

No. 43781-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CRAIG H. WALLACE II,

Appellant.

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

The Honorable James J. Dixon, Judge  
Cause No. 12-1-00035-6

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether recorded phone calls between Wallace and the party protected by a no-contact order were properly authenticated at trial.

2. Whether statements made by the victim, a party to the recorded phone calls, were hearsay.

3. Whether trial counsel was ineffective for failing to object to the admission of the recorded phone calls on the grounds that they violated the Confrontation Clause as well as the Washington Constitution.

4. Whether the information charging Wallace with obstructing a law enforcement officer omitted an essential element of the offense.

B. STATEMENT OF THE CASE.

The State accepts Wallace's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The recordings of the telephone calls from Wallace in the Thurston County Jail to the party protected by a no-contact order were properly authenticated and the trial court did not abuse its discretion by admitting them.

The State offered excerpts of several telephone calls placed by Wallace from the jail to Mony Leap, the person protected by the no-contact order that Wallace was charged with violating. The

court admitted them over Wallace's objection that the State had failed to lay a proper foundation. RP 287.<sup>1</sup>

Admission of evidence is within the trial court's "sound discretion" and will not be disturbed on review absent an abuse of that discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." *Id.* The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983).

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<sup>1</sup> Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the three-volume trial transcript dated June 25 through June 27, 2012.

ER 901 governs the authentication and admissibility of exhibits. In pertinent part, that rule reads:

Rule 901. Requirement of Authentication or Identification.

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

.....  
(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Authentication is a preliminary question and the court may consider evidence, such as hearsay, that might be objectionable under other rules of evidence. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984); State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007) (“In making a determination as to authenticity, a trial court is not bound by the rules of evidence”.); ER 104(a), 1101(c)(1).

The identity of the parties to a telephone call may be established by either direct or circumstantial evidence. Id. at 472. Statements made during the conversation itself can be considered for the purpose of authentication. Id. at 471. The court should admit the evidence if the proof is sufficient to allow a reasonable juror to find that the conversation is what the proponent purports it to be. Passovoy v. Nordstrom, 52 Wn. App. 166, 171, 758 P.2d 524 (1988). While self-identification alone is insufficient to authenticate a phone conversation, that combined with almost any circumstantial evidence is sufficient. Id. The rule does not limit the type of evidence that may support a finding of authenticity. Williams, 136 Wn. App. at 500.

The proponent of the evidence must make only a prima facie showing of the authenticity of the evidence. The court is to consider only the evidence offered by the proponent and disregard any contrary evidence produced by the opponent. 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE at 513 (2012-2013 ed.); Williams, 136 Wn. App. at 500.

A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may

consider any information sufficient to support the prima facie showing that the evidence is authentic.

Williams, 136 Wn. App. at 500.

In Wallace's case, the court heard evidence about the telephone system that the Thurston County Jail made available to inmates. The calls made from the jail are all preceded by an automated announcement that they would be recorded. RP 265-66. Each inmate is given a personal identification number (PIN) and assigned an account with Telmate, the service provider. RP 265-66. In addition, when the account is activated, the inmate must speak his or her name into the system, and voice identification verifies that future calls are indeed made by that inmate. RP 266. Telmate has a web-based program that permits authorized personnel to access recorded calls for any specific inmate. RP 267-268. The Telmate program allows a person to search for specific phone numbers called from the jail. RP 270.

Detective David Claridge of the Thurston County Sheriff's Office testified that he located a phone number that the protected party, Mony Leap, had provided to the Sheriff's Office "several times" as a contact for her. RP 270-71. Claridge, who was not familiar with Leap's voice, listened to 14 calls made using Wallace's

PIN and voice verification to that number. RP 271, 283. Claridge did not notice any differences in the voice of the female recipient of all of the calls. RP 277.<sup>2</sup> During one of those calls, Claridge heard the woman called by Wallace refer to an incident in which Leap had been arrested on a warrant, an incident with which Claridge was personally familiar. RP 220-21, 272-732.

There was substantial additional evidence to support the conclusion that all of the recorded calls were between Wallace and Leap. The female expressed remorse at being the cause of Wallace's incarceration, and called him "Craig." RP 161. She referred several times to "Alicia." RP 164, 167, 198, 208. Leap had an 11-year-old daughter named Alicia. RP 48. There was a discussion about who had called the police, with the female favoring a woman named Lisa. The male referred to Lisa as the landlord. RP 168-69, 191-92, 219. Lisa Blazer was the apartment manager at the complex where Wallace and Leap lived. RP 64. She called the police on January 1 and January 4, 2012. RP 49, 52.

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<sup>2</sup> The judge commented that the voice on call No. 4, which defense counsel maintained sounded like a different woman, sounded to him the same as the voice on the other calls. RP 212.

On January 4, deputies with the Sheriff's Office who responded to the call determined that Wallace was inside the apartment, but Leap denied that and refused to allow officers into the apartment. While one officer was applying for a search warrant, another used a loudspeaker to order Wallace to come out of the apartment, which he eventually did. RP 129-30. In one of the phone calls from the jail, the parties discuss that incident. RP 193-95. In another call, shortly after the female answered the phone, she said "I'm just now getting to the house. . . . To my—to our house." RP 177. During that same call, the male talked to a female child and identified himself: "It's Craig." RP 178. Also in that same call, "Craig" called the female speaker "Mony." RP 182. In several calls there were declarations of love between the two parties. RP 159, 176-77, 195-96, 211, 223-24. The male asked the female to bring him a specific pair of shoes. RP 207, 221. In one call the two pretended to be speaking about other people when they were actually referring to themselves, because the male had become concerned that the authorities knew about his calls to the female, e.g., "I've got to cut it short because I don't want her to get hurt." RP 216. "They'll think I'm breakin' the no contact letters." RP 221. RP 214-221 generally. However, near the end of the

conversation they again discussed personal commitment, and the male asked the female to marry him. RP 223-26.

The trial court in this instance was well within its discretion to find that the State had authenticated the calls. That ruling should stand.

2. The statements made by the female recipient of the telephone calls made by Wallace from the jail are not hearsay.

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Wallace argues that the statements made by Leap in the recorded telephone calls admitted at trial were offered for the truth of the matters asserted and were therefore hearsay. His argument assumes that unless the assertions made by the woman on the recordings were true, they do not prove her identity. The State disagrees.

The statements made by Leap during the recorded calls demonstrate her identity regardless of whether or not they were true. The very fact that she made them is relevant to identification. For example, when the woman said she thought it was Lisa who called the police, RP 292, it did not matter to the question of her

identity whether Lisa did in fact call law enforcement. It is the fact that the two were discussing a snitch and naming a person who could have called the police that is relevant. Similarly, it does not matter whether it was true that Leap was at the movies with Alicia. RP 306. The fact that Leap refers to a person named Alicia is relevant to proving identity, but the statement was not offered for the truth of the matter asserted. All of the statements in the calls prove Leap's identity simply because they were made, not because the content was the truth. The State did not offer them to prove that they were true; the truth of the statements was not relevant.

The trial court did not abuse its discretion in overruling a hearsay objection to the recorded phone calls.

3. The admission of the recorded telephone calls did not violate the Confrontation Clause, and therefore defense counsel was not ineffective for failing to object to the recordings on that basis.

The State takes no issue with Wallace's authorities regarding effectiveness of counsel or his summary of the law regarding both state and federal constitutional rights to confront witnesses. The State does disagree with his contention that the statements made on the recordings by Mony Leap were testimonial. He argues that because the calls were recorded, and

Leap was aware of that fact, her statements were made “under circumstances which would lead an objective witness reasonably to believe that the statement(s) would be available for use at a later trial.” Crawford v. Washington, 541 U.S. 36, 52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Appellant’s Opening Brief at 12.

Crawford held that out of court testimonial statements may not be admitted at trial unless (1) the declarant testifies at trial or (2) the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 59. Testimonial statements are a special class of statements scrutinized under the Sixth Amendment; non-testimonial statements are left to the State rules regarding hearsay. Id. at 61, 68. The court did not offer a “comprehensive definition” of what constitutes testimonial statements, but “at a minimum, it applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Id. at 68.

“Witnesses,” in the context of the Sixth Amendment, are “those who bear testimony” against a defendant. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Witnesses whose statements establish only the

authenticity of an exhibit are not making testimonial statements. Melendez-Diaz, 557 U.S. at 311 n. 1.

It is difficult to envision how Leaps statements were testimonial. It is not apparent that Leap understood that because the calls were recorded her statements would be used at trial. She never expressed any such understanding, nor did she censor her remarks to make them less incriminating. More importantly, it would be an odd result indeed if statements made by a person during the commission of a crime were considered testimonial merely because there is the possibility that the crime will be discovered and prosecuted. That is plainly not the sort of “testimonial” statements contemplated by the court in Crawford. No State action was involved in causing her to make those statements and the State is not restrained from using them except as required by the rules of evidence.

Although Wallace asserts, correctly, that article I, section 22 of the Washington Constitution is more restrictive than the Sixth Amendment, Appellant’s Opening Brief at 11-12, he does not argue any specific grounds other than Crawford for his contention that the statements in the calls were testimonial.

Defense counsel was not ineffective for failing to make a Confrontation Clause objection to the recordings because it would certainly have been overruled.

4. The charging document alleged all of the essential elements of obstructing a law enforcement officer.

Wallace argues that the language charging him with obstructing a law enforcement officer, Count 3 of the Information, CP 11, was insufficient because it failed to allege that he knew the officer was discharging his official duties at the time he obstructed that officer.

Under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution, a charging document must set forth all of the essential elements of the alleged crime so that a criminal defendant can be apprised of the nature of the charge and can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. Id. at 102. The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d

245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. Id. at 360. Under that liberal analysis, the appellate court examines: (1) whether the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the defendant can show that he was nonetheless actually prejudiced by the inartful language used in the document. Kjorsvik, 117 Wn.2d at 105-106. In the present case, the defendant has not alleged any prejudice, and so only the first prong of the above-stated test is pertinent here.

It is not necessary to use the exact words of a statute in a charging document. It is sufficient if words conveying the same meaning are used. A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result. State v. Moavenzadeh, 135 Wn.2d 359, 262, 956 P.2d 1097 (1998).

A charging document must include all essential elements of a crime, statutory or nonstatutory, “to afford notice to an accused of the nature and cause of the accusation against him.” Kjorsvik, 117 Wn.2d at 97. An “essential element is one whose specification is

necessary to establish the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

The charging language here reads as follows:

OBSTRUCTING A LAW ENFORCEMENT OFFICER,  
RCW 9A.76.020 – GROSS MISDEMEANOR:

In that the defendant, CRAIG HOWARD WALLACE, II, State of Washington (sic), on or about January 1, 2012, did willfully hinder, delay, or obstruct any law enforcement officer in the discharge of his or her official powers or duties.

CP 11.

This document explicitly set forth all of the essential statutory elements of the crime. RCW 9A.76.020(1) reads:

A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

Applying the test of Kjorsvik, the first question is whether “the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction.” Kjorsvik, 117 Wn.2d at 105-106. Here, the charging document alleged that Wallace “did willfully hinder . . . “ any law enforcement officer. Willfulness implies knowledge. “A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the

offense, unless a purpose to impose further requirements plainly appears.” RCW 9A.08.010(4). A fair reading of the charging language informed Wallace of the requirement that he know that the officers were discharging their official duties at the time.

The second question under Kjorsvik is whether Wallace was actually prejudiced by the language of the Information. He does not claim any prejudice, and none is apparent from the record. The evidence was that Deputy Rod Ditrich arrived at the protected residence on January 1, 2012, and saw Wallace in front of the protected party’s apartment. RP 71. Wallace turned, saw the patrol car, RP 71, which was marked, RP 75, and ran. RP 71. Ditrich gave chase on foot, wearing a full uniform. RP 73, 75. There can be no doubt but that Wallace knew the deputy was discharging his official duties. There is no indication in the record that he was caught by surprise by the jury instruction,<sup>3</sup> which spelled out the element of knowledge, CP 51, or that he was in any way hindered in his ability to defend himself because of the charging language.

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<sup>3</sup> Wallace took no exceptions to the jury instructions, although he earlier objected to the court’s choice of WPIC 4.01 because of the “abiding belief” language. RP 363, 366.

Wallace did not challenge the charging document until after the verdict was reached, and under the more liberal standard for evaluating post-conviction challenges to the charging language, the information was sufficient.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Wallace's convictions.

Respectfully submitted this 12<sup>th</sup> day of June, 2013.

  
\_\_\_\_\_  
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Attorney for Respondent

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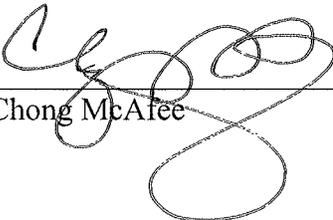
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2013, at Olympia, Washington.

  
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