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NO. 53374-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JERRELL POSEY,

Appellant.

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

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES IN REPLY</u>	1
B. <u>ARGUMENT IN REPLY</u>	1
1. <u>The Trial Court Erred by Admitting Exhibits 28 and 29 because the Facebook Records therein Were Not Properly Authenticated; the State’s Contrary Argument Relies on Unpublished Authority that Supports Mr. Posey’s Position</u>	1
2. <u>The State’s Argument on the Confrontation Clause Issue is Wrong and Irreconcilable with its Argument on Authentication</u>	5
3. <u>The State’s Discussion of Other Hearsay Exceptions is Irrelevant to Any Issue in this Case</u>	7
4. <u>The Error in Admitting Exhibits 28 and 29 was not Harmless</u> . 7	
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Bashaw</u> 169 Wn.2d 133, 234 P.3d 195 (2010).....	7
<u>State v. DeVries</u> 149 Wn.2d 842, 72 P.3d 748 (2003).....	5, 7
<u>State v. Dreewes</u> 2 Wn. App. 2d 297, 325 (unpublished text), 409 P.3d 1170 (2018).....	2, 3
<u>State v. Guzman Nunez</u> 174 Wn.2d 707, 285 P.3d 21 (2012).....	7
<u>State v. Ramirez-Vasquez</u> 9 Wn. App. 2d 1074, 2019 WL 3413648	2, 3
<u>State v. Young</u> 192 Wn. App. 850, 369 P.3d 205 (2016).....	5
<u>FEDERAL CASES</u>	
<u>Melendez-Diaz v. Massachusetts</u> 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).....	6
<u>OTHER JURISDICTIONS</u>	
<u>State v. Hood</u> 135 Ohio St. 3d 137, 984 N.E. 2d 1057 (2012)	4
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 5.45.020.....	5

A. ISSUES IN REPLY

1. The Facebook messages admitted as exhibits 28 and 29 were not properly authenticated; for its contrary argument the State relies entirely on unpublished authority that in fact supports Mr. Posey's position.

2. The Facebook custodian's certificate was testimonial for purposes of confrontation clause protections; the State's contrary argument is incorrect and contradicts its theory of authentication.

3. The State's arguments about other hearsay exceptions are irrelevant.

4. Ms. Walters's imperfect identification of Mr. Posey did not render the erroneous admission of the Facebook records harmless.

B. ARGUMENT IN REPLY

1. The Trial Court Erred by Admitting Exhibits 28 and 29 because the Facebook Records therein Were Not Properly Authenticated; the State's Contrary Argument Relies on Unpublished Authority that Supports Mr. Posey's Positions

The Facebook messages admitted as exhibits 28 and 29 were offered to prove Mr. Posey's "whereabouts" around the time of the shooting. RP (Feb. 19, 2019) at 415. Thus, the timing of these archived messages was critical to their relevance. The only sworn statements attesting to the accuracy of the time stamps on the archived messages were the statements (by Detective James Buchanan in court and by the Facebook custodian in the out-of-court

“Certificate”) that the messages were responsive to a search warrant for records from that general time period. Ex. 1; RP (Feb. 5, 2019) at 31; RP (Feb. 19, 2019) at 456-57. Such statements are insufficient to authenticate archived messages.

The State cites two unpublished cases, State v. Ramirez-Vasquez, 9 Wn. App. 2d 1074, 3, 2019 WL 3413648, and State v. Dreewes, 2 Wn. App. 2d 297, 325 (unpublished text), 409 P.3d 1170 (2018), to argue that it is possible to authenticate Facebook messages for admission at trial. Br. of Resp. at 13-14. Mr. Posey does not argue otherwise. But neither Ramirez-Vasquez nor Dreewes involves any discussion of the issue here: authentication of Facebook messages by certificate. Thus, neither is apposite.

In Ramirez-Vasquez, the trial court admitted screenshots of a Facebook Messenger conversation between the defendant and his minor victim. 2019 WL 3413648 at *2, 4-5. The screenshots were taken by the victim’s relatives and given to law enforcement. Id. at *5. At trial, those relatives testified to “accessing and observing [the victim’s] account,” and the victim testified that she recognized the accounts displayed in the screenshots as her own and the defendant’s. Id. Thus, the screenshots in Ramirez-Vasquez were authenticated by people—including the owner of one Facebook account in question—with direct knowledge of the messages they depicted (i.e., knowledge of when those messages were created and what they said).

Nothing similar occurred in Mr. Posey’s case, where the only live testimony “authenticating” the Facebook records came from the detective who applied for the search warrant to obtain them. See Brief of Appellant at 8-10.

Like Mr. Posey’s case, Dreewes involved records produced by Facebook in response to a search warrant. 2 Wn. App. 2d 297. The records at issue in Dreewes were Facebook messages in which the defendant allegedly offered to pay two people for finding and beating up another individual. Id. at 302. But the State in Dreewes did not rely on any custodian’s certificate for authentication. Id. at ¶¶ 74-75. Instead, it authenticated the records—including, significantly, their time stamps—through the live testimony of a participant in the message exchange. Id. at ¶ 74. That participant testified that the records accurately reflected the messages she had exchanged with the defendant and the time period during which this exchange had taken place. Id. at ¶¶ 74-75. In this respect, Dreewes is distinguishable from Mr. Posey’s case for exactly the same reason that Ramirez-Vasquez is.

To the extent they are persuasive authority, Ramirez-Vasquez and Dreewes support Mr. Posey’s position, not the State’s. In both cases, the State authenticated Facebook records through witnesses with direct, personal knowledge of the timing and substance of the messages depicted therein. Ramirez-Vasquez, 2019 WL 3413648 at *4-5; Dreewes, 2 Wn. App. 2d at ¶¶ 74-75. These witnesses could explain, subject to cross-examination, why they

knew the exchange at issue involved the defendant's account and occurred during a relevant time period. *Id.* That type of testimony is precisely what was missing in Mr. Posey's case, where the only live witness who "authenticated" the Facebook records at issue, Detective Buchanan, could not answer basic questions about when and how they were created. See Brief of Appellant at 10.

Through Detective Buchanan's testimony, the State offered screenshots (Exhibit 6) and claimed they showed Mr. Posey went by the Facebook name, "Thatkidd Uzi." RP (Feb. 19, 2019) at 419, 445-46. But those same screenshots showed the account they depicted was not created until *after* the period for which Detective Buchanan obtained the Facebook records at issue here (exhibits 28 and 29). RP (Feb. 5, 2019) at 31; (Feb. 19, 2010) at 456. When asked about this discrepancy, Detective Buchanan said the records obtained through the search warrant must be from the relevant time period because that is what the search warrant asked for. RP (Feb. 19, 2019) at 456-57.

As explained in the opening brief, that tautology is inadequate to authenticate electronic records. Brief of Appellant at 14-15 (citing State v. Hood, 135 Ohio St. 3d 137, 141-47, 984 N.E. 2d 1057 (2012)). It implies that

any electronic material returned pursuant to a search warrant is self-authenticating. See Brief of Respondent at 16. This court should reject it.

This court should also reject the State’s argument that “purported inconsistencies in the records are not relevant to authenticity.” Brief of Respondent at 16 (citing State v. Young, 192 Wn. App. 850, 369 P.3d 205 (2016)). The authority the State cites for that proposition does not support it, and the proposition is incompatible with the evidence rules governing business records. See RCW 5.45.020 (record admissible if custodian testifies to “its identity and the mode of its preparation”); 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”).

2. The State’s Argument on the Confrontation Clause Issue is Wrong and Irreconcilable with its Argument on Authentication

The State asserts that the Certificate is non-testimonial and thus does not implicate confrontation clause protections. This court should reject that argument, for two reasons.

First, it is wrong for the reasons given in Mr. Posey’s opening brief. See Brief of Appellant at 17-19. As explained there, the Certificate describes a “search” for records responsive to the warrant. Id. at 18. This implies that a Facebook employee culled the company’s archives according to some criteria the Certificate does not explain. Id. Such a search entails

the exercise of judgment and thus triggers confrontation clause protections. Id. (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 320, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)).

Second, the State’s argument on the confrontation clause issue is fundamentally irreconcilable with its argument on authentication.

In its argument on authentication, the State contends the Certificate “was made more reliable by its reference to Detective Buchanan’s January 2018 warrant . . . along with the prosecutor’s record that the warrant requested Facebook materials from September 2017 to January 2018.” Brief of Respondent at 16. In other words, the State argues that, at least in combination with Detective Buchanan’s testimony, the Certificate shows the messages in exhibits 28 and 29 *really were* from the time period in question. And the messages were admitted at trial to prove exactly that critical fact: Mr. Posey’s “whereabouts” at the time of the shooting. RP (Feb. 19, 2019) at 415.

When addressing the confrontation clause issue, however, the State contends that “[t]he ‘search’ [referenced in the Certificate] . . . refers to the production of records, not a search resulting in a fact at issue.” Brief of Respondent at 21.

The State cannot have it both ways.

3. The State's Discussion of Other Hearsay Exceptions is Irrelevant to Any Issue in this Case

The State argues that even if the Facebook records in exhibits 28 and 29 were improperly admitted under the business records exception, they are still admissible as admissions of a party-opponent, statements of a co-conspirator, and photographs. Brief of Respondent at 22-25. This argument fundamentally misunderstands the issue in this case.

Mr. Posey does not argue that exhibits 28 and 29 would have been inadmissible hearsay even if they were properly authenticated. The only issue here is authentication.

As explained in the opening brief, any exhibit is inadmissible if not properly authenticated. Brief of Appellant at 11-12 (citing DeVries, 149 Wn.2d at 847, and 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)). This remains true no matter what theory of substantive admissibility is advanced. Id.

4. The Error in Admitting Exhibits 28 and 29 was not Harmless

The State contends that the verdict would have been the same if the Facebook records at issue had been excluded. In support of that argument, it cites only Ms. Walters's identification. Brief of Respondent at 25-26. For the reasons given in Mr. Posey's opening brief, this court should reject that

argument. See Brief of Appellant at 19-20. Ms. Walters's identification was imperfect.

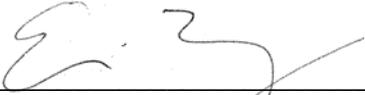
D. CONCLUSION

The trial court erred by admitting unauthenticated records. The records went to a key issue in the case, Mr. Posey's whereabouts at the time of the alleged offense, and their erroneous admission was therefore not harmless. This court must reverse Mr. Posey's convictions and grant him a new trial.

DATED this 31st day of March, 2020

Respectfully submitted,

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