

FILED
Court of Appeals
Division II
State of Washington
8/22/2018 2:29 PM
No. 51179-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES BITNER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT4

 A. THE ADMISSION OF THE TEXT MESSAGES WAS NOT AN ABUSE OF THE TRIAL COURT’S DISCRETION, AS THEY WERE PROPERLY AUTHENTICATED PURSUANT TO ER 9014

 1. Standard Of Review.....5

 2. The Text Messages Were Sufficiently Authenticated Pursuant To ER 9015

 3. Any Error In Admitting The Text Messages Was Not Prejudicial 12

 B. THE ADMISSION OF THE TEXT MESSAGES DID NOT VIOLATE BITNER’S RIGHT TO CONFRONTATION ...14

 1. Standard Of Review..... 15

 2. There Is No Violation Of The Confrontation Clause For Any Of The Texts In Exhibit 23, As They Are Either Inquiries Or Admissions By A Party Opponent..... 15

 3. The Testimonial Statements Admitted Were Harmless Beyond A Reasonable Doubt 18

IV. CONCLUSION.....21

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Anderson</i> , 171 Wn.2d 764, 254 P.3d 815 (2011).....	19
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010)	6
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	5, 12
<i>State v. C.J.</i> , 148 Wn.2d 672, 63 P.3d 765 (2003)	5
<i>State v. Collins</i> , 76 Wn. App. 496, 886 P.2d 243 (1995).....	17
<i>State v. Cotton</i> , 75 Wn. App. 669, 879 P.2d 971 (1994), <i>review denied</i> , 126 Wn.2d 1004 (1995)	17
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999)	5
<i>State v. Hudlow</i> , 182 Wn.2d 266, 331 P.3d 90 (2014).....	15, 16
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011).....	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	5
<i>State v. Young</i> , 192 Wn. App. 850, 369 P.3d 205 (2016)	6, 10, 11

Federal Cases

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004)	15
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)	15, 16

Constitutional Provisions

U.S. Constitution, Amendment VI	14, 15, 16
---------------------------------------	------------

Other Rules or Authorities

ER 80116, 17
ER 9011, 4, 5, 6, 7, 10
ER 1101(c)(1)6

I. ISSUES

- A. Did the trial court abuse its discretion by admitting photographs of text messages that were not properly authenticated pursuant to ER 901?
- B. Did the trial court violate Bitner's constitutional right to confront and cross-examine witnesses against him by admitting testimonial statements contained within the text messages without testimony from Ms. Thompson?

II. STATEMENT OF THE CASE

Detective Withrow, with the City of Centralia Police Department, is assigned to the Joint Narcotics Enforcement Team (JNET), where he works with Detectives from other agencies in Lewis County. RP 151, 183, 198-99. On August 24, 2016, Detective Withrow participated in a controlled buy of methamphetamine using a confidential informant, Rachel Thompson. RP 151-54. Ms. Thompson was working off several drug counts in consideration for a reduction in her charges if she completed her contract as a confidential informant. RP 168-70.

Detective Withrow instructed Ms. Thompson to purchase methamphetamine at the Kentucky Fried Chicken (KFC) in Centralia located on Main Street from Bitner. RP 154. It is standard procedure in controlled buys when an informant uses text messaging on their cell phone to set up a drug buy for Detective Withrow to take photographs of the text messages. RP 164.

Detective Withrow was present for part of the arrangement of the controlled buy, via the text messages. RP 172. Detective Withrow took photos of Ms. Thompson's cell phone text messages after the buy. RP 163; Ex. 23, 24, 25.

Ms. Thompson was strip searched, given 100 dollars in buy money, and driven within a block of the KFC in Centralia. RP 155-60. Ms. Thompson was under constant surveillance from the time she got out of the car with the detectives until she got back into the car. RP 159-60, 187-89, 194-95, 201-02.

Bitner, the target of the controlled buy, arrived at KFC before Ms. Thompson. RP 192-94. Detectives were made aware Bitner would be in a red Honda Civic. RP 193. Bitner arrived in a red Honda Civic with a gray hood. RP 193, 200. Bitner went inside the KFC. RP 200.

Ms. Thompson arrived at KFC, walked up directly to Bitner's car on the passenger side, and stood there on her phone. RP 194, 201. Less than a minute later Bitner exited KFC, got in the driver's side of the Honda, and Ms. Thompson got into the passenger side of the vehicle. RP 194, 201. There was no one else in the Honda. RP 194-95, 202. Bitner and Ms. Thompson exited the car after a couple minutes, walked up to the main entrance of KFC, talked for

a bit, then Bitner went back inside the restaurant, and Ms. Thompson went back in the direction she came from. RP 195, 202.

Ms. Thompson arrived back at the drop off site and handed Detective Withrow a bag containing a crystal substance, which later tested positive for methamphetamine. RP 161, 218. None of the buy money detectives had given Ms. Thompson was discovered in the post buy search strip search of Ms. Thompson. RP 164.

The State charged Bitner by information on April 4, 2017, later amended on July 20, 2017, with one count of Delivery of Methamphetamine. CP 1-2, 36-37. The State also alleged Bitner had delivered the methamphetamine within 1,000 feet of a school bus route. *Id.* Bitner elected to have his case tried to a jury, and a trial was scheduled for July 20, 2017. RP 6. Prior to trial the State submitted a trial brief in anticipation to issues regarding the admissibility of text messages. CP 5-9. The issue was brought up during the motions in limine. RP 15-32. The trial court ultimately ruled the State could not elicit testimony regarding the phone number sending the messages. RP 29-30. Bitner's first jury trial ended in a mistrial after the trial court found the jury panel had been tainted during voir dire. RP 90-91.

A second jury trial was held on October 11 and 12, 2017. RP 94. During the second trial the State was able to admit the photographs of text messages from Ms. Thompson's phone. Ex. 23, 24, 25. Ms. Thompson did not testify. See RP. Bitner was convicted as charged. CP 61-62. Bitner was sentenced to 84+ months in prison, including the 24 months for the school bus stop enhancement. CP 74. Bitner timely appeals his conviction. CP 83.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE ADMISSION OF THE TEXT MESSAGES WAS NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION, AS THEY WERE PROPERLY AUTHENTICATED PURSUANT TO ER 901.

The text messages offered by the State and admitted into evidence by the trial court were properly authenticated. Bitner asserts the trial court abused its discretion by admitting text messages not properly authenticated under ER 901. Brief of Appellant 4-8. Bitner's argument fails. The authentication of the text messages was sufficient, the trial court did not abuse its discretion, and the text messages were properly admitted. This Court should affirm the ruling and the conviction.

1. Standard Of Review.

This Court reviews admissibility of evidence determinations by the trial court under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

If the trial court’s evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (citations omitted).

2. The Text Messages Were Sufficiently Authenticated Pursuant To ER 901.

Bitner argues the authentication of the text messages was insufficient because the confidential informant did not testify, the detective’s testimony was limited to 1) the context was consistent with the controlled buy, 2) the text messages were on Ms. Thompson’s phone after the controlled buy took place, and 3) Detective Withrow took the photographs, and the detectives were

using Ms. Thompson for a controlled buy on another target that same day. Brief of Appellant 5. Bitner's analysis of the requirement for authentication is flawed, as is his review of Detective Withrow's testimony, in particular how it relates to the content of the exhibits. The exhibits were sufficiently authenticated.

ER 901 sets forth the requirement for authentication of exhibits prior to their admission. The key issue with authentication is the proponent of the evidence must make a prima facie showing that the evidence in question is what the proponent of the evidence claims it to be. *State v. Young*, 192 Wn. App. 850, 854, 369 P.3d 205 (2016), *citing* ER 901(a), *State v. Bashaw*, 169 Wn.2d 133, 140-41, 234 P.3d 195 (2010). "The proponent of offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove the evidence is what it purports to be." *Young*, 192 Wn. App. at 854 (internal citations and quotation omitted).

Authenticity is a preliminary determination; therefore, the rules of evidence need not apply. ER 1101(c)(1). The trial court can rely upon reliable, but normally inadmissible information, such as hearsay or lay opinions. *Young*, 192 Wn. App. at 855.

ER 901 gives many examples of ways the proponent can demonstrate the authenticity of the evidence.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

...

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

...

(10) Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901 (b).

Detective Withrow testified he took photographs of the text messages from Ms. Thompson's cell phone after the controlled buy took place. RP 163. Detective Withrow also testified the messages matched the events surrounding the controlled buy. RP 164-65. The messages were admitted by the trial court. RP 165; Ex. 23, 24, 25. The messages state the following:

[CI] Will u be in town around 1? And do u got a ball?
11:21 AM

Yes an yes
11:21

[CI] Would u be able to meet me at kfc?
11:22 AM

[CI] Im splitting it with someone and tell me the price
11:22 AM

Yes of corse
11:22

Ex. 23.¹ The text stream from Exhibit 23 was carried to Exhibit 25,
including the last text from Exhibit 23.

Yes of corse
11:23 AM

[CI] Okay
11:22 AM

100
11:23 AM

[CI] K
11:24 AM

[CI] About a half hour
12:26 PM

[CI] 130ish
12:37 pm

U ready

¹ The State is adding “[CI]” in front of every entry on the text message that is attributed to Ms. Thompson for clarity purposes in the reproduction of the text messages from the exhibits.

1:20 PM

Ex. 25. The text stream from Exhibit 25 was then carried to Exhibit 24, including the last two texts.

[CI] 130ish
12:37 pm

U ready
1:20 PM

[CI] Yeah I will be just a few I had to pick up the \$
1:20 PM

[CI] Im hurrying
1:20 PM

OK
1:21 PM

[CI] Omw
1:27 PM

Ok
1:27 PM

Ex. 24. All texts on the exhibits include the time they were sent or received. There had been testimony from Detective Withrow the controlled buy occurred at KFC on West Main Street in Centralia. RP 158. Detective Withrow also confirmed Ms. Thompson used text messaging on her phone to set up the controlled buy, which was why he looked at her phone and took the photos. RP 164. This is sufficient for authentication of the text messages prior to their admission. Detective Withrow looked at the text messages on the

confidential informant's cell phone immediately after the controlled buy, the information on the text messages was consistent with the events of the controlled buy, and Detective Withrow was the person who took the photographs admitted into evidence. This satisfies the authentication requirements under ER 901.

Bitner argues his case is distinguishable from *Young*, where this Court upheld the authentication and admissibility of text messages. Bitner asserts the evidence in his case is lacking many of the pieces of authentication found in *Young*, such as testimony from the recipient of the text messages who was able to testify not only to the content but also to the phone number. Brief of Appellant 6-7, *citing Young*, 192 Wn. App. 857-58. Yet, Detective Withrow was able to testify that he looked at the phone immediately after the controlled buy, the phone belonged to one of the participants of the controlled buy, and the conversation he took photographs of was consistent with the events of the controlled buy.

The trial court considers only the evidence offered by the proponent of the evidence regarding authentication and disregards contrary evidence offered by the opponent in determining whether the evidence has been authenticated. *Young*, 192 Wn. App. at 857 (internal citations and quotations omitted). An opponent is free to

bring in contrary evidence to argue weight of the evidence, but not the admissibility of the evidence. *Id.*

Further, the testimony provided after the exhibits were admitted but prior to any discussion regarding what was actually contained within the exhibits added to the authenticity of the exhibits. Detective Withrow stated the time the controlled buy took place, 1:37 p.m. RP 166. Detective Withrow stated he was present, looking over Ms. Thompson's shoulder for some of the texts. RP 172 Detective Withrow also explained he had been present for the texts, all but the first text, on Exhibit 24. RP 173. Detective Withrow was also able to later clarify, after he read the text messages to the jury, that he had witnessed Ms. Thompson actually send and receive the messages on Exhibit 24. RP 174.

While Detective Withrow's testimony regarding Exhibit 24 could have been provided prior to the actual admission of the exhibits, as argued above it was not necessary. If the trial court prematurely admitted the exhibits without this additional piece of authentication, there was no harm because the testimony was proffered prior to Detective Withrow reading the contents of the exhibits. The trial court did not abuse its discretion and this Court

should affirm the ruling admitting the text messages and Bitner's conviction.

3. Any Error In Admitting The Text Messages Was Not Prejudicial.

While not conceding the trial court abused its discretion in admitting the text messages, *arguendo*, any error in the admission of the text messages was not prejudicial. The error must, within reasonable probabilities, materially affect the outcome of the trial to be prejudicial and warrant reversal. *Bourgeois*, 133 Wn.2d at 403.

Bitner does not address whether he was prejudiced by the trial court's alleged erroneous evidentiary ruling authenticating the text messages. Brief of Appellant 8. The totality of the overwhelming evidence presented against Bitner by the State's witnesses is sufficient to establish there was no prejudice by the admission of the text messages.

Detective Withrow testified he was working with a confidential informant, Ms. Thompson, who he instructed to set up a controlled buy with Bitner as the target. RP 153-54. Ms. Thompson was strip searched, no contraband or money was found, she was provided 100 dollars in buy money, and dropped off by Detective Withrow and Detective Holt a block from KFC in Centralia. RP 155-59, 184-86. Ms. Thompson walked to KFC to

meet Bitner. RP 160, 186, 194, 201. Four different detectives at different vantage points were able, working as a team, to keep Ms. Thompson under constant surveillance during the controlled buy. RP 160, 187-88, 194-95, 200-02.

Bitner arrived at KFC prior to Ms. Thompson. RP 193-94, 200-01. Bitner drove to the KFC in a Honda Civic, the same car Ms. Thompson walked directly to when she arrived at KFC. RP 193-94, 200-01. Bitner came back out of KFC, got into the Honda on the driver's side, Ms. Thompson got in on the passenger side. RP 194-95, 200-01. Detective Schlecht and Detective Sergeant Warren affirmatively testified there was no one else in the vehicle. RP 194-95, 202.

Ms. Thompson did not contact anyone on her route to KFC or at KFC, except Bitner. RP 161, 202. Ms. Thompson returned to Detective Withrow and Detective Holt and handed over a baggie containing methamphetamine. RP 161, 189. Ms. Thompson was strip searched a second time pursuant to controlled buy procedures and nothing was found, including the 100 dollars in buy money. RP 164, 180. The detectives did acknowledge they did not witness the actual hand off of the drugs. RP 197, 205.

The State also presented evidence at trial regarding the school bus stop enhancement. RP 221-29. The evidence presented was overwhelming. While none of the detectives saw the actual hand off between Ms. Thompson and Bitner, there was no place Ms. Thompson could have received the methamphetamine from other than Bitner. Ms. Thompson had no methamphetamine and 100 dollars when she left Detective Holt and Detective Withrow and walked to KFC. Under constant surveillance, the only person Ms. Thompson interacted with was Bitner. Ms. Thompson then returned to Detective Withrow and Holt without the 100 dollars and with methamphetamine. If this Court finds the trial court's admission of the text messages an abuse of discretion, there was no prejudice and Bitner's conviction should be affirmed.

B. THE ADMISSION OF THE TEXT MESSAGES DID NOT VIOLATE BITNER'S RIGHT TO CONFRONTATION.

Bitner argues the admission of the text messages, absent the availability of Ms. Thompson for testimony and cross-examination, violated his right to confrontation guaranteed under the Sixth Amendment. Brief of Appellant 9-12. Bitner further asserts the error cannot be harmless beyond a reasonable doubt and the Court must reverse his conviction. The admission of the text

messages did not violate Bitner's right to confrontation, arguendo, any violation was harmless beyond a reasonable doubt.

1. Standard Of Review.

This Court reviews alleged violations of the confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted). Determinations whether a statement is hearsay are reviewed de novo. *State v. Hudlow*, 182 Wn.2d 266, 281, 331 P.3d 90 (2014).

2. There Is No Violation Of The Confrontation Clause For Any Of The Texts In Exhibit 23, As They Are Either Inquiries Or Admissions By A Party Opponent.

A criminal defendant has the right to confront witnesses against him or her. U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Admissible hearsay under one of the hearsay exceptions becomes inadmissible under the confrontation clause if it is testimonial hearsay. *Hudlow*, 182 Wn.2d at 828, *citing Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

If, absent an ongoing emergency, "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution[.]" then the out-of-court

statement of the declarant is considered testimonial. *Hudlow*, 182 Wn.2d at 828, *citing Davis*, 547 U.S. at 822.

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.

Hudlow, 182 Wn. App. at 282 (citations omitted). While there is not a definitive definitional list of the type of statements the courts consider testimonial, the appellate courts have summarized a nonexclusive list of definitions for testimonial statements to aid practitioners and the courts. *Id.* at 282-83 (internal quotations and citations omitted).

(1) ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, and prior testimony that the defendant was unable to cross-examine; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) 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.

Id. at 283 (internal quotations and citations omitted).

Testimonial statements must be statements. For an out of court statement to be hearsay it must be a statement and offered for the truth of the matter asserted. ER 801(c). A statement is

defined as, “an oral or written assertion or [] nonverbal conduct of a person if it is intended to be an assertion.” ER 801(a). A question or an inquiry is not an assertion and therefore not a statement. *State v. Collins*, 76 Wn. App. 496, 498, 886 P.2d 243 (1995).

Assertion is not defined by the rule, but the advisory committee’s note to subdivision (a) of Fed. R. Evid. 801, to which the Washington rule defers, provides that nothing is an assertion unless intended to be one. Therefore, because an inquiry is not assertive, it is not a statement as defined by the hearsay rule and cannot be hearsay.

Collins, 76 Wn. App. at 498 (internal quotations and citations omitted).

Three key text messages made by Ms. Thompson were inquiries, not assertions. Ms. Thompson started the text chain by asking, “Will u be in town around 1? And do u got a ball?” Ex. 23. The answer is a statement offered against a party opponent, which is not hearsay. ER 801(d)(2). This includes “a statement of which the party has manifested an adoption or belief in its truth.” ER 801(d)(2)(ii). A party can manifest an adoption of a statement by words, gestures, or complete silence. *State v. Cotton*, 75 Wn. App. 669, 689, 879 P.2d 971 (1994), *review denied*, 126 Wn.2d 1004 (1995). Bitner replies, “Yes an yes” Ex. 23.

The next inquiry immediately follows, “Would u be able to meet at kfc?” This is followed by the next inquiry, “Im splitting it with someone and tell me the price” Ex. 23. While “Im splitting it with someone” has the appearance of an assertion, it is helpful background information for the actual inquiry, asking the price of the ball. Bitner replies “Yes of corse” Ex. 23. The questions asked in the text messages are not hearsay, they are not testimonial as they are not assertions, and therefore they were admissible. The entirety of Exhibit 23 was admissible on its face.

3. The Testimonial Statements Admitted Were Harmless Beyond A Reasonable Doubt.

Bitner argues the testimonial hearsay admitted in violation of the confrontation clause was prejudicial because they provided the context of the rest of the evidence presented to the jury. Brief of Appellant 11-12. As stated above, the preliminary questions are not testimonial as they are not statements, but inquiries. Therefore, the remaining assertions, statements, of Ms. Thompson are not prejudicial, and are harmless beyond a reasonable doubt.

Exhibit 25 includes the overlap of “Yes of corse” and also contains the answer to the price “100[,]” both admissible as admissions of a party opponent. There are seven statements included in the text messages that could be considered testimonial

statements, “okay[,]” k[,]” “About a half hour[,]” “1:30ish[,]” “Yeah I will be just a few I had to pick up the \$[,]” “Im hurrying[,]” and “Omw.” Ex. 24-25.

The seven testimonial statements made in Exhibits 24 and 25 are subject to a constitutional harmless error analysis. Those seven statements are harmless if the State can show they are harmless beyond a reasonable doubt.

A constitutional error is deemed harmless if the reviewing court is certain beyond a reasonable doubt that the verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The Supreme Court has held, “[t]his court employs the overwhelming untainted evidence test and looks to the untainted evidence to determine if it so overwhelming that it necessarily leads to a finding of guilt.” *Anderson*, 171 Wn. 2d at 770.

As discussed above in the section regarding potential prejudice of admitting the text messages, there was ample evidence, absent any of the text messages, let alone the seven testimonial statements at issue here. Detectives testified regarding how the controlled buy was set up, Bitner was the target, surveillance was set up at the KFC, and Bitner arrived prior to Ms.

Thompson in the vehicle detectives expected him to be driving. Ms. Thompson was strip searched, nothing was found, and the detectives supplied Ms. Thompson 100 dollars in buy money. The detectives then dropped off Ms. Thompson a block away from KFC and surveilled her from when she left the van until she returned after meeting with Bitner. Ms. Thompson met with no one except Bitner, arrived back at the van, handed Detective Withrow a baggie containing methamphetamine, and was strip searched again, locating nothing of consequence including the buy money. The seven text messages are harmless beyond a reasonable doubt as the verdict is unattributable to the alleged error. This Court should affirm Bitner's conviction and sentence.

IV. CONCLUSION

The trial court did not abuse its discretion when it admitted the text messages as they were properly authenticated through Detective Withrow's testimony. The text messages in Exhibit 23 did not violate Bitner's constitutional right to confrontation. The remaining seven texts that contained testimonial statements were harmless beyond a reasonable doubt. Therefore, this Court should affirm Bitner's conviction.

RESPECTFULLY submitted this 22nd day of August, 2018.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

August 22, 2018 - 2:29 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51179-7
Appellate Court Case Title: State of Washington, Respondent v. James A. Bitner, Appellant
Superior Court Case Number: 17-1-00204-1

The following documents have been uploaded:

- 511797_Briefs_20180822142842D2051469_3230.pdf

This File Contains:

Briefs - Respondents

The Original File Name was Bitner.jam Response 51179-7.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- appeals@lewiscountywa.gov
- babbitts@seattleu.edu
- valerie.liseellner@gmail.com

Comments:

Sender Name: Teri Bryant - Email: teri.bryant@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20180822142842D2051469