NO. 73242-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ADEM GERZIC,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONALD J. PORTER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES

1. Statements to police are nontestimonial, and therefore admissible, when the primary purpose of the questioning is to enable police assistance to meet an ongoing emergency. Here, the victim's 911 call described that Gerzic had assaulted her, threatened her life, and had very recently left her apartment with the stated intention of getting a gun. At the time of the call Gerzic had not yet been detained by police. Did the trial court properly find that the admitted portion of the 911 call was nontestimonial?

2. Authentication requires a prima facie showing that the proffered evidence is what it purports to be. A police officer saw text messages on the victim's phone, and the content of the messages, which included a photograph of Gerzic holding a shotgun to his chin, was consistent with the content of the victim's 911 call. Did the trial court properly exercise its discretion in finding that the text messages had been sent by Gerzic to the victim and admitting the evidence?

3. In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is manifest, and of constitutional dimension. On appeal, Gerzic claims for the first time that admitting the text messages without the victim testifying violated his right to confront witnesses. The text messages were properly authenticated

without reliance on the victim's testimony. When the text messages were properly authenticated by other means, has Gerzic failed to establish a manifest and constitutional error simply because the recipient of the messages was not present to testify?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Adem Gerzic was charged with one count of felony harassment for threatening to kill Christine Clark[1]. CP 1. Clark did not testify at trial. Two police officers testified, and the trial court admitted a redacted version of Clark's 911 call as well as text messages from Gerzic to Clark.

The jury convicted Gerzic as charged. CP 88. Although his standard range sentence was one to three months in custody, the trial court sentenced Gerzic to eight days in jail under the first offender waiver option. CP 92, 94.

2. SUBSTANTIVE FACTS

On the night of March 4, 2014, Bellevue police officers were dispatched to the Cascadia Apartments. 2RP[2] 25-26. Christine Clark had

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[1] RCW 9A.46.020(1), (2)(b).

[2] The verbatim report of trial court proceedings consists of four volumes, which will be referred to in this brief as follows: 1RP (2/10/15); 2RP (2/11/15); 3RP (2/12/15); 4RP (2/20/15).

called 911 from her apartment and given the operator the following information[3]:

- She had been trying to break up with her boyfriend, Adem Gerzic, and he had threatened "to come and just put a bullet in my head if I don't want to continue our relationship." Ex. 8 at 2.
- He was currently at her door, threatening to break it down if she did not open it. Id.
- He told her that he had a gun in his car and was going to go get it. Id. at 2-3.
- As the call progressed, Clark said that Gerzic had left: "Yeah. I think he just went back to his car. I think he heard me calling you. So probably he's gonna leave. I don't know. But I'm so scared." Id. at 3.
- Clark provided Gerzic's full name and date of birth. Id. at 3.
- Clark said that shortly before she called 911 Gerzic had slapped her. Id. at 4.

[3] The following information is taken from the 911 call audio recording after the trial court had made redactions in response to Gerzic's objections. Ex. 7, the redacted call, was played for the jury. 3RP 29. Ex. 8 is a transcript of the redacted call and was used by the jury during the playing of Exhibit 7. 3RP 29.

- She reported that he had said: "you will not make it to the office tomorrow." Id. at 4. He said that, according to Clark, "Because he wants to kill me." Id. at 5.
- Clark told the operator: "He said he wants to kill me. He said he wants to kill his ex-wife, and he wants to kill himself too." Id. at 5.
- When asked how Gerzic would react if police contacted him, Clark replied "he can be violent," but that she didn't know how he would react to police. Id. at 5.
- Clark repeated that she was scared. And she said, "If you guys take him and talk to him and release him, the next day... I don't know what's gonna happen." Id. at 5.

When Corporal Benjamin Buck first responded to the call and entered the apartment complex he heard another officer transmit that he was with the suspect, Gerzic. 2RP 66-67. Gerzic had been detained by officers seven minutes after the first dispatch of the call at 10:01 p.m. 2RP 44. Buck went to Officer Akahani's location, which was within the large apartment complex, and found him to be with Gerzic, who was sitting unhandcuffed on a curb. 2RP 66-67. Gerzic appeared to be cooperating with Akahani. 2RP 67.

Buck then went to Christine Clark's apartment. 2RP 68. Officer Buck testified that Clark was hesitant to open the door and appeared scared when Buck and another officer began speaking to her. 2RP 68. After a brief contact with Clark, Buck returned to where Gerzic was with Officer Akahani. 2RP 69. Gerzic then consented to a search of his car. 2RP 69-70. Officers were looking for firearms, but found none in Gerzic's car. 2RP 70.

In responding to the call, Officer Colin Cufley went directly to Clark's apartment. 2RP 27. Cufley first contacted Clark in her front hallway and saw that "she was very upset and excited." 2RP 28. While Clark talked to Cufley, she was "constantly looking at the door asking where Mr. Gerzic was." 2RP 28. Because she was so upset, Cufley asked Clark if she wanted to sit down. 2RP 28. They went into her bedroom and sat down and he took a statement from her. 2RP 28-30. Although there were no visible signs of injury, Clark did complain of pain. 2RP 29, 55.

Clark told Officer Cufley that Gerzic had previously sent her threatening text messages. 2RP 34. Clark showed Cufley the text messages on her phone. 2RP 34. Those text messages were

photographed.[4] 2RP 34. Those text messages include a photograph of Gerzic holding what appears to be a shotgun under his chin, with the accompanying message: "This You want?" Ex. 4. In the messages, Gerzic repeatedly asks Clark, "are you with me or no?" Ex. 4. And, finally, "you want me dead?" Ex. 4.

After speaking with Clark, Cufley went outside to where Gerzic was being detained by other officers. 2RP 35. Cufley advised Gerzic of his Miranda[5] rights and Gerzic agreed to speak to him. 2RP 35. Gerzic said that he had been at Clark's apartment and that they had argued. 2RP 35. He said that when she asked him to leave he had left, but he admitted to having come back and knocked on her door. 2RP 35. He said that when she again asked him to leave, he did leave and that's when he was detained by police. 2RP 35.

C. ARGUMENT

1. THE PORTION OF THE 911 CALL THAT WAS ADMITTED WAS NONTESTIMONIAL AND DID NOT VIOLATE GERZIC'S RIGHTS UNDER THE CONFRONTATION CLAUSE.

Gerzic claims that although the trial court redacted significant portions of Clark's 911 call, a segment of the admitted call violated his

[4] The photographs of the text messages on Cufley's phone were admitted as Exhibit 4.

[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

right to confront witnesses against him. Gerzic's claim must be rejected. The portions of the 911 call admitted by the trial court concerned, and were necessary to resolve, a present emergency. Therefore, the evidence was not testimonial in nature and was properly admitted.

A Confrontation Clause challenge is reviewed de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). Under the Sixth Amendment[6], "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that this provision prohibits the "admission of testimonial statements of a witness who d[oes] not appear at trial unless he [is] unavailable to testify, and the defendant had a prior opportunity for crossexamination." In Crawford, the Court reversed the defendant's conviction because the trial court had admitted a police-recorded statement of a witness who was unavailable because of spousal privilege. Id. at 69. Without fully spelling out a comprehensive definition of "testimonial," the Court stated that at minimum it includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations." Id. at 68.

[6] U.S. CONST. amend. VI.

The United States Supreme Court considered further what statements are testimonial in the consolidated cases of Davis v. Washington, and Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). As with the case at bar, both of these cases involved domestic violence. The facts of Davis are remarkably similar to this case. In Davis, the victim made statements to a 911 operator during a domestic disturbance with Adrian Davis, her former boyfriend. Id. at 817. She reported, "He's here jumpin' on me again," and "[h]e's usin' his fists." Id. The operator asked for his name, which the victim provided. Id. at 818. The victim also responded that Davis was "runnin' now." Id. She did not appear at trial, and the trial court admitted the 911 recording of her conversation with the operator.

In Hammon, police responded to a domestic disturbance call at the residence shared by the victim and defendant. Id. They found Amy Hammon on the front porch, appearing "somewhat frightened." Id. She told them "nothing was the matter." Id. After obtaining her permission, police entered the house and encountered the defendant. Id. They kept the parties separated while interviewing them both. Id. at 819-20. The victim completed for police an affidavit detailing the defendant's assaults against her and her daughter that had taken place before police arrived. Id.

at 820. When the victim failed to appear at trial her affidavit was admitted into evidence. Id. at 820-21.

The Supreme Court affirmed the conviction in Davis and reversed the conviction in Hammon. Id. at 834. In its analysis, the Court expanded upon the meaning of "testimonial" discussed in Crawford and addressed the meaning of an ongoing emergency. Id. at 822. In doing so, the Court adopted the "primary purpose" test to determine whether a statement is testimonial. Id. Under this test:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id.

Applying this test to the victim's 911 call in Davis, the Court decided the statements were nontestimonial. Id. at 828. The key distinguishing factors for the Court were that the Davis victim's statements were about events as they were actually happening, rather than describing past events; that there was an ongoing emergency, and the statements were necessary to resolve that emergency; and, that the statements were not formal. Id. at 827.

In contrast, it was clear that the police interview that resulted in the Hammon victim's affidavit was part of an investigation into past criminal conduct. Id. at 829. There was no emergency at the time of the interrogation. Id. at 829-30. The Court found that, although done at her house rather than the police station, the victim's statements were sufficiently formal, and, therefore, testimonial. Id. at 830. The statements were not a cry for help to enable authorities to end a threatening situation. Id. at 832.

In Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), the Supreme Court further developed the application of the "primary purpose" test. The Court held that the primary purpose of a statement alleged to be testimonial is determined by "objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." Id. at 370. Whether an "ongoing emergency" exists at the time of the statements "is among the most important circumstances informing the 'primary purpose' of an interrogation." Id. at 361. This is because "statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation." Id. at 370. "[T]he nature of what was asked and answered" helps determine whether statements were elicited "to be able to

resolve the present emergency or to establish what had happened in the past." Id. at 367.

In State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009), our state supreme court compared the circumstances in Crawford with those in Davis and adopted a four-factor test to determine whether the primary purpose of police interrogation is to enable assistance to meet an ongoing emergency:

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant.
>
> (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency.
>
> (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of a suspect so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial.

(4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19. In Koslowski, police responded to a robbery victim's residence after her 911 call. When the victim died before trial, the State sought to admit, and the trial court admitted, extensive statements the victim had made to the responding officers at her residence after the robbers had left. The 911 call itself was not at issue. The Koslowski court, applying the four-factor test and specifically comparing the facts to Davis, held that the statements were testimonial because the circumstances showed that the primary purpose of the police interrogation was to establish past events relevant to a later criminal prosecution. Id. at 432.

Here, application of the Koslowski factors establishes that the portions of Clark's 911 call that were admitted were correctly found by the trial court to be nontestimonial. Gerzic claims that the court erred in admitting any of the 911 call beyond page 3, line 11, of Exhibit 8, because, according to his argument, the situation at that point was no longer an emergency, but rather an inquiry into a past crime. Brief of Appellant, at 10.

Looking at the first Koslowski factor, clearly Clark's 911 call concerned current events as they were actually occurring that required police assistance. At the outset of the call, Gerzic was still present, yelling and banging on Clark's apartment door, threatening to break it down. He had very recently struck Clark and threatened her life. When he left he said he was going to his car to get a gun.

Gerzic's argument that the emergency ended when he left Clark's apartment has been specifically rejected by several authorities. In a very similar case, State v. Reed, 168 Wn. App. 553, 567-68, 278 P.3d 203 (2012), the court of appeals held that it was not error for the trial court to have admitted a portion of a domestic violence victim's 911 call that occurred after the assailant had left the scene. In that case, it was significant to the court "that Reed, having driven away only moments before [the victim] placed the call, was highly mobile and could potentially return to the scene to resume the assault. Id. at 568.

Reed quoted State v. Ohlson, 162 Wn.2d 1, 18, 168 P.3d 1273 (2007): "There is no way to know, and every reason to believe, that Ohlson might return... and perhaps escalate his behavior even more." 168 Wn. App. at 568. In Ohlson, our supreme court rejected the appellant's Confrontation Clause challenge, upholding the admission of a victim's 911 call even though the defendant had driven away minutes

before the call. Ohlson, 162 Wn.2d at 19. Regarding the presence of the defendant, or lack thereof, at the time of the 911 call, the Ohlson court stated, "the critical consideration is not whether the perpetrator is or is not at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an on-going emergency." Id. at 15.

The second Koslowski factor also supports the trial court's admission of Clark's 911 call. Here, under these circumstances, a reasonable listener would plainly conclude that Clark was facing an ongoing emergency that required help. This was a 911 call for help against a bona fide physical threat, which Koslowski recognizes as "a clear example where a reasonable listener would recognize that the speaker was facing such an emergency." Koslowski, 166 Wn.2d at 418-19. This was not a Hammon situation, in which officers took the victim's statement after having arrived at the scene and ensured that the victim was safe and separated from the suspect.

Turning to the third factor, the nature of the questions asked by the 911 operator and the answers given by Clark, when viewed objectively, were clearly necessary to resolve the emergency. In addition to the questions and answers relating to the assault, threat to kill, and the suspect's access to a gun, the 911 operator asked for Clark to provide Gerzic's full name and date of birth. Gerzic argues that asking for this

type of "pedigree" information indicated there was no longer an ongoing emergency. Brief of Appellant at 9. Again, this argument has been specifically rejected. Ohlson held that questions and answers establishing the suspect's identity were necessary to resolve the present emergency. Ohlson, 162 Wn.2d at 12. "Resolving the present emergency even encompassed establishing the assailant's identity because it was important for the responding officers to know whether they might 'be encountering a violent felon.'" Ohlson, 162 Wn.2d at 12 (quoting Davis, 547 U.S. at 827). Similarly, the 911 operator's question regarding whether Gerzic would likely comply with commands of police officers was clearly intended to obtain information relevant to officer safety during the emergency.

Addressing Koslowski's fourth factor, here the interrogation was informal. Clark was responding to the 911 operator's questions during an ongoing emergency in a setting that was not yet safe. The Supreme Court drew this distinction in comparing the circumstances of the victim in Davis to those of the Crawford victim:

> And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's (the victim in Davis) frantic answers were provided over the phone, in an environment that was

> not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Davis, 547 U.S. at 827.

Here, considering all of the circumstances, it is clear that the primary purpose of the questions and answers between the 911 operator and Clark was to enable police assistance in meeting an ongoing emergency. The trial court properly determined these statements to be nontestimonial, and Gerzic's right to confrontation was not violated by the admission of the statements.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE TEXT MESSAGES HAD BEEN SUFFICIENTLY AUTHENTICATED.

Gerzic claims that the trial court erroneously admitted the photographs of text messages sent to Clark's phone because, he contends, they were not sufficiently authenticated. Gerzic's claim is without merit. The State proffered evidence that established a prima facie basis to conclude that the questioned evidence was what it was purported to be -- text messages sent by Gerzic to Clark.

A court's admission of evidence is reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. Magers, 164 Wn.2d at 181.

At trial, Officer Cufley testified that Exhibit 4 consisted of photographs that "fairly and accurately" depicted text messages that Clark had shown him on her phone. 2RP 34. Cufley testified that Clark told him that the messages had been sent by Gerzic. Id. Gerzic's attorney objected to the admissibility of Exhibit 4 "due to lack of foundation." Id.

"Authentication is a threshold requirement designed to assure that evidence is what it purports to be." State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). Under ER 901(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." Because the proponent must make only a prima facie showing of authenticity for purposes of establishing admissibility, ER 901 is met "if the proponent shows enough proof for a reasonable fact finder to find in favor of authenticity." In re Detention of H.N., 188 Wn. App. 744, 355 P.3d 294, 298 (2015) (quoting Payne, 117 Wn. App. at 108).

ER 901(b) provides examples of authentication conforming with the requirements of the rule. These examples are "[b]y way of illustration

only, and not by way of limitation." ER 901(b). They include the following:

> (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
>
> ...
>
> (10) *Electronic Mail (E-mail).* Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the email purports to be sent from an email address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the email, taken in conjunction with the circumstances, are sufficient to support a finding that the email in question is what the proponent claims.

Id. at (4), (10).

The current version of ER 901(b) does not specifically address text messages. Nevertheless, these illustrative examples provide proper bases for the trial court's determination in this case, and have been relied on by this court in two recent decisions examining the authentication of text messages, H.N., supra, and State v. Bradford, 175 Wn. App. 912, 308 P.3d 736 (2013).

In H.N., the trial court admitted "e-mailed screenshots of text messages" that were used by a medical expert as part of her opinion testimony. H.N., 188 Wn. App. at 750. At issue in the involuntary

commitment hearing was H.N.'s mental condition, and the text messages, purported to be authored by H.N., included a number of statements of intent to do harm to herself. Although in H.N., the sender of the text messages had admitted to the medical expert that she had created and sent the texts, the court of appeals, citing Bradford, supra, nonetheless relied heavily on assessment of the content of the messages in holding that the trial court did not abuse its discretion by admitting them. See H.N., 188 Wn. App. at 753-54. The court found that "the distinctive characteristics of the messages taken in conjunction with the circumstances are sufficient to support authentication." Id. at 759.

In Bradford, factually very similar to the case at bar, the text messages at issue were purportedly sent by the defendant, who did not admit having authored or sent the messages. Bradford was convicted of several offenses, including felony stalking of his ex-girlfriend. Bradford, 175 Wn. App. at 915. Among the evidence admitted at trial were text messages that Bradford had sent to his ex-girlfriend and her friend. Id. at 928. The ex-girlfriend received a number of text messages, which she then forwarded to a friend who repeatedly reported having received the messages to the same responding police officer. Id. at 918. The officer would view the text messages on the friend's phone and record each message verbatim into his notebook, from which he would subsequently

copy his entries into a police report. Id. At trial, the contents of the text messages sent to the ex-girlfriend were introduced through the testimony of the officer who read to the jury quotations from the text messages from his police report. Id. at 919 n.1.

Bradford held that sufficient evidence had been produced to support the trial court's admission of the text messages. Id. at 928-29. Several factors were important to the court's analysis. First, the court noted that the defendant's actions showed his "desperate desire" to communicate with his ex-girlfriend. Id. at 929. The court stated that "[i]t was consistent with this obsessive behavior that he would also send text messages to [the friend] as part of his efforts to contact [his ex-girlfriend]." Id. Second, the court stated that "the content of the text messages themselves indicated that Bradford was the individual who sent them." Id. For example, the text messages repeatedly mentioned his ex-girlfriend's name. Further, the threats contained in the text messages "were consistent with Bradford's previous threats made in 2010." Id.

Here, the trial court did not err in admitting Exhibit 4, the photographs of text messages. There was prima facie evidence that the offered exhibit was what it purported to be -- text messages from Gerzic to Clark. In addition to the testimony of Officer Cufley that he had personally seen the text messages on Clark's phone and that Clark had told

him they were sent by Gerzic, as in Bradford the content of the text messages is consistent with other aspects of the case. Clark had called 911 that night because of Gerzic's reaction to her attempts to break off their relationship. Ex. 8 at 2. He had threatened to put a bullet in her head if she would not continue the relationship. Id. He had also threatened to kill himself. Id. at 5. Similarly, the text messages evince Gerzic's desperation to continue his relationship with Clark. His texts begin with, "Did you want me for life together?" Ex. 4 at 1. He then repeatedly asks, "Are you with me or no?" Ex. 4 at 3. He states: "I am happy with You don't do this to me." Ex. 4 at 3. His text messages included a photograph of himself holding a shotgun barrel to his chin with the caption, "This you want?"[7] Ex. 4 at 1-2. Thus, the content of the text messages is entirely consistent with the nature of the emergency responded to by police on the night of Clark's 911 call.

Gerzic's arguments that the trial court abused its discretion in admitting the text messages are without merit. Gerzic argues that the source of the messages was not sufficiently established because more than one person can use a phone or an email address. He also argues that "multiple applications exist which allow for text messages to be sent from

[7] On appeal, Gerzic does not deny that the photograph is of him. "The only corroboration which connected Mr. Gerzic to the text messages was a picture of him." Brief of Appellant at 20.

someone other than the purported user." But, considering the internal consistencies between the text messages and Clark's 911 call, argued above, this is mere speculation. " '[T]he proponent of offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be....' " H.N., 188 Wn. App. at 751 (citing State v. Andrews, 172 Wn. App. 703, 708, 293 P.3d 1203 (quoting State v. Thompson, 777 N.W.2d 617, 624 (N.D. 2010)), review denied, 177 Wn.2d 1014 (2013)).

In a similar vein, Gerzic seems to argue that "forensic evidence" is required to authenticate text messages. He asserts that in Bradford, "the police performed a 'phone dump' of the receiver's cell phone, generating a report that itemized each text message sent or received to the phone over the period of several months, including the text messages at issue." Brief of Appellant at 21. That is a misleading and partial reference to Bradford. In Bradford, only a portion of the admitted emails had been authenticated by forensic testimony regarding the "phone dump." As discussed above, Bradford also upheld the trial court's admission of text messages that a police officer had simply seen on the victim's phone and had recorded verbatim in his notes and then transferred into his incident report. There is no requirement of "forensic evidence" to authenticate text messages.

Gerzic also argues that because Clark did not testify, "without an acknowledgment from either party, the prosecution did not establish the authenticity of the text messages." Brief of Appellant at 20. However, Officer Cufley, in fact, testified that Clark told him that Gerzic had sent her the text messages. 2RP 34. Gerzic did not object to the officer's testimony as hearsay. Aside from "lack of foundation," Gerzic's trial counsel cited no other basis of objection to the admission of Exhibit 4.[8] 2RP 34. Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An objection in the trial court on different grounds than those argued on appeal is not sufficient to preserve the alleged error. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).

Even had Gerzic objected to Officer Cufley's testimony as containing hearsay, the trial court would not have been precluded from considering the testimony in assessing the foundation for the text messages. The trial court is not bound by the rules of evidence in making the

[8] After Exhibit 4 was admitted, upon further discussion counsel for Gerzic stated "We've addressed the hearsay issues generally in regards to these – these items." 2RP at 36. It's not clear what counsel was referring to. The record does not reflect that there had been any argument that the text messages were hearsay.

preliminary admissibility determination. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007) (citing ER 104(a)). The trial court may rely on lay opinion, hearsay, or any other evidence supporting the proponent's position. Id. While the court must find the evidence reliable, the evidence supporting admissibility need not itself be admissible. Id. For example, a sound recording does not need to be authenticated by any witness who has any personal knowledge of the events of the recording. Rather, a trial court could simply listen to the recording and determine admissibility based on a comparison of the voice to a known voice, or by the content of the conversation on the recording. Id.; State v. Danielson, 37 Wn. App. 469, 471-72, 681 P.2d 260 (1984) (the content of a communication, such as a declarant's message in a communication, can be used and may alone be sufficient to prove authentication). As the Williams court aptly put it, "the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic." Williams, 136 Wn. App. at 501.

The trial court did not abuse its discretion in finding that the State had presented prima facie evidence supporting the admission of Exhibit 4. Gerzic has failed to prove that no reasonable person would have taken the

position adopted by the trial court and found that the messages were what they purported to be, text messages from Gerzic.

3. GERZIC FAILS TO ESTABLISH CONSTITUTIONAL AND MANIFEST ERROR IN ARGUING FOR THE FIRST TIME ON APPEAL THAT ADMISSION OF THE TEXT MESSAGES VIOLATED HIS RIGHT TO CONFRONT WITNESSES.

Gerzic also claims that the trial court erred by allowing the admission of the text messages without Clark being present for cross examination. Although he did not object on this basis at trial, Gerzic now claims that his due process right to confront witnesses against him was violated by the admission of the text messages.

In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. Not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 343-44, 835 P.2d 251 (1992) ("[I]t is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals."). A manifest error is "an error that is 'unmistakable,

evident or indisputable,'" and that has "practical and identifiable consequences in the trial of the case." State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)).

Here, there was only one response by Officer Cufley regarding the source of the text messages that even arguably contained hearsay. First, Cufley testified that he had seen the text messages on Clark's phone, which in no way implicated hearsay. 2RP 33. Cufley then testified that Clark had told him that the messages were from Gerzic. 2RP 34. Gerzic's failure to object to that testimony on the basis of either hearsay or the confrontation clause deprived the trial court and the State of any opportunity to respond.

As argued above, a trial court may consider otherwise objectionable evidence in determining whether a foundation for admission of other evidence has been established. Gerzic has provided no authority for the proposition that a court may not consider hearsay, testimonial or not, for the purpose of authenticating a proffered exhibit. Thus, Gerzic, who did not object at trial, cannot establish manifest error that is "unmistakable, evident or indisputable." ("Where no authorities are cited in support of a proposition, the court is not required to search out

authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Gerzic may also be arguing that, aside from the court considering for foundation purposes Officer Cufley's testimony regarding Clark having told him that Gerzic sent the text messages, his confrontation rights were violated by allowing the jury to hear the testimony as substantive evidence. Even if it were error, Gerzic cannot establish that the error was manifest such that it caused "practical and identifiable consequences in the trial of the case." As argued herein, the text messages were properly admitted. Thus, if the jury had been precluded from hearing that Clark had told Cufley the source of the messages, the jury would still have had the text messages and heard Cufley's testimony that he had personally seen them on Clark's phone. As discussed above, the consistencies between the content of the messages and the nature of the 911 call, as well as the photograph of Gerzic holding a shotgun to his chin, left no doubt as to the source of the messages.

Gerzic has failed to establish that his due process confrontation right was violated by Clark not testifying at his trial.

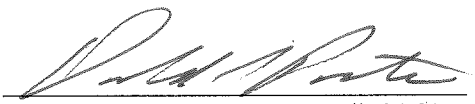
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Gerzic's judgment and sentence.

DATED this 10 day of November, 2015.

Respectfully submitted,

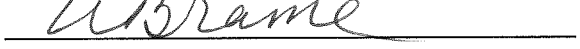
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONALD J. PORTER, WSBA #20164
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Travis Stearns, containing a copy of the Brief of Respondent, in STATE V.ADEM GERZIC, Cause No. 73242-1-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.



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Date : Nov. 10, 2015

Done in Seattle, Washington