IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28619-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ROY ANTHONY WELCH,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Roy A. Welch appeals his first degree theft conviction and three forgery convictions. He contends the trial court erred in: (1) admitting evidence as business records, (2) failing to grant a mistrial or a continuance, (3) instructing on aggravating factors, (4) ordering an exceptional sentence, and (5) setting restitution. We disagree with his contentions, and affirm.

FACTS

Mr. Welch worked for Paul Hoffman at Mr. Hoffman's closely held insurance company. Near the end of his employment in 2007, Mr. Welch worked as the company bookkeeper authorized to fill out checks in the QuickBooks accounting system, but not

sign them. In December 2007, Mr. Hoffman's business manager, Eliza Alby, received a phone call from a creditor about a suspect debt prompting an investigation. Ms. Alby discovered a check had been entered into QuickBooks as payment on the suspect debt. But according to the bank statement, the check was actually written to Mr. Welch. Mr. Hoffman then investigated the account, partly by comparing QuickBooks with his bank statements and found other discrepancies. Because of the discrepancies, the State charged Mr. Welch with first degree theft and five forgery counts.

At trial, the State presented several checks written to Mr. Welch as exhibits. For each check, Mr. Hoffman testified the signature shown on each check was his but he did not sign the checks. Mr. Hoffman described the company's QuickBooks computer program, relating it was Mr. Welch's job to input information into QuickBooks. He testified he had a printout, identification 48, from QuickBooks indicating how checks were entered into QuickBooks. Further, he had instructed Jennifer Payton, a bookkeeper, to prepare the printout and he testified he had verified everything in the report. The State sought to refresh Mr. Hoffman's memory with the report.

Defense counsel objected for lack of foundation, arguing the report was hearsay prepared in anticipation of trial. The State responded it was not offering the report, but only wanted Mr. Hoffman to be able to testify regarding its contents. Solely, as additional foundation for identification 48, the State offered two reports Mr. Hoffman had prepared overnight; one was a complete, voluminous QuickBooks ledger, the other was an audit trail showing any changes made in QuickBooks.

Mr. Welch argued the two reports were late discovery. The court observed, "But now, is this – is this not now in response to your argument that this is not reliable evidence that's being offered, the original report itself?" Report of Proceedings (RP) at 140. Counsel then unsuccessfully moved for a mistrial. Eventually, the court admitted identification 48 under *State v. Smith*, 16 Wn. App. 425, 558 P.2d 265 (1976), as a business record, reasoning: "Mr. Hoffman supervised the preparation of the report, and he then – the report itself would be a business record that could be admitted." RP at 143. Mr. Welch next asked for the QuickBooks ledger and audit trail be marked as exhibit 49 and exhibit 50. Then Mr. Welch moved for a continuance. Denying the continuance, the court reasoned the ledger and audit trail were foundational to exhibit 48.

Elaborating on exhibit 48, the court reasoned Mr. Hoffman was the record custodian, exhibit 48 was a business record kept in the ordinary course of business made at or near the time of the act or event, and that it was reliable. The court noted exhibit 48 was a fair summary supported by exhibits 49 and 50, was verified by Mr. Hoffman, and generated by standard computing equipment. The court rejected defense counsel's argument that the report was testimonial under *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531, 174 L. Ed. 2d 314 (2009). It explained the information was "routine, descriptive, [and] non-analytical." RP at 192. Further, no confrontation problem existed because Mr. Hoffman was subject to cross-examination. The court redacted all testimonial notations in exhibit 48, designating the redacted

version "48A" for the jury.

Referring to exhibit 48 while testifying, Mr. Hoffman repeated his earlier testimony concerning unauthorized checks written to Mr. Welch but apparently written into QuickBooks as payable to others. Mr. Welch renewed his objection to exhibit 48 before it was submitted to the jury as 48A.

The jury found Mr. Welch guilty of first degree theft and three of the five forgery counts and answered "yes" to the position-of-trust special verdict. At sentencing, the court imposed a 60-month sentence based on the position-of-trust aggravating factor. The court ordered restitution of $43,219. Mr. Welch appealed.

ANALYSIS

A. Business Records

The issue is whether the court erred in admitting exhibit 48 as a business record. We review business record hearsay determinations for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). Confrontation clause challenges are reviewed de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantees criminal defendants the right to confront and cross examine witnesses. Testimonial out-of-court statements of an absent witness are permitted only if the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Business records admitted under the business records exception does not violate a defendant's confrontation right because business records are not testimonial evidence under the confrontation clause. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799, (2005); *State v. N.M.K.*, 129 Wn. App. 155, 163, 118 P.3d 368 (2005) (citing *Crawford*, 541 U.S. at 56). But "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial. *Melendez-Diaz*, 129 S. Ct. at 2531 (citing *Crawford*, 541 U.S. at 51-52).

Mr. Welch contends the report was not a proper business record because it was prepared in anticipation of litigation and not in the regular course of business.

RCW 5.45.020 governs business records as evidence:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the 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 as to justify its admission.

If the statutory requisites are met, computerized records are treated the same as any other business records. *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004) (citing *State v. Ben-Neth*, 34 Wn. App. 600, 603, 663 P.2d 156 (1983)).

Mr. Welch argues the bookkeeper's report fails to meet any of the statutory

requirements. We disagree. While Mr. Hoffman was not the person who prepared the document, the trial court properly reasoned he supervised report preparation. This is a closely held corporation with two or three employees, including Mr. Hoffman as the principal. Although the report was prepared at Mr. Hoffman's request, the data was entered when the checks were written. The critical underlying checks were individually placed in evidence with the aid of Mr. Hoffman's testimony, subject to cross-examination. Exhibit 49, the voluminous register, showed each item in exhibit 48, and the court fairly noted its summary effect. Exhibit 50 showed the audit trail.

Significantly, Mr. Hoffman testified he had some knowledge regarding how the information was entered and stored in QuickBooks. The State correctly relies on *State v. Smith*, 16 Wn. App. 425, 558 P.2d 265 (1976) and *State v. Kane*, 23 Wn. App. 107, 594 P.2d 1357 (1979), to show Mr. Hoffman was a qualified witness. In *Smith*, a bank vice president furnished the foundation testimony for an exhibit prepared by a bank employee. *Smith*, 16 Wn. App. at 432. The trial court admitted the exhibit, which the employee had prepared from computer printouts even though the vice president did not verify the accuracy of the exhibit. *Id*. In *Kane*, the court allowed a bank branch officer to testify concerning a summary he had prepared from computer printouts of account records. *Kane*, 23 Wn. App. at 110. *Smith* and *Kane* both held a summary or compilation of records, which themselves would be admissible as business records, is likewise admissible if the original records are too numerous or voluminous for easy court use. *Smith*, 16 Wn. App. at 433; *Kane*, 23 Wn. App. at 110-11. And ER 1006

provides, "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place."

Moreover, a confrontation clause violation is subject to a harmless error analysis. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). While presumed prejudicial, the State bears the burden of proving that any constitutional error is harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). An error is harmless if we are convinced beyond a reasonable doubt that the jury would have reached the same verdict absent the error. *Id.* In making this determination, we apply the "overwhelming untainted evidence" test. *Id*. Under this test, we look solely "at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.* at 636. Considering the facts without exhibit 48, the jury had overwhelming evidence to convict Mr. Welch. Mr. Hoffman's testimony independent of exhibit 48 and the critical checks were before the jury. And, Mr. Hoffman verified Mr. Welch's role in placing the unauthorized checks into QuickBooks. Any error was harmless.

B. Mistrial and Continuance Requests

The issue is whether the court erred by abusing its discretion in denying Mr. Welch's mistrial and continuance requests based on the State's responsive offering of exhibits 49 and 50 as further foundation for exhibit 48.

A trial court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). Mr. Welch moved for a mistrial when the State produced hundreds of pages of documents during trial. Considering exhibits 49 and 50 were responsive to his objection to exhibit 49, and were not intended for the jury, we cannot say Mr. Welch had been so prejudiced that a new trial would ensure fairness. The trial court did not abuse its discretion in denying his motion for a mistrial.

A trial court's decision to grant or deny a continuance is reviewed for abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). After his mistrial motion was denied, Mr. Welch requested the new documents be marked as exhibits. Next, Mr. Welch's counsel asked for a continuance. The State then explained it was not asking for admission but that they be available to refresh witness memory. In denying the continuance, the court explained that the new documents "go to the question of whether [exhibit 48] would be admitted or not and actually go to the jury." RP at 152. As discussed above, exhibit 48 was unnecessary to convict Mr. Welch. The new documents were presented responsively to defense counsel's foundational concerns over exhibit 48 and did not go to the jury. Considering all, we conclude the court did not abuse its discretion in denying the continuance.

C. Aggravating Factor Instructions

The issue is whether the court erred in instructing the jury on aggravating factors by failing to define each element and in requiring a unanimous negative response alternatively to agreement on the aggravating factor. We review challenged jury instructions de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Mr. Welch did not object to the jury instructions at trial. "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), which requires timely and well stated objections be made to instructions given or refused "'in order that the trial court may have the opportunity to correct any error.'" *Id.* at 686 (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)).

To overcome RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate that the error is "truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). We will not assume an error is of constitutional magnitude, *id*. at 98 (citing *Scott*, 110 Wn.2d at 687); rather, the appellant must identify the constitutional error. *Id*. (citing *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). Mr. Welch has not identified a constitutional provision violated by the court's instructions and does not claim a violation of any recognized constitutional right, let alone a manifest one. *Id*. at 99. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Id.* (internal

quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). "To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935).

Mr. Welch asserts "actual prejudice is demonstrated by the failure to provide any definition of the element." Br. of Appellant at 40-41. This alone does not show the instructions had practical and identifiable consequences in the trial of the case. Thus, we decline review of Mr. Welch's claimed instructional error for the first time on appeal.

D. Exceptional Sentence

The issue is whether the court erred in imposing an exceptional sentence under RCW 9.94A.535(3). Mr. Welch contends insufficient evidence shows the current offense was a major economic offense or series of offenses, and he asserts the trial court's conclusions of law exceeded its findings.

"If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4)." RCW 9.94A.535. "To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4).

Mr. Welch presents a question of statutory interpretation, a question of law we review de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). When interpreting a statute, our fundamental objective is to ascertain and carry out the legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain meaning of a statute is derived "from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Jacobs*, 154 Wn.2d at 600.

RCW 9.94A.535(3) partly provides:

> [T]he following circumstances are an exclusive list of factors that can support a sentence above the standard range.
> . . . .
> (d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
> . . . .
> (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

Similarly, 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.13, at 709 (3d ed. 2008) partly provides:

> To find that this crime is a major economic offense, [at least one of] the following factor[s] must be proved beyond a reasonable doubt:
> . . . .
> [(4)] [The defendant used [his] [her] position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.]

The jury was asked if Mr. Welch used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. The court concluded this was a major economic offense or series of offenses exactly as authorized by RCW 9.94A.535(3)(d)(iv). Therefore, the court did not err in its sentence enhancement.

E. Restitution

The issue is whether the court abused its discretion in ordering $43,219 restitution. Mr. Welch contends the restitution amount includes the amount of the forgery charges for which he was acquitted. Our review shows Mr. Welch is incorrect.

We review restitution orders for abuse of discretion. *State v. Christensen*, 100 Wn. App. 534, 536, 997 P.2d 1010 (2000). A court's authority to impose restitution in a criminal case is derived solely from statute. *Id*. (citing *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992)); RCW 9.94A.753. The statute provides that restitution "shall be based on easily ascertainable damages." RCW 9.94A.753(3). The award of restitution must be based on a causal relationship between the offense charged and proved and the victim's losses or damages. *Christensen*, 100 Wn. App. at 536 (citing *State v. Blair*, 56 Wn. App. 209, 214-15, 783 P.2d 102 (1989)).

Here, the trial court ordered restitution for the first degree theft charge and specifically excluded the amounts of the checks for which Mr. Welch was charged with forgery but acquitted. The judge explained:

> Well, counsel, what I'm going to do here is I'm going to order $43,219, which would be the – the amounts for the checks that come within the theft in the first

> degree charge, and so they are a part of the charged count, one large count. And furthermore they – as Mr. Enzler's been careful to do – don't include those checks that for whatever reason the jury did not find Mr. Welch guilty of forgery, is how that worked. And – kind of a mystery to me, but they would have gone through and carefully – they heard all of that evidence, and those – those few counts they didn't find the defendant guilty of, so those should be deducted.

RP at 532.

Given this colloquy, the court did not order restitution for acquitted counts. Mr. Welch fails to demonstrate the court erred in its deductions. Accordingly, the court did not abuse its discretion in ordering restitution.

Affirmed.

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

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.