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NO. 51179-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

JAMES BITNER,
Appellant.

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

The Honorable J. Andrew Toynebee, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR.....1

Issues Presented on Appeal.....1

B. STATEMENT OF THE CASE.....2

SUBSTANTIVE FACTS.....2

PROCEDURAL FACTS.....2

C. ARGUMENT.....4

1. THE TRIAL COURT ABUSED ITS
DISCRETION WHEN IT ADMITTED
TEXT MESSAGES INTO EVIDENCE
THAT WERE NOT PROPERLY
AUTHENTICATED UNDER ER 901
.....4

2. BITNER’S RIGHT TO
CONFRONTATION WAS VIOLATED
WHEN TEXT MESSAGES FROM THE
INFORMANT WERE ADMITTED
WITHOUT HER APPEARING AT TRIAL
TO BE CROSS-EXAMINED
.....9

D. CONCLUSION.....12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Anderson</i> , 171 Wn.2d 764, 254 P.3d 815 (2011)	11
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010)	4
<i>State v. Blair</i> , 415 P.3d 1232 (2018)	4
<i>State v. Chambers</i> , 134 Wn. App. 853, 142 P.3d 668 (2006).....	10
<i>State v. Hudlow</i> , 182 Wn. App. 266, 331 P.3d 90 (2014).....	9, 10, 11
<i>State v. Payne</i> , 117 Wn. App. 99, 69 P.3d 889 (2003)	5
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995)	4
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003)	4
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984)	10
<i>State v. Smith</i> , 85 Wn.2d 840, 540 P.2d 424 (1975)	10
<i>State v. Young</i> , 192 Wn. App. 850, 369 P.3d 205 (2016).....	6, 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Crawford v. Washington,
541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 9, 10

Davis v. Washington,
547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d (2006) 9

RULES, STATUTES, AND OTHERS

ER 901 1, 3, 4, 8

U.S. Const. Amend. VI 3, 9, 12

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted photos of text messages into evidence and the State failed to present sufficient evidence to authenticate the messages under ER 901.

2. The trial court erred when it admitted photos of a text message conversation in violation of Bitner's right to confrontation when the conversation contained testimonial hearsay statements from an informant who did not testify at trial.

Issues Presented on Appeal

1. Did the trial court abuse its discretion when it admitted photos of a text message conversation when the State failed to present sufficient evidence to authenticate the messages as having been sent by Bitner?

2. Did the trial court err by admitting photos of the text message conversation when it contained testimonial hearsay statements from an informant who did not testify at trial?

B. STATEMENT OF THE CASE

SUBSTANTIVE FACTS

On August 24, 2016, the Centralia Police Department staged a controlled buy of methamphetamine targeting James Bitner. RP 153-154. The police planned and executed the buy using an informant who did not testify at trial. RP 103, 153. The police drove the informant to the KFC located at 619 West Main Street in Centralia where she met with Bitner. RP 158. The police provided the informant with money to execute the buy and directed her to buy methamphetamine from Bitner in the KFC parking lot. RP 154.

The informant met with Bitner at his car in the KFC parking lot. RP 194. They both entered his car for less than a minute. RP 195. The informant left the car and walked back to meet with the police. RP 195. She returned with a bag containing a crystalline substance that later tested positive for methamphetamine. RP 161, 217-218.

PROCEDURAL FACTS

The State charged Bitner with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver. CP 34. The State also alleged a sentencing enhancement, specifically that

Bitner committed the offense within 1000 feet of a school bus stop.
CP 34.

Bitner's first trial ended in a mistrial after the court found the jury panel had been tainted during voir dire. RP 90-91. Bitner objected to the admission of photos depicting a text message conversation purported to be between him and the informant during pretrial motions in both trials under both ER 901 and the Confrontation Clause of the Sixth Amendment. RP 21-23. The court ruled that the messages could be admitted but the State could not elicit testimony regarding the phone number sending the messages. RP 29-30. The text messages were admitted into evidence at trial over the defense's objection. RP 102-105, 164-165. The informant was not subjected to cross-examination because she did not appear to testify at trial. RP 102.

The jury found Bitner guilty as charged and answered "yes" on the special verdict form regarding the school bus stop enhancement. RP 278-279. Bitner filed a timely notice of appeal. CP 66.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED TEXT MESSAGES INTO EVIDENCE THAT WERE NOT PROPERLY AUTHENTICATED UNDER ER 901.

The trial court abused its discretion when it admitted text messages into evidence and no testifying witness had the requisite knowledge for authentication under ER 901. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). A trial court abuses its discretion if its ruling is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Blair*, 415 P.3d 1232, 1235 (2018) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). ER 901 requires that evidence be authenticated before it is admitted at trial. ER 901(a). Evidence may be authenticated through the testimony of a witness with knowledge, or through distinctive characteristics. ER 901(b)(1); ER 901(b)(4). The party offering the evidence bears the burden of producing sufficient proof for a "reasonable juror to find in favor of authenticity or identification." *State v. Bashaw*, 169 Wn.2d 133, 140-41, 234 P.3d 195 (2010)

(quoting *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003)).

In the context of this case, the State offered three exhibits consisting of photographs depicting a text message conversation alleged to have taken place between Bitner and the informant during the controlled buy. RP 164-65; Ex. 23-25, Supplemental Designation of Clerk's Papers. The only testimony regarding authentication of these text messages came from the detective who organized the controlled buy. RP 164-65. His testimony was limited to establishing that (1) the text messages were on the informant's phone after the controlled buy took place, (2) the content of the messages was consistent with a controlled buy, and (3) that he took the photographs. RP 164-65. The record also shows that the police were utilizing the same informant in another controlled buy on that same day. RP 154. Neither Bitner nor the informant testified at trial. RP 236.

The trial court abused its discretion when it admitted the text messages contained in exhibits 23, 24, and 25 because the State failed to produce sufficient evidence to authenticate the messages as being part of a conversation between the informant and Bitner. Because the informant did not testify at trial, there was no testimony

regarding the identity of the other person involved in the text message conversation depicted in exhibits 23, 24, and 25. In the absence of any evidence identifying the other party as Bitner, there was insufficient evidence before the trial court for the messages to be properly authenticated as probative evidence against him.

This court analyzed similar circumstances in *State v. Young*.¹ In that case, the defendant was being prosecuted for multiple crimes including communicating with a minor for immoral purposes. *Young*, 192 Wn. App. at 852. The State offered text messages purported to be between the defendant and the minor victims into evidence. *Young*, 192 Wn. App. at 853. The defendant challenged the admission of these text messages on appeal on the basis that there was insufficient evidence before the court to authenticate the messages as having come from him. *Young*, 192 Wn. App. at 853-54. The court upheld the admission of the messages in *Young*'s case, but it did so based on evidence that is not present in Bitner's case.

In *Young*, the court found that the messages were sufficiently authenticated due to the testimony of witnesses with knowledge,

¹ 192 Wn. App. 850, 369 P.3d 205 (2016).

specifically the two minor victims who were also involved in the text message conversation. *Young*, 192 Wn. App. at 857-58. Those witnesses testified that the messages being offered as evidence were from Young and that they knew this because the messages were from a contact associated with a phone number Young had given to them or put into their phone himself. *Young*, 192 Wn. App. at 857-58. The court held that this testimony was sufficient for a reasonable juror to find that the text messages were in fact from the defendant because the testifying witnesses had personal knowledge of the sender's identity. *Young*, 192 Wn. App. at 858.

Young is distinguishable from Bitner's case because the evidence used to authenticate the text messages in *Young* is not present in the record of Bitner's trial. Unlike in *Young*, the recipient of the messages purported to be from Bitner did not testify at trial. RP 102. The record contains no evidence regarding the identity of the person communicating with the informant. There is no testimony regarding how the phone number that was the source of the messages was entered into the informant's phone, nor is there any evidence of that number being associated with Bitner.

The State argued that the content of the messages was consistent with a controlled buy and therefore they were sufficiently authenticated. RP 16-18, 103-04. While the context and substance of the messages is one consideration when doing an authentication analysis under ER 901, its importance is diminished in this case because the police were targeting another suspect in a separate controlled buy on the same day with the same informant. RP 154. The simple fact that the informant had text messages on her phone consistent with a controlled buy is insufficient to authenticate the messages under ER 901 because it only proves that a controlled buy took place, not that the buy involved Bitner.

In the absence of more evidence establishing Bitner as the source of the messages, the photographs admitted into evidence were not sufficiently authenticated. Authentication is a condition precedent to admissibility. ER 901(a). The trial court abused its discretion by admitting photographs that were not properly authenticated. This court should reverse Bitner's conviction and remand his case for a new trial where the photographs will be excluded from evidence unless the State can provide sufficient proof of their authenticity.

2. BITNER'S RIGHT TO CONFRONTATION WAS VIOLATED WHEN TEXT MESSAGES FROM THE INFORMANT WERE ADMITTED WITHOUT HER APPEARING AT TRIAL TO BE CROSS-EXAMINED.

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. Amend. VI. “The admission of testimonial hearsay statements of a witness who does not appear at a criminal trial violates the confrontation clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination.” *State v. Hudlow*, 182 Wn. App. 266, 282, 331 P.3d 90 (2014) (*quoting Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). Alleged violations of the confrontation clause are reviewed *de novo*. *Hudlow*, 182 Wn. App. at 282.

“A declarant’s out-of-court statement is testimonial if, in the absence of an ongoing emergency, ‘the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.’” *Hudlow*, 182 Wn. App. at 282 (*quoting Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d (2006)). Testimonial statements include “statements

made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *State v. Chambers*, 134 Wn. App. 853, 860-61, 142 P.3d 668 (2006) (citing *Crawford*, 541 U.S. at 51-52). This category of testimonial statements includes statements made by a confidential informant in the context of a controlled buy. *Hudlow*, 182 Wn. App. at 283 (citing *Chambers*, 134 Wn. App. at 861).

The informant in this case was aware her statements would be used in a subsequent prosecution because she was cooperating with police to execute the controlled buy and receive a favorable resolution on her own criminal case. RP 168-71. Under the holdings in *Chambers* and *Hudlow*, her statements are testimonial and subject to a confrontation clause analysis. The record in this case contains no evidence that the informant was unavailable to testify or had previously been cross-examined. When the fact that the informant was not going to testify was discussed at trial, the State’s only explanation was that they did not know where she was. RP 171. “When a confrontable witness is not produced unavailability must be certain.” *State v. Ryan*, 103 Wn.2d 165, 171, 691 P.2d 197 (1984) (citing *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975)). The

State failed to establish that the informant was unavailable to testify and there is no evidence that she was ever cross-examined before trial. The admission of the informant's text messages into evidence violated Bitner's right to confrontation.

Confrontation clause violations are subject to a harmless error analysis. *Hudlow*, 182 Wn. App. at 284. A constitutional error is harmless "if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error." *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). In analyzing whether a constitutional error was harmless, courts "look to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt." *Anderson*, 171 Wn.2d at 770.

The text messages admitted in this case in violation of the confrontation clause provide context for the rest of the evidence presented to the jury. The text messages discussed meeting up for the controlled buy, and introduced the term "ball" to the jury. RP 166. The State used this term during closing argument to assert that Bitner met up with the informant with the intent to sell her a controlled substance following testimony associating the term with a particular amount of methamphetamine. RP 260-61. Furthermore, the text

messages are presented to the jury as if the person responding to the informant is Bitner when there is insufficient evidence to establish the identity of the sender. Bitner had no opportunity to test the State's assertion that he was the sender of the messages because he was denied the opportunity to cross-examine the informant about the subject. Bitner was unable to test the State's allegation that he was the person discussing methamphetamine with the informant in violation of his right to confrontation. The error in admitting the messages was not harmless and requires reversal of Bitner's conviction.

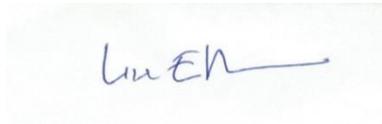
D. CONCLUSION

The admission of the text messages depicted in exhibits 23, 24, and 25 was erroneous for two reasons. First, the messages were admitted into evidence without the State presenting sufficient evidence to authenticate them as having been sent by Bitner. The admission of these messages constituted an abuse of discretion by the trial court. Second, the admission of these messages without the informant appearing to testify regarding her testimonial statements in the course of a controlled buy violated Bitner's Sixth Amendment right to confrontation. The admission of this evidence in violation of both

the Confrontation Clause and rules of evidence was erroneous and deprived Bitner of a fair trial. Bitner's conviction should be reversed and the case remanded for a new trial where the text messages will be excluded from evidence.

DATED this 12th day of June 2018.

Respectfully submitted,

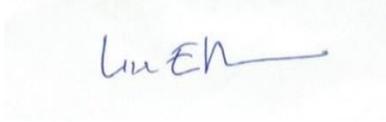


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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and James Bitner/DOC#833033, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on June 12, 2018. Service was made by electronically to the prosecutor and James Bitner by depositing in the mails of the United States of America, properly stamped and addressed.



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