IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN WESTLEY GROVER, Appellant.	No. 41966-1-II UNPUBLISHED OPINION

Armstrong, J. – Justin Westley Grover appeals his conviction of violating a no contact order, arguing that the trial court violated his public trial rights by conducting an in-camera hearing and violated his confrontation clause rights by admitting the protected party's identification card. Grover also contends that his attorney represented him ineffectively by failing to object to admission of the identification card. We affirm.

Facts

Grover went to his family's house at 2407 Bush Avenue in the early morning hours and banged and kicked the door. His brother Shawn was inside and called 911. Officer Jeff Jordan responded and confirmed that a court order required Grover to stay 1,000 feet from his sister Marcia's residence. Officer Jordan arrested Grover, and the State charged him with violating the order that protected Marcia.[1] The State added two special allegations: the offense was a domestic violence offense and Grover's third violation of the no contact order.

At the start of Grover's first trial, defense counsel referred to a motion in limine he had brought to the court's attention in chambers. Counsel then explained that he wanted to prevent

[1] We use the first names of Grover's family for clarity of reference.

the State from eliciting the fact that Marcia was not at home at the time of the alleged offense because she was at SafePlace, a domestic violence shelter. After the parties discussed the issue, the trial court granted defense counsel's motion.

After Shawn and Officer Jordan testified, the jury was unable to reach a decision. In granting a mistrial, the trial court noted that Grover had conceded the existence of the no contact order, his knowledge of the order, his two prior convictions of the order, and his presence at 2407 Bush Avenue. The defense had not conceded, however, that Grover knowingly violated the order or that 2407 Bush Avenue was the residence of Marcia, the protected person.

When Officer Jordan testified during Grover's second trial, the State introduced exhibit 4, which included a copy of Marcia's identification card and a printout from the Department of Licensing records custodian identifying it as such. The identification card listed Marcia's address as 2407 Bush Avenue. Defense counsel did not object to exhibit 4 but ascertained from Officer Jordan that the identification card had been issued on December 9, 2009, approximately one year before the incident at issue, and that it reflected Marcia's address only on the date of issuance. Officer Jordan admitted that he had stopped people whose identification cards did not contain their current addresses.

The State then played Shawn's 911 call during which he described Grover as kicking the door at 2407 Bush Avenue and said Grover was not supposed to be there. Shawn testified that although Marcia was not home at the time, she did live at the house. Grover's mother testified that she had lived at 2407 Bush Avenue for 10 or 11 years, that Marcia had always resided there with her, and that Marcia would hide whenever Grover "got out." Report of Proceedings (March

24, 2011) at 50-51.

During closing argument, the prosecuting attorney contended that exhibit 4, together with the testimony of Shawn and his mother, proved that Marcia lived at 2407 Bush Avenue. The jury found Grover guilty as charged, and the trial court imposed a standard range sentence.

Analysis

I. Open and Public Trial

Grover contends that the trial court violated his and the public's right to an open and public trial by conducting an in-camera hearing to review pretrial motions.

Both the state and federal constitutions require that criminal cases be tried openly and publicly. *State v. Njonge*, 161 Wn. App. 568, 573, 255 P.3d 753 (2011) (citing U.S. Const. amends. I, VI, XIV; Wash. Const. art. I, §§ 10, 22). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The failure to follow the proper analysis requires reversal for a new trial. *Bone-Club*, 128 Wn.2d at 261-62. Courtroom closure issues may be argued for the first time on review, and our review is de novo. *State v. Lam*, 161 Wn. App. 299, 304, 254 P.3d 891 (2011); *Njonge*, 161 Wn. App. at 573.

We see no violation of either Grover's or the public's right to open and public trial proceedings on this record. After being alerted in chambers to an anticipated pretrial motion, the trial court heard the substance of that motion in open court and made its ruling in open court. That counsel alerted the court to an upcoming motion in chambers does not violate the constitutional guarantee to open and public trial proceedings. Furthermore, even if such a

violation occurred, Grover received the remedy to which he was entitled: a new trial. We need not consider this issue further.

II. Department of Licensing Record

Grover argues in addition that exhibit 4 constituted testimonial hearsay and that its admission violated his right to confront adverse witnesses under the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (confrontation clause prohibits admission of testimonial statements made by witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination).

Because Grover did not object to exhibit 4 at trial, this issue is arguably waived. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (right to confrontation may be waived by failing to object to the offending evidence); *State v. Schroeder*, 164 Wn. App. 164, 168, 262 P.3d 1237 (2011) (defendant waived right to confrontation on disputed piece of evidence by failing to object to its admission at trial). Furthermore, a recent decision from our Supreme Court disposes of the possibility that Grover's claim is one of manifest constitutional error that may be raised for the first time on appeal. *See State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) (error raised for first time on appeal may be considered if it unmistakably or indisputably affects a constitutional right).

The Washington Supreme Court recently held that certifications attesting to the existence or nonexistence of public records are testimonial statements subject to the demands of the Sixth Amendment's confrontation clause. *State v. Jasper*, 174 Wn.2d 96, 100-01, 271 P.3d 876

(2012). Some of the certifications in *Jasper* included affidavits from legal custodians of driving records concerning the defendants' driving status and the reasons therefor. *Jasper*, 174 Wn.2d at 101-02. In holding that these records were testimonial hearsay, the court relied on *Melendez-Diaz*, which held that "'[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But this is not the case if the regularly conducted business activity is the production of evidence for use at trial.'" *Jasper*, 174 Wn.2d at 112 (quoting *Melendez-Diaz*, 557 U.S. at 321). The *Jasper* court observed, however, that *Melendez-Diaz* had found one exception to the rule that any document prepared for use in a criminal proceeding is testimonial: "'a clerk's certificate authenticating an official record--or copy thereof--for use as evidence.'" *Jasper*, 174 Wn.2d at 112 (quoting *Melendez-Diaz*, 557 U.S. at 322). Without implicating confrontation clause protections, therefore, a clerk may by affidavit authenticate or provide a copy of an otherwise admissible record, but a clerk may not create a record for the sole purpose of providing evidence against the defendant. *Melendez-Diaz*, 557 U.S. at 322-23; *Jasper*, 174 Wn.2d at 112; *see also State v. Mares*, 160 Wn. App. 558, 564, 248 P.3d 140 (2011) (records custodian's certificate authenticating driver's license was admissible under *Melendez-Diaz*).

Exhibit 4 is a two-page document. The first page contains the state seal and the signature of the Department of Licensing records custodian and asserts that Marcia's identification card was in effect on November 8, 2010. This date is an apparent reference to the date of Grover's offense, corrected elsewhere in the record to November 6. The second page is a copy of Marcia's identification card. The cover sheet thus identifies the attached record but does not interpret it or

provide independent evidence. Consequently, exhibit 4 does not contain testimonial hearsay sufficient to implicate Grover's confrontation clause rights, and he fails to present a claim of manifest constitutional error. *See Mares*, 160 Wn. App. at 564 (although prepared for use at trial, certificate of authenticity is not testimonial because it attests only to existence of particular public record and does not interpret it nor certify its substance or effect).

Because the admission of exhibit 4 did not implicate the confrontation clause, Grover's attorney was not deficient in failing to object to its admissibility on this basis. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (where defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, he must show that an objection to the evidence likely would have been sustained). Consequently, Grover's related claim that his trial counsel represented him ineffectively fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.