

FILED

FEB 03, 2014

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31359-0-III

STATE OF WASHINGTON, Respondent,

v.

JEROME LIONEL PLEASANT, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

As it did in its motion on the merits, the State relies entirely upon extra-judicial assertions of fact that are not supported in the record to contend that the e-mail communication about the value of the GPS tracker was admissible under the “business records” exception to the hearsay rule. *See, e.g., Respondent’s Brief* at pp. 4, 6, 8; RAP 10.3. Self-serving statements in appellate briefs that are unsupported in the record are not to be considered on appeal. *Housing Authority of Grant County v. Newbigging*, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001) (citing *State v. Falling*, 50 Wn. App. 47, 52 n. 3, 747 P.2d 1119 (1987)). Indeed, the State’s argument underscores the confrontation implications of the e-mail’s introduction; the State now makes factual representations and draws inferences that the defendant never had an opportunity to test at trial, because the State failed to establish the minimum foundation to establish the e-mail as a business record. *See* RCW 5.45.020.

The State contends, illogically, that the e-mail could not have been “testimonial” because it was sent before charges were filed. The State does not explain how this differs from statements made during any police investigation to garner evidence against a defendant for purposes of filing criminal charges.

Similarly, the State argues that the e-mail was not testimonial because the declarant did intend the statement to be used in a criminal investigation. But the declarant was not produced for trial; the declarant's understanding of the communication is entirely speculative on the part of the State, who bears the burden of establishing that out-of-court statements are non-testimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

The State further argues that the e-mail was not testimonial because it does not include a certification, as was the case in *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). It is true that in *Melendez-Diaz*, the documents at issue were “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths,” which the government sought to introduce to prove the fact in question – that the substance in the defendant's possession was cocaine. 557 U.S. at 310. Similarly, the *Jasper* court followed *Melendez-Diaz* in concluding that a clerk's certificate as to the non-existence of certain records went beyond mere authentication of public records but reflected the clerk's interpretation of the public record and served as substantive evidence against the defendant. 174 Wn.2d at 115. The certifications at issue in *Jasper* and *Melendez-*

Diaz, like the e-mail in this case, contained substantive evidence of guilt and went beyond merely authenticating otherwise admissible records. Certainly the fact of the certifications in *Jasper* and *Melendez-Diaz* spoke to the testimonial nature of the statements because it was clear that the statements were made for introduction into court proceedings. Here, the absence of such a certification raises a legitimate question whether the declarant knew that the evidence of value would be used in subsequent criminal proceedings or intended to assist law enforcement in obtaining evidence against Pleasant. But because *Koslowski* clearly establishes the burden of demonstrating such facts falls on the State, the State has failed to meet its burden to show the statements are non-testimonial.

With respect to the offender score, Pleasant accepts the State's concession of error and agrees that the correct remedy under *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012), is remand for resentencing. Because Pleasant did not object to the offender score at the time of sentencing, *Hunley* requires that the State be afforded an opportunity to present proof of the facts supporting the alleged offender score.

II. CONCLUSION

Because the State failed to establish a foundation to show that the e-mail establishing the value of the GPS tracking unit was a business

record within the meaning of RCW 5.45.020, and because the State failed to meet its burden to show that the substantive evidence of the unit's value was non-testimonial, introduction of the evidence violated Pleasant's Fifth Amendment confrontation rights. The conviction must, accordingly, be reversed.

RESPECTFULLY SUBMITTED this 3rd day February, 2014.


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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3rd day of February, 2014 in Walla Walla,
Washington.



Kristin McCaffrey