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Division II
State of Washington
NO. 50930-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

VICTOR BUENO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00623-6

BRIEF OF RESPONDENT

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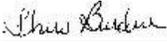
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in admitting the contents of a letter to allow authentication and identification of the writer?
2. Whether there is sufficient evidence that the defendant sent the letter to the victim?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Victor Bueno was charged by information filed in Kitsap County Superior Court with violation of a court order with a special allegation of domestic violence. CP 1-2.

At trial, the evidence included Bueno's stipulation that he had previously been convicted of a charge of violation of a court order. CP 23. Bueno also stipulated that the actual court order the violation of which was the charge in this case is admissible without foundation. RP 355.

This prosecution proceeded on an allegation that Bueno wrote a letter to the protected person. The defense moved pretrial to exclude the contents of the letter as irrelevant. CP 12-13. The defense argued that the fact of the letter served to prove the case but that the contents of it are hearsay. RP, 8/28/17, 28. Additionally, the defense moved to redact prejudicial matter from the letter. CP 12-13; RP 28. The state responded

that the contents of the letter give it context and allow inference that Bueno wrote it. RP 32. The state noted the narrow purpose for which the letter was to be admitted: not for the truth of any statements therein but to show only that Bueno was the author. RP 33; RP 41.

The trial court proceeded to quiz the state as to which of the passages of the letter that the defense found to be prejudicial were necessary to allow the witness to identify the writer. RP 35-38. The trial court ruled that it is not appropriate to exclude the entire contents of the letter. RP 38. The content allows the victim to place the matters addressed in the letter in context and thereby to identify the writer. *Id.* But the trial court ordered some redactions to meet the defense's concerns. RP 38-40; RP 44. The trial court specifically ordered the redaction of a portion of the letter referring to someone giving Bueno a gun with which to kill the victim. RP 49.

During trial, the redaction of the letter issue was revisited. The state requested additional redaction regarding Bueno's discussion of his cancer diagnosis. RP 374. The state argued that this passage may engender sympathy and prejudice the prosecution. *Id.* Also, the prosecutor observed that the state may offer Bueno's words but that if Bueno offers them, they are hearsay. RP 375. The trial court denied the state's motion. RP 378.

Soon thereafter, the defense reasserted its motion in limine number 3, moving again to exclude the contents of the letter. RP 384. The defense maintained its position that the contents are hearsay and neither Ms. Harris, the victim, nor an investigating officer should repeat the hearsay. RP 384-85. The state responded that the contents are not hearsay because not offered for the truth of the statements—whether in fact Bueno had cancer, and etc.—but because the signature and phrases used serve to identify Bueno as the writer. RP 386. The defense lamented that it must be for the truth of the matter because the occasions discussed therein must be true occasions in Bueno’s life in order to establish that those occasions prove that he wrote the letter. RP 387. The trial court continued its previous ruling that the contents are not being admitted for the truth of the statements therein but for a different purpose, identification. *Id.*

The jury returned a verdict of guilty. CP 44. The jury also returned a special verdict finding that Bueno and the victim were members of the same family or household. CP 45. With an 11 offender score, Bueno maxed out this class C felony, receiving a sentence of 60 months. CP 74. Bueno timely filed this appeal. CP 85.

B. FACTS

Bremerton police responded to a complaint from Mardi Harris. RP

400. The investigating officer took a statement from Ms. Harris and received evidence from her. RP 401. State's exhibit 4, a pink envelope, was admitted and published. RP 405. The envelope was addressed to "Mari Harris" at Marti Harris's address. RP 406. When Ms. Harris gave the envelope to the officer, it had a card in it. Id. The card was blank but inside the card was state's exhibit 5, the letter received from Ms. Harris. RP 408. Exhibit 5 was exchanged for exhibit 5A, which is the redacted copy of the letter. RP 407-08. Exhibit 5A was admitted without objection. RP 408.

Marti Jo Harris is Bueno's ex-wife. RP 422. They were married for 15 years but divorced in April, 2016 after separating in 2015. RP 422-23. There were nicknames in the marriage—Bueno referred to by Ms. Harris as "Papi," he called her "Mommy." RP 425. Ms. Harris had called the police because she "received a letter in the mail with very threatening comments in it, and at that time I had a permanent restraining order." RP 427. She found a card and a three page letter when she opened the envelope. RP 428. She read the letter. Id.

Reading the letter led Ms. Harris to believe that Bueno had sent it. RP 430. She said that Bueno had referred to her as "Mari" instead of "Marti" before; that is how he pronounced her name. RP 430-31. Similarly, Ms. Harris noted that the address was misspelled in a manner

consistent with how Bueno had previously misspelled it. RP 432. The letter was postmarked from Seattle and Ms. Harris knew that that is where Bueno was residing. Id. She also noted that the type of card in the envelope, showing multicolored flowers and a hummingbird, was not unusual for Bueno because “that is the type of things he was into.” RP 433.

Ms. Harris identified state’s exhibit 5 as the letter she had received and testified from the redacted version, state’s exhibit 5A. RP 434. She read the redacted version aloud to the jury. RP 434-436. Ms. Harris said that after 15 years of marriage she is familiar with Bueno’s handwriting, having seen it in a variety of circumstances. RP 437. She specifically recognized some of the lettering and the writing style and therefrom asserted that the letter is in Bueno’s handwriting. RP 437-38. She said that the salutation, “Ola Mama,” was something he would say to her on a daily basis. RP 438.

As to the sentiments expressed in the letter, where the letter says that Bueno needs to pick up his belongings, Ms. Harris indicated that she in fact still had some of Bueno’s belongings. RP 438. She recognized an incident that the letter spoke of where Bueno was arrested because of her. RP 439. When he referred to being there for his son for 15 years, she verified that Bueno had lived with the boy for 15 years. RP 439-40.

Further, although the child was hers and not his, it was not unusual for Bueno to refer to the boy as his son. RP 440. He mentions a black jacket; she says she actually has a black jacket that belongs to him. Id. He wanted a cell phone to stay in contact with his people in Cuba. RP 441. She verified that he is from Cuba. Id. He refers to a person named Paula and Ms. Harris is aware that he knows someone named Paula. RP 442. A phone number was written on the letter and Ms. Harris recognized that number as a number that Bueno has called her from during the divorce proceedings. RP 442-43.

Ms. Harris recognized the “tenor” of the letter, saying “it sounds exactly like him.” RP 443. Ms. Harris did not know all the details in the letter and this may have caused her some pause in identifying Bueno, but she could not think of anyone else that would have sent her such a letter. RP 444.

The court order was identified as an order given to Bueno in court. RP 367-68. The trial court read the parties’ stipulations to the jury: first, that Bueno had received notice of and a copy of the no-contact order in question; second, that Bueno had on two previous occasions been convicted of violations of court orders. RP 371-712.

III. ARGUMENT

A. THE TESTIMONY WAS NOT HEARSAY BY ITS NATURE OR BY THE PURPOSES FOR WHICH IT WAS ADMITTED.

Bueno argues that the contents of the letter that he sent to Ms. Harris are hearsay and inadmissible as such. This claim is without merit because the content of the letter served to identify its writer and were therefore admitted, not for the truth of the matter in the writing, although some of it may be true, but for the purpose of allowing a witness with personal knowledge identify Bueno as the writer. And, since the document is a statement by Bueno used against him, it is an admission, not hearsay.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). Discretion is abuse if manifestly unreasonable or if exercised on untenable grounds or for untenable reasons.¹ *Id.*, citing *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court's evidentiary ruling can be upheld on the grounds articulated by the trial court or on any other proper grounds that are supported by the record. *Id.*, citing *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

¹ "Untenable" is defined as "not able to be defended." Merriam-Webster, on-line dictionary, <https://www.merriam-webster.com>.

1. The contents of the letter were not admitted for the truth of the statements therein but for the purpose of identifying the person who wrote the letter.

Often, it is not the nature of the evidence that controls admissibility but rather the purpose for which the evidence is admitted. *See, e.g., State v. Gresham*, 173 Wn.2d 405, 419-423, 269 P.3d 207 (2012) (admissibility under ER 404(b) depends upon the purpose for which the evidence is offered). Here, the state had no need to establish the truth of any of the particular statements found in the letter; and the state did not try to so establish. The purpose for which the contents of the letter were admitted was not the truth of the statements therein. It was admitted for the non-hearsay purpose of identifying the author. For instances, the moniker “Papi” is neither true nor false but is helpful in identifying the writer.

Moreover, much of the contents that Ms. Harris refers to in identifying Bueno are not statements under the hearsay rule. ER 801 (a) defines “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” In this case, the state relied on much nonverbal evidence that was not intended as an assertion. The salutation (“Ola Mama”) and signature (“Papi”) cannot be credibly called an assertion; his pet name for his ex-wife is neither true nor false. Similarly, the misspelling is not intended as an assertion. Perhaps the “tenor” of the letter could be an assertion in a given case (a witness reacting to the “threatening tone” of a writing), but not here. The

return address provided Ms. Harris with a clue, but was not an assertion by Bueno. The lettering and writing style led Ms. Harris to identify the writing as Bueno's hand; difficult to shoehorn writing style into assertion of fact. Much of what Ms. Harris referred to in identifying the writer were not even assertive statements.

2. *ER 801 (d)(1)(iii) is either not applicable because the evidence was not admitted for a hearsay purpose or the rule in fact allows the challenged testimony.*

It is unclear that ER 801 (d)(1)(iii) applies to this issue. No one testified as to any out of court statements by Ms. Harris regarding identification of Bueno. The rule argued by Bueno, at least in how he argues the rule, applies to another witness declaring an out of court statement by another that is a statement of identification. Here, Ms. Harris read Bueno's words in order to establish the provenance of the letter. No one else said Ms. Harris's words and thus the rule is of dubious application.

But, if the rule applies, the state believes that Bueno is wrong in his argument about admissibility of hearsay for purposes of identification. There is absolutely no doubt that Ms. Harris has in fact previously perceived the person of Victor Bueno. Moreover, she has perceived his

handwriting, phraseology, and mannerisms. She had perceived his use of terms of endearment to her and in identifying himself (“Papi”). She comes to court able to identify Victor Bueno as the author of the letter. The trial court was not in error for allowing the evidence for that limited purpose.

Suppose that a witness identified a person by virtue of the fact that the witness saw a distinctive red cap. At the relevant time, the witness saw the distinctive red cap and identified the other person thereby and reported the same to investigating officers. As long as the witness testifies and is subject to cross examination, she can identify the person by her relationship to the red cap. *See e.g. State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (yellow shirt). Similarly, here, the victim was able to identify Bueno by reference to the language used and circumstances related in the text of the letter.

The state does not agree that the rule is as narrow as Bueno asserts. In *State v. Jenkins*, 53 Wn. App. 228, 231-32, 766 P.2d 499 (1989) *review denied* 112 Wn.2d 1016 (1989), an issue was raised regarding the out of court identification of a car. Jenkins argued that such was not an “identification of a person” as required by the rule. But, “[c]ase law has expanded the scope of ER 801 (d)(1)(iii) to include such identifications.” *Id.* The *Jenkins* Court noted federal authority allowing application of the

hearsay exception to identification of things like places and buildings. *Id.* at 232 (footnote 1).

The author of the letter needed to be identified. The witness was able to do so by the content of the letter—thus identifying the defendant. Just as identifying a red cap or yellow shirt may lead to identification of a certain individual, so the identification of the letter’s text led to the identification of Bueno. The trial court did not abuse its discretion.

3. *The contents of the letter were admissible to establish the authenticity of the letter and constituted an admissions by party opponent.*

The definition of hearsay excludes an admission by party opponent. ER 801 (d)(2). The letter settles nicely into the definition because the letter was offered against Bueno and “is (i) the party’s own statement, in either an individual or representative capacity...” Without more, then, the letter constitutes an admission by party opponent and is not hearsay. What remains is the question whether or not the letter is what the state asserts it to be.

Trial courts go about this by considering “evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901 (a). One method of providing this foundation is to take the “Testimony of Witness with Knowledge. Testimony that a matter is what it is claimed to be.” ER 901 (b)(1). Also, “nonexpert opinion as to the

genuineness of handwriting, based on familiarity not acquired for the purposes of the litigation.” ER 901 (b)(2). Further still, the material may be authenticated by “appearance, **contents**, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.” ER 901 (b)(4) (emphasis added). Ms. Harris essentially did all of these things. Ms. Harris provided sufficient evidence to establish that the exhibit is what its proponent, the state, claims that it is—a letter from Bueno to Ms. Harris.

Further, Professor Tegland reveals the compatibility of the concepts of authentication and identification by referring to the two ideas as interchangeable: “The process by which a party establishes this aspect of relevance is termed authentication or identification.” Karl Tegland, *Courtroom Handbook on Washington Evidence*, Vlm. 5D, Thomson Reuters (2017), p. 465. The necessity of laying this foundation alone provides the trial court with tenable and reasonable grounds to admit the evidence. In fact, this area of evidence law shows that the trial court was probably referring to identifying the letter, not Bueno himself.

The matter was thus authenticated. And, as an authenticated letter from Bueno, it is offered against him and are his own statements. In this analysis, the words in the letter are again not hearsay. They are both evidence of the authenticity of the letter and are admissions by party opponent.

4. *If admission of the letter's contents was erroneous, it caused no prejudice and was harmless.*

Bueno freely admits in his argument here that the contents of the letter were irrelevant on the question before the jury. The sending of the letter, and its receipt by Ms. Harris, are the operative facts. An evidentiary error warrants reversal “only where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict.” *Williams*, 137 Wn. App. at 747, citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Again, the sending and receiving of the letter mattered to the guilty verdict, not the contents of the letter. The contents were admissible to show that it was Bueno that wrote the letter, which of course goes to guilt. In that sense, the admission of the contents was prejudicial; but not improperly prejudicial.

If error to admit the letter's contents, that error was harmless. It is not required that evidentiary error be shown to be harmless “beyond a reasonable doubt.” *State v. McComas*, 186 Wn. App. 307, 329-30, 345 P.3d 36, review denied 184 Wn.2d 1008 (2015). “[E]videntiary error is not prejudicial unless, within reasonable probabilities, the trial's outcome would have differed had the error not occurred.” 186 Wn. App. at 320, citing *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Here, there is no reasonable possibility that the result would have been different.

As noted above, Ms. Harris was able to refer to non-assertive

aspects of the letter in establishing its provenance. Post marks, terms of endearment, spelling mistakes, phrasing, and handwriting all assisted in the identification of the letter.

Moreover, the testimony about the contents of the letter, establishing that Bueno wrote it is rebuttal on this record as Bueno denied writing the letter. The properly authenticated letter caused no improper prejudice. Error, if any, was harmless.

B. THE JURY BELIEVED MS. HARRIS, NOT BUENO; THIS DOES NOT MEAN THERE WAS INSUFFICIENT EVIDENCE.

Bueno next claims that the evidence was insufficient because the state never proved beyond a reasonable doubt that the letter was written by Bueno.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Appellate courts defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

Ms. Harris said that Bueno “speaks English very well.” RP 426. When asked directly who sent her the letter, Ms. Harris said, without objection, “Victor Bueno.” RP 430. She said the tenor of the letter “sounds exactly like him.” RP443. In short, nearly all of Ms. Harris’s testimony provided authentication for the letter and left no doubt who wrote it.

But since Bueno testified that he did not write it, he asserts insufficient evidence here. But the jury exercised its function of assessing this conflicting testimony and judging the credibility the witnesses. The jury believed Ms. Harris and did not believe Bueno. And taking this position was in no sense the action of an unreasonable trier of fact—the facts and circumstances testified to by Ms. Harris, taken in a light most favorable to the state, provided more than substantial evidence on the point. The matter was proven beyond a reasonable doubt and Bueno’s denial does not change the jury’s decision.

IV. CONCLUSION

For the foregoing reasons, Bueno's conviction and sentence should be affirmed.

DATED June 13, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", written in a cursive style.

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