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Court of Appeals
Division III
State of Washington

No. 297497

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JAMIE STEWART ANDREWS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF FACTS</u>	2
III. <u>ARGUMENT</u>	4
1. <u>Sufficient evidence supported the conviction, as even without the text message photographs, there was evidence that Andrews attempted to get Ms. Frazier to absent herself from trial</u>	4
2. <u>The court did not abuse its discretion in admitting the photographs of the text messages, as they were properly authenticated</u>	6
IV. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

PAGE

Cases

Braut v. Tarabochia, 104 Wn.App. 728, 17 P.3d 1248 (2001) 6

State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001)..... 6

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 4

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 4

State v. Galisia, 63 Wn.App. 833, 822 P.2d 303,
review denied 119 Wn.2d 1003, 832 P.2d 487 (1992)..... 5

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 4

State v. Walton, 64 Wn.App. 410, 824 P.2d 533,
review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992)..... 4, 5

Federal Cases

In re Gulph Woods Corp., 82 B.R. 373, 377 (Bankr.E.D.Pa. (1988) 11

In United States v. Siddiqui, 235 F.3d 1318, 132-23 (11th Cir. (2000) 8

Lorraine v. Markel American Insurance Co., 241 F.R.D. 534,
(D.Md. 2007) 10, 11

Additional Cases

In re. F.P., 2005 PA Super 220, 878 A.2d 91,
93-95 (Pa. Super.Ct. 2005) 8

Dickens v. State, 175 Md.App.231, 927 A.2d 32,
36-38 (Md.Ct.Spec.App.2007)..... 8

People v. Chromik, 408 Ill.App.3d 1028,
946 N.E. 2d 1039, 1056 (2011)..... 9

TABLE OF AUTHORITIES (continued)

PAGE

State v. Thompson, 2010 ND 10, 21, 777 N.W. 2d 617, 624. 7, 8, 9

Additional Authorities

Tegland, Courtroom Handbook on Washington Evidence,
Ch.5, p.485 (2006 E.d)..... 6

Statutes and Rules

RCW 9A.72.120 6

N.D.R. Ev. 901(a) 7

ER 901(a) 7

FED. R. EVID. 901(b)(4) 10

FED. R. EVID. 1001(3) 10

ER 1001(c) 10

ER 1003 1, 6

ER 1004 1

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supports the Appellant's conviction for witness tampering, where the court admitted into evidence photographs of text messages received by the victim, purportedly sent by the defendant, which included his nickname?
2. Whether the photographs of the text messages on the victim's phone were authenticated duplicates of the messages sent and thus properly admitted under ER 1003 and ER 1004?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence to support the conviction. Even absent the text message evidence, the victim was able to identify the Appellant in court, and could recognize his voice from both voice mails left on her phone, as well as other conversations between the two of them. Throughout the contacts, the Appellant, Mr. Andrews, used the same nickname, and he attempted to induce the victim to absent herself from trial.

2. The court did not abuse its discretion in admitting the photographs, as they were sufficiently authenticated.

II. STATEMENT OF FACTS

The State supplements Mr. Andrews' Statement of the Case with the following.

At trial, Ms. Frazier testified as to three voice mail recordings left on her cell phone. **(RP 133-142)** On the first message, from April 22, 2010, the caller, identified as "Yoshie", told the victim that she needed to "stay under the radar", and that "if it happens any different than yeah, you're gonna have some problems . . . " **(Ex. 12; Voicemail RP 1)**

Ms. Frazier understood the message to mean that she was to make herself unavailable to testify at trial, that Yoshie was serious, and that she might be subject to retaliation if she did show up to testify. **(RP 134)**

The second message was from April 30th, the caller again identifying himself as Yoshie. He demanded a call back from Ms. Frazier, in order to make sure "you're doing what you're supposed to do . . . " **(Ex. 12; Voicemail RP 1)**

Ms. Frazier understood that he was checking to make sure she was not going to trial. **(RP 137)**

The third voice mail was delivered on May 4th, and Yoshie instructed her to let him know “where you are and what’s up”, and “I think it’s today”. **(Ex. 12; Voicemail RP 2)** Ms. Frazier understood that Yoshie was requesting that she should stay unavailable for just one more day, and the trial would be over with. **(RP 141-42)**

Ms. Frazier testified that the voice mail messages, as well as the text messages, were on her cell phone when she was arrested on a material witness warrant in State v. Ralston, on May 18, 2010. **(RP 142)**

Ms. Frazier was personally acquainted with Yoshie, and hung out with him about a month before the messages began. She confided in him at that time that she was nervous about testifying in the Ralston matter. She did not know him by any other name, not even a first name. **(RP 137-38; 140)**

She also spoke to him on the phone about the Ralston case. He advised her at that time that she did not need to go to court and that there were people who did not want her to go to court. In fact, Yoshie volunteered to her that he might get five hundred dollars if she did not make it to court. **(RP 143-44)**

Ms. Frazier identified Mr. Andrews in court as the individual known to her as Yoshie. **(RP 144)**

Additionally, she recognized the voice in the recordings, as well as the voice with whom she spoke about the trial, as Yoshie's. (RP 153)

At trial, Ms. Frazier was apprehensive, and feared retaliation for testifying. (RP 153)

III. ARGUMENT

1. **Sufficient evidence supported the conviction, as even without the text message photographs, there was evidence that Andrews attempted to get Ms. Frazier to absent herself from trial.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64

Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Contrary to Mr. Andrews' assertion in his opening brief, Ms. Frazier did, in fact, identify the voice in the recordings as belonging to Yoshie. He was known to her; she had met him in person, and they had discussed the Ralston case. This provided the context for their later conversation on the phone, and Yoshie explained why he was now trying to dissuade from attending the trial: he might get money if he were to be successful.

This was also the reason for the voice mails, which, based upon her prior acquaintance with Yoshie, she knew were left by him. It cannot be emphasized enough that the text messages from "Yosh13" carried on this same effort, with very similar language. **(Ex. 1-11)**

Even if the photographs of the text messages were not admitted, there was sufficient evidence, then, upon which a rational trier of fact could find that Yoshie, or Mr. Andrews, was attempting to induce Ms.

Frazier to absent herself in the proceedings against Mr. Ralston, in violation of RCW 9A.72.120.

2. The court did not abuse its discretion in admitting the photographs of the text messages, as they were properly authenticated.

The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. State v. Atsbeha, 142 Wn.2d 904, 913-13, 16 P.3d 626 (2001).

ER 1003 governs the admissibility of duplicates. As noted, the court relied upon that rule in denying Mr. Andrews' *motion in limine*. A trial court does have a measure of discretion in administering the rule, and objections are often said to go to the weight of the evidence rather than admissibility. Tegland, Courtroom Handbook on Washington Evidence, Ch. 5, p. 485 (2006 Ed.), *citing Braut v. Tarabochia*, 104 Wn. App. 728, 17 P.3d 1248 (2001).

While there are no Washington cases directly on point, other state courts have faced similar issues. The Supreme Court of North Dakota held that a victim's testimony as to the defendant's phone number and signature was sufficient to authenticate pictures of received text messages:

. . . the proponent of offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be; rather, the

proponent must provide proof sufficient for a reasonable juror to find the evidence is what it purports to be.

State v. Thompson, 2010 ND 10, 21, 777 N.W. 2d 617, 624.

Further: “[i]f the court decides evidence is what its proponent claims it to be, the court may admit the evidence and the question of its weight is for the trier-of-fact.” Id., at 23, 777 N.W. 2d at 624.

It is important to note that the decision of the Thompson court relied primarily upon Rule 901(a), N.D.R.Ev., the evidence rule which appears to be identical to both the federal rule, as well as ER 901(a). That rule provides:

(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.

ER 901(a).

The Appellant casts the second issue on appeal as one involving authentication, so a closer look at ER 901 is in order.

That court had not previously considered an issue about foundational requirements for the admissibility of text messages, but was persuaded by the language of the court rule and decisions in other courts holding that similar electronic messages were authenticated by

circumstantial evidence establishing the evidence was what the proponent claimed it to be. In United States v. Siddiqui, 235 F.3d 1318, 132-23 (11th Cir. (2000), such circumstantial evidence included the defendant's e-mail address, factual details known known to the defendant, as well as the defendant's nickname and that the messages were followed by phone conversations on the same topic. Id.

Threatening text messages were held to be properly authenticated by circumstantial evidence in Dickens v. State, 175 Md. App. 231, 927 A.2d 32, 36-38 (Md. Ct. Spec. App. 2007). Similarly, instant messages were properly authenticated through circumstantial evidence including screen names, as well as the context of the messages. In re F.P., 2005 PA Super 220, 878 A.2d 91, 93-95 (Pa. Super. Ct. 2005).

The Thompson court quoted at length from the F.P. decision as to whether electronic messages are inherently unreliable, and the words of the Pennsylvania court are particularly instructive here:

Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and

send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents.

...

We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.

Thompson, 777 N.W. 2d at 625-26, *quoting* F.P., 878 A.2d at 95.

An Illinois appellate court, citing Thompson, held that there was no error in admitting a transcript of received text messages as read by the victim at trial. People v. Chromik, 408 Ill. App. 3d 1028, 946 N.E. 2d 1039, 1056 (2011)

Here, of course, the subject of the text messages was essentially the same as the voice mail messages, which was that Ms. Frazier was to keep her head down and stay away from the proceedings, and the sender of the instant messages used a screen name quite similar to the nickname he used in his personal interactions with Ms. Frazier. The circumstantial evidence surrounding the text messages was sufficient to authenticate them, that they were what Ms. Frazier purported them to be: communications from Yoshie. The jury could weigh that evidence, as well as the credibility of all of the witnesses, in reaching its decision.

A case relied upon by Mr. Andrews in his opening brief is also instructive. The decision of the Maryland federal district court in Lorraine v. Markel American Insurance Co., 241 F.R.D. 534, (D. Md. 2007), is an exhaustive primer on electronically stored information.

As to Federal Rule of Evidence 901(b)(4), the federal court's analysis is very similar to the North Dakota decision. Indeed, the decision observes that 901(b)(4) is "one of the most frequently used to authenticate e-mail and other electronic records." Lorraine, 241 F.R.D. at 546. The District Court also quotes at length from F.P., supra. Id., at 543.

Beyond the issue of authentication and Rule 901, the Lorraine decision also addresses the "original writing rule", encompassing FED. R. EVID. 1001 through 1008. The court noted that, largely as a result of Rule 1003, the "distinction between duplicates and originals largely has become unimportant, as duplicates are co-extensively admissible as originals in most instances. Id., at 578. Also, under FED. R. EVID. 1001(3) (ER 1001(c)), the "original" of information stored in a computer is the readable display of the information on the computer screen, as well as any other printout or output that may be read. Id.

Under this analysis, the 'original' of the text messages resided on Ms. Frazier's cell phone, viewable on that phone's screen, and preserved with a photograph. A computer record which accurately reflects the

contents of another writing, and prepared contemporaneously, may qualify as an original under Rule 1001. See, In re Gulph Woods Corp., 82 B.R. 373, 377 (Bankr. E.D. Pa. 1988), cited in Lorraine, 241 F.R.D. at 578.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction, as the issues raised on appeal are without merit.

Respectfully submitted this 7th day of June, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 7th day of June, 2012

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