

72654-4

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Court of Appeals  
Division I  
State of Washington

72654-4

NO. 72654-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

VINOD RAM,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Carol Schapira, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting exhibit 101, a chart summarizing testimony and prepared by the detective.

2. Admission of the chart unfairly emphasized the conclusions drawn by a law enforcement witness, thereby denying appellant a fair trial.

3. The court erred in permitting a non-law-enforcement witness who had no independent recollection to testify based what he read in a police report.

Issues Pertaining to Assignments of Error

Appellant was charged with conspiracy to commit identity theft and 18 counts of identity theft by using cloned fuel account cards. Over defense objection, the court admitted a spreadsheet showing the dates, times, locations, dollar amounts, and fuel quantities of the allegedly fraudulent transactions as well as whether there was surveillance video or photographs, whether the detective had been able to identify any of the alleged accomplices in the video, and the dates and times of phone calls to and from the alleged accomplices and a phone alleged to be appellant's.

1. Where the chart did more than summarize the information from the fuel card statements but also implicitly contained the detective's opinions and conclusions based on her investigation, did the court's

decision to admit the exhibit unfairly emphasize the detective's conclusions and deny appellant a fair trial?

2. One witness testified he described the person in charge of the fuel transactions to police and identified appellant in a series of photographs presented to him. However, he testified he had no independent recollection and was relying solely on the police report in order testify. Did the court err in admitting this testimony and denying appellant's motion to strike?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Vinod Ram with one count of conspiracy to commit identity theft and 18 counts of identity theft in the first degree. CP 1-13. During trial, the State dismissed count VIII, and the jury found Ram not guilty of count II. 13RP<sup>1</sup> 84-85; 14RP 61; CP 174, 196. Ram was found guilty of conspiracy and 16 counts of first-degree identity theft. CP 136-212. The jury also found that the aggravating factor for a major economic offense applied to each count. CP 146-213. The court

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<sup>1</sup> There are 14 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – July 24, 2014; 2RP – July 30, 2014; 3RP – Aug. 26, 2014; 4RP – Aug. 27, 2014; 5RP – Sept. 2, 2014; 6RP – Sept. 3, 2014; 7RP – Sept. 4, 2014; 8RP – Sept. 8, 2014; 9RP – Sept. 9, 2014; 10RP – Sept. 10, 2014; 11RP – Sept. 11, 2014; 12RP – Sept. 15, 2014; 13RP – Sept. 16, 2014; 14RP – Sept. 17, 2014.

imposed concurrent standard range sentences and 12 months of community custody. CP 235, 237, 238. Notice of appeal was timely filed. CP 248.

2. Substantive Facts

a. Suspicious Fuel Transactions

Between August 2010 and August 2011, several companies in the Puget Sound area began noticing unusual activity on their fuel account cards. See, e.g., 7RP 30-31, 9RP 29. The cards are issued by companies that operate so-called “cardlock” fuel stations, which are largely unstaffed and used by commercial enterprises with fleets of vehicles. 6RP 53-54. The self-serve fueling kiosks are unlocked using a card and pin number, and the fuel is charged to the cardholder’s account. 7RP 47-50; 10RP 58; 11RP 117-18. The cardholder can require that other information be entered, such as a truck number and/or odometer reading. 10RP 59-60. Petrocard and APP are two local companies that issue cards that may be used at Pacific Pride stations, CFN stations, or both. 10RP 52-53; 11RP 116-18.

Employees reviewing their companies’ fuel account statements began noticing anomalies such as the same truck refueling several times within a few minutes, or in two different locations at the same time, or using far more fuel than usual, or refueling at a time when the truck was supposed to be at a repair facility. 6RP 78, 80; 7RP 30-31, 218-19, 238-39; 9RP 31-32; 10RP 149-50. Because the suspicious activity was occurring across the

boundaries of many law enforcement jurisdictions, Detective Moate of the Washington State Patrol was assigned to investigate. 11RP 148. Moate noted that most of the companies still had the cards in their possession. 11RP 164.

One day in 2010, Scott White of Knight Transport and David Hanson of APP decided to take matters into their own hands. After noticing suspicious transactions on Knight Transport's account with APP, rather than canceling the card, Hanson and White decided to set up an email alert whenever the card was used. 6RP 56. They noticed many of the transactions occurred at a station on West Marginal Way between 2:30 and 5:00 a.m. 6RP 58-59.

During the early morning hours of October 1, 2010, White and Hanson waited in the woods across the street with a good view of the station. 6RP 61. They saw a man pull up in a green pickup and swipe a card at the kiosk. 6RP 63-64. Within seconds, they got the email that Knight Transport's card had been used. 6RP 63-64. While White ran towards the station, Hanson followed the green pickup and called 911. 6RP 64-65.

Hanson saw the green pickup turn down a dead-end road, where it was blocked in by police responding to Hanson's 911 call. 6RP 66. He testified the police arrested the man he had seen operate the kiosk at the APP station on West Marginal Way. 6RP 67. He and White also helped police

look for a discarded fuel card along the route they had driven, but none was found. 6RP 71. Ram was the driver of the green pickup, and a search incident to his arrest revealed \$690 in cash but no fuel account card. 6RP 22-23.

Police had previously questioned Ram during a 2009 investigation of fuel card fraud. 8RP 29. At that time, police told Ram he had been seen at some stations where fraudulent transactions had occurred and warned him he was now trespassed from all Pacific Pride stations and could be arrested if he were found on the premises.<sup>2</sup> 8RP 29, 33.

b. Manny Chuks

A break in the case came in March 2011, when a private investigator hired by Petrocard obtained good quality video recordings of faces and license plates involved in one of the suspicious transactions. 11RP 164-65. Moate spoke to the owner of one of the trucks involved, and the owner identified the person operating the pump as Manny Chuks. 11RP 166-67.

Chuks worked as an owner/operator truck driver. 7RP 43. As such, he drove on contract and purchased his own fuel. 7RP 43-45. He frequented cardlock fuel stations. 7RP 47-52. He testified that, in late 2010, his friend Mousie offered to get fuel for him using a card. 7RP 56-57. Mousie would pump the fuel for him and instructed him to go and pay another person. 7RP

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<sup>2</sup> The jury was instructed that the testimony about this incident was to be considered solely for the effect of the officers' statements on Ram's state of mind. 8RP 33; CP 157.

58-59. The price was heavily discounted - 50 or 60 percent of the market price. 7RP 60-61. Chuks testified the person he paid was Ram. 7RP 59.

Whenever Chuks bought gas this way, there would be several other drivers there. 7RP 62-63. He would get a call and, after everyone was there, all the trucks would be filled up using a card. 7RP 63. Usually, either Mousie or Ram's cousin Damium Prasad would use the card; Ram would be nearby but not on the station premises. 7RP 63-65. He testified that, on a few occasions, Ram operated the pump using the card himself. 7RP 66.

Eventually, Chuks claimed, Ram invited him to assist by using the cards and pumping the gas. 7RP 66. In return, Chuks was offered an even steeper discount on his own fuel. 7RP 67. He testified he obtained fuel cards from Ram and initially assumed the card and pin number belonged to Ram. 7RP 70-71, 73-74. Sometimes the cards appeared to be the usual account cards with the company logo and the account-holder's name, and at other times, the cards were blank white cards that worked the same way. 7RP 73-74.

He did not know how many times he filled up other trucks using cards obtained from Ram, but it was roughly weekly from February until June 2011. 7RP 78. He would fill up five to ten trucks at stations ranging from Seattle to Kent to Tacoma. 7RP 79. Sometimes he would call Ram if he needed fuel; other times Ram would call to ask him to fuel other trucks.

7RP 76. He testified he never fueled other trucks in this way without Ram's involvement; he always obtained the fuel cards from Ram. 7RP 97. Chuks identified himself in numerous slides in exhibit 17 showing surveillance videos and still photos from card lock stations around the area. 7RP 84-88, 91-93, 95, 97-100, 104, 168-69, 173-79.

Chuks was charged with seven counts of identity theft and one count of conspiracy with the aggravating factor that the offenses were major economic offenses. 7RP 124, 182-83. He was aware that, for the identity theft charges, the statutory maximum was 10 years and under the aggravating factor, the sentences could have been run consecutively. 7RP 184-85. He pled guilty to only one count of conspiracy and one count of identity theft. 7RP 122-24. In exchange for dismissal of six counts and the prosecutor's recommendation that he serve only nine months of work release, he agreed to testify against Ram. 7RP 186, 189-91. Initially, Chuks told police he did not know the name of the man who gave him the cards. 7RP 119-20. When they showed him a series of photographs, he picked out Ram. 7RP 121. He identified a phone number ending in 7621 as the number he used to reach Ram. 7RP 213.

c. Damiun Prasad

Damiun Prasad testified Ram is his father's brother, sometimes referred to as a cousin. 9RP 61. Prasad testified that, after he helped Ram

with a yard sale, Ram offered to pay him \$50 per truck to help fill up trucks with gas. 9RP 65-66. Unemployed and needing money, Prasad agreed. 9RP 66-67. He claimed he believed this was for Ram's own trucking company. 9RP 65-67.

He testified Ram would take him to meet up with a truck driver, Prasad would ride with the truck driver to a fueling station, several other drivers would arrive, and Prasad would operate the pump to fill as many as six trucks with fuel. 9RP 67-71. Afterwards, the drivers would pay Ram. 9RP 70. He would report to Ram the number of gallons each driver received, and the driver would pay Ram a flat \$2.50 per gallon. 9RP 84-85.

Prasad testified he got the fuel cards from Ram. 9RP 73. Like Chuks, Prasad testified the cards were sometimes the usual fuel cards with colorful logos and embossed account holder names, but at other times, the cards were blank white cards with a magnetic strip. 9RP 74-75. He testified he saw Ram also give cards to both Chuks and Mousie. 9RP 82-83.

Prasad testified he filled up an average of three trucks every time, never less than two and never more than six. 9RP 86. He testified he did this for Ram sometimes once a day, sometimes three times per day at Pacific Pride and CFN stations usually in industrial or port areas in Seattle, Tacoma, Fife, Tukwila, or Burien. 9RP 86-91. Sometimes he worked for Ram only once per week, sometimes as many as four days per week, and sometimes

not at all for weeks at a time. 9RP 95. Like Chuks, Prasad testified he never filled up trucks without Ram. 9RP 99. Occasionally, he took cash from the drivers to hold for Ram, with Prasad himself never receiving more than the agreed-upon \$50 per truck. 9RP 106-08.

Prasad testified that, on two occasions, he saw Ram with a card reader, used for reading or copying the information stored on the magnetic strips of credit and other cards. 9RP 115-16. Once, Prasad saw it in Ram's black backpack, and another time he saw it on Ram's bed attached to a laptop computer with a USB cable. 9RP 115-16.

Both Chuks and Prasad testified that sometimes the cards or pin numbers did not work. 7RP 77; 9RP 77-78. In those instances, they reported this to Ram, who would either give them a new card or a new pin number to try. 7RP 77; 9RP 77-80.

The week before trial was to start, Ram went to Prasad's wedding. 12RP 126-27, 134. One of the wedding guests testified Ram told him repeatedly Prasad was a snitch who would get him in trouble and threatened to tell this to the assembly of guests. 12RP 130-32. The guest reported Ram's comments to Prasad, and Prasad asked Ram to leave. 12RP 133.

d. Eva Gumiran

Prasad testified that Ram lived with him (Prasad) and his parents, but was rarely there. 9RP 63-64, 92. A couple of times, Prasad dropped Ram

off at a hotel to meet his wife, Eva Gumiran. 9RP 93-94. Gumiran testified she lived in a home in Pacific, Washington, that she purchased with her own money. 8RP 87-88, 95. She testified Ram never lived there and did not contribute to the house or the household beyond a few gifts for their children. 8RP 91, 166. She testified he was not there except to transfer or visit their children. 8RP 89-90. However, Detective Moate claimed Gumiran told her Ram lived there with her in October and November 2011. 12RP 77. Gumiran's daughter testified Ram lived in the house with them in October 2011. 10RP 22-24. She also claimed her mother told her Ram had bought the house, and she observed Ram purchasing much of the furniture for the house, always using cash. 10RP 25-26, 31.

When police searched the house, they found a card reader with a power cord and a USB cable in a bedroom closet. 11RP 11-12, 18-20. In a rice dispenser in the pantry they also found a carefully wrapped wad of cash amounting to \$35,000. 12RP 82-85. Gumiran testified the money was hers and she put it there. 8RP 126. However, Detective Moate testified that, when she searched the house, she asked Gumiran where Ram's money might be. 12RP 79-80. Gumiran walked into the pantry, stared at the rice dispenser, and said that it might be in there but she was not allowed to go in. 12RP 79-80.

e. Jail Phone Calls

In phone calls from jail to Gumiran, Ram expressed concern about the house in Pacific that he referred to as “ours” but now “yours.” Ex. 48. He also expressed concern about the police search and whether they took his laptop and scanner. Exs. 46, 47. In a call to Prasad, he instructed Prasad to throw away a lens cleaner box in his room and not to tell anyone about it. 9RP 170-75; Ex. 56. Prasad claimed he did not look inside, but based on the weight, he believed the box contained 15 or 20 of the cards they had been using to fuel trucks. 9RP 175-77. Prasad testified he did as instructed and threw the box into the garbage outside his home. 9RP 177.

f. Other Truck Drivers

At trial, the State also presented testimony by two truck drivers who claimed to have purchased steeply discounted fuel at a cardlock station. Michael Asma described how a friend called to offer him discounted gas. 8RP 56. He could not recall where this occurred except that it was probably within 100 miles of Seattle. 8RP 56. He testified he arrived, waited a bit for someone else to show up, and paid \$400-\$500 cash to fill up his 220 gallon tank. 8RP 57. There were several other trucks there fueling as well, but he did not recall how many. 8RP 58. He testified the man in charge was in a white van parked off to the side away from the pumps. 8RP 82-83.

Asma testified he described the person in charge to Detective Moate and picked Ram out of a series of photographs. 8RP 59-62, 67-72. However, he admitted on cross examination that he was testifying mostly based on Moate's report, which he had never seen before that day. 8RP 72-76. He testified he did not currently have independent recollection, but it was fresh in his mind when he spoke to Moate. 8RP 72-75.

In response to defense counsel's repeated objections to hearsay and improper refreshment of recollection, the prosecutor argued the proper hearsay exception was recorded recollection. 8RP 59, 77, 115-17. Defense counsel pointed out there was no foundation that Asma had made or adopted Moate's report at a time when his memory was intact. 8RP 118. The court agreed this was true and stated this was why Moate's report was not admitted as an exhibit. 8RP 118. But the court overruled defense objections and denied the motion to strike. 8RP 61, 77. Detectives Medeiros, who showed Asma the photographic lineup, repeated his identification of Ram under the hearsay exception for statements of identification. 9RP 44-46.

A second truck driver, Fassil Gedlu, also testified he bought steeply discounted fuel from Chuks. 10RP 96, 99-100. He testified he saw a man in a white shirt was parked nearby in a jeep, and saw Chuks talking to him. 10RP 96-97. He did not know Ram's name, but picked out person number 5 in a series of photographs shown him by Detective Moate. 10RP 104.

g. Exhibits

In conjunction with Moate's testimony, the court admitted exhibit 101, her summary of her investigation. 12RP 45. The chart juxtaposes the dates, times, locations, and amounts of all the suspicious fuel transactions with cell phone records of Chuks, Prasad, Gedlu, and the phone number Chuks and Prasad testified they used to contact Ram. Ex. 101. The chart includes a column indicating whether there was any surveillance video or photographs near the time and location of the transactions and whether Moate could identify Chuks or Prasad in the recordings. Ex. 101.

Ram argued the chart amounted to improper opinion testimony by the detective and unfairly emphasized her testimony and the State's theory of the case by presenting argument to the jury in written form. 12RP 13, 24-26. At a minimum, Ram argued, the chart should be admitted for illustrative purposes only and be accompanied by a limiting instruction that it is not substantive evidence. 12RP 37. The State argued it was admissible as a summary of the inconveniently voluminous invoices, cell phone records, and surveillance recordings under ER 1006. 12RP 37. The court required the State to redact by removing Moate's opinion that the number was, in fact, Ram's, but admitted the exhibit. 12RP 27-28, 45. Moate then testified explaining exhibit 101 and showing portions of it to the jury via a PowerPoint presentation. 12RP 195-28; 13RP 23-49.

The actual fuel invoices, cell phone records, and surveillance videos and photographs were admitted as exhibits as well. See, e.g., exs. 15, 36, 91. As discussed above, employees from the various companies testified as to which transactions they believed to be fraudulent and why. See, e.g., 10RP 146-52; Ex. 74. Most of the invoices were either highlighted or initialed to indicate the suspicious transactions. See, e.g., 10RP 147-48; Ex. 74.

The State argued Ram believed he had committed the perfect crime by using Chuks and Prasad to fuel the trucks and never giving anyone his name. 14RP 102, 112, 128. Ram argued Chuks and Prasad had every incentive to lie by accusing Ram to reduce their own criminal liability. 14RP 155.

C. ARGUMENT

1. PERMITTING THE JURY UNLIMITED USE OF A CHART SUMMARIZING DETECTIVE MOATE'S CONCLUSIONS UNDULY EMPHASIZED HER TESTIMONY AND DENIED RAM A FAIR TRIAL.

Admission of exhibit 101 as substantive evidence requires reversal of Ram's conviction for three main reasons. First, the summary amounted to a written summary of Detective Moate's testimony about her investigation and conclusions and invaded the province of the jury. Second, the court failed to adopt safeguards to prevent the written summary from unduly emphasizing Moate's testimony during deliberations. Finally, having Moate's

conclusions available to the jury in written form during deliberations amounted to a second closing argument for the State.

ER 1006 provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rulings on admissibility of evidence may be reversed on appeal when the decision to admit the evidence is manifestly unreasonable or based on untenable grounds. State v. Barnes, 85 Wn. App. 638, 658, 932 P.2d 669 (1997).

- a. Exhibit 101 Amounted to a Written Summary Not of Voluminous Records, But of the Conclusions Moate Drew from Her Investigation.

Exhibit 101 contained a list of details about all the allegedly fraudulent transactions, largely gleaned from invoices. Ex. 101; 13RP 51-52. It also showed whether the dates, times, and locations of those transactions matched up with the dates, times, and locations of surveillance video and photos, whether the detective had been able to identify any alleged accomplices in those recordings and if so, whom, and how the dates and times of the transactions matched up with cell phone records of Prasad and

Chuks and a third phone number they claimed to use to contact Ram. 12RP 190-92.

A mere summary of the information from the various billing invoices would likely have been admissible under ER 1006. The same is true for a summary of the phone records. But by selection only some of the transactions and some of the calls and juxtaposing them in a chart with identifications by the detective, exhibit 101 was basically a summary not of the objective information in the invoices or records, but of Moate's investigation and the conclusions she drew from the evidence. In short, exhibit 101 amounted to Moate's opinion in written form.

Rather than summarizing the contents of the fuel card invoices or phone records, Exhibit 101 summarized the conclusions Moate drew from her review of those and other records. By admitting the exhibit, the court essentially permitted the jury to consider a written summary of her testimony during its deliberations.

The accuracy of the information in the invoices about the location, times, dates, and quantities of the allegedly fraudulent transactions was in great dispute at trial. See, e.g., 4RP 189-203 (motion to exclude third party information from invoices due to lack of personal knowledge). But the spreadsheet admitted in Exhibit 101 did not reflect this dispute. Instead, it presented, as though established fact, the details of all the transactions. It

was also disputed whether the phone records had anything to do with the transactions. 13RP 56-57 (cross examination of Moate establishing she had no information directly connecting the calls to the transactions). By matching them up in a chart, exhibit 101 amounted to an opinion that the calls were linked to the transactions. Additionally, the chart contained, in written form, Moate's opinion as to the identity of the person she saw in surveillance photos and videos.

Exhibit 101 should not have been admitted because it invaded the province of the jury. In State v. George, 150 Wn. App. 110, 112, 206 P.3d 697 (2009), a conviction was reversed because the police witness invaded the province of the jury by identifying the defendant in surveillance video that was shown to the jury. The court reasoned that opinion testimony about the identity of a person in a surveillance video was only permissible if the witness had extensive contacts with the person identified and thus was substantially more likely to be able to identify the person than the jury. Id. at 118-19.

Whether Chuks or Prasad could be seen in the videos and photographs was a question for the jury. It was also up to the jury to decide whether there was any link between the phone records and the fuel card invoices. And it was for the jury to determine whether the information contained in the invoices was likely enough to be accurate in order to sustain

a verdict beyond a reasonable doubt. Exhibit 101 invaded the province of the jury by presenting all of these facts as established based on Detective Moate's conclusions.

b. The Trial Court Took No Precautions to Avoid Unduly Emphasizing Moate's Testimony.

Under some circumstances, the prosecution may be permitted to use a written summary to help the jury organize complex testimony. Such a summary must be based on, and fairly represent, evidence already before the jury. State v. Lord, 117 Wn.2d 829, 855, 822 P.2d 177 (1991). Even though this type of summary is intended to be illustrative only, it is a very persuasive and powerful tool. Such an exhibit creates the very real danger that the jury may rely on the summary as established fact or as a substitute for assessing witnesses' testimony. Id. at 856. Thus, the jury must be cautioned that the summary is not itself evidence but is only an aid in evaluating the evidence. Id.

Here, the court did not intend Exhibit 101 to serve merely as an illustration of complex testimony. It admitted the exhibit as substantive evidence under ER 1006. 12RP 21-22. Consequently, no restrictions were placed on the jury's use of that exhibit.<sup>3</sup> Without these restrictions, the State

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<sup>3</sup> The jury was instructed, "The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial... The exhibits that have been admitted will be available to you in the jury room." CP 148.

was permitted to use this very persuasive and powerful evidence to unfairly bolster its case.

Generally, testimonial exhibits are not submitted to the jury for unsupervised review. This rule was developed to prevent the jury from placing undue emphasis on the submitted testimony. State v. Monroe, 107 Wn. App. 637, 640-41, 27 P.3d 1249 (2001). Courts have recognized “the concern such documents would, in effect, ‘act as a speaking, continuous witness . . . to the exclusion of the totality of the evidence taken at the trial which must be viewed in its entirety.’” State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997) (quoting Pino v. State, 849 P.2d 716, 719 (Wyo. 1993)).

Admission of Exhibit 101 raises this same concern. The exhibit was sent to the jury room during deliberations, and the jury was free to consider the exhibit without restriction and without supervision by the court. Because the exhibit was essentially a written representation of Moate’s testimony, the jury’s unrestricted use of that exhibit placed undue emphasis on her testimony. Moreover, presenting Moate’s conclusions in written form created the danger the jury would accept them as established fact, rather than assessing the reasonableness of those conclusions. The court abused its discretion in admitting this exhibit. See Monroe, 107 Wn. App. at 645 (court

abused discretion in providing transcript of witness' testimony because procedure used unduly emphasized that testimony).

c. Exhibit 101 Essentially Permitted the State a Second Closing Argument Outlining the Inferences It Believed Should Be Drawn from the Evidence.

Another danger of summary charts like exhibit 101 is that they amount to a second chance for the State to present closing argument, in written form. See United States v. Lemire, 720 F.2d 1327, 1349 (D.C. Cir. 1983) (“A third danger posed by summaries of evidence is that they provide an extra summation for the government that comes from the witness stand rather than the counsel’s lecturn.”). Because of this danger, summaries under ER 1006 should not draw any controversial conclusions, but must be limited to “routine computations and culling through of documents to eliminate confusing and extraneous evidence.” Id. at 1350.

Exhibit 101 is not so limited. It is not a mere computation or culling of extraneous information. Instead, by compiling evidence from many sources (invoices, phone records, surveillance video) and juxtaposing them in chart form, the exhibit inherently contains opinions about the connections between the evidence and the conclusions to be drawn from it. Drawing such inferences is “best left to the closing argument of counsel.” Id.

When a chart draws conclusions from complex evidence, it is “is not so much a summary, which takes the place of the information summarized,

as it is a piece of demonstrative evidence in the nature of a graph.” Matsushita Elec. Corp. of Am. v. Salopek, 57 Wn. App. 242, 247-49, 787 P.2d 963 (1990). This type of evidence is generally admitted for illustrative purposes only. See id. at 249 (holding court did not abuse discretion in admitting chart for illustrative purposes). The many dangers, discussed above, of summary charts that draw conclusions from the evidence, has led in the federal courts to a requirement of “‘guarding instructions’ to the effect that the chart is not itself evidence but is only an aid in evaluating the evidence.” Lemire, 720 F.2d at 1348; United States v. Scales, 594 F.2d 558, 564 (6th Cir. 1979) (citing Holland v. United States, 348 U.S. 121, 128, 75 S. Ct. 127, 99 L. Ed. 150 (1954)); United States v. Bartone, 400 F.2d 459, 461 (6th Cir. 1968)); see also Monroe, 107 Wn. App. at 638 (before permitting jury to review witness testimony during deliberations, court must adopt safeguards to prevent undue emphasis). No such instruction was given in this case. The jury’s consideration of exhibit 101 as substantive evidence was not guided or limited in any way.

Under the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, a defendant is guaranteed the right to a fair trial before an impartial trier of fact. Allowing a deliberating jury unrestricted use of an exhibit summarizing the conclusions drawn by the investigating detective violates the right to a fair trial because it improperly

over emphasizes the importance of that testimony. The court's erroneous admission of Exhibit 101 denied Ram a fair trial, and his conviction must be reversed.

2. ASMA'S TESTIMONY ABOUT HIS EARLIER IDENTIFICATION OF RAM WAS INADMISSIBLE HEARSAY.

Asma was permitted to testify that he met with police, described the person who seemed to be in charge of the discounted fuel transaction he participated in, and then picked Ram out of a series of photographs. 8RP 59-70. He testified he described an Indian or Spanish-looking man between 30 and 40 years old with darker skin and glasses, about five feet seven inches tall and weighing 200 pounds with a white Ford van. 8RP 61-62. He then picked person number five out of a series of six photographs shown to him by police. 8RP 67. He said the facial structure resembled the person he had seen at the gas station and told police this was the "main guy" or "the man." 8RP 68, 70.

However, on cross examination, Asma testified he did not recall much about this and was mostly relying on the notes in Detective Moate's report. 8RP 72. He testified that the events were fresh in his mind when he spoke to Moate, but she wrote the report and he had not seen it until that day. 8RP 76. Ram moved to strike Asma's testimony on the grounds that his recollection was not refreshed by referring to Moate's report and the report

did not meet the requirements for the recorded recollection hearsay exception. 8RP 77, 115-16, 118. An evidentiary ruling that is based on an incomplete analysis of the law or one that is based on misapprehension of the legal issues may constitute an abuse of discretion because it is a decision based on untenable grounds. City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The court erred in admitting this testimony because Asma's recollection was not refreshed and the report does not meet any other exception to the hearsay rule.

- a. Asma's Testimony Should Have Been Stricken Because His Memory Was Not Refreshed and He Had No Independent Personal Knowledge.

Witnesses generally must testify from their personal knowledge of events or circumstances. ER 602. Testimony based on out of court statements is inadmissible hearsay. ER 801, 802. However, a witness may use a writing to refresh his or her memory while testifying. ER 612. Courts must ensure that the writing is used only to refresh, and not to supplant, the witness' own memory. State v. McCreven, 170 Wn. App. 444, 475, 284 P.3d 793 (2012) (citing State v. Little, 57 Wn.2d 516, 521, 358 P.2d 120 (1961)). The writing itself is only admissible if used on cross-examination to impeach the witness. ER 612; State v. Savaria, 82 Wn. App. 832, 842-43, 919 P.2d 1263 (1996).

The requirements of using a writing to refresh a witness' memory are: (1) the witness' memory needs refreshing, (2) opposing counsel has the right to examine the writing, and (3) the trial court is satisfied that the witness is not being coached, i.e., the witness is using notes to aid, and not supplant his or her own memory. McCreven, 170 Wn. App. at 475 (citing Little, 57 Wn.2d at 521).

When, after reviewing the writing, the witness still has no independent memory, questioning about the writing must cease:

If it is apparent that the witness has no independent recollection of the matter in question, it is improper to continue to question the witness about the contents of the writing. Further questions which are designed simply to convey the contents of the writing to the jurors are properly barred under Rule 403

Karl B. Tegland, 5A Washington Practice, Evidence Law and Practice § 612.3 (5th ed.). Merely reading the writing into the record is not permitted unless the writing meets another hearsay exception such as that for recorded recollections. Id. (citing Preston v. Metropolitan Life Ins. Co., 198 Wash. 157, 87 P.2d 475 (1939)). Using the witness to convey the contents of the writing to the jury also violates ER 403. Id. (citing United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977)).

Because he testified he had no independent memory, even after looking at Moate's report, Asma's testimony was nothing but hearsay. 8RP

72-75. The court should have sustained Ram's objection that Asma's recollection was not actually refreshed and should have granted the motion to strike. 8RP 77.

b. Asma's Testimony Should Have Been Stricken Because It Failed to Meet the Requirements for Past Recollection Recorded.

The prosecutor recognized Asma's memory was not refreshed, and argued instead that his testimony, which essentially consisted of reading the police report, was admissible under ER 803(a)(5)'s hearsay exception for recorded recollection. 8RP 117. But the police report does not meet the requirements for that exception either.

ER 803(a)(5) provides

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Admission under ER 803(a)(5) is proper when the following prongs are met:

(1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness memory; and (4) the record reflects the witness prior knowledge accurately.

State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). In this case, factor (3) is not satisfied. Asma did not create the police report; Detective Moate did. 8RP 76. Nor did Asma adopt it at a time when the matter was fresh in his memory. On the contrary, he testified he had never seen it before the day he testified. 8RP 76. The trial court implicitly agreed with counsel's argument that Asma's testimony did not meet the requirements of ER 803(a)(5), explaining that was why she did not admit as an exhibit the document that Asma was looking at. 8RP 118.

This error was prejudicial because an identification by a live witness is inherently more powerful and persuasive than the hearsay statements by detectives that Asma had made the identification. The entire case hinged on whether Ram could be linked to any of these fraudulent transactions. The links forged by Chuks and Prasad were inherently weak because of their own motivation to implicate him to save themselves. Indeed, the jury was instructed to view their accomplice testimony with caution. CP 165. But identification by a more neutral party, one of the truck drivers who purchased fuel from Chuks and Prasad, was likely to be far more persuasive to a jury. Similarly, although another detective attested to Asma's identification under the hearsay exception for statements of identification, the identification was far more persuasive coming from Asma himself, rather than relayed as hearsay. Improperly admitting an eyewitness identification

without any basis in personal knowledge was likely to affect the verdict and requires reversal of Ram's convictions.

Ram's motion to strike Asma's testimony should have been granted when it became clear he was not testifying from personal knowledge but merely telling the jury what he read in Moate's police report. His recollection was not refreshed and the report was not a recorded recollection.

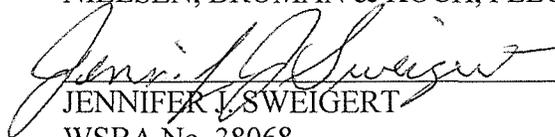
D. CONCLUSION

Because the improper admission of exhibit 101 and Asma's testimony violated Ram's right to a fair trial, he requests this Court reverse his convictions.

DATED this 25<sup>th</sup> day of June, 2015.

Respectfully submitted,

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72654-4-I
	)	
VINOD RAM,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VINOD RAM  
NO. 214025646  
KING COUNTY JAIL  
500 5<sup>TH</sup> AVENUE  
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JUNE 2015.

x Patrick Mayovsky