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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32398-6-III

STATE OF WASHINGTON, Respondent,

v.

WILMER SANTIAGO GUERRERO, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State first contends that Guerrero failed to object on confrontation grounds below, thereby waiving the issue. Respondent's Brief at p. 2. The record demonstrates that Guerrero did object to introduction of the DOL record on hearsay grounds, and the objection was overruled. 2 RP (Trial) at 185. Nevertheless, even were Guerrero's objection inadequate because it did not include the word "testimonial," as the State correctly notes, the error is still reviewable as a manifest error affecting a constitutional right.

RAP 2.5(a) permits discretionary review of matters not argued below, establishing review as a matter of right for manifest errors affecting a constitutional right. *State v. Blazina*, __ Wn.2d __, __ P.3d __, slip op. no. 89028-5 (March 12, 2015), at p. 3 To warrant review under this section, the error must be both manifest – meaning that the error actually affects the Appellant's rights – and of constitutional magnitude. *State v. O'Hara,* 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The court considers whether the alleged error implicates a constitutional interest and is not merely another form of trial error. *Id.* If the error is of constitutional magnitude, the court then evaluated whether the asserted error had practical and identifiable consequences in the case. *Id.* at 99. The factual

record must be sufficient to permit appellate review or the error is not manifest. *State v. Fenwick*, 164 Wn. App. 392, 400, 264 P.3d 284 (2011).

In the present case, the error is of constitutional magnitude because it implicates Guerrero's Sixth Amendment right to confront the Department of Licensing witness who reviewed his driving record and made a determination about his driving status at the time of the incident. Introduction of testimonial hearsay without an opportunity to cross-examine the declarant is well established to violate the Confrontation Clause of the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). Moreover, in the present case, the error was manifest because it practically affected the outcome of the case – the offending document was the only evidence introduced by the State at trial to prove the essential elements of the charge of driving with a suspended license in the first degree. Because the error is of constitutional magnitude and had practical, identifiable consequences in the case, review under RAP 2.5(a)(3) is appropriate.

The State next contends that Guerrero misunderstands *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012), because the driver's abstract qualifies as a business record and was not testimonial. Respondent's Brief at p. 3. But the State fails to acknowledge that both *Melendez-Diaz v.*

Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011) addressed nearly identical reports, where law enforcement officers provide evidence or information to government officials for analysis and opinion. In *Melendez-Diaz*, the reports at issue were certificates of analysis prepared following analysis of evidence seized by police and forwarded to the laboratory. There, the Court held that the reports did not qualify as business records because the regularly conducted business activity was the production of evidence for use at trial. *Melendez-Diaz*, 227 U.S. at 321-22. The Court further acknowledged that the sole piece of evidence traditionally admitted despite being prepared for use at trial was a clerk's certificate authenticating an official record, which permitted the clerk to identify and authenticate an existing document but not to prepare a document for trial purposes. *Id.* at 322-23. Likewise, in *Bullcoming*, the Court held that the blood analysis reports were documents created solely for evidentiary purposes and were "in all material respects" analogous to the reports in *Melendez-Diaz*, even though they were not formally sworn. ___ U.S. ___, 131 S. Ct. at 2716-17.

The State attempts to evade the inescapable conclusion that the driver's abstract was a testimonial document, prepared specifically for use as evidence at trial by government employees who received Guerrero's

identifying information from law enforcement for that purpose, by comparing the driver's abstract with the BAC simulator certificates that Division II recently held were not testimonial. *State v. Federov*, 183 Wn. App. 736, 335 P.3d 971 (2014), *review granted*, __ P.3d ___ (2015). Assuming, for the sake of argument, that the holding in *Federov* is affirmed following review, the BAC simulator solution records were completely dissimilar to the driver's abstract at issue here. The BAC records were generalized, not specific to any defendant, and established a record of the ongoing maintenance of the BAC devices in the field rather than any providing any specific evidence against the defendant. *Id.* at 747-48.

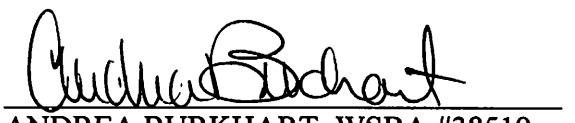
Indeed, contrary to the State's argument, the *Federov* court relied upon *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014), in which the Washington Supreme Court held that the Confrontation Clause applied to testimony by a medical examiner as to toxicology reports of which he had no personal knowledge. Accepting the defendant's argument that the medical examiner "was merely a mouthpiece for the conclusions of an absent analyst," and that the report had an inculpatory effect, the *Lui* Court held that the medical examiner's surrogate testimony fell squarely within the *Bullcoming* precedent and should not have been admitted. *Id.* at 494-95.

In this case, the trial testimony establishes that the driver's abstract was prepared on January 16, 2014 and certified by an authorized Department of Licensing representative. 2 RP (Trial) at 184. The record was, accordingly, prepared after the events in question for purposes of determining Guerrero's driving status on October 29, 2013, for a trial held in March 2014, at the request of the prosecuting attorney. 2 RP (Trial) at 184. As in *Lui*, the testifying witness simply served as the mouthpiece for the information contained in a testimonial document prepared by someone else. 2 RP (Trial) at 190. As in *Jasper*, the certified document "goes beyond mere *authentication* of otherwise admissible public records" in that it furnishes an interpretation of what the record contains as substantive evidence against the defendant. 174 Wn.2d at 115.

VI. CONCLUSION

For the foregoing reasons, Guerrero respectfully requests that this court vacate his conviction for driving with a suspended license in the first degree and remand the cause for retrial.

RESPECTFULLY SUBMITTED this 8th day of April, 2015.



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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 8th day of April, 2015 in Walla Walla, Washington.

Breanna Eng