

72654-4

FILED
September 24, 2015
Court of Appeals
Division I
State of Washington

72654-4

NO. 72654-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VINOD CHANDRA RAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where a summary chart prepared by the lead detective met all the requirements for admission under ER 1006 and was not unfairly prejudicial, did the trial court properly exercise its discretion in admitting the chart as substantive evidence?

2. Where a witness testified about his prior identification of the defendant in a photo line-up largely without refreshing his memory, and used an admitted exhibit to refresh it when necessary, did the trial court properly exercise its discretion in allowing the witness to testify about the prior identification?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Vinod Chandra Ram, with one count of conspiracy to commit identity theft in the first degree and 18 counts of identity theft in the first degree, with a "major economic offense" aggravating factor alleged on all counts. CP 26-38. The charges pertained to events between August 2010 and August 2011 and involved 18 separate business entity victims. CP 26-38. One of the counts of identity theft was dismissed at the close of the State's case because a necessary witness did not

appear for trial, and the jury acquitted Ram of one other count of identity theft. 14RP 61; CP 196. The jury found Ram guilty of the conspiracy charge and the remaining 16 identity theft charges, and found the aggravating factor proven for each of those charges. CP 136-46, 197-220. The trial court imposed concurrent standard range sentences of 60 months on the conspiracy charge and 80 months on each identity theft charges. CP 235, 237. Ram timely appealed. CP 248.

2. SUBSTANTIVE FACTS.

Companies that own fleets of large trucks frequently use a system of "card lock" stations to fuel their vehicles. 6RP 54; 8RP 18. A card lock station is a specialized unattended fueling station. 6RP 53; 8RP 18. Trucking companies that use such stations have credit accounts with a fuel company, which issues "fuel cards" to the trucking company; fuel cards function as credit cards usable for purchasing fuel at stations in the fuel company's network. 6RP 53-54. Two commonly used fuel companies in Washington State are Associated Petroleum Products (APP) and PetroCard. 6RP 53-54; 10RP 52. Two major card lock station brands are Pacific Pride and CFN, which between them have approximately 400 card lock stations in western Washington. 6RP 53-54. Companies such

as APP sometimes participate in both networks, so that their customers can use either type of station. 6RP 53-54.

After a fuel company issues cards to a customer business, such as a trucking company, the trucking company's employee drivers can then each drive into a card lock station, swipe his or her fuel card, enter a personal identification number (PIN) at a computerized kiosk to activate a fuel pump, and fuel his or her truck. 6RP 53; 7RP 48-50; 9RP 67. The trucking company would then receive a monthly or bi-monthly bill for all recent fuel transactions made using the company's fuel cards. 6RP 44-45; 10RP 52. The bills typically reflect the time, date, and location of each purchase, as well as the quantity and price of fuel purchased, the card number and PIN used, and sometimes include additional information that a particular company required its employees to enter at the kiosk, such as the odometer reading or truck number. Ex. 5, 8, 36. Many companies assign one fuel card to each vehicle, and a unique PIN to each driver, so that for any transaction it is possible to determine which driver and which truck were involved. 6RP 44, 86; 7RP 217.

In 2009, Vinod Ram was contacted by Kent police officers after being seen at some fuel stations where fraudulent fuel

transactions had occurred. 8RP 27-29. The officers informed Ram that he was being trespassed from all Pacific Pride locations, and would be subject to arrest if he went to one in the future. 8RP 33-34. Ram indicated that he understood. 8RP 34.

In April of 2011, Detective Stacy Moate of the Washington State Patrol was assigned to investigate a string of fuel thefts and fuel card fraud that had been occurring at numerous card lock stations in western Washington. 11RP 148-50. Multiple victim companies had reported seeing numerous unauthorized purchases showing up on their fuel bills, which were made at times and locations, and in quantities, that clearly indicated that the purchases were not made by the businesses.¹ 6RP 48, 78-79; 7RP 27, 220-21, 227-29; 11RP 162. Seventeen different companies reported fraudulent charges on their fuel card accounts totaling between \$2,600 and \$106,000 per company.² 6RP 49, 82, 95; 7RP 31-39, 221, 231, 239; 8RP 182-84; 9RP 33, 140; 10RP 155;

¹ For example, on many occasions a particular truck's fuel card would be used multiple times within minutes to purchase far more fuel than the corresponding truck could hold. E.g., 6RP 48; 7RP 237-38. On other occasions, a truck's fuel card would be used multiple times while the truck was not in service because it was being repaired. 6RP 49, 78-79. One company had a fuel card used multiple times in Washington while the truck to which the card belonged was actually in southern Oregon. 1RP 104-05.

² An eighteenth company also reported losses, but its representative failed to appear for trial, resulting in the dismissal of the identity theft charge pertaining to that victim. 12RP 111; 13RP 18.

11RP 37, 46, 74, 88, 109-10; 12RP 61. In total, there were over 1,100 fraudulent charges, spanning from August 2010 until August 2011. Ex. 101; 12RP 37.

In late September 2010, David Hanson of APP set up an email alert for one of the victim companies, Knight Transport, at the request of its owner, Scott White. 6RP 55-56. Knight Transport had noticed that a number of unauthorized transactions were occurring on one of the company's fuel cards, which was missing from the truck in which it was usually kept. 6RP 86-87. After Hanson set up the alert, White would automatically receive an email almost instantaneously any time the card was swiped at a fuel station. 6RP 55. Noticing that all of the fraudulent transactions were occurring between 2:30 a.m. and 5:00 a.m. at a particular fuel station in Seattle, which lacked surveillance cameras, Hanson and White decided to lie in wait across the street on an early October morning, in the hopes of catching the thief using Knight Transport's card. 6RP 58-61, 88-89.

Around 5:00 a.m., they observed two owner-operator semi-trucks pull into the station and just wait, without refueling. 6RP 62, 90. After a few minutes, a green pickup truck arrived and a man got out of the pickup and swiped a card at the kiosk. 6RP 63, 92.

Within seconds, White received an alert that Knight Transport's stolen card had just been used at that location. 6RP 64, 92. White ran across the street to try to apprehend the man. 6RP 64, 93. Seeing White, the man quickly got back into the green pickup and sped off as Hanson followed in his vehicle while calling 911. 6RP 65, 93.

Hanson lost sight of the truck when it turned down a dead-end road where Hanson did not feel safe following, but the truck then emerged from the dead-end road just as multiple police cars arrived to stop it. 6RP 66. Hanson could see that the man who was driving the truck when it was stopped by police, later identified as Ram, was the same man who had swiped the card at the fuel station. 6RP 66-67; 7RP 18, 21. White was brought to that location and also confirmed that Ram was the person who had swiped the card. 6RP 94. Arresting officers located \$690 in folded bills in Ram's pants pocket, but Ram was no longer in possession of a fuel card, and despite attempts to search the dead-end road, it was never recovered. 6RP 71; 7RP 22-23. However, there were no more fraudulent transactions on Knight Transport's card after that night. 6RP 100.

When Moate began speaking with the victim companies and reviewing business records and any surveillance videos that were available from the involved fuel stations in the spring of 2011, she saw that the thefts appeared to all be connected, with the same two men repeatedly seen in the videos using a card to activate the fuel pumps and directing truck drivers to go to particular pumps and fuel their vehicles. 1RP 151, 157. However, most companies reported that the fuel card that was used to make the fraudulent purchases was still physically in the company's possession. 11RP 164.

Moate knew that a device such as a card reader could be used to copy information off a fuel card and then imprint it onto any new card with a magnetic strip, creating a copy of the card that could be used after the original fuel card was put back in its proper place.

11RP 169. In some of the surveillance videos the thieves appeared to be using blank white cards. E.g., 9RP 189; 12RP 209; 13RP 42; Ex. 59.

After a private investigator hired by PetroCard was able to record license plates of trucks that were present at a fuel station at a time when unauthorized fuel charges were being made, Moate spoke to the owners of those vehicles and learned that the person seen operating the kiosk on a surveillance video was a truck driver

named Manny Chuks. 11RP 164-67. A search of Chuks' truck and residence did not turn up any card scanning or skimming equipment, blank magnetic cards, large amounts of cash, or anything else of evidentiary value. 11RP 167-68. When contacted by Moate, Chuks agreed to speak with her, and revealed what had been going on. 7RP 125.

Chuks testified that he is an owner-operator truck driver, which means that he owns his own truck and hires out his services. 7RP 43. Like all owner-operators, he is responsible for purchasing his own fuel. 7RP 44. He first met Ram in 2010 through a friend named Mousie. 7RP 56. Chuks was not told Ram's name, but thought of him as the "gas man." 7RP 75. Chuks and other owner-operator truck drivers would buy fuel from Ram and Mousie at a discounted rate. 7RP 58-61. Once a group of five or six drivers was present at a card lock station, Mousie would use a fuel card provided by Ram to activate the pump; the drivers would then fill their trucks and pay Ram in cash, at about half the normal price for fuel. 7RP 58-63. Sometimes, Ram's cousin Damiun would be there instead of Mousie and would activate the pump using the card provided by Ram. 7RP 63, 65. Ram would sometimes be around or near the fuel station, but rarely within the station. 7RP 65. Only

on a few occasions did Chuks see Ram come within the area where surveillance cameras might see him to operate the kiosk himself. 7RP 66. Ram drove a variety of vehicles, including a green or blue pickup truck, an ash-colored van, and a Jeep Liberty. 7RP 110-11.

Eventually, Ram suggested that Chuks start helping him by doing what Mousie and Damiun did, and offered an even bigger discount on Chuks' fuel in return. 7RP 66-67. Chuks agreed, and began working for Ram. 7RP 66. Ram would call Chuks to say that he had drivers who wanted to get fuel and would ask if Chuks could help fill them up. 7RP 76. If Chuks was available, Ram would provide him with a fuel card and a PIN, and Chuks would use it to activate the pumps so that the drivers could fuel up, and then the drivers would pay Ram. 7RP 70-73. Sometimes the cards Ram gave Chuks looked like normal fuel cards, and sometimes they were just blank white cards. 7RP 73. If a card stopped working, Ram would provide another with a new PIN. 7RP 77.

Chuks worked for Ram from February 2011 until June 2011, when he became uncomfortable with the high number of drivers purchasing the discounted fuel. 7RP 69, 78. Chuks' cell phone number was 206-730-7720, and had been for over 15 years.

7RP 89. Ram changed phone numbers more than five times in the five months Chuks worked for him. 7RP 208. At the time Chuks spoke to Moate in June of 2011, Ram's phone number was 253-880-7621. 7RP 208-09. After Chuks told Moate all of this, Moate used a search warrant to obtain copies of Chuks' cell phone records. 11RP 170. The records confirmed that Chuks had communicated with the phone number Chuks had identified as Ram's frequently around the time of many of the fuel thefts. 11RP 174-75; Ex. 92, 101. Chuks was later charged as Ram's co-defendant, but was allowed to plead to two felonies as part of a plea agreement that required him to testify in Ram's trial. 7RP 189.

Moate's investigation led her to speak with other owner-operator truck drivers as well. 12RP 98. One that she contacted was Fassil Gedlu. 12RP 99. Gedlu told Moate, and later testified at trial, that he had originally been contacted by Chuks, with whom he had previously worked, regarding an opportunity to purchase discounted fuel. 10RP 96. Gedlu identified Ram in a photo line-up and at trial as the man who had been sitting in a Jeep on a street close to the fuel station during one or more of the sales. 10RP 96. Gedlu had observed Chuks speaking to Ram during the transaction. 10RP 96. Gedlu provided Moate with the cell phone

number Gedlu had had for more than five years, 206-660-5869.

Moate then obtained Gedlu's phone records, which confirmed that Gedlu had communicated with both Chuks' and Ram's cell phone numbers around the time of several of the fuel thefts. Ex. 91, 101.

Moate's investigation also led her to contact a man named Michael Asma, another owner-operator who had been seen on a surveillance video at the time of one of the thefts. 11RP 177.

Asma told Moate, and testified at trial, that he had purchased discounted fuel on one occasion in June 2011, and gave a physical description of the person in charge of the fuel sale. 8RP 59 62.

Asma later identified Ram in a photo line-up as that person. 8RP 67; 9RP 44-48; Ex. 43, 66.

In mid-January of 2012, Moate obtained a search warrant for the home in Pacific, Washington, where Ram's ex-wife Eva Gumiran resided with her children. 11RP 181-82. The house was in Gumiran's name. 12RP 75. During the search, Moate observed that almost all of the furniture, electronics, and household items (such as towels, rugs, and knick-knacks) in the residence were new, with most still bearing price tags. 12RP 72. A card reader was found in a box on a shelf in an upstairs bedroom. 11RP 18-19.

When asked where cash might be located in the home, Gumiran walked to the pantry, and eventually pointed to a rice dispenser and stated that only Ram was allowed to go into that. 12RP 80, 89. When officers began emptying the rice dispenser, they found a brick-shaped object inside, which turned out to be \$35,000 in one-hundred-dollar bills, wrapped tightly in plastic and foil. 12RP 82-85.

At trial, Gumiran testified that she moved into the home in Pacific in October 2011 with her children; she has two teenage sons with Ram and two adult daughters from a prior relationship. 8RP 87. Gumiran testified that Ram had never resided in the house or stayed overnight, and that she had purchased the house and everything in it out of her income (approximately \$3,000 per month before taxes), her income tax refund, and child support from the father of her daughters (\$500 per month total). 8RP 91, 95-98, 167. Gumiran also claimed that she lied when she told police she didn't know where the money had come from, and that in reality she had put the money in the rice dispenser. 8RP 127-28. She testified that the entire \$35,000 had come from Ram's father, who had given her his pension and social security payments every month so that she could use them for Ram's sons. 8RP 126,

156-57, 163. Gumiran claimed that she would unwrap the plastic and foil and add more money to the brick in the rice dispenser every month when she would get a few thousand more dollars from Ram's father. 8RP 166.

Gumiran's testimony was contradicted by Gumiran herself and by numerous other witnesses. When pressed by the prosecutor, Gumiran conceded that she was no longer receiving child support for her daughters at the time she purchased the house because they were 19 and 20 years old at that point. 9RP 168. In jail calls between Ram and Gumiran, Ram referenced the home as being "our house," instructed Gumiran to put locks on the bedrooms, and asked if she knew how to pay the bills, and Gumiran referred to the house as "your investment." 8RP 145-49; Ex. 53 at 3, 8-9, 16. In a call shortly after the search of the residence, Ram questioned Gumiran about what items the police had taken, asking specifically whether the police had taken the "scanner" and "my laptop." Ex. 52 at 5.

Additionally, Moate testified that the packaging around the brick of money did not appear to have been opened and resealed repeatedly as Gumiran claimed at trial, and that Gumiran had previously told her that Ram had resided in the house at one point.

12RP 76, 84. Gumiran's daughter Kayla also testified that Ram had lived in the house and it had been Ram who purchased the house and furnishings with cash. 10RP 23-26, 31. Kayla further testified Ram changes phones frequently, and that she had seen him with what looked like blank white credit cards. 10RP 34-35.

After speaking with Gumiran during the search of the residence, Moate contacted Damiun Prasad. 11RP 179-80. Moate recognized Prasad as one of the men repeatedly seen operating the kiosks in the surveillance videos of the fuel thefts. 12RP 95. Prasad told Moate, and later testified at trial, that Ram is his great-uncle on his father's side, but that he refers to Ram as his uncle or cousin. 9RP 61. Prasad first met Ram in 2010 when his father asked him to help Ram move some things for a yard sale. 9RP 62-63. Soon thereafter, Ram moved in with Prasad and his parents, and lived with them in Federal Way for approximately seven months. 9RP 63-64. During the yard sale, Ram told Prasad, who was in the midst of a long period of unemployment, that Prasad could earn money working for Ram. 9RP 65.

Ram said that he had a business with trucks and drivers working for him, and needed help fueling them up. 9RP 66, 82. Ram explained that Prasad would just have to swipe a card at the

fuel station, put in a PIN, and help the drivers fill up, and that Ram would pay him \$50 per truck. Prasad, who had never seen a card lock station or used a fuel account card before, agreed, believing that Ram's "business" was legal. 9RP 67-68. Ram subsequently introduced Chuks and Mousie as two of the drivers who worked for Ram, and Prasad occasionally observed Ram provide fuel cards to both men. 9RP 82-83.

Over the next several months, Ram would randomly call Prasad and let him know that they needed to go "fill up." 9RP 68-69. Because Prasad did not have a driver's license, Ram would pick him up, tell him where they were going, and drive Prasad to a location away from the fuel station where Ram had directed the truck drivers to gather. 9RP 69-71. As they drove, Prasad would hear Ram talking on the phone with the drivers, telling them where to meet him. 9RP 71. Ram would give Prasad a fuel card and PIN, and Prasad would then get into the passenger seat of one of the trucks, and travel with the trucks to the fuel station Ram had chosen. 9RP 69-70, 72, 74.

When Prasad and the truckers arrived at the station, Prasad would start the pumps using the fuel card and PIN Ram had provided, and all the trucks would fill up. 9RP 72. Sometimes,

another truck would join the group once they were at the fuel station; if the driver told Prasad, "Your cousin sent me," Prasad knew that Ram wanted him to let that driver fill up as well. 9RP 72-73. None of the truck drivers ever actually used Ram's name. 9RP 73. As Prasad helped the drivers fuel up, Ram would always be nearby, and was sometimes visible as he drove around near the station, "keeping his eye out." 9RP 78, 108. Ram usually drove a green Chevy truck, but sometimes drove Prasad's sister's Jeep Liberty or Prasad's father's "gloomy gold" van. 9RP 79. Ram told Prasad that he had been banned from all Pacific Pride and all CFN stations for fighting. 9RP 108-09.

Sometimes, the kiosk would reject the card or PIN that Ram had given Prasad. 9RP 77-78. When that occurred, Prasad would call Ram and Ram would give him a new card or a new PIN to try. 9RP 78-80. When the truckers were done fueling, they and Prasad would leave and meet Ram back at the place where they had initially gathered. 9RP 72. There, Prasad would tell Ram how many gallons a driver had received, Ram would tell the driver how much they owed him, and the drivers would pay Ram in cash. 9RP 85. Ram would charge the drivers \$2.50 per gallon of fuel,

although the normal price at that time was much higher. 9RP 85, 105.

In the beginning, the cards Ram provided to Prasad looked like legitimate fuel cards, with the logo and company name of the fuel network on the card. 9RP 73-74. However, after Prasad had been working for Ram for seven or eight months, Ram started providing him with cards that were completely blank and white except for the magnetic strip. 9RP 75-76. At that point, Prasad began to suspect that Ram's operation was not legal. 9RP 102. At times, Prasad would see Ram with as many as three or four blank fuel cards at one time, as well as very large amounts of cash even when not at the fuel stations. 9RP 110, 112-13. A few weeks after Ram began providing blank white fuel cards, Prasad saw Ram with a card reader multiple times, both in the backpack Ram always carried and attached to a laptop on Ram's bed in Prasad's house. 9RP 115-19, 152. Prasad also on occasion saw Ram with a "slim jim," a device for unlocking any vehicle that has a pop-up door lock.

When Prasad talked to Ram about his concern regarding the blank white fuel cards, Ram told him that the original card was with Ram's long-haul driver, and that Ram had made a copy so that he could use it for his local drivers in the meantime. 9RP 122-23.

Several months later, Ram moved out of Prasad's house and into a house in Pacific, Washington, with his ex-wife Eva Gumiran and their children. 9RP 124. Two or three months later, in the fall or early winter of 2011, Prasad stopped working for Ram. 9RP 124.

In early January 2012, Prasad received a recorded phone call at home from Ram while Ram was in the King County Jail on an unrelated matter. 9RP 168; 13RP 26. Prasad's father initially answered the phone in Hindi, and Ram asked to speak to Prasad. 9RP 171. At the time of the call, Ram had primarily been staying with Prasad's family after living off and on with Gumiran for a time. 9RP 172. Ram asked Prasad to go to the bedroom in which only Ram lived and instructed him to throw away a box that was hidden underneath Ram's dresser, and to not tell anyone what he had done. 9RP 172-75; Ex. 64. Prasad did as Ram asked; although he did not look inside the box that he threw away, he could tell based on the weight of the box and the sound and movement of the items in it that it contained numerous fuel cards. 9RP 175-77.

When Prasad was contacted by Moate in late January 2012 regarding the fuel thefts, he willingly explained to her what his involvement had been. 9RP 126-27, 153-54, 156. Like Chuks, Prasad was later charged as Ram's co-defendant, and pled guilty

to two felonies pursuant to a plea agreement that required him to testify in Ram's trial. 9RP 160-65; 12RP 156. Five days before Ram's trial was scheduled to begin, Ram showed up at Prasad's wedding and called Prasad a "snitch" to one of Prasad's friends while showing him King County court paperwork. 9RP 201; 12RP 126-30.

Ram did not testify at trial, nor did he call any witnesses to testify on his behalf. 14RP 61. Additional facts are presented below in the sections to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE SUMMARY CHART AS SUBSTANTIVE EVIDENCE.

Ram contends that the trial court committed reversible error when it admitted Exhibit 101, the chart prepared by Moate to summarize the fuel card invoices, surveillance records, and phone records, as substantive evidence. This contention should be rejected. The chart was admissible as substantive evidence because it met all four criteria for admission under ER 1006.

a. Relevant Facts.

In preparation for trial, Detective Moate created a chart to keep track of information from victim companies' fuel invoices, surveillance cameras, and phone records. 12RP 188-89. At trial, the State offered this summary chart, marked as Exhibit 101, under Evidence Rule 1006. 3RP 50; 12RP 193. The first six columns on the chart were copied from the victim companies' fuel invoices that were admitted at trial. 12RP 190. For a given transaction, the columns listed the company's name, the date of the transaction, the time of the transaction, the quantity of fuel purchased, the location at which the transaction occurred, and the amount billed to the company for the transaction. 12RP 190; Ex. 101. Moate copied and pasted into the chart all transactions that the victims had marked on the admitted exhibits as being fraudulent, and arranged them in chronological order. 12RP 190; 13RP 52; Ex. 101.

The next two columns in the chart were drawn from the many surveillance videos that were admitted at trial, as well as testimony by Chuks, Prasad, and Moate. 12RP 189. One column was labeled "Photo/Video" and simply noted whether surveillance photos or video had been admitted at trial for a given transaction. 12RP 189; Ex. 101. The other column was labeled "Person ID"; for

those transactions with corresponding photos or video, this column listed "Damiun," "Manny," or was left blank, corresponding to Moate's testimony regarding whether she was able to identify Prasad or Chuks in the photo or video based on having met them. 12RP 191; Ex. 101. Moate's testimony and the information in the "Person ID" column of Exhibit 101 was coextensive with Prasad's and Chuks' testimony independently identifying themselves in the relevant videos. 7RP 84-106; 9RP 178-201; 12RP 194-225; 13RP 34-47; Ex. 101.

The final three columns in the chart were copied from the phone records that had been admitted at trial pertaining to Chuks' and Gedlu's phone numbers. 12RP 191. The first column was labeled "Chuck's [sic] Phone Records 206-730-7720," and listed the date and time of any calls appearing in Chuks' phone records between Chuks and 253-880-7621, the phone number Chuks identified as belonging to Ram, on the same day as a fraudulent transaction. 12RP 191; Ex. 101. The next column was labeled "Incoming/Outgoing Chucks [sic] phone records," and listed whether the call had been incoming to Chuks' phone or outgoing from Chuks' phone, and the fact that other phone number involved in the call was 253-880-7621. 23RP 191; Ex. 101. The final

column was titled "Gedlu Phone Records 206-660-5869," and listed the date and time of any calls between Gedlu's number and Chuks' number or 253-880-7621 (identified by Chuks as Ram's number) on the same day as a fraudulent transaction, and whether the calls were incoming or outgoing. 12RP 191; Ex. 101.

Moate testified at trial that the phone calls were not necessarily tied directly to the transactions in whose rows the calls appeared. 13RP 55-56. Instead, she stated, she had merely listed the calls chronologically, placing the first relevant call from a given date in the row corresponding to the first fraudulent transaction on that date. 13RP 55-56. As a result, when there were more calls on a given date than there were fraudulent transactions, some of the calls would end up appearing on rows pertaining to the next day's transactions. 13RP 56-57; Ex. 101. Moate testified that the chart should not be read to imply a direct relationship between a given transaction and any particular phone call, and noted that she had no personal knowledge about the contents of any of the phone calls. 13RP 56-57.

Drawing from hundreds of pages of records, the final 40-page summary chart presented details regarding a total of approximately 277 phone calls and approximately 1,100 fuel

transactions, 162 of which were associated with surveillance photos and videos totaling four to five hours in length. 12RP 37, 39; Ex. 101.

When the admissibility of the summary chart was litigated, Ram challenged the summary on the ground that it was cumulative of the records from which it was drawn, which were themselves in evidence. 12RP 12-13; CP 110-12. He also argued (prior to Moate's explanation) that the summary was conclusory and not objectively accurate because it purported to link specific phone calls to specific fuel card transactions, and that it improperly contained information regarding the surveillance photos and videos that was derived from testimony rather than exhibits. 12RP 15-18; CP 114-16. Finally, Ram acknowledged that trial courts have the discretion to admit summary exhibits as substantive evidence under ER 1006, but argued that the court should only admit the chart as an illustrative exhibit given the concerns raised in his other arguments. 12RP 19; CP 116-18.

The trial court overruled most of Ram's objections and admitted Exhibit 101 as substantive evidence.³ 12RP 45. The court found that the fuel invoices, surveillance photos and videos, and phone records were "voluminous," and the proper subject of a summary exhibit. 12RP 25. The court also found that the inclusion of all three types of information in one chart was "extremely helpful" to the jury, and did not constitute an opinion or argument regarding Ram's guilt. 12RP 25.

b. Exhibit 101 Was Admissible As Substantive Evidence Under ER 1006.

A trial court's evidentiary rulings will not be reversed on appeal absent a showing of abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97-102, 935 P.2d 1353 (1997). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Evidence Rule 1006 in both the Washington and federal rules of evidence states:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined

³ The trial court did sustain Ram's objections to the inclusion of his name as associated with phone number 253-880-7621, and required the State to remove Ram's name from the chart before it was admitted, which the State did not oppose. 12RP 18, 27-28, 38.

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.

In order to admit a summary under this rule, the “summary’s proponent must show that: (1) the original materials are voluminous and an in-court examination would be inconvenient, (2) the originals are authentic and the summary accurate, (3) the underlying materials would be admissible as evidence, and (4) the originals or duplicates have been made available for examination and copying by the other parties.” State v. Pedersen, 122 Wn. App. 759, 770, 95 P.3d 385 (2004) (footnotes omitted).

The final line of ER 1006 signifies that the trial court has the discretion to require that the voluminous records being summarized also be admitted at trial, but need not do so. United States v. Strissel, 920 F.2d 1162, 1163 (4th Cir. 1990). ER 1006 thus does not prohibit the admission of summaries of documents already in evidence. United States v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006); United States v. Lemire, 720 F.2d 1327, 1347 (D.C. Cir. 1983). Unlike a summary admitted only to help illustrate a witness’s testimony, a summary admitted under ER 1006 is substantive evidence and goes to the jury room during

deliberations. State v. Lord, 117 Wn.2d 829, 856 n.5, 822 P.2d 177 (1991); see also 5C Wash. Prac., Evidence Law and Practice §§ 1006.2, 1006.7 (5th ed.).

Here, the summary chart in Exhibit 101 met all four requirements for proper admission under ER 1006. First, the chart summarized information from fuel invoices for 17 different companies, which contained thousands of transactions over the course of a year, as well as hundreds of pages of phone records and hours of surveillance videos. 12RP 37, 39; Ex. 101. It presented together in one place the approximately 1,100 fuel transactions and 277 phone calls that were relevant to the charges against Ram, as well as basic information from the surveillance photos and videos relating to 162 of the fuel transactions. 12RP 37, 39; Ex. 101. The record thus supports the trial court's finding that the records being summarized were "voluminous." 12RP 40.

Second, the original materials were authentic and the summary was accurate. Although Ram contested whether the underlying fuel invoices and cell phone records met the statutory requirements for admissibility as a business record without live testimony by a custodian of records, Ram never raised any concern that the records themselves were not what they purported to be.

4RP 189-209; CP 69-74. Furthermore, the trial court's ruling admitting the original materials as properly authenticated is unchallenged on appeal.

The trial court also properly determined that the summary was accurate. Moate testified that she merely copied and pasted information from the original fuel and cell phone records and surveillance videos into the summary, and the column identifying who could be seen in the videos and photos was based on her own observations after meeting Prasad and Chuks, as well as Prasad's and Chuks' own testimony. 7RP 84-106; 9RP 178-201; 12RP 191; 13RP 52; Ex. 101. At no point did Ram challenge the accuracy of those identifications or any of the other information in the chart.⁴ Indeed, Ram reaffirmed the identifications on cross-examination, and relied on testimony by Chuks and Prasad identifying themselves in the photos and videos to argue in closing that the evidence established only the guilt of Chuks and Prasad. 7RP 168-78; 24RP 155-57, 165-66.

⁴ Contrary to assertions in Ram's brief, the accuracy of the information in the fuel invoices was not in dispute at trial. Brief of Appellant at 16. Ram challenged only whether the invoices fell within the hearsay exception for business records and were accompanied by proper certifications from records custodians; he never questioned that the information in the invoices was factually accurate. 4RP 189-209; CP 69-74.

Ram's only claim of inaccuracy was that the placement of phone call data in rows pertaining to fuel transactions inaccurately purported to link specific calls to specific transactions.⁵ 12RP 12-13; CP 110-12. The State explained that Moate's testimony would make clear that the chart did not purport to do that. 12RP 38. And, indeed, Moate explained on the stand her method for choosing on what rows to display the information from the phone records, and specifically stated that the chart did not purport to link specific calls to specific transactions. 13RP 55-57. The trial court thus properly exercised its discretion in finding that the chart was accurate and not misleading. 12RP 33.

The third factor for admissibility under ER 1006, the admissibility of the underlying materials, was clearly met here, as all of the underlying materials were in fact admitted at trial, and that decision is unchallenged on appeal. CP 236-69. Finally, there is no dispute that the materials underlying the summary chart were provided to the defense prior to trial. 3RP 50-51. Because all the requirements of ER 1006 were met, the trial court properly exercised its discretion in admitting the summary chart as

⁵ Ram conceded that the same summaries of the phone records and fuel records would be proper if they were in separate charts. 12RP 35.

substantive evidence. See Lord, 117 Wn.2d at 856 n.5; Pedersen, 122 Wn. App. at 770.

Ram's first and third arguments challenging the summary chart on appeal turn on Ram's contention that the summary chart in fact contained conclusions Moate reached as a result of her investigation. Brief of Appellant at 15-18, 20-21. Although Ram concedes that summaries of the fuel invoices and cell phone records "would likely have been admissible under ER 1006," he asserts that by culling out the irrelevant record entries and presenting only the relevant entries together in the same chart, Exhibit 101 ceased to be a summary of objective information and instead became a written expression of Moate's opinions. Brief of Appellant at 16. This is not the case.

The very purpose of ER 1006 is to allow the jury to focus on the relevant record entries without wading through the voluminous original materials, and nothing in the rule prohibits summarizing multiple types of evidence within one summary exhibit. ER 1006; see Milkiewicz, 470 F.3d at 398. Indeed, it is the very act of pulling related, relevant information from multiple sources and presenting it together in one place that made Exhibit 101 so helpful to the jury, and not unwarrantedly cumulative. 12RP 25. While the

juxtaposition of information from multiple sources certainly supported the drawing of certain inferences regarding the relationship between the listed fuel transactions, the phone calls, and the people seen in the surveillance videos, the chart itself expressed no conclusions, and no more constituted a written expression of Moate's opinions or a second closing argument for the State⁶ than did the admission of the same information through the original records.

The only column in the summary chart which was not simply the importation of objective data from other records was the "Person ID" column, which set out whether Chuks or Prasad was visible in those surveillance photos or videos that had been admitted at trial. Ex. 101. Admittedly, that column summarized testimony by Moate, Chuks, and Prasad, rather than simply presenting data from the records. However, given that there was no dispute as to the accuracy or admissibility of the identifications, and no prejudice to Ram in allowing that information to be included

⁶ The flaw in Ram's claim that the chart functioned as a second closing argument for the State is highlighted by the fact that nothing in the chart directly implicated Ram in the fuel thefts (a point Ram noted in his own closing argument). 14RP 166; Ex. 101. Instead, the chart merely presented data strongly supporting an inference that Chuks, Prasad, and the person owning phone number 253-880-7621 were involved.

in the chart,⁷ the trial court did not abuse its discretion in allowing that column to remain in the summary chart when it was admitted as substantive evidence.

Because the chart was properly admitted as substantive evidence, Ram's second argument, that the trial court should have given a limiting instruction or otherwise restricted the jury's use of the exhibit, also fails. Brief of Appellant at 18-20. It is true that when a summary exhibit is admitted under ER 611(a) simply as a pedagogical device to help the jury understand a witness's testimony or to help counsel clearly present an argument, such summaries are not themselves evidence, and a limiting instruction should be given.⁸ Milkiewicz, 470 F.3d at 397 (discussion of differences and overlap between admission of summaries under ER 1006 and admission under other rules of evidence); Lord, 117 Wn.2d at 856. However, this rule has no implications for the propriety of admitting a summary exhibit as substantive evidence under ER 1006. When the requirements of ER 1006 are met, admission as substantive evidence is entirely proper. Lord, 117

⁷ The theory of Ram's defense was that Prasad and Chuks committed the fuel thefts on their own and were lying about Ram's involvement. 14RP 155-56.

⁸ In both the Washington and federal rules of evidence, ER 611(a) gives the trial court "control over the mode . . . of . . . presenting evidence."

Wn.2d at 856 n.5; 5C Wash. Prac., Evidence Law and Practice §§ 1006.2, 1006.7 (5th ed.).

Because the summary chart in Exhibit 101 met the requirements of ER 1006, the trial court properly exercised its discretion in admitting it as substantive evidence.

c. Any Error Was Harmless.

Even if this Court were to determine that the trial court abused its discretion in admitting part or all of the summary chart as substantive evidence, the error was harmless in light of the fact that the information in the chart was undisputed and was cumulative of other evidence properly admitted at trial. The erroneous admission of evidence under ER 1006 is not of constitutional dimension, and thus is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. See State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Here, the fuel invoices, phone records, and surveillance photos and videos from which the information in the chart was drawn were all independently admitted into evidence, and none of those evidentiary rulings are challenged on appeal. CP 263-69. Additionally, the information in the "Person ID" column was

cumulative of undisputed testimony by Chuks, Prasad, and Moate identifying Chuks and Prasad in the various surveillance photos and videos. 7RP 84-106; 9RP 178-201; 12RP 194-225; 13RP 34-47; Ex. 101. There was thus no information in Exhibit 101 that the jury would not have heard had Exhibit 101 not been admitted as substantive evidence, or been excluded entirely.

Furthermore, and perhaps most importantly, Ram's strategy at trial did not involve questioning the accuracy of any of the information in the summary chart. Instead, he used the information in the chart to argue that the only thing the evidence showed was that Chuks and Prasad were guilty of the thefts, and that they, faced with overwhelming evidence against them, had falsely implicated Ram to buy themselves leniency. 14RP 155-56, 166.

However, not only was Chuks' and Prasad's testimony corroborated by each other, but it was corroborated by a wide variety of testimony by other witnesses implicating Ram in the conspiracy. This included testimony by Hanson and White that they had seen Ram swipe a card at a fuel station at the exact moment Knight Transport's stolen fuel card was used at that station, jail calls placed by Ram directing Prasad to throw away evidence, the discovery of a card reader and large quantity of cash

in Ram's home, testimony by Ram's ex-step-daughter that she had seen Ram with large amounts of cash and blank white cards, evidence that Gumiran lied on the stand when she denied that Ram had lived in the home or contributed large amounts of cash to the purchase of the house and furnishings, and the identifications of Ram as the leader in the fuel thefts by Gedlu and Asma. 6RP 63-67, 92-94; 7RP 63-73; 8RP 209; 9RP 65-80; 10RP 27, 34-35; 11RP 18-19, 168, 174-75; Ex. 52, 53, 64, 91-92.

Given Ram's theory of the case and the other evidence admitted at trial, there is no reasonable probability that the outcome of the trial would have been materially affected had the summary exhibit not been admitted as substantive evidence. This Court should therefore affirm Ram's convictions.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING ASMA'S TESTIMONY REGARDING HIS PREVIOUS IDENTIFICATION OF RAM.

Ram contends that the trial court erred when it admitted Michael Asma's testimony regarding his previous identification of Ram to detectives, on the theory that Asma was merely reading hearsay from a police report rather than testifying from memory. This claim should be rejected. Not only does the record indicate

that Asma's testimony about his photo line-up identification of Ram was properly based on his memory, but the corresponding portion of the police report would have itself been admissible under the hearsay exception for statements of identification, and any error was harmless in light of the other evidence admitted.

a. Relevant Facts.

Michael Asma testified at trial as follows: he is an owner-operator truck driver, meaning that he owns his own semi-truck and is responsible for purchasing his own fuel, which is his largest business expense. 8RP 48, 50. In 2011, he was contacted by a friend about an opportunity to purchase fuel at a discounted price. 8RP 51, 56. He went to the specified location, and waited for someone else to arrive. He paid approximately \$400 to \$500 in cash to fill up the fuel tanks on his truck, which can hold 220 gallons of fuel. 8RP 57.

Several months later, Detective Moate showed up at Asma's apartment one morning asking about his purchase of discounted fuel. 8RP 51-52. Asma told her what had happened, and provided a physical description of the person who had been in charge of selling the discounted fuel. 8RP 59. About a week later, he was shown a photo line-up by another officer. 8RP 66. Asma identified

one of the photos as the “main guy” involved with selling the discounted fuel. 8RP 67-68.

During his testimony, Asma at times indicated that he could not remember certain details, and used an unadmitted police report to refresh his memory about many of them. 8RP 63-70. The details he indicated he could not remember until after he refreshed his memory included things such as whether there were other trucks getting fuel at the same time Asma purchased the discounted fuel, the precise physical description he gave Moate of the person who was in charge of selling the discounted fuel, the type of vehicle that person arrived at the fuel station in, how many photos he was shown during the photo line-up, and in which position in the photo line-up the person he identified had been.⁹ 8RP 58-67. However, Asma did not need to refresh his memory before testifying that he had given Moate a physical description of the person in charge of selling the fuel or before testifying that he had picked that person out in the photo line-up and signed a piece of paper identifying which person he had picked out. 8RP 59, 67.

⁹ Asma used Exhibit 43 (which was admitted as substantive evidence) to refresh his memory that the photo he identified was fifth in the photo line-up, rather than the unadmitted police report. 8RP 67-68; CP 266.

Ram repeatedly objected to the refreshing of Asma's memory on the grounds that Asma was merely reading from the police report rather than actually refreshing an independent memory of the events, and eventually requested a standing objection on the issue. 8RP 58-61. Each time, the trial court overruled the objection, stated that the refreshing was proper if the document helped the witness to remember, and admonished the witness that if the document did not help him to remember, he should say so. 8RP 55, 58, 60.

On at least one occasion, Asma explicitly affirmed that reading the police report did in fact help him remember the circumstances surrounding his purchase of the fuel. 8RP 56. However, on cross-examination he agreed that he was "pretty much relying on the [police report]" for some of his testimony, and stated that he had never seen the police report before his testimony. 8RP 73, 77. Asma stated that there were certain events that he did have an independent memory of, such as when Moate came to his apartment the first time and when he was shown the photo line-up. 8RP 73-75. But he stated that he had to refer to the report for "the specifics," such as the details of what he told Moate about the fuel sale. 8RP 75.

Ram then moved to strike Asma's entire testimony as inadmissible hearsay, arguing that Asma had merely testified to what was written on the document rather than testifying from memory, and that the document itself was not admissible. 8RP 77, 115-16. The trial court denied the motion. 8RP 77, 117.

The photo line-up Asma was shown, an identical line-up with names attached to each photo, and the form Asma had signed identifying which photo he had picked out were all admitted as substantive evidence. 8RP 72; Ex. 18, 43. Moate testified that she had contacted Asma on September 14, 2011, and had asked him about an incident on June 6, 2011, in which Asma's truck was seen on surveillance video at the time of a fraudulent fuel transaction. 11RP 177. Moate testified that Asma had appeared nervous, but was willing to talk about what had happened, and had provided information that assisted in the investigation.

Detective Ruth Medeiros testified that she had shown Asma a photo line-up, admitted as part of Exhibit 66,¹⁰ at Moate's request. 9RP 44-45; Ex. 66; CP 267. She read the instructions on the photo

¹⁰ Medeiros identified Exhibit 66 (which includes a six-photo array with names, the same array without names, and the six individual photos on their own pages) as the photo line-up she showed Asma, while Asma identified Exhibit 18 as the line-up he was shown; however, the two exhibits contain the same line-up. 8RP 72; 9RP 45; Ex. 18, 66.

line-up admonition, admitted as Exhibit 43, to Asma before showing him the six photos one by one. 9RP 47-49. The photos did not contain any names or identifying information. 9RP 45; Ex. 66. As Medeiros placed the fifth photo in front of Asma, he immediately said, "That's him, that's the man." 9RP 50. The fifth photo in the line-up was a photo of Ram. Ex. 66.

b. Asma's Testimony Regarding His Prior Identification Of Ram Was Admissible.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. Emery, 174 Wn.2d at 765. An appellate court may uphold a trial court's ruling on any grounds that are supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). In this case, the trial court repeatedly reminded Asma that he was not permitted to simply read from the police report, and that if the report did not refresh his memory then he should say so. 8RP 55, 58, 60. At no point did Asma indicate that the police report was unsuccessful in refreshing his memory of his prior identification of Ram.

Furthermore, the only question related to his identification of Ram in the photo line-up that Asma indicated he could not answer without refreshing his memory was a question regarding which position in the line-up the photo he identified had been in. 8RP 67. Ram did not use the unadmitted police report to refresh his memory on that point, but rather the photo line-up admonition form, which was itself admitted as substantive evidence. 8RP 67-68, 72. Even if Asma had truly answered the question by reading from the admonition form rather than by using it to refresh an independent memory, it would have been proper. See 5A Wash. Prac., Evidence Law and Practice § 612.3 (5th ed.) (where document fails to refresh witness's memory, witness not permitted to read from document unless document is itself admissible) (citing Preston v. Metro. Life Ins. Co., 198 Wn. 157, 164-65, 87 P.2d 475 (1939)).

Similarly, even if Ram were correct that Asma was merely reading from the police report rather than from his refreshed memory when testifying to the details of the physical description he gave Moate for the person in charge of selling the discounted fuel, such testimony was nevertheless proper because that portion of the report fell within the hearsay exception for statements of identification. ER 801(d)(1)(iii) ("A statement is not hearsay if . . .

[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person.”); see State v. Jenkins, 53 Wn. App. 228, 230-32, 766 P.2d 499 (1989) (giving of description qualifies as statement of identification ER 801(d)(1)(iii)).

The trial court therefore properly exercised its discretion in admitting Asma’s testimony about his prior identification of Ram.

c. Any Error Was Harmless.

Even if this Court were to conclude that the trial court abused its discretion in permitting Asma to testify about his prior identification of Ram, the error was harmless in light of the other admitted evidence that is unchallenged on appeal. Where there is no violation of the Confrontation Clause, the erroneous admission of hearsay evidence is not of constitutional magnitude. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. Cunningham, 93 Wn.2d at 831.

Here, Asma's testimony regarding his prior identification of Ram was entirely cumulative of Medeiros's unchallenged testimony regarding Asma's identification of Ram and admitted exhibits establishing that Asma identified Ram. 9RP 44-50; Ex. 43, 66. Furthermore, Asma's identification of Ram was merely one small part of the overwhelming evidence against Ram.

Not only did Chuks and Prasad testify that Ram directed their actions and provided them with the fuel cards by which the thefts were accomplished, but truck driver Fassil Gedlu identified Ram as being involved with the sales of discounted fuel and corroborated Chuks' and Prasad's testimony that Ram was usually nearby during the fuel sales, and David Hanson and Scott White testified that they had seen Ram operate a fuel pump at the exact moment that a fraudulent transaction was occurring at that location. 6RP 63-67, 92-94; 7RP 63-73; 9RP 65-80. Surveillance videos and testimony by a private investigator also corroborated Chuks' and Prasad's testimony that the drivers who purchased the discounted fuel usually paid Ram at another location rather than paying Chuks or Prasad at the card lock station, and cell phone records corroborated their testimony that they communicated with Ram by

phone prior to and during the transactions. 8RP 209; 11RP 174-75; Ex. 91-92.

Additionally, Ram's ex-step-daughter testified that Ram lived in his ex-wife's home and that she had seen Ram in possession of large amounts of unexplained cash and the type of blank white cards used to accomplish many of the thefts, officers testified that they discovered a card reader capable of copying legitimate fuel card data onto blank white cards in Ram's ex-wife's home (corroborating Prasad's testimony that he had seen Ram with a card reader), and the jury heard recorded jail phone calls by Ram in which he directed accomplices to destroy evidence and made statements indicating that he considered his ex-wife's home to be his home as well and statements suggesting that he was concerned that the search of the home might have yielded evidence against him. 10RP 27, 34-35; 11RP 18-19, 168; Ex. 52, 53 64.

Given all of that, there is no reasonable probability that the outcome of the trial would have been materially affected had Asma not testified about his prior identification of Ram, and therefore any error was harmless.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ram's convictions.

DATED this 24th day of September, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Vinod Chandra Ram, Cause No. 72654-4, 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.

Dated this 29th day of September, 2015.

U Brame

Name:

Done in Seattle, Washington