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No. 50455-3-II

Grays Harbor County No. 16-1-00482-5

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN PETERSON,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
GRAYS HARBOR COUNTY

The Honorable Thomas Copland, trial judge

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting text messages without sufficient foundation.
2. The trial court abused its discretion in allowing an officer to testify, over defense objection, about the content of an online advertisement he saw.
3. The trial court errors were not harmless.

B. QUESTIONS PRESENTED

1. Where there is no evidence that text messages came from a phone number associated with the defendant and the state fails to make a sufficient foundation to show how the documents it said represented the text messages came to be produced for trial, did the trial court err in admitting those messages over defense objection?
2. Is it a violation of the best evidence rule and the prohibition against hearsay to allow a police officer to testify about the contents of a Craig's List ad he read when though the state failed to provide the ad or an acceptable copy of the ad or to explain why that failure should be excused?
3. Were the trial court's errors in improperly admitting the text messages and testimony about the Craig's List ad where that evidence formed a large part of the prosecution's evidence against the defendant and there is more than a substantial likelihood the errors affected the verdict?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant John Peterson was charged by information in Grays Harbor County with Conducting the Business of Selling Cigarettes Without a License. CP 1-2; RCW 82.24.500. Pretrial hearings were held before the Honorable Judges F. Mark McCauley on December 5 and 12, 2016, David Edwards on January 23, February 6, 13 and 21, and

April 17, 2017, and Thomas Copland on May 16, 2017. 1RP 1, 2RP 1.<sup>1</sup> Jury trial was held before Judge Copland on May 16, 2017, after which the jury found Mr. Peterson guilty as charged. CP 47; 2RP 1, 211.

On May 30, 2017, Judge Copland ordered a First Offender Sentencing Alternative. CP 65-76. Mr. Peterson appealed and this pleading follows. See CP 80-81.

2. Testimony at trial

In August of 2016, Robert Raveica, an enforcement officer with the Washington State Liquor and Cannabis Board, was working the “Tobacco and Taxes” unit, which targets “illicit tobacco” and “business being conducted in the State of Washington without proper taxation being satisfied first.” 2RP 96-07. As part of his job, Reveica would look “for the illicit online ads” on various websites such as “Craig’s List,” to see if someone was trying to sell cigarettes. 2RP 97.

Such sales on websites, the officer declared, “generally would be criminal in nature.” 2RP 97.

On August 24, the officer perused a website, “Craig’s List” on his department-issued phone. 2RP 97, 113. An advertisement caught Raveica’s eye. 2RP 98. Over defense objection, the officer described

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<sup>1</sup>The verbatim report of proceedings consists of four volumes, only some of which are chronologically paginated. the volume containing the proceedings of December 5 and 12, 2016, and May 15 and 16, 2017, as “1RP;” the three chronologically paginated volumes containing the proceedings of January 23, February 6, 13 and 21, and April 17, 2017, trial of May 16, 2017, and sentencing of May 30, 2107, as “2RP.”

the ad he saw, a copy of which was not introduced at trial. 2RP 98.<sup>2</sup> The officer said the ad was for “approximately four cartons of cigarettes, Camel,” a “Russian branded cigarette.” 2RP 98. The officer also stated that he “automatically” knew “it was basically counterfeit cigarettes entering the state of Washington, due to lack of tax stamp, and European language on the stickers.” 2RP 98.

According to Raveica, the advertisement had a phone number listed. 2RP 99, 104. The officer sent that phone number a “text” about the cigarettes, asking if they were still for sale. 2RP 99, 104. The officer also arranged with the person on the other end of the text messages to meet. 2RP 99.

According to Raveica, the text messages indicated that the seller had gotten the cigarettes from his cousin. 2RP 104. In the text message responses, the officer testified, the person gave an address and the officer went to that location. 2RP 100. The officer also said the texts identified the cigarettes for sale “by brand and quantity.” 2RP 100.

After arranging the meeting, the officer got some “tobacco tax-issued funds for undercover buy[s].” 2RP 103. About six or seven hours after Officer Raveica had responded to the online ad, he met a man who walked up to the street in front of the arranged address wearing a black backpack. 2RP 107. The man pulled cartons of cigarettes out of the backpack and put them onto the hood of the

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<sup>2</sup>For more discussion of this issue, please see the argument section, *infra*.

officer's unmarked car. 2RP 107. Raveica gave the man \$210 for about four cartons of cigarettes- an amount Raveica said was less than "market" rate. 2RP 105.

At that point, another officer Raveica had enlisted to help pulled up in a police car. 2RP 107, 117. Officer Raveica then identified himself as an officer and arrested the man with the cigarettes for selling them without a license. 2RP 108.

At trial, Raveica testified that he had contacted the "cover officer" for support with the arranged meet-up, because Raveica did not "know exactly the circumstances" of how the cigarettes came to be for sale. 2RP 105. The officer declared, "it could be a robbery, it could be something else." 2RP 105. Officer Raveica then testified that he brought in the other officer for "officer safety reasons." 2RP 105-106.

That "cover" officer, Elizabeth Horne, testified that her job was to locate people "in businesses" that were selling and buying "tobacco products without a license," or bringing the products into the state from another country or state "without paying taxes, which is also illegal." 2RP 128-29. Horne met with Raveica before the other officer went to the arranged meeting. 2RP 128-31. Horne then watched Raveica's interaction regarding the cigarettes. 2RP 128-31.

After the arrest, Officer Horne looked at the cigarettes and described them as "counterfeit Camels," which she explained was indicated by the packaging. 2RP 133. Officer Raveica said the packaging and stamps did not include Washington state tax stamps

on them and that he had not previously seen this particular Russian brand of cigarettes for sale “lawfully in the United States[.]” 2RP 111-12.

The man with the black backpack was later identified as John Peterson. 2RP 101, 104.

At trial, the prosecutor asked Officer Raveica whether he had come to “a conclusion about who the text messages were from,” and the officer answered, “Mr. Peterson, John Peterson.” 2RP 101. The officer then identified the series of text messages admitted into evidence as between the officer and Peterson. 2RP 101-102.

The exhibit containing the text messages did not indicate the number of the officer’s phone as the place from which any of the messages came. 2RP 121. The state did not establish that the phone number from which the responses came had any association with Peterson or to whom that phone belonged.

Kimberly Johnson of the Department of Revenue testified about keeping records of any business license application to sell cigarettes. 2RP 139-40. She did not recall any cigarette business licenses for private individuals in the area where Mr. Peterson lived. 2RP 143. She also said that she did a search of the records and found no one registered in that area with the name “John Arthur Peterson.” 2RP 143-44.

Johnson admitted, however, that she did not check the information in August of 2016. 2RP 146. She had only checked for licenses the week before trial, not at the time that the incident

occurred. 2RP 146.

A friend of Peterson's testified about Peterson's situation in August of 2016, when Peterson was moving from Elma to Ocean Shores and selling things off before the move. 2RP 157. That friend recalled Peterson offering to sell him some cigarettes that summer. 2RP 158. He knew Mr. Peterson had not smoked for 15 years or more and had not seen him smoke in a long time. 2RP 157. The friend was pretty sure that Peterson was doing most of his sales through on line sites, like tires or things he did not want. 2RP 158. Mr. Peterson had just texted his friend about having some cigarettes for sale. 2RP 158-59.

Mr. Peterson testified that he had sometimes used websites to sell things he got when people traded him for other things. 2RP 161. He had worked as a professional musician at one point and also in hospitality. 2RP 162. He was forced to move after his daughter was raped, for safety. 2RP 162-63. He was moving from four bedrooms to two and had to give away and sell items such as the extra beds. 2RP 163.

When Peterson was contacted by the officer, he said he was selling for a cousin and did not mention that he had bought the cigarettes from a website. 2RP 165-66. Peterson explained he did not want to "go into detail with people and have long conversations" or give people the website information. 2RP 165-66. Mr. Peterson testified that he did not know that selling the cigarettes that way was illegal. 2RP 166. He admitted he did not have a license to sell

cigarettes and said he was unaware that he had to do so in order to avoid breaking the law. 2RP 168. He explained the website he bought the cigarettes from said “it was legal, safe, and fast delivery” and they were out of the country, so they “can’t be prosecuted or brought here today.” 2RP 168. The website he used was Discountcigarettes.com or something similar. 2RP 168-69. Although he did not smoke, his friend had been borrowing money for cigarettes and he had thought there had to be a way to get them cheaper so she did not have to borrow so much money. 2RP 170. He looked online and bought them. 2RP 170. A couple of weeks later, she did not want them, so they laid around his house and he decided to sell them. 2RP 170.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN  
ADMITTING IMPROPER EVIDENCE IN VIOLATION OF  
THE HEARSAY AND BEST EVIDENCE RULES AND THE  
ERRORS WERE NOT HARMLESS

The state’s case against Mr. Peterson relied on the evidence of the papers which purported to be text messages between Mr. Peterson and the officer’s testimony describing the Craig’s List ad, without providing that ad or a duplicate as evidence. The trial court erred and abused its discretion in admitting that evidence over defense objection, and this Court should reverse, because those errors cannot be deemed “harmless.”

a. Relevant facts

Before trial, Mr. Peterson objected to the prosecution

introducing photographs of “text messages” which were alleged to have been sent by Mr. Peterson to the officer in arranging the “sale.” 2RP 85. He argued that the messages were hearsay, but the prosecutor argued that the text message photos were statements of “a party opponent” because they came from the defendant. 2RP 86. The prosecutor admitted, “[t]hey are offered for the truth of the matter, in part.” 2RP 88-89.

Counsel further objected that the state had failed to provide sufficient foundation to prove that the messages in response came from the defendant, because the state had no evidence the defendant was using that phone number or that it belonged to him. 2RP 89.

The prosecutor told the court he intended to ask the officer if the text messages were “consistent with his later interaction with the defendant,” and whether the officer “therefore. . . believes that they were from the defendant.” 2RP 92. The prosecutor also intended to talk about the text messages even before the exhibit with them was admitted. 2RP 92-93.

The judge denied the motion to exclude the evidence, stating that the legal standard was whether the state could “make a *prima facie* [sp] case that” the texts were “attributable to the defendant.” 2RP 93. The judge then declared, “I think the evidence rises to that level, so I’m not going to exclude it.” 2RP 93.

Later, at trial, when the prosecution sought to admit the photos of the text messages, counsel objected, “lack of foundation.” 2RP 102. The court overruled the objection. 2RP 102.

On cross-examination, the officer admitted that he did not know if the person who contacted him via text message that day was actually Mr. Peterson. 2RP 114-15.

In the messages, which the prosecutor read in closing argument, the officer asked if the cigarettes were still for sale and the reply was “yes, Camels are six dollars a pack, and generic are four dollars a pack.” 2RP 191. The people messaging arranged to meet “down the street” from the seller’s house and the seller texted, “I will be getting more as well.” 2RP 192. After eliciting the officer’s belief the texts were from Peterson at trial, in closing, the prosecutor read the texts identifying the person responding to Raveica in the texts as “[t]he defendant.” 2RP 191-192. There were additional texts about leaving for dinner, traffic being bad, and meeting at a house that was abandoned and for sale, with the seller saying, “I do this quite a bit.” 2RP 193. The prosecutor said that the texts proved that “this is a business, folks, to” the defendant. 2RP 194.

Also pretrial, Mr. Peterson objected to the state’s plan to have the officer testify about the contents of a “Craigslist” advertisement the officer had seen and responded to as part of the investigation. 2RP 85. The state did not have a copy of the ad and did not plan to get one or try to introduce one into evidence. 2RP 85-86.

Counsel objected that the state wanted to use the information contained in the ad to prove its case that Peterson was in the business of selling cigarettes. 2RP 85-86. The ad was thus being used to prove the truth of the matter asserted. 2RP 85-86.

The prosecutor admitted that the state did not have a copy of the alleged ad. 2RP 86. He nevertheless urged the court to find that it was proper to allow the officer to describe the ad as a “statement of a party opponent” by the defendant. 2RP 86. After first claiming the ad was only going to be used to explain how the officer ended up coming into contact with Mr. Cooper, when questioned by the trial judge, the prosecutor ultimately admitted that it intended to have the officer describe the ad in order to prove the truth of its contents, i.e., that the cigarettes were advertised for sale with a particular phone number, which the officer then used to arrange the “buy.” 2RP 87.

Counsel renewed his objection that the testimony was improper hearsay, further objecting, “we don’t have the best evidence on what the content of the ad is[.]” 2RP 86-87. Without discussion, the trial judge declared, “I don’t think it’s hearsay. I am going to let it in.” 2RP 87.

The prosecutor began the trial in opening argument by emphasizing the Craig’s List ad as evidence that Cooper was “running a little business. . . . selling cigarettes” - the very question before the jurors. 2RP 94. The prosecutor described what the officer saw in the ad and the text messages exchanged and relied on them throughout trial.

b. The evidence should not have been admitted

In general, this Court reviews a trial court’s decision to admit evidence for abuse of discretion. State v. Kinard, 109 Wn. App. 428,

435, 36 P.3d 573 (2001), 146 Wn.2d 1022 (2002). A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons. See State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Failing to follow the requirements of a rule is an abuse of discretion. Id. If the court's decision below involves interpretation of an evidence rule, that decision is reviewed de novo, as a matter of law. Id.

On review, this Court should reverse. First, the trial court abused its discretion, violated the prohibition against hearsay and violated the "best evidence" rule in allowing the officer to testify about the contents of the Craig's List ad, rather than requiring the prosecution to provide a copy of that ad or explain its absence.

Hearsay is a statement made outside of court but offered in evidence in court to prove the "truth of the matter asserted." ER 801(c). Hearsay is presumptively inadmissible unless there is an exception which applies. See ER 802.

The hearsay rule also works in relation to other rules. The "best evidence" or "original writing rule" applies when "a party is attempting to admit the contents" of a writing. In re the Personal Restraint of Adolph, 170 Wn.2d 556, 567, 243 P.3d 540 (2010). The rule does not require that a party must always establish a fact "by the best evidence available;" instead, it "typically requires the use of the original writing or a duplicate, to prove the contents of the writing." Id.

ER 1002 provides, in relevant part, "[t]o prove the content of a

writing, recording, or photograph, the original writing, recording, or photograph is required[.]” If the state fails to provide that original or a verified facsimile thereof, the state must make a reasonable showing explaining its unavailability before a witness may testify as to the missing writing’s contents. State v. Fricks, 91 Wn.2d 391, 392-94, 588 P.2d 1328 (1979). A duplicate is only proper if it was produced through some technique that “accurately reproduce[s] the original.” ER 1001(d).

Thus, where a defendant was accused of stealing money from a gas station, the “best evidence” rule prohibited the manager from testifying that the daily tally sheet where employees recorded the day’s receipts had established on the day of the robbery that there was \$102 in the cash register. Fricks, 91 Wn.2d at 392-94. Instead, the tally sheet had to be produced at trial, either an original or duplicate, or the state had to establish that the evidence was not available for some reason other than the fault of the state. 91 Wn.2d at 397.

A similar ruling was issued but not based on the “best evidence” rule, on hearsay grounds, in a case where the defendant was alleged to have stolen a bike from a car rack and the victim searched on the Craig’s List website for an ad selling a similar bike. In re Jovan A., 6 N.E.3d 760, 762-63, 379 Ill. Dec. 432 (1<sup>st</sup> Dist. Ill. App., 2014). It was improper hearsay when the state asked the victim to describe what she had seen in the ad she found on the site, instead of the state bringing in a copy of the ad. 6 N.E.3d at 762-63. The victim had used the phone number on the site to dig up some information and turned

a copy of the ad over to police. Id. An officer who investigated said he also went onto the site and viewed the ad. Id. Further, the officer described the ad and about using the telephone number listed in the ad to call someone who ended up being the defendant. 6 N.E.2d at 764.

The appellate court reversed. The testimony describing the content of the ad, including the telephone number, was hearsay. The statements found by the court to be improper were not just the written content of the ad but also “the implication that a [specific type of] bicycle was for sale and that interested parties could contact the seller via the telephone number listed.” 6 N.E.2d at 76.

Similarly, in this case, the officer’s testimony describing the contents of the ad and how he used the phone number in the ad to arrange the subsequent sale was improper hearsay and in violation of the best evidence rule.

It was also improper for the trial court to admit the paper copies of what were described as text messages between the defendant (as the seller) and the officer. Before evidence can be introduced, it must be meet the requirement of “authentication,” which means proof “that evidence is what it purports to be.” State v. sPayne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003), review denied, 150 Wn.2d 1028 (2004). Under ER 901, this means that the state must provide this proof as a “threshold matter,” in order to permit a reasonable fact finder to find that the evidence is authentic. See Payne, 117 Wn. App. at 106.

The ease with which we communicate and the general reliability of sending and receiving messages via “text” in our every day lives does not mean that authentication is not required. Under ER 901, for email messages, to authenticate them for trial, the court must receive testimony from someone who knows 1) the email purports to be created by the particular sender or their agent, 2) that the email appears to have been sent from an email address shown to be associated with the particular sender/agent, 3) and the appearance, contents and other characteristics of the email in light of the circumstances. The idea is to provide trial courts with information “sufficient to support a finding that the e-mail in question is what the proponent claims.” ER 901(b)(10).

In Washington, similar requirements are used for authentication of messages sent by “text.” See State v. Bradford, 175 Wn. App. 912, 929-30, 308 P.3d 36 (2013), review denied, 179 Wn.2d 1010 (2014). Thus, in Bradford, there was sufficient evidence to support the trial court’s conclusion that harassing text messages came from the defendant who was accused of sending those messages as part of harassment of the victim. 175 Wn. App. at 917. The texts were shown to an officer who responded to many of the 9-1-1 calls the victim made, and the officer copied the messages verbatim into his notebook from her phone. The state also had evidence from a “phone dumped” which showed the calls and the defendant had also similarly called and appeared at the victim’s place of employment and outside her house, which “demonstrated Bradford’s desperate desire to

communicate” with the victim. 157 Wn. App. at 928-29. Further, the content of the messages referred to a sex video Bradford had made with the victim and repeated threats he had made in person. 157 Wn. App. at 929. Also relevant was the fact that, while the defendant was in jail and unable to send text messages or emails, the victim did not receive any of the offensive text messages, but they resumed later after he ran into her in a restaurant - and referred to that restaurant in one of the texts. 157 Wn. App. at 929-30.

In contrast, here, there was no evidence the phone number belonged to Peterson. The prosecution presented no evidence that supported the state’s theory that the text messages arranging the sale were from Peterson. It presented no evidence of phone records showing that Mr. Peterson used the relevant phone number. There were no phone records identifying the number as belonging to him or anyone close to him. There was no identifying information common to the officer and Peterson mentioned in texts which would have identified him. The only evidence was the later appearance of Peterson to meet with the officer, who himself admitted he did not have proof the phone number from which the responses came was associated with Peterson.

These errors were not harmless. Evidentiary evidence will require reversal and remand for a new trial if, “within reasonable probabilities, the outcome of the trial would have been materially affected” if the error had not occurred. State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). This does not require the defendant to

show that he would not have been convicted, but just that it was reasonably likely that the errors could have materially affected the verdict. State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2007). In contrast, error in admitting evidence is “harmless” if “the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, there is a reasonable probability that the errors affected the outcome of the trial and the evidence was more than just of “minor” significance. The prosecution used the improperly admitted texts and testimony about the Craig’s List ad throughout its case, and as a crucial part of its arguments about guilt. The trial court abused its discretion in admitting the evidence over Mr. Peterson’s objections. The errors were not harmless, and this Court should reverse and remand for a new trial.

E. CONCLUSION

The trial court abused its discretion in admitting the evidence of the text messages and the hearsay testimony from the officer declaring what he saw in the online ad. The admission of the description of the Craig's List ad also violated the best evidence rule. The prosecution used the improperly admitted evidence to prove its case, and the errors were not harmless.

DATED this 11th day of May, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, to Grays Harbor County prosecutor's office, and to Mr. Peterson, at 102 Garden Hill Rd. W, Elma, WA. 98541.

DATED this uth day of May, 2018,

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## Transmittal Information

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