

FILED
Court of Appeals
Division III
State of Washington
2/22/2019 11:17 AM

No. 36237-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 18-1-00036-1

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

BENNY GONZALEZ SEDANO,
Defendant/Appellant.

BRIEF OF RESPONDENT

Douglas J. Shae
Chelan County Prosecuting Attorney

Andrew B. Van Winkle WSBA #45219
Deputy Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
P.O. Box 2596
Wenatchee, Washington 98807-2596
(509) 667-6204

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u> -----	1
II. <u>COUNTER-STATEMENT OF ISSUES</u> ----	2
1. Should this Court decline to review the merits of Mr. Sedano’s claims due to failure to provide an adequate appellate record? -----	2
2. Could any rational trier of fact find Mr. Sedano guilty beyond a reasonable doubt? -----	2
3. Did the superior court abuse its discretion by admitting Mr. Sedano’s jail calls? -----	2
4. Has Mr. Sedano met his burden of proving flagrant and ill-intentioned prosecutorial error during closing argument? -----	2
III. <u>STATEMENT OF THE CASE</u> -----	2
IV. <u>ARGUMENT</u> -----	6
A. This Court should decline to review Mr. Sedano’s claimed errors due to failure to provide an adequate record. -----	6

TABLE OF CONTENTS (con't)

	<u>Page</u>
B. Sufficient evidence supports Mr. Sedano's convictions. -----	8
C. The trial court did not abuse its discretion by admitting the defendant's jail calls. -----	9
1. Standard of review. -----	10
2. Standard for authenticating telephone calls. -----	12
3. Direct evidence supports identification of Mr. Sedano's voice. -----	13
4. Circumstantial evidence supports identification of Mr. Sedano's voice. -----	13
5. Direct and circumstantial evidence support identification of Ms. Eaton's voice. -----	18
6. A witness need not be intimately familiar with a voice in order to authenticate it. -----	20

TABLE OF CONTENTS (con't)

	<u>Page</u>
7. Self-identification is not a requirement for voice authentication. -----	20
8. Related case law involving authentication of text messages also sets a low bar for admission and does not require self-identification. -----	24
D. Mr. Sedano fails to demonstrate the presence of any prosecutorial error during closing argument. -----	25
1. Standard of review. -----	25
2. The State did not misstate the evidence. -----	27
3. The State's argument did not relieve it of its burden of proof. -----	28
4. The State never told the jury it had a duty to do anything. -----	30
5. Assuming any error occurred, Mr. Sedano fails to prove it is reversible. -----	31

TABLE OF CONTENTS (con't)

	<u>Page</u>
V. <u>CONCLUSION</u> -----	32

TABLE OF AUTHORITIES

<u>State Cases</u>	<u>Page</u>
<i>Diaz v. State</i> , 175 Wn.2d 457, 285 P.3d 873 (2012) -----	10
<i>In re Det. of Halgren</i> , 156 Wn.2d 795, 132 P.3d 714, (2006) -----	7
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971) -----	10
<i>State v. Curry</i> , 191 Wn.2d 475, 423 P.3d 179 (2018) -----	11
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013)-----	11
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012) -----	26,27
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)-----	10
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) -----	11
<i>State v. Peterson</i> , 109 Wash. 25, 186 P. 264 (1919) -----	20
<i>State v. Rempel</i> , 114 Wn.2d 77, 785 P.2d 1134 (1990)-----	8
<i>State v. Tatum</i> , 58 Wn.2d 73, 360 P.2d 754 (1961) -----	11

TABLE OF AUTHORITIES (con't)

<u>State Cases</u>	<u>Page</u>
<i>State v. Wilson</i> , 71 Wn.2d 895, 431 P.2d 221 (1967) -----	11
<i>Alexander v. Gonser</i> , 42 Wn. App. 234, 711 P.2d 347 (1983) -----	31
<i>Hansel v. Ford Motor Co.</i> , 3 Wn. App. 151, 473 P.2d 219 (1970) -----	11
<i>State v. Bradford</i> , 175 Wn. App. 912, 308 P.3d 736 (2013) -----	24
<i>State v. Corbett</i> , 158 Wn. App. 576, 242 P.3d 52 (2010)-----	25,26
<i>State v. Deaver</i> , 6 Wn. App. 216, 491 P.2d 1363 (1971)-----	20,21
<i>State v. Elie</i> , 4 Wn. App. 352, 481 P.2d 464 (1971) -----	20,21
<i>State v. Firven</i> , 22 Wn. App. 703, 591 P.2d 869 (1979) -----	6,7
<i>State v. Hoffpauir</i> , 44 Wn. App. 195, 722 P.2d 113 (1986) -----	20
<i>State v. Lubers</i> , 81 Wn. App. 614, 915 P.2d 1157 (1996)-----	9
<i>State v. Mahoney</i> , 80 Wn. App. 495, 909 P.2d 949 (1996) -----	12,13
<i>State v. McKenney</i> , 20 Wn. App. 797, 582 P.2d 573 (1978) -----	11

TABLE OF AUTHORITIES (con't)

<u>State Cases</u>	<u>Page</u>
<i>State v. Peterson</i> , 2 Wn. App. 464, 469 P.2d 980 (1970) -----	13,18
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254 (1980)-----	8,9
<i>State v. Tracy</i> , 128 Wn. App. 388, 115 P.3d 381 (2005) -----	7,8
<i>State v. Williams</i> , 136 Wn. App. 486, 150 P.3d 111 (2007) -----	13,18,21
<i>State v. Young</i> , 192 Wn. App. 850, 369 P.3d 205 (2016) -----	11,12,24
<i>State v. Berrian</i> , No. 45922-1-II (Unpublished 2015)-----	22
<i>State v. Oxford</i> , No. 47291-1-II (Unpublished 2016)-----	22
<i>State v. Saunders</i> , No. 67677-6-I, ¶ 2-4 (Unpublished 2013)-----	22
<i>State v. Wallace</i> , No. 32156-8-III, ¶ 6 (Unpublished 2014)-----	23
 <u>Federal Cases</u>	 <u>Page</u>
<i>United States v. Axselle</i> , 604 F.2d 1330 (10th Cir. 1979) ----	30
<i>United States v. Rizzo</i> , 492 F.2d 443 (2d Cir. 1974) -----	30
<i>United States v. Watson</i> , 594 F.2d 1330 (10th Cir. 1979)----	30

TABLE OF AUTHORITIES (con't)

<u>Rules</u>	<u>Page</u>
ER 901(b) -----	12
ER 901(b)(5)-----	12,24
GR 14.1 -----	22
RAP 9.6-----	6
RAP 9.10 -----	6
<u>Other</u>	<u>Page</u>
5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 901.4 (2016 ed.) ---	11

I. INTRODUCTION

While pending trial on multiple felony cases, defendant-appellant Benny Sedano, twice violated a domestic violence no contact order protecting Lisa Eaton. Mr. Sedano violated the order while incarcerated in the Chelan County Jail. He did so by using another inmate's (Edward Salvador's) phone account to make two calls to Ms. Eaton.

At trial, the State admitted audio recordings of the phone calls. Neither party to the phone calls testified at trial. The State obtained a material witness warrant for Ms. Eaton's arrest, but was still unable to procure her presence at trial. At the time the warrant was issued, Ms. Eaton had another outstanding arrest warrant on an unrelated felony charge. To this day, Ms. Eaton's felony arrest warrant is still active.

Despite the lack of testimony from either party to the phone calls, the State was able to identify the voices on the telephone calls through the investigating officer, Detective Seabright. The State was also able to identify the voices through a large quantity of circumstantial evidence, including: connecting the number dialed to Ms. Eaton, the context of the conversations, Mr. Sedano's presence in the same cell with Mr. Salvador and access to the telephone, and through other calls placed to that same number by both Mr. Sedano and Ms. Eaton. All of this led to a reasonable inference that the parties on the calls were Mr. Sedano and Ms. Eaton.

II. COUNTER-STATEMENT OF ISSUES

1. Should this Court decline to review the merits of Mr. Sedano's claims due to failure to provide an adequate appellate record?
2. Could any rational trier of fact find Mr. Sedano guilty beyond a reasonable doubt?
3. Did the superior court abuse its discretion by admitting Mr. Sedano's jail calls?
4. Has Mr. Sedano met his burden of proving flagrant and ill-intentioned prosecutorial error during closing argument?

III. STATEMENT OF THE CASE

In December of 2017, Chelan County Sheriff's Detective Aaron Seabright listened to Mr. Sedano's jail phone calls and the phone calls of other inmates housed with Mr. Sedano, including Edward Salvador. Regarding this case, Det. Seabright investigated two calls placed from Edward Salvador's phone account to Lisa Eaton. These calls were placed on December 22nd and 23rd, 2017. Ex. 2.2 and 2.1;¹ 1 RP 106, 95. At this time, Mr. Salvador was housed in the same cell as Mr. Sedano. 1 RP 139, 141-43.

¹ Exhibits 2.1, 2.2, and 2.3 are in reverse chronological order. Exhibit 2.3 is a call on December 17th from Mr. Sedano's phone account to Ms. Eaton's mother. Exhibit 2.2 is a call from December 22nd from Edward Salvador's phone account by Mr. Sedano to Ms. Eaton. Exhibit 2.1 is a call from December 23rd from Edward Salvador's phone account by Mr. Sedano to both Ms. Eaton and her mother.

Although the calls were made from Mr. Salvador's account, Det. Seabright identified the voice of the party placing the calls as Mr. Sedano's voice. Detective Seabright made that identification based upon his familiarity with Mr. Sedano's voice from prior field contacts. 1 RP 93-94. Furthermore, Jail Deputy Director Ron² Wineinger testified that it is not uncommon for inmates to place phone calls on their account and then pass the phone to another inmate. 1 RP 72-73.

At this same time, Mr. Sedano and Ms. Eaton had a domestic violence no contact order in effect, which prohibited Mr. Sedano from having contact with Ms. Eaton. Ex. 1. Detective Seabright suspected that the receiving party on the calls was Ms. Eaton. He was subsequently able to identify the receiving party on the calls as Ms. Eaton based on a totality of circumstances. He first gained a familiarity with Ms. Eaton's voice from monitoring calls she placed to her mother while incarcerated at the jail. 1 RP 94. Part of his familiarity came from Lisa Eaton identifying herself when placing her outgoing calls (while she was an inmate) in order to pass the voice authentication software. 1 RP 94.

His identification was further confirmed by the fact that the calls admitted at trial were placed to a phone number the detective knew belonged to the protected party's mother, and that the protected party used

² The Report of Proceedings misspells the deputy director's first name as Ryan. It is Ron.

to call her mother while she was in jail. 1 RP 98-100, 103-04, 132-34. Furthermore, both Mr. Sedano and Ms. Eaton had made calls to this same number while in jail. Ex. 2.3; 1 RP 89-90, 131-34. When Mr. Sedano called that number while Ms. Eaton was in jail, he greeted the older female answering the phone as “mom” and she greeted him as “son” and they discussed how the male had been in a relationship with the female’s daughter for four years. Ex. 2.3 at 01:00, 02:00, 12:30.

Detective Seabright was also able to identify the female on the December 22nd and 23rd calls as Ms. Eaton based on the context of the conversations. The male and female also talked about going back up to the property where they had lived together, and immediately prior to their arrests Mr. Sedano and Ms. Eaton were in fact living together. Ex. 2.2 at 01:30; 1 RP 105-06. On both calls, the female talks about intimate details that one would expect to only be discussed with an intimate partner (i.e. STD test results, shaving the pubic region, and needing to “take a shit,” the female calling the male “babe”). Ex. 2.2 at 05:55; 10:05, 15:15; Ex. 2.1 at 02:50. The female on the calls also spoke using the unique vernacular of jail inmates. Part of that unique vernacular included talking about “rapos” (rapists), “commissary,” “books,” and “CIs” (confidential informants). RP 98-100, 103-04. The female talked about having been in jail for 47 days. Ex. 2.2 at 06:38. Ms. Eaton had just gotten out of jail

after 47 days in custody. 1 RP 137. The female also talked about having been home for three days. Ex. 2.2 at 04:50. At the time of that call, Ms. Eaton had only been out of jail for a few days. 1 RP 137. The male and female also profess their love for each other. Ex. 2.2 at 00:25, 06:00, 06:45-07:30; Ex. 2.1 at 00:30, 03:15, 06:15, 15:00.

With that familiarity, Det. Seabright identified the male voice in Exhibit 2.1, 2.2, and 2.3 as the defendant's voice. 1 RP 98, 104, 107. And, he identified the first/younger³ female voice in Exhibit 2.1 and the sole female voice in Exhibit 2.2 as the protected party's voice. 1 RP 98, 104-05. He identified the second/older female voice in Exhibit 2.1 and the sole female voice in Exhibit 2.3 as the protected party's mother. 1 RP 108.

Following Det. Seabright's investigation, the State charged Mr. Sedano with two felony counts of violating a domestic violence no contact order based on the December 2017 phone calls from the 22nd and 23rd. CP 1-2, 31-32. The case proceeded to trial. At trial, the defense objected to admission of the phone calls based on insufficient authentication of the voices on the calls. The court, ultimately admitted the calls, finding the voices sufficiently authenticated. 1 RP 84-91. The jury returned guilty

³ The State differentiates between the younger and older female voices because Ms. Eaton's mother gets on the phone briefly toward the end of the December 23rd call.

verdicts on both counts. CP 35-38. Thereafter, Mr. Sedano timely appealed to this Court.

IV. ARGUMENT

Mr. Sedano presents three arguments on appeal. First, he argues that there is insufficient evidence to support his convictions for violating the no contact order. Second, he argues the trial court abused its discretion by admitting his jail calls. Third, he argues the State committed flagrant and ill-intentioned prosecutorial error during closing argument. The State responds to each of these arguments in turn after first discussing why this Court should decline to review these issues.

A. This Court should decline to review Mr. Sedano's claimed errors due to failure to provide an adequate record.

RAP 9.6 requires “[t]he party seeking review of a lower court’s ruling [to] designat[e] the necessary clerk’s papers and exhibits.” *State v. Firven*, 22 Wn. App. 703, 704-05, 591 P.2d 869 (1979). “Although the appellate court has the power to correct or supplement the record, RAP 9.10, it is not required to do so.” *Id.* at 705.

Here, Mr. Sedano’s appellate counsel failed to designate and have transmitted to this Court exhibits 2.1, 2.2, and 2.3—the jail calls. As the Court can tell from the trial transcript, the jail calls themselves were played often throughout the trial and referred to frequently throughout the

trial. They were the corpus of the crime. They were the single most important piece of evidence considered by the jury.

Without these calls, this Court cannot adjudicate Mr. Sedano's sufficiency of the evidence claims because this Court does not have all of the evidence considered by the jury. This Court also cannot adjudicate Mr. Sedano's authentication claims because authentication relies, in large part, on the content of the phone calls. This Court cannot adjudicate Mr. Sedano's claims of prosecutorial error without the context provided from listening to the jail calls.

In similar circumstances, our appellate courts have refused to review the claimed errors. In *Firven*, the Court of Appeals declined to review a claimed error regarding depositions in a criminal case due to not having a record of the proceeding where the depositions were ordered. *Firven*, 22 Wn. App. at 704-05. In *Halgren*, the Supreme Court refused to review a claimed error in a sexually violent predator case because the petitioner had "made no effort, let alone a good faith effort, to provide the materials required by" the Rules of Appellate Procedure. *In re Det. of Halgren*, 156 Wn.2d 795, 804-05, 132 P.3d 714, (2006).

In *Tracy*, the Court of Appeals refused to review a claimed error concerning exclusion of evidence because the defendant/appellant failed to have that excluded evidence transmitted to the appellate court. *State v.*

Tracy, 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005) (When an appellant fails to meet the burden of providing an adequate record, “the trial court’s decision stands.”). By this same token, the trial court’s decision should stand due to Mr. Sedano’s failure to have transmitted the evidence he believes should have been excluded.

In an appeal like this, where the whole appeal centers on one particular exhibit, the failure to have that exhibit transmitted to this Court for review is inexcusable.

B. Sufficient evidence supports Mr. Sedano’s convictions.

“The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). “A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all inferences that can reasonably be drawn therefrom. The evidence is interpreted most strongly against the defendant and in a light most favorable to the State.” *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980).

“[W]hen [the] evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to

decide the disputed questions of fact.” *Id.* “Circumstantial evidence is equally as reliable as direct evidence.” *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). “Credibility determinations are for the trier of fact and are not subject to review. This court gives deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of evidence.” *Id.* (citations omitted).

Mr. Sedano claims the State failed to prove the voices on the calls were those of the defendant and the protected party. This argument fails because it relies on reweighing testimony, which this court will not do. *Lubers*, 81 Wn. App. at 619. Because Det. Seabright testified that the voices were those of Mr. Sedano and Ms. Eaton, 1 RP 98, 104-05, 107, this Court is required to construe this testimony in the light most favorable to the State, and most strongly against the defendant, and give it the same weight that the jury obviously assigned it.

C. The trial court did not abuse its discretion by admitting the defendant’s jail calls.

Mr. Sedano next argues the trial court abused its discretion by admitting the defendant’s jail calls. Mr. Sedano’s argument under this section is that because the authentication that occurred in this case is not like what occurred in the cases he cites, that the trial court abused its

discretion. App. Br. at 9-10. Based on a narrow cherry-picked selection of cases, Mr. Sedano argues that voice authentication requires self-identification on the recording, plus additional circumstantial evidence to support that self-identification. App. Br. at 11. The problem with this argument by analogy is that it sets up a fallacious strawman by failing to acknowledge the broader legal standards for admitting evidence. The State never tried to authenticate these calls based on “self-identification”; thus, the narrow line of cases cited by Mr. Sedano is irrelevant. Furthermore, no case has ever held that all phone calls require self-identification on top of additional circumstantial evidence or when there is direct evidence.

1. Standard of review.

“A trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion.” *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012); *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). A court abuses its discretion when its decision “is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

“[W]e give great deference to the trial court’s determination: even if we disagree with the trial court’s ultimate decision, we do not reverse that decision unless it falls outside the range of acceptable choices because

it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying the wrong legal standard.” *State v. Curry*, 191 Wn.2d 475, 423 P.3d 179 (2018) (citing *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013)). Appellate courts are “always reluctant to disturb a discretionary ruling of the trial court.” *State v. McKenney*, 20 Wn. App. 797, 807, 582 P.2d 573 (1978). “[T]he trial judge,’ having ‘seen and heard’ the proceedings ‘is in a better position to evaluate and adjudge than can we from a cold, printed record’” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

During authentication, “the judge considers only the evidence of authenticity offered by the proponent and disregards any contrary evidence offered by the opponent.” 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 901.4 at 290 (2016 ed.) (citing *State v. Tatum*, 58 Wn.2d 73, 360 P.2d 754 (1961); *Hansel v. Ford Motor Co.*, 3 Wn. App. 151, 473 P.2d 219 (1970)). “[T]he trial court considers only the evidence offered by the proponent and disregards any contrary evidence offered by the opponent in determining whether evidence has been authenticated. [Defendant] was free to bring up any contrary evidence, but this goes to weight, not admissibility.” *State v. Young*, 192

Wn. App. 850, 857, 369 P.3d 205 (2016) (citations and quotations omitted) (authentication of text messages).

2. Standard for authenticating telephone calls.

One method for authenticating telephone calls is through ER 901(b)(5): “Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” But, this is only one way of authenticating calls, because ER 901(b)’s subsections are “[b]y way of illustration only, and not by way of limitation.” ER 901(b).

More broadly, when admitting the contents of telephone calls, voice identification can be *either* direct or circumstantial. *State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949 (1996). In *Mahoney* there was both direct and circumstantial evidence. Directly, the officer testified that he was familiar with the defendant’s voice from recent contacts. *Id.* Circumstantially, the number called was known to belong to the defendant’s mother and the person answering the call at that number gave first-hand details about the crime under investigation. *Id.* Either, by itself, would have been sufficient to admit the statements from the telephone call. *Id.*

Furthermore, “[a] sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic.” *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111 (2007). “The identification of the voice at the other end of a telephone conversation need not be unimpeachably declared. It is sufficient that the witness provide a reasonable basis for such identification.” *State v. Peterson*, 2 Wn. App. 464, 467, 469 P.2d 980 (1970).

3. Direct evidence supports identification of Mr. Sedano’s voice.

Here, Det. Seabright directly identified the male voice on the recordings as Mr. Sedano’s voice, based on his prior personal experience with Mr. Sedano. 1 RP 84, 93-94, 98, 104, 107. As stated in *Mahoney*, the law requires no more than that in order for a trial judge to rule a phone call authenticated.

4. Circumstantial evidence supports identification of Mr. Sedano’s voice.

Circumstantially, the State also properly identified the male voice on the recordings as Mr. Sedano based on the following facts:

- The calls were all placed from a phone Mr. Sedano had access to.
1 RP 69-72.

- The calls were all placed to a number associated with the protected party, Ms. Eaton, and Ms. Eaton placed calls to that same number using her own account while in jail. 1 RP 89-90, 131-34. Because Mr. Sedano and Ms. Eaton are intimate partners, Ex. 1 at 2, it makes sense they would be calling the same numbers and addressing Ms. Eaton's mother as "mom." Ex. 2.3 at 01:00, 12:30.
- Mr. Sedano had placed calls to that same number using his own account. Ex. 2.3. And, there were no calls to that number from Mr. Salvador's account after Mr. Sedano was taken out of that cell. 1 RP 132. This further supports an inference that Mr. Sedano made the two calls from Mr. Salvador's account.
- On the December 17th call with Ms. Eaton's mother, Mr. Sedano acknowledges the existence of a no contact order and discussed his initial confusion about whether it also extended to Ms. Eaton's mother. Ex. 2.3 at 05:00, 10:25. Mr. Sedano has a no contact order with Ms. Eaton, Ex. 1; thus, it is reasonable that Mr. Sedano would have some confusion as to whether it also extends to Ms. Eaton's mother, especially when Ms. Eaton's mother talks about being subpoenaed as a witness in Mr. Sedano's other pending case. Ex. 2.3 at 1:10.

- In this same call, the two refer to each other as mother and son. Ex. 2.3 at 01:00, 12:30. The female also acknowledges that the male caller has been with her daughter for 4 years. Ex. 2.3 at 02:00. The female states that “Lisa” has been subpoenaed for the male caller’s trial. Ex. 2.3 at 02:20. The male says he saw “Lisa” on his way to court recently and that he did not talk to her because he did not want to get in trouble, but that she knows he loves her. Ex. 2.3 at 05:30. The male talks about living with the female’s daughter. Ex. 2.3 at 12:10. Given that Mr. Sedano and Ms. Eaton are intimate partners, Ex. 1 at 2, and were living together when the no contact order was put in place, 1 RP 105-06, 133, it makes sense that Mr. Sedano would speak this way to Ms. Eaton’s mother at a telephone number connected to Ms. Eaton through prior law enforcement contacts and through her own jail phone calls to this same number. 1 RP 89-90, 131-34.
- Because the male voice on all three calls is the same, it is also inferable that it was Mr. Sedano who made the calls to Ms. Eaton on Mr. Salvador’s phone account.

Aside from the voices matching, the context of the calls on December 22nd and 23rd also supports an inference that the male caller is Mr. Sedano:

- On both calls, the two repeatedly profess their love for each other. Ex. 2.2 at 00:25, 06:00, 06:45-07:30; Ex. 2.1 at 00:30, 03:15, 06:15, 15:00. On both calls, the female talks about intimate details that one would expect to only be discussed with an intimate partner (i.e. STD test results, shaving the pubic region, needing to “take a shit,” the female calling the male “babe”). Ex. 2.2 at 05:55; 10:05, 15:15; Ex. 2.1 at 02:50. Because Mr. Sedano and Ms. Eaton are intimate partners, Ex. 1 at 2, and the number called is associated with Ms. Eaton, it is reasonable to infer that the male caller is Mr. Sedano.
- On the December 22nd call, the female asks if the male needs anything from the property, and the male just complains about the vehicles and items that the police seized from the residence. Ex. 2.2 at 01:30. As previously stated, Mr. Sedano and Ms. Eaton were living together when they were arrested and the no contact order was put in place. 1 RP 105-06, 133.
- On that same call, the female says she is not sure whether she should be talking to the male. Ex. 2.2 at 02:00. Given the

existence of a no contact order, and that the call is to a number associated with Ms. Eaton, it is reasonable to infer from the context that Mr. Sedano is the caller.

- At the end of that call, the female recites a prayer, asking God to grant to the police, judge, and prosecutor compassion and mercy toward “Benny,” (specifically using his name) and then thanks God for their relationship, and the male thanks her for praying for him. Ex. 2.2 at 08:25.
- Further support of this same inference comes from the pair attempting to talk in code throughout the December 22nd call, with Mr. Sedano and Ms. Eaton pretending Ms. Eaton is her mother and then referring to her “daughter” when discussing facts specific to Ms. Eaton, but Ms. Eaton keeps slipping up and referring to herself in the first person and then correcting herself to say “my daughter.” Ex. 2.2 at 03:00, 03:13, 3:38, 04:07, 04:30, 06:38, 10:10. By the end of the phone call, Ms. Eaton drops the ruse altogether. Ex. 2.2 at 11:40, 12:50, 14:40. There would be no need for this attempted subterfuge, but for the presence of a no contact order.
- The pair attempt this subterfuge again on the December 23rd call. Ex. 2.1 at 8:24. Also on the call, the pair discuss another planned subterfuge that would not be necessary, but for the presence of a

no contact order. This one occurring through one of Mr. Sedano's friends calling Ms. Eaton with a plan whereby Ms. Eaton would set up a visit to the jail with one inmate and then switch keys to the visiting booths with another person who had scheduled a visit with Mr. Sedano. Ex. 2.1 at 04:00-04:30, 06:35. The ability to conduct this type of ruse is one of the failings of the Chelan County Jail's security infrastructure. 1 RP 139. This is in contrast to the call with Ms. Eaton's mother where Mr. Sedano openly talks about setting up a jail visit with Ms. Eaton's mother because he knows a no contact order does not exist. Ex. 2.3 at 10:10.

Given all of these facts, including the context of the conversations on these calls, the State presented overwhelming circumstantial evidence that the male caller was Mr. Sedano, which was more than sufficient for the prima facie showing required for authentication. *Williams*, 136 Wn. App. at 500. As stated in *Peterson*, the voice need not be unimpeachably identified; rather, the State just needs to present a reasonable basis for believing that it is as the State claims. *Peterson*, 2 Wn. App. at 467.

5. Direct and circumstantial evidence support identification of Ms. Eaton's voice.

These same facts also establish prima facie evidence that the female caller on the December 22nd call and the younger female on the

December 23rd call is Ms. Eaton. Additional evidence in support of authentication of the voice as Ms. Eaton's includes:

- Detective Seabright routinely listened to the calls Ms. Eaton made from jail, compared the voices, and identified the voice on Exhibits 2.1 and 2.2 as Ms. Eaton's voice. 1 RP 84-85, 94, 98.
- The female speaks using the unique vernacular of someone who has been an inmate. 1 RP 86, 100, 103-04. Furthermore, the female states on the December 22nd call that she recently bailed out of jail a few days earlier. Ex. 2.2 at 04:30, 4:50. Ms. Eaton bailed out of jail a few days earlier on December 18th. 1 RP 137.
- Furthermore, the female mentions she was just in jail for 47 days. Ex. 2.2 at 6:38. Deputy Director Wineinger testified Ms. Eaton was in jail from November 1 to December 18 (47 days). 1 RP 137.
- On the December 17th call to Ms. Eaton's mother, she says she is going to bail her daughter out tomorrow. Ex. 2.3 at 7:40. Indeed, Ms. Eaton bailed out of jail the next day. 1 RP 137.

Just as the State did with Mr. Sedano, the State also presented more than enough evidence to satisfy the prima facie standard for authentication both through Det. Seabright's direct identification of the voice and through the context of the phone number dialed and the topics of discussion during the calls.

6. A witness need not be intimately familiar with a voice in order to authenticate it.

On appeal, Mr. Sedano makes much of the fact that Det. Seabright only had a few in person contacts with him. But, authentication does not require intimate familiarity with the voice being identified. In *Hoffpauir*, the victim hearing the stranger-defendant's voice but once in her life was sufficient to permit the witness to identify the defendant. *State v. Hoffpauir*, 44 Wn. App. 195, 203, 722 P.2d 113 (1986). In another case, the Supreme Court held that a phone conversation was sufficiently tied to the defendant to be admissible, even though the voice was never identified at trial. *State v. Peterson*, 109 Wash. 25, 186 P. 264 (1919). Rather, there was sufficient circumstantial evidence that the defendant was the caller because the defendant knew unique details of the call (specifically when and where to pick up the stolen goods). *Id.* A similar result was reached in *Deaver* and *Elie*, where an individual called using a false name but knew sufficient facts about the crime for the court to connect the call to the defendant. *State v. Deaver*, 6 Wn. App. 216, 491 P.2d 1363 (1971); *State v. Elie*, 4 Wn. App. 352, 481 P.2d 464 (1971).

7. Self-identification is not a requirement for voice authentication.

Mr. Sedano would like this Court to hold that all telephone voice authentications require self-identification plus additional evidence. But,

that argument is directly contrary to *Deaver* and *Elie* where the call was still admissible in spite of the defendant self-identifying using a false name. Similarly, it can be said that Mr. Sedano self-identified using a false name by placing the calls from Mr. Salvador's account. But, Mr. Sedano's access to the phone, the particular number dialed, and the unique context of the calls all provide even more evidence in support of authentication than was presented in *Deaver* and *Elie*. In neither of those cases did the State show that the defendant had access to the phone from where the call was placed or that the defendant had a prior intimate and familial connection to the dialed phone number—all of which was shown here.

In the *Williams* case, the Court of Appeals found a 9-1-1 call sufficiently authenticated based on the judge comparing the voice on the call to the voice of the person he heard in court during a prior court hearing in the case. *Williams*, 136 Wn. App. at 499-501. Importantly, the caller in *Williams* did not testify at trial. *Id.* at 491. This is not appreciably different than the court relying on Det. Seabright's comparison of the voices.

In looking to prior cases, there are no published decisions involving authentication of jail calls. However, there are several unpublished decisions over the last several years involving authentication

of jail calls. Pursuant to GR 14.1, the State cites the following unpublished decisions not as binding authority, but for whatever persuasive value this court assigns.

In *Berrian*, no one testified that the defendant's voice was the same voice heard on the call. *State v. Berrian*, No. 45922-1-II (Unpublished 2015). The call was sufficiently authenticated based on the following: the call was made from the defendant's account to someone named "Courtney," and someone named "Courtney" visited the defendant in jail. *Id.* at ¶ 26.

In *Oxford*, no one testified that the defendant's voice was the same voice heard on the call. *State v. Oxford*, No. 47291-1-II (Unpublished 2016). The call was sufficiently authenticated based on the following: call was made from the defendant's account, the defendant's first name was used in the one of the calls, the phone number dialed was associated with the protected party, and the content of the calls including repeated discussion of a no contact order. *Id.* at ¶ 9.

In *Saunders*, the appellate court upheld authentication of a jail call based on the witness having listened to several prior voicemail messages left by the defendant and being told they were from the defendant. *State v. Saunders*, No. 67677-6-I, ¶ 2-4 (Unpublished 2013). Notably, the authenticating witness had never met the defendant in person. *Id.* at ¶ 3.

Finally, in *Wallace*, the female recipient of a jail call was properly authenticated even though the female did not self-identify on the recording and no one testified to being familiar with her voice. *State v. Wallace*, No. 32156-8-III, ¶ 6 (Unpublished 2014). Despite the lack of the same evidence that Mr. Sedano claims is missing here, this Court upheld authentication because the call was placed to a number associated with the protected party, the two discuss having a no contact order, they mention by name other people known to be associated with them, and the two repeatedly profess their love for one another. *Id.* at ¶ 9.

The *Wallace* facts are not appreciably different than the facts presented above related to this case where: the call is made to a number associated with the protected party, the two repeatedly profess their love for one another, they discuss whether or not they should be talking, they obviously attempt to speak in code to avoid the order, “Benny” is mentioned by name, they discuss intimate details with each other, the female discusses unique facts about getting out of jail that match the protected party’s recent incarceration, and the discussion of other facts that align with discussion on the defendant’s earlier call to the protected party’s mother.

As these cases demonstrate, self-identification is not a requirement for authentication of telephone calls through circumstantial evidence. All

that these cases require is that the context of the conversations somehow be tied to the caller who is being identified, which is essentially just a restatement of ER 901(b)(5).

8. Related case law involving authentication of text messages also sets a low bar for admission and does not require self-identification.

In the related context of text message authentication, even less evidence is required in order to authenticate than is usually presented in phone call cases. *E.g. State v. Young*, 192 Wn. App. 850, 856-57, 369 P.3d 205 (2016). In *Young*, the only evidence was that the text messages came from a number associated with the defendant and the content of the messages was consistent with topics of conversation the recipient had had with the defendant (i.e. prostitution and check fraud). *Id.* Notably, the sender of the text messages did not self-identify. Nor did the sender of text messages in another texting case, *Bradford*, self-identify. *See State v. Bradford*, 175 Wn. App. 912, 929-30, 308 P.3d 736 (2013). Instead, the messages were authenticated along the same lines as in *Young*.

Given that self-identification is not a requirement for authentication of text-messages, why would the rule be any different for telephone calls? The device used to send the communication is frequently the same and the authentication concerns are not any different. Because authentication of text messages is not appreciably different from

authentication of telephone calls, and because no case has ever held that self-identification is a requirement for authentication, this Court should defer to our case law with respect to authentication of text messages.

D. Mr. Sedano fails to demonstrate the presence of any prosecutorial error during closing argument.

Mr. Sedano's final argument concerns prosecutorial error. He takes issue with two comments made during closing argument. Both issues are frivolous and without merit. The first claim is a non-issue because the record shows the deputy prosecutor did not make the comment that Mr. Sedano's appellate attorney claims was made. The second comment is also a non-issue because the deputy prosecutor merely invited the jury to draw a permissible inference from the evidence. Assuming, *arguendo*, that any error did occur, both comments are non-issues because Mr. Sedano fails to prove (1) that there was a substantial likelihood the comments affected the verdict, (2) that they were flagrant and ill-intentioned, and (3) that an instruction could not have cured any error.

1. Standard of review.

"A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. Corbett*, 158 Wn. App. 576, 594, 242

P.3d 52 (2010). “In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney’s comments were improper.” *Id.* “If the prosecuting attorney’s statements were improper, and the defendant made a proper objection to the statements, then we consider whether the statements prejudiced the jury.” *Id.* “Prejudice is established only where there is a substantial likelihood the instance of misconduct affected the jury’s verdict.” *Id.*

“Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice.” *Id.* “We review a prosecutor’s allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given.” *Id.* “A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *Id.* at 595.

In a claim of prosecutorial misconduct the defendant must first establish that the prosecutor’s comments were improper. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Once the defendant shows the statements were improper, he must make a showing of prejudice. “If the defendant did not object at trial, the defendant is deemed to have waived

any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 76-761.

Because there were no objections at trial to the challenged statements, the higher "flagrant and ill-intentioned" standard applies.

2. The State did not misstate the evidence.

Mr. Sedano claims the deputy prosecutor misstated the evidence by stating all three calls were placed from Mr. Sedano's account. App. Br. at 13, 19-21, citing (but not quoting) 1 RP 188-89. That is not what was said.

The prosecutor stated that the first call (Ex. 2.3) was made from Mr. Sedano's account and that the other two (Ex. 2.1 and 2.2) were made from Mr. Salvador's account:

We're here having a conversation with a mother talking about her daughter Lisa. And how does Benny greet her? Remember this - - as was testified, this phone call was made from Mr. Benny Sedano's account. So Mr. Benny Sedano's account placed this is call. The other two, December 22nd and 23rd, were placed from Mr. Edward Salvador's account.

1 RP 188. This comment was supported by the evidence. 1 RP 108-09 (Det. Seabright testifying).

After that statement during closing argument, the prosecutor went on to continue playing Ex. 2.3, which the prosecutor had been playing

parts of for the jury and then discussing immediately prior to the comment at issue. 1 RP 187-88. Following that playback, the prosecutor then quotes a portion of exhibit 2.3, which had just been played back: “Hi, mom. How you doin’? ‘Good. How are you, son?,’” and then discusses it: “We are talking about this relationship here back and forth. We’ve got -- This is clearly from Benny Sedano’s account.” 1 RP 188. As the overall context of this transcript shows, the prosecutor was only discussing exhibit 2.3 (the Dec. 17th call to Ms. Eaton’s mother), which was the call being made from Mr. Sedano’s account. The prosecutor never said the other two calls were made from Mr. Sedano’s account, and instead reaffirmed for the jury that they were made from Mr. Salvador’s account. 1 RP 188. The fact that Mr. Sedano’s trial attorney did not object to this argument further suggests that Mr. Sedano’s appellate counsel misread the trial transcript.

3. The State’s argument did not relieve it of its burden of proof.

Mr. Sedano next claims the deputy prosecutor telling the jury they could decide whose voices they heard relieved the State of its burden of proof. App. Br. at 13 (discussing 1 RP 188-89, 197). In the first challenged statement, Mr. Sedano challenges where the State invited the jury to compare the voices for themselves to tell whether they were the same voices from call to call to call. 1 RP 188-89. The context of this

statement was not asking the jury to disregard the evidence and decide out of nowhere whether the voices were Mr. Sedano's or Ms. Eaton's. The context was to compare the voices to see if they were the same on each call. Thus, if the State proved that the voice on the December 17th call was Mr. Sedano's and if the jury believed it was the same voice on the other two calls, then the inference to be drawn is that it was also Mr. Sedano on those calls.

This was all in the context of discussing the definitions of direct and circumstantial evidence. 1 RP 185. The trial transcript clearly demonstrates the State was asking the jurors that if they did not want to rely on Det. Seabright's direct identification of the voices that they could still rely on the circumstantial evidence in order to find that the State had met its burden of proving who made and received the calls at issue. Far from relieving the State of its burden of proof, the State's argument was merely explaining that it could meet its burden of proof by either direct or circumstantial evidence as permitted in Instruction Number 2. 1 RP 160.

Mr. Sedano also hones in on the sentence "You folks can put those pieces together yourselves even ignoring that and find that." 1 RP 197. But, he completely ignores the context of the sentences preceding that statement where the State explains that what the jury is doing for itself is weighing the circumstantial evidence in the event it disregards the direct

evidence of identification. This is explicitly authorized by Instruction Number 2, which defines circumstantial evidence as “evidence of facts or circumstances from which the existence or nonexistence of other facts **may be reasonably inferred from common experience.**” 1 RP 160 (emphasis added). In other words, the State was asking the jurors to make reasonable inferences from their common experience. The only time that the jurors should not be making their own comparisons is on matters requiring expert testimony. But, as all of the previously discussed cases show and as the following cases show, voice identification does not require expert testimony. *See also United States v. Axselle*, 604 F.2d 1330, 1338 (10th Cir. 1979) (no expert witness necessary for voice identification) (citing *United States v. Rizzo*, 492 F.2d 443, 448 (2d Cir. 1974); *United States v. Watson*, 594 F.2d 1330, 1335 (10th Cir. 1979)).

4. The State never told the jury it had a duty to do anything.

In support of his argument that the State misstated the law during closing, Mr. Sedano relies heavily on several cases discussing the “duty to convict” and telling the jury it has a “duty” to do one thing or another. App. Br. at 15-19. The State never told the jurors they had a duty to do anything or find anything. *See generally* 1 RP 170-179, 185-198. As discussed immediately above, the State only invited the jurors to make reasonable inferences from the circumstantial evidence (as permitted by

Instruction 2) and did not tell them they had to make such inferences. Accordingly, Mr. Sedano's argument from pages 15 through 19 of his brief is inapposite.

5. Assuming any error occurred, Mr. Sedano fails to prove it is reversible.

Because Mr. Sedano's trial counsel did not object to the challenged statements, Mr. Sedano has to meet the higher burden of proving the comments were flagrant, ill-intentioned, and that no instruction could cure the error; this is in addition to meeting the normal standard of proof that there is a substantial likelihood the error affected the jury's verdict. Because Mr. Sedano's appellate counsel does nothing more than quote the applicable prejudice standard, without analyzing whether any prejudice occurred, Mr. Sedano has not met his burden of proving that the claimed errors are reversible. As the party with the burden on appeal, Mr. Sedano must do more than recite generic legal standards in order to establish resulting prejudice and not just legal error. *E.g. Alexander v. Gonser*, 42 Wn. App. 234, 236 fn. 2, 711 P.2d 347 (1983) ("A reviewing court will not consider an issue in the absence of argument and citation of authority."). Accordingly, Mr. Sedano's claims of prosecutorial error do not merit review by this Court.

V. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully asks this Court to affirm Mr. Sedano's convictions.

DATED this 22nd day of February, 2019.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Andrew B. Van Winkle WSBA #45219
Deputy Prosecuting Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

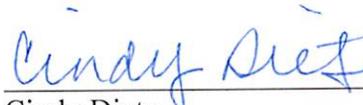
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	No. 36237-0-III
Plaintiff/Respondent,)	Chelan Co. Superior Court No. 18-1-00036-1
)	
vs.)	DECLARATION OF SERVICE
)	
BENNY GONZALEZ SEDANO,)	
)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 22nd day of February, 2019, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

Lise Ellner	()	U.S. Mail
Attorney at Law	()	Hand Delivery
P.O. Box 2711	(X)	E-Service Via Appellate
Vashon, WA 98070-2711		Courts' Portal
liseellnerlaw@comcast.net		
valerie.liseellner@gmail.com		
Benny Gonzalez Sedano	(X)	U.S. Mail
2099 Ivan Morse Road	()	Hand Delivery
Manson, WA 98831	()	E-Service Via Appellate

Signed at Wenatchee, Washington, this 22nd day of February, 2019.



 Cindy Dietz
 Legal Administrative Supervisor
 Chelan County Prosecuting Attorney's Office

DOUGLAS J. SHAE
 CHELAN COUNTY
 PROSECUTING ATTORNEY
 P.O. Box 2596
 Wenatchee, WA 98807
 (509) 667-6202

CHELAN COUNTY PROSECUTING ATTORNEY

February 22, 2019 - 11:17 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36237-0
Appellate Court Case Title: State of Washington v. Benny Gonzalez Sedano
Superior Court Case Number: 18-1-00036-1

The following documents have been uploaded:

- 362370_Briefs_20190222111617D3004149_8883.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Sedano 36237-0 Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- douglas.shae@co.chelan.wa.us
- valerie.liseellner@gmail.com

Comments:

Sender Name: Cindy Dietz - Email: cindy.dietz@co.chelan.wa.us

Filing on Behalf of: Andrew Bryan Van Winkle - Email: andrew.vanwinkle@co.chelan.wa.us (Alternate Email: prosecuting.attorney@co.chelan.wa.us)

Address:
P.O. Box 2596
Wenatchee, WA, 98807
Phone: (509) 667-6204

Note: The Filing Id is 20190222111617D3004149