

NO. 36800-5-II

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

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DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW NESSETH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00382-7

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED July 28, 2008, Port Orchard, WA *[Signature]*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Nesseseth's confrontation rights were preserved where (a) Agent Miyake identified Nesseseth in court based on her own observations and (b) Miyake testified to Thomas Beard's phone identification of Nesseseth where Beard testified at trial?
2. Whether Nesseseth fails to establish prosecutorial misconduct where the prosecutor to elicited from Agent Miyake the fact that Thomas Beard identified Nesseseth as the person he called where Nesseseth did not object to the testimony, which was in any event admissible as under ER 801(d)(1)(iii)?
3. Whether the trial court acted within its discretion in granting the State a continuance to procure the attendance at trial of the informant Beard, who, unbeknownst to the State, had relocated to New Mexico?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Matthew Nesseseth was ultimately charged by information filed in Kitsap County Superior Court with three counts of delivery of methamphetamine. CP 94.

Nesseseth was arraigned on June 4, 2007, resulting in a 60-day time-for-trial date of August 3. Trial was set for July 24. CP 21.

On July 24, the State requested a continuance of two weeks in order to make travel arrangements for witness Thomas Beard, who was the confidential informant, and who had relocated to New Mexico since the buys. RP (7/24) 2. The trial court granted the continuance, and reset trial for August 6. The time for trial date was thereby extended to September 4, 2007.¹

On July 27, Nesselth moved to reset the trial within the original 60-day period. RP (7/27) 2. The State reiterated its original reasons for the continuance, and also pointed out that the defense had requested that fingerprint analyses of the methamphetamine baggies be performed. This process would take two weeks, so Nesselth would not be ready for trial before August 3 in any event. RP (7/27) 2. The trial court remained satisfied that the continuance was justified in the administration of justice and that there was no prejudice to the defense. RP (7/27) 2-3.

Nesselth then moved for a further continuance on the grounds that defense counsel would be unavailable due to scheduled vacation on August 8 and 9, and August 15 through 17. RP (7/27) 3. The court granted the defense continuance and set the trial for August 20. RP (7/27) 4.

On August 20, the State moved to reset the trial because the assigned

¹ September 3 was Labor Day.

prosecutor was in another trial and was concerned that it would not be completed. RP (8/20) 6. The court reset the case for August 27. RP (8/20) 7.

On August 27, the State reported that the chief investigator in the case, Kara Miyake, was going to be at sea aboard the USS Stennis until the end of the week. RP (8/27) 2. The trial date was reset to September 4. RP (8/27) 6.

Trial commenced on September 4. RP (9/4)² 2. At the conclusion of the trial, the jury found Nesseth guilty as charged on Counts I and III, and acquitted him on Count II. CP 141-44.

B. FACTS

Kara Miyake was a special agent with the Naval Criminal Investigative Service (NCIS). RP (9/5) 32. Miyake interviewed Thomas Beard, who was a sailor, after he tested positive during a random narcotics urinalysis. RP (9/5) 42. She then worked with him as an informant during the summer and fall of 2005. RP (9/5) 43. He made controlled buys from various suspects, mostly people that he knew. RP (9/5) 43.

Under the cooperation agreement, Beard could have possibly improved his discharge status by working with NCIS. RP (9/5) 44. Without

² References to "RP (9/4)" are to the report from that date marked "Trial, Vol 1 of 3" unless otherwise indicated.

the cooperation he was facing an other-than-honorable discharge. RP (9/5) 44. He did not receive an honorable discharge. RP (9/5) 44.

On October 3, 2005, around 5:00 p.m., Miyake and Beard set up a controlled buy from Nesselth. RP (9/5) 45. Beard met Nesselth at the 7-Eleven on Wheaton Way in Bremerton and made a controlled purchase of methamphetamine. RP (9/5) 45.

Before proceeding to the 7-Eleven, Miyake and other agents met with Beard at her office on base. RP (9/5) 45. After they briefed and searched Beard and his vehicle, Beard drove to the 7-Eleven while Miyake and her colleagues followed. RP (9/5) 45. No contraband was found during the search of Beard or his car. RP (9/5) 46. Beard arranged the transaction by calling Nesselth over the phone. RP (9/5) 46. Miyake gave Beard \$60 for the buy. RP (9/5) 46. Miyake had Beard in view the entire way to the 7-Eleven. RP (9/5) 47. He did not make any stops en route. RP (9/5) 47. They had another agent stationed in the 7-Eleven. RP (9/5) 47.

Miyake parked across the street where she could see what was going on. RP (9/5) 47. Beard pulled into the 7-Eleven. RP (9/5) 48. She saw a white pick-up truck pull in, and Nesselth got out. RP (9/5) 48. Miyake identified Nesselth in court as the person she saw in the truck. RP (9/5) 48. Miyake did not know him as "Nesselth" at that time, she only knew him as

“Scotty.” RP (9/5) 48. That was how Beard referred to him. RP (9/5) 49. Although she did not know his identity at the time of the buy, she positively saw him on that date, and the person she saw then was the same person who was now appearing in court as the defendant. RP (9/5) 49. She also conducted other controlled buys from Nesseth with Beard and on the third occasion, had actual physical contact with Nesseth. RP (9/5) 49.

After Nesseth got out of his car, she saw him go to Beard’s vehicle. RP (9/5) 50. That was all she personally saw. RP (9/5) 50. Nesseth went into the 7-Eleven, and Beard left the parking lot, at which point Miyake and the other agent followed him back to their meeting place behind the Albertsons. RP (9/5) 50-51.

They watched Beard the entire way. RP (9/5) 51. He did not stop anywhere. RP (9/5) 51. Beard provided her with the crystal methamphetamine he had just purchased. RP (9/5) 51. They again searched both Beard and his vehicle and found nothing untoward. RP (9/5) 51-52. Then they went back to her office where Beard gave her a sworn statement regarding what had occurred. RP (9/5) 52.

On October 6, 2005, around 5:00 p.m., Miyake again met with Beard. RP (9/5) 55, 59. Beard contacted Nesseth via cell phone. RP (9/5) 59. They set up a controlled buy and went through the same briefing and search

protocol. RP (9/5) 59. Other agents were already staged outside Nesseth's home at 1510 Snyder Avenue. RP (9/5) 60.

Both Beard and his car were searched beforehand. RP (9/5) 60. No contraband was found. RP (9/5) 60. Miyake gave Beard \$100 for the buy. RP (9/5) 61. She watched Beard drive the entire way. RP (9/5) 61. He did not make any stops. RP (9/5) 61. There was no one else in his car. RP (9/5) 61. When they arrived, Miyake parked on the street and watched Beard get out of his car and proceed in the direction of the rear apartment. RP (9/5) 61. She watched as he entered the apartment and then came back out a short time later. RP (9/5) 62.

They followed Beard to the meeting location where Beard produced a quantity of crystal methamphetamine. RP (9/5) 62. He and his car were again searched. RP (9/5) 62. He did not stop anywhere along the way. RP (9/5) 62. Miyake again took Beard back to her office and obtained a sworn statement. RP (9/5) 63.

On October 27, 2005, Miyake again met with Beard. RP (9/5) 65. Beard again contacted Nesseth. They again set up a controlled buy. RP (9/5) 65. They searched Beard again. RP (9/5) 65. They proceeded again to Nesseth's residence at 1510 Snyder Avenue. RP (9/5) 65. Miyake gave Beard \$80. RP (9/5) 65. Beard made no stops along the way. RP (9/5) 66.

Miyake watched as Beard went to the same door as before. RP (9/5) 66. Beard walked up to the house, and then he walked somewhere else. RP (9/5) 66. It did not appear that anyone was answering the door. RP (9/5) 67. Then Beard returned to the door. RP (9/5) 67. Miyake lost sight of Beard when he walked away from the door. RP (9/5) 67. Beard went in and then Miyake saw him come out. RP (9/5) 67.

After Beard came out they followed the same procedure as before. RP (9/5) 67. Beard again produced a quantity of methamphetamine. RP (9/5) 67.

Later that evening Miyake drafted a probable cause statement, and with the help of Bremerton officers, obtained warrant for Nesseth's arrest and executed it at the Snyder Avenue residence. RP (9/5) 71. When the owner of the residence answered the door, they informed him that they had a warrant for Nesseth's arrest. RP (9/5) 71. The owner was initially uncooperative, but eventually let them in and they informed Nesseth he was under arrest. RP (9/5) 72.

Miyake searched Nesseth incident to arrest and recovered the money that she had given Beard for the controlled buy. RP (9/5) 72. She found the money in Nesseth's wallet. RP (9/5) 72. The serial numbers matched those of the bills she had photocopied before the buy. RP (9/5) 72-73.

Thomas Beard began using methamphetamine while he was in the Navy in 2005. RP (9/6)³ 35. He used for about six months. RP (9/6) 35. He tested positive for drugs, and was told that he might get a general discharge if he acted as an informant. RP (9/6) 36. He agreed. RP (9/6) 36.

Beard did three buys with Miyake. RP (9/6) 38. Nesselth was the person he bought the methamphetamine from. RP (9/6) 39. They had originally met playing pool in a bar. RP (9/6) 39. Beard felt that Nesselth was “a nice guy all around.” RP (9/6) 39. They discussed using drugs and the price of methamphetamine on occasion. RP (9/6) 40.

Beard remembered two of the buys well. RP (9/6) 40. The first one was the one at the convenience store. RP (9/6) 41. Miyake asked Beard to call Nesselth to arrange a buy. RP (9/6) 41. He did as requested. RP (9/6) 41. He was searched before the buy. RP (9/6) 41. He did not have any drugs on him beforehand, and the police took his money from him. RP (9/6) 41. He arrived at the convenience store and waited for a short time. RP (9/6) 42. Nesselth showed up with his girlfriend in a pickup truck. RP (9/6) 42.

³ References to “RP (9/6)” are to the trial volume from this date, which bears the notation “Trial – Day #3” on the third page. There are two other reports that are also dated September 6, 2007: one is marked “Supplemental Record” on the cover and contains opening statements; the other indicates on the second page that it the “continuation of jury voir dire.” Both of these latter two volumes appear to record events that actually took place on September 5, 2007, which is also the date the trial testimony began. *See also* RP (9/5) 2 (indicating opening statements took place on that date but were not [originally] transcribed). This discrepancy does not affect any issue raised on appeal.

Nesseth tossed a small bag of methamphetamine onto Beard's passenger seat, and Beard put down the money, which Nesseth took. RP (9/6) 43. He said good bye and Beard left to meet up with Miyake. RP (9/6) 43. The police searched him and then interrogated him at their office. RP (9/6) 44.

On the second occasion that he recalled, he went to Nesseth's home. RP (9/6) 45. They had searched him like before. RP (9/6) 45. He went into the house and gave Nesseth the money in exchange for the drugs. RP (9/6) 45. Afterward the agents told Beard that they were going to arrest Nesseth and search his home. RP (9/6) 47.

After refreshing recollection from his written statement, Beard also testified briefly about the October 6 buy. RP (9/6) 48-49. Before looking at the statement he recalled doing three buys, just not the details of the second one. RP (9/6) 62. He did not remember the circumstances of that buy. RP (9/6) 62. Miyake gave him a favorable recommendation, but he still received an other-than-honorable discharge. RP (9/6) 68.

Forensic testing showed that the substance Nesseth delivered on each occasion was methamphetamine. RP (9/6) 75-82. Evidence was also introduced that demonstrated that all three buys took place within 1000 feet of a school or school bus stop, or both. RP (9/6) 95-98, 102-06.

Nesseth testified at trial that he was good friends with Beard. RP

(9/6) 112. They talked on the phone a lot. RP (9/6) 115. He probably talked to him on the phone before he saw him at the 7-Eleven. RP (9/6) 115, 132. Lived near the 7-Eleven at the time, but got evicted, and then moved in with Mike Scott at the Snyder address. RP (9/6) 116. He arrived at 7-Eleven in pickup with girlfriend. RP (9/6) 115. He approached Beard and gave him a cigarette. RP (9/6) 126.

He also asserted that Beard had owed him \$120 for a speaker. RP (9/6) 117. Beard paid Nesseth the day they arrested him. RP (9/6) 118. He talked to him on the phone before he came over. RP (9/6) 118. He was in the parking lot behind the house when Beard got there. RP (9/6) 120. Beard stayed for only a short while, paid Nesseth the money he owed him and left. RP (9/6) 121.

Nesseth admitted that he had done drugs with Beard, but was not his dealer. RP (9/6) 122. He also stated that Beard had his number, although he did not remember what it was then. RP (9/6) 123.

III. ARGUMENT

A. NESSETH'S CONFRONTATION RIGHTS WERE NOT VIOLATED WHERE AGENT MIYAKE IDENTIFIED NESSETH IN COURT BASED ON HER OWN OBSERVATIONS NOR WHERE SHE RELATED BEARD'S PHONE IDENTIFICATION OF NESSETH WHERE BEARD TESTIFIED AT TRIAL.

Nesseth argues that Miyake's in-court identification of Nesseth and testimony regarding phone calls made to Nesseth violated his Sixth-Amendment confrontation rights. The former claim is without merit because the identification was clearly based on Miyake's personal observations. The latter claim is baseless because the declarant testified at trial.

1. *In-court identification.*

Nesseth contends that Miyake's in-court identification was "directly contrary to her own testimony that she would not be able to identify Mr. Nesseth as the man she saw based on her observations of October 3." Brief of Appellant, at 9. Therefore, he posits, her identification had to be based on the reports of other officers and was therefore testimonial hearsay the admission of which violated *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

This contention misperceives Miyake's testimony. Although she did testify that she did not know Nesseth's *identity* when she saw him on October

3, she also testified that she clearly saw him on that date and when she arrested him, and that the person at the 7-Eleven was the same person who was seated in the courtroom.

A. I saw Thomas Beard's vehicle obviously into the 7-Eleven. I saw another white pickup truck pull up to the vehicle, and that is pretty much it, and a Caucasian male getting out of the vehicle, but I did not see anything further than that.

Q. *Do you see the individual that got out of that white truck in the courtroom today?*

A. *Yes, I do.*

Q. Can you identify that person by where they are sitting and an article of clothing they are wearing?

A. He is sitting next to the woman in the black suit. He is wearing a light-colored green shirt with a green tie.

MS. SIGAFOOS: May the record reflect she has identified the defendant.

THE COURT: The record will so reflect.

MS. SSIGAFOOS: Thank you.

Q. So you saw the defendant get out of the white car and walk over to Mr. Beard's car?

A. At the time I didn't get a great physical description. Another agent did get a better description than I did. It was later down the road that Mr. Nesselth's picture and whatnot was identified – where he was actually identified as Matthew Scott Nesselth, but up until that point I knew him as Scotty and, like I said, him showing up in a white pickup truck.

Q. So you knew him by a different name. Up to this point in time you knew him by the name Scotty?

A. Yes.

Q. Is that what Mr. Beard referred to him as?

- A. Yes.
- Q. So this individual – *just to clarify, the defendant is the person that you saw get out of that white truck and approach Mr. Beard’s car on that date?*
- A. Well, at the time I saw a white – or excuse me, a Caucasian male getting out of the vehicle. I wouldn’t be able to say that on that specific day I knew it was that gentleman there. However, later on in the course of the investigation I did identify him as the defendant.
- Q. So when you were – *you didn’t know his identity as you watched him, correct?*
- A. *That is correct.*
- Q. *But the person, the defendant in this case is the one that you saw on that date?*
- A. Yes. And we had other controlled buys with and, you know, on the third controlled buy I actually had physical contact with the defendant.

RP (9/5) 48-49 (emphasis supplied). Nesselth was certainly free to argue to the jury that Miyake’s identification was weak.⁴ The record fails to support his claim that it was based on hearsay, however.

Moreover, given that both Beard and Nesselth also testified that Nesselth was at the 7-Eleven, any purported error would be harmless beyond a reasonable doubt. *State v. Flores*, ___ Wn.2d ___, ¶ 53, 186 P.3d 1038 (2008) (*Crawford* error harmless where improper testimony was “merely cumulative of ... overwhelming untainted evidence”). This claim should be rejected.

⁴ Nesselth indeed argued this point to the jury. RP (9/10) 59-60, 70, 73.

2. *Cell-phone identification*

Nesseth also claims his confrontation rights were violated when Miyake testified that Beard called Nesseth on his cell phone.⁵ *Crawford* directly answers this contention:

In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), we held that this provision bars “admission of testimonial statements *of a witness who did not appear at trial* unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”

Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (emphasis supplied). Beard appeared at trial, testified, and was cross-examined at length. RP (9/6) 33-68. Nesseth’s confrontation rights were thus preserved, and *Crawford* is not implicated.⁶

Moreover, even assuming, *arguendo*, that any error occurred, it would be harmless. Nesseth thoroughly examined Miyake on the subject, who repeatedly admitted that she did not actually hear Nesseth on the phone, nor

⁵ Nesseth only argues that his confrontation rights were violated; he does not allege and error under the rules of evidence. Nor could he, because allegedly improper admission of evidence does not establish manifest constitutional error permitting review for the first time on appeal under RAP 2.5. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000). Moreover, a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). As discussed more fully with regard to the next claim, Nesseth never objected to Miyake’s identification of Nesseth as the recipient of Beard’s calls. He only objected to her relating what Nesseth said to Beard over the phone. *See* Point B, *infra*. Moreover, even if the claim were preserved, the evidence was properly admitted. *Id.*

⁶ The thornier question of whether the testimony was “testimonial” thus need not be addressed. *But see, e.g., State v. Chambers*, 134 Wn. App. 853, 142 P.3d 668 (2006).

verify the phone records after the fact to be sure that Beard had actually called Nesselth. RP (9/5) 91-93, 104-05; RP (9/6) 6, 13. Beard verified Miyake's testimony. RP (9/6) 41.

Moreover, Miyake did testify that the number she saw Beard dial was the number of the cell phone that was found on Nesselth when he was arrested. RP (9/6) 13. Miyake tried calling the number after the arrest and Nesselth's phone rang. RP (9/6) 13. This testimony was not hearsay, as Miyake observed Detective Berntsen actually retrieve the phone. RP (9/6) 31. The detective then gave the phone directly to Miyake. RP (9/6) 31.

Finally, Nesselth himself admitted that he and Beard were friends and that Beard called him all the time. RP (9/6) 115. Nesselth conceded that he probably talked to Beard on the phone before he saw him at the 7-Eleven. RP (9/6) 115, 132. Nesselth also admitted that he talked to Beard on the phone before Beard came over the day he was arrested. RP (9/6) 118. This claim should be rejected.

B. IT WAS NOT MISCONDUCT FOR THE PROSECUTOR TO ELICIT FROM MIYAKE THE FACT THAT BEARD IDENTIFIED NESSETH AS THE PERSON HE CALLED WHERE NESSETH DID NOT OBJECT TO THE TESTIMONY, WHICH WAS ADMISSIBLE AS UNDER ER 801(D)(1)(III).

Nesseth next claims that the prosecutor committed misconduct by eliciting testimony from Miyake, over defense objection and contrary to the court's ruling, that Beard said he contacted Nesseth on the phone. This claim is without merit because the only objection Nesseth raised, and the only ruling the court made, related to the *content* of Beard's conversation with Nesseth, and because the mere identification of Nesseth by Beard, who testified at trial, was properly admissible as a statement of identification.

As a preliminary matter, Nesseth's reliance on *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), is grossly misplaced. *Napue* holds that the State may not knowingly introduce or rely upon false evidence or allow such evidence, once introduced, to go uncorrected. *Napue*, 360 U.S. at 269. Regardless of whether Miyake's testimony that Beard spoke to Nesseth on the phone was inadmissible as hearsay or not, there is no evidence that that testimony was *factually false*. To the contrary, as discussed above, both Beard and Nesseth confirmed at trial that at least two of the phone calls occurred, and as will be discussed, Miyake properly

testified to Beard's contemporaneous identifications of Nesselth as the man on the phone. Any claim that *Napue* was violated is thus unfounded at best.

As discussed above, Nesselth's confrontation claim fails because the declarant testified at trial. Even in the context of a prosecutorial misconduct claim, a criminal defendant's rights under the confrontation clause are not violated when the relator of a hearsay statement is available for cross-examination as a witness under oath and whose demeanor, observations, and perceptions of the events that existed at the time the declarant's statement was made can be assessed by the trier of fact. *State v. Davis*, 141 Wn.2d 798, 840, 10 P.3d 977 (2000).

As also noted above, a non-constitutional evidentiary claim may not be raised for the first time on appeal. As will be addressed shortly, Nesselth did not raise the present claim in the trial court. He should not therefore be permitted to raise it now. Even were the Court to permit Nesselth to skirt that procedural prohibition by characterizing this simple evidentiary question as on one of "prosecutorial misconduct," Nesselth fails to show either impropriety or prejudice, as is his burden.

To prevail on a claim of prosecutorial misconduct the defendant must show: (1) the conduct of the prosecuting attorney was improper, (2) the conduct had a prejudicial effect on the jury's verdict, (3) an objection was

made at trial and (4) a curative instruction was requested unless such an instruction would not cure the prejudice. *Davis*, 141 Wn.2d at 840. If the defendant did not object at trial, the issue of prosecutorial misconduct is waived unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006).

Contrary to Nesseseth’s reading of the record, he never objected below to Miyake’s identification of Nesseseth as the recipient of Beard’s calls. Instead he objected only to Miyake relating the substance of Beard’s telephone conversations with Nesseseth. These objections were sustained, and that ruling was followed by the prosecutor.

Notably, Miyake testified, without objection, regarding the October 3 transaction at the 7-Eleven, that Beard arranged the transaction by calling Nesseseth over the phone. RP (9/5) 46. Then with regard to the October 6 buy, there was no objection until Miyake attempted to relate what Nesseseth *said* on the phone:

A. That evening Mr. Beard, again, made contact with Mr. Nesseseth, and we – Mr. Nesseseth said that he wanted Mr. Beard to –

MS. HARVEY: Objection; hearsay.

RP (9/5) 55. The State responded that it was a statement of a party opponent.

RP (9/5) 56. Notably, Beard's identification of Nesseth would clearly not be a statement *of* Nesseth, who was the party opponent.

Nesseth then argued that Beard should be the one to testify *as to the statement*, otherwise it was hearsay-within-hearsay. RP (9/5) 56. Again, Beard's identification of Nesseth would be Beard's statement to Miyake, and could not be hearsay-within-hearsay.

The jury was excused and the testimony was read back by the reporter. RP (9/5) 56. Defense counsel clarified her objection:

MS. HARVEY: Your Honor, the way that I believe it was asked is what – or least what the witness was saying was recounting *what Mr. Nesseth said*, and that *should not be allowed*.

RP (9/5) 57 (emphasis supplied). The Court also clarified the objection:

THE COURT: So the objection was about *what Mr. Nesseth was about to say*?

MS. HARVEY: Right.

Id. The prosecutor then conceded that she would have to lay a foundation that Miyake could hear Nesseth speaking before Nesseth's *statements* could come in. RP (9/5) 57. Based on that concession, the objection was sustained, and the State was permitted to rephrase the question. RP (9/5) 57. An offer of proof was made, and Miyake testified that she could not hear what Nesseth was saying. RP (9/5) 58. She only knew from what Beard had told her. RP (9/5) 58. The State conceded it could not lay the foundation, and the

objection was sustained. RP (9/5) 58. The jury was returned to the courtroom and the testimony continued.

Miyake testified that she met with Beard to arrange a controlled buy. RP (9/5) 59. The prosecutor then asked the agent: “What happened when you met with Mr. Beard?” Miyake responded that Beard contacted Nesseth via cell phone. RP (9/5) 59. No objection was interposed to that part of her testimony. Miyake went on to state, “I was present for the phone call, and then *Mr. Beard subsequently told me that Mr. Nesseth* was willing to meet—” RP (9/5) 59 (emphasis supplied). Nesseth now objected again on the basis of hearsay, and the objection was sustained. RP (9/5) 59. Notably, nothing in the prosecutor’s question called for testimony regarding any statements by Nesseth.

The prosecutor then asked, without objection, “What happened after Mr. Beard spoke with Mr. Nesseth on his cell phone?” RP (9/5) 59. Miyake responded, without objection, that they set up a controlled buy and went through the same briefing and search protocol. RP (9/5) 59. Miyake thereafter testified, again without objection, that she and another agent followed Beard in another vehicle and Beard made contact with Nesseth in his residence. RP (9/5) 60. With regard to the last transaction, on October 27, Miyake, again without objection, testified that Beard again contacted Nesseth and that they again set up a controlled buy. RP (9/5) 65.

From the foregoing it is plain that the only objections interposed by Nesselth, as understood by both the court and the State, was to Miyake relating the *specific content* of any telephone conversations between Beard and Nesselth. At no point did the trial prosecutor ask any question that can be seen as an attempt to elicit such statements either before or after the trial court's ruling. The conduct that Nesselth now objects to was thus not addressed below.

Even were this issue raised below, it appears that both parties and the court believed Beard's identification of Nesselth as the other party to his call was admissible through Miyake. They presumably saw it as a statement of identification under ER 801(d), which provides:

Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (iii) one of identification of a person made after perceiving the person; or

Here, the declarant, Beard, testified at trial and was subject to cross-examination without limitation.

Miyake's testimony consisted of Beard's statement that he had just had a conversation with Nesselth on the phone. This statement was made after Beard perceived Nesselth. "Perceive" includes auditory identification: "To become aware of directly through any of the senses, esp. to see or hear."

American Heritage Dict., at 920 (2d coll. ed. 1985).

Finally, although this should go to weight, not admissibility, *State v. Lass*, 55 Wn. App. 300, 777 P.2d 539 (1989), the evidence, by Nesseseth's own testimony, showed that Nesseseth and Beard talked frequently on the phone, such that Beard would have had a basis to identify him by voice. The questions and answers were thus proper. This is most likely why they drew no objection.

Finally, even were impropriety shown, Nesseseth meets neither the preserved or unpreserved standards of prejudice. As discussed with regard to the preceding claims, that Beard called Nesseseth was verified by both Beard and Nesseseth, and corroborated by the fact that the number Miyake watched Beard dial was the number of the phone Nesseseth was carrying when he was arrested.

Moreover, as Nesseseth notes, the jury acquitted him of the specific buy to which the now-objected-to testimony pertained. He contends that this acquittal does not show a lack of prejudice because it made it appear that Miyake had more personal knowledge than she really had. This is of course preposterous, because, as noted above, Miyake repeatedly admitted on cross-examination that she had *no* personal knowledge that Nesseseth was actually on the other end of the line, and that she never verified that he was via phone

records or any other means.

Nor is Nesseth's claim that the evidence was prejudicial because it bolstered Miyake and Beard's credibility tenable. To the contrary, the acquittal on the October 6 charge shows that the jury accorded very little weight to this testimony. Indeed Miyake's testimony that Beard called Nesseth is one of the few common threads among all three buys. Plainly it was not the dispositive factor. The common evidentiary features of the two buys that the jury did convict Nesseth of committing were Beard's recollection of the sale, Nesseth's admissions, and corroborating evidence tying Nesseth directly to the sale.

As to Count I, the first incident, which occurred at the 7-Eleven, Beard related that Nesseth put the drugs on the car seat and that Beard gave Nesseth the money. Miyake testified that she saw Nesseth get out of his car at the store and approach Beard's car. Nesseth also admitted that he was at the store that day and approached Beard's car, and that he and Beard may have spoken on the phone beforehand.

Regarding Count III, the third and final incident, which took place on the day Nesseth was arrested, Beard again related going to Nesseth's house and making the buy. Nesseth was arrested later that day, and had the "recorded" money and the cell phone in his possession at the time of the

arrest. Nesseth again admitted to talking to Beard on the phone and later seeing him that day.

The jury acquitted on Count II, the second buy. Beard had virtually no recollection of this sale,⁷ and Nesseth did not address it. Miyake could only testify that she saw Beard go into the house and come out with drugs. There was no evidence specifically tying Nesseth to the transaction. Clearly the jury decided that this evidence was too circumstantial and acquitted. In view of the evidence of each transaction and the resulting verdicts it is plain that Miyake's testimony that Beard called Nesseth, if improper at all, was not so flagrant and ill-intentioned that it could not have cured by an instruction. This claim should be rejected.

⁷ What recollection he did have came only after he refreshed his memory by reviewing his statement to Miyake. Even then his description of the events was sketchy at best. RP (9/6) 48-49.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE A CONTINUANCE TO PROCURE THE ATTENDANCE AT TRIAL OF THE INFORMANT BEARD.

Nesseth's final claim is that the trial court erred in granting the State a continuance to allow it procure the attendance of informant Beard at the trial. The trial court did not abuse its discretion.

Nesseth argues that the trial court abused its discretion when it continued his trial to allow the State time to secure the attendance of a critical State witness, the informant Beard, who lived in New Mexico. Relying on *State v. Adamski*, 111 Wn.2d 574, 761 P.2d 621 (1988), he argues that the State failed to exercise due diligence to secure Beard's presence earlier. His reliance is misplaced, however. As this Court observed in *State v. Bible*, 77 Wn. App. 470, 473, 892 P.2d 116 (1995), *Admanski* was a juvenile case, and the juvenile rule⁸ specifically required an exercise of due diligence before a continuance could be granted. CrR 3.3(f)(2),⁹ however, "only requires findings that a continuance is necessary for the administration of justice and will not substantially prejudice the defense." *Bible*, 77 Wn. App. at 473.

⁸ Former JuCR 7.8(d)(2) provided that "continuances or other delays may be granted on motion from the prosecuting attorney if (ii) the State's evidence is presently unavailable, the prosecution has exercised due diligence, and there are reasonable grounds to believe that it will be available within a reasonable time."

⁹ *Bible* was addressing former CrR 3.3(h)(2), which contained language identical to the

Adamski therefore does not apply in the adult setting. *Id.*

The State is not unmindful that the Court in *Bible* noted that its holding could be found to conflict with *State v. Nguyen*, 68 Wn. App. 906, 915, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993).¹⁰ *Nguyen* should not control for several reasons.

First, it is not at all clear that the case was decided under CrR 3.3. The Court first quoted the continuance language of the rule and then observed that the granting of a continuance is subject to an abuse of discretion standard. *Nguyen*, 68 Wn. App. at 914. It then ruled that “[t]he unavailability of a material State witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.” *Id.* There is no mention here of due diligence, and the tenor of this paragraph suggests that the Court was approving the trial court’s exercise of discretion. The Court then goes on to note that CrR 3.3 does not define the limits of the *constitutional* right to speedy trial. *Id.*

The Court only thereafter mentions *Admanski*. The reference is not decisive, however, as the Court only addresses *Admanski* in disposing of the

current CrR 3.3(f)(2), upon which the trial court relied.

¹⁰ *See also State v. Iniguez*, 143 Wn. App. 845, 180 P.3d 855 (2008) (following *Nguyen* without analysis).

defendant's claim thereunder as unsupported by the record. *Nguyen*, 68 Wn. App. at 915.¹¹ Because the defendant in *Nguyen* failed to provide a record in support of his *Adamski* claim, *Nguyen* never actually applied *Adamski* in the adult context and the case cannot be read for support that the due diligence rule should be read into CrR 3.3.

Moreover, *Bible* is even more compelling since the 2003 amendments to CrR 3.3.¹² CrR 3.3(a)(4), added at that time, is quite specific that the courts are not to engraft requirements appearing in the plain text of the rule:

Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

As *Bible* holds, nothing in the language of the rule requires a showing of “due diligence.” Moreover, the Supreme Court has recently noted that judicial imposition of such “due diligence” requirements was a driving factor in the 2003 amendments to the rule. The Supreme Court recently explained the reason for this construction provision, adopting the rationale of the Time For

¹¹ The Court's reference to *State v. Whisler*, 61 Wn. App. 126, 137, 810 P.2d 540 (1991), as being in accord, *Nguyen*, 68 Wn. App. at 915, is also misplaced. *Whisler* was addressing the issue of whether a witness was unavailable for purposes of the hearsay rules and the right to confrontation. These tests are not the same, however. *State v. DeSantiago*, 149 Wash.2d 402, 412, 68 P.3d 1065 (2003).

¹² Notably, the same series of amendments also deleted the “due diligence” reference from the juvenile rule, substituting the “administration of justice” standard found in CrR 3.3. See JuCR 7.8(f)(2).

Trial Task Force that the Court had convened and which produced the amendments the Court approved in the 2003:

In explaining the purpose of this provision, the Time-for-Trial Task Force stated:

Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be read in. Criminal cases should be dismissed under the time-for trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions.

Washington Courts Time-For-Trial Task Force, *Final Report* II.B at 12-13 (Oct. 2002) (on file with Admin. Office of Courts), available at http://www.courts.wa.gov/programs_orgs/pos_tft (last visited May 31, 2007).

State v. George, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007).

Moreover, the interpretation of “administration of justice” has consistently be held to require only the unavailability of a material State witness, and the availability of the witness within a reasonable time. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988). CrR 3.3 by its terms also requires that the continuance cause no substantial prejudice to the defense of the charges.

Here, the continuance resulted in postponement of the trial for only

three days beyond the original time-for-trial expiration date of August 3. RP (7/24) 3-4. No prejudice to the defense is shown. Notably, the defense was still undertaking discovery unrelated to Beard at the time the continuance was granted.¹³ RP (7/27) 2. The case was then subsequently continued due to defense counsel's vacation, the assigned prosecutor's other trial obligations, and the State's other main witness's being at sea. RP (7/27) 3-4; RP (8/20) 4, 7; RP (8/27) 2. In any event, trial commenced on September 4, within the reset time for trial under CrR 3.3(b)(5). RP (9/4) 19-21.

Finally, the State would submit that even were a showing of due diligence required, it met its burden below. Nesseth was arraigned on June 4. The prosecutor determined on July 10 that it did not have the contact information for the informant. RP (7/24) 2. It took the State a week to get contact information from the Navy, which had investigated the case. RP (7/24) 2. Because Beard was no longer in the Navy, the NCIS had no contact information on him. CP 35. The State had to have its own investigator track the witness down. CP 35. On July 17, it learned that Beard had relocated to New Mexico. CP 35. Two weeks were needed to make arrangements to fly him back to Washington. RP (7/24) 2.

¹³ As a result of this discovery, the defense called an expert from the State crime lab regarding fingerprint testing that was done on the methamphetamine baggies. RP (9/10) 5-10.

None of this information was disputed by the defense. There is no suggestion as in *Adamski* or the other juvenile cases that the witness was unavailable because the State failed to utilize proper subpoena procedures. There is no evidence that two weeks is not within the normal and acceptable time in which to issue subpoenas for a trial. There is no evidence that the State had any reason to suppose that the witness was no longer resident in Bremerton. In short there simply is no evidence in the record, as in *Nguyen*, that the State was did not exercise due diligence.

The trial court did not abuse its discretion in granting a brief continuance. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Nesseth's conviction and sentence should be affirmed.

DATED July 28, 2008.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R. Hauge', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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