

NO. 68958-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN M. SOMMER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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2013 JUL -8 PM 3:14

COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. ISSUES

1. The failure to timely challenge a certification of authenticity under RCW 10.96.030 waives the objection to admission of the evidence. Sommer challenges the sufficiency of the "Certification of Custodian of Records" for the first time on appeal. Has he waived any error?

2. The certification of a records custodian is sufficient to authenticate a business record if it provides, among other things, "[t]he identity of the record and the mode of its preparation." Where the certification that accompanied computer-generated records provides that "computer generated records are compiled by computer systems maintained by our company," was the trial court within its discretion to admit the records?

3. A criminal defendant waives or forfeits the right of confrontation by failing to assert it before or during trial. At trial, Sommer specifically disclaimed the confrontation clause errors he urges on appeal. Has he waived any error?

4. A criminal defendant may challenge a manifest error affecting a constitutional right for the first time on appeal. Sommer cannot demonstrate that any error in admitting the cell phone

records caused any actual prejudice. Should this Court decline to address his untimely confrontation clause claim?

5. An affidavit authenticating cell phone records in accordance with RCW 10.96.030 is not “testimonial,” and its admission does not violate the defendant’s right to confrontation. The cell phone records here were accompanied by a certification of authenticity that complies with RCW 10.96.030. Did the trial court properly admit the records?

6. A confrontation clause error is harmless where the records proved only what other evidence had already established. An evidentiary error is harmless unless there is a reasonable probability that the outcome of the trial would have been different absent the error. Where Sommer’s repeated telephone contacts with the victim in violation of court order were established through the victim’s testimony, as well as by photographs of the call history on the victim’s cell phone, was any error in admitting cell phone records harmless under either standard?

7. An offender may not be sentenced to terms of confinement and community custody that together exceed the statutory maximum for the offense. The trial court imposed combined terms of confinement and community custody that

exceed the statutory maximum for Sommer's offense. Should this Court remand for correction of the judgment and sentence?

B. STATEMENT OF THE CASE

Steven Sommer and Krishna Lee began dating in 2007, and Sommer moved in with Lee, her father, and her children that year. 8RP 49-50. In 2009, Sommer and Lee had a daughter, C.L. 8RP 51.

Sommer became abusive after C.L. was born. 8RP 51-52. In December 2010, Lee was sitting in her car with her infant daughter when Sommer got into the back seat, grabbed Lee's neck from behind, and struck her in the mouth. 8RP at 32-33, 52, 144-47. Lee's teenage daughter and father witnessed the aftermath and called the police. Id. Lee did not want Sommer to go to jail, however, so she declined to cooperate. 8RP 53. After this incident, Lee's father asked Sommer to move out. 8RP 59-60,147.

Believing the abuse to be a singular episode, Lee attempted to continue the relationship. Later in December 2010, Lee brought C.L. to spend time with Sommer in a motel. 8RP 58. Sommer was angry about having to move out of Lee's home. 8RP 59-60. He grabbed Lee's neck, refused to let her leave the room, and pulled the phone

out of the wall when she threatened to call the police. 8RP 60. Lee managed to leave the motel room with C.L. and run barefoot to her car, but Sommer punched the windshield and broke it. 8RP 61. Sommer then falsely reported that Lee had tried to run him over, and Lee was arrested. 8RP 62-63. Lee was soon released and never charged in the incident. Id.

Sommer erupted again in May 2011, when he showed up at Lee's home late at night. 8RP 64. Sommer was angry, refused to leave the house, threw a drink at Lee's father, pushed Lee down, kicked down the bathroom door, and destroyed Lee's cell phone. 8RP 42-43, 64-65, 148-50. Although Lee was upset, she again tried to protect Sommer when police responded. 8RP 43.

Sommer's threatening behavior continued, and in June 2011, Lee finally called the police. 8RP 71-72. Sommer was charged with a domestic violence offense and a pre-trial no-contact order was issued on June 10. 10RP 9-10. Lee obtained another protection order in July 2011 that additionally prohibited Sommer from contacting C.L. 8RP 64, 68-71. Still hopeful for reconciliation, Lee nevertheless continued to facilitate visits between C.L. and Sommer. Id.

On the morning of September 22, 2011, Sommer was to appear in court on two counts of violating the no contact order, and he wanted to see C.L. afterward. 8RP 72, 10RP 15-17. Sommer sent Lee several text messages, and the two arranged to meet at Kids Quest at Factoria Mall. 8RP 77. Lee parked next to Sommer's car in the parking lot. 8RP 78-79.

Sommer was upset when he approached Lee's car. 8RP 81. He blamed Lee for his legal troubles and thought she should pay for his court-ordered parenting classes. Id. Sommer angrily told two-year-old C.L. that "Mommy is trying to put daddy in jail[.]" Id. When Sommer got into the backseat of Lee's car, Lee was afraid. 8RP 82. She got out of the car to get C.L., and Sommer got out too. 8RP 82-84. He told Lee that if he had to go back to jail, he would kill her. Id. Lee believed him, quickly got back into the car, and locked the doors. Id. Sommer then broke the window nearest to C.L.'s car seat, scattering shattered glass all over the two-year-old. 8RP 85-86.

Lee quickly drove to a nearby Burger King to make sure C.L. was unharmed. 8RP 87. She called her father to come home, cleaned the glass out of C.L.'s car seat, and drove home. 8RP 88-89.

As Lee drove home, Sommer called her repeatedly. 8RP 91. “Sometimes there would just be silence and I would hang up, and he would call back. Other times he was crying and I would hang up and he would call back.” Id. At one point, Sommer threatened to jump off the bridge. 8RP 92. The calls continued after Lee got home. “[A]s soon as I would hang up, he would call back, so my phone was continually engaged with his on these calls, and I was scared. I was scared that he would come there and hurt us, and I was scared that he was going to hurt himself.” 8RP 94.

Lee spoke to Sommer in an unsuccessful effort to de-escalate the situation. 8RP 94. Sommer “said he was going to come over with his AK-47 and shoot me and my family.” 8RP 95. Lee knew that Sommer possessed such a weapon and was concerned. Id. Sommer told Lee that he “had nothing left to lose” and assured her that “I always do what I say I’m going to do[.]” 8RP 96-97.

Lee called the police and Bellevue Police Officer Sarah Finkel responded to Lee’s home. 8RP 99; 9RP 8-9. Finkel took Lee’s statement and took pictures of the shattered car window. 8RP 99-100; 9RP 13-10. Finkel also photographed various screens from Lee’s phone to document the incoming and outgoing calls and text messages. 9RP 19-20. Finkel also located the scene of the incident

at Factoria Mall and took photos of the broken glass there. 9RP 21-29.

Officer Finkel obtained a search warrant for Lee's and Sommer's Verizon phone records. 9RP 31-33. The records mirrored the call and text data from Lee's phone. 9RP 69.

By amended information, the State charged Steven Sommer with one count of felony harassment, three counts of felony violation of a court order, and one count of malicious mischief in the third degree. CP 21-24. The State alleged that each count was a crime of domestic violence, and the felony counts were alleged to involve the aggravating factor of an on-going pattern of abuse. Id.

After the first jury trial resulted in no verdict, a second jury trial was held in May 2013 before the Honorable Bruce Heller. Sommer objected to a demonstrative exhibit that Officer Finkel had created based upon the data in the phone records. 7RP 43-45, 50-51. Sommer argued that Finkel "manipulated" the data, and the resulting exhibits were hearsay and would violate Sommer's right to confrontation. After clarifying that Sommer did not object to the unmodified phone records prepared by Verizon, the court admitted the records. 7RP 67-68.

The jury convicted Sommer as charged. CP 75, 77, 79, 81, 83, 84-85. Following a separate hearing on aggravating circumstances, the jury returned special verdicts that the felonies were aggravated domestic violence offenses. CP 76, 78, 80, 82.

The court imposed a sentence of 58 months on each of the three counts of felony violation of a court order, 43 months on the felony harassment count, and 364 days on the malicious mischief charge, concurrent to the felony sentences. CP 102, 108. In addition, the court imposed a 12-month term of community custody for the felonies. CP 109.

C. ARGUMENT

1. SOMMER HAS WAIVED ANY HEARSAY OBJECTION TO THE VERIZON PHONE RECORDS.

Sommer contends that the court erred by admitting the Verizon phone records (Exhibits 34 and 35¹) because the “Certification of Custodian of Records” did not meet the statutory requirements for admission without live testimony. Because Sommer made no objection on that basis below, the issue is not properly before this Court. Further, had the issue been timely raised, the trial court would have been within its discretion to admit

¹ Exhibits 34 and 35 are attached as an appendix to the Brief of Appellant.

the phone records. Accordingly, this Court should reject Sommer's argument.

To be admissible without testimony from the custodian of records, RCW 10.96.030 requires that business records be accompanied by an affidavit, declaration, or certification by its records custodian that attests to certain information. RCW 10.96.030(2). Among the necessary information are the "identity of the record and the mode of its preparation." RCW 10.96.030(2)(b).

Sommer argues that the certifications accompanying the phone records do not comport with the statute because they fail to detail "the mode of ... preparation." But Sommer did not object on this basis below. Indeed, Sommer did not articulate any objection to admission of the Verizon business records in Exhibits 34 and 35 at all. Rather, the pretrial discussion focused on Exhibits 49 and 50, which were the annotated versions of Exhibits 34 and 35 prepared by Officer Finkel to make the relevant information clearer for the jury. See 7RP 43-51.² Sommer's counsel explained his concern:

My understanding is [the phone records] are sent electronically in a form to the detective, or I'm not sure if she is an officer or a detective in this case, but

² For the Court's convenience, this portion of the record is attached as an appendix to this brief.

she is the one, the actual law enforcement officer who testifies and the one who dealt with these records, Your Honor.

She manipulates them into something else and says that it didn't change any of the data, but it is in some different form, and then what is shown to the jury is blow ups with designations like, "This is when the threatening calls happened," and that sort of thing.

I think what these are, judge, is -- despite what Verizon says in their boilerplate authentication, that these are in the Court's [sic] business, what they are being used for is actual substantive evidence of proof of the contacts, and that is what I don't have a chance to -- I think -- usually the argument is these aren't prepared -- these were prepared in the ordinary course of business.

Well they might have started that way at Verizon, but there is something else by the time they get here, and that is the problem I have, so I want to object on Crawford³¹ grounds that I don't get to cross-examine whoever manipulated, dealt with these records, and what happened. And secondly, they don't pass muster on a hearsay objection, because they aren't just the Verizon records that are coming over here and being authenticated instead of having a Verizon person saying, "Yeah, these are the records." They are going way beyond that, and that is one of the absolute fundamental things in this trial, Your Honor, is the way they are really convincing the jury of the contacts is having these numerous, and I will say it, numerous calls on a specific day during a specific time, Your Honor.

And I have read the case law that usually the Crawford objection is not -- is not pertinent, but I think we have a different set of circumstances here. This

³ Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Sommer's confrontation objections are addressed separately below.

isn't simply the Verizon stuff being sent over, and that is what we are using, which is the usual authentication, Your Honor. So it is both a sixth amendment objection and also that *they don't pass muster on the hearsay due to how they were manipulated and what they ultimately become in the courtroom.*

7RP 44-45.

The trial court confirmed that Sommer's objection was to admission of the "manipulated" data, and not the actual Verizon records: "I don't think he is disputing that Verizon keeps them during the normal course, but he is relying on the fact that the detective or somebody else changed the records in order to make a more compelling presentation in court." 7RP 47. Further, when Sommer's counsel argued that "the nature of these [exhibits] is that they were prepared purely as testimonial evidence," the trial court again clarified that that counsel was not referring to the records prepared by Verizon, but to the annotated versions prepared by Officer Finkel. 7RP 51.⁴

Under RCW 10.96.030, a party waives any objection to admission of business records by failing to timely object.

⁴ Although Sommer did refer to his "continuing objection" when Exhibits 34 and 35 were later offered and admitted, he articulated no basis for the objections beyond what had been discussed before trial. 9RP 35-36, 58-59.

RCW 10.96.030(4).⁵ While RCW 10.96.030 allows the court to “for good cause shown ... grant relief from the waiver,” Sommer has demonstrated no good cause in this case. The trial court and parties discussed the admissibility of the business records at length, and the issue he urges on appeal should have been addressed at that time. Because it was not, this Court should conclude that any error was waived. RCW 10.96.030(4); ER 103 (“[e]rror may not be predicated upon a ruling which admits or excludes evidence unless ... a timely objection or motion to strike is made, stating the specific ground of objection”); RAP 2.5(a) (appellate court may refuse to review any claim of error which was not raised in the trial court).

2. THE CERTIFICATION COMPLIED WITH RCW 10.96.030.

Even if this Court reaches the merits of Sommer's argument concerning the records custodian's certification, it should conclude that there was no error.

⁵ “Failure by a party to timely file a motion under subsection (4) of this section shall constitute a waiver of objection to admission of the evidence, but the court for good cause shown may grant relief from the waiver. When the court grants relief from the waiver, and thereafter determines the custodian of the record shall appear, a continuance of the trial may be granted to provide the proponent of the record sufficient time to arrange for the necessary witness to appear.” RCW 10.96.030(4).

Properly authenticated business records of regularly conducted activity are admissible as an exception to the rule against hearsay. ER 803(a)(6); RCW 5.45.020; RCW 20.96.030. A trial court's determination that evidence falls within a hearsay exception will not be disturbed on appeal absent an abuse of discretion. State v. Davis, 141 Wn.2d 798, 842, 10 P.3d 977 (2000). Discretion is abused when the trial court's decision is manifestly unreasonable, is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Sommer contends that the certifications accompanying the Verizon phone records were inadequate because they failed to identify the "mode of preparation" of the attached documents. He is incorrect. The certifications indicated, "Computer generated records are compiled by computer systems maintained by our company/organization." Ex. 34 at 1, Ex. 35 at 1. For the first time, Sommer argues that this explanation is insufficient because there "is no indication whether the attached documents were in fact computer generated, much less what action the custodian took to generate the records or how the records were compiled." Brief of Appellant at 10. But Sommer provides no authority indicating that

such specificity is required, especially absent objection.⁶ Further, it is apparent that the records were computer-generated. Sommer has established no abuse of discretion.

3. SOMMER WAIVED THE CONFRONTATION ISSUE HE RAISES FOR THE FIRST TIME ON APPEAL.

Sommer next contends that the trial court violated his constitutional right to confront witnesses by admitting the Verizon phone records in Exhibits 34 and 35. Because Sommer did not raise this issue at trial, he has waived it.

Criminal defendants have the right to confront the witnesses against them. U.S. Const. amend. VI, XIV; Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The admission of “testimonial” hearsay evidence violates this right unless the proponent shows that the declarant is unavailable and that the accused had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 53-54, 68, 124 S. Ct. 1354. But if evidence is not “testimonial,” then no such showing is required. Id.

In Melendez-Diaz v. Massachusetts, the Supreme Court considered whether “certificates of analysis” introduced in a

⁶ Had the issue been raised, the State would have had an opportunity to obtain a more detailed certification or to call the records custodian as a live witness.

criminal prosecution were testimonial statements. 557 U.S. 305, 307, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The certificates in that case reported the results of forensic analysis establishing that a seized substance was cocaine. Id. Because the certificates were created specifically for use in a criminal proceeding and were used as substantive proof of a fact at trial, they were “functionally identical” to live, in-court testimony. Id. at 310-11. Accordingly, the Court concluded that the certificates were testimonial statements for purposes of the confrontation clause. Id.

The Court made clear, however, that not all documents prepared for use in a criminal proceeding are testimonial. A “clerk’s certificate authenticating an official record—or copy thereof—for use as evidence” is not testimonial, so long as it is limited to authenticating an otherwise admissible record and does not “furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” Id. at 322-23.

In State v. Jasper, our supreme court considered whether certifications attesting to the existence or non-existence of public records are testimonial statements subject to the confrontation clause. 174 Wn.2d 96, 271 P.3d 876 (2012). In two of the three

consolidated cases, the State had charged the defendants with Driving While License Suspended and introduced affidavits from the legal custodian of driving records as substantive evidence that the defendants' licenses had been suspended. Id. at 101-106. In the third case, the State had charged the defendant with unregistered contracting and introduced an affidavit from the records custodian from the Department of Labor and Industries to establish that the defendant was not a registered contractor. Id. at 106-108.

Citing dicta in Melendez-Diaz, the court held that such affidavits are testimonial because they “were created, and in fact used, for the sole purpose of establishing critical facts at trial” and “would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched.” Id. at 115 (citing Melendez-Diaz, 557 U.S. at 323).

On appeal, Sommer contends that the phone records and “Explanation Form for Historical Records,” which accompanied the records, were testimonial hearsay under Melendez-Diaz. He argues that the records contained in Exhibits 34 and 35 were produced in response to a search warrant and used to establish that Sommer contacted Lee, and that the Explanation Form

furnished the custodian of records' interpretation of what the records mean. In essence, Sommer contends that Verizon's record custodian did what the records custodians did in Jasper: create records for the sole purpose of establishing critical facts at trial. Accordingly, Sommer argues that admitting the Verizon records without allowing an opportunity to cross-examine the records custodian violated his right to confrontation. Brief of Appellant at 13-16.

But not only did Sommer fail to articulate any such objection to the documents provided by Verizon at trial (in contrast to the demonstrative exhibits prepared by Officer Finkel using the Verizon data), Sommer's counsel explicitly disclaimed the argument he makes here:

THE COURT: So you are not arguing – for instance, are you arguing that Verizon itself was standing in the shoes of the department of motor vehicles person in the Jasper case? Are you familiar with the Jasper case?

MR. McDANIEL: Yes. Yes.

THE COURT: I didn't hear you make that argument.

MR. McDANIEL: Yes.

THE COURT: Is that correct?

MR. McDANIEL: Yes.

THE COURT: You did not make it?

MR. McDANIEL: No.

7RP 49. Sommer's counsel again clarified that he was not arguing that Verizon prepared any of the documents it produced as testimonial evidence, but that the officer manipulated the records for that purpose. 7RP 51. The trial court concluded that that evidence did not implicate Sommer's confrontation rights because Officer Finkel would testify and be subject to cross-examination.

7RP 67-68.⁷ The trial court admitted both the Verizon records

⁷ The trial court explained:

So the issue is whether or not the State can introduce an exhibit in which they have taken that information and using their words, have tried to make some sense out of them, and to use the defense's words, they have manipulated the records, but they have changed. ...

That doesn't create Crawford problems. We are going to have testimony by the person, by the detective who rearranged the records, and it seems to me that if the defense wishes to cross-examine on the grounds that the records are either not accurately portrayed, or they are not accurate, then that is a subject for cross-examination. So I don't see any Crawford issues there, and while there was a reference made to the fact that [the deputy prosecuting attorney] had been involved in this process, I certainly don't see any issue here as to his need to testify, but I will reserve on that issue to see what the detective has to say with respect to the Verizon records. So they will be admitted based on the Court's conclusion that Crawford is not implicated.

7RP 67-68.

(Exhibits 34 & 35) and Officer Finkel's annotated versions (Exhibits 49 & 50). 9RP 167.⁸

After a thorough analysis of United States Supreme Court precedent, this Court concluded that the defendant has an obligation to assert a Sixth Amendment confrontation clause objection at or before trial. State v. O'Cain, 169 Wn. App. 228, 235-48, 279 P.3d 926 (2012). The failure to do so "results in the right being forgone." Id. at 232. This Court reiterated its view in State v. Fraser, explaining that the ability to raise the objection for the first time on appeal would place the trial court in the untenable position "of *sua sponte* interposing confrontation objections on the defendant's behalf or risk knowingly presiding over a trial headed for apparent reversal on appeal." 170 Wn. App 13, 26, 282 P.3d 152 (2012).

In this case, Sommer did not merely fail to lodge a confrontation clause objection to the cell phone records, he explicitly declined to assert such a claim. As a result, he forfeited

⁸ The trial court later instructed the jury that Exhibits 49 and 50 were not evidence but only an aid in evaluating the actual phone records contained in Exhibits 34 and 35. 9RP 167; 10RP 50-51, 76-77.

his right.⁹ This Court should adhere to its recent decision in O’Cain and Fraser and decline to review Sommer’s confrontation clause claim.

4. THERE IS NO MANIFEST CONSTITUTIONAL ERROR JUSTIFYING REVIEW OF THE CONFRONTATION CLAUSE CLAIM.

Sommer may argue that he is entitled to assert a confrontation clause violation for the first time on appeal as a manifest constitutional error under RAP 2.5(a). Because the asserted error had no practical and identifiable consequences, this Court should conclude otherwise.

In general, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). An exception exists for claims of “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Not every constitutional error can be raised for the first time on appeal, however. State v. Lynn, 67 Wn. App 339, 344, 835 P.2d 251 (1992). To be “manifest,” the error must result in actual prejudice. Fraser, 170 Wn. App at 26.

⁹ Whether the lost right is properly considered “waived” or “forfeited” appears to be a matter of little concern to the Supreme Court in this context. See O’Cain, 169 Wn. App at 240 n.5.

In State v. Lee, this Court reached the confrontation clause issue even though defendants made no objection to admission of cell phone records at trial. 159 Wn. App 795, 813-14, 247 P.3d 470 (2011). In doing so, this Court determined that the error was “manifest” because the records corroborated the testimony of the only eye-witness, whose credibility was otherwise “shaky.” Id. Since the witness’s credibility problems might have affected the jury’s decision absent corroboration, it was plausible that the admission of the phone records had practical and identifiable consequences in the trial. Id.¹⁰

That was not the case in Fraser. There, the State charged Fraser with the murder of his ex-girlfriend’s new boyfriend. 170 Wn. App at 17. The State offered cell phone records showing hundreds of text messages and phone calls from Fraser to his ex-girlfriend in the weeks preceding the murder to prove that Fraser was obsessed with her and jealous of her new boyfriend. Id. at 25.

Fraser did not raise the confrontation issue at trial, but argued that admission of the cell phone records was manifest constitutional error that can be raised for the first time on appeal. Id. This Court disagreed, distinguishing Lee, because “admission of

¹⁰ The Lee court ultimately concluded that there was no error. 159 Wn. App at 818.

the phone records proved what other evidence had already established: that Fraser was obsessed with getting [his ex-girlfriend] back and was threatening towards [the victim].” Id. at 28. For example, unchallenged evidence established that Fraser sent a series of threatening text messages to the victim. Id. Moreover, since defense counsel had made other objections on confrontation clause grounds, the trial “judge was entitled to assume that the defense had strategic reasons for choosing not to object to the testimony of the custodian of the cell phone records on confrontation clause grounds.” Id.

This case is like Fraser. The State introduced the cell phone records to show that Sommer had called and texted Lee several times on September 22, 2011. But that fact had already been established through Lee’s testimony. Lee testified that she began receiving text messages from Sommer that morning. 8RP 72-73. After the altercation in the parking lot, Lee testified that Sommer “called multiple times, repeatedly.” 8RP 92-95. In addition to Lee’s testimony, the State introduced the photos that Officer Finkel took of Lee’s cell phone, which documented the numerous calls and text messages from Sommer. 9RP 20.

Given the copious evidence of Sommer's unlawful contacts with Lee, the cell phone records merely proved what had already been established and could not have caused actual prejudice. Further, since Sommer objected to the annotated records prepared by Officer Finkel on confrontation clause grounds, the trial court was entitled to assume that he knew how to raise the issue with respect to the Verizon records themselves.¹¹ Because Sommer fails to demonstrate any manifest error, this Court should not review the claim. Fraser, 170 Wn. App at 29.

5. THE VERIZON DOCUMENTS WERE NOT "TESTIMONIAL."

Even if this Court reaches the merits of Sommer's confrontation clause claim, it must be rejected.

An alleged violation of the confrontation clause is reviewed de novo. Jasper, 174 Wn.2d at 108. When a violation has occurred, the reviewing court then determines whether the error was harmless. Id.

In Lee, this Court held that affidavits authenticating cell phone records in accordance with RCW 10.96.030 are not

¹¹ In fact, Judge Heller made no such assumption, but repeatedly clarified that Sommer was not objecting to the Verizon records. See 7RP 47, 49-50, 51, 67-68.

“testimonial,” and thus admission of such affidavits does not violate the defendant’s Sixth Amendment right to confrontation. 159 Wn. App. at 818. As in Lee, the Verizon records custodians’ certifications included no information beyond that required by the statute. Thus, the certifications were non-testimonial and admissible without live testimony. Id.

Sommer argues to the contrary, claiming that the Verizon phone records are testimonial because they were produced in response to a search warrant and thus, created specifically for use at trial. This Court should reject this argument, which is entirely unsupported by authority and expressly inconsistent with his position at trial. See 7RP 51, 67 (trial court observing that “Mr. McDaniel ... conceded this morning as I think he would have to that those phone [records] were not prepared for purposes of litigation”).

Sommer also claims that the trial court erred by admitting the “Explanation Form for Historical Records” provided by the Verizon records custodian because that document improperly “furnish[ed] his interpretation of what the records mean[.]” Brief of Appellant at 16.

In Melendez-Diaz, the Supreme Court majority observed that a clerk’s certificate authenticating an official record, although

prepared for use at trial, is admissible without live testimony. 557 U.S. at 322. The Court pointed out that this exception was narrow: while the affiant was permitted to certify the correctness of the record at issue, he or she was not permitted to “furnish, as evidence for a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” Id.

The phone records at issue here were provided in a spreadsheet format with information arranged in columns, each of which bears a title. For example, one column is entitled “Call Direction.” Ex. 35, 36. The information included within each column is not self-explanatory. For example, the information in the column entitled “Call Direction” consists of single digit numbers: 3, 5, or 6. Id. Because those digits are otherwise meaningless, the records included an “Explanation Form.” The form does two things. First, it identifies the information provided in each column. For the column entitled “Call Direction,” for example, the form indicates, “This is the type of call, e.g. inbound, outbound, or voicemail.” Second, the form provides a key for the coded information appearing the column. For example, “Inbound calls display the following numbers: 0 & 6” and “*86 is voicemail retrieval.” Id.

Although the explanation form provides a tool to interpret the data in the phone records, it does not itself furnish an interpretation of what the records show. In this way, the explanation form functions like the legend on a map, which identifies a feature on the map and indicates what that feature signifies: a dotted line means unpaved road, for example, or city names in bold text show state capitols. Although the legend is necessary, perhaps, to determine that Olympia is the capitol of Washington, the legend itself does not provide that information. The same is true with the explanation form. Though the form is necessary to determine which calls retrieved voicemail, the form itself does not show that Lee checked her voicemail twice on September 22, 2011.

If this Court reaches the issue, it should conclude that neither the cell phone records nor the explanation form provided with them are "testimonial" and there was no error in admitting them.

6. ANY CONSTITUTIONAL OR EVIDENTIARY ERROR
IN ADMITTING THE PHONE RECORDS WAS
HARMLESS.

A constitutional error is harmless if "the appellate court is assured beyond a reasonable doubt that the jury verdict is

unattributable to the error.” State v. Anderson, 171 Wn.2d 764, 770, 254 P.3d 815 (2011) (citing State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)). Reviewing courts look to the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. Id. If there is no reasonable probability that the outcome of the trial would have been different had the error not occurred, the error is harmless beyond a reasonable doubt. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). An evidentiary error by the trial court (such as admission of hearsay) is harmless unless, within a reasonable probability, the outcome of the trial would have been materially different.” State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). Under either standard, any error in admitting the cell phone records was harmless.

Sommer contends that admission of the cell phone records was not harmless because the State relied on those records to prove a violation of a court order based on phone contacts, because Officer Finkel testified about the phone records at length, and because the prosecutor emphasized that the phone records corroborated Lee’s testimony. The State disagrees.

The State argued that Sommer committed the felony harassment charged in Count 1 when he told Lee over the phone that he would kill her with his AK-47. 10RP 88-89. The State also argued that Sommer was guilty of Count 4 because he called Lee in violation of the no contact order. 10RP 84, 96. The cell phone records clearly supported these arguments, but Lee's testimony and the photos of her phone that documented the numerous calls and text messages proved the same point. Because the untainted evidence would necessarily lead to a finding of guilt, any error was harmless beyond a reasonable doubt. Fraser, 170 Wn. App at 29.

7. THE STATE AGREES THAT THE COMBINED TERM OF INCARCERATION AND COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM.

Sommer contends that the trial court erred by sentencing him to a combined term of incarceration and community custody that exceeds the statutory maximum for the three counts of felony violation of a court order. The State agrees.

Felony violation of a no contact order is a class C felony and a crime against a person. RCW 26.50.110(1), (4), (5). The statutory maximum for a class C felony is 60 months.

RCW 9A.20.021(1)(c). The statutory term of community custody for a crime against a person is 12 months. RCW 9.94A.701(3)(a).

Sommer's standard range for the three counts of felony violation of a no contact order was 51-60 months. CP 106. The court imposed a sentence of 58 months of confinement on the three counts, plus 12 months of community custody, resulting in a combined term of 70 months – 10 months above the statutory maximum. CP 106-09.

Under RCW 9.94A.701(9), the statutory community custody term "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." The court erred by failing to reduce Sommer's term of community custody to avoid a sentence in excess of the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). This Court should remand to correct the community custody term on the judgment and sentence. Id.

D. CONCLUSION

Because the trial court erred in imposing a sentence that exceeds the statutory maximum, this Court should remand to

amend the judgment and sentence. Because Sommer waived any evidentiary or constitutional error in the admission of the Verizon cell phone records by failing to lodge a timely objection to these materials, cannot demonstrate manifest constitutional error justifying review for the first time on appeal, and any potential error in admitting the phone records was harmless beyond a reasonable doubt in any event, the State respectfully requests that the Court otherwise affirm Sommer's convictions.

DATED this 8th day of July, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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Appendix A

1 You know, we litigated this issue in front of Judge
2 Washington, and we played the redacted version for the jury,
3 and I have a transcript of that ready, as well.

4 THE COURT: I think I am going to have to listen
5 to at least the redacted version.

6 So why don't we do that?

7 MR. GAUEN: Sure.

8 THE COURT: Whenever you have the ability to play
9 it for me?

10 I think we were on 12. Have we discussed everything
11 that we need to discuss with respect to that?

12 MR. GAUEN: Yes, Your Honor.

13 THE COURT: All right, 13?

14 MR. GAUEN: This is a motion to admit business
15 records from Verizon obtained through a search warrant.

16 We have a custodian of records who has signed a
17 declaration indicating that these are the records they
18 pulled; these are business records; it complies with RCW
19 10.96.030, and I am just -- if there is any type of
20 objection, I would like to address that now.

21 THE COURT: Any objection?

22 MR. McDANIEL: Yes, Your Honor.

23 If I could make this for the record?

24 I would object on sixth amendment, Crawford -- US v.
25 Crawford.

1 Essentially, and now that I have had a chance at the
2 first trial to see how these records them in and what they
3 are used for, the Verizon business records, the Verizon
4 records that are certified in accordance with the statute, I
5 have -- that is absolutely accurate, Your Honor.

6 My understanding is they are sent electronically in a
7 form to the detective, or I'm not sure if she is an officer
8 or a detective in this case, but she is the one, the actual
9 law enforcement officer who testifies and the one who dealt
10 with these records, Your Honor.

11 She manipulates them into something else and says that
12 it didn't change any of the data, but it is in some
13 different form, and then what is shown to the jury is blow
14 ups with designations like, "This is when the threatening
15 calls happened," and that sort of thing.

16 I think what these are, judge, is -- despite what
17 Verizon says in their boilerplate authentication, that these
18 are in the Court's business, what they are being used for is
19 actual substantive evidence of proof of the contacts, and
20 that is what I don't have a chance to -- I think -- usually
21 the argument is these aren't prepared -- these were prepared
22 in the ordinary course of business.

23 Well they might have started that way at Verizon, but
24 there is something else by the time they get here, and that
25 is the problem I have, so I want to object on Crawford

1 grounds that I don't get to cross-examine whoever
2 manipulated, dealt with these records, and what happened.

3 And secondly, they don't pass muster on a hearsay
4 objection, because they aren't just the Verizon records that
5 are coming over here and being authenticated instead of
6 having a Verizon person saying, "Yeah, these are the
7 records." They are going way beyond that, and that is one
8 of the absolute fundamental things in this trial, Your
9 Honor, is the way they are really convincing the jury of the
10 contacts is having these numerous, and I will say it,
11 numerous calls on a specific day during a specific time,
12 Your Honor.

13 And I have read the case law that usually the Crawford
14 objection is not -- is not pertinent, but I think we have a
15 different set of circumstances here.

16 This isn't simply the Verizon stuff being sent over,
17 and that is what we are using, which is the usual
18 authentication, Your Honor. So it is both a sixth amendment
19 objection and also that they don't pass muster on the
20 hearsay due to how they were manipulated and what they
21 ultimately become in the courtroom

22 THE COURT: Mr. Gauen?

23 MR. GAUEN: Your Honor, there are two separate
24 issues here. One is a constitutional issue, sixth
25 amendment, and the second is whether the records should be

1 invisible under evidence rules, and in particular the
2 hearsay rules.

3 With the sixth amendment issue, there is case law right
4 on point, and I cited in the last case, it is --

5 THE COURT: State v. Lee.

6 MR. GAUEN: State v. Lee, and I don't have the
7 actual citation, but I can get that at the next recess for
8 Your Honor -- that says that when these kinds of records
9 from a private company, in particular, are given, and the
10 result -- or obtained through a search warrant, there is no
11 confrontation issue because these records were not prepared
12 for the sole purpose of litigation. So they are not
13 testimonial.

14 Again, a sixth amendment analysis only arises when the
15 evidence is testimonial. And these particular records are
16 not inherently testimonial.

17 Now there is recent case law that we have seen, that I
18 have seen, in particular, where defense has cited State v.
19 Jasper, and that dealt with a department of licensing
20 document where the State had actually requested a department
21 of licensing representative to obtain a person's licensing
22 status on a particular date, and the DOL representative goes
23 through the records, and then makes a -- actually makes a
24 form saying that this person on this date was suspended in
25 the third degree, for example. That is inherently

1 testimonial, because that person knows that this record is
2 going to be used in court at a future date.

3 This is completely distinguishable because these are
4 records maintained for the normal course of business at
5 Verizon, and when Verizon receives a search warrant, they
6 literally just ship over what they maintain in the normal
7 course of business, which is records that are not created or
8 maintained for the purpose of litigation, but created for
9 their own --

10 THE COURT: Well my understanding of Mr.
11 McDaniel's argument, I don't think he is disputing that
12 Verizon keeps them during the normal course, but he is
13 relying on the fact that the detective or somebody else
14 changed the records in order to make a more compelling
15 presentation in court.

16 MR. GAUEN: I am going to get there.

17 So when Verizon ships the records over to the
18 detective, they do so electronically. And the detective
19 burns that on a disk, and the State, immediately, when it
20 receives a copy of that is, ships it over to defense.

21 The detective will testify that when she receives that
22 disk and the contents of that disk, she just makes no
23 changes to that particular information, and that will be
24 laid out in the foundation of her testimony.
25

1 What Mr. McDaniel's concerned about is that in this
2 together case, our detective took a lengthy Excel
3 spreadsheet that has a lot of different data on it, and
4 taking a copy of the original records, she went through
5 those records and summarized them in a fashion that shows
6 incoming and outgoing calls from a number that is associated
7 with the victim, and a number associated with the defendant.
8 And based on the testimony about the particular numbers, the
9 jury will be able to see that on this date, a number
10 associated with the defendant calling a number associated
11 with the victim.

12 In the first trial what I did was I admitted as an
13 exhibit that was -- that went to the jury, a copy of records
14 that were not touched at all by the detective, and those are
15 the records that were actually obtained directly from
16 Verizon.

17 And then I also admitted as a separate exhibit records
18 that the detective went through and tried to make sense of.
19 I mean we usually -- and the Court will see this when the
20 exhibits are pulled -- she went through and highlighted --
21 we actually did it together -- went through and highlighted
22 particular numbers so that the jury could somehow make sense
23 of this issue.

24 This is not hearsay. It is not an out-of-court
25 statement offered to prove the truth of the matter asserted.

1 The witness is going to be right here testifying to what she
2 did. There's no sixth amendment confrontation issue there.
3 And the actual records come under the business records
4 hearsay exception to the hearsay rule.

5 So I think counsel's argument fails on all those
6 grounds.

7 THE COURT: Mr. McDaniel, are you relying on any
8 cases to support your argument?

9 MR. McDANIEL: No, it is the general Crawford --
10 on the confrontation, Your Honor?

11 THE COURT: Yes.

12 MR. McDANIEL: Because I have seen --

13 THE COURT: So you are not arguing -- for
14 instance, are you arguing that Verizon itself was standing
15 in the shoes of the department of motor vehicles person in
16 the Jasper case? Are you familiar with the Jasper case?

17 MR. McDANIEL: Yes. Yes.

18 THE COURT: I didn't hear you make that argument.

19 MR. McDANIEL: Yes.

20 THE COURT: Is that correct?

21 MR. McDANIEL: Yes.

22 THE COURT: You did not make it?

23 MR. McDANIEL: No.
24
25

1 THE COURT: So you are really focusing more on
2 what happened to the records once they were received by the
3 detective?

4 MR. McDANIEL: It is two things, and I don't think
5 there is direct case law on the first thing I have said --
6 is that the records duly authenticated pursuant to the
7 Washington statutes, that in a case like this, take on a
8 different character than may be a case where there might be
9 all sorts of business records for different issues.

10 There is no phone being introduced. There is no
11 analysis of phone. There is no GPS. There is nothing.

12 The evidence here of those records are taking on a
13 status that you don't usually see of business records in a
14 case -- in a typical case, Your Honor, or a typical civil
15 case.

16 They are there is the -- this is, "He made the calls."
17 That's it.

18 And secondly, now I am hearing that the prosecutor
19 himself was manipulating, or dealing with the data, with the
20 officer, so I guess I have to cross-examine the prosecutor
21 as to what this process, so that I can cross-examine, was
22 this a process that was done fairly -- fairly to my client,
23 in front of the jury, because now I have that knowledge that
24 it was two people that actually dealt with that data and put
25 it in this form.

1 Maybe the prosecutor deals with that on direct, Your
2 Honor, and I am not trying to be facetious here, I am just
3 saying that this is not a case where we have GPS. This is
4 not a case where we have triangulation as to where these
5 calls were made. This is not even a case where the phones
6 are entered into evidence. This is not a case where the
7 officer ever even saw the phones. Well, she saw one phone,
8 the -- Ms. Lee's phone.

9 So it is a -- the sun is shining on this as we are
10 sitting in here in court, and this is what the jury has to
11 say he made those calls, and that's it, and I think, yes, I
12 will do cross-examination, and argument, and all that sort
13 of thing, but the nature of these is that they were prepared
14 purely as testimonial evidence.

15 THE COURT: But not by Verizon?

16 MR. McDANIEL: Not by Verizon, no.

17 THE COURT: Okay.

18 I will take that one under advisement.

19 Number 15 is fairly standard. I assume you don't have
20 any objection to that, Mr. McDaniel?

21 MR. McDANIEL: Yes. I think there was one --

22 THE COURT: Oh, I missed 14.

23 MR. McDANIEL: And I do have something on that,
24 just very briefly.

25 THE COURT: Go ahead.

1 MR. McDANIEL: In the first trial -- and I don't
2 know that much came out. I think that Ben talked about a
3 previous relationship or whatever she had -- she didn't want
4 to talk about it. I don't know whether she started -- she
5 looked like she was close to tears. There was some problem
6 with it. I would exclude -- and we never got into it, other
7 than the jury saw she was very uncomfortable about it.
8 There is something to do with a prior relationship that has
9 nothing to do with this case, and I would ask that those
10 questions be excluded and in fact I think what she told the
11 prosecutor is she didn't even want to ask those.

12 I have the transfer here, but it was very brief. But I
13 always worry about some outside sympathy thing of --
14 especially at the very start of the testimony and the start
15 of the trial, Your Honor.

16 THE COURT: Mr. Gauen?

17 MR. GAUEN: I think what counsel is referring to,
18 and if I am mistaken, please correct me, is that when I was
19 asking initial questions that in my mind were relevant for
20 the witness's credibility, and this was during direct
21 examination of Ms. Lee -- I asked if she had ever been
22 previously married, because she has two other children in
23 addition to the child with Mr. Sommer, and she indicated
24 yes, and I said is that father still around, or is he still
25 in your children's picture? And she said no, he passed

1 I would also -- I wanted to ask this as a question:
2 There was a previous incident involving some text messages
3 and some reference to killing of ducks?

4 Did I understand correctly, Mr. Gauen, that the parties
5 had agreed, or the State had -- was going to redact the
6 reference to the animals? Or was that just something the
7 Court thought should be done?

8 MR. GAUEN: No, Your Honor, Judge Washington ruled
9 in the last trial that such evidence was not relevant and
10 therefore not admissible.

11 THE COURT: All right, so then I agree with that
12 ruling.

13 So those are the Court's rulings on the 404B issues.

14 And we also had an issue regarding the Verizon records,
15 and just so that the record is clear, there's no Crawford
16 issue with respect to the Verizon records themselves. Mr.
17 McDaniel I think conceded this morning as he I think would
18 have to that those phone workers were not prepared for
19 purposes of litigation, and we also have the State v. Lee
20 case in which the Court of Appeals very recently noted that
21 fact with respect to cell phone records.

22 So the issue is whether or not the State can introduce
23 an exhibit in which they have taken that information and
24 using their words, have tried to make some sense out of
25 them, and to use the defense's words, they have manipulated

1 the records, but they have changed. Let's use a neutral
2 term for what happened.

3 That doesn't create Crawford problems. We are going to
4 have testimony by the person, by the detective who
5 rearranged the records, and it seems to me that if the
6 defense wishes to cross-examine on the grounds that the
7 records are either not accurately portrayed, or they are not
8 accurate, then that is a subject for cross-examination. So
9 I don't see any Crawford issues there, and while there was a
10 reference made to the fact that Mr. Gauen had been involved
11 in this process, I certainly don't see any issue here as to
12 his need to testify, but I will reserve on that issue to see
13 what the detective has to say with respect to the Verizon
14 records.

15 So they will be admitted based on the Court's
16 conclusion that Crawford is not implicated.

17 Now were there any other issues that -- I had taken
18 under advisement?

19 MR. McDANIEL: Yes, the teenage daughter, Chloe,
20 who is testifying to a couple of the prior bad acts, Your
21 Honor.

22 She was added as a witness. She wasn't a witness in
23 the first trial. She has been added as a witness in this
24 trial.

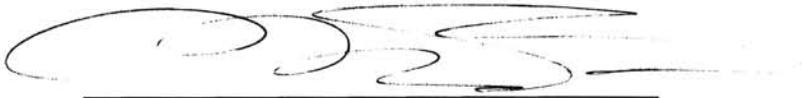
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. STEVEN SOMMER, Cause No. 68958-4 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 8 day of July, 2013



Name
Done in Seattle, Washington

2013 JUL -8 PM 3:14
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON