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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 38705-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

JAMES GRIFFIN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
KRAIG C. NEWMAN
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WSBA #33270

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TABLE

Table of Contents

ARGUMENT 1
CONCLUSION 4

TABLE OF AUTHORITIES

Table of Cases

State v. Vasques, 109 Wn.App. 310, 34 P.3d 1255 (2001) 2

STATUTES

RCW 45.020 1
RCW 9.94A.537 3

Table of Court Rules

Rule of Appellate Procedure 2.5 3
Rule 1001 2
Rule 1002 2
Title X of the Rules of Evidence 2

ARGUMENT

The defendant's sole claim of error is based on the objection of trial counsel to the admission of hearsay evidence pertaining to the defendant's prior commitment in the Grays Harbor County Jail. At trial the defense counsel made a specific objection to foundation and basis of knowledge of the testifying party. No objection was made to the fact that a written document was not entered to prove the same fact.

RCW 45.020 allows the admission of business records as competent evidence if a qualified witness testifies to their identity, mode of preparation, and if the document was made in the regular course of business at or near the time of the event. Admissibility is determined by the trial court based on the source of the information and method and time of preparation.

In this case, the Court made the factual finding that the State had established that the records that Sergeant Davis testified to were maintained in the database at the Sheriff's Office and were based on a "name" number system by which each individual is identified. Sergeant Davis had recently examined the records and had determined that the defendant's prior release date was August 19, 2008.

The Court made a factual determination that proper foundation for the admission of such record was met. Such a finding is reviewed for,

“substantial evidence” to support the finding. State v. Vasques, 109 Wn.App. 310, 34 P.3d 1255 (2001). Substantial evidence is met when there is a “sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.”

The State provided a description of the database, in which the Grays Harbor County Jail keeps inmate information. It explained that such data is maintained by a “name” number system. Each individual has assigned to them a unique number by which he is tracked. The State also established that Sergeant Davis had recently reviewed the information, and that he is a person that maintains such records. This is substantial evidence by which the Court could make the finding that Sergeant Davis’s testimony was admissible over trial counsel’s objection.

The appellant also claims that foundation was not met because no written document was admitted into evidence to prove the same fact. He explains that this is based on “the best evidence rule.” Title X of the Rules of Evidence pertaining to contents of writings, records, and photographs provide for the admission of recorded materials into evidence. Rule 1001 states that the, “original “ of data stored in a computer is any printout or other output readable by cite. Rule 1002 requires that the original be admitted into evidence. If it was an error on the part of the lower court to allow the testimony of Sergeant Davis without a paper document admitted

into evidence, this objection was not made at the trial level and should not be allowed to be made for the first time on appeal.

Rule of Appellate Procedure 2.5 states that the Appellate Court can refuse to review any claim of error which was not raised at the trial court. This policy is to assure that trial court has adequate notice of any objections so that it has an opportunity to correct any error. Generally, issues are allowed to be raised for the first time on appeal if they present a manifest error affecting the Constitutional right.

In this case, the objection to the lack of written document was not made at the time of the admission of evidence. The prosecution could have provided such document if the objection was made. Defense counsel failed to make this objection, and only now on appeal does the appellant assert this argument. The Court of Appeals should reject this argument as untimely.

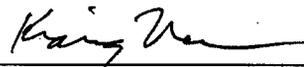
The appellant suggests that if the verdict is overturned for lack of evidence, the remedy would be to remand for re-sentencing within the standard range. This is not correct. RCW 9.94A.537 provides that in any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the Superior Court may impanel a jury to consider any alleged aggravating circumstances. In this case if the Court of Appeals rules that insufficient evidence was presented

by the State to maintain the aggravating factor, then the proper remedy is to remand to the trial court for re-litigation of the aggravating portion of the trial. This trial was presented to the bench.

CONCLUSION

Because the State established foundation for business records and the appellant has made no objection to the lack of written document at the trial level, the State asks the Court of Appeals to deny the appellants claim of error.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

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No.: 38705-1-II

DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman, hereby declare as follows:

On the 15th day of September, 2009, I mailed a copy of the Brief of Respondent to Dana M. Lind, Attorney at Law, Nielsen, Broman & Koch, PLLC, 1908 East Madison, Seattle, WA 98122 and to James Griffin, DOC No. 318086, Washington Corrections Center, P. O. Box 900, Shelton, WA 98584, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 15th day of September, 2009, in Montesano, Washington.

Barbara Chapman

DECLARATION OF MAILING

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