

FILED  
Court of Appeals  
Division II  
State of Washington  
11/4/2019 4:10 PM

NO. 53374-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JERELL POSEY,

Appellant.

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

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred by admitting Facebook “records” without live testimony by a Facebook custodian of records.

Issues Pertaining to Assignment of Error

1. Did the trial court violate statutory limits on the use of affidavits, certificates, or declarations to authenticate evidence when it admitted Facebook postings and messages as “business records,” pursuant to a “Certificate of Authority” that did not meet the requirements in RCW 10.96.030?

2. Did the trial court violate the defendant’s Sixth Amendment right of confrontation when it admitted Facebook postings and messages without live testimony by a Facebook custodian of records?

B. STATEMENT OF THE CASE

The State charged Jerrell Posey with two counts of first degree assault and one count of second degree unlawful possession of a firearm, stemming from his alleged involvement in a shooting on October 12, 2017. CP 35-36. It also sought firearm enhancements with respect to the assault charges. CP 35-36.

The State presented testimony by Courtney Holmes that, on October 12, 2017, someone shot at Ms. Holmes and her friend, Marcel Walker, as they drove away from the Stop Mart corner store at 15th and MLK Way in Tacoma.

RP (Feb. 14, 2019) at 217-26. Ms. Holmes testified that she waited in the car while Mr. Walker went into the Stop Mart to make some purchases, and that she saw three young men approach him as he exited the store, throwing up gang signs and asking “Where are you from?” RP (Feb. 14, 2019) at 226, 237-38. She said that she immediately recognized one of these young men as Leeshawn Redic, with whom she had attended “juvenile drug classes” several days per week, within the last two years. RP (Feb. 14, 2019) at 233.

Ms. Holmes also claimed to recognize one of the other young men as Mr. Posey, but her memory was imperfect. RP (Feb. 14, 2019) at 231-22. She testified that she had attended the same high school as Mr. Posey, a few years prior to trial, but did not have any classes with him or socialize with him. RP (Feb. 14, 2019) at 231-32. Even at the time of trial, Ms. Holmes could not recall Mr. Posey’s first name. RP (Feb. 14, 2019) at 229-30.

The three men engaged Mr. Walker for about three minutes, during which time Ms. Holmes observed that Mr. Redic had a black pistol in his waistband. RP (Feb. 14, 2019) at 240-44. Once Mr. Walker got back in the car, Ms. Holmes began to back out of the Stop Mart’s parking lot. RP (Feb. 14, 2019) at 244. As she did so, she observed the three men walk across the street. RP (Feb. 14, 2019) at 244. Ms. Holmes saw Mr. Redic hand the gun to the young man she identified as Mr. Posey. RP (Feb. 14, 2019) at 246-47.

She saw this man aim the gun at her car and, as she drove away, heard four gunshots and her window breaking. RP (Feb. 14, 2019) at 248-50.

Ms. Holmes drove a short distance and then stopped to call 911. RP (Feb. 14, 2019) at 251-52. She identified Mr. Redic in the 911 call but did not identify Mr. Posey. RP (Feb. 14, 2019) at 256. When officers arrived at the scene a short time later, Ms. Holmes scrolled through her Facebook “newsfeed” until she found an image of Mr. Posey. RP (Feb. 14, 2019) at 260. She showed that image to the officers and identified the person in it as “the shooter that shot at my car.” RP (Feb. 14, 2019) at 261.

Because this identification was tenuous, the State sought to bolster it by admitting several “Facebook records” it claimed were associated with Mr. Posey’s and Mr. Redic’s accounts. RP (Feb. 5, 2019) at 22-23. These “records” contained both images and messages with time stamps. RP (Feb. 5, 2019) at 22-28. Every page of the proffered “records” bore the title “Facebook Business Record” at the top. Exhibits 2 & 3.

The State argued the “records” were necessary to show (1) that Mr. Posey and Mr. Redic possessed a black .40 caliber handgun around the time of the shooting, (2) that they self-identified as Hilltop Crips, and (3) that they had a conversation on Facebook about laying low and avoiding detection immediately after the shooting. RP (Feb. 5, 2019) at 25-27. One of the images

in the exhibits was the picture of Mr. Posey that Ms. Holmes had presented to investigating officers on October 12, 2017. RP (Feb. 5, 2019) at 27.

The prosecutor acknowledged that these “records” would have to be authenticated before they could be admitted at trial. RP (Feb. 5, 2019) at 12. But he explained that it is a “logistical nightmare” to subpoena a Facebook records custodian for live testimony, and he argued that the State should instead be permitted to authenticate the Facebook records with an “affidavit” or “certificate” consistent with RCW 10.96.030, which permits authentication by “affidavit, declaration, or certification” under certain circumstances. RP (Feb. 5, 2019) at 14-15.

The State then offered a “Certificate of Authenticity of Domestic Records of Regularly Conducted Activity,” which provided, in its entirety:

I, Alexandro Verdugo, certify:

1. I am employed by Facebook, Inc. (“Facebook”), headquartered in Menlo Park, California. I am a duly authorized custodian of records for Facebook and am qualified to certify Facebook’s domestic records of regularly conducted activity.
2. I have reviewed the records produced by Facebook in this matter in response to the Search Warrant received on January 27, 2018. The records include search results for basic subscriber information, IP logs, messages, photos, videos, other content and records UziLondon666, dope.bo92, weezyredic, leeshawn.redic.37, Robert.doss.7169 and 100002246579224.

3. The records provided are an exact copy of the records that were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook. The records were saved in electronic format after searching Facebook's automated systems in accordance with the above-specified legal process. The records were made at or near the time the information was transmitted by the Facebook user.
4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Ex. 1; RP (Feb. 5, 2019) at 12-13. The Certificate was signed and dated January 24, 2019. Ex. 1.

The prosecutor explained that, in 2017 and 2018, the State was investigating "a large number" of unsolved shootings in the Hilltop area and obtained a search warrant for Facebook records associated with "a number of individuals," including Mr. Redic and Mr. Posey. RP (Feb. 5, 2019) at 20. That warrant prompted Facebook to produce the "records" referred to in the Certificate; hence, the apparent reference in the Certificate to "other accounts not related to these defendants." RP (Feb. 5, 2019) at 13, 20.

The prosecutor asserted that Mr. Posey used the name "Thatkidd Uzi" in his Facebook profile, and this name does appear in several of the message exchanges in the records the State sought to admit. RP (Feb. 5, 2019) at 23-24. But the prosecutor did not explain which of the apparently unique identifiers listed in paragraph 2 of the Certificate (UziLondon666, dope.bo92, weezyredic, leeshawn.redic.37, robert.doss.7169 and 100002246579224) was

associated with Mr. Posey's account. RP (Feb. 5, 2019) at 23-24. The search warrant was not admitted into evidence. RP (Feb. 5, 2019) at 13-40.

The defense objected to the authentication by certificate, arguing that this method is inappropriate to social media archives:

I think the reason that a witness from Facebook is necessary for authentication and later for confrontation is because Facebook records are different from any other kind of business record. They're dynamic, they're changing, and they're subject to data manipulation. What we are looking at are the records that were pulled by someone at Facebook at an unknown date and time. We don't know how they were compiled. We don't know what changes were made since the incident date or since the date of production of these messages, and we're left with no ability to question anybody about whether or not these messages could have been altered by someone before they were produced for trial. And that's where I think Facebook records differ from other business records, and that's why I believe the affidavit is not sufficient.

RP (Feb. 5, 2019) at 27.

The prosecutor responded that he would be happy to arrange an "interview" with a Facebook employee, who could answer any questions the defense had with respect to possible manipulation. RP (Feb. 5, 2019) at 19.

But he insisted that Mr. Posey had no right to confront any Facebook witness in court:

. . . There's a reason the statute exists. These types of witnesses are frankly a waste of time. You have to spend thousands of dollars to fly someone up from California for ten minutes of testimony when there is hardly ever any cross or any question as to authenticity of these records. And the types of argument that [defense counsel] . . . has, can be answered

both through an interview and through questioning of the witness who will lay the foundation for these records.

RP (Feb. 5, 2019) at 19-20.

The prosecutor then stated that he “expect[ed] to lay sufficient foundation through the lead detective in the case . . . to establish who was using these accounts, whose names these accounts are in.” RP (Feb. 5, 2019) at 18.

The trial court admitted the Facebook “records,” finding that the Facebook custodian’s Certificate satisfied RCW 10.96.030 and therefore posed no authentication or confrontation problem. RP (Feb. 5, 2019) at 22 (“I think the . . . declaration complies with the statute, at least it was the intent of the statute.”).

The court next addressed several defense motions to exclude or redact the Facebook “records” on other grounds. RP (Feb. 5, 2019) at 22-33. In this context defense counsel noted that, according to the time stamp therein, the photograph Ms. Holmes used to identify Mr. Posey was not uploaded to Facebook until December of 2017, two months after Ms. Holmes made her identification. RP (Feb. 5, 2019) at 29. In light of this discrepancy, counsel noted she was “a little confused about how it’s the identification photograph.” RP (Feb. 5, 2019) at 29. The prosecutor responded that Mr. Posey must have had the picture on his account when Ms. Holmes made the identification, and

then “re-uploaded this photograph again during the period covered by the search warrant” (September 12, 2017 through January 25, 2018). RP (Feb. 5, 2019) at 31.

At trial, Detective James Buchanan testified that he regularly used Facebook in his investigations for the Tacoma Police Department and F.B.I. South Sound Gang Task Force. RP (Feb. 19, 2019) at 391-92, 411-12. He said that for his investigation into this case he identified Mr. Posey’s and Mr. Redic’s Facebook accounts through Ms. Holmes, who directed investigators to Mr. Posey’s profile, and he then “[o]btained a search warrant for the accounts associated with this case.” RP (Feb. 19, 2019) at 410-11. Detective Buchanan identified Mr. Posey’s account as the account of “Thatkidd Uzi.” RP (Feb. 19, 2019) at 411. He said he sought the search warrant partly to determine Mr. Posey’s and Mr. Redic’s “whereabouts” on the day of the shooting. RP (Feb. 19, 2019) at 415.

Detective Buchanan explained that Facebook maintains a “portal” through which it accepts search warrants, but when asked to elaborate on the term, “portal,” he said he was “not computer smart enough to know.” RP (Feb. 19, 2019) at 416-17. Nevertheless, he claimed “familiarity” with the way Facebook stores records, and he testified about the need to convert the time stamps in these records from “Universal Time Coordinated” (UTC) to local time—in this case, Pacific Standard Time (PST). RP (Feb. 19, 2019) at

417-19. During this portion of the testimony, it became clear that most of the pages marked “Facebook Business Record” in the State’s exhibits had in fact been altered by the prosecutor in this case. RP (Feb. 19, 2019) at 419, 455. After receiving the “records” from Facebook, the prosecutor had added a “Correct Time” entry (reflecting PST) to every page that had a UTC time stamp. RP (Feb. 19, 2019) at 419, 455.

Through Detective Buchanan’s testimony and over defense counsel’s renewed objection, the court admitted two exhibits consisting of Facebook “records” obtained through the search warrant.<sup>1</sup> RP (Feb. 19, 2019) at 418-20, 431-32. Detective Buchanan then described the images and messages contained in the exhibits, and the “corrected” time stamps associated with each. RP (Feb. 19, 2019) at 421-29, 431-43. He described a message exchange allegedly between Mr. Posey (going by the profile name “Thatkidd Uzi”) and Mr. Redic, which included a reference to “lay[ing] low,” and testified that it took place about 35 minutes after the shooting on October 12, 2017. RP (Feb. 19, 2019) at 424-31. He also testified that, separate from the search warrant, he had obtained some “[s]creen captures” from the Facebook account of “Thatkidd Uzi” while investigating this case. RP (Feb. 19, 2019)

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<sup>1</sup> These exhibits were marked 28 and 29, but they consisted almost entirely of Facebook records that appeared in exhibits 2 and 3, discussed at the February 5, 2019, hearing.

at 419 at 445-46. The court admitted these screen captures as Exhibit 6. RP (Feb. 19, 2019) at 446.

On cross-examination, Detective Buchanan testified that he didn't use Facebook except for work, and so did not know whether pictures could be edited. RP (Feb. 19, 2019) at 454. He also acknowledged that the "Thatkidd Uzi" profile page in Exhibit 6 indicated that the user had joined Facebook in February 2018, several months after the time frame covered by the warrant. RP (Feb. 19, 2019) at 456. When asked to explain this discrepancy, Detective Buchanan testified that he assumed a user could "adjust that." RP (Feb. 19, 2019) at 456. When asked for further clarification, he stated, "Because I did the search warrant from date of the incident and around the incident, until when [Mr. Posey] was captured in 2018. So the chat was from then." RP (Feb. 19, 2019) at 456-57.

On redirect, Detective Buchanan again explained that he did not know whether a Facebook user could adjust the "joined" date on a Facebook profile, because "I don't work for Facebook." RP (Feb. 19, 2019) at 463. And he again asserted that the profile for "Thatkidd Uzi" must have been in use in 2017 because the search warrant had yielded "records" associated with that name. RP (Feb. 19, 2019) at 463.

The jury convicted Mr. Posey as charged. CP 86-87, 89-90, 92. The trial court sentenced him to a total of 180 months confinement, followed by 36 months of community custody. CP 121-22.

C. ARGUMENT

Hearsay, defined as an out-of-court statement ““offered in evidence to prove the truth of the matter asserted,”” is inadmissible ““except as provided by [the Evidence Rules], by other court rules, or by statute.”” State v. Hamilton, 196 Wn. App. 461, 476, 383 P.3d 1062 (2016) (quoting ER 801(c), 802). RCW 5.45.020 provides one such exception for “business records,” which are admissible

if the custodian or other qualified witness testifies to [the record’s] identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event [in question], and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

See also ER 803(a)(6) (providing that “Records of Regularly Conducted Activity” are “not excluded by the hearsay rule,” pursuant to chapter 5.45 RCW).

The detailed testimony required under RCW 5.45.020—explaining when and how the business record at issue was produced—is necessary to

authenticate that record,<sup>2</sup> i.e., to prove that it is what the proponent claims it is.<sup>3</sup> Under RCW 10.96.030, that authentication may occur through an “affidavit, declaration, or certification,” in lieu of live testimony, provided the document “attests to the following:”

- (a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;
- (b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of these matters;
- (c) The record was made in the regular course of business;
- (d) The identity of the record and the mode of its preparation; and
- (e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

As noted, at Mr. Posey’s trial the State invoked this statute to admit the “Facebook records” without live testimony by a custodian.

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<sup>2</sup> State v. DeVries, 149 Wn.2d 842, 847, 72 P.3d 748 (2003) (RCW 5.45.020 “does not create an exception for the foundational requirements of identification and authentication”).

<sup>3</sup> State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) overruled on other grounds by State v. Guzman Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012) (citing ER 901(a)) (“It is fundamental that evidence must be authenticated before it is admitted. Authentication requires that the proponent produce proof ‘sufficient to support a finding that the matter in question is what its proponent claims.’”).

In a criminal case, the prosecution's reliance on affidavits for authentication is limited not only by the terms of RCW 10.96.030, but also by the Sixth Amendment right of confrontation. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307-08, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Consistent with that right, the prosecution may not rely on an affidavit to authenticate a record when the affidavit, the record, or the combination thereof, is "testimonial." See id. at 322-24.

In this case, the admission of the Facebook "records" pursuant to the "Certificate of Authenticity" violated both RCW 10.96.030's requirements and Sixth Amendment confrontation clause protections.

1. The Trial Court Erred by Admitting the Facebook Postings and Messages as "Business Records," Pursuant to a "Certificate of Authority" that Did Not Meet RCW 10.96.030's Requirements

A trial court's admission of evidence is reviewed for abuse of discretion. Bashaw, 169 Wn.2d at 140. However, "[t]he range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

In this case, the State made two arguments in favor of authenticating the Facebook "records" by "Certificate." First, it argued that obtaining live testimony by a Facebook custodian was too inconvenient to bother with. RP

(Feb. 5, 2019) at 19-20. Second, it argued that Detective Buchanan could fill any gaps left by the custodian's absence. RP (Feb. 5, 2019) at 18. Defense counsel objected that the Certificate was insufficient because Facebook archives are unlike the "business records" contemplated in RCW 10.96.030. She maintained that the detective's testimony would not solve that fundamental problem. RP (Feb. 5, 2019) at 27.

Defense counsel was correct. While no Washington case has squarely addressed this issue, the Ohio Supreme Court has held that an investigating detective's testimony cannot substitute for authentication by a records custodian. State v. Hood, 135 Ohio St. 3d 137, 141-47, 984 N.E.2d 1057 (2012).

In Hood, the trial court admitted cell phone records that had not been authenticated by any phone company custodian, pursuant to a detective's testimony that he obtained the records through an official subpoena process. 135 Ohio St. 3d 137, 141-42, 984 N.E.2d 1057 (2012). As in Mr. Posey's case, the subpoena itself was never admitted. Id. at 141. Applying that state's equivalent of Washington's business records exception,<sup>4</sup> the Ohio Supreme

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<sup>4</sup> Hood, 135 Ohio St. 3d at 146 (to be admissible under Evid. Rule 803(6), "a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, even or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness'" (quoting State v. Davis, 116 Ohio St. 3d 404, 880 N.E.2d 31 (2008)).

Court held that the detective’s testimony could not authenticate the records, since he was not a proper custodian and was not familiar with the phone company’s record-keeping protocol. Id. at 147. In other words, the court held that a law enforcement officer cannot authenticate a record simply by testifying that it was responsive to a warrant or other legal process. Id.

This case differs from Hood in that, here, the State at least purported to authenticate the Facebook exhibits with the “Certificate” from a Facebook custodian. Ex. 1. But that “Certificate” is inadequate for the same reasons that the detective’s testimony was inadequate in Hood: it simply states that the records it references were obtained pursuant to a search warrant. Ex. 1 (“The records were saved in electronic format after searching Facebook’s automated systems in accordance with the above-specified legal process.”). That conclusory statement does not explain “the mode of [the records] preparation,” as required by RCW 10.96.030. Neither does the Certificate’s vague reference to “the automated systems of Facebook” or assertion that “[t]he records were made at or near the time the information was transmitted by the Facebook user.” Ex. 1. With respect to the records’ mode of preparation, these statements raise more questions than they answer.

Perhaps for this reason, courts considering Facebook “certificate[s]” with identical language—referring to “records . . . ‘made and kept by the automated systems of Facebook in the course of regularly conducted activity

as a regular practice of Facebook . . . [and] made at or near the time the information was transmitted by the Facebook user”—have held that such certificates are insufficient to authenticate message logs and other Facebook “records.” E.g., United States v. Browne, 834 F.3d 403, 436-37 (2016); People v. Glover, 363 P.3d 736, 741 (Colo. Ct. App. 2015). Applying evidence rules equivalent to Washington’s RCW 5.45.020, 10.96.030, and ER 803(a)(6), these courts reason that Facebook postings and messages are not records of “regularly conducted activity” as contemplated in the rules permitting authentication of “business records” by affidavit. Browne, 834 F.3d at 409 (quoting Fed. Evid. Rule 803(6) and 902(11)); Glover, 363 P.3d at 740-41 (quoting Colo. Evid. Rule 902(11) and 803(6)). This is precisely what defense counsel argued in this case.

Without live testimony by a Facebook records custodian, several significant questions went unanswered at Mr. Posey’s trial. These include what the apparently unique identifiers in the “Certificate” refer to and how they relate to Mr. Posey or to the name, “Thatkidd Uzi”; why Facebook was able to return “Thatkidd Uzi” messages from 2017, when exhibits obtained through “screen grabs” indicated the “Thatkidd Uzi” account was not created until February of 2018; and why the records submitted with the Certificate showed that the picture Ms. Holmes used to identify Mr. Posey in October

2017 had not been uploaded until December of that year. RP (Feb. 5, 2019) at 29; RP (Feb. 19, 2019) at 456.

When asked about these issues, Detective Buchanan testified only that “Thatkidd Uzi” must have had a Facebook account in 2017, because the search warrant asked for records from that year. RP (Feb. 19, 2019) at 463. That assumption, by a witness who disavowed knowledge of Facebook’s record-keeping protocol, was insufficient to authenticate the social media postings at issue here. Compare Hood, 135 Ohio St. 3d at 147 with RP (Feb. 19, 2019) at 454-56, 463.

2. By Admitting the Facebook “Records” without Live Testimony from a Records Custodian, the Trial Court Violated Mr. Posey’s Sixth Amendment Right of Confrontation

In Melendez-Diaz, the United States Supreme Court held that the Sixth Amendment right of confrontation applies to affidavits or certificates that are “testimonial” for Sixth Amendment purposes, and that such documents therefore cannot substitute for live testimony, without the defendant’s waiver. Id. 557 U.S. at 311.

The Melendez-Diaz Court recognized that an affidavit could be used to authenticate a business record, provided the affiant attested only to “the correctness of a copy of a record kept in his office,” and did not offer “his interpretation of what the record contains or shows, or . . . certify to its substance or effect.” Id. at 322 (quoting State v. Wilson, 141 La. 404, 409,

75 So. 95 (1917)). In the latter circumstance, the Court reasoned, the affidavit essentially functions as expert witness testimony, and cross-examination is necessary to uncover that witness's "lack of proper training or deficiency in judgment." Id. at 320.

The "Certificate" at issue in this case implicates that reasoning. It repeatedly refers to a "search," which it asserts was "in accordance with" the "Search Warrant received on January 27, 2018" but does not otherwise explain. Ex. 1. Because the search methods are not explained, it is unclear to what extent they involve the "exercise of judgment" discussed in Melendez-Diaz, 557 U.S. at 320. Paragraph 2 of the "Certificate," which refers to "search results" and the "Warrant received on January 27, 2018," does not help; indeed, it appears to be missing one or more words. Ex. 1 ("The records include search results for basic subscriber information, IP logs, messages, photos, videos, other content and records UziLondon666, dope.bo92, weezyredic, leeshawn.redic.37, Robert.doss.7169 and 100002246579224.").

While it does nothing to explain how the "records" it references were stored, located, or prepared, or how those records relate to Mr. Posey or the profile name "Thatkidd Uzi," the Certificate does make one thing clear: it does more than verify the "correctness of a copy of a record." Melendez-Diaz, 557 U.S. at 332 (internal quotations omitted). It describes a "search" and attests to the results. Ex. 1. Those qualities make it testimonial and thus subject to

confrontation. See State v. Jasper, 174 Wn.2d 96, 113-14, 271 P.3d 876 (2012) (“clerk certifications attesting to the nonexistence of a public record are testimonial statements subject to confrontation”); See United States v. Smith, 640 F.3d 358, 362-63 (D.C. Cir. 2011) (signed and sealed letter from court clerk attesting that “‘it appears from an examination of the records on file in this office’ that [the defendant] has been convicted of a felony” was testimonial under Melendez-Diaz).

3. The Erroneous Admission of Facebook “Records” Caused Prejudice Warranting Reversal

Confrontation clause errors are subject to constitutional harmless error analysis. Jasper, 174 Wn.2d at 117. Under this standard, the State must show beyond a reasonable doubt that the error did not affect the verdict. Id. In the absence of a confrontation clause violation, the admission of unauthenticated evidence is non-constitutional error. Bashaw, 169 Wn.2d at 200. Such an error “is not harmless ‘if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’”” Id. (quoting State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986))).

Under either standard, Mr. Posey’s conviction must be reversed. As detailed above, Mr. Posey’s identity as the shooter was in dispute. Ms. Holmes’s identification was imperfect: she did not identify Mr. Posey in the

911 call she placed immediately after the shooting, and at trial she could not remember Mr. Posey's name. RP (Feb. 14, 2019) at 229-30, 256. Thus, the State needed the archived Facebook records to bolster Ms. Holmes's identification.

The State admitted the records as evidence of Mr. Posey's "whereabouts" at the time of the shooting. RP (Feb. 19, 2019) at 415. At trial, Detective Buchanan testified that the records showed Mr. Posey was discussing the shooting approximately 35 minutes after it occurred. RP (Feb. 19, 2019) at 424-31. These records were essential to the State's case.

It is within reasonable probabilities that, had the trial court not erroneously admitted the records, the jury would not have convicted Mr. Posey. The trial court's error was certainly not harmless beyond a reasonable doubt. Thus, under either constitutional or non-constitutional harmless error analysis, Mr. Posey's convictions must be reversed. Jasper, 174 Wn.2d at 117; Bashaw, 169 Wn.2d at 200.

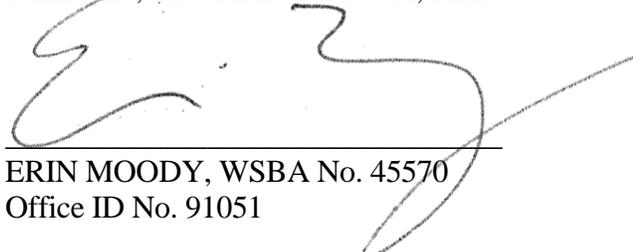
D. CONCLUSION

By admitting Facebook “records” pursuant to a “Certificate of Authenticity,” the trial court misapplied the “business records” exception to the rule against hearsay. It also violated Mr. Posey’s Sixth Amendment right of confrontation. Because that error was not harmless, Mr. Posey’s convictions must be reversed.

DATED this 4th day of November, 2019

Respectfully submitted,

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**November 04, 2019 - 4:10 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53374-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Jerrell Allen Posey, Appellant  
**Superior Court Case Number:** 18-1-00170-8

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