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Recommended Citation
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DOCKET NO. 950384-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 950384-CA
MARVIN JEAN JACQUES,	:	
Defendant/Petitioner.	:	

PETITION FOR REHEARING

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FILED
OCT 17 1996
COURT OF APPEALS

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Plaintiff/Appellee,	:	
v.	:	Case No. 950384-CA
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PETITION FOR REHEARING

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QUESTIONS PRESENTED FOR REHEARING

1. Did this Court, in applying the second prong of Rule 901(b)(2), Utah Rules of Evidence, properly determine that the non-expert witness' testimony was inadmissible because there was a possibility that her familiarity with defendant's handwriting may have been gained by looking at documents from past prosecutions and comparing them to documents in the present prosecution?

2. Did this Court properly determine that the error in admitting the non-expert witness' testimony was not sufficiently inconsequential as to constitute harmless error?

ARGUMENT

POINT ONE

BECAUSE THE STATE ADEQUATELY DEMONSTRATED THAT THE NON-EXPERT'S FAMILIARITY WITH DEFENDANT'S HANDWRITING PREDATED THE PRESENT LITIGATION, THE TRIAL COURT PROPERLY DETERMINED THAT HER TESTIMONY WAS ADMISSIBLE

This Court determined that Sherry Ragan, a non-expert witness, should not have been permitted to testify about the authenticity of defendant's handwriting under rule 901(b)(2) because the State failed to "demonstrate that Ms. Ragan's ability to identify defendant's handwriting predated the present litigation, i.e., that she did not gain such familiarity specifically for purposes of preparing to testify in the present action." Jacques, slip. op. at 6 (citations omitted).[1]

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[1] To support this conclusion, the Court cites two cases, neither of which are analogous to this case. In the first case, the prosecution produced a witness whom it tried unsuccessfully to qualify as a handwriting expert. The witness subsequently testified as a non-expert under rule 901(b)(2). The appellate court properly determined that this was error because the witness' familiarity with defendant's handwriting was unquestionably acquired "(1) after the grand jury returned the indictment against the appellant [by government subpoena of handwriting exemplars], and (2) for the sole purpose of testifying at Cepeda's trial." People v. Cepeda, 851 F.2d 1564, 1567 (9th Cir. 1988).

In the second case, a trial court refused to allow an attorney representing defendant in another action in another

Ragan testified at length outside the presence of the jury about how and when she had become familiar with defendant's handwriting:

The State:	In what capacity do you know him [defendant]?
Witness:	Prosecuting him two or three times.
The State:	For what cases?
Witness:	I had a case against him six or seven years ago for a burglary that was dismissed, and then prosecuted him for prescription fraud.
The State:	In connection with those prosecutions, have you seen what you consider to be the defendant's handwriting?
Witness:	Yes.
The State:	And how many documents have you seen?
Witness:	I think probably four or five, and letters that he's written to me and motions that he's filed, court documents that he's filed for himself in cases.
The State:	And in connection with these documents

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state to opine about the authenticity of a signature of a witness in the case before the court. The appellate court upheld this ruling because the witness had "acquired any expertise he arguably had for purposes of a pending criminal investigation;" and because his "familiarity" consisted only of a "one-shot comparison" of two documents, lacking in the extent of familiarity contemplated by rule 901(b)(2). United States v. Pitts, 569 P.2d 343, 348 (5th Cir. 1978), cert. denied, 436 U.S. 959 (1978).

and the letters written to you, have you had conversations with Marvin regarding the contents of those letters?

Witness: Not the letters, but as to the motions following his filing those in court. Then he would appeal in court and argue those motions in his own behalf indicating he had written them.

(R. 80-81). Ragan thus clearly testified that her familiarity was developed over the course of several years in which she twice prosecuted defendant. Based on this past familiarity, established by the State through this foundational testimony, Ragan identified State's exhibit #10 as a letter she had received from defendant in the course of one of the previous prosecutions (R. 81). She then opined that two other exhibits, a letter and an envelope, appeared to be in defendant's handwriting (R. 81-82). The trial court ruled that the documents were admissible as a matter of law, and that Ragan was a competent non-expert witness (R. 90-91). The court also stated that the evidence was necessitated by the allegation that defendant had tried to disguise his handwriting in the court-ordered sample (R. 99).

Defendant objected that Ragan was not a handwriting expert, that Ragan didn't see who wrote the documents, that there was no foundation for the writings, and that only the court-ordered sample should be admissible (R. 86, 90, 91). Notably, he did not

object on the ground that Ragan's familiarity with his handwriting was gained solely for the purposes of this litigation.

In ruling that Ragan's testimony should not have been admitted, this Court now raises a new factual possibility:

> [Ragan's] testimony is insufficient . . . because it fails to dispel the possibility . . . that she simply pulled defendant's files from past prosecutions and compared his handwriting found therein to the handwriting on the letter and envelope submitted in the present prosecution, all for the sole purpose of testifying in this litigation at the request of her fellow prosecutor.

Jacques, slip. op. at 6. This is an argument not presented below, raised by the Court sua sponte on appeal. As such, given Ragan's explicit foundational testimony, it should not provide a ground for reversal.[2] Cf. State v. Steggell, 660 P.2d 252, 259 (Utah 1983)(court will not consider issue raised for the first time on appeal).

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[2] Rule 901(b)(2) is silent on the Court's implication that refreshing one's recollection by examining a document with which the witness is already familiar somehow creates a fatal flaw, invalidating the past familiarity and replacing it with familiarity gained only for purposes of this litigation.

POINT TWO

ABSENT THE TESTIMONY OF THE NON-EXPERT WITNESS, THE REMAINING FACTS DEMONSTRATE NO REASONABLE LIKELIHOOD OF THE JURY RETURNING A VERDICT MORE FAVORABLE TO DEFENDANT

This Court determined that the trial court's error in admitting Sherry Ragan's authentication testimony was not harmless. Jacques, slip. op. at 8. In reaching this conclusion, the Court has misconstrued the record facts. When read correctly, the record obviates the possibility of a more favorable result for defendant, even in the absence of Sherry Ragan's testimony.

First, referring to the court-ordered writing sample in which defendant tried to disguise his handwriting (State's exhibit #3), the Court states:

> After proper authentication, the State's expert testified that the specimen shared 18-20 points of common identification with the prescription -- not enough on which to base an opinion that the prescription was definitely written by defendant.

Jacques, slip. op. at 7. This statement, however, does not accurately reflect the record evidence. During the questioning in which Chuck Senn was being qualified as a questioned document examiner, the following exchange occurred:

The State: Is there a particular scale that you use in determining how sure you are about a document?

Witness: [B]ecause it is an evaluative process, I try to stay between 10 to 20 points of identification to be able to be highly probable or positive that the person did it.

(R. 115-116).

Senn then testified at length about the court-ordered writing sample. Initially, he stated:

> From going through the writing, it was -- from doing handwriting for a long time I could tell there were definitely some capricious changes made. In other words, someone was fooling around with their slant and the way that they made things.

(R. 133). Still referring to the court-ordered sample, he continued, "However, we still leave things behind. We still leave points. And in going through it, I came up with -- I think it was around 18 to 20 points that I knew I had from this" (Id.).

The prosecutor then directly questioned Senn about the authorship of the court-ordered sample:

The State: So you indicated you found 18 to 20 points of similarity between this document, State's exhibit 3, and the prescription; is that correct?

Witness: That's correct.

The State: So from that document what is your --

where does that fall in your certainty level?

Witness: It would be my opinion that all of these documents were written by the same individual.

(R. 134). Consistent with Senn's expert opinion and contrary to this Court's conclusion, the 18-20 points of identification in the court-ordered sample provided a sufficient basis for his opinion that the prescription was definitely written by defendant.

Second, in its opinion, the Court also states:

> Had Ms. Ragan been precluded from authenticating the writings at issue, the expert would have been left with only the problematic court-ordered sample to compare with the prescription. Although the court-ordered sample contained 18-20 points of common identification with the prescription, it was not nearly as incriminating as the comparison with the samples authenticated by Ms. Ragan, which contained all 32 possible points of common identification. Thus, there is a reasonable likelihood that the jury would have returned a verdict in favor of defendant in the absence of Ms. Ragan's testimony and the resulting evidence.

Jacques, slip op. at 8 (footnote omitted). While the Court is correct in recognizing that 32 points of identification may be *more* incriminating than 18-20 points, that statement does not undercut the expert's testimony that the lesser number of points

was sufficient for a positive identification.[3] Indeed, Senn testified, "Again, depending upon how strong of points we find, 10 to 20 is normally what I would use for positive identification. Doing 32, obviously someone might say, overkill [sic]. But there's alot of writing here that can be used for identification" (R. 131).

Senn's testimony was consistent. He never veered from his opinion that the court-ordered sample was written by defendant. While he chose to focus for comparison purposes on the documents Ragan authenticated, rather than on the court-ordered sample, he did so for reasons of practicality and efficiency:

> With all of the capricious changes in here [the court-ordered sample] it would be very difficult for me to sit up there and for the lay person to look at it and say, yeah, these were made by the same person. I can tell you that as an expert, but to try and prove it to you, it was definitely a lot better to use the natural handwriting.

(R. 134). That the court-ordered sample was problematic did not, however, undermine Senn's opinion that it was written by the same person who wrote the prescription. The following exchange on redirect examination clarifies Senn's unwavering position:

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[3] By analogy, one might be *more* pregnant at eight months than at one month, but that does not render a pregnancy at one month any less real.

The State: Is there any question in your mind that State's exhibit #3 [the court-ordered sample], which the defendant wrote, is the same handwriting as written on the Percocet prescription?

Witness: No, sir.

The State: Now, when you say you couldn't prove it to a jury, aren't you in fact saying it would be difficult to put it on the board?

Witness: Sure.

The State: When you look at these handwriting samples you use a microscope and that to establish the same points you showed on the board here today?

Witness: Yes.

The State: And is it expensive to create overheads from a microscope?

Witness: Yes. They have to be photographed first and then go from there.

The State: So when you say you couldn't prove it to a jury, you're saying it's easier to demonstrate on the board with the other samples?

Witness: That's correct.

The State: But it's your opinion there was a positive match, in the high seventy category,[4] with this handwriting sample to the handwriting sample on the prescription?

Witness: That would be my opinion.

(R. 148-49). Thus, absent the documents Ragan authenticated, the State still had a positive identification between the court-ordered writing sample and the questioned prescription. Senn's expert testimony definitively matching the court-ordered writing sample with the questioned prescription provided the crucial link in the testimony necessary to convict defendant. Notably, defendant did not produce a rebuttal witness to dispute Senn's testimony.

Furthermore, even if the evidence that came in through Sherry Ragan is discounted, the remaining evidence must still be construed in the light most favorable to the jury's verdict. In reciting the circumstantial evidence adduced by the State, the Court has misconstrued one other relevant fact. The Court opines "that defendant *possibly* had the opportunity to obtain blank prescription pads" and, in a footnote, adds that the room in which defendant was examined "had contained blank prescription

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[4] This term was never explained, nor does it appear anywhere else in the record.

pads, *perhaps* including some in the name of his associate, Dr. Olsen." Jacques, slip. op. at 8 & n.5 (emphasis added).

The Court's use of the qualifiers "possibly" and "perhaps" is not warranted by the record. Dr. Bateman, a physician who practiced with the doctor whose name appeared on the forged prescription, testified that he saw defendant in the Ephraim clinic on the day before the forged prescription was tendered, that prescription pads were left unsupervised in the clinic examination rooms, and that defendant was alone in the examination room before the doctor examined him (R. 70, 72-73). Based on this evidence, there was more than a *possible* opportunity for defendant to obtain a blank prescription pad.

In addition, each doctor does not have his or her own personal prescription pads, as the opinion infers. A cursory examination of the forged prescription reveals that all of the clinic's doctors at all locations are named on the prescription pads. See addendum B. Thus, any prescription pad in any examination room would necessarily -- not "perhaps" -- have had Dr. Olsen's name on it.

The State's case was further strengthened by the testimony of two employees in the pharmacy where defendant tendered the prescription. While neither eyewitness could positively identify

defendant, they provided strong circumstantial corroboration through physical descriptions of the individual and his distinctive cherry red sports car (R. 44-45, 49-50).

Apart from the testimony and evidence that came in through Sherry Ragan, the State adduced evidence on all elements of the crime for which defendant was convicted. Accordingly, even omitting the Ragan testimony, and construing the remaining evidence in the light most favorable to the jury's verdict, there is simply no reasonable likelihood of a more favorable result for defendant. See State v. Knight, 734 P.2d 913, 920 (Utah 1987).

CONCLUSION

For the reasons stated, the State asks this Court to modify its opinion to conform with the record evidence and to affirm defendant's conviction. Pursuant to rule 35(a), Utah Rules of Appellate Procedure, the State certifies that this petition is presented in good faith and not for purposes of delay.

RESPECTFULLY submitted this 17th day of October, 1996.

JAN GRAHAM
Attorney General

Joanne C. Slotnik

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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Margaret P. Lindsay, Utah County Public Defender Association, 40 South 100 West, Suite 200, Provo, Utah 84601, this 17th day of October, 1996.

Joanne C. Slotnik

ADDENDA

ADDENDUM A

AG

FILED

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COURT OF APPEALS

This opinion is subject to revision before publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee,	)	OPINION (For Official Publication)
v.	)	Case No. 950384-CA
Marvin Jean Jacques, Defendant and Appellant.	)	F I L E D (September 19, 1996)

Fourth District, Provo Department
The Honorable Guy R. Burningham

Attorneys: Margaret P. Lindsay, Provo, for Appellant
Jan Graham and Joanne C. Slotnik, Salt Lake City, for Appellee

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Before Judges Orme, Greenwood, and Wilkins.

ORME, Presiding Judge:

Defendant Marvin J. Jacques appeals his conviction for uttering a forged prescription. He contends the trial court erroneously admitted nonexpert opinion testimony of the genuineness of handwriting claimed to be his. We reverse defendant's conviction and remand for a new trial.

FACTS

On September 27, 1994, an individual entered the Art City Pharmacy in Springville, Utah, seeking to fill a prescription for the narcotic, Percocet. The prescription was made out to James Brooks and signed by Dr. Darrel Olsen. Being suspicious of the spelling "Percoceth" in the prescription, the pharmacist's assistant asked her supervisor to look at the prescription. Attempts were made to contact Dr. Olsen to verify the prescription, but to no avail. The police department was subsequently contacted, but officers arrived after the customer had left the pharmacy. The police learned from witnesses at the pharmacy that the customer was an African-American male, approximately 6'2" tall, and drove a small red sports car.

Defendant Jacques was subsequently arrested and charged with uttering a forged prescription in violation of Utah Code Ann. § 58-37-8(4)(a)(iii)(1996), a third degree felony. At trial, the State tried to connect defendant to the forged prescription in several ways. In addition to showing that defendant had been in the office of Dr. Olsen's partner on the previous day, met the general description of the customer who presented the prescription, and drove a red sports car, the State adduced the testimony of two handwriting witnesses. The first of these witnesses, an expert in comparative handwriting, administered a court-ordered handwriting exercise to defendant. At trial, this expert testified that he could not state conclusively, on the basis of the court-ordered specimen, whether the prescription was written by defendant. The expert opined that the specimen had been deliberately written to be at variance with defendant's usual penmanship.

The second handwriting witness was Sherry Ragan, a Utah County prosecutor with no expertise in the area of handwriting analysis. Ms. Ragan offered her opinion concerning the genuineness of defendant's handwriting in several documents allegedly penned and addressed by defendant to the prosecutor's office and to the trial court in the course of the present litigation. After hearing Ms. Ragan's testimony, the trial court found the writings to be authentic and admitted them into evidence. These supposedly authenticated samples of defendant's handwriting were later compared by the handwriting expert to the handwriting on the forged prescription. On the basis of these samples, the expert was able to testify conclusively that the forged prescription was written by defendant.

The jury returned its verdict of guilty, and the trial court sentenced defendant to an indeterminate term of imprisonment not to exceed five years.

STANDARDS OF REVIEW

In reviewing a trial court's decision to admit evidence, we apply several standards of review. State v. Thurman, 846 P.2d 1256, 1270 n.11 (Utah 1993). See also State v. Ramirez, 817 P.2d 774, 781 n.3 (Utah 1991)(stating that several standards of review must be employed given that the trial court's determination of admissibility involves both legal and factual conclusions). In determining whether the trial court properly admitted the opinion of a nonexpert for authentication purposes, a matter governed by Rule 901 of the Utah Rules of Evidence, we first apply a correction of error standard to the legal content of that decision. See State v. Horton, 848 P.2d 708, 714 (Utah App.) (applying correctness standard to issue of whether trial court properly excluded photograph of car trunk), cert. denied, 857

P.2d 948 (Utah 1993). In making this determination, "we [illegible] (1) whether the trial court selected the correct rule of evidence, (2) whether the trial court correctly interpreted that rule, and (3) whether the trial court correctly applied the rule." Id. at 713

After reviewing the trial court's legal decision for correctness, we apply an abuse of discretion standard in determining whether the trial court reasonably determined the nonexpert witness properly authenticated the writing samples pursuant to Rule 901. Id. at 714. Even if we find error in the decision to admit evidence, such decision does not result in reversible error unless the error is prejudicial. See State v. Villarreal, 857 P.2d 949, 957 (Utah App. 1993), aff'd, 889 P.2d 419 (Utah 1995).

ISSUES ON APPEAL

We must decide whether the trial court erred in admitting the testimony of a nonexpert to authenticate handwriting samples, when the witness had not personally observed the actual writing of such samples. Beyond this threshold question, defendant contends the State failed to adequately prove the nonexpert's familiarity with defendant's handwriting and the origin of that familiarity, as required by Rule 901(b)(2) of the Utah Rules of Evidence. The State counters that the origin of the nonexpert's familiarity with defendant's handwriting was sufficiently proven to support a finding of admissibility, and that, in any event, any error in permitting the challenged testimony was harmless.

AUTHENTICATION UNDER RULE 901(b)(2)

The general rule governing the admissibility of writings or other documentary evidence is that the proponent, prior to introducing such evidence, must first authenticate the evidence by showing that it is what the proponent claims it to be. Utah R. Evid. 901(a); State v. Horton, 848 P.2d 708, 714 (Utah App.), cert. denied, 857 P.2d 948 (Utah 1993). This process of authentication must be distinguished from a finding of authenticity. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 9.2, at 1124 (1995). In their recent treatise, Mueller and Kirkpatrick explain that the process of authentication "deals with the foundation required for admitting evidence, and the adequacy of that foundation is determined by the trial judge." Id. They also state that although the jury is ultimately responsible for determining whether the evidence is in fact authentic once the evidence is admitted, the court must fulfill its screening function under

Rule 104(b),[1] which requires the trial court "to assess whether there is evidence sufficient to support a jury finding of authenticity." Id. at 1124 (citations omitted). See also State v. Ramirez, 817 P.2d 774, 778 (Utah 1991) (distinguishing trial court's role in making "any necessary preliminary factual findings" in order to reach legal conclusions concerning admissibility of evidence from jury's role in crediting or discrediting admitted evidence); Edward L. Kimball & Ronald N. Boyce, Utah Evidence Law 1-27 (1996)(stating resolution of fact questions surrounding admissibility generally entrusted to judge).

Utah Rule of Evidence 901(b) provides, by way of illustration, several possible methods for authenticating a writing. Specifically, Rule 901(b)(2) provides that a trial court may allow a nonexpert witness to state an opinion as to the authenticity of handwriting, provided that two requirements are satisfied: first, that the witness is shown to be familiar with the handwriting, and second, that it is established the witness's familiarity was not gained for purposes of the litigation.[2]

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1. Rule 104(b) of the Utah Rules of Evidence provides as follows:

> **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

2. Rule 901 of the Utah Rules of Evidence provides as follows:

> (a) **General provision.** The requirement of authentication or identification 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.
>
> (b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

As to the first requirement, it is inconsequential for the trial court's determination whether the nonexpert has personally observed the person put pen to paper or exactly how many times the nonexpert has actually seen the person's handwriting; such facts go only to the weight accorded the evidence by the jury. See, e.g., United States v. Binzel, 907 F.2d 746, 749 (7th Cir. 1990). Cf. State v. Freshwater, 30 Utah 442, 447, 85 P. 447, 448 (1906) (stating it is "settled that no great degree of familiarity with handwriting is required to render a witness competent to give an opinion. If he has seen the person write a single time, it has generally been held sufficient.") (citation omitted).

Although there is no requirement that the nonexpert personally observe the act of writing, Rule 901(b)(2) does require that the nonexpert have an adequate familiarity with the person's handwriting. The adequacy of familiarity may be present "'if [the witness] has seen writings purporting to be those of the person in question under circumstances indicating their genuineness.'" United States v. Standing Soldier, 538 F.2d 196, 202 (8th Cir.) (quoting Edward W. Cleary, McCormick's Handbook of the Law of Evidence § 221, at 547 (2d ed. 1972)), cert. denied, 429 U.S. 1025 (1976).

The second requirement under Rule 901(b)(2) mandates that any familiarity with the person's handwriting not have been obtained for purposes of the present litigation. See People v. Cepeda, 851 F.2d 1564, 1566-67 (9th Cir. 1988)(holding rule was violated when witness's familiarity with defendant's handwriting was acquired after indictment was returned and for sole purpose of testifying at defendant's trial). See also United States v. Pitts, 569 F.2d 343, 348 (5th Cir.)(affirming trial court's exclusion of nonexpert's opinion concerning signature on a receipt when nonexpert made "one-shot" comparison with a genuine signature for purposes of pending criminal investigation), cert. denied, 436 U.S. 959 (1978). Under the second prong of 901(b)(2), a nonexpert may not offer an opinion as to the genuineness of handwriting if it is established that the witness gained familiarity for purposes of testifying in an action in which the handwriting is at issue. In other words, the witness's familiarity with the handwriting must predate the present litigation.

In the instant case, the nonexpert called to authenticate the writings at issue was Ms. Ragan, an attorney in the very office that was prosecuting defendant. Ms. Ragan began her testimony out of the jury's presence by stating that she knew defendant from past contact with him. Ms. Ragan testified that she had seen defendant's handwriting in certain documents he filed with the trial court in past prosecutions. Ms. Ragan was then shown two writings: a letter written to the prosecutor in

the present action and the envelope in which the letter was sent. Upon being shown these items, Ms. Ragan offered her opinion that the handwriting contained in the letter and on the envelope was that of defendant.[3]

As a whole, Ms. Ragan's testimony indicates that she met the first prong of Rule 901(b)(2), even though she had never witnessed defendant in the act of writing. Her testimony establishes that she did possess some degree of familiarity with defendant's handwriting. Although Ms. Ragan demonstrated her general familiarity with defendant's handwriting, her testimony wholly fails to satisfy the second prong of Rule 901(b)(2).

To satisfy this second prong, the prosecution had to demonstrate that Ms. Ragan's ability to identify defendant's handwriting predated the present litigation, i.e., that she did not gain such familiarity specifically for purposes of preparing to testify in the present action. See Cepeda, 851 F.2d at 1567; Pitts, 569 F.2d at 348. Her testimony is insufficient in this respect because it fails to dispel the possibility--especially distinct given the fact that she works as a deputy county attorney who has prosecuted defendant in the past--that she simply pulled defendant's files from past prosecutions and compared his handwriting found therein to the handwriting on the letter and envelope submitted in the present prosecution, all for the sole purpose of testifying in this litigation at the request of her fellow prosecutor.

Accordingly, given the deficiency in Ms. Ragan's testimony, we must conclude that the court erred in admitting the letter and envelope which were then used by the expert for purposes of comparison with the forged prescription.

HARMLESS ERROR

We must still decide whether the trial court's error in admitting Ms. Ragan's authentication testimony was harmless. The doctrine of harmless error applies to "'errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that we conclude there is no

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3. Ms. Ragan later testified to her opinion in the presence of the jury, but was careful not to disclose that she had prosecuted defendant on prior occasions. Ms. Ragan testified that she was a local attorney who knew defendant from unspecified prior dealings and that she was familiar with defendant's handwriting. Again, over defendant's objection, the trial court allowed Ms. Ragan to state her opinion that the handwriting in the envelope and letter belonged to defendant.

reasonable likelihood that the error affected the outcome of the proceedings.'" State v. Villarreal, 857 P.2d 949, 957-58 (Utah App. 1993) (quoting State v. Verde, 770 P.2d 116, 120 (Utah 1989)), aff'd, 889 P.2d 419 (Utah 1995). For an error to require reversal, "the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." State v. Knight, 734 P.2d 913, 920 (Utah 1987).

In determining whether reversal is required, several factors are considered, including "'the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence co[rro]borating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'" State v. Hackford, 737 P.2d 200, 205 (Utah 1987) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986)).

In the instant case, the prosecution attempted to connect defendant to the forged prescription by showing the jury, through expert testimony, that the handwriting in several past letters and documents allegedly penned by defendant was the same as the handwriting in the forged prescription. The first proffered sample of defendant's handwriting was the specimen ordered by the trial court prior to trial. The specimen contained letters of the alphabet and various words, all written by defendant. After proper authentication, the State's expert testified that the specimen shared 18-20 points of common identification with the prescription--not enough on which to base an opinion that the prescription was definitely written by defendant.

The second sample of handwriting used for comparison by the expert consisted of the items analyzed by Ms. Ragan. After Ms. Ragan's purported authentication of these writings and their admission into evidence, the State's expert testified that all 32 points of common identification were present. Therefore, the expert concluded that the handwriting in the documents authenticated by Ms. Ragan and the handwriting in the forged prescription definitely belonged to the same person, namely defendant.

Thus, Ms. Ragan was a critical witness for the State. Her testimony led to the admission into evidence of the very handwriting samples which allowed the State's expert to make a conclusive comparison with the forged prescription. The jury also heard her state she was familiar with defendant's writing and that the letter and envelope considered by the expert appeared to have been written by defendant. Finally, her testimony enabled the jury to conduct its own comparison of the handwriting in the forged prescription and in the specimens she authenticated. See Utah R. Evid. 901(b)(3) (allowing trier of

fact to make its own comparison with authenticated specimens of handwriting). Had Ms. Ragan been precluded from authenticating the writings at issue, the expert would have been left with only the problematic court-ordered sample to compare with the prescription. Although the court-ordered sample contained 18-20 points of common identification with the prescription, it was not nearly as incriminating as the comparison with the samples authenticated by Ms. Ragan, which contained all 32 possible points of common identification. Thus, there is a reasonable likelihood that the jury would have returned a verdict in favor of defendant in the absence of Ms. Ragan's testimony and the resulting evidence.[4] Therefore, we cannot conclude that the court's error in admitting Ms. Ragan's testimony was sufficiently inconsequential as to constitute harmless error.

This conclusion is especially compelling in view of the overall strength of the State's case. The State presented the testimony of several other witnesses. Although these witnesses testified that they saw a male resembling defendant in the pharmacy on the day in question, and that defendant possibly had the opportunity to obtain blank prescription pads,[5] none of these witnesses could make a positive identification of defendant as the person passing the forged prescription.

CONCLUSION

Before allowing Ms. Ragan to provide authentication testimony on the samples of defendant's handwriting, the trial court should have required testimony as to the origin of Ms.

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4. It should be noted that appellate courts are especially reluctant to find errors harmless when they concern opinions given by experts, see, e.g., State v. Iorg, 801 P.2d 938, 941-42 (Utah App. 1990), given the perception that jurors tend to give great weight to such testimony. Although Ms. Ragan was not herself an expert, her authentication testimony paved the way for the expert's ultimate opinion that defendant forged the prescription, the single most incriminating part of the State's case.

5. The State presented the testimony of Dr. Bateman. Dr. Bateman testified that on September 26, 1994, he had treated defendant for a sprained knee and prescribed defendant "Lodine," an anti-inflammatory drug. Dr. Bateman testified that at the time of this treatment, defendant had been left alone in the examination room for a few minutes, which is customary in the doctor's office, and that the room had contained blank prescription pads, perhaps including some in the name of his associate, Dr. Olsen.

Ragan's familiarity with defendant's handwriting, and, in particular, whether it was acquired for purposes of this litigation. Because Ms. Ragan's testimony is completely lacking in this regard, the trial court erred in admitting Ms. Ragan's authentication testimony and related evidence. This error was not harmless. Therefore, we reverse defendant's conviction and remand for a new trial.

Gregory K. Orme,
Presiding Judge

WE CONCUR:

Pamela T. Greenwood, Judge

Michael J. Wilkins, Judge

ADDENDUM B

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