

FILED
August 17, 2015
Court of Appeals
Division I
State of Washington

NO. 73242-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ADEM GERZIC,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Adem Gerzic was denied the right to confront the witnesses against him when the State failed to produce the witness who accused him of making felony threats. Although Christine Clark “politely declined” to appear at trial, the court admitted testimonial portions of her statements to a 911 operator. Because any emergency had passed and these statements were the result of questioning, Mr. Gerzic was entitled to confront Ms. Clark.

The only other evidence offered against Mr. Gerzic were text messages Ms. Clark claimed were sent to her by Mr. Gerzic. The court allowed the State to introduce Ms. Clark’s hearsay statement that the text messages had been sent by Mr. Gerzic and admitted the substance of the text messages without sufficient authentication.

Mr. Gerzic’s constitutional right to confrontation and his right to a fair trial were violated when the only evidence offered against him was out of court statements that were insufficiently corroborated and never subject to cross examination. He is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. The court denied Mr. Gerzic's constitutional right to confrontation when it admitted testimonial out of court statements made by a witness who did not appear in court.

2. The court erred in admitting text messages without proper authentication.

3. The court denied Mr. Gerzic's right to confrontation when it admitted testimonial evidence found in text messages purportedly sent by Mr. Gerzic without offering him an opportunity to cross examine the witness offering the statement against him.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. A person who is accused of a crime has the right to confront witnesses who testify against him. This right to confrontation applies to testimonial out of court statements. Is the right to confrontation violated by the admission of statements to a 911 operator made when an emergency no longer exists and the declarant does not testify?

2. Reversal is required when the State fails to sufficiently authenticate a text message and it is reasonably probable that its admission materially affects the outcome of a hearing. Did the court commit reversible error when it admitted text messages which were

unverified by either the sender or receiver of the messages and not otherwise sufficiently corroborated where there was no forensic evidence establishing they were sent by Mr. Gerzic?

3. The right to confrontation requires an opportunity to cross examine a witness when testimonial evidence is offered against a defendant. Where the State introduced evidence purportedly authenticating Mr. Gerzic's having sent text messages to Ms. Clark without providing Mr. Gerzic with the opportunity to cross examine the source of this testimonial evidence which was used to establish authentication, was Mr. Gerzic's right to confrontation denied?

D. STATEMENT OF THE CASE

Adem Gerzic was charged with felony harassment after Christine Clark claimed he had threatened to kill her if she broke up with him. CP 3.¹ Ms. Clark made these statements in a 911 call, and she also showed the police pictures and text messages on her phone that she claimed came from Mr. Gerzic. *Id.* Mr. Gerzic denied making any threats to Ms. Clark. *Id.*

¹ For this brief, references to the record will be referred to by the date on the cover sheet of each volume and then the page number. E.g., 2/10/15 RP 1. Clerk's papers will be referred to as "CP" and then the designated page number. E.g., CP 1. Exhibits which have been designated as part of the clerk's papers will be referred to by exhibit number and then the page within the exhibit. E.g., Ex. 8 at 1.

Ms. Clark was represented by Kevin Trombold, who communicated on her behalf with the prosecuting attorney. 2/10/15 RP 9. Before trial, Ms. Clark informed the State she had no interest in testifying. *Id.* at 10. Although Mr. Trombold did not challenge the subpoena, he told the State that “Ms. Clark tells me that she would like to politely decline coming at all.” 2/11/15 RP 3. Although a material witness order was obtained by the State, Ms. Clark never appeared for trial. 2/11/15 RP 60.

The State sought to introduce a copy of Ms. Clark’s 911 call as an excited utterance. 2/10/14 RP 29. Mr. Gerzic objected, pointing out that “shortly after the inception of the 911 call, the statements by Ms. Clark become testimony in nature, that they are given in response to direct, and at some points leading, inquiry on the part of the 911 caller.” *Id.* at 30. The court ruled some of the statements were an excited utterance and that the call then became a “Q and A testimonial.” *Id.* at 31. The court redacted the sections of the 911 tape it determined were testimonial. *See, Id.*, at 36 (pg. 3, line 11 through p. 4, line 1), 40 (pg. 5, line 2 through pg. six, line 1), 42-43 (pg. 7, line 12 through the end of the call); *see also*, Ex. 8.

The State also sought to introduce text messages that a police officer said Ms. Clark gave him and asserted were sent to her by Mr. Gerzic. Mr. Gerzic asked that the texts be excluded under ER 404(b) and because they were remote in time, having been sent three months earlier. 2/10/14 RP 54, 56. Mr. Gerzic also moved to exclude the messages when no witness appeared who could authenticate that they were sent by him. 2/11/14 RP 36. The court denied Mr. Gerzic's requests and admitted the text messages into evidence. *See* Ex. 4.

The only witnesses to testify at trial were two police officers. 2/11/15 RP 20, 64. Neither officer was a witness to any interaction between Mr. Gerzic and Ms. Clark. An officer testified Ms. Clark told her Mr. Gerzic sent her the text messages. 2/11/15 RP 34. The only evidence introduced at trial to prove Mr. Gerzic had committed felony harassment was the 911 call and the text messages.

Mr. Gerzic was found guilty of felony harassment. 2/12/15 RP 99. He was sentenced under a first time offender waiver to eight days confinement and one year of probation. 2/20/15 RP 11. He also was ordered to complete and comply with a mental health evaluation. *Id.*

E. ARGUMENT

1. Mr. Gerzic's right to confrontation was denied when the court allowed a 911 call to be introduced as evidence when the caller was not present.

a. An accused person must be provided with the opportunity to confront testimonial statements made outside of court.

The Washington Constitution provides that “in criminal prosecutions, the accused shall have the right ... to meet the witnesses against him face to face.” Const. art. I § 22. The Federal Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....” U.S. Const. amend. VI. Under Washington’s constitution, this “means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to the facts testified by him.” *State v. Stentz*, 30 Wn. 134, 142, 70 P. 241 (1902), abrogated on other grounds by *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001). The United States Supreme Court has likewise established objective criteria for determine whether an out of court statement violates the confrontation clause. *Davis v. Washington*, 547 U.S. 813, 827, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Testimonial statements made out of court are hearsay and thus inadmissible unless the State is able to demonstrate both unavailability of the witness and a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A statement is testimonial “when the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. Statements are not testimonial “when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.*

To determine whether an out of court statement satisfies the confrontation clause, the circumstances must objectively show (1) that there is or is not an ongoing emergency and (2) that the primary purpose of the interrogation is or is not to establish past events relevant to later criminal prosecution. *Davis*, 547 U.S. at 822. Statements made “under interrogation are an obvious substitute for live testimony because they do precisely what a witness does on direct examination; they are inherently testimonial.” *Id.*, at 830.

Washington has adopted a four part test to determine whether the confrontation clause is satisfied looking to (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation. *State v. Pugh*, 167 Wn.2d 825, 832, 225 P.3d 892, 896 (2009) (citing *Davis*, 547 U.S. at 827).

b. Ms. Clark's statements to the 911 operator were testimonial in nature.

i. Ms. Clark was not speaking of events as they were actually occurring and was instead describing past events.

No crimes were being committed when Ms. Clark began speaking with the 911 operator. Instead, Ms. Clark was calling about threats she alleged Mr. Gerzic had already made. She told the 911 operator, that “he threatened to come and just put a bullet in my head if I don’t want to continue our relationship.” Ex. 8 at 2. While she told the 911 operator she was scared, she also made it clear Mr. Gerzic “went back to his car. I think he heard me calling you. So probably he's gonna

leave.” Ex. 8 at 3. In fact, Mr. Gerzic was arrested “quite a ways” from Ms. Clark’s residence. 2/11/15 RP 68. He had a calm and quiet demeanor. *Id.* at 36. From the moment Ms. Clark notified the 911 operator Mr. Gerzic was leaving for his car, there was no suggestion that Ms. Clark was in any type of an emergency. Ex. 8 at 3. Once Ms. Clark indicated Mr. Gerzic was returning to his car, her statements to the police involved only past conduct. *Id.* at 3-4. This is especially true when she related threats made by Mr. Gerzic to her. *Id.*

That the 911 operator understood the emergency was over is clear from the questions being posed. Rather than seeking information regarding possible danger to Ms. Clark, the 911 operator asked questions regarding Mr. Gerzic’s pedigree after Ms. Clark relayed that she was not in danger. Ex. 8 at 3. The 911 operator asked Ms. Clark to provide Mr. Gerzic’s full name and date of birth. *Id.* at 3-4.

After Ms. Clark let the 911 operator know she was no longer in danger, the 911 operator turned to concerns Ms. Clark had about future conduct, rather than her present situation. Ex. 8 at 4. The operator then asked Ms. Clark whether Mr. Gerzic could comply with orders, presumably to help a court officer determine bail and what orders to impose. *Id.* at 5.

When an officer or 911 operator is attempting to determine what happened in the past rather than what was happening at the time, the out-of-court statements of the witness should be excluded. *Davis*, 547 U.S. at 830. Because the 911 operator shifted from determining whether there was an emergency to what crime might have occurred on page 3, line 11 of the 911 transcript, the remainder of the transcript was testimonial and should have been excluded. Ex. 8 at 3.

- ii. A reasonable listener would not recognize that the speaker is facing an ongoing emergency.

At the beginning of the 911 call, Ms. Clark states, “I’m gonna call the cops okay. If you don’t leave,” which indicates any emergency which might be ongoing is about to end. Ex. 8 at 1. She confirms the emergency has ended when she tells the 911 officer she believes Mr. Gerzic left for his car. Ex. 8 at 3. At no time in the call after this point did Ms. Clark indicate there was an immediate threat to her or that she was in any current danger. Instead she only referred to past actions or concerns she had about what Mr. Gerzic had done or might do in the future. She even gets frustrated that the 911 officer is interrogating her about Mr. Gerzic’s identifying information, rather than acting to have him arrested. Ex. 8 at 3. Under the circumstances of this call, a reasonable listener would recognize Ms. Clark was not in any danger

after she informed the 911 operator Mr. Gerzic had returned to his car.

Id.

- iii. The questions and answers do not show that the statements were necessary to resolve a present emergency.

Because there was no emergency the police were responding to, the statements made by Ms. Clark were not necessary to resolve one. Instead, the questions were designed to discover more about what had happened in the past. Once the 911 operator determined Ms. Clark was not in an emergency, the questions became an interrogation to gather information in order to arrest and prosecute Mr. Gerzic. The operator asked for Mr. Gerzic's full name, including his middle initial. Ex. 8 at 3. The operator then asked for his date of birth. *Id.* From this point on, the 911 operator began to question Ms. Clark regarding the past incident rather than try to resolve an emergency. *Id.* Throughout the remainder of the call, Ms. Clark remained calm and answered all of the 911 operator's questions.

- iv. The level of formality of the interrogation.

After the 911 operator had determined there was no emergency, the questions posed to Ms. Clark were formal and designed as an examination. The operator sought pedigree information and then facts

regarding the past and future behavior of Mr. Gerzic. The operator asked about prior incidents and contact with law enforcement. When Ms. Clark became frustrated by the questions, the 911 operator remained on script, rather than immediately replying to Ms. Clark's frustrations. *See, e.g.*, Ex. 8 at 3-4.

c. The denial of Mr. Gerzic's right to confront the testimonial evidence provided through the 911 call entitles him to a new trial.

Mr. Gerzic's constitutional right to confrontation was violated when the court allowed the jury to hear statements made by an out of court declarant which were testimonial in nature without giving Mr. Gerzic an opportunity to confront the speaker. The emergency had concluded when Ms. Clark informed the operator Mr. Gerzic had left for his car and the court should have excluded all of the statements made by Ms. Clark after this point. Instead, the court attempted to parse the call further, allowing the jury to hear Ms. Clark's testimonial statements, even though Mr. Gerzic had no opportunity to cross examine her.

No evidence was offered against Mr. Gerzic which did not violate his right to confrontation. The only testimony the jury heard which could establish felony harassment came from the out of court

statements of Ms. Clark, either through the 911 operator or through the officer who authenticated text messages she claimed to have received from Mr. Gerzic. The State cannot establish that the court's error in violating Mr. Gerzic's constitutional rights was harmless beyond a reasonable doubt. Because Mr. Gerzic's constitutional right to confrontation was violated, he is entitled to a new trial.

2. The court introduced unauthenticated text messages that violated Mr. Gerzic's right to confrontation

a. The ease in which electronic messaging may be created through falsehood or fraud requires court to carefully review authorship prior to admitting an electronic message.

“Authentication is a threshold requirement designed to assure that evidence is what it purports to be.” *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). In order to satisfy the requirements for authentication under ER 901, the State must introduce sufficient proof to permit a reasonable factfinder to find in favor of authenticity or identification. *Id.* Thus, the evidence must support a finding that the evidence in question is what the proponent claims it to be. *Id.* A court's admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

While ER 901 does not include text messages in its illustrative list, it does examine email messages. ER 901(b) (10). With regard to email messages, it requires:

Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901(b) (10).

Because text messages are a relatively new form of communication, few courts have examined how testimony offered through a text message should be authenticated. *See, e.g. In re Detention of H.N.* --- P.3d ---, No. 72003-1-I, 2015 WL 4081790 (Wash. Ct. App. July 6, 2015). However, text messages are essentially documents and should be subject to the same requirements for authenticity as non-electronic documents. Documents may be authenticated by direct proof, such as the testimony of a witness who saw the author sign the document, acknowledgment of execution by the signer, admission of authenticity by an adverse party, or proof that the document or its signature is in the purported author's handwriting. *See*

Com. v. Koch, 2011 PA Super 201, 39 A.3d 996, 1004 (2011) (citing McCormick on Evidence, §§ 219–221 (E. Cleary 2d Ed.1972)).

The difficulty that frequently arises in e-mail and text message cases is establishing authorship. *Koch*, 39 A.3d at 1004. More than one person may use an address or phone number, and accounts can be accessed without permission. *Id.* The majority of courts across the country which have considered this question have determined the mere fact that an e-mail bears a particular address is inadequate to authenticate the identity of the author; typically, courts demand additional evidence. *Id.* This same standard should be applied to text messages.

Courts have imposed a heavier burden of authentication on messaging and social network postings because of the increased dangers of falsehood and fraud. Judge Alan Pendleton, *Admissibility of Electronic Evidence A New Evidentiary Frontier*, Bench & B. Minn., October 2013, at 14, 16. In fact, multiple applications exist which allow for text messages to be sent from someone other than the purported user.² Courts have thus been wary of allowing social network messages

² Among other applications which may be downloaded to a cell phone to create false text messages, a search of the internet reveals applications like www.spoofmytext.com, www.sendanonymoussms.com, www.pranktexts.com, and

to be entered into evidence, again stating their concerns with the website's security and the potential for access by hackers. *See State v. Eleck*, 130 Conn. App. 632, 638-39, 23 A.3d 818, 822 (2011) *aff'd on other grounds*, 314 Conn. 123, 100 A.3d 817 (2014) (The need for authentication arises because an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender). Proving only that a message came from a particular account, without further authenticating evidence, is inadequate proof of authorship. *See, e.g., Commonwealth v. Williams*, 456 Mass. 857, 869, 926 N.E.2d 1162 (2010) (admission of message was error where proponent advanced no circumstantial evidence as to security of page or purported author's exclusive access).

Maryland has suggested that authentication may be perfected when the proponent of a document is able to search the device owned by the purported author for history and stored documents or by seeking authenticating information from the commercial host of the e-mail, cell phone messaging or social networking account. *Griffin v. State*, 419

www.ios7text.com, all of which may be used to create an account from which to send false text messages (each cite last visited on 8/13/15).

Md. 343, 363–64, 19 A.3d 415 (2011). New York has found messages to be authenticated where the police retrieved the records from the victim’s hard drive and had an employee of the company which owned the messaging service verify the defendant had created the sending account. *People v. Clevestine*, 68 A.D.3d 1448, 1450–51, 891 N.Y.S.2d 511 (2009) *appeal denied*, 14 N.Y.3d 799, 899 N.Y.S.2d 133, 925 N.E.2d 937 (2010). In other cases in which a message has been held to be authenticated, the identifying characteristics have been distinctive of the purported author and corroborated by other events or with forensic computer evidence. *See, e.g., State v. John L.*, 85 Conn. App. 291, 298-302, 856 A.2d 1032 (2004); *see also United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir.2000), *cert. denied*, 533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed.2d 737 (2001) (e-mails authenticated not only by defendant's e-mail address but also by inclusion of factual details known to defendant that were corroborated by telephone conversations); *United States v. Tank*, 200 F.3d 627, 630–31 (9th Cir. 2000) (author of chat room message identified when he showed up at arranged meeting); *United States v. Safavian*, 435 F. Supp.2d 36, 40 (D.D.C.2006) (e-mail messages authenticated by distinctive content including discussions of various identifiable

personal and professional matters); *Dickens v. State*, 175 Md.App. 231, 237–41, 927 A.2d 32 (2007) (threatening text messages received by victim on cell phone contained details few people would know and were sent from phone in defendant's possession at the time); *State v. Taylor*, 178 N.C.App. 395, 412–15, 632 S.E.2d 218 (2006) (text messages authenticated by expert testimony about logistics for text message receipt and storage and messages contained distinctive content, including description of car victim was driving); *In re F.P.*, 2005 PA Super 220, 878 A.2d 91, 93-95 (2005) (instant electronic messages authenticated by distinctive content including author's reference to self by name, reference to surrounding circumstances and threats contained in messages that were corroborated by subsequent actions); *Massimo v. State*, 144 S.W.3d 210, 215–17 (Tex.App.2004) (e-mails authenticated where e-mails discussed things only victim, defendant, and few others knew and written in way defendant would communicate). *Compare Griffin*, 419 Md. at 347–48 (admission of MySpace pages was reversible error where proponent advanced no circumstantial evidence of authorship).

Washington has followed the heightened requirements for authentication of text messages. *See, State v. Bradford*, 175 Wn. App.

912, 929-30, 308 P.3d 736 (2013). In *Bradford*, the court found sufficient authentication only where the witnesses testified they had received the text messages and where the State established sufficient corroborating evidence to connect the defendant to the messages, which included corroboration of the content and the ability of the defendant to send the text messages. *Id.* In *H.N.*, the court acknowledged the significance of the sender's admission that the text messages had been sent by her, the identifying information in the text message, the content of the text messages and that the text messages were consistent with the time line of certain events in H.N.'s life. *H.N.*, 2015 WL 4081790, at *6.

b. The State failed to establish Mr. Gerzic authored the text messages offered by the State.

The State offered little of the corroboration necessary to authenticate that Mr. Gerzic sent the text messages offered against him at trial. Unlike *Bradford*, the only witness to testify as to the authenticity of these text messages was the police officer who took a photograph of the telephone's screen. 2/11/15 RP 33. The only identifying information on the text message was the name "Adem" *Id.* at 36-37. The contact information did not include unique identifiers,

such as a phone number. *Id.* The text messages were claimed to have been made over three months prior to the incident. 2/10/15 RP 54. There was never an acknowledgement by Mr. Gerzic that he had sent the messages. The only corroboration which connected Mr. Gerzic to the text messages was a picture of him. Ex. 4. Looking at the appearance, the content, the substance, the internal patterns or other distinctive characteristics of the message, it is impossible to authenticate the text messages in this matter. *Compare H.N.*, 2015 WL 4081790, at *6.

There was no in-court corroboration of the messages by either the sender or receiver of the text messages. In *H.N.*, the sender acknowledged to her treating physician that she had sent the messages. *Id.* at *7 (“She acknowledged sending the text messages”). In *Bradford*, the receiver of the messages testified as to their authenticity. *Bradford*, 175 Wn. App. at 930. Here, Ms. Clark did not testify and Mr. Gerzic did not acknowledge that he sent the messages. Without an acknowledgement from either party, the prosecution did not establish the authenticity of the text messages.

Likewise, the text messages were not tied to chronological events that could establish their veracity. The messages were remote in

time, purportedly sent three months prior to Mr. Gerzic's arrest. 2/10/15 RP 54. In fact, being able to tie the text messages to actual events in time was critical to both Washington cases where text messages were admitted. In *Bradford*, the State tied text messages to actions taken by the defendant and silence in the messaging to times when he did not have access to his phone because he was incarcerated. 175 Wn. App. at 929-930. The State in *H.N.* was able to directly link the messages to H.N.'s commitment time. *H.N.*, 2015 WL 4081790, at *6 ("I think I'm at the hospital now."). Here, no evidence was introduced to relate the messages to anything Mr. Gerzic had done which would have authenticated that he sent the messages. The failure to establish any timeline connected to verified events undermines the authentication of the text messages used against Mr. Gerzic.

There was also no forensic evidence used to establish Mr. Gerzic sent the text messages. In *Bradford*, the police performed a "phone dump" of the receiver's cell phone, generating a report that itemized each text message sent or received to the phone over the period of several months, including the text messages at issue. *Bradford*, 175 Wn. App. at 919. And unlike *H.N.*, which was a commitment hearing with a very tight timeline, there was no reason

why the State could not have at least verified messages were sent from Mr. Gerzic to Ms. Clark on the dates when the messages were purported to have been sent by him. Instead, the only verification the State relied upon was the picture of Mr. Gerzic within the text messages and the name of the sender as “Adem.” Because this identifier is not a phone number but instead is likely to be a contact name created by the receiver of the text message, it is insufficient for authentication of the text messages.

c. When Ms. Clark failed to appear for trial Mr. Gerzic was denied the opportunity to confront the testimonial evidence presented against him that he sent her threatening text messages.

The right to confront witnesses offered against an accused person is protected by the state and federal constitutions. *See*, Const. art. I § 22, U.S. Const. amend. VI. A testimonial statement made out of court and offered for the truth of the matter asserted is inadmissible where there is no prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. When Ms. Clark choose not to testify in Mr. Gerzic’s trial, his opportunity to challenge the veracity of the text messages was denied.

When the police began to interview Ms. Clark about the text messages on her phone, no emergency existed. Instead, Ms. Clark was

attempting to help the police in their investigation and was engaging in the type of question and answer conversation which courts have found to be testimonial. *See Davis*, 547 U.S. at 822. Mr. Gerzic was detained by other officers and Ms. Clark was in no danger. 2/11/15 RP 35. Instead, the purpose of their conversation was clearly for investigative purposes. In fact, the messages were only provided when the officer “asked her if I could look at the information.” *Id.* at 34. They were provided as a direct result of questioning by the officer after any emergency had passed.

Confrontation is required when evidence is offered which is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, *supra*, at 51, (*quoting* 2 N. Webster, *An American Dictionary of the English Language* (1828)). When the State offers evidence which is “precisely what a witness does on direct examination” the confrontation clause is violated. *Davis*, 547 U.S. at 830.

Ms. Clark “politely declined” to appear for trial. 2/11/15 RP 3. While Mr. Gerzic objected to Ms. Clark’s testimonial statements regarding who had sent the text messages being offered against him, the court allowed them to be entered into evidence. 2/11/15 RP 39. It is

clear the statements made by Ms. Clark that the text messages had been sent by Mr. Gerzic were testimonial. Without the opportunity by Mr. Gerzic to cross examine Ms. Clark, Mr. Gerzic's right to confrontation was denied. This constitutional error requires reversal.

d. Because the court committed error which was both constitutional and materially affected the outcome of the trial, reversal is required.

Mr. Gerzic was denied the opportunity to fully confront and contest the text messages offered against him at trial. The failure of the State to sufficiently authenticate the messages resulted in error which materially affected the outcome of the trial. When it is reasonably probable that the trial court's error materially affected the outcome of a hearing, reversal is required. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. *Id.* Denial of the right to confront witnesses requires reversal unless the State proves the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The only evidence offered against Mr. Gerzic in this trial were the out of court statements made by Ms. Clark and the text messages.

Without the text messages, the veracity of the out of court statements would have been suspect. The admission of the unauthenticated text messages resulted in error which materially affected the outcome of the trial and Mr. Gerzic was denied his right to confront the out-of-court allegation to police that he sent these text messages. The improper admission of the text messages was not harmless, and this Court should reverse.

F. CONCLUSION

When the State introduced testimonial statements made out of court by a witness who choose to make herself unavailable, Mr. Gerzic's right to confrontation was denied. When the State offered text messages claimed to have been made by Mr. Gerzic by this same witness, the court erred in finding they were properly authenticated. The failure of the court to protect Mr. Gerzic's right to confront evidence offered against him and to require the State to properly authenticate the text messages offered against him entitles him to a new trial.

DATED this 14th day of August 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73242-1-I
)	
ADEM GERZIC,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING 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 17TH DAY OF AUGUST, 2015.

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