

NO. 43046-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT JESSE HILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper, Judge

No. 11-1-03777-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in admitting the recordings of defendant's messages left for Mr. Young where the recording was properly authenticated?

B. STATEMENT OF THE CASE.

1. Procedure

On September 14, 2011, the State charged defendant, Robert Jesse Hill, with one count of Intimidating a Judge. CP 1. The victim of the charge was Commissioner R. Hansen. CP 2-3. Defendant was found competent to stand trial on October 26, 2011. CP 22-23. An amended information was filed on December 12, 2011, which clarified the charging period. RP 29.

The case was called for trial on January 4, 2012. RP 3. Defendant waived jury trial and the case proceeded to a bench trial in front of the Honorable Ronald E. Culpepper. RP 36, CP 37-39. A corrected information was filed on January 11, 2012, that corrected two words in the charging period. RP 67-68, CP 57. Defendant objected to the admission of three recorded messages that were contained on two separate CDs. RP 16-24, RP 51-52. The trial court admitted the recordings. RP 52, 81, Ex.

1 and 2. On January 12, 2012, the trial court found defendant guilty as charged. RP 173-180. Findings of Facts and Conclusions of Law were entered on February 3, 2012. RP 11, CP 65-69.

Sentencing was held on February 3, 2012. RP 11, CP 70-82. Defendant was sentenced to a low end of the standard range sentence of 16 months. RP 17, CP 70-82.

Defendant filed a timely notice of appeal. CP 89-100.

2. Facts

Tacoma Assistant City Prosecutor Erik Furer was in court on September 8, 2011. RP 70-71. Commissioner Randy Hansen was presiding that day. RP 71. Defendant, Robert Jesse Hill, was on the docket for a hearing that day and Commissioner Hansen set bail for defendant. RP 71. Defendant was taken into custody. RP 72.

The next day, September 9, 2011, defendant appeared back in the courtroom with a stack of photocopied affidavits of prejudice. RP 73. Defendant had filled in "Randy I Think I am so Handsome Hansen" and was encouraging people to file the affidavits against the Commissioner. RP 74. Defendant was there for one to two hours. RP 73-74. At the end of the docket, defendant approached Mr. Furer. RP 74. Defendant appeared agitated. RP 74. Defendant said he wanted to readdress bail and Mr. Furer told defendant he was not on the docket for that day. RP 74. Defendant was persistent and agitated and wanted to speak with the

Commissioner himself. RP 75. Defendant started to raise his voice and “made comments to the effect that Commissioner Hansen had given him the MF'ing, expletive, bail of \$15,000 because he had knowledge of the commissioner's incestuous relationship with his daughter, Jodi, and that's why, in some type of retaliatory sense, he was giving him the increased bail that I requested the day before.” RP 75. Defendant then left the courtroom and they locked the door. RP 75.

Mr. Furer related the comments to Commissioner Hansen because he was concerned for the Commissioner. RP 75. Mr. Furer asked defendant if he had a daughter named Jodi. RP 76. He then related defendant's comment to the Commissioner. RP 76. The Commissioner's eyes got wide and he looked flustered. RP 76.

Sergeant Jesus Villahermosa works for the Pierce County Sheriff's Department. RP 41. For four years, Sergeant Villahermosa was the sergeant of court security at the Pierce County Courthouse. RP 41. Sergeant Villahermosa first became aware of defendant from his predecessor in court security. RP 43. Over the course of four years, Sergeant Villahermosa had dozens of personal face to face contacts with defendant as well as dozens of phone conversations with defendant. RP 43-46, 61-62. Sergeant Villahermosa testified that defendant's voice over the phone is very familiar to him. RP 46.

On September 12, 2011, Sergeant Villahermosa was made aware of two recorded messages believed to be from defendant. RP 46. A man named Derek Young had the original recordings of the messages and Sergeant Villahermosa met Mr. Young at Mr. Young's office to retrieve the recordings. RP 46-47. The recordings had been left on Mr. Young's business voicemail. RP 47. Sergeant Villahermosa listened to the recordings and recognized the voice on both recordings as belonging to defendant. RP 47, 49-50, 57. This identification was based on the Sergeant's prior contacts with defendant as well as some of the comments that defendant himself made on the messages. RP 47. Sergeant Villahermosa played the two recordings for Commissioner Hansen. RP 57. The messages were as follows:

Yeah, this is Robert Hill. It's Sunday morning the eleventh of September. Tomorrow morning there's a big event I'm going to be a part of in the county courthouse on the second floor on the north side of the west half because it's normally Judge Ladenburg's court but there's this punk-ass bitch Judge Hansen who put me at fifteen thousand and he did it for bad reason cuz I mean he did it for bad reason and he did it to the wrong person and you can watch with your camera or whatever you want to use to make notes of uhh...and, you know, publish it in your thing exit 133. Ex. 2 and 3, CP 58-61.

Do you want to do the story on the commissioner that had incest with his daughter that gave me fifty(?) thousand dollars bail and he's going to get fucked in the ass, rhetorically, figuratively speaking, tomorrow probably? Uhh...there's a guy name of Robert Hill. He's making all the stink about this. He's kind of well known. And if you want to reach him, my name's Bubba. I'm his...I'm a

...just a friend just kind of making some extra phone calls to the media. Six-eight-two-forty-eleven.
Ex. 3 and 4, CP 58-61.

On September 12, 2011, Mr. Furer received a phone message from defendant. RP 77. The message harkened back to the comments defendant had made in court the Friday before. RP 77. Mr. Furer took steps to get the message recorded and also alerted Sergeant Villahermosa. RP 78. Mr. Furer had handled many of defendant's cases over the years and recognized defendant's voice. The message stated:

Hi, this is the Honorable Sovereign State Master, Robert comma Hill comma, candidate for Tacoma City Council Position Three comma upper and lower case, former Precinct Committee Officer to the Twenty Seventh Legislative District of Washington State. There's more but I don't have time to say it right now. Two-five-three-six-eight-two-forty-eleven, considering that I've had carnal relations with Jody, the daughter of Judge Hansen, who also have has had carnal relations with her that she's told me about the incest with him and that's why he gave me fifteen thousand dollars mother fucking bail. You might not have known all that but now you do. Hey, and I just want to reset everything on this thing in front of him today if possible. I tried to do it yesterday in a friendly way and the county sheriff's department that knows that I know this and wants to fuck with my schedule kept me away from doing this yesterday so give me a call at your earliest convenience because I'd like to do this in an easy way in a nice friendly way not embarrass the City of Tacoma government way. But I'll do it the mother fucking hard way if I have to. If you don't call me by ten o'clock today at six-eight-two-forty-eleven it's on your shoulders Erik Furer.

Ex. 1 and 5, CP 58-61.

Commissioner Randall Hansen had been presiding in Tacoma Municipal court on September 8, 2011. RP 88-89. Defendant appeared before him that day and he increased defendant's bail and had defendant taken into custody. RP 90. The next day, defendant came back into the courtroom. RP 90-91. The comments defendant made to Mr. Furer caused the Commissioner concern. RP 92. The next week, the Commissioner listened to the recordings of the three phone messages. RP 93. The recordings also caused him concern. RP 98. He had to ask his daughter if she knew defendant and then had to discuss defendant's comments with her. RP 98-100. The Commissioner described this as a very awkward and uncomfortable conversation for him to have. RP 98-100. His daughter did not know defendant. RP 99-100.

Defendant testified on his own behalf. Defendant indicated that he learned about Commissioner Hansen's daughter from another inmate who said that he had a kid with her. RP 107. He learned this information on September 8, 2011 after court. RP 107. Defendant described his bail getting increased as an aggravating action, especially because a photographer from The News Tribune was in court that day. RP 110. Defendant admitted he went back to court on September 9th and that he filled out, copied and distributed the affidavits of prejudice. RP 111, 126. Defendant also admitted he talked to Mr. Furer that day but denied making any comments about the Commissioner's daughter. RP 114.

Defendant did admit that he made the calls to Mr. Young and to Mr. Furer. RP 114, 131, 148. Defendant admitted that it was his voice on the tapes and claimed that he was intoxicated and angry at the time. RP 115-116, 145. Mr. Young was the owner and webmaster of Exit 133 which defendant described as a blog about activities in the City of Tacoma. RP 132. Defendant thought he had called The News Tribune for the second call but accidentally called Mr. Young twice. RP 117. Defendant tried to disguise his voice on the second call and left the phone number for his answering service on the messages. RP 135-137. The call to Mr. Furer was the third call. RP 140. Defendant stated that he wanted to embarrass Commissioner Hansen by pointing out what he perceived to be a legal error about bail and not by accusing him of incest. RP 118-119. Defendants admitted his comments about having sex with the Commissioner's daughter and about the Commissioner committing incest were untrue. RP 123-124. Defendant said that he thought if the Commissioner believed there was a relationship between defendant and his daughter, then the Commissioner would have to recuse himself from his cases. RP 127. Defendant said he wanted to ask the Commissioner on the record if he thought defendant had gotten his daughter pregnant. RP 129-130.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE MESSAGES LEFT BY DEFENDANT FOR MR. YOUNG WHEN THE RECORDINGS WERE PROPERLY AUTHENTICATED.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

ER 901 provides as follows:

(a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming to the requirements of this rule:

(1) Testimony of Witness with Knowledge.

Testimony that a matter is what it is claimed to be.

...

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.

(5) Voice Identification. 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 to the alleged speaker.

A trial court's decision regarding the authenticity of an exhibit is reviewed using an abuse of discretion standard. *State v. Payne*, 117 Wn. App. 99, 110, 69 P.3d 889 (2003). A trial 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). "Rule 901 does not limit the type of evidence

allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.” *United States v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989). “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, 50 P.3d 111 (2007), *see also State v. Jackson*, 113 Wn. App. 762, 769, 54 P.3d 739 (2002). An expert as to the operation of the recording device is not required. *State v. Robinson*, 38 Wn. App. 871, 886, 691 P.2d 213 (1984). When determining authenticity, a trial court is not bound by the rules of evidence. *Williams*, 136 Wn. App. at 500, citing ER 104(a); ER 1101(c)(1); *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260(1984). The trial court may rely upon lay opinions, hearsay, or the proffered evidence itself in making its determination. *Williams* 136 Wn. App. at 500. “Such information must be reliable, but need not be admissible.” *Id.*, citing *City of Bellevue v. Mociulski*, 51 Wn. App. 855, 860, 756 P.2d 1320 (1988). In addition, this Court can affirm on any basis that is supported by the law and the record. *See State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001).

In the instant case, two different recordings of three different messages were admitted by the trial court. Ex 1 and 2. Exhibit 1 contained the message left for Mr. Furer, and exhibit 2 contained the two messages left for Mr. Young. RP 52. At trial, defendant initially objected to foundation and authentication for both recordings. RP 16, 51. The trial court initially admitted exhibit 2 and provisionally admitted exhibit 1. RP 52. When the trial court later admitted exhibit 1, defendant did not renew his objection to its admission. RP 81. On appeal, defendant only contests the admission of the two messages left for Mr. Young. Ex. 2. The trial court did not abuse its discretion in admitting the exhibit.

Defendant's primary argument below was that Mr. Young was out of the country and so without his testimony, the message could not be authenticated. RP 16. Specifically, defendant argued that there was no evidence of where the tapes came from or who made the recordings. RP 16. The State argued that while Mr. Young was out of the country, Sergeant Villahermosa could testify as to the manner in which he received the CDs from Mr. Young, on what date he received them from Mr. Young, and that he listened to them and could identify the defendant's voice on the CD. RP 17. The court also listened to all three recordings and noted that the voice on all three sounded the same, the person on the recording identified himself as defendant, and the person gave the same call back number on the messages. RP 23. The trial court then reserved ruling until

he had heard the testimony of Sergeant Villahermosa before making his decision regarding admissibility of the recordings. RP 24.

Sergeant Villahermosa testified that he had received the recorded messages from Mr. Young on September 12, 2011. RP 46. Sergeant Villahermosa contacted Mr. Young at Mr. Young's office. RP 46. Mr. Young gave Sergeant Villahermosa the CD of the recordings that had come into his business voicemail. RP 47. The CD was not altered or changed by Sergeant Villahermosa and the original CD received directly from Mr. Young was the one admitted into evidence. RP 48, 51. Sergeant Villahermosa was able to identify defendant's voice on the recordings as he had had many contacts with defendant, both over the phone and face to face. RP 43-46, 47, 49-50, 57, 61. The trial court heard testimony as to how Sergeant Villahermosa came to be in possession of the CD, the day he received it, how he received it, what he did after he received it and the fact that he was able to identify defendant's voice on the recording.

The trial court listened to all three messages on both recordings and heard from Sergeant Villahermosa before making his decision. The recording that defendant does not challenge that contained the message to Mr. Furer referenced many of the same things contained in the other two messages, defendant identified himself in the message and gave the same call back number as the message left for Mr. Young. Ex. 1 and 5, CP 58-61. The message was also retrieved on the same day as the messages to Mr. Young. RP 77. The trial court relied on Sergeant Villahermosa's

observations and recollections, as well as the statements made to him by Mr. Young at the time he received the recording. The trial court is permitted to rely on reliable testimony, even hearsay. The evidence to authenticate the recording does not have to be admissible as shown in the case law above. Further, the authentication can come from the recording itself. Defendant says on the recording that he is leaving the message on the eleventh of September. This fits with the right time frame as defendant had just been in front of the court on the eighth of September and back in the courtroom on the ninth. RP 71-72, 73. Further, defendant mentions being in Judge Ladenburg's court in front of "Judge Hansen." Commissioner Hansen had just increased his bail and he mentions that as well in both messages. The content of the recordings themselves lend to the finding of authenticity and this is supported by the case law. The trial court did not abuse its discretion in finding that the recording had been authenticated and admitting exhibit 2.

In addition, the messages were left on an answering machine. Defendant called both Mr. Young and Mr. Furer and left his phone number for call back. Defendant even admitted to making all of the calls and confirmed that it was his voice on all three recordings. RP 114, 115, 117, 131, 135, 136-37, 140, 141, 148. Defendant made these phone calls voluntarily and left the messages voluntarily. Defendant himself provided additional evidence that confirmed the authenticity of the calls. Authenticity had been established prior to defendant testifying, but with

defendant admitting making the calls and then going further to clarify how and when he made them, there is no doubt as to the recordings authenticity. Defendant did not deny making the phone calls or leaving the messages. Defendant in fact provided additional details to further authenticate the messages. Defendant used the recording and the circumstances around their creation to try and explain his side of the story and as part of his theory of the case. The trial court did not error in admitting the recordings.

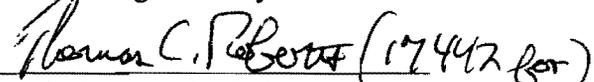
The trial court is in the best position to determine authenticity. Here the court listened to the recordings, listened to argument, and determined that the recordings could be authenticated. The court found that the recording has been authenticated. RP 52. The court did not abuse its discretion.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the conviction and sentence below.

DATED: September 17, 2012.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTOR

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