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Court of Appeals
Division II
State of Washington
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Supreme Court No. 97240-1
COA No. 50930-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VICTOR BUENO,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Victor Bueno requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Bueno, No. 50930-0-II, filed on April 23, 2019. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. An out-of-court statement is hearsay if it is offered for the truth of the matter asserted. Here, the State offered the contents of a letter to prove Bueno wrote the letter. The statements were relevant for that purpose only if they were true. Were the statements hearsay?

2. An otherwise inadmissible hearsay statement is admissible as a statement of identification under ER 801(d)(1)(iii) if it is made by a witness identifying a person "after perceiving the person." Here, the statements in the letter were not made by a witness identifying a person "after perceiving the person." Instead, they merely tended to connect Bueno to the crime. Did the trial court abuse its discretion in admitting the contents of the letter under this hearsay exception?

3. To prove the crime of violation of a no-contact order, the State was required to prove beyond a reasonable doubt that Bueno

wrote the letter. Did the State fail to meet this burden where the evidence showed Bueno was unable to read and write in English?

C. STATEMENT OF THE CASE

Victor Bueno and Mardi Jo Harris were married for 16 years. They lived with Harris's son Jordan in a house in Bremerton. The couple separated in 2015 and divorced in 2016. RP 422-23, 440.

In November 2015, a two-year no-contact order was entered prohibiting Bueno from contacting Harris. CP 5. Bueno acknowledged receiving notice of the order. RP 354-56, 371.

On March 30, 2017, Harris received an envelope in the mail containing a card and a letter inside. She believed Bueno had sent the letter and notified the police. RP 399-401, 406-08, 428-29; Exhibit 5A.

The State charged Bueno with one count of felony violation of a court order.[1] CP 1-2.

Bueno testified he did not send the letter and did not know who did. RP 463, 502. He could not have sent the letter because he does not know how to read or write in English. RP 462-64. He was born in Cuba, where he learned how to read and write in Spanish. RP 464, 498.

---

[1] The State alleged Bueno had two prior convictions for violating the provisions of a court order. CP 1-2. At trial, Bueno stipulated to the two prior convictions. CP 23-26; RP 372.

He never received any formal education in the English language. RP 462-63. While he and Harris were married, she would assist him when he needed to communicate with someone in English, such as at medical appointments or when dealing with social security. Harris would fill out the forms and speak to the individuals. RP 463-64. Bueno has never written a letter to Harris. RP 464.

Bueno was assisted by a Spanish-language interpreter throughout the proceedings. E.g., RP 2, 3. His testimony was translated into English for the jury. RP 462.

To help prove Bueno wrote the letter, the State moved to admit the contents of the letter, arguing several statements of fact could be connected to Bueno's own circumstances and experiences. The State explained, "The contents of the letter itself are the most important part of the State's case, as the contents in context prove that it was, in fact, the defendant who wrote this letter." RP 32.

Defense counsel objected to admission of the contents of the letter as hearsay. Counsel pointed out that most of the statements could not be connected to Bueno unless they were actually true. Therefore, they were being offered for the truth of the matters asserted and were hearsay. RP 384-87.

The trial court overruled the objection. The court reasoned that the contents of the letter were not being offered for the truth of the matters asserted because they were offered for the purpose of "identification." RP 387.

The court ordered portions of the letter redacted because they were inflammatory, not because they were hearsay. RP 39-49; Exhibit 5A. At trial, Harris read the redacted contents of the letter aloud to the jury as follows:

> Ola Mama, how are you doing? I'm trying to pick up my stuff, but I have to talk to you first before I get it because I don't want to make a mistake. I don't want to hurt you like you do to me.
>
> You know you call, lie to me, tell me to come home. And you lied and called the police on me. Five cop cars, police in the terminal ferry in Bremerton, and put guns in my face and put me on the floor. You're the one who put me in jail.
>
> The pastor for the church and your family speak to me and they told me not to do that. God love me. God bless me every day, and God be there for me, and God make me forget you and my son.
>
> Thank you so much for everything you have done to me because you know I have been there for my son for 15 years. When you been work, I've been here my son every day. I do – I don't go nowhere. I give to you free to go everywhere while I'm in the house with my son.
>
> You listen to too many people. You know when I first met you exactly what I'm doing. There was nothing new to you. I see you're an evil woman. You want everything for you. All I want is my stuff, my black jacket, my shoes, my clothes, my cell phone, because the police never give it to me.

> Please, I need the phone because contacts, addresses for my family in Cuba is in the phone. Do you want money? Do you want some money for the phone? Let me know.
>
> I have a big medical problem. I'm not asking for you to be there for me because everything is over. I have a big cash coming. The company want more to make a deal with me because it's too much money.
>
> I put a lawsuit about what happened on the night the police came to the house. I never take anything. The video camera he show put my cell phone in my pocket, then the lady find out the electronic device for my car because the lady that found it has it so I can't get it back.
>
> So that's why I say have no charger. I have a lawyer, John Mellow and Taniece Johnson, that's my lawyers. I have to go to Olympia and sign the paper so the money can go to the Bank of America in Seattle. I was in Bremerton for four days four blocks from your house.
>
> I was staying in Paula house. I need you or my son to call me right away because I don't have too much life and I'm about to die because I have cancer and doctor said he can't do nothing because the cancer is too big.
>
> No matter what happened, I want you to have a wonderful life with any man you want. And I miss my son so very much. And tell him God bless you. God is good. God is gonna be here for me. I love you. Call me.

RP 434-36. Written at the bottom of the letter was a telephone number. The letter was signed "Papi." RP 436.

The State questioned Harris in detail about the statements in the letter, attempting to link them to Bueno. The prosecutor elicited that Harris indeed had some of Bueno's belongings, including his clothing and a cell phone he had used, as stated in the letter. RP 438, 441. Harris

had called the police on Bueno, as stated in the letter. RP 439. Jordan had lived with them while they were married and Bueno thought of him as a son, as stated in the letter. RP 439. Bueno still had family in Cuba, as stated in the letter. RP 441. Harris did not know "Paula" but she remembered Bueno talking about her. RP 441. Bueno had a "multitude" of health issues, consistent with the statements in the letter. RP 443.

The police never tried to obtain fingerprints or DNA evidence from the card or the letter in an effort to prove they came from Bueno. RP 416-17. The State conducted no handwriting analysis. RP 417-18.

The jury found Bueno guilty as charged. CP 44-45. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court abused its discretion in admitting the contents of the letter under the hearsay exception for statements of identification.

a. The statements of fact contained in the letter were inadmissible hearsay unless they fell under an exception to the hearsay rule.

The statements of fact contained in the letter that were offered to prove Bueno wrote the letter were offered to prove the truth of the

matters asserted. Therefore, they were inadmissible hearsay unless they fell under an exception to the hearsay rule.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Under the hearsay rule, "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802.

The statements of fact contained in the letter would not be relevant to prove Bueno wrote the letter unless they were actually true. For example, the statement, "you lied and called the police on me," was not relevant to show Bueno wrote the letter unless it was true that Harris had called the police on him. That is why the State elicited from Harris that she had called the police. RP 439. The State could not link this statement to Bueno unless the event had actually occurred.

Likewise, the statements, "I'm trying to pick up my stuff," and, "All I want is my stuff, my black jacket, my shoes, my clothes, my cell phone," were relevant only if it was true that Harris indeed had some of Bueno's belongings. Thus, the State elicited from Harris that she did have some of Bueno's belongings, including his clothing and a cell

phone he had used. RP 438, 441. Again, the State could not link this statement to Bueno unless it was actually true.

Most of the statements in the letter were relevant to show that Bueno wrote the letter only if they were true. Thus, they were offered for the truth of the matters asserted and were inadmissible unless they fell under an exception to the hearsay rule. ER 801(c); ER 802.

b. The statements in the letter did not fall under the hearsay exception for statements of identification, contrary to the trial court's ruling.

The trial court ruled that the contents of the letter were admissible because they were not offered for the truth of the matters asserted but were offered for the purpose of "identification." RP 387. This ruling was erroneous for two reasons. First, as shown above, the statements *were* offered for the truth of the matters asserted. Second, they did not fall under the hearsay exception for statements of identification.

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Kinard, 109 Wn. App. 428, 435, 36 P.3d 573 (2001). A court abuses its discretion if it fails to abide by an evidence rule's requirements. State v. Fisher, 165 Wn.2d 727,

745, 202 P.3d 937 (2009). A court's interpretation of an evidence rule is reviewed *de novo* as a matter of law. Id.

Under the hearsay exception for statements of identification, an out-of-court statement by a "witness" is not hearsay if it is "one of identification of a person made after perceiving the person." ER 801(d)(1)(iii).

The rule "excepts from hearsay treatment any statement identifying an accused made by a perceiving witness who testifies at trial and is subject to cross examination." State v. Grover, 55 Wn. App. 252, 256, 777 P.2d 22 (1989). The rule allows as substantive evidence an out-of-court statement identifying a person, whether the statement is made directly to the police at the scene, or during a line-up or photographic montage or other similar identification procedure. Id.

The rule does *not* allow "out-of-court statements that arguably identify a person (typically the defendant in a criminal case) but that really describe facts that occurred in the past and implicate the defendant in the crime charged." 5B Karl B. Tegland, Washington Law and Practice: Evidence Practice § 801.29 (6th ed. 2017). Such an application of the rule "erroneously ignore[s] the purpose and language of the rule." 2 McCormick on Evidence § 251 (7th ed. 2016).

The purpose of ER 801(d)(1)(iii) is to allow out-of-court identifications as substantive evidence because they are preferable to in-court identifications. United States v. Kaquatosh, 242 F. Supp. 2d 562, 565-67 (E.D. Wis. 2003).[2] First, courtroom identifications are thought to be less convincing than prior, out-of-court identifications made when a witness's memory is fresher and the conditions less suggestive. Id. Thus, corroboration with the earlier identification is permitted. Id. Second, the rule was designed to address the situation where a witness cannot make an in-court identification due to memory lapse or recantation. Id. In that situation, evidence of an earlier identification is admissible so long as the witness is available and subject to cross-examination at trial. Id.

Consistent with this purpose, the plain language of ER 801(d)(1)(iii) allows only prior statements of "identification." The legislative history of the rule makes clear that it "is intended to apply to out-of-court identification procedures such as line-ups, show-ups and displays of photographs" which themselves must comport with the

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[2] Washington's ER 801(d)(1)(iii) is the same as FRE 801(d)(1)(C). Tegland, Washington Practice: Evidence Law and Practice, supra, at § 801.1, n.1. Thus, federal case law interpreting FRE 801(d)(1)(C) is persuasive authority in interpreting Washington's rule. In re Det. of Pouncy, 168 Wn.2d 382, 392 n.9, 229 P.3d 678 (2010).

standards of due process. State v. Shaw, 2005 SD 105, 705 N.W.2d 620, 628 (S.D. 2005).

Moreover, the out-of-court statement must be made by the witness "after perceiving the person." ER 801(d)(1)(iii). The purpose of this requirement is to "permit evidence of an identification made after recognizing the assailant on subsequent observation." Kaquatosh, 242 F. Supp. 2d at 565 (internal quotation marks and citation omitted).

Washington cases applying ER 801(d)(1)(iii) generally comply with these requirements. An out-of-court identification has been held admissible under the rule only where the witness identified the accused or his likeness in a line-up, show-up, photo montage or similar procedure, or directly to a police officer at the scene. See State v. Stratton, 139 Wn. App. 511, 514, 161 P.3d 448 (2007) (statements of identification made by witnesses after viewing suspects in show-up and photomontage); Grover, 55 Wn. App. at 256 (statement of identification made by witness to police detective at scene of crime); State v. Jenkins, 53 Wn. App. 228, 230, 766 P.2d 499 (1989) (statement of identification made by witness after viewing suspect in photo montage).

Thus, the rule is limited to statements of "identification" made by a witness "after perceiving the person." ER 801(d)(1)(iii). It does not apply to other kinds of out-of-court statements, even those that connect the accused to the crime in a case where identity is at issue. The rule does not allow testimony "that a certain person, known to the witness, committed a crime." McCormick on Evidence, supra, at § 251. It is also not a proper way to introduce "detailed accounts of the actual crime." Randolph v. United States, 882 A.2d 210, 220 (D.C. 2005).

Applying these principles here, it is apparent the contents of the letter were not admissible under the hearsay exception for statements of identification. None of the statements was made by a witness identifying a person "after perceiving the person." ER 801(d)(1)(iii). Instead, the statements were allegedly made by Bueno himself. They were admitted only because they tended to connect him to the crime. The trial court abused its discretion in admitting the statements under the hearsay exception for statements of identification.

2. The State did not prove beyond a reasonable doubt that Bueno wrote the letter.

The State did not prove beyond a reasonable doubt that Bueno wrote the letter, in violation of due process.

Due process places the burden on the State to prove the elements of an offense beyond a reasonable doubt. State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Although the State may rely upon circumstantial evidence, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). "A 'modicum' of evidence does not meet this standard." Rich, 184 Wn.2d at 903 (quoting Jackson, 443 U.S. at 320).

To prove the crime, the State was required to prove beyond a reasonable doubt that Bueno knowingly violated a provision of the no-contact order. CP 37; RCW 26.50.110. The State relied entirely upon the letter received by Harris in the mail to prove the crime.

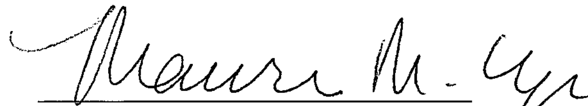
The State did not prove beyond a reasonable doubt that Bueno knowingly violated a provision of the no-contact order because it did not prove he wrote the letter. Bueno denied writing the letter. RP 463, 502. He could not have written the letter because he cannot read or write in English. RP 462-63. He was assisted by a Spanish-language interpreter throughout the proceedings. RP 2, 3, 462. When he and Harris were married, she would assist him whenever he needed to communicate with someone in English. RP 463-64. He has never written her a letter. RP 464.

Reversal for insufficient evidence is equivalent to an acquittal and bars retrial for the same offense. State v. Hummel, 196 Wn. App. 329, 359, 383 P.3d 592 (2016). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id. (quoting Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). The conviction must be reversed and the charge dismissed.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 22nd day of May, 2019.



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VICTOR BUENO, Appellant.	No. 50930-0-II UNPUBLISHED OPINION

MELNICK, P.J. — A jury convicted Victor Bueno of violating a court order by sending a letter to his ex-wife, Mardi Jo Harris. Bueno appeals his conviction, arguing that the trial court erred by admitting the letter itself into evidence because it was hearsay and that insufficient evidence supports his conviction because he is unable to read or write in English. Bueno makes additional arguments in a statement of additional grounds (SAG). We affirm.

FACTS

Bueno and Harris divorced in 2016 after 15 years of marriage. In November 2015, the Bremerton Municipal Court issued a domestic violence no-contact order prohibiting Bueno from contacting Harris through November 2017.

On March 30, 2017, Harris received a letter she believed to be from Bueno. She immediately called the Bremerton police and reported Bueno's violation of the order.

The State charged Bueno with felony violation of a court order,[1] with an allegation that Bueno and Harris were members of the same family or household. The case proceeded to a jury trial.

Bueno moved to exclude the contents of the letter because it was hearsay, irrelevant, and unfairly prejudicial. The letter referenced an incident where Harris had Bueno arrested and Harris's possession of some of Bueno's property. It was addressed "Hola Mama" and signed "Papi," and included a phone number at the bottom. Ex., at 98, 101.

The court admitted the letter for "context that somehow helps prove the State's case," and because there were "certain identifiers or facts that are written about here that would somehow allow for the victim to—allow for the victim to say that she knows because of these facts that Mr. Bueno is the writer." 1 Report of Proceedings (RP) at 38. The court redacted certain prejudicial sections of the letter. It stated that the content of the letter was relevant "if the State can hinge actions, words, somehow to be able to identify that these phrases can be connected to Mr. Bueno." 1 RP at 45.

Several days after the trial began, Bueno renewed his motion to exclude the contents of the letter, again arguing it was hearsay. Bueno argued that the specific events referenced in the letter were offered for the truth of the matter asserted because they would only show Bueno had written the letter to the extent that those events actually happened. He claimed that, because the letter was only relevant if the events described in it were true, it was offered for the truth of the matter asserted and was inadmissible hearsay. The court denied the renewed motion, holding that specific events

[1] The State alleged that Bueno had at least two prior convictions for violating provisions of a court order, making this violation a Class C felony. RCW 26.50.110(5).

from the letter "would not be offered for the truth of [the] matter asserted, but for another purpose, i.e., identification." 4 RP at 387.

Harris believed Bueno authored the handwritten letter for numerous reasons. Bueno would often go by "Papi," the name by which she called him. The envelope the letter came in misspelled both her name and the street she lived on, consistent with the way Bueno often pronounced both words. In addition to the letter, the envelope contained a card with flowers and a hummingbird on it that Harris believed Bueno would have sent. During the marriage, Bueno would say "Olá Mamã [sic]" "almost on a daily basis" to Harris and "Mama" was one of the names he called her. 4 RP at 438.

Harris recognized Bueno's handwriting. She also recognized the phone number written in the letter as a number from which Bueno had called her during divorce proceedings. Harris said the tenor and attitude of the letter "sound[ed] exactly like him." 4 RP at 443. Harris could not think of anyone besides Bueno who might have sent the letter.

Harris also testified that several events referred to in the letter were consistent with her relationship with Bueno. She confirmed that Bueno had previously had contact with police because of her. She also stated that she had a black jacket and shoes that belonged to Bueno and a cell phone that he had used during their marriage, all items specifically referenced in the letter.

Harris knew that Bueno could read, write, and speak in both Spanish and English. They would communicate in English at home, and Bueno would communicate with her son, who did not speak any Spanish, in English.

Bueno testified that he did not write the letter. He said he could not have written the letter because he could not read or write in English. Bueno testified that, throughout his marriage to Harris, Harris had assisted him any time he needed to fill out forms or interact with English-speaking people.

Jordan Harris, Harris's son, testified in rebuttal that Bueno could write in English and he had seen him do so on multiple occasions. He recognized the letter as Bueno's handwriting.

The jury convicted Bueno of violating a court order and found that Bueno and Harris were members of the same family or household. Bueno appeals his conviction.

ANALYSIS

I. HEARSAY

Bueno contends the letter was inadmissible hearsay because it was offered to prove the truth of the matters asserted in it, because it only showed he had written the letter if its contents were true. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is generally inadmissible unless it comes within an exception. ER 802.

We review whether or not a statement was hearsay de novo. *State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014). We then review a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds supported by the record. *Williams*, 137 Wn. App. at 743.

The State offered the letter to prove that Bueno violated the court's no-contact order by sending Harris the letter. The letter included statements that Harris had had Bueno arrested at the

Bremerton ferry terminal and that Harris had possession of Bueno's black coat and shoes. However, the State did not seek to prove that Bueno had been arrested at the Bremerton ferry terminal or whether Harris had possession of items belonging to Bueno. These events helped authenticate Bueno as the author of the letter.

Because the truth of the matters asserted in the letter was irrelevant except to prove the identity of the letter's author, the letter was not offered to prove the truth of the matters asserted. It did not meet the definition of hearsay and the trial court did not err by admitting it into evidence.

II. SUFFICIENCY OF EVIDENCE

Bueno contends that the State failed to prove that he knowingly violated the no-contact order because it did not prove he wrote and sent the letter beyond a reasonable doubt. He claims that he could not have written the letter because he cannot read or write in English. Sufficient evidence supports Bueno's conviction.

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In claiming insufficient evidence, "the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences "'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

To convict Bueno of violation of a court order, the jury had to find beyond a reasonable doubt:

> (1) That on or about March 30, 2017 there existed a no-contact order applicable to [Bueno];

> (2) That [Bueno] knew of the existence of this order;
> (3) That on or about said date, [Bueno] knowingly violated a provision of this order;
> (4) That [Bueno] had twice been previously convicted for violating the provisions of a court order; and
> (5) That the acts occurred in the State of Washington.

Clerk's Papers at 37; RCW 26.50.110(5). Bueno contends that the State failed to present sufficient evidence of the third element, that he violated the order. He claims the State failed to prove that he sent the letter Harris received.

The parties presented conflicting evidence regarding Bueno's capacity to write in English. Bueno testified that he could not write in English and Harris had helped him communicate in English throughout their marriage. However, Harris and her son both testified that Bueno could read, write, and speak in both Spanish and English. They further testified that they both recognized the letter as Bueno's handwriting. Harris provided extensive additional testimony indicating that Bueno had written the letter.

On matters of conflicting testimony and evaluating the persuasiveness of the evidence, we defer to the trier of fact. *State v. Fleming*, 155 Wn. App. 489, 506, 228 P.3d 804 (2010). Because conflicting testimony exists regarding Bueno's ability to write in English, we defer to the jury's determination. Bueno's challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Because a rational trier of fact could have found the elements of the crime beyond a reasonable doubt, Bueno's argument fails.

SAG ANALYSIS

I. Sufficiency of Evidence

Bueno contends that the State failed to prove the elements of the crime beyond a reasonable doubt, violating his due process rights.[2] He alleges that sufficient evidence does not support his conviction because the letter and Harris's testimony were insufficient to prove he violated the no-contact order beyond a reasonable doubt.

Bueno makes the same argument in his brief. Where a SAG contains alleged errors that "have been thoroughly addressed by counsel," they are "not proper matters for [the] statement of additional grounds under RAP 10.10(a)." *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012).

II. Governmental Misconduct

Bueno alleges the State committed governmental misconduct by failing to follow "proper procedure" in the handling of the letter, that the card was "possibly already tampered with," and that the reporting officer did not call the number provided in the letter. SAG at 5.

Bueno has not shown how accepting the letter from Harris or stating it had been handled in the mail constituted governmental misconduct. Nor has he provided any legal grounds that would have required the police to call the number included in the letter. We reject these arguments.

[2] A defendant's framing of his argument in constitutional terms does not change the standard of review. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013); *State v. Blair*, 3 Wn. App. 2d 343, 350, 415 P.3d 1232 (2018).

III. ALLEGED PERJURY

Bueno contends that Harris perjured herself and his conviction must be overturned because it relies on false testimony. He claims Harris's testimony was contradictory and that she intentionally lied. Bueno alleges that the State's use of Harris's testimony violated his constitutional rights to equal protection and due process. He further claims that the prosecutor committed misconduct by relying on perjured testimony. We disagree.

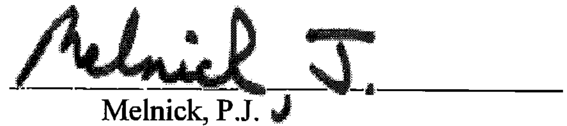
"A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Larson*, 160 Wn. App. 577, 594, 249 P.3d 669 (2011).

Bueno contends that Harris's testimony that Bueno could speak English "very well, just as well as you and I," was inconsistent with her later testimony that he sometimes needed assistance understanding plain language and that he pronounced her first name "Mari" instead of "Mardi." SAG at 16. Harris clarified that Bueno sometimes needed assistance with "medical terminology" at the doctor's office. 4 RP at 452. Harris's statements do not expressly contradict one another and do not show that Harris perjured herself.

"To prevail on a prosecutorial misconduct claim, a petitioner 'must establish both improper conduct by the prosecutor and prejudicial effect.'" *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 496, 251 P.3d 884 (2010) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998)). Bueno contends the prosecutor committed misconduct by knowingly relying on Harris's perjured testimony to sustain a conviction. Because Bueno has not shown that Harris committed perjury, he has not shown any instance of prosecutorial misconduct. We reject Bueno's argument.

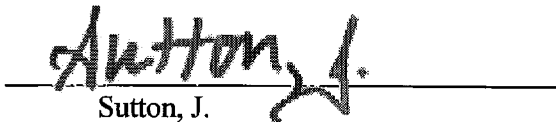
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, P.J.

We concur:



Sutton, J.

Glasgow, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 50930-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent John Cross
[kcpa@co.kitsap.wa.us]
Kitsap County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 22, 2019

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