mr. Cross. That event happened just one and one-half months before the murder. Given all of these circumstances a rational juror would have no doubt that Mr. Cross was likely in fear of the defendant, and feared him even at the time of the murder.

A rational juror would also likely conclude that Mr. Cross felt harassed by the defendant. The defendant sent numerous threatening and crude text messages to Mr. Cross. Ex. 54. He also hounded Ms. Sigmond with hundreds of text messages and phone calls in the days leading up to Mr. Cross's murder. Ex. 1 and 45; 5 RP 534-45. In addition Mr. Cross had reason to believe

⁴ On the other hand the only evidence of threat made by Mr. Cross to the defendant came from the defendant's testimony following the incident where Mr. Cross's car was damaged. The defendant testified Mr. Cross threatened to beat the defendant up. 6 RP 710. There was no evidence Mr. Cross ever threatened to kill the defendant. The defendant testified Ms. Sigmond made a more direct threat to kill either the defendant or members of his family. 6 RP 711. Since the defendant also testified that he continued to pursue Ms. Sigmond a rational juror would likely conclude that the defendant did not think much of her threat.

the defendant targeted him and Ms. Sigmond when their car windows were broken out. The defendant was seen leaving rapidly from their apartment parking lot. The next morning only Ms. Sigmond and Mr. Cross's vehicle had been damaged. 3 RP 96-97.

Other evidence established the defendant acted with a premeditated intent to kill Mr. Cross. In addition to repeatedly stating that he intended to kill Mr. Cross, his actions on the morning of the murder lead to the inescapable conclusion that he formed the intent to carry out his plan before approaching Mr. Cross. The defendant indicated in his text message to Ms. Sigmond that he was stalking her and Mr. Cross. See Ex. 45, message sent from the defendant's cell on September 13 at 13:28:11 hours. The defendant left his home earlier than usual on September 14 and armed himself with an assault rifle. He arrived before Ms. Sigmond was scheduled to be at work and lay in wait. Once he saw Mr. Cross, the defendant approached. Arming himself with the assault rifle was inconsistent with the defendant's claim he just wanted to know why Mr. Cross was there.

The physical evidence also refutes the defendant's claim of accident. The stippling on the left side of Mr. Cross's face established two facts. First the defendant was very close to Mr.

Cross when he shot. Second, Mr. Cross was sideways to the defendant's firearm, consistent with just getting out of his car at the time he was shot. The trajectory of the bullet also supports the conclusion that Mr. Cross had not got out of his car and stood up before he was shot. The defendant was shorter than Mr. Cross, but the trajectory of the bullet was at a downward angle. That indicates that the defendant stood over Mr. Cross as he shot him. The untainted evidence shows beyond a reasonable doubt that the defendant would have been convicted even without the challenged evidence.

B. THE DEFENDANT DID NOT PRESERVE FOR REVIEW HIS CLAIM THAT INTRODUCTION OF HIS CELL PHONE RECORDS VIOLATED HIS CONFRONTATION RIGHTS. IF THE COURT REVIEWS THE ISSUE, HIS CONFRONTATION RIGHT WAS NOT VIOLATED. ALTERNATIVELY, ANY ERROR WAS HARMLESS.

1. The Defendant Did Not Object To Cell Records in Exhibits 1 and 45 On The Ground He Raises On Appeal. The Issue On Appeal Has Not Been Preserved For Review.

Exhibit 1 was a record kept by Sprint in the ordinary course of business which related to text messages from the defendant's phone from September 6 to September 15, 2009. Exhibit 45 was a record of incoming and outgoing phone calls from the defendant's phone between September 1 and September 15, 2009. 3 RP 75-76; 5 RP 501-02. After the records custodian testified regarding the

manner in which the records had been created, retained, and retrieved the State offered each exhibit into evidence. The defense agreed the records had been authenticated. They nevertheless objected to admission of the records on the basis that they were more prejudicial than probative under ER 403. The Court overruled the objection and admitted the records. 5 RP 506-08.

The defendant now argues for the first time on appeal that the records violated his right to confront the witnesses against him because the records custodian who pulled the records from Sprint's database was not the records custodian who testified. Generally a party may only assign evidentiary error on appeal on the specific ground made at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). RAP 2.5. The purpose of the rule is to allow the trial court the opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). It is also based on consideration of fairness to the opposing party. Id.

The Court may consider an issue even though it has not been preserved for review if it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). An error is manifest if it had

practical and identifiable consequences in the trial of the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The defendant argues that he may raise this issue for the first time on appeal because it is a manifest error affecting a constitutional right, citing State v. Lee, 159 Wn. App. 795, 813, 247 P.3d 470 (2011). Lee is not dispositive because it involved different facts than those presented here.

In Lee this Court was asked to consider whether admission of cell phone records which were authenticated by a certificate from the custodian of records pursuant to RCW 10.96.030 violated the defendants' Sixth Amendment Confrontation right even though the defendants had not objected to their admission at trial. This Court agreed to consider the issue because the issue involved a constitutional right. It was "manifest" as that term has been interpreted because in that case the records corroborated the only eye witness to a homicide where the identity of the murderers was contested. Lee, 159 Wn. App. at 813-814.

Unlike Lee the identity of the murderer in this case was not contested. Moreover, no records custodian testified in Lee. The records were admitted after the conditions in RCW 10.96.030 had been met. Here the defendant admitted he shot and killed Mr.

Cross. A records custodian who was familiar with the manner in which the records were created and maintained as well as retrieved testified. 5 RP 494-505.

The records were relevant to the defendant's motive and premeditation. However, there was a considerable amount of other evidence which also established the defendant's motive and premeditation, some of which was produced by the defendant himself. The defendant threatened to kill Mr. Cross on at least three occasions to Ms. Sigmond. He made similar threats to kill Mr. Cross to Mr. Wene, and to Mr. Cross directly. Exhibit 54, which the defendant does not challenge on appeal, listed text messages sent from the defendant to Mr. Cross. The defendant made clear in those texts that he did not like Mr. Cross and was jealous of Mr. Cross's relationship with Ms. Sigmond. He also made it clear that he intended to do Mr. Cross harm. On one instance in July the defendant and his cousin ambushed Mr. Cross, clearly intending to harm him.

The defendant also said he daily drove 30 miles before work to see Ms. Sigmond at her coffee stand. No one would drive that far for coffee. Rather that conduct clearly shows the defendant was

obsessed with Ms. Sigmond. That in turn gave the defendant motive to get Mr. Cross out of the way.

The defendant also packed his AK-47 in his car before going to the coffee stand. He arrived at least 20 minutes before the time he knew Ms. Sigmond arrived for work. He saw Mr. Cross pulling over to the bushes and walked more than 2000 feet before reaching him. 3 RP 196-97 The stippling on the left side of Mr. Cross's face and lack of stippling on the right side of his face is evidence Mr. Cross was sideways to the defendant as he got out of his car and the defendant stood at the rear of Mr. Cross's car. That shows the defendant did not wait to find out what Mr. Cross was doing there, but rather was there to make good on his threat to "blast" Mr. Cross.

This case is also different from Lee in that here defense counsel specifically agreed that the records had been authenticated. Even if the records were admitted in error, that error was invited. The invited error doctrine precludes a defendant from inviting a court to act and then claim that act was error on appeal. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

Unlike Lee the facts in this case are considerably different. Any error in admitting the defendant's cell phone records in exhibits

1 and 45 was not manifest. The Court should decline to consider the issue raised for the first time on appeal.

2. Business Records Which Were Pulled From The Phone Company's Data Base By One Records Custodian But Authenticated At Trial By A Second Records Custodian Did Not Violate The Defendant's Right of Confrontation.

Even if the Court does consider the issue, the defendant's confrontation rights were not violated when Exhibits 1 and 45 were admitted into evidence. To authenticate the records the State called Thomas Koch as custodian of records for Sprint. Mr. Koch supervised a group of records custodians for that company. Their job was to authenticate and help understand records maintained by Sprint⁵. 5 RP 494-95.

Mr. Koch testified his company kept cell records in the regular course of business. He testified about how the records were created, maintained, and retrieved. Mr. Koch identified exhibits 1 and 45 as compilations of its records for text and calls made from and received by the defendant's cell phone from September 6 to 15, 2009. Mr. Koch did not personally prepare the

⁵ Although Mr. Koch's also said a custodian helps interpret the records, that term was not used in the same sense it was in either Melendez-Diaz or Bullcoming. Mr. Koch did not testify to what the records meant. Rather he testified to the mechanics involved in capturing and storing the data compiled in the two exhibits.

compilation of records in those two exhibits. 5 RP 498-505.

The cell phone logs in exhibits 1 and 45 constituted business records. A “business record” includes a record of an act, condition or event, made in the regular course of business, at or near the time of the act, condition, or event. RCW 5.45.020. The record is admissible if the records custodial testifies to its identity and the mode of its preparation, and if, in the opinion of the court, the sources of information, method and time of preparation justified its admission. Id. It is not necessary that the person who created the record testifies. It is sufficient if the witness is one who has custody of the record as a regular part of his work or has supervision of its creation. State v. Iverson, 126 Wn. App. 329, 338, 108 P.3d 799 (2005). Mr. Koch’s testimony satisfied the statutory criteria for admission of the cell logs as business records.

The defendant argues admission of Exhibits 1 and 45 violated his right to confront the witnesses against him even though he concedes the data contained in those exhibits was not “testimonial.” BOA at 34. Instead he argues the retrieval from the business’ data base and compilation of that data into a report was “testimonial” and he was therefore entitled to cross examine the individual that created those compilations.

To support his position the defendant relies on Crawford, Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009), and Bullcoming v. New Mexico, ___ U.S. ___ 131 S.Ct. 2705, ___ L.Ed.2d ___ (2011). Each of these cases is factually different from the facts presented here. For that reason they do not support the defendant's claim.

Crawford addressed the admission of out of court statements that implicated a defendant's rights under the Confrontation Clause. The Court divided statements into testimonial and non-testimonial categories. While admission of the first group implicated the Confrontation Clause the admissibility of the second group was governed solely by State hearsay law. Crawford, 541 U.S at 68. The Court noted that business records were clearly not testimonial. Id. at 56.

Melendez-Diaz considered the application of Crawford when the State sought to prove an element of a drug crime through a lab technician's affidavit certifying that a substance tested was cocaine. Since the affidavit fell within the "core class of testimonial statements" it was inadmissible absent showing the lab technician who performed the work was unavailable and the defendant and a

prior opportunity to cross-examine him. Melendez-Diaz, 129 S.Ct. at 2532.

Bullcoming addressed whether the Confrontation Clause permitted introduction of a forensic laboratory report that contained a testimonial certification which was made in order to prove a fact at trial, through the testimony of an analyst who did not sign the certification, or participate in, or observe the test reported in the certification. Bullcoming, 131 S. Ct. at 2713. The Court noted the analyst's report contained assertions about past facts and human actions which were appropriate for cross examination. Id. at 2714. Because the testifying analyst could not convey what the analyst who performed the test knew, or expose any lapses in that analyst's test, the Confrontation Clause required the person who actually performed the test to testify at trial. Id. at 2715-2716.

In each of these three cases the Court was concerned with out of court "statements." Statements are "1. something stated: as (a) a single declaration or remark; assertion, (b) a report of facts or opinions." www.merriam-webster.com/dictionary/statement. A statement has also been defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person

as an assertion.” ER 801(a). The conduct at issue here is not a statement.

The conduct at issue involves the act of Mr. Koch’s subordinate who responded to a search warrant or subpoena to search Sprint’s database for certain specified records using a particular search tool with defined search parameters. 5 RP 495, 501-02. The act of compiling the records into a single document is non-verbal conduct. Non-verbal conduct is an assertion only if it is intended to be an assertion. In re Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985). “Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay.” Id. (emphasis in the original). Since hearsay is defined as a specific kind of statement, nonverbal conduct cannot be a statement unless the actor intends the act to express a fact or opinion. Responding to a command to produce documents however expresses no fact or opinion. It simply is a reaction to a specific request. Because the records custodian who pulled the records in exhibits 1 and 45 made no statement, the Crawford line of cases has no application.

To the extent that it could be argued that the record custodian’s act is a statement it at most conveys “these are the

records kept in Sprint's database that you requested." In that sense it is no different from the certification of a records clerk certifying official documents. The Court recognized that kind of statement was exempt from the Confrontation Clause. Melendez-Diaz, 129 S.Ct. at 2539. The Court noted that a clerk's certification differed from other statements because the clerk did not give his interpretation of what the record contained or showed, nor did he certify its substance or effect. Id. Similarly the records custodian who prepared exhibits 1 and 45 did not interpret the data in those documents or give an opinion as to its effect. The conduct of the records custodian here stands in stark contrast to the analysts' report in Melendez-Diaz and Bullcoming. In each of those cases the analyst tested a substance, interpreted the data resulting from those tests, and reported his opinion as to what the data meant.

Unlike the surrogate witness in Bullcoming Mr. Koch could testify to the procedures performed in making and retrieving the records in question. Because a custodian of records only authenticates those records and does not interpret them or express any opinions in regard to them, the problem with a surrogate witness identified in Bullcoming is not present here.

3. If Records Of The Defendant's Phone Calls and Text Messages To Ms. Sigmond Was Admitted In Error, It Was Harmless.

Assuming for the sake of argument that the Court erred in admitting phone records which were authenticated by someone other than the records custodian who pulled those records, it was harmless error. As discussed above the records were relevant to establish the defendant's motive for killing Mr. Cross and his premeditation in doing so. The overwhelming untainted evidence also showed the defendant was a jealous ex-boyfriend who was obsessed with Ms. Sigmond and who hated her new boyfriend Mr. Cross. When his attempt to enlist Ms. Sigmond's mother to help break up Ms. Sigmond's relationship with Mr. Cross failed, the defendant repeatedly threatened to kill Mr. Cross. The defendant went so far as to ambush Mr. Cross at Ms. Sigmond's apartment a few months earlier. The defendant's text messages to the Mr. Cross demonstrated the defendant's obsession with Ms. Sigmond and his intent to hurt Mr. Cross. Ex. 54.

The defendant knew when Ms. Sigmond got to work because he went to her coffee stand regularly. He arrived much earlier than the beginning of her shift that day and lay in wait, armed with an assault rifle. As discussed the physical evidence

supports the conclusion that Mr. Cross was sideways to the defendant and just getting out of his car when the defendant shot him. Mr. Cross was not in a position to have lunged at the defendant as the defendant described.

The defendant's conduct after the shooting was inconsistent with someone who accidentally shot someone. The defendant ran away and hid in some bushes. He got rid of his gun and tried to change his appearance by taking his sweatshirt off. He refused to turn himself in as his dad told him to because he knew that he would be in trouble. Given all the untainted evidence even without the cell records in exhibits 1 and 45 the jury would have convicted the defendant as charged.

C. THE AUTOPSY PHOTOGRAPH OBJECTED TO AT TRIAL WAS RELEVANT TO EXPLAIN THE MEDICAL EXAMINER'S TESTIMONY. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING IT INTO EVIDENCE.

Prior to trial the defense moved to limit autopsy photos on the basis that they were gruesome and had the potential to impact the jury's objectivity. The trial court ruled that photographs that were "necessary to illustrate the type of death, cause of death, and in regards to deal with situations about any grabbing of the gun and how it was grabbed or what have you." The court reserved any

ruling with respect to specific photographs until after the parties' and the court had an opportunity to review the State's proposed photos. 2 RP 59.

The court revisited the issue before the medical examiner, Dr. Tiersch, testified. The parties had reached an agreement with respect to all of the proposed autopsy photos with the exception of exhibits 62 and 63. Dr. Tiersch explained the pictures showed the injury to the back portion of Mr. Cross's neck and the back of his mouth. The court indicated that the two exhibits appeared to be somewhat repetitive, with exhibit 63 being the more troublesome of the two. The court sustained the defense objection to exhibit 63 and allowed exhibit 62 into evidence. 4 RP 403-05. Dr. Tiersch used exhibit 62 to illustrate the bullet's direction of travel through Mr. Cross's mouth and head. 4 RP 428.

The defendant argues the exhibit was improperly admitted because it was cumulative to other evidence admitted, because it was gruesome, and because its probative value was outweighed by the unfairly prejudicial. The admission of photographs is within the sound discretion of the trial court, which will not be disturbed on appeal absent showing an abuse of discretion. State v. Stackhouse, 90 Wn. App. 344, 357, 957 P.2d 218, review denied,

136 Wn.2d 1002, 966 P.2d 902 (1998). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable, or is based on "untenable grounds, or for untenable reasons." In re Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).

Where the probative value of photographs outweighs their prejudicial effect they are admissible, even if they are gruesome or unpleasant. State v. Harris, 106 Wn.2d 784, 791, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). "Unless it is clear from the record that the primary reason to admit gruesome photographs is to inflame the jury's passion, appellate courts will uphold the decision of the trial court." State v. Daniels, 56 Wn. App. 646, 649, 784 P.2d 579, review denied, 115 Wn.2d 1015, 791 P.2d 534 (1990).

The Court found no error in admission of five autopsy photographs in State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981). The photos illustrated the pathologist's testimony and helped to establish the cause of death and the location of the lethal wounds. Because those facts were relevant to the defendant's self defense claim, the Court found the trial court did not abuse its discretion in admitting those photos. Id. at 628.

In Gentry the Court found no error in admission of photos even though they were gruesome. State v. Gentry, 125 Wn.2d 570, 608-09, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). One of the issues at trial was whether the defendant had the intent to kill. The Court found that trial court did not abuse its discretion in admitting photographs that showed more detail than other photos that had been admitted, or x-rays or diagrams because they were relevant. The photos showed the number and depth of the wounds, which in turn were relevant to the issues of intent and premeditation. Gentry, 125 Wn.2d at 609.

Even where the Court found the rationale for admitting the photos was arguable, it deferred to the trial court's decision where the record supported that decision. In Harris the defendant challenged admission of a crime scene photo showing the victim lying in a pool of blood. The State argued the photograph showed surprise on the victim's case. That expression supported the State's theory that the victim had been ambushed. It refuted the defendant's claim that he approached the victim to talk about a refund for faulty car repair work. While the Court said the photo arguably did not show any particular expression on the victim's face, it found the record supported the trial court's decision to admit

the photograph, and thus there was no reversible error. Harris, 106 Wn.2d at 792

Here the State sought to prove that the defendant shot Mr. Cross as Mr. Cross was getting out of his vehicle. 7 RP 829-30, 834. The evidence showed that Cross was about 3 to 4 inches taller than the defendant. 4 RP 420; 6 RP 672 (victim was 5'11", defendant was 5'7" to 5'8"). The defendant shot Cross 36 seconds after Sigmond got out of Cross's car and Cross drove away. 4 RP 342-43. Cross fell where he was shot; he was found slumped over sitting next to the driver's side door. Ex. 36; 6 RP 673, 792.

The medical examiner used a rod to show the trajectory of the bullet through Cross's head. 4 RP 427. Exhibit 61 showed the rod going into the outside of the victim's face. Exhibit 62 showed the rod going through the victim's mouth. The exhibits were used to illustrate the medical examiner's testimony showing the entrance wound was about 1-1/2 inches below the exit wound. 4 RP 423, 426. The medical examiner concluded that given the trajectory of the bullet the gun was higher than the victim when it was shot. If the victim was taller than the shooter, then the victim may have been squatting or bending down. 4 RP 436.

The direction of travel the bullet took through Mr. Cross's head was relevant therefore to show the victim's head was below the gun when the defendant shot him. That, with other evidence, supported the State's theory that the defendant shot at Mr. Cross as he was getting out of his car. It refuted the defendant's claim that Mr. Cross grabbed at the gun causing it to accidentally fire. The pictures which showed the direction the bullet went through Mr. Cross's head help to explain the medical examiner's testimony. The trial judge did not abuse his discretion when he allowed exhibit 62 to be admitted into evidence.

The defense argues that the exhibit was offered to show the injury to the inside of the victim's mouth, which he states was not relevant to any issue. BOA at 40. The State supplied two photos of the victim's mouth. Dr. Tiersch explained that both exhibit 62 and 63 showed the injuries to the back portion of the victim's neck. Exhibit 62 showed the rod which demonstrated the trajectory, while exhibit 63 was a larger view showing more of the injury. Because the trajectory of the bullet was relevant to the State's theory of the case it was not error to admit exhibit 62. Because exhibit 63 appeared to be cumulative of the injuries already depicted in exhibit

62, and did not show the trajectory of the bullet, the trial judge justifiably exercised his discretion to exclude it.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on October 13, 2011.

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