

64437-8

64437-8

NO. 64437-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

CESAR VALADEZ CIENFUEGOS,

Respondent.

2010 MAY 28 PM 4:10
COURT OF APPEALS
DIVISION I
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN C. GONZALEZ
(ON APPEAL FROM COURT OF LIMITED JURISDICTION)

BRIEF OF APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ASSIGNMENTS OF ERROR

1. The superior court erred in holding, on appellate review of this district court trial, that a certified letter from the Washington department of licensing (DOL), attesting to the defendant's driving status and authenticating records, was a testimonial document under Confrontation Clause analysis.

2. The superior court erred in holding that any error in admitting exhibit 10 was not harmless beyond a reasonable doubt.

3. The superior court erred in holding that reversal was required because an "abstract of complete driving record" (ADR) was admitted at trial.

4. The superior court erred in holding that reversal was required because evidence was admitted that the defendant's license was "suspended or revoked in the first degree."

5. The superior court erred in deciding that reversal was required because evidence of speeding and of an arrest after violation should have been excluded.

6. The superior court erred in deciding that remand for dismissal was the appropriate remedy when, on appeal, it is determined that a portion of the State's evidence violated the Confrontation Clause.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was a certified letter from DOL nontestimonial where the letter simply recounted, without opinion, the status of Cienfuegos' driving privilege on a certain date?
2. Even if the letter was testimonial, was any error harmless beyond a reasonable doubt where other evidence, including two other certified documents, clearly established that Cienfuegos was an "habitual traffic offender" whose license had been suspended?
3. Did the superior court err in deciding that the abstract of driving record (ADR) – listing the driving offenses that led to suspension of Cienfuegos' driver's license as a "habitual traffic offender" -- violated ER 404(b), where evidence of his driving status and the nature of the revocation was necessary to prove an element of the crime, and where the superior court appears not to have acknowledged or applied the abuse of discretion standard of review?
4. Did the superior court err in deciding that reversal was required simply because the State presented evidence that Cienfuegos was "suspended or revoked in the first degree," when

the Washington Supreme Court decision relied upon is inapposite, and does not forbid use of that phrase?

5. Did the superior court err by finding reversible error in the admission of testimony that Cienfuegos was speeding before being stopped, and that he was arrested after police discovered his driving status?

6. Did the superior court err in holding that the remedy for admitting evidence in violation of the Confrontation Clause was dismissal of the prosecution, rather than a remand for retrial without the offending evidence?

C. STATEMENT OF THE CASE

1. DISTRICT COURT.

On April 15, 2005, Cienfuegos was stopped by Corporal Monica Matthews of the Washington State Patrol (WSP) for speeding. 4RP 103-04. Corporal Matthews contacted Cienfuegos and requested his driver's license, registration, and insurance card. 4RP 105.¹ Cienfuegos gave Corporal Matthews his Washington state identification card and the registration for the vehicle.

¹ The report of proceedings for March 10, 2008 will be cited herein as "4RP."

Corporal Matthews determined that Cienfuegos' privilege to drive was revoked in the first degree, and that he was required to have an ignition interlock installed in his vehicle; he was arrested. 4RP 106-08.

Cienfuegos was tried by jury in the King County District Court on March 10, 2008. Corporal Matthews testified at trial and described the above events. 4RP 100-21. The State also admitted into evidence a packet of three certified public records -- the certified copy of driving record (CCDR) -- to prove the charges. The CCDR consisted of: (1) a certified letter dated May 9, 2005, stating that Cienfuegos' driving status on April 15, 2005 was revoked in the first degree due to habitual offender status, and saying that he was required to have an ignition interlock device installed on his vehicle, CP 460 (Plaintiff's Ex. 10); (2) an order of revocation dated February 28, 2003 that was sent to Cienfuegos in 2003 and which ordered him stop driving for seven years, CP 459 (Plaintiff's Ex. 9); and (3) a certified copy of Cienfuegos' "abstract of complete driving record" or (ADR) that listed his prior driving offenses, including the notation that he was determined to be a Habitual Traffic Offender in March, 2003. CP 461-62 (Plaintiff's Ex. 11).

Cienfuegos objected to these exhibits on a variety of grounds. Most pertinent to this appeal, he argued that exhibit 10 was testimonial and inadmissible hearsay, and thus inadmissible without live testimony. 4RP 13-15. On this point, the trial court ruled that exhibit 10 was admissible because it was not prepared solely for litigation and that it was a simple summary of the driving record. 4RP 17-18.

On March 11, 2008, the jury found Cienfuegos guilty of Driving While License Suspended or Revoked in the First Degree, CP 98, and Violation of Ignition Interlock. CP 99; 5RP 37.

2. APPEAL TO SUPERIOR COURT.

On April 1, 2008, Cienfuegos filed a notice of appeal under the Rules of Appeal from Courts of Limited Jurisdiction (RALJ). Cienfuegos argued, *inter alia*, that the admission of exhibit 10 violated his right to confront witnesses. CP 338-66. He argued that the Supreme Court holding in Melendez-Diaz v. Massachusetts,² overruled Washington Supreme Court cases regarding the

² ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

admissibility of certified driving records.³ The State responded that admission of the documents did not violate Cienfuegos' right of confrontation, citing State v. Kronich, 160 Wn.2d 893, 904, 161 P.3d 982 (2007) (a certified statement regarding a defendant's driving status is not testimonial evidence), and arguing that Kronich survived Melendez-Diaz, because Kronich is consistent with Crawford v. Washington, 541 U.S. 36 (2004). CP 432-62.

The superior court accepted Cienfuegos' argument, suppressed the evidence, and ordered dismissal of the case.

While the Washington Supreme Court previously held, pursuant to Crawford, that the admission of a CCDR does not violate the confrontation clause, the United States Supreme Court's decision in Melendez-Diaz, effectively overturns Kirkpatrick and is binding on all Washington courts on this point of federal constitutional law...Under the Court's analysis in Melendez-Diaz, the CCDR is a testimonial affidavit, and the DOL official is a "witness" for purposes of the Sixth Amendment. Therefore, the CCDR was inadmissible without corresponding testimony from the DOL official who performed the diligent search, interpreted what was found, and opined as to its effect. Even particularized guarantees of trustworthiness do not get the CCDR past the Sixth Amendment

Exhibit 10 was the only direct evidence that Cienfuegos' Habitual Traffic Offender revocation was still in effect on April 15, 2005...Without this improperly admitted exhibit, the evidence is likely

³ State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007); State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007).

insufficient to support his conviction. The conviction must be vacated and the case remanded for dismissal.

Supp. CP ____ (Sub No. 35, filed 10/8/09 -- Decision on RALJ Appeal at 4).⁴ The court also reversed the driving with suspended license conviction on a number of other grounds, discussed below. As to the interlock charge, the State conceded that its charging document was deficient, and that the case must be reversed and dismissed without prejudice. Id.

On November 6, 2009, the State filed a notice for discretionary review and review was granted. CP 493-94.

D. ARGUMENT

1. CERTIFIED DOCUMENTS FROM THE DOL WERE PROPERLY ADMITTED.

The DOL documents admitted as exhibits in this case were not testimonial under recent United States Supreme Court authority because the documents are akin to the long-recognized business records and public records exceptions. The documents contain only information derived directly from the department's records, without opinion, interpretation, or the exercise of judgment. The

⁴ This decision was attached to the State's Motion for Discretionary Review.

Confrontation Clause is not violated when such documents are admitted without live testimony. In any event, even if the cover letter was partly testimonial, any error was harmless because other documents established that Cienfuegos' license was suspended on the date in question.

a. Certified Copies Of DOL Records Are Admissible As Public Records.

RCW 5.44.040 provides that copies of records and documents filed in state departments are admissible if certified under the official seals of the records custodian.⁵ A public record certified in this manner is self-authenticated. ER 902(d); State v. Monson, 113 Wn.2d 833, 836-37, 784 P.2d 485 (1989) (upholding admission of a certified copy of a driver's record (CCDR) as a public record). To be admissible, certified public records must:

- (1) contain facts, rather than conclusions that involve the exercise of judgment or discretion or express an opinion,
- (2) relate to facts that are of a public nature,
- (3) [are] retained for the benefit of the public, and
- (4) there [is] express statutory authority to compile the report.

⁵ "Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state." RCW 5.44.040.

State v. C.N.H., 90 Wn. App. 947, 949-50, 954 P.2d 1345 (1998).

A driving record is “a classic example of a public record kept pursuant to statute, for the benefit of the public and available for public inspection.” State v. Monson, 53 Wn. App. 854, 858, 771 P.2d 359, aff'd, 113 Wn.2d 833 (1989). Washington appellate courts have repeatedly held that a certification from DOL indicating the status of a defendant’s driving privilege is a public record, and may be admitted into evidence. State v. Smith, 122 Wn. App. 699, 94 P.3d 1014 (2004), rev’d on other grounds, 155 Wn.2d 496 (2005).

Moreover, just three years ago the Washington Supreme Court rejected the argument that such records are testimonial evidence that violate the Confrontation Clause if offered without live testimony. State v. Kronich, 160 Wn.2d 893, 903-04, 161 P.3d 982 (2007) (certification as to driving records); State v. Kirkpatrick, 160 Wn.2d 873, 886, 161 P.3d 990 (2007) (certification as to the absence of a driving record).

The documents admitted in Cienfuegos’ trial appear to be nearly identical to the cover letter and documents admitted in Smith, Chapman, Kronich, and Kirkpatrick. The documents pertain to the status of Cienfuegos’ driving privilege. CP 459-62. The cover

letter (CP 460 – Ex. 10) includes a neutral recitation of the facts contained in the department’s records rather than “conclusions that involve the exercise of judgment or discretion.” See C.N.H., 90 Wn. App. at 449.

b. Exhibit 10 Is Not Testimonial.

The Superior Court in this case ruled that the recent Supreme Court decision in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) abrogates the Washington Supreme Court’s decisions in Kronich and Kirkpatrick, and precludes the use of certified public records like those admitted against Cienfuegos because they are “testimonial” documents. This ruling should be reversed. The analyst’s laboratory report at issue in Melendez-Diaz is fundamentally different from the DOL records at issue here. The analyst’s report attests to actions taken wholly after commission of the defendant’s crime, whereas the DOL certification letter and attached documents simply attest to the state of the defendant’s driving record at the time of the offense. But-for the crime, the analyst’s report would not exist. In contrast, the DOL records -- and Cienfuegos’ driving status – existed independent of the crime.

Six years ago the Supreme Court held that a defendant's right under the Confrontation Clause was to confront those "who bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court held that a witness's testimonial assertions are admissible only if the witness appears at trial or the defendant has some other opportunity to cross-examine the witness. Crawford, 541 U.S. at 54. The Court adopted the term "testimonial" to describe the class of statements covered by the Confrontation Clause. Testimonial evidence was said to include:

. . . ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . ; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . ; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (citations omitted).

Not all out-of-court statements are testimonial. For instance, the Supreme Court suggested that neither business records nor public records are testimonial. Crawford, 541 U.S. at 56 (business

records); at 76 (Rehnquist, C.J., concurring) (stating that the majority would find “official records” nontestimonial). Statements made to resolve an on-going emergency are not testimonial. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Statements in “medical reports created for treatment purposes” are not testimonial. Melendez-Diaz, at 2533 n.2. And, dying declarations and statements made as part of an on-going conspiracy are not testimonial. Crawford, 541 U.S. at 55.

In Melendez-Diaz, the issue was whether an analyst’s report of a laboratory drug test was testimonial. A white powdery substance had been found in Melendez-Diaz’s possession when he was arrested. Police requested that the substance be tested, it was, and a laboratory analyst found that the substance contained cocaine. The analyst prepared a report which was admitted at trial. Based on this evidence, Melendez-Diaz was convicted of drug possession. Melendez-Diaz, at 2530-31.

The Supreme Court concluded that there was “little doubt” that the laboratory report was testimonial because it was an affidavit attesting to the results of an analysis that had been conducted after the defendant’s arrest, and that “the sole purpose of the affidavit... was to provide prima facie evidence of the

composition, quality, and the net weight of the analyzed substance.” Melendez-Diaz, at 2532. The Court noted that it had previously held that similar evidence offended the confrontation clause. Id. at 2538 (citing Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) (trial court reversed for admitting an accident report prepared by a railroad company employee after an accident describing the events from the railroad employee’s perspective)).

The government argued that the report was a business record, but the Court rejected that argument. It contrasted true business records with this situation by saying, “a clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but [a clerk] could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.” Id. at 2539. The Court also rejected an argument that cross-examination of the drug analyst would be fruitless; cross-examination could expose or deter incompetent or fraudulent analysts. Id. at 2536-38.

Although the Court found the laboratory report *not* to be a business record, it confirmed its earlier indications that true business or public records are not testimonial: “documents kept in

the regular course of business may ordinarily be admitted at trial despite their hearsay status.” Id. at 2538.⁶ Thus, the question was whether a particular document is a business or public record similar to those historically admitted into evidence without live testimony.

The Court observed that early cases permitted the use of “records prepared for the administration of an entity's affairs, and not for use in litigation.” Id. at 2538 n.7 (citing King v. Rhodes, 1 Leach 24, 168 Eng. Rep. 115 (1742) (ship's muster-book was admissible to prove death of a crewman in a will forgery case); King v. Martin, 2 Camp. 100, 101, 170 Eng. Rep. 1094, 1095 (1809) (a vestry book was admissible in a libel case to prove that a person was a duly elected town treasurer); and King v. Aickles, 1 Leach 390, 391-92, 168 Eng. Rep. 297, 298 (1785) (a prison logbook was properly admitted as to the date of a prisoner's release from custody)).

The Court reconfirmed the admissibility of clerk's certificates. It observed that “a clerk's certificate authenticating an official record – or a copy thereof – was traditionally” admissible. Id. at 2538-39.

⁶ The Court had observed in Crawford that: “Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” Crawford, 541 U.S. at 56.

The clerk was “permitted to certify to the correctness of a copy of a record kept in his office but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” Id. at 2539 (internal quotation marks and citations omitted). The Court also observed that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Id. at 2532 n.1. And, the Court noted that a clerk or judge historically could certify to the conduct of a defendant’s prior trial and such certification would not be considered testimonial. Id. at 2539 n.8 (citing Dowdell v. United States, 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753 (1911)).

The records in Cienfuegos’ case fit within this historical exception for business records or public records. As discussed above, Washington Courts have repeatedly held that DOL records are classic public records. Kirkpatrick, 160 Wn.2d at 886.⁷ The

⁷ An abstract of driving record contains: (a) An enumeration of motor vehicle accidents in which the person was driving; (b) The total number of vehicles involved; (c) Whether the vehicles were legally parked or moving; (d) Whether the vehicles were occupied at the time of the accident; (e) Whether the accident resulted in any fatality; (f) Any reported convictions, forfeitures of bail, or findings that an infraction was committed based upon a violation of any motor vehicle law; (g) *The status of the person’s driving privilege in this state*; and (h) Any reports of failure to appear in response to a traffic citation or failure to respond to a notice of infraction served upon the named individual by an arresting officer. RCW 46.52.130(6) (emphasis added).

records are prepared and kept for the public benefit and to permit administration of the driving laws of the state of Washington.⁸ A certification as to the contents of such a record is likewise admissible, even if the certification contains a terse summary of the relevant body of records, as the certification in this case did. CP 460 (Ex. 10); Smith, 122 Wn. App. 704-05; State v. Chapman, 98 Wn. App. 888, 891, 991 P.2d 126 (2000). The certification does not contain opinion and it does not involve the exercise of discretion or judgment. Id. The certification here met the criteria of Melendez-Diaz: “a clerk . . . by affidavit authenticate[d] [and] provide[d] a copy of an otherwise admissible record.” Melendez-Diaz, at 2539.

Cienfuegos argues that the certification was testimonial because it was prepared *after* the event in question, for the purposes of litigation. But *any* certification authenticating public records will be created after the fact of the event. The important point, for purposes of determining whether the document is

⁸ DOL records may be requested by statutorily specified recipients for specific public safety purposes. Those recipients include: an employer or prospective employer for purposes of determining whether the individual named in the record should be permitted to drive a commercial vehicle or school bus; an employee or agent of a transit authority checking prospective vanpool drivers for insurance and risk management purposes; an insurance carrier for underwriting purposes; and an alcohol drug assessment and treatment agency. See RCW 46.52.130(1), RCW 46.52.130(10) and RCW 46.52.130(11).

testimonial, is that the certification not contain opinions or the exercise of judgment, especially as to matters that post-date the crime. In other words, the certification must simply be a reflection of the “administration of an entity’s affairs” before or on the date of the crime. Melendez-Diaz, at 2538 n.7.

The documents admitted in Cienfuegos’ trial are fundamentally different from the laboratory report in Melendez-Diaz or the railroad accident report in Palmer v. Hoffman. A laboratory report involves the exercise of scientific expertise, judgment and discretion. It is the product of a scientific testing process where an analyst examines a substance, performs steps to test that substance, and reports his or her results. Similarly, an accident report documents the event in question, not pre-existing conditions or circumstances. Both a laboratory report and an accident report are the creation of new evidence rather than the simple reporting of events or records that existed before the request from law enforcement. In contrast, Cienfuegos’ DOL records – and his status as a habitual traffic offender – existed regardless of whether he drove and was arrested on April 15, 2005.

Finally, DOL records are different from laboratory reports in another way, to-wit: defendants may obtain their own DOL record

directly from the DOL.⁹ Thus, the defendant is not at the mercy of the prosecution, as would be the case for a report commissioned by police or the prosecution. Armed with his own copy of his driving record, a defendant can dispute information contained in a certification, he can attack the completeness of the custodian's records search, and he can supplement the trial record with whatever additional, relevant information he wishes the judge or jury to consider. And, since the records pertain to the defendant's own conduct, he is in the *best* position to know if the record is accurate because it pertains to events that happened to him. A defendant facing an affidavit attesting to the chemical content of a seized substance is unable to mount such defense. Thus, unlike Melendez-Diaz, cross-examination of the custodian of DOL records would truly be "an empty formalism." Id. at 2537 n.6.

Courts from other jurisdictions are split on whether public licensing records are admissible after Melendez-Diaz.¹⁰ Two courts have determined that licensing certificates are public records and,

⁹ DOL is also authorized to prepare a certified abstract of an individual's driving record which can be provided to the person named in the abstract, RCW 46.52.130(1)(a), and to city and county prosecuting attorneys, RCW 46.52.130(1)(h).

¹⁰ Because this is a federal constitutional issue, decisions of the Supreme Court are binding on this court but decisions of federal appellate courts are not.

thus, *not* testimonial. State v. Murphy, ___ M.E. ___, 991 A.2d 35 (2010) (certificate attesting to authenticity of attached records and to license suspension, notice, and failure to reinstate driving privilege held not testimonial); Com. v. Martinez-Guzman, 76 Mass.App.Ct. 167, 920 N.E.2d 322, 325 n.3 (2010) (certificate of authenticity of records and copies of records from Registrar of Motor Vehicles). Other courts have determined that licensing records are testimonial. Washington v. State, 18 So.3d 1221 (Fla.App. 4 Dist., 2009) (certificate regarding absence of construction license); Tabaka v. District of Columbia, 976 A.2d 173 (2009) (document attesting to absence of driver's license is testimonial).¹¹

The two contrary cases are based on a cryptic paragraph in Melendez-Diaz wherein the Supreme Court opined that certificates of the non-existence of a record are testimonial. Melendez-Diaz, at 2539. No such certificate was at issue in Melendez-Diaz, so any comments on that topic should be considered non-binding dicta.

¹¹ Two federal circuit courts have held that a certificate of non-existence of record (CNR) is testimonial. U.S. v. Norwood, 595 F.3d 1025 (9th Cir. 2010), *Opinion Amended and Superseded on Denial of Rehearing by U.S. v. Norwood*, ___ F.3d ___, 2010 WL 1236319 (9th Cir. 2010); U.S. v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010). However, the federal prosecutor conceded the point in each case so the issue was not litigated.

State v. Murphy, 991 A.2d at 42. See also Pierre N. Leval, Judging Under The Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev 1249 (2006).

Moreover, if an affiant can certify to and authenticate records, Melendez-Diaz, at 2538-39, it seems logical that the affiant can also attest that his or her record search was complete. It seems illogical that a document would become “testimonial” simply based on this assertion. The Supreme Court has yet to directly confront this issue. In any event, if the assertion “[a]fter a diligent search of the computer files . . .” is the only part of exhibit 10 that offends the Confrontation Clause, then that phrase may be excised, and any error is clearly harmless, as argued below.

For the reasons set forth above, the better-reasoned cases hold that a certificate from a record custodian attesting to the contents of a pre-existing record is fundamentally different than a laboratory report issued by a forensic analyst. This Court should hold that exhibit 10 was nontestimonial, and properly admitted.

- c. Even If Exhibit 10 Was Testimonial, Any Error Was Harmless In Light Of Other Evidence, Including Exhibits 9 And 11.

The Superior Court found that the DOL documents should not have been admitted, the State cannot show beyond a

reasonable doubt that he was driving with a suspended license.

Supp. CP ____ (Decision on RALJ Appeal). This was error.

A violation of the confrontation clause may be harmless error. State v. Hieb, 107 Wn.2d 97, 109, 727 P.2d 239, 246 (1986); Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (whether the limitation of cross-examination in a particular case was harmless error is determined by analyzing five factors). In determining whether the error was harmless, courts look to factors such as “the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case.” Van Arsdall, 475 U.S. at 684.

Cienfuegos did not challenge exhibit 9 on appellate review and the superior court's order does not address the admissibility of that document. Exhibit 9, a certified public record, is dated February 28, 2003. CP 459. It contains the defendant's name, date of birth, address, and driver's license number. It also says:

ON 3/30/03 YOU MUST STOP DRIVING A MOTOR
VEHICLE IN THIS STATE. IF YOU HAVE A
WASHINGTON STATE DRIVER'S LICENSE IN

YOUR POSSESSION IT MUST BE SURRENDERED
TO THIS DEPARTMENT.

YOUR DRIVING PRIVILEGE IS REVOKED FOR
7 YEARS AS A HABITUAL TRAFFIC OFFENDER.
AUTHORITY: RCW 46.65.070.

A HEARING REQUEST FORM IS ENCLOSED.

TO REINSTATE YOUR DRIVING PRIVILEGE
REFER TO PARAGRAPHS A, B, E ON THE
ENCLOSED REINSTATEMENT SHEET. DO NOT
DRIVE UNTIL YOU HAVE BEEN NOTIFIED OF
REINSTATEMENT BY THIS DEPARTMENT.

I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON
THAT I CAUSED TO BE PLACED IN A U.S. POSTAL
SERVICE MAIL BOX, A TRUE AND ACCURATE
COPY OF THIS DOCUMENT TO THE PERSON
MANDED HEREIN AT THE ADDRESS SHOWN,
WHICH IS THE LAST ADDRESS OF RECORD,
POSTAGE PREPAID, CERTIFIED MAIL, ON
FEBRUARY 28, 2003.

CP 459 (Ex. 9). This document establishes that Cienfuegos' license was revoked for seven years beginning in 2003. Moreover, exhibit 11, the ADR, definitively shows that Cienfuegos' license remained suspended five years later, in 2008. CP 461. (As argued below, exhibit 11 was relevant on this very point, and the superior court erred by ruling that it was not admissible.) In other words, the summary statements in exhibit 10 are detailed in exhibits 9 and 11.

Additionally, the jury learned that when Cienfuegos was stopped by Corporal Matthews, he did not produce a driver's license, as one would expect, and as Corporal Matthews requested; rather, Cienfuegos produced a Washington State identification card. 4RP 105. Surely his failure to produce a license is evidence that he did not have one. Together with exhibits 9 and 11, these facts illustrate that any error in admitting exhibit 10 (or portions thereof) was harmless beyond a reasonable doubt.

2. THE RALJ COURT SHOULD NOT HAVE REVERSED BASED ON VARIOUS EVIDENTIARY CLAIMS.

In addition to reversing the trial court based on exhibit 10, the superior court also decided that the trial court erred in admitting other evidence, including the following: exhibit 11 (the ADR); testimony that Cienfuegos' license was "suspended or revoked in the first degree"; testimony that Cienfuegos was speeding and was arrested after he was discovered to be driving with a suspended license.

An appellate court may reverse a trial court's evidentiary ruling only for a manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An abuse of discretion

occurs when a decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The superior court erred in failing to apply this standard before reversing the trial court's evidentiary rulings.

a. Plaintiff's Exhibit 11 Was Properly Admitted.

As noted above, exhibit 11 was the "abstract of complete driving record" for Cienfuegos. CP 461-62. Cienfuegos argued that the exhibit should be excluded as irrelevant, and pursuant to ER 404(b) because it listed prior convictions. 4RP 47-48. The State responded that the document was essential to prove its case. 4RP 48. The trial court appears to have ruled that the document was admissible, but ruled that language referring to "suspended or revoked first degree" should be redacted because it stated an opinion. 4RP 49-50. The State asked the court to reconsider on this point because it was required to prove that the defendant's license was still suspended in 2005. 4RP 57-59, 67, 77-84. The court reconsidered and allowed that language. 4RP 84. The defense then renewed its request to redact prejudicial and criminal history information; the motion was denied. 4RP 84.

On review, the superior court held that exhibit 11 was irrelevant and prejudicial, and should not have been admitted. Specifically, the court held that the ADR “contained no relevant information” and that “[t]he document, dated ‘03-18-08’ did not bear on the date of violation of April 15, 2005.” Supp. CP ____ (Decision on RALJ Appeal at 5, lines 18-21). The court appears to have believed that any document post-dating the date of offense must be irrelevant. The court also held that the evidence could have been viewed as propensity evidence. Id. (lines 24-25). This was plainly error.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. ER 401. “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state.” ER 402. Decisions on the admissibility of evidence are reviewed for a manifest abuse of discretion. Bourgeois, 133 Wn.2d at 399.

Exhibit 9 (the revocation letter) shows that Cienfuegos’ license was suspended for seven years, beginning in 2003. CP

459. Exhibit 11 (the ADR) shows that it was *still* suspended in 2008. CP 461-62. This information can hardly be called irrelevant. It shows that Cienfuegos' license was suspended before and *after* the date of offense. An element of the crime of driving with suspended license is the fact that the license was suspended on the date in question. Moreover, exhibit 11 also confirms that Cienfuegos was considered a Habitual Traffic Offender as of March, 30, 2003, confirming the information in exhibit 9, the revocation letter. Exhibits 9 and 11 together corroborate the assertions made in exhibit 10, that Cienfuegos' license was suspended on April 15, 2005. They clearly "bear on" the central question at trial, so the trial court's ruling was not manifestly unreasonable. Thus, the superior court erred in holding that reversal was warranted on this basis.

The superior court also erred in holding that the listing of prior offenses was inadmissible evidence of prior bad acts. This was a prosecution for driving with a suspended or revoked license. Exhibit 9, which was admitted at trial and was not challenged on appeal, clearly tells the jury that Cienfuegos was ordered to cease driving because he was a "HABITUAL TRAFFIC OFFENDER." CP 459 (all-caps in original). It would come as no surprise to the jury

that a habitual traffic offender is one with a long list of driving offenses. Thus, even if each and every offense listed on exhibit 11 was not independently admissible, it cannot be said that the trial court abused its discretion in admitting the document.

Alternatively, even if the document should have been redacted, any error was harmless. Nonconstitutional error in admitting ER 404(b) evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The issue in this case was whether Cienfuegos drove with a suspended license. The documents and the testimony of the trooper clearly proved that he did. The documents also appropriately showed that he was a habitual traffic offender. Any additional modicum of prejudice caused by exhibit 11 was not reasonably likely to materially affect the trial's outcome. Thus, any error was harmless. The superior court's decision should be reversed.

- b. "Suspended And Revoked In The First Degree" Language Was Superfluous, At Worst, And Was Not A Basis To Reverse This Conviction.

The superior court ruled that "[t]he phrase 'suspended and revoked in the first degree' appearing in the exhibits is a legal and

factual fiction which was improperly admitted since it is irrelevant and confusing to the jury.” Supp. CP ____ (Decision on RALJ Appeal, citing State v. Smith, 155 Wn.2d 496, 503-04, 120 P.3d 559 (2005)). This holding is clearly erroneous.

In State v. Smith, the Washington Supreme Court considered a case where DOL exhibits simply referred to the fact that the defendant was “suspended/revoked in the first degree.” Smith, 155 Wn.2d at 499. Likewise, the “to convict” instruction said that the jury must find only that “the defendant’s privilege to drive was suspended or revoked in the first degree.” Id. at 500. The crime of driving with a suspended license in the first degree requires, however, that the suspension be due to a finding that the defendant was a habitual traffic offender. Id. at 502 (citing RCW 46.20.342). Because nothing in the State’s evidence supported such a finding, and because the jury instruction did not require that finding, the conviction was reversed. Id. at 503. The court noted that “revoked in the first degree” was a convenient shorthand way of referring to the crime, but the phrase was not sufficient; evidence must show and the instructions must require a finding that suspension was pursuant to habitual offender status.

But, nothing in the Smith opinion forbids use of those words in a license suspension case. There is nothing “confusing” about the use of this term where the State has also supplied evidence that the defendant was a habitual traffic offender, as the State did here. CP 459 (Ex. 9). The superior court erred in holding that the trial court abused its discretion by admitting that evidence. The superior court’s decision should be reversed on this point.

c. Evidence Of Speeding And Arrest Were Innocuous, And Not A Basis For Reversal.

Evidence that Cienfuegos was speeding was provided simply to explain why he was stopped on the night in question. There was an objection to the foundation for testimony about the radar device but there was no objection to testimony that Cienfuegos exceeded the speed limit. 4RP 103-04, 122. The trial court did not permit the State to elicit testimony regarding how fast he was traveling. Thus, this argument was not preserved for review. RAP 2.5(a). A simple “foundation” objection does not preserve a relevance or ER 403 argument. State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006).

Even if the argument was preserved, it should be rejected. The trial court’s ruling was a reasonable exercise of discretion. The

court simply permitted the prosecutor to establish that the trooper had a lawful basis for stopping the defendant. And, driving with a suspended license is an arrestable offense, as most jurors likely expect, so the fact that the defendant was arrested is fairly innocuous, too. The superior court erred in finding a manifest abuse of discretion in admitting these basic background details.

In any event, any error on either of these points was plainly harmless, for the reasons described above. The proof of driving without a valid license was strong, and the jury would not have been swayed simply by virtue of the fact that the defendant was exceeding the speed limit and subsequently arrested for driving on a suspended license.

3. RETRIAL, NOT DISMISSAL, IS THE APPROPRIATE REMEDY IF ERROR IS FOUND IN THIS CASE.

The superior court's decision on RALJ appeal said, "Exhibit 10 was the only direct evidence that Cienfuegos' Habitual Traffic Offender revocation was still in effect on April 15, 2005. . . . Without this improperly admitted exhibit, the evidence is likely insufficient to support his conviction. The conviction must be vacated and the case remanded for dismissal." Supp. CP __ lines 10-14 (citing State v. Smith). This holding is both factually and

legally incorrect. Assuming this Court finds reversible error, the remedy is a new trial, not dismissal.

The holding is factually incorrect because, as explained above, there was ample other evidence that the defendant's license was suspended or revoked due to his habitual offender status, and the evidence showed that his suspension was still in effect in April, 2005.

The ruling is legally incorrect because it confuses a finding of constitutional trial error, which results in reversal of the conviction and retrial, with a finding of insufficient evidence to convict, which requires dismissal of the charges upon remand. When evidence is inappropriately admitted under the Confrontation Clause, the remedy is a remand for retrial without that evidence. See e.g. State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). At any retrial in this case, the State may call a live witness to provide the necessary evidence. The State's case is not judged for sufficiency of the evidence *without* the evidence that has been ruled inadmissible.

The superior court's reliance on State v. Smith was misplaced. As discussed above, Smith was a pure sufficiency of the evidence case where the State had failed to submit *any*

evidence on an essential element of the crime. Clearly, dismissal is the appropriate remedy under those circumstances. But here, even assuming exhibit 10 violated Cienfuegos' rights to confront a DOL employee, the remedy is remand for a trial where he is given that opportunity to confront.

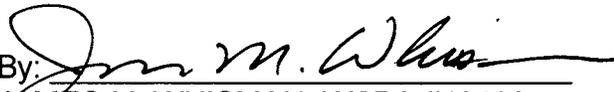
E. CONCLUSION

For the foregoing reasons, the State requests that the appellate decision of the superior court be reversed, and that Cienfuegos' convictions be affirmed.

DATED this 28th day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nielsen, Broman & Koch, the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. CESAR VALADEZ CIENFUEGOS, Cause No. 64437-8-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.

U Brame
Name
Done in Seattle, Washington

6/1/10
Date 6/1/10