

29749-7-III
COURT OF APPEALS
DIVISION III

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Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMIE ANDREWS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The conviction was based on insufficient evidence, violating due process.
2. The court erred in admitting copies of evidence that were not authenticated.

B. ISSUES

1. The evidence of the offense consisted of messages received by the victim of alleged witness tampering. The only evidence that the defendant had sent the messages was the inclusion of his name near the end of each text message. Absent evidence that this name was known only to the sender and recipient, that the texts contained information known only to these two parties, or that the defendant had ever had actual possession of the cell phone from which the messages were sent, is the evidence sufficient to show beyond reasonable doubt that the defendant was the sender of the messages and thus guilty of the offense?
2. The texts of messages received on the victim's cell phone were the sole evidence of the alleged offense of witness tampering. The evidence admitted at trial included

photographic and digitally recorded copies of messages the victim had received. Under ER 1003 and 1004, a duplicate of original evidence is admissible only if it is authentic and not unfairly admitted. When the issue at trial is the intent of the sender, is the message entered into the sender's phone the original? If so, does the court abuse its discretion in admitting the duplicates without requiring authentication of the copies contained in the recipient's cell phone?

C. STATEMENT OF THE CASE

Ron Ralston brought a stolen car to Carrie Frazier's house and left it there for a long time. (RP 127) Officer Michael Durbin was investigating a car theft that took place in September 2009. (RP 91) Mr. Ralston was charged in that car theft. (RP 95) On May 18 2010, Officer Durbin obtained a material witness warrant and arrested Ms. Frazier. (RP 96, 98) He then obtained a search warrant for her cell phone. (RP 97)

Using a digital camera, Officer Durbin photographed text messages he found on the cell phone. (RP 97) He also used a digital recorder to capture some voice messages. (RP 97)

A series of photographs of the first text message show that it was sent on April 20th, and read:

From: Cosmo Mike Yeah, this is my new number. Check it out, though, the guy that took the stolen car to your mom's house, wants you not to go. I'm only warning you cause you don't really need to go through all the drama this guy is wanting you to go through. Just stay under the radar and do not go and everything should be fine. Yosh13 CB: 509-406-2111 Apr 20, 2:38 pm

(RP 130-32; Exh. 1-4) Additional photographs showed more text messages:

From: Cosmo Mike 2 days till the day. You need to bounce out and if you are thinking about turning me in you need to think about that one seriously. Get at me ASAP. Yosh13 CB: 509-406-2111 Apr 27, 1:57 pm

(Exh. 5-6)

From: Cosmo Mike You busy? Call me. Yosh13 CB: 509-406-2111 Apr 27, 5:19 pm

(Exh. 7)

From: Cosmo Mike You where you need to be girl? Yosh13 CB: 509-406-2111 Apr 29, 2:52 pm

(Exh. 8)

From: Cosmo Mike Tomorrow night it will be done and taken care of. Get at me and let me know you are still cool. Yosh13 CB: 509-406-2111 May 3, 6:56 pm

(Exh. 9-10)

From: Cosmo Mike Whats going on with you girl? Starting to scare me by not getting back at me. If you do

that its my ass for handling it the way I did so please get at
me. CB: 509-406-2111 May 4, 6:00 pm

(Exh. 11)

On May 27, 2010, the State charged Jamie Andrews with intimidating a witness. (CP 1) The information was later amended to include a charge of witness tampering. (CP 16) Before trial, and again during Officer Durbin's testimony, defense counsel objected to the admission of the photographs and recordings into evidence. (RP 98) They were nevertheless admitted. (RP 98)

Ms. Frazier told the jury that she has a friend named Cosmo, Cosmo has an uncle named Mike, and she stored Mike's cell phone number in her cell phone under the name "Cosmo Mike." (RP 130) She explained that if someone texted her and the name associated with that cell phone number was stored in her cell phone the message would appear under that name. (RP 130-31)

Ms. Frazier went on to tell the jury that she had a friend named Yoshie, and it was Yoshie who had sent her the text messages telling her not to testify against Mr. Ralston. (RP 129) The prosecutor asked Ms. Frazier to relate the content of the text to the jury and provide her own interpretation of what the texts meant. (RP 130-32) Defense counsel objected to Ms. Frazier's speculation as to the meaning of the text; the

prosecutor responded that since she was a prospective witness, her perception of how the text influenced her was relevant. (RP 133-34) The court overruled the objection. (RP 133)

Ms. Frazier testified that she thought she was being told that Mr. Ralston didn't want her to testify and that if she did she would have problems. (RP 133)

The prosecutor then played a voicemail recording. (RP 133) Ms. Frazier testified that her understanding of these recordings was that they, too, instructed her not to testify, to stay where she could not be found, and that otherwise she would "have some problems." (RP 133-34)

The prosecutor asked Ms. Frazier to read the remaining text messages, listen to the voicemail recordings and to interpret them for the jury. (RP 135) She did so, again over defense counsel's objection. (RP 135-39)

Ms. Frazier told the jury she had a friend named Yoshie, and that Yosh13 was his signature for text messaging. (RP 137) Several months before she received the April 20 text message, she had talked with Yoshie about her concern about testifying at Ron Ralston's trial. (RP 140) She was worried that she would be perceived as a "narc." (RP 141) He had told her he didn't know Ron, and reassured her that she had to do what she had to do. (RP 141)

The prosecutor played the third recording, asked Ms. Frazier for her interpretation, and she said it meant that if she waited one more day they would have to go to trial without her and it would all be over. (RP 142)

Corrections Officer Teresa Schuknecht testified that on May 20 she had made a computer printout of a booking sheet for Jamie Andrews when he was booked into jail on May 4. (RP 116, 122-23) The booking sheet included a photograph of Mr. Andrews and the name “Yoshie” in the comments section. (RP 123) It also showed a phone number where he could be contacted. (RP 125)

The jury found Mr. Andrews guilty of witness tampering. (CP 89)

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant’s guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence, and all reasonable inferences therefrom are drawn in

the light most favorable to the State. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

A person commits the crime of tampering with a witness when he attempts to induce a witness to absent himself or herself from any official proceedings. (CP 79) The State's case offered no basis from which a jury could infer that Mr. Andrews ever attempted to induce Ms. Frazier to absent herself from a trial or other proceedings.

The text messages on Ms. Frazier's phone appeared to suggest that she refrain from going through some drama relating to a car theft, possibly the one involving Mr. Ralston. Mr. Ralston is not named in the texts, nor is any trial or testimony mentioned. Assuming all of these texts relate to the same subject matter, the subject was an event that was expected to occur between April 20 and May 4. The State presented no evidence relating to any trial or proceeding that was expected to occur during that period. The only event identified during that time frame was Mr. Andrews's arrest.

The State did not provide any evidence that the number displayed in the text on Ms. Frazier's cell phone is necessarily the number of the cell phone from which the text was sent. The State did not offer the cell phone itself into evidence or present any testimony respecting how or whether it accurately displayed the source of incoming messages.

Ms. Frazier testified that she had stored a number in her cell phone under the name Cosmo Mike. She did not testify that the number under which that name was stored was the number that appeared on the face of the texts. But assuming it was the same number, and assuming her cell phone could determine the number from which the text originated, this would only support the inference that the text originated from a telephone that belonged to a person she knew as Cosmo's Uncle Mike. The State presented no evidence that Mr. Andrews knew "Uncle Mike" or had access to Uncle Mike's telephone. Ms. Frazier did not testify that Mr. Andrews and Uncle Mike were the same person. No evidence showed that Mr. Andrews ever possessed Uncle Mike's cell phone.

Ms. Frazier testified that she believed the text messages came from the person she knew as Yoshie. She based this belief on the fact that the name Yoshie appeared near the end of each message. The State presented no evidence that any person named Yoshie sent these messages. Anyone could have composed these messages, including not only the portions suggesting that Ms. Frazier should stay under the radar, but also the portion containing the name "Yoshie."

Finally, Ms. Frazier did not identify the voice in the recordings as the voice of either Mr. Andrews or the person she knew as Yoshie.

Whether the person who sent the text messages and/or left the voicemail messages in fact intended to induce Ms. Frazier to refrain from testifying at Mr. Ralston's trial is a question of fact for the jury, but the State did not present sufficient evidence for any rational trier of fact to conclude beyond a reasonable doubt that Mr. Andrews was that person.

2. THE PHOTOGRAPHS AND RECORDINGS WERE INADMISSIBLE COPIES, THE AUTHENTICITY OF WHICH WAS NOT SHOWN.

Before trial, defense counsel objected to the admission of the photographs of the text messages purportedly sent by Mr. Andrews to Ms. Frazier because they were not the original texts and thus not the best evidence, citing ER 1004. The prosecutor assured the court that these recordings were the basis for the charges against Mr. Andrews, reflecting efforts to influence her testimony. (RP 61) The court held the reproductions were admissible under the provision of ER 1003. (RP 63)

ER 1004 provides:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (a) Original Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (b) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

- (c) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (d) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

ER 1004. The State did not contend, and the court did not find, that the original messages had been lost, destroyed or were otherwise unobtainable, or that the original was in Mr. Andrews's control. And, as the prosecutor pointed out, these messages were not collateral but rather the essence of the State's case.

In admitting the evidence, the court relied on ER 1003, which provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. In so doing, the trial court abused its discretion.

The proponent of evidence bears the burden of establishing its admissibility. *See State v. Hilton*, -- Wn. App. --, 261 P.3d 683 (2011). Here, the State not only failed to show that evidence other than the original was admissible under ER 1004, but also failed to show the authenticity of the purported copies or to overcome the obvious unfairness

of admitting a copy of a copy, as required by ER 1003, without establishing the circumstances under which the original was created.

Electronic evidence often consists of data stored on a computer or other electronic device. *See* Andrew Grossman, NO, DON'T IM ME – INSTANT MESSAGING, AUTHENTICATON, AND THE BEST EVIDENCE RULE, *George Mason Law Rev.* 1309, 1322-23 (2006). A printout of such data is generally deemed an original, because it reflects the stored data.

This analysis does not apply, however, to data that is sent from one device to another. In such cases either the data that was sent, or the data that was received, is the original. The distinction is significant because, if the evidence is offered to prove that the recipient received data, then the recipient's copy is the relevant document, and thus the original. *Id.*, *citing* 7 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 1263(3)(a) (Chadbourn rev. 1978); 2 Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE, 1073-74 (3d ed. 2003). If, on the other hand, the fact to be proved is the intent of the sender, then it is the sender's message that is the original. *Id.*

Here, then, the original writing would have been contained in "Uncle Mike's" telephone, since that is the electronic device where the message originated. The displays on Ms. Frazier's cell phone were copies

of the original, and the photographs were copies of those copies. As Ms. Frazier pointed out, there was a discrepancy between the time that would show the message was sent and the time shown on the message that she received. (RP 132) This is but one example of the potential differences between the message sent and the message received.

The message received on Ms. Frazier's cell phone, and the photographs of the message displayed there, would have been admissible as originals or authentic duplicates had the issue in this case been whether Ms. Frazier received notice that Mr. Ralston did not want her to testify. The issue, however, was whether Mr. Andrews intended to convey such a message to Ms. Frazier. Photographs of the display on Mike's telephone, showing the outgoing messages, would have overcome at least part of the requirement of ER 1003 for admission as duplicates. But that was not the evidence the court ruled admissible.

More significant than the State's failure to produce either the originals or accurate copies of the original messages is the State's failure to authenticate the copies that it did provide. Since the authenticity of the messages shown in the photographs was the essence of the State's case, the court's failure to consider this factor under ER 1003, or to require the State to make any offer of proof is an absolute abuse of discretion

The purpose of authentication is to establish that “the thing” authenticated is what it purports to be. *State v. Monson*, 113 Wn.2d 833, 837, 784 P.2d 485 (1989). The photographs offered and admitted into evidence purported to be duplicates of cell phone messages Mr. Andrews sent to Ms. Frazier. Yet the State presented no evidence showing that, as a logical probability, Mr. Andrews sent any of the messages.

The cell phone from which they were purportedly sent belonged to Uncle Mike, not Mr. Andrews. The State presented no evidence the cell phone had ever been in Mr. Andrews’s possession. Even if the cell phone had belonged to Mr. Andrews, it is generally recognized that unauthorized persons may have access to an electronic device. *See Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 548 (D.Md.,2007), *citing* Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 900.01[4][a] (Joseph M. McLaughlin ed., Matthew Bender 2d ed.1997).

The substance of evidence sought to be authenticated may itself provide evidence of authenticity. *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984); *see People v. Chromik*, 408 Ill. App.3d 1028, 1047, 946 N.E.2d 1039, 1056, 349 Ill. Dec. 543, 560 (Ill.App. 3 Dist., 2011); *In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005); *compare State v. Damper*, 223 Ariz. 572, 577, 225 P.3d 1148, 1152 - 1153 (Ariz.App. Div. 1, 2010); *State v. Taylor*, 178 N.C.App. 395, 414,

632 S.E.2d 218, 230-31 (2006). Thus, if there were evidence that Mr. Andrews was the only person who knew that Ms. Frazier was a prospective witness in the trial of someone charged with car theft, one could infer that he must have sent the first message. *See Grossman, supra.* at 1325-26. Yet the State presented no such evidence.

The only evidence suggesting Mr. Andrews authored these messages was the inclusion of the name “Yosh13” near the end of the messages, together with evidence that Mr. Andrews sometimes used the name Yoshie. But there was no evidence that this was a secret name known only to Mr. Andrews and Ms. Frazier. Indeed the evidence showed that his use of that name was likely widely known. Given that, at the very least, Mr. Andrews did not have exclusive possession of Mike’s cell phone, and that his use of the name Yoshie was no secret, the appearance of that name in the messages is insufficient, without more, to establish that Mr. Andrews was indeed the sender. And nothing more was offered.

Ms. Frazier provided detailed interpretations of the likely meaning of the voicemail messages that were played for the jury. She did not expressly identify Mr. Andrews as the person who was speaking in the recordings. Thus similarity in the content of the voice messages and text messages provides no evidence that either involved Mr. Andrews.

In *Lorraine v. Markel* , *supra*, Magistrate Judge Grimm attempted to provide the parties to that case with a comprehensive guide to the issues implicated by the use of electronic evidence. Since *Lorraine* was based almost entirely on email exhibits, the judge sought to ensure that the parties based their cases on admissible evidence from the outset. *Id.* at 585. As the judge explained:

[E]-mails are a form of computer generated evidence that pose evidentiary issues that are highlighted by their electronic medium. Given the pervasiveness today of electronically prepared and stored records, as opposed to the manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence.

Id. at 537. As electronic data is increasingly used at trials, it is important for the courts to acknowledge the proponent's duty to determine whether proffered evidence is indeed an original or true duplicate and adequately show that the evidence is what it purports to be.

While it is apparent from her testimony that Ms. Frazier believed Mr. Andrews sent these messages, neither her testimony nor the content of the messages nor any other evidence supports that belief. The record provides no support for the judge's decision to admit the evidence of electronic data over defense counsel's objection. Since, as the State

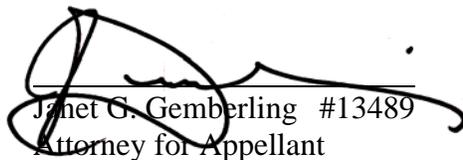
assured the court, the evidence was central to the State's case, the abuse of discretion could not be harmless error.

E. CONCLUSION

The court erred in admitting copies of copies of electronic messages allegedly sent by the defendant absent evidence they were actually sent by him. Absent some reasonably reliable evidence Mr. Andrews was indeed the author and sender of the messages received by the victim, the evidence was insufficient to support the conviction. This court should reverse and dismiss the conviction based on the insufficiency of the State's evidence.

Dated this 7th day of November, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29749-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JAMIE ANDREWS,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on November 7, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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Signed at Spokane, Washington on November 7, 2011.


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