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DEC 30, 2013

Court of Appeals  
Division III  
State of Washington

**NO. 31359-0-III**

**STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JEROME LIONEL PLEASANT**

**Appellant.**

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**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

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## A. STATEMENT OF THE CASE

### **1. PROCEDURAL HISTORY**

Appellant, Jerome Lionel Pleasant, was charged by an Information filed June 22, 2012, with the felony crime of Theft in the Second Degree, RCW 9A.56.020(1)(a) and 9A.56.040(1)(a), a class "C" felony. (CP 75-76). The appellant was arraigned on January 31, 2012. A 3.5 hearing was held and completed on August 14, 2012, resulting in the admissibility of appellant's statements at trial. (CP 73-74). The appellant was found guilty by jury verdict on November 30, 2012. (RP 52). Appellant was sentenced on December 18, 2012 by the Honorable Vic L. VanderSchoor to 12 months plus 1 day incarceration and filed a notice of appeal on the same date. (CP 6-7).

### **2. FACTS RELEVANT TO MOTION**

Respondent accepts and relies upon the Appellant's statement of facts and requests it be incorporated within respondent's motion.

## B. GROUNDS FOR RELIEF AND ARGUMENT

Respondent respectfully requests that the Court of Appeals Division III, affirm the conviction of appellant by jury trial. The State

agrees the Court should remand the matter to the Superior Court for sentencing requiring the Respondent to prove the Appellant's criminal convictions on the record.

**1. THE VALUE GIVEN TO THE GPS DEVICE BY EMAIL WAS CORRECTLY ADMITTED BY THE COURT AS A BUSINESS RECORD.**

Appellant argues that the email between Tracy Miller of the Washington Association of Sheriffs and Police Chiefs (here-in-after, WASPC) and Charles Dorendorf of the Department of Corrections was either testimonial hearsay and should have been excluded, or, if a business record, it was still testimonial, and triggers the Confrontation Clause, resulting in exclusion.

Appellant erroneously cites *State v. Beadle*, 173 Wn.2d 97, 108, 265 P.3d 863 (2011), the "on-going emergency test" as applicable to this case. The Court limits the "on-going emergency test" specifically to "the police interrogation context." *Id.*, at 108. Here, the GPS unit vendor representative, Tracy Miller from the WASPC, sent an email in the normal course of business to the Washington Department of Corrections Officer, Charles Dorendorf, the coordinator of GPS tracking devices, to replace a missing unit.

No police officer, nor police interrogations were involved. Therefore, the “on-going emergency test” to determine if a statement is testimonial is not applicable because the email was not created the context of a police interrogation.

The applicable test in Washington for this case to determine if the email was testimonial is “whether the declarant intended to bear testimony against the accused” or “whether a reasonable person in the declarant’s position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant’s intent by evaluating the specific circumstances in which the out-of-Court statement was made.” *Id.*

A business record is a record competent as evidence if “the custodian testifies to its identity and mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the Court, the sources of information, method and time of preparation were such to justify its admission.” RCW 5.45.020. This Business Record rule is an exception to hearsay under ER 803(6) to allow in evidence which might otherwise be excluded under the hearsay rule.

In this case, the vendor, WASPC, had an ongoing business relationship with the Washington Department of Corrections (here-in-after, DOC), which supplies DOC with GPS tracking devices. If a device was damaged, lost, or missing, the coordinator from DOC would, as a normal part of the business relationship, contact the vendor to purchase a replacement GPS tracker. The vendor had no knowledge of, or authority to decide whether DOC or the offender would pay for the replacement equipment, or if any criminal charges would be considered against the offender.

As shown on the instructions presented to the appellant, “Offender Instructions—Care and Use of GPS Equipment,” State’s exhibit 1, signed by the appellant on April 23, 2012, it states on page 2: “Any intentional damage or loss will result in my responsibility to pay for damaged or lost equipment. I could also be charged with a new crime:” Under the terms of this signed agreement, the defendant would be required to pay for the replacement equipment. However, under this same agreement, a charge for a new crime was an option, but not a requirement.

On June 5, 2012 appellant turned himself into custody for a DOC violation at the Benton County jail without his GPS tracking

device on his person. (RP page 27, lines 7-15). When he was released from jail on June 8, 2012, he was transported directly to this Community Corrections Officer, Sheila Perkins. Appellant informed her he had cut off the GPS device from his person. (RP 27, line 25). Ms. Perkins advised appellant to return the device by June 12, 2012 or he could be facing additional charges. (RP 28, Lines 1-4). When the appellant failed to report or turn himself in on June 12, 2012, a warrant was issued for his arrest.

On June 14, 2012, Ms. Tracy Miller from the WASPC emailed Officer Dorendorf a list of various types of GPS tracking devices. (Exhibit 2) The list consisted of a number of different models that were available for purchase, with the missing GPS device assigned to appellant highlighted with the cost of replacement. The subject line of the email indicates the purpose of the information in the email is to determine "equipment costs." The body of the email says, "below is a list of equipment costs for lost or damaged equipment." Nothing the subject line, body of the email, or lists of devices for sale indicate this email was created in anticipation of, or with the intent of any criminal investigation or prosecution. The email relates to normal business transactions

between a vendor who supplies GPS tracking devices, and the Washington DOC coordinator in charge of replacing the appellant's missing GPS tracker. On June 19, 2012, appellant surrendered himself for unrelated DOC violations and failed to produce the missing GPS device. (RP 15, lines 1-7). The information charging the appellant with the theft charge was filed June 22, 2012. (CP 75-76).

The day, June 14, 2012, Officer Dorrendorf and Ms. Miller exchanged information via email, no theft investigation or criminal charges were in progress. The only thing the email could have pertained to was regularly conducted business activity. The intent of Ms. Miller in sending the email to Officer Dorendorf was not to create a statement to be used as testimony, but rather to give the equipment replacement cost to the individual tasked with controlling the tracking devices for the Franklin County DOC office. The email was sent in the normal, regular course of business. The email statement of June 14, 2012, could not have been created in anticipation of, or with the intent to be used for a criminal prosecution because charges had not been filed until June 22,

2012, without the knowledge of Tracy Miller, the declarant of the statement.

The three requirements for a business record exception include that the custodian testify to the identity and mode of preparation of the statement, and that it was made in the regular course of business. In this case, the custodian, Charles Dorendorf, testified that the WASPC was the vendor for obtaining the GPS devices used by the local corrections office. (RP 11, lines 12-14). Finally, as discussed above, clearly the email was created in the regular course of business because there were no criminal charges filed or investigation of criminal charges when the email was created on June 14, 2012.

A business record is an exception to the hearsay rule of evidence. Therefore, even if the Court had held the email was hearsay, the email was not erroneously admitted because of the business record exception. However, the State contends the email statement does not meet the requirements to have specifically been testimonial hearsay because the applicable testimonial test is not met.

“Testimonial” hearsay requires the declarant to intend the statement to be used in a criminal investigation or prosecution. Here, the declarant intended the statement be used to determine the cost of replacing GPS equipment. Even if the DOC were to have charged the appellant with the replacement cost, that did not change the statement to one intended for use in a criminal prosecution. Therefore, because the email was not testimonial, the email was correctly admitted as a non-testimonial business record that existed prior to prosecution. Accordingly, the correctly admitted email record provided sufficient evidence to establish the value of the GPS device exceeded \$750.00.

## **2. CONFRONTATIONAL CLAUSE AND BUSINESS RECORDS**

Defense suggests that *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012), *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 129 S.Ct. 2527 (2009) demonstrate that the Confrontation Clause is triggered in this case. Appellant states that business records are not excluded from also being testimonial, and therefore can trigger the Confrontation Clause.

As discussed above, the email from Ms. Miller regarding the value of the replacement GPS devices does not meet the minimum requirements to be testimonial under the correct test applicable to this case. However, even if the email business record had been testimonial, appellant once again mischaracterizes the holdings of the cited cases. In each case cited, the issues regarding the record was the “certification” being testimonial, not the record itself.

In *Melendez-Diaz*, the Court considered whether ‘certificates of analysis’ introduced in a criminal prosecution were testimonial statements.” *Jasper*, at 111. In *Jasper* there was a certified document that no driving record existed, which was used as substantive evidence, *Id.*, at 115. The issue in these cases was best noted by the *Melendez-Diaz* Court which emphasized, “that [the] confrontation clause analysis does *not* focus on the *nature* of the particular records addressed by the certification, but on *the nature of the certification itself*.” (emphasis added). *Jasper*, at 116 quoting *Melendez-Diaz*, 129 S.Ct. at 2538. The court noted the certifications themselves were testimonial in nature, regardless of the content of the document.

In this case, there are no testimonial statements, and there are no certifications on the email business record. Without State's exhibit # 2 being a certified document, *Melendez-Diaz* and *Jasper* have no application in this case. Further, while *Crawford* is well known for stating that "out of Court testimonial statements" are barred by the Confrontation Clause, as discussed above, the email from Tracy Miller does not meet the requirements to be testimonial. If the statement is not testimonial, the Confrontation Clause is not triggered. In this case the email was not testimonial. Therefore, the Confrontation Clause is not triggered in the case at bar regarding the email business record.

### **3. PROVING PRIOR CRIMINAL HISTORY, SENTENCING AND REMAND**

The appellant was sentenced on December 18, 2012. (CP 11-23). Appellant requests the Court to remand the case for resentencing and ordering the trial court to calculate the appellant's offender score as a "1." Appellant relies primarily on *State v. Hunley*, 175 Wn.2d 901 (2012, decided November 1, 2012, shortly before the sentencing in the instant case). The Washington State Supreme Court found RCW 9.94A.530(2) unconstitutional on its

face. The *Hunley* Court states that allowing the lack of a defense objection to a prosecutor's summary statement of a defendant's prior criminal history, "would not only obviate the plain requirement of the SRA, but would result in an unconstitutional shifting of the burden of proof to the defendant." *Id.*, at 914. The Court indicates there are some ways of documenting evidence to establish the prior convictions such as a "certified judgment and sentence or other comparable document of record, like a DISCIS criminal history summary." *Id.*, at 913.

The Court also indicates the remedy for accepting the lack of objection as an acknowledgment of prior criminal history is to remand. During remand, the State would be required to prove the prior convictions unless affirmatively acknowledged. *Id.*, at 915 (also holding there could be a resentencing *if* the offender score was erroneous at the prior sentencing).

Because the *Hunley* holding was so close to the sentencing in this case, the State was unaware of the change in the law that no longer allowed the lack of objection to be an acknowledgement as stated in RCW 9.94A.530(2). The State agrees it should prove appellant's prior convictions in remand. However, the State does

not agree that the sentence should be reduced to 90 days, or that the offender score should be considered a “1” because the prior criminal history was considered acknowledged at sentencing as previously required under the statutory language of RCW 9.94A.530(2).

The *Hunley* court does not advocate such a reduction in sentencing without the offender score being found erroneous upon remand. Following the court in *Hunley*, because the offender score will be proven during remand to be correct at a “6”, and the sentence of 12 months and 1 day was well within the standard sentencing range of 12 to 14 months, the sentence should stand. *Hunley* does not even suggest the State not get a chance to prove the prior criminal history, or that the defense can claim an offender score of “1” if the State did not prove, or get affirmative acknowledgement of the prior criminal history. On the contrary, *Hunley* specifically sate the State is required in remand to prove, or get affirmative acknowledgement of the prior criminal history. Further, a sentence change was only considered if the offender score from the original sentencing was proven to be erroneous, which is not the case here. Therefore, the State agrees the Court

should remand to prove the appellant's prior convictions on the record as newly required under *Hunley*. However, the State moves to follow the *Hunley* Court regarding sentencing and to affirm the 12 month and 1 day sentence.

C. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that this court affirm the jury's finding of guilt and subsequent conviction. Further, the Court should remand for sentencing so that the State may prove the appellant's prior criminal history and sentence based upon it.

Dated this 30<sup>th</sup> day of December, 2013.

Respectfully submitted,

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