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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRELL ALLEN POSEY,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Judge James Orlando

No. 18-1-00170-8

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

Erica Eggertsen
Deputy Prosecuting Attorney
WSB # 40447
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

Jerrell Posey repeatedly shot at Courtney Walters and Marcel Walker as they drove away from a convenience store. Walters knew Posey, and showed police who he was minutes later using photographs from Facebook. Police obtained the Facebook records of Posey and his codefendant with a warrant. Those records were admitted at trial and showed Posey's conversations before and after the shooting, his possession of a handgun, and his gang affiliation relevant to his motive for the shooting.

The Facebook records were authenticated by a record custodian's certification, the testimony of Walters and the lead detective, and internal photographs and statements indicating Posey controlled the account. The records were admitted at trial as business records. Other rules of evidence support their admission even if this Court finds the business records exception does not apply to Facebook records. The certification did not violate the Confrontation Clause because it lacked any testimonial fact relevant to proving the crimes.

Even if this Court determines there was error in the admission of all or some of the Facebook records, the error was harmless given Walters' strong identification of Posey as the shooter. This Court should affirm Posey's convictions.

II. RESTATEMENT OF THE ISSUES

A. Were the Facebook records properly authenticated by the certification from Facebook, the testimony of two witnesses with knowledge the account was Posey's, and the contents demonstrating Posey's ownership of the account and involvement in the crimes?

B. Were the Facebook records properly admitted as business records when the certification provided by Facebook met the statutory requirements for admission without live testimony and did not contain any testimonial statements?

C. Even if the Facebook records do not qualify as business records, were the contents properly admitted as statements of a party-opponent, statements of a co-conspirator, and relevant photographs?

D. Was any error in the admission of the Facebook records harmless where the victim knew Posey and credibly identified him as the shooter minutes after the crimes?

III. STATEMENT OF THE CASE

A. Facts

Courtney Walters screamed in terror as Jerrell Posey, the defendant, fired five bullets at her car, shattering two of the windows and hitting the driver's door just inches from her body. 4RP 249-50. Police quickly responded to the two 911 calls she made just minutes after the shooting. 4RP 212-14, 251-53; Ex. 4. Walters knew Posey, and used photographs from Facebook to identify him and the person she saw handing him the gun, Leeshawn Redic. 4RP 253, 260, 300, 304. At trial, she explained the circumstances of the shooting as well as how she was familiar with Posey

and Redic. 4RP 217-290. The passenger in Walters' vehicle, Marcel Walker, also testified at trial but was uncooperative and unwilling to provide many details. 5RP 363-390.

On October 12, 2017, Walters was spending time with her friend Walker.[1] 4RP 219. Shortly before 12:30pm, they drove into the parking lot of the Stop Mart convenience store on 15th Street and Martin Luther King Jr. Way in Tacoma. 4RP 219, 223, 226. Posey, a member of a Tacoma gang known as the Hilltop Crips, lives near this store. 5RP 443, 448-49, 457; Ex. 6. Walters, who was driving, parked in a spot just to the right of the store's entrance. 4RP 223, 226. She waited in her car with her window rolled partway down while Walker went inside to buy a cigar. 4RP 227. That day he was wearing a blue shirt and jacket, a color associated with the Crips. 4RP 257; 5RP 452.

From where she was sitting, Walters could see three people standing to the left of the store's entrance. 4RP 228. She recognized two of them. 4RP 229, 267-68. Posey had been a classmate of hers at Clover Park High School about two years prior when she was a junior and he was a freshman. 4RP 230, 347-48. She didn't socialize with him, but saw him there in the mornings. 4RP 230. He hung out with at least one member of her extended

[1] Walters married prior to trial, changing her last name to Holmes. 4RP 217.

family. 4RP 230. She remembered talking to him. 4RP 231. She said, "I used to say that your shoes were nice back at that school. That's about it." 4RP 231. In addition to the few months in 2015 they were classmates, the two were friends on Facebook. 4RP 232, 262, 274, 347. Walters had seen a picture of Posey appear in her Facebook newsfeed a few days before she saw him at the Stop Mart the day of the shooting. 4RP 260, 262, 274, 276.

Walters also knew Redic. 4RP 233. She and Redic had participated in small-group treatment sessions together at Remann Hall for two months in 2015. 4RP 233, 340. Walters thought the third man's face looked familiar, but did not know who he was. 4RP 234-36. He was later identified by police as Miquon Phillips. 5RP 405.

Redic confronted Walker when he came out of the Stop Mart, shouting, "Where are you from? Where are you from?" and asking if he "gang bang[ed]." 4RP 237-38. Posey began "throwing up" a thumbs-up hand gesture Walters recognized as a gang sign for the Hilltop Crips. 4RP 238-39. Walker told them, "I don't bang." 4RP 238. Walters told the group to stop harassing them and added that they should be in school. 4RP 240, 243. Redic responded to Walters' comment by pulling up his shirt to expose a black handgun tucked in his waistband. 4RP 241. Posey, Redic, and Phillips began walking away toward the parking lot's exit. 4RP 242.

Walters pulled out of the parking lot as Posey, Redic, and Phillips crossed 15th Street toward the entrance to an alleyway. 4RP 245. She saw Redic take the gun from his waistband and hand it to Posey. 4RP 247. Posey raised the gun, pointed it at her car, and started shooting. 4RP 247-49. Walters screamed but remained focused on driving even as she heard her windows shatter. 4RP 248-50. When she turned the corner and looked back, Posey, Redic, and Phillips were running down the alleyway. 2RP 248.

Walters drove to a nearby grocery store where she called 911. 4RP 251-52. She was so upset she had trouble communicating, hung up, and had to call back a few minutes later. 4RP 252, 5RP 385; Ex. 4. The Tacoma Police Department (TPD) officer who responded calmed her down and spoke to her about the shooting. 4RP 259, 304. Walters used her phone to access Facebook and found a picture of Posey on her newsfeed. 4RP 260-63, 273, 307; Ex. 9C. She showed the picture to the officer and identified him as the person who shot at her just minutes before. 4RP 260-63; Ex. 9C. Walters didn't remember Posey's real name at the time, but as Facebook friends had access to his profile and identified the "Thatkidd Uzi" account name as his. 4RP 262, 317; Ex. 9C. Walters showed the officer another photo from Facebook that included Posey, Redic, and Phillips. 4RP 263-64; Ex. 9D. She initially remembered Redic's name as "Rashad." 4RP 309.

Within a few hours of speaking with the responding officer in person, Walters called him and identified Redic by name. 4RP 308-09.

Police surveyed the area of the shooting. 4RP 319. Five recently-fired .40 caliber casings were found across the street from Stop Mart in the alleyway described by Walters. 4RP 319-21. Police also examined Walters' car, finding suspected bullet strikes on the surface of the driver's door and the rear door frame on the driver's side. 4RP 332. Two of the vehicle's windows were shattered and a bullet was found in the back seat. 4RP 334.

TPD Detective James Buchanan investigated the shooting. 5RP 394. He recognized the three individuals Walters had identified by photograph as Posey, Redic, and Phillips. 5RP 401, 403-06. He had independent knowledge that the photograph Walters used to identify Posey after the shooting was from Posey's Facebook account. 5RP 402.

Facebook provided records for Posey's "Thatkidd Uzi" Facebook profile and Redic's "Jay Johnson" Facebook profile in response to a search warrant. 5RP 411, 413. Portions of Redic's Facebook profile were admitted at trial as Exhibit 28 and portions of Posey's profile were admitted as Exhibit 29.[2] 5RP 418, 431-32; Ex. 28, 29. Publicly-available screenshots of

[2] In addition to Detective Buchanan's testimony that exhibits 28 and 29 were Facebook records received in response to a warrant, the prosecutor provided a certificate of authenticity from Facebook to the court prior to trial. 1RP 13-40; Ex. 1, 28, 29.

Posey's "Thatkidd Uzi" profile were admitted at trial as Exhibit 6. 5RP 445-50; Ex. 6.

Statements and photographs in the Facebook exhibits corroborated Walters' identification of the "Thatkidd Uzi" profile as belonging to Posey. Ex. 6, 28, 29. The user "Thatkidd Uzi" identifies himself as "Jerrell," Posey's first name, in a messenger conversation. Ex. 29 (pg. 9). In this conversation, the user "Thatkidd Uzi" says, "Im yung duecy from 16 hilltop crip aka Uzi loc." 5RP 441-43; Ex. 29 (pg. 8-9). In the next message he says, "[m]y real name is jerrell." 5RP 441-43; Ex. 29 (pg. 8-9).

Posey appears in both photographs on the "Thatkidd Uzi" profile page. 5RP 447-50; Ex. 6. Text on this page identifies him as a Hilltop Crip with a reference to the specific street on Hilltop where he lives. 5RP 447. The photograph Walters used to identify Posey the day of the shooting was provided by Facebook as a record from the "Thatkidd Uzi" account. 5RP 440-41; Ex. 29 (pg. 6). Screenshots from the account included photographs of the Stop Mart where Walters and Walker were assaulted, including one featuring Posey standing in front of the store with the caption "I really be in my hood, do you be in yours tho?" 5RP 449-50; Ex. 6 (pg. 3-4).

Facebook messenger conversations corroborate Walters' identification of Posey and Redic as the people responsible for the shooting. 5RP 405-06, 414, 425-29, 433-36; Ex. 28, 29. About thirty-five minutes

prior to the shooting, Posey and Phillips message each other about meeting up soon with "Leeshawn" (Redic). 5RP 405-06, 414; 433-36; Ex. 29 (1-2). After the shooting, Posey and Redic talk about finding a ride and "laying low." 5RP 425-29; Ex. 28 (7-9).

The records also provide evidence Posey had access to the type of gun that was used to shoot at Walters and Walker. Ex. 28, 29. The shell casings found at the crime scene were .40 caliber. 4RP 321. In conversations on November 4 and 6, 2017, Posey talks about possessing a "glock 40." Ex. 29 (pg. 3-5). He is holding a black handgun in the picture Walters used to identify him. 5RP 437-39; Ex. 29 (pg. 3-5). Redic, who gave the gun to Posey at the Stop Mart, has multiple pictures of a black handgun on his profile. 5RP 423-24; Ex. 28 (pg. 2, 4, 6).

B. Procedural History

Posey was charged with two counts of assault in the first degree and one count of unlawful possession of a firearm in the second degree. CP 3-4, 35-36. Redic was charged as a codefendant and pleaded guilty prior to jury selection. 3RP 74. During motions in limine, the court addressed the admission of records received from Facebook. 1RP 12-40. The prosecutor asserted the records were relevant to showing Posey's involvement in the

shooting, his status as a Hilltop Crip, and his possession of a black .40 caliber handgun. 1RP 13-14, 21-22, 25-26, 39-40; Ex. 2, 3.[3]

Regarding authentication and admissibility, the prosecutor said that Facebook provided the records to law enforcement in response to a warrant requesting Posey's and Redic's account among several others. 1RP 20. Both the Facebook records and the search warrant had been provided to defense in discovery. 1RP 14. The prosecutor provided the court with a certification from a Facebook records custodian pursuant to RCW 10.96.030. 1RP 13. The certification referred to five accounts, including Posey's and Redic's. 1RP 20. The prosecutor explained the lead detective would provide background information establishing that Posey and Redic were using the specific accounts. 1RP 18.

The prosecutor argued the certification in combination with the detective's expected testimony was sufficient for authentication and admission of the records. 1RP 14, 16, 19. Posey argued a Facebook representative was necessary to address the issue of possible data manipulation and to testify about how the records were created and maintained. 1RP 17-18; CP 29-32. The court found that the certification fulfilled the requirements of RCW 10.96.030 for authentication as a

[3] The contents of Exhibits 2 and 3 were discussed during pre-trial hearings; Exhibits 28 and 29 contained the actual Facebook records admitted at trial. 1RP 13-40; Ex. 2, 3, 28, 29.

business record without live testimony of a custodian. 1RP 21-22. The court further found that the certification along with the detective's testimony connecting the accounts to Posey and Redic was sufficient for admission. 1RP 21-22. The court noted that the questions raised by Posey were relevant to the weight of the evidence rather than its admissibility. 1RP 21-22; Ex. 1. Lastly, the court found the content of the records relevant to the State's proof of the crimes charged. 1RP 13-14, 21-22, 25-26, 39-40; Ex. 2, 3.

Trial took place from February 5, 2019, to February 19, 2019. 1RP 2; 5RP 361-62. Posey stipulated he had a prior felony conviction for purposes of the unlawful possession of a firearm charge. CP 55-56. Posey was convicted as charged of two counts of assault in the first degree and one count of unlawful possession of a firearm in the second degree. CP 86, 89, 92. The jury found he was armed with a firearm when he committed both counts of assault in the first degree. CP 87, 90. He was sentenced on March 29, 2019, to 180 months incarceration at the Department of Corrections. CP 122. Posey timely appealed. CP 142.

IV. ARGUMENT

A. The Facebook records were authenticated under RCW 10.96.030 and ER 901 by the certification from Facebook, the testimony of Walters and Detective Buchanan, and internal characteristics showing Posey's control of the account and involvement in the crimes described by Walters.

A finding of authenticity is a condition precedent to the admission of evidence. ER 901(a). The proponent of evidence need only offer "evidence sufficient to support a finding that the matter in question is what its proponent claims" to establish authenticity. (ER) 901(a). The court considers evidence offered by the proponent and disregards contradictory evidence from the opponent in determining whether there is a prima facie showing of authenticity. *In re the Detention of H.N.*, 188 Wn. App. 744, 751, 355 P.3d 294 (2015). This prima facie showing is achieved "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d 736 (2013). The proponent need not "rule out all possibilities inconsistent with authenticity" to meet the requirements of ER 901. *In re H.N.*, 188 Wn. App. at 751.

The court may consider and rely upon otherwise inadmissible evidence in its preliminary evaluation of whether evidence is authentic. ER 104; ER 1101(c)(1); *Bradford*, 175 Wn. App. at 928. The Confrontation Clause does not ordinarily apply to preliminary determinations. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172-73, 241 P.3d 800 (2010) (citing and discussing numerous cases on this issue). Evidence may be authenticated by any reliable means including the illustrative examples under ER 901(b). *City of Bellevue v. Mociulski*, 51 Wn. App. 855, 860, 756

P.2d 1320 (1988). A trial court's finding of authenticity is reviewed for abuse of discretion. *State v. Payne*, 117 Wn. App. 99, 110, 69 P.3d 889 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Williams*, 236 Wn. App. 486, 499, 150 P.3d 111 (2007).

Traditional methods of authenticating evidence apply to evidence in an electronic format. *See State v. Young*, 192 Wn. App. 850, 853-58, 369 P.3d 205 (2016), *subsequent determination*, 198 Wn. App. 797, 396 P.3d 386 (2017); *see also Bradford*, 175 Wn. App. at 928-29; *see also In re H.N.*, 188 Wn. App. at 758-59. Authentication may be established by the testimony of a witness with knowledge. ER 901(b)(1). The witness need not have comprehensive knowledge of all of the evidence's contents so long as the witness provides prima facie proof the evidence is authentic. *See, e.g., State v. Sapp*, 182 Wn. App. 910, 914-17, 332 P.3d 1058 (2014). If the evidence is contained within a business record, authentication is permitted by a certification fulfilling the requirements listed in RCW 10.96.030(2).

The content of proffered evidence may itself constitute evidence of authenticity. ER 901(b)(4); *Bradford*, 175 Wn. App. at 928. Authentication may also be established by the surrounding circumstances; for example, evidence may be authenticated by testimony it was received in response to a letter or request. *See, e.g.*, *Conner v. Zanuzoski*, 36 Wn.2d 458, 464, 218

P.2d 879 (1950). Traditional means of authenticating evidence are applied to electronic mail in ER 901(b)(10). Sufficient authentication under this provision is established when a witness with knowledge testifies an email address is associated with a particular sender, the email is sent from that address, and the contents and circumstances suggest the email is what the proponent claims. ER 901(b)(10).

Washington courts have found electronic writings such as text messages or social media postings authenticated through one or more of these methods. In *Young*, this Court affirmed the trial court's finding that text messages were authenticated when a witness testified the texts came from the defendant's phone number and the content of the messages suggested he was the author.[4] *Young*, 192 Wn. App. at 856-57. Although there was evidence someone other than the defendant may have written the messages, this Court noted the possibility of fabrication or interference was relevant to weight rather than admissibility. *Young*, 192 Wn. App. at 857.

Two recent unpublished cases have addressed the authentication of Facebook messages. *State v. Ramirez-Vasquez*, 9 Wn. App.2d 1074, 3, 2019 WL 3413648 (2019);[5] *State v. Drewes*, 2 Wn. App.2d 297, 325

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[4] This analysis applies to the "texts from Y.G. to R.E." *Young*, 192 Wn. App. at 856-57. This Court also found that the "texts from Papi to C.B." were admissible based on a similar analysis. *Young*, 192 Wn. App. at 857-58.

[5] Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may

(unpublished text), 409 P.3d 1170 (2018), *reversed in part and affirmed in part*, 192 Wn.2d 812, 432 P.3d 795 (2019).[6] In *Ramirez-Vasquez*, the defendant challenged the introduction of screenshots of Facebook messages between himself and the victim given the victim's denial she participated in the conversation. *Ramirez-Vasquez*, 9 Wn. App.2d at 4. The Court upheld the trial court's finding of authenticity because the defendant's messages were accompanied by his name and picture, the defendant historically communicated with the victim by Facebook, and there was no evidence his account was compromised. *Ramirez-Vasquez*, 9 Wn. App.2d at 4.

In *Drewes*, the Court affirmed the admission of Facebook messages when a witness testified they comprised a conversation between herself and the defendant even though she could not remember all of the conversation's details. *Drewes*, 2 Wn. App.2d para 79. The Court found that her general recollection of the communication along with the timing and distinctive characteristics of the messages established authenticity. *Drewes*, 2 Wn. App.2d para 80. The Court in both *Ramirez-Vasquez* and *Drewes* relied upon traditional methods of establishing authenticity under ER 901 rather than a certification pursuant to RCW 10.96.030. Various federal courts have

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be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

[6] Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

done the same. *United States v. Barber*, 937 F.3d 965, 969-71, 110 Fed. R. Evid. Serv. 325 (7th Cir. 2019); *United States v. Farrad*, 895 F.3d 859, 877-79, 106 Fed. R. Evid. Serv. 1157 (6th Cir. 2018); *United States v. Browne*, 834 P.3d 403, 439 (3rd Cir. 2016).

A photograph, whether printed or electronic, is authenticated when there is sufficient evidence it is what its proponent claims. *Farrad*, 895 F.3d at 877-79; *see also Sapp*, 182 Wn. App. at 916. Authenticity does not require that all the details in the photograph are explained or the circumstances surrounding its creation are known. *Sapp*, 182 Wn. App. at 914-17. Any purported flaws, inaccuracies, or possible alterations are relevant to the evidentiary weight of the photograph rather than its authentication or admissibility. *See State v. Sexsmith*, 138 Wn. App. 497, 508-09, 157 P.3d 901 (2007).

In this case, the Facebook records in Exhibits 28 and 29 and their contents were authenticated by several different means. First was the certification from Facebook relied on by the trial court. Ex. 1. The certification addressed each factor required by RCW 10.96.030(2) for authentication. 1RP 21-22; Ex. 1. During this preliminary stage, the court was permitted to consider otherwise inadmissible evidence and the Confrontation Clause did not apply. ER 104; 1101; *Fortun-Cebada*, 158 Wn. App. at 172-73. Posey's concerns about potential flaws in Facebook's

systems, the possibility of tampering, the desire for more details about Facebook's record-keeping, and purported inconsistencies in the records are not relevant to authenticity but the weight of the evidence. *Young* 192 Wn. App. at 208; Br. of Appellant at 16. Posey was free to explore these topics at trial and did so. *Young* 192 Wn. App. at 208; 5RP 453. The certification was made more reliable by its reference to Detective Buchanan's January 2018 warrant for the records along with the prosecutor's record that the warrant requested Facebook materials from September 2017 to January 2018. 1RP 31; 5RP 456; Ex. 1. Detective Buchanan testified at trial that he served the warrant during his investigation in 2018 and the records admitted at trial were those he received from Facebook. 5RP 411, 413, 456.

The Facebook records were also authenticated by the testimony of two witnesses with knowledge: Walters and Detective Buchanan. ER 901(b)(1). Walters knew who Posey was, was friends with him on Facebook, and knew his profile was under the name "Thatkidd Uzi." 4RP 230, 260, 262, 274, 276. She recognized him in photographs posted to his Facebook page. 4RP 260-63, 273, 307; Ex. 9C, 9D. Detective Buchanan had independent knowledge of Posey, photographs he had posted, and knew that Posey's Facebook profile was labeled "Thatkidd Uzi." 5RP 401-06. Detective Buchanan testified he received the Facebook records in Exhibits

28 and 29 in response to a warrant he sent to Facebook, another factor supporting authentication. *Zanuzoski*, 36 Wn.2d at 464; 5RP 411, 413.

Internal characteristics of the Facebook records constituted additional evidence the records were what they were purported to be. ER 901(a)(4). Posey identifies himself in a messenger conversation as "jerrell," his first name. 5RP 441-43; Ex. 29 (pg. 8-9). A photograph provided by Facebook was the same one Walters found in her Facebook newsfeed the day of the shooting. 5RP 440-41; Ex. 29 (pg. 6). In Facebook messenger conversations, Posey repeatedly talks about owning the type of gun used to shoot at Walters' vehicle. 4RP 321; Ex. 29 (pg. 3-5). Posey had a photograph of himself with Redic and Phillips, who were with him the day of the shooting. 4RP 263-64; Ex. 9D.

Redic's Facebook records have several photographs of a black handgun consistent with the type used to shoot at Walters' vehicle, relevant because Walters saw Redic handing a gun to Posey. 4RP 247; 5RP 423-24; Ex. 28 (pg. 2, 4, 6). The messenger conversation in Redic's records about getting a ride and "laying low" in the aftermath of the shooting identifies Posey's Facebook profile by name and a number that matches what appears in his own records. 5RP 425-29; Ex. 28 (7-9). The content of this conversation corroborates Walters' description of who was involved in the shooting. 5RP 425-29; Ex. 28 (7-9). Identifying details in the records from

Facebook, such as Posey's identification as a Hilltop Crip, match information from Posey's publicly-available "Thatkidd Uzi" profile. 5RP 445-50; Ex. 6, 29.

Exhibits 28 and 29 were not merely authenticated by certificate as Posey argues on appeal. Br. of Appellant at 15. The evidence they were what they purported to be also included the testimony of two witnesses with knowledge, Detective Buchanan's receipt of the records in response to a warrant, and the internal characteristics of the records. This evidence demonstrated ownership of the account by Posey as well as evidence of the crimes against Walters and Walker. These factors established authentication under ER 901 as well as under RCW 10.96.030. *Barber*, 937 F.3d at 969-71; *Farrad*, 895 F.3d at 877-79; *Browne*, 834 P.3d at 439. This Court should find that the records were properly authenticated.

B. The trial court did not abuse its discretion by admitting the Facebook record exhibits as business records under ER 803(a)(6), RCW 5.45.020, and RCW 10.96.030 and their admission did not violate Posey's right to confrontation.

Once the trial court has determined evidence is authentic, its admission is subject to the rules of evidence and applicable statutes. ER 901(a); *Bradford*, 175 Wn. App. at 928. The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). A trial court abuses its discretion when its

decision is manifestly unreasonable or is based upon untenable grounds or reasons. *Williams*, 236 Wn. App. at 499. The trial court's evidentiary rulings can be affirmed on any grounds supported by the record and the law. *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012).

Records of regularly conducted activity fall within the "business records" exception to the hearsay rule. ER 801, 802, 803(a)(6); RCW 5.45. A business record is admissible when a witness testifies to its identity, mode of preparation, and whether it was timely created in the regular course of business. RCW 5.45.020. By statute, business records may be admitted without live testimony if a certification provides that: (1) the attesting witness is a qualified records custodian; (2) the record was made at or near the time of the event by a person with knowledge of the contents; (3) the record was made in the regular course of business; (4) the record and its mode of preparation is identified; and (5) the record is an original or accurate duplication. RCW 10.96.020; RCW 10.96.030(2)(a)-(e).

The Confrontation Clause is only implicated by testimonial statements, i.e. statements constituting a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2005)). This occurs when the certification or business

record relates to the "production of evidence for use at trial," rather than the regularly conducted business of an entity unrelated to proving the elements of a specific crime. *Melendez-Diaz*, 557 U.S. at 321.

Testimonial statements include those averring to the existence of a fact at issue such as the results of forensic testing of a controlled substance in a drug case. *Melendez-Diaz*, 557 U.S. at 311. Testimonial statements also include those asserting an absence of pertinent information based on the results of a diligent search. *State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012). An alleged violation of the Confrontation Clause is reviewed de novo. *State v. Lee*, 159 Wn. App. 795, 815, 247 P.3d 470 (2011), *review denied*, 177 Wn.2d 1012, 302 P.3d 181 (2013).

Posey wrongly contends the Confrontation Clause was violated by the State's reliance on a certification to authenticate and admit his Facebook records. Br. of Appellant at 17. In contrast to certifications asserting the presence or absence of a fact necessary to meet the elements of a crime, certifications that merely authenticate records as true and correct copies of those produced in an entity's regular course of business do not violate the Confrontation Clause. *Lee*, 159 Wn. App. at 817. In *Lee*, Division I held that an affidavit certifying the authenticity of phone records did not violate the Confrontation Clause because the information in the affidavit did not constitute "a record for the sole purpose of providing evidence against a

defendant." *Lee*, 159 Wn. App. at 818. The Court noted this is consistent with the United States Supreme Court's observation in *Melendez-Diaz* that the Confrontation Clause does not require the State to call witnesses to verify foundational issues such as chain of custody, authenticity, or the accuracy of a device. *Lee*, 159 Wn. App. at 816.

The affidavit relevant to the Facebook records in Exhibits 28 and 29 was comparable to the affidavit for the phone records in *Lee*. Facebook did not create any of the records for the purpose of litigation or proving the element of a crime. Ex. 1. Rather, the records were those generated in the normal course of its business and produced in response to a warrant. Ex. 1. Like the records themselves, the affidavit from Facebook did not include any assertions relevant to proving an element of a crime but merely included the information necessary for authentication and admissibility under RCW 10.96.030. The affidavit was not "testimonial" under the Confrontation Clause. *Melendez-Diaz*, 557 U.S. at 321; *Lee*, 159 Wn. App. at 818. The "search" Posey contends is testimonial refers to the production of records, not a search resulting in a fact at issue as occurred in *Jasper*. Br of Appellant at 18; *Jasper*, 174 Wn.2d at 109. Thus, the trial court rightly considered the certification in its determination the records contained in Exhibits 28 and 29 were admissible under RCW 10.96.030 without the testimony of a records custodian.

C. Even if this Court finds the Facebook records were not admissible under the business records exception to the hearsay rule, the records were properly authenticated under ER 901 and the contents were admissible as statements of a party-opponent, statements of a co-conspirator, and relevant photographs.

Even if this Court decides the Facebook records in Exhibits 28 and 29 do not qualify as business records, the record supports the admission of their contents as statements of a party-opponent, statements of a co-conspirator, and relevant photographs. *Grier*, 168 Wn. App. at 644. Posey's statements in the Facebook records were admissible as statements by a party opponent. ER 801(d)(2)(i). The statements of Redic were admissible as statements of a co-conspirator. ER 801(d)(2)(v). Statements not belonging to Redic and Posey were not offered for the truth of the matter asserted but as res gestae, context for Posey's statements. ER 801(c). The photographs were admissible as relevant evidence of Posey's culpability as the shooter, his gang involvement, his connection with Stop Mart, his association with Redic, and his ownership of a gun consistent with the one used to shoot multiple times at Walters and Walker. ER 401.

1. Statements of Posey

The statements of a party-opponent are not hearsay pursuant to ER 801(d)(2)(i). The testimony of Walters and Detective Buchanan and the internal characteristics of the "Thatkidd Uzi" account established that it was Posey's. ER 901. Posey's statements on Facebook about his ownership of a

Glock 40, meeting up with Redic and Phillips before the shooting, talking with Redic and Phillips about getting a ride from the area and "laying low" after the shooting, and his identification as a Hilltop Crip were all admissible statements of a party-opponent under 801(d)(2)(i). Ex. 28, 29.

2. Statements of Posey's co-conspirators

Statements of a co-conspirator made during the course of and in furtherance of a conspiracy are treated as statements of a party-opponent pursuant to ER 801(d)(2)(v); *State v. Whitaker*, 133 Wn. App. 199, 221, 135 P.3d 923 (2006), *review denied*, 159 Wn.2d 1017, 157 P.3d 404, *certiorari denied*, 128 S.Ct. 375, 552 U.S. 948, 169 L.Ed.2d 260 (2007). To be admissible as a statement of a co-conspirator, there must be evidence that a conspiracy existed at the time the statement was made and that the defendant was part of the conspiracy. *State v. Guloy*, 104 Wn.2d 412, 420, 705 P.2d 1182 (1986), *cert denied*, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986).

A conspiracy is simply an agreement to do an unlawful act. *Whitaker*, 133 Wn. App. at 223. No formal agreement is required; a conspiracy may be demonstrated by "concert of action, all the parties working together understandably with a single design for the accomplishment of a common purpose." *State v. Sanchez Guillen*, 135 Wn. App. 636, 643, 145 P.3d 406 (2006). A conspiracy may include events taking place after a crime, such as during an escape. *Id.* The admission of

nontestimonial statements made during the course of a conspiracy does not violate the Confrontation Clause. *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003). Testimonial statements in the context of a conspiracy would be those made in anticipation of use in a future trial, such as statements made to police after arrest. *State v. Williams*, 131 Wn. App. 488, 494, 128 P.3d 98 (2006).

Redic and Posey entered into a conspiracy to assault Walters and Walker when Redic handed the gun to Posey immediately prior to the shooting. 4RP 247. Redic's participation in the conversation afterwards about getting a ride and "laying low" were statements of a co-conspirator in furtherance of the conspiracy. Ex. 28 (pg. 7-9). This Court should find Redic's statements in the Facebook records admissible as statements of a co-conspirator.

3. Photographs

The admissibility of an authenticated photograph rests upon its relevance and related considerations. ER 401, 402, 403. The photographs in Exhibits 28 and 29 were authenticated by the testimony of Walters and Detective Buchanan. *Sapp*, 182 Wn. App. at 916; *Sexsmith*, 138 Wn. App. at 508-09. Each witness identified Posey and Redic in the photographs contained in the exhibits. 4RP 260-63; 5RP 401-2, 403-06 Ex. 9C, 9D, 28, 29. The photographs in Redic's account were relevant to show that Redic

and Posey associated with each other and that they had access to the type of gun used to shoot at Walters and Walker. Ex. 28 (pg. 2, 4, 6). The photographs in Posey's account were relevant to show Posey's possession of the same type of gun as well as the photograph Walters used to identify him at the scene. Ex. 29 (pg. 4 and pg. 6). This Court should find that these photographs were admissible as relevant evidence of Posey's guilt of the crimes charged.

D. Even if the Facebook records were admitted in error, the error is harmless where Walters knew Posey and credibly identified him minutes after the shooting.

Even if any of the exhibits were admitted in error, the error was harmless. Evidentiary error is only grounds for reversal if it results in prejudice. *Bourgeois*, 133 Wn.2d at 403. Prejudice only exists if there is a reasonable probability the outcome of the trial would be different. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). There is harmless error if the evidence is of minor significance to the whole. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Constitutional error is harmless if the remainder of the evidence overwhelmingly proves guilt. *State v. Thomas*, 91 Wn. App. 195, 203, 955 P.2d 420 (1998).

Walters knew who Posey was, immediately recognized him at the Stop Mart, observed then interacted with his group as they confronted Walker outside the store, and identified him as the shooter minutes after

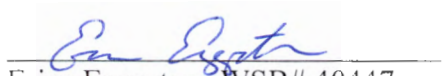
fleeing in terror from the scene. 4RP 299, 240, 243, 267-68, 26-60; 9D. There is no realistic probability the result of the trial would be different absent the admission of the Facebook records given Walters' unequivocal identification of Posey as the shooter. *Smith*, 106 Wn.2d at 780. The evidence she provided at trial overwhelming proved Posey's guilt. *Thomas*, 91 Wn. App. at 203. Under either an evidentiary or constitutional error analysis, the admission of the Facebook records was harmless even if error.

V. CONCLUSION

Posey's Facebook records were authenticated by the record custodian's certification, the testimony of two witnesses with knowledge, and the internal characteristics of the contents. The admission of the records was proper on multiple evidentiary bases and did not violate the Confrontation Clause. Posey's convictions for his violent and frightening assaults of Courtney Walters and Marcel Walker on October 12, 2017, and his unlawful possession of a firearm, should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Erica Eggertsen WSB# 40447
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

3/4/20 _____

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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