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Court of Appeals
Division I
State of Washington

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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 92983-1
(COA No. 73242-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADEM GERZIC,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Adem Gerzic, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a) and RAP 13.4 (b).

B. COURT OF APPEALS DECISION

Mr. Gerzic seeks review of the Court of Appeals decision dated March 7, 2016, a copy of which is attached to this brief as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the admission of testimonial out of court statements made to a 911 operator by a witness who did not appear for trial violates the right to confrontation when the statements were made after the emergency had passed.

2. Whether the failure to properly authenticate text messages that were not verified by either the sender or receiver of the message requires reversal.

3. Whether the admission of testimonial statements made within text messages violates the right to confrontation where there is no opportunity for cross examination.

D. STATEMENT OF THE CASE

Adem Gerzic was charged with felony harassment after CC stated he had threatened to kill her if she broke up with him. CP 3. These statements were made to a 911 operator. CC also showed the police pictures and text messages on her phone, claiming they came from Mr. Gerzic. CP 3. Mr. Gerzic denied making any threats to CC and did not admit to having sent the text messages. CP 3.

CC chose not to testify at Mr. Gerzic's trial. 2/11/15 RP 60. CC's call to 911 was introduced by the State as an excited utterance. 2/10/14 RP 29. Over objection, the court ruled some of the statements were an excited utterance and that the call then became a "Q and A testimonial." 2/10/14 RP 31. The court redacted sections of the 911 tape it determined were testimonial. *See* 2/10/14 RP 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 CC 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 CC. An officer testified CC 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.

E. ARGUMENT

1. **Review should be granted to address the unauthenticated text messages introduced into evidence by the State.**

As text messaging replaces other more traditional forms of communication, courts are forced to grapple with applying traditional rules of authentication to modern technology. 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. Without a witness to authenticate the text messages used against Mr. Gerzic, the trial court erred in finding that the State properly authenticated the text messages. This Court should grant

review of the Mr. Gerzic's petition to correct this error which involves an issue of substantial interest. RAP 13.4.

“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 but does examine email messages. ER 901(b) (10). For 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 they should be authenticated. *See e.g., In re Detention of H.N.*, 188 Wn.App. 744, 751, 355 P.3d 294 (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.¹ Courts have thus been wary of allowing social network messages to be entered in to 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

¹ 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.spooftext.com, www.sendanonymoussms.com, www.pranktexts.com, and www.ios7text.com, all of which may be used to create an account from which to send false text messages (each site last visited on 3/31/16).

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 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).

While the Court of Appeals relies upon *State v. Bradford* to deny Mr. Gerzic relief, this Court should not read *Bradford* this way. App A at 7; *see also, 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.* The court took pains to compare the text messages sent in Bradford to real time events, including when Mr. Bradford had left videos on cars in the victim's neighborhood and when he was in jail. *Id.*

The court conducted a similar analysis in *H.N.*, where 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.*, 188 Wn.App. 744 at 758.

Unlike *Bradford*, the State offered little of the corroboration necessary to authenticate the text messages used against Mr. Gerzic. 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" 2/11/15 RP 36-37. The contact information did not include unique identifiers, such as a phone number. 2/11/15 RP 36-37. 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. There was also 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”). 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.*, 188 Wn.App. at 758

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.*, 188 Wn.App. at 758 (“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. While the Court of Appeals argues that the forensic evidence used to authenticate the text messages in *Bradford* was not introduced to the fact finder, this is not relevant to the question of authentication. *State v. Williams*, 136 Wn.App. 486, 150 P.3d 111 (2007); App A 9. 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 CC 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. This issue is of substantial public interest and should be accepted for review by this Court. RAP 13.4 (b).

2. Review should be granted to correct the confrontation clause violation when an out of court statement from a 911 call was introduced which was not made to meet an ongoing emergency.

The Court of Appeals found that the primary purpose of the 911 call made here was to enable police assistance to meet an ongoing emergency and did not violate the Sixth Amendment. App A 5. Mr. Gerzic seeks review of this holding as a significant question under the state and federal constitution. RAP 13.4.

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. For Washington, 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 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. The United States Supreme Court has also established objective criteria for determine when 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 inadmissible unless the State is able to demonstrate both witness unavailability 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.

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.

Washington has adopted a four part test to determine whether the confrontation clause is satisfied looking to (a) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (b) whether a reasonable listener would

recognize that the speaker is facing an ongoing emergency; (c) 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 (d) 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). Here, Mr. Gerzic's right to confrontation was violated when portions of the 911 call were admitted which did not satisfy the confrontation clause.

a. CC described past events once the 911 operator had determined there was not an ongoing emergency.

No crimes were being committed when CC began speaking with the 911 operator. Instead, CC described threats she alleged Mr. Gerzic had already made. Ex. 8 at 2. She told the 911 operator she was scared, but also stated Mr. Gerzic "went back to his car. I think he heard me calling you. So probably he's gonna leave." Ex. 8 at 3. Mr. Gerzic was in fact arrested "quite a ways" from CC's residence. 2/11/15 RP 68.

That the 911 officer understood the emergency was over is clear from the questions being posed. Rather than seeking information regarding possible danger to CC, the 911 operator asked questions regarding Mr. Gerzic's pedigree. Ex. 8 at 3. The 911 operator also asked CC to provide Mr. Gerzic's full name and date of birth. Ex. 8 at

3-4. The operator then asked CC whether Mr. Gerzic could comply with orders, presumably to help a court officer determine bail and what orders to impose on him when arrested. Ex. 8 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.

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

At the beginning of the 911 call, CC states, "I'm gonna call the cops okay. If you don't leave," which indicates an emergency which might be ongoing but is about to end. Ex. 8 at 1. CC confirmed the emergency has ended when she told the 911 officer she believed Mr. Gerzic left for his car. Ex. 8 at 3. At no time in the call after this point did CC 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 got 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 CC was not in any danger after she informed the 911 operator Mr. Gerzic had returned to his car. Ex. 8 at 3.

c. 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 CC 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 CC 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 CC regarding the past incident rather than try to resolve an emergency. *Id.* Throughout the remainder of the call, CC remained calm and answered all of the 911 operator's questions.

d. The level of formality of the interrogation.

After the 911 operator had determined there was no emergency, the questions posed to CC 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 his prior incidents and his contact with law enforcement. When CC became frustrated by the questions, the 911 operator remained on script, rather than immediately replying to CC's frustrations. *See, e.g.*, Ex. 8 at 3-4.

The denial of Mr. Gerzic's right to confront the testimonial evidence provided through the 911 call entitles him to a new trial. Because the emergency had concluded when CC informed the 911 operator Mr. Gerzic had left for his car, the court should have excluded all of the statements made by CC after this point. Instead, the court attempted to parse the call further, allowing the jury to hear CC's testimonial statements without providing Mr. Gerzic had no opportunity to cross examine CC.

The only testimony the jury heard which could establish felony harassment came from the out of court statements of CC, 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. This Court should grant Mr. Gerzic's petition for review to correct the trial court's error

which resulted in Mr. Gerzic being denied his constitutional right to confrontation.

3. Review should be granted to correct the confrontation clause violation when text messages claimed to have been sent by the petitioner were introduced without affording the petitioner the right to confrontation.

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)). Evidence which is “precisely what a witness does on direct examination” violates the confrontation clause. *Davis*, 547 U.S. at 830.

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).

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. Mr. Gerzic was denied his right to confront the out-of-court allegation to police that he sent these text messages. This Court should grant review to address this important constitutional issue. RAP 13.4 (b).

F. CONCLUSION

Based on the foregoing, petitioner Adem Gerzic respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 31st day of March 2016.

Respectfully submitted,

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

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APPENDIX

2016 MAR 7 AM 9:30

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 73242-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
ADEM GERZIC,)	
)	FILED: March 7, 2016
Appellant.)	

BECKER, J. — On the night of March 4, 2014, CC called 911 and reported that her boyfriend, appellant Adem Gerzic, was threatening to shoot and kill her if she ended their relationship. When police responded, CC told Officer Colin Cufley that Gerzic had previously sent her threatening text messages. She showed him these messages on her cell phone. Gerzic was arrested and charged with one count of felony harassment-domestic violence.

CC failed to appear at Gerzic's trial despite the fact that the court issued a material witness warrant. The State entered into evidence a redacted transcript of CC's 911 call and photographs of the text messages that CC showed Officer Cufley. Gerzic was convicted as charged. He appeals.

CONFRONTATION CLAUSE

Gerzic first argues that his right to confrontation was denied when a redacted recording and transcript of CC's 911 call were admitted into evidence.

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He contends that some of CC's statements during the 911 call are testimonial and should have been excluded. Our review is de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008).

Under the Sixth Amendment, a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The confrontation clause bars the admission of testimonial statements, with certain exceptions not relevant here. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The United States Supreme Court has adopted the "primary purpose" test to determine whether a statement is testimonial. Under this test:

Statements are nontestimonial 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (emphasis added).

The Washington Supreme Court has drawn from Davis four factors to determine whether the "primary purpose" of police interrogation is to enable assistance to meet an ongoing emergency:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the

speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009) (footnote omitted).

Because this is a domestic violence case, we focus on the threat to the victim and assess the ongoing emergency from the perspective of whether there was a continuing threat *to her*. See Michigan v. Bryant, 562 U.S. 344, 363-64, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (explaining the Court's ongoing emergency analysis in Davis). The duration and scope of an emergency may also depend in part on the type of weapon employed. Bryant, 562 U.S. at 364. CC told the 911 operator that Gerzic threatened to kill her and told her he was going to get a gun from his car. She was calling for help against a bona fide physical threat, just as the caller in Davis. See Davis, 547 U.S. at 827.

Gerzic argues that the emergency ended when CC told the 911 operator: "I think he just went back to his car. I think he heard me calling you. So probably he's gonna leave. I don't know. But I'm so scared." We disagree. CC was speculating that Gerzic might not return because he heard her call the police. This does not mean the emergency was at an end. CC also heard Gerzic say he was going to his car to get a gun. We have specifically rejected the argument

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that an emergency necessarily ends when an assailant leaves the scene of a domestic assault. State v. Reed, 168 Wn. App. 553, 567-68, 278 P.3d 203, review denied, 176 Wn.2d 1009 (2012). Here, as in Reed, CC was without police protection and her assailant was still at large. There was every reason to believe that he would return with a gun, as that was his stated intention. Any reasonable listener would recognize that CC was facing an ongoing emergency. See also State v. Ohlson, 162 Wn.2d 1, 18, 168 P.3d 1273 (2007) (ongoing emergency where assailant had fled scene because, objectively viewing the course of events, there was every reason to believe that assailant might return again and perhaps escalate his behavior). Cf. Koslowski, 166 Wn.2d at 432 (no ongoing emergency where assailants fled the scene in a car before police arrived and no evidence suggested they might return or pose further danger to any identifiable person).

The operator's questions during this portion of the call were generally designed to ascertain the identity of CC's assailant, his location, and whether he posed a threat to police—indicating, under Koslowski, that CC's answers were nontestimonial. For example, the operator asked CC for Gerzic's full name and date of birth, if CC heard him at the door still or knew where he went, and how he would react to police officers contacting him. Viewed objectively, these elicited statements were necessary to resolve the ongoing emergency. See Davis, 547 U.S. at 827 (even the operator's effort to establish the identity of the assailant was necessary to resolve the present emergency, "so that the dispatched officers might know whether they would be encountering a violent felon").

As to the level of formality, the conversation the 911 operator had with CC was not a formal investigation. As in Davis, CC's statements were provided over the phone to a 911 operator "in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Davis, 547 U.S. at 827 (contrasting this to the formality of the interrogation in Crawford, where the witness gave calm responses to interrogation at the police station with the officer-interrogator taping and making notes of her answers).

Finally, CC was describing "current events as they were actually occurring, requiring police assistance. Koslowski, 116 Wn.2d at 418. She was reporting that Gerzic told her she would not make it to work the next day and that he was going to kill her, his ex-wife, and himself. She was seeking police assistance, not establishing past events for the sake of later prosecution.

We conclude that the primary purpose of CC's 911 call was to enable police assistance to meet an ongoing emergency. CC's statements were nontestimonial, and their admission did not violate Gerzic's Sixth Amendment right to confrontation.

AUTHENTICATION OF TEXT MESSAGES

At trial, Officer Cufley testified that CC told him she had received threatening text messages from Gerzic in the past. She showed him the text messages on her phone. He further testified that the photographs offered by the State fairly and accurately depicted the messages that CC showed him. The State then moved to admit the photographs of the text messages into evidence. Gerzic objected on the basis of lack of foundation, but the trial court admitted the

photographs. Gerzic argues that the trial court erred in admitting the photographs of these text messages. We review a trial court's admission of evidence for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Gerzic first contends that the text messages were not properly authenticated because the State did not prove that he sent the messages. 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), review denied, 150 Wn.2d 1028 (2004). The requirement of authentication 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). Because the proponent must make only a prima facie showing of authenticity for purposes of establishing admissibility, ER 901 is met "if the proponent shows enough proof for a reasonable fact finder to find in favor of authenticity." In re Detention of H.N., 188 Wn. App. 744, 355 P.3d 294 (2015), quoting Payne, 117 Wn. App. at 108.

We have recently considered the issue of text message authentication in H.N., 188 Wn. App. 744, and in State v. Bradford, 175 Wn. App. 912, 308 P.3d 736 (2013), review denied, 179 Wn.2d 1010 (2014). Bradford is especially analogous to Gerzic's case. Bradford would not accept repeated attempts by his girlfriend, Vilayphone, to end their affair, and she eventually obtained an antiharassment protection order against him. Bradford, 175 Wn. App. at 917. In the month after she obtained this order, January 2011, Bradford tried to contact

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Vilayphone by sending text messages to her friend, who would forward the messages to Vilayphone. Bradford, 175 Wn. App. at 917. After receiving each of these forwarded messages, Vilayphone would call 911 and show the responding officer the forwarded text messages displayed on her cell phone. Bradford, 175 Wn. App. at 917-18. The responding officer would then record each text message verbatim in his notebook, and later copy them verbatim into his police report. Bradford, 175 Wn. App. at 918. At trial, the responding officer read these text messages aloud, quoting directly from his police reports. Bradford, 175 Wn. App. at 918.

We held that there was sufficient evidence introduced to support a finding that the text messages that were read to the jury were written and sent by Bradford, despite the fact that he did not acknowledge sending them. Bradford, 175 Wn. App. at 928-29. The messages were consistent with his other "obsessive behavior" reflecting a "desperate desire" to communicate with Vilayphone; the content of the messages themselves indicated that Bradford was the individual who sent them; and Vilayphone and her friend who received the messages testified to their belief that the text messages were from Bradford. Bradford, 175 Wn. App. at 929-30.

In this case, as in Bradford, CC showed the text messages on her cell phone to the responding officer and told him that they had been sent by Gerzic. These messages include a photograph of Gerzic holding a shotgun to his throat with the caption "This You want?" Other messages include "I Love You Christine!," "Are you with me or no?," "I am happy with You don't do this to me

please,” and “You want me dead?” These messages were consistent with Gerzic’s other obsessive behavior reported by CC in her 911 call, including threats to put a bullet in her head and to kill her, himself, and his ex-wife when she tried to break up with him. They reflect his “desperate desire” to be with CC and his rejection of any attempt to end the relationship. The photograph that Gerzic sent of himself also identifies him as the sender. In addition, CC received these text messages from a contact listed in her phone as “Adem,” which is Gerzic’s first name.

Significantly, in Bradford, the State did not even offer photographs of the text messages to authenticate them, as the State has here. Instead, the officer read the text messages from his police report, which had been copied from his notebook, which had been copied from Vilayphone’s cell phone. By providing photographs of the text messages, the State here has offered better proof to authenticate than in Bradford.

Gerzic emphasizes that neither the sender nor the receiver, CC, corroborated or acknowledged the text messages. Although CC did not testify at trial, the responding officer testified that CC told him she received the text messages from Gerzic. The trial court is not bound by the rules of evidence when making a determination as to authenticity. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007), citing ER 104(a). For this reason, the trial court could consider CC’s out-of-court statement that Gerzic sent the text messages when determining the authenticity of the text messages. Gerzic does not acknowledge sending the text messages, but neither did Bradford, and we

nevertheless held in Bradford that there was sufficient evidence for authentication.

Gerzic also highlights the fact that there was no forensic evidence that he sent the text messages. He points to the fact that in Bradford, the police did a "phone dump" to generate a report itemizing each text message the phone had received during a specific time period. But the part of this report that was admitted into evidence did not include the January 2011 text messages that the responding officer read from his police report. There was no forensic evidence corroborating Bradford's January 2011 text messages, just as there is none here.

We conclude the trial court did not abuse its discretion in finding that the State made a prima facie showing of authenticity. Gerzic failed to prove that no reasonable fact finder would have taken the position adopted by the trial court.

Next, Gerzic contends that his right to confrontation was violated when the responding officer testified that CC told him the text messages were from Gerzic. But Gerzic did not object to this testimony. Therefore, to have this claim reviewed for the first time on appeal, Gerzic must demonstrate that it is manifest constitutional error. RAP 2.5. A manifest error is an error that is unmistakable, evident, or indisputable, and that has practical and identifiable consequences in the trial of the case. State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011), review denied, 176 Wn.2d 1020 (2013). Even if CC's out-of-court statement had been excluded, the photographs of the text messages would still have been admissible and, as detailed above, they provided sufficient evidence that the messages were from Gerzic. In addition, the jury would still have heard

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Officer Cufley's testimony that CC showed him the messages on her phone.

Gerzic has not demonstrated that any constitutional error is manifest.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Jan, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73242-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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