

No. 68958-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN M. SOMMER,

Appellant.

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

The Honorable Bruce E. Heller

REPLY BRIEF OF APPELLANT

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DIVISION ONE
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A. ARGUMENT

1. Documents attached to e-mailed cellular telephone records entitled “Explanation Form For Historical Records,” were admitted in violation of Mr. Sommer’s constitutional right to confrontation and the business record exception to the rule against hearsay.

The documents entitled “Explanation Form For Historical Records” were created to establish a fact at trial and to interpret the cellular telephone records, rather than in the normal course of Verizon’s internal business affairs, and, therefore, Mr. Sommer was entitled to the opportunity to cross-examine the person who created the documents. First, the explanatory documents were not business records for purposes of RCW 5.45.020, which refers to “[a] record of an act, condition or event ... made in the regular course of business, at or near the time of the act, condition or event...” In fact, the documents make no reference to the telephone records of either Mr. Sommer or Ms. Lee. Second, the Confrontation Clause of the United States Constitution “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the declarant] 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) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L.Ed.2d 177

(2004). An out-of-court statement is “testimonial” when it was created for the purpose of establishing or proving a fact at trial, rather than for the administration of the business’s internal affairs.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S. Ct. 2527, 74 L.Ed.2d 314 (2009). Specifically, where, as here, the record was created for the purpose of establishing a fact at trial and interpreting the telephone records, the defendant must be afforded the opportunity to cross-examine the person who created the document to test the procedures and methodologies employed in the creation of the document. *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 2713, 2715, 180 L.Ed.2d 610 (2011); *Melendez-Diaz*, 557 U.S. at 322.

The State analogizes the documents to a legend on a map. Br. of Resp. at 26. A map, however, is not a business record and is not admissible pursuant to the business record exception to the hearsay rule. Rather, maps are routinely admitted by judicial notice. *State v. Nichols*, 161 Wn.2d 1, 5 n.1, 162 P.3d 1122 (2007). The State’s analogy is inapt.

The State argues the explanatory documents were necessary because the telephone records were “not self-explanatory” and “otherwise meaningless.” Br. of Resp. at 25. However, the State cites to no authority that these concerns justify circumvention of either the Confrontation Clause or the business records exception to the hearsay rule. Moreover,

this argument demonstrates that the documents were separate and apart from the telephone records and that admission of those documents was not harmless. As the officer acknowledged, “Verizon also very kindly provided this key that explains the different – the different columns and what they mean.” 9RP 54.

Admission of the explanatory documents was in violation of the rule against hearsay and Mr. Sommer’s right to confrontation. Reversal is required.

2. The State properly concedes this matter must be remanded for re-sentencing because the combined terms of confinement and community custody exceed the statutory maximum for the offenses.

The State’s concession that this matter should be remanded for resentencing is well-taken. Br. of Resp. at 28-29. Mr. Sommer was convicted of, *inter alia*, felony harassment and three counts of felony violation of a court order, all of which are Class C felonies with a statutory maximum sentence of 60 months. RCW 9.94A.441(2), 9A.20.021(1), 26.50.110(5). However, the court imposed a term of confinement on each count of 58 months, plus 12 months of community custody, for a combined total of 70 months. CP 106, 108, 109. Because the combined total terms of confinement and of community custody exceed the statutory maximum for the offenses, this matter should be remanded for sentencing

within the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

B. CONCLUSION

For the foregoing arguments and the arguments set forth in the Brief of Appellant, Mr. Sommer respectfully requests this Court reverse his convictions for harassment and violation of a court order. In the alternative, Mr. Sommer requests this Court remand this matter for sentencing within the statutory maximum for the offenses.

DATED this 2nd day of August 2013.

Respectfully submitted,


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Respondent,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF AUGUST, 2013.

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