Court of Appeals No. 38305-9-III

102206-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

PETRU HOADREA, JR., Petitioner

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

THE HONORABLE JUDGE LECH RADZIMSKI

PETITION FOR REVIEW

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253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Petru Hoadrea, Jr., the appellant below, asks the Court to accept review of the decision of the Court of Appeals, terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner Petru Hoadrea, Jr. seeks review of the Court of Appeals unpublished opinion entered June 22, 2023. A copy of the opinion is attached as an appendix.

III. ISSUES PRESENTED FOR REVIEW

A. The Confrontation Clauses of the state and federal constitutions preclude the admission of testimonial hearsay statements where a defendant has not had the opportunity to cross-examine the declarant. Is a significant issue involved under the United States Constitution and the Washington Constitution where the

criminal defendant's confrontation guarantees are not exercised by his counsel, and the Court denies review under RAP 2.5(a)(3) under *State v. Burns?*

B. Did Mr. Hoadrea receive ineffective assistance of counsel where counsel did not assert Mr. Hoadrea's constitutional right to confront his accuser by failing to object to admission of hearsay statements made by an unavailable witness?

C. To obtain a lawful conviction, the State must prove the elements of a crime beyond a reasonable doubt. Did the Court of Appeals err when it held that despite the alleged victim's testimony, he was *not* afraid, the jury could "infer that from his background and demeanor that he would not lightly admit to being afraid"?

IV. STATEMENT OF THE CASE

Petru Hoadrea, a retired military veteran, bought a home on a piece of property hoping to have space and quiet. RP 325-26. Jack and Elaine Simmons moved to the

adjacent property within a few years of his purchase. RP 212. A dispute arose over the property's boundary lines, spurring civil litigation. RP 215-219; 324-27;329,331.

As frustration about perceived encroachment grew, the parties built and removed each other's fences. RP 220, 224-25,244-45, 333. Like Mr. Hoadrea, Mr. and Mrs. Simmons owned and carried firearms on their property. RP 239, 250. Before May 19, 2020, Elaine Simmons obtained a protection order against Mr. Hoadrea. RP 219.

On the morning of May 19, Mr. and Mrs. Simmons set about erecting a fence using guidelines from their surveyor. RP 234. Mrs. Simmons sat in a four-wheeler as Mr. Simmons drove posts into the ground. PR 234. Mr. Hoadrea, atop a hill on his property, told the couple to stop and that he would fire a warning shot if they did not leave his property. RP 335-36. Mr. Simmons said he soon heard a gunshot and heard Mr. Hoadrea say, "The next

one will be closer." RP 235-238. Mr. Hoadrea denied making the second statement. RP 353.

Mrs. Simmons called 911 to report the incident. RP 301-02. By the time of trial, Mrs. Simmons was unavailable to testify: unrelated to these events, she had suffered a brain aneurysm and lived in an assisted care facility. RP 215.

Pretrial Rulings

In pretrial rulings, the court relied on the excited utterance exception to the hearsay rule to admit the 911 call made by Mrs. Simmons. RP 106-107. Defense counsel did not raise Mr. Hoadrea's right to confront his accuser. The State played the call at trial. RP 301-302.

The court ruled that the officer who responded to the 911 call could *not* repeat what Mrs. Simmons said. RP 108.

Trial Testimony

Despite the pretrial ruling, the officer who responded to the 911 call testified Mrs. Simmons told him directly that she feared Hoadrea. RP 307-09. Over defense objection, the court held the statement qualified as an excited utterance. RP 310. Defense counsel did not object based on the confrontation clause.

Mr. Simmons testified his wife was "spooked" by the gunshot. RP 240. He reported his wife told him, "he shot at you." RP 236. He also said his wife showed him the area she believed the bullet had landed. RP 236.

Mr. Simmons testified he was **not** frightened by Hoadrea or his actions that day. RP 240.

Mr. Hoadrea testified he fired a single shot, from a .22 revolver, into a target practice hill on his property. He deliberately shot 90 degrees to the left of where the couple were situated. RP 335-36, 339,341,352.

After he fired the warning shot, he returned to his home, put the revolver in a drawer, and called 911. Then he went back to bed. RP 336.

About two hours later, the police arrived to investigate the 911 calls. RP 309-310. They obtained a search warrant, confiscated Mr. Hoadrea's firearms, and arrested him. RP 265.

The police report attached as part of the affidavit of probable cause submitted by Office Schumacher stated:

> …when I asked **if she [Mrs. Simmons] is afraid of him carrying out his threats** of "the next one will be closer" **she said, "No, because he is a gutless wonder.**" She then told me she cannot even sit outside on her property without Hoadrea walking the property line taking pictures of her. **She also stated she has to take her pistol out with her when she goes outside because of him. I asked her why she does that, and she said, "because the deputies told me to**." I told her it seems that if she was doing that, it would appear she would have a fear for her life, and she quickly said, "I do!"

CP 7. (Emphasis added).

Prosecutors charged, and a jury found Mr. Hoadrea guilty of two counts of assault in the second degree with a firearm, unlawful aiming or discharge of a firearm, two counts of harassment, and one count of a felony violation of a no-contact order with a firearm. CP 109-110. He made a timely notice of appeal. CP 119-127.

Appellant argued the statements alleged to have been made by Mrs. Simmons were testimonial, and it was both a violation of Mr. Hoadrea's right to confrontation and ineffective assistance of counsel for failing to object on that basis.

Relying on *State v. Burns,* 193 Wn.2d 190, 438 P.3d 1183 (2019), the Court held Mr. Hoadrea waived his right to confrontation when his attorney did not raise the constitutional challenge. The Court also held Mr. Hoadrea did not receive ineffective assistance of counsel for failure to object based on his right to confront. The Court ruled that despite Mr. Simmons' testimony that he was not

afraid, the jury was entitled to infer that Mr. Simmons might be reluctant to admit it and upheld the harassment conviction.

V. WHY REVIEW SHOULD BE ACCEPTED

A. The Violation Of Mr. Hoadrea's Right To Confrontation Must Be Appealable As A Manifest Error Affecting A Constitutional Right.

An accused person's constitutional right to confront witnesses against him prohibits the prosecution from using out-of-court accusations as a substitute for live testimony. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004); U.S. Const. amend. VI; Const. art. I, § 22.

The Confrontation Clause concerns the fundamental protection of the right to confront and meaningfully cross-examine those who "bear testimony" against the accused individual.

Crawford v. Washington, 541 U.S. at 51. Here, both the 911 call and the statements given to the police officer were testimonial.

A "testimonial statement" is one made under circumstances that would lead an objective witness to reasonably believe the statements made would be available for use at a later trial. *Id.* 124 S.Ct. at 1364. Testimonial statements that report a crime, initiate an investigation, and do not involve a current ongoing emergency *may not* be elicited at a trial where the declarant does not testify. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

Out-of-court statements that may be admissible under an exception to the hearsay rule must still be measured against the guarantees of the Confrontation Clause. *Crawford,*541 US. at 61.

The State must show that testimonial statements from non-testifying witnesses do not violate the Confrontation Clause guarantee. *Id*. To prove a statement to law enforcement is not testimonial, the State must show objectively that a reasonable person in the declarant's shoes would *not* understand the statement would be available for use in a criminal case. *Michigan v. Bryant*, 562 U.S. 344, 360, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011); See also *Crawford*, 541 U.S. at 52.

Here, Mrs. Simmons' 911 call was a routine exercise as the police had been to the area many times in response to the property dispute.[1]. RP 260-61.

The parties made their calls from inside their respective homes. There was no immediate threat or

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[1] The affidavit of probable cause set forth that Mrs. Simmons herself said she had taken to carrying her gun around on the property because deputies had so advised her. Mrs. Simmons regularly carried a weapon before the incident at bar ever occurred.

danger. Simply because a crime may have occurred does not render it an “emergency” for purposes of the Confrontation Clause. *Michigan v. Bryant*, 562 U.S. at 365. Mrs. Simmons called to report an alleged crime that had occurred and to trigger a criminal prosecution, not to seek immediate assistance in an emergency.

Where there is no ongoing emergency, and the primary purpose of speaking with law enforcement is "to establish or prove past events potentially relevant to later criminal prosecution," the statements are testimonial. *Id.* at 822. *State v. Burke,* 196 Wn.2d 712, 726, 478 P.3d 1096 (2021); *State v. Hudlow,*182 Wn.App. 266, 331 P.3d 90 (2014).

A statement becomes testimonial when the accuser “makes a formal statement” to inform police about what has already happened and ended. *Id.* at 824. “The fact that the victim…is distressed is not dispositive of whether an emergency exists because …the victim may be upset

long after the emergency situation has been resolved." *State v. Koslowski,* 166 Wn.2d at 424. Mrs. Simmons' emotional upset bears no weight in a *Davis* analysis and is irrelevant to whether her statements were testimonial.

The admitted statements were testimonial statements made by an unavailable witness.

This Court Must Reconsider Its Holding In State v. Burns

This Court does not lightly set aside precedent. Still, there is a sound basis for reconsideration where the earlier decision is incorrect because it harms the integrity of the judicial process and directly conflicts with RAP 2.5(a). *State v. Crossguns,* 199 Wn.2d 282, 505 P.3d 529 (2022).

Until 2019, this Court preserved an appellant's right to raise a violation of his constitutional right to confrontation for the first time on appeal. *State v. Kronich,* 160 Wn.2d 893, 161 P.3d 982 (2007).

This Court reversed its course in *State v. Burns,* 193 Wn.2d 190, 438 P.3d 1183 (2019). Relying on its understanding of *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 1354, 158 L.Ed.2d 314 (2009), the Court carved out an exception to the protections available to a criminal defendant whose attorney fails to object to the violation of his Sixth Amendment right to confrontation. *Burns,* 193 Wn.2d at 207. The Court held unpreserved confrontation clause claims as waived and unreviewable by the appellate court. *Id*.at 208.

This exceptional holding limits the appellate court's ability to do justice and conflicts with the review made possible under RAP 2.5(a)(3). *Burns,* 193 Wn.2d at 220 (*Concurrence).*

RAP 2.5(a)(3) provides that the appellate court may refuse to review any claim of error not raised in the trial court. *However*, a party may raise for the first time in the appellate court a *manifest error affecting a constitutional*

right. State v. Sublett, 176 Wn.2d 58, 78, 292 P.3d 715 (2012). Thus, by its terms, the Rule applies to all errors not objected to at trial.

The Court has placed guardrails on exercising review under RAP 2.5(a): if an alleged manifest error affecting a constitutional right is not raised in the trial court, relief will be granted only after a showing of actual prejudice resulting from the error. *Sublett* at 78. The rule does not prohibit Washington courts from addressing a confrontation error, just as it would any other manifest constitutional error.

Burns held that after *Melendez-Diaz,* "we are free to interpret our rules [RAP 2.5(a)(3)] to require a defendant to object on confrontation clause grounds at trial or waive that right on appeal, as we do in this opinion." *Burns,* 193 Wn.2d at 209 n.4.

However, RAP 2.5(a)(3) is not concerned with a waiver: that is, a deliberate choice to forgo a constitutional

right. Rather, RAP 2.5(a)(3) is concerned with failure to *preserve* an issue associated with a constitutional right. To avoid a “windfall” for the defendant, the Court has required that absent an objection, a more stringent standard for review is required: a showing of prejudice must be made.

Here, the testimonial statements triggered the constitutional right to cross-examine the affiant, and the inability to cross-examine the affiant prejudiced Mr. Hoadrea. *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *State v. McDaniel,* 155 Wn.App. 829, 230 P.3d 245 (2010); *Crawford v. Washington,* 541 U.S. at 51.

The State used the statements attributed to Mrs. Simmons in closing arguments to convict Mr. Hoadrea. The State said during the 911 call, "you could hear her voice shaking and cracking." And "Even Det. Schumacher could see even two hours later she's still shaking, she's

still upset, she's still scared to death that something's going to happen." And *she told Det. Schumacher she was afraid* and indicated -- And Det. Schumacher, not just taking her word, indicated how shaky and scared she was."

RP 391-94.

Where a prosecutor relies on out-of-court statements from a non-testifying witness, he must show beyond a reasonable doubt the improper evidence did not contribute to the verdict obtained. *Chapman v. California,* 368 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Delaware v. Van Arsdall,*475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

While it is "impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors," the Court must assume the "damaging potential of cross-examination would be fully realized" had the defendant been able to confront the declarant.

Delaware v. Van Arsdell, 475 U.S.at 684; *State v. Robinson,* 24 Wn.2d 909, 917, 167 P.2d 986 (1946).

In the same conversation with the detective, Mrs. Simmons said she was *not afraid* of Mr. Hoadrea. She had been carrying her gun around her property well before the incident. This evidence was not brought out at trial because the witness was unavailable to explain her contradictory statements. The evidence against Mr. Hoadrea regarding Mrs. Simmons was adduced by a violation of his constitutional right to confront his accuser.

The result in this matter is that Mr. Hoadrea suffered prejudice because there is reasonable doubt the evidence was sufficient to sustain the conviction for harassment. The error was not harmless.

This Court should reconsider its opinion in *Burns* and hold that a defendant has not "waived" his right to review of a constitutional violation when he does not object that his right to confrontation has been violated.

Melendez-Diaz does not restrict the States from reviewing unpreserved confrontation clause errors. *Burns,* 193 Wn.2d at 214. RAP 2.5(a)(3) is precisely written to allow for review of a manifest constitutional error when the error has not been preserved, giving a criminal defendant recourse to address the violation directly.

B. Mr. Hoadrea Received Ineffective Assistance of Counsel.

Without conceding the above argument, Mr. Hoadrea also asks this Court to review whether he received ineffective assistance of counsel where counsel did not object to the admission of evidence that violated his right to confrontation. There is no reasonable tactical decision not to object to inadmissible evidence on constitutional grounds.

Where trial counsel fails to object to inadmissible, highly prejudicial evidence, which violates the defendant's guaranteed right to confront his accusers, counsel has

performed deficiently. *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutheby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Ineffective assistance of counsel occurs when counsel's representation falls below an objective standard of reasonableness and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. A reasonable probability is lower than a preponderance standard. *Id*

A witness produced by the State to help prosecute the accused is not immune from confrontation. *Melendez-Diaz v. Massachusetts,* 557 U.S. at 314. Whenever there is testimonial evidence for purposes of the Sixth

Amendment right of confrontation, a defendant's right to cross-examine the affiant is triggered.

Here, counsel conceded, and the court admitted the 911 call made by Ms. Simmons under the excited utterance hearsay exception. Counsel did not object the statement was a testimonial statement precluded under the Confrontation Clause. (RP 106-107).

To show ineffective assistance of counsel for failure to object, the defendant must not only show there was no legitimate strategic or tactical reason for the conduct, but he must also show that an objection would likely have been sustained. *State v. FortunCebeda*, 158 Wn.App. 158, 167,172, 241 P.3d 800 (2010).

Counsel should have known that evidence gathered by police falls well within the class of testimonial statements that trigger the constitutional right to confrontation. *State v. Vazquez,* 198 Wn.2d 239, 494 P.3d 424 (2021). This is especially significant in this

matter. Failing to object to the out-of-court testimonial statements, which were potentially allowable under the rules of evidence, rendered the guarantee to confront an accuser powerless. *Crawford v. Washington*, 541 U.S. at 52.

Failing to object is unreasonable when it presents no advantage to the defense. *Pavel v. Hollins*, 261 F.3d 210 (2001). Had the trial court been told of the potential violation of the confrontation clause, it would have followed case law authority, found the statements were testimonial, and upheld Mr. Hoadrea's right to confrontation. Even though the statements could be classified as admissible "excited utterances" under the hearsay rules, constitutional protection was necessary because "where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence…" *Crawford v. Washington*, 541 U.S. at 61.

C. As A Matter Of Law The Evidence Was Insufficient To Sustain The Convictions For Harassment.

Under the State and Federal constitutions, due process requires the State to prove every element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. Art. I, §3; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Sufficiency of the evidence is a question of constitutional law that is reviewed *de novo. State v. Rich,* 184 Wn.2d 897, 365 P3d 746 (2016).

When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green,*94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To convict for the crime of harassment, the State must prove beyond a reasonable doubt that a person

knowingly threatened to cause bodily injury and *placed the other person* by words or *conduct in reasonable fear that the threat would be carried out*. RCW 9A.46.020(1)(a)(i)(b).

Here, the evidence does not support a guilty verdict for either count of harassment beyond a reasonable doubt. Mr. Simmons testified he was *not* afraid the threat would be carried out. He was not frightened when he thought he heard Mr. Hoadrea say, "the next one will be closer." RP 240. His concern was possibly ricochet or that he was a "sitting duck," but he was clear he was not afraid. RP 249.

Similarly, the only evidence that Mrs. Simmons was in fear was the inadmissible hearsay statement offered by the State. Without that statement, the admission of which violated Mr. Hoadrea's right to confrontation, the State had no evidence she was in reasonable fear the threat would be carried out. And as shown by the police report,

Mrs. Simmons said she was not afraid Mr. Hoadrea would carry out the alleged threat. CP 7.

In its opinion, the Court of Appeals held that because jurors were aware Mr. Simmons had lived and worked on a ranch, "They could infer from his background and demeanor that he would not lightly admit to being afraid" and "could infer from their common sense and experience that having a 'warning shot' fired in one's direction would be fear-inducing for most people." *Slip Op.* at 20.

The Court was wrong in its reasoning. The question is *not* whether a reasonable person would be afraid. Instead, the statutory requirement is that a person actually experienced reasonable fear because of the threat. The distinction is significant.

The Court's opinion in this matter conflicts with this Court's ruling in *State v. C.G.,* 150 Wn.2d 604, 80 P.3d 594 (2003). As a matter of law, when the testimony

establishes the individual was not afraid the threat would be carried out, the State cannot prove harassment beyond a reasonable doubt. *State v. C.G.,* 150 Wn.2d 604. This Court held evidence does not support a conviction for felony harassment where there was no evidence the threatened individual was placed in reasonable fear.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hoadrea respectfully asks this Court to grant a review of his petition.

Respectfully submitted this 24th day of July 2023.

Per RAP 18.17, this document has 4128 words.

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 38305-9-III
Respondent,	)	
	)	
v.	)	
	)	
PETRU HOADREA, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Petru Hoadrea Jr. appeals convictions for second degree assault, harassment, unlawful aiming or discharge of a firearm, and felony assault in violation of a protection order, all arising out of a late morning confrontation with neighbors with whom he was having a boundary dispute.

He asserts confrontation claims that were waived at trial, other issues raised for the first time on appeal, and alleges his trial lawyer provided ineffective assistance of counsel. We affirm the convictions but remand with directions to strike the costs of supervision imposed at subsection 4.2(B)(7) of his judgment and sentence.

FACTS AND PROCEDURAL BACKGROUND

As of mid-May 2020, when Petru Hoadrea committed the offenses in this matter, his once-friendly relationship with his Stevens County neighbors, Jack and Elaine Simmons, had soured. The parties' homes sat on a hill above a pond, and Mr. Hoadrea had built a fence on an allegedly-surveyed property line on their lower property that Mr. Simmons removed after obtaining his own survey, which he recorded. The parties had called the police on each other multiple times. In early 2020, Elaine Simmons had obtained a no-contact order against Mr. Hoadrea. In mid-April of that year, Mr. Hoadrea had been arrested and charged with violating the no-contact order and for theft in the third degree after stealing the Simmonses' fence posts.

At around 11:00 a.m. on May 19, Mr. Hoadrea was sleeping in, having completed a stint in jail, when he woke to the sound of Mr. Simmons driving stakes for a new fence conforming to his recorded survey. Mr. Hoadrea went outside to investigate and saw Mr. Simmons performing the fence work while Ms. Simmons sat on a four-wheeler nearby. Standing on the hilltop above them, Mr. Hoadrea began yelling at them to stop and get off his property. Mr. Simmons did not respond or look up, but Ms. Simmons yelled back that they had a right to be there. Mr. Hoadrea threatened to "fire a warning shot" if they did not leave, after which he fired a shot from a .22 revolver, allegedly in their direction. Rep. of Proc. (RP) at 336.

Ms. Simmons and Mr. Hoadrea both called 911. Stevens County Sheriff's Deputy Travis Feldner responded and spoke with the Simmonses. Based on a brief statement obtained from the Simmonses, Deputy Feldner undertook to obtain a warrant to search Mr. Hoadrea's home, which he and Detective Travis Frizzell assisted Detective J. Coleman Schumacher in executing after the detective also interviewed the Simmonses. The officers seized ammunition and 15 firearms during the search, including the .22 caliber revolver used to fire the warning shot.

Mr. Hoadrea was eventually charged with two counts of assault in the second degree, two counts of harassment, one count of unlawful aiming or discharge of a firearm, and one count of felony assault in violation of a protection order while armed with a firearm.

Pretrial proceedings and trial

A month before Mr. Hoadrea's jury trial, the State filed motions in limine in which it sought to offer, as excited utterances and present sense impression, both the recording of Ms. Simmons's 911 call and statements she made to her husband in the moments after the warning shot was fired. The State disclosed in its motion that while Ms. Simmons's unavailability for trial was not required for the hearsay exceptions to apply, she *was* unavailable, as "[she] has had a brain aneurism and . . . is unable to be present or testify at trial due to her physical and mental inability." Clerk's Papers (CP) at 39. At a pretrial hearing, the court and both lawyers agreed that a foundation could likely be laid for

admitting the 911 call and statements to Mr. Simmons under the hearsay exceptions, and they would be admitted subject to a proper foundation. The State had not moved for an order permitting it to offer the statements made by the Simmonses to law enforcement, and the court and counsel agreed at the hearing that the ruling did not go that far.

At trial, Mr. Simmons testified to a couple of things Ms. Simmons said to him immediately following the warning shot: When he turned to her after hearing the shot and asked, "What's this?" she answered, "He shot at you"; and pointed out to him where the bullet had touched ground. RP at 236. Mr. Simmons was asked to identify for jurors the spot she identified using photographs that were in evidence. She pointed to a spot in coarse gravel above where he had been standing. He testified that Ms. Simmons also told him at the time the shot was fired that she was scared. Questioned about her behavior in the weeks following the shooting, he testified that she seemed anxious and took additional precautions around the house, including sleeping with a gun under her pillow.

The recording of Ms. Simmons's 911 call was played for the jury without objection. In relevant part, it captured the following exchanges:

> OPERATOR: . . . What's going on[?]
>
> CALLER: He came out—we were trying to build our fence. We got it re-surveyed. We've got a copy of the survey—[its] been recorded three times and he just shot at us.
>
> OPERATOR: What's his name?
>
> CALLER: Petru Hoadrea.
>
> . . . .

> OPERATOR: What is he doing today?
>
> CALLER: We're down here building the (inaudible) fence and he just shot at us.
>
> . . . .
>
> OPERATOR: Okay. —you guys okay?
>
> CALLER: Yeah. He said it was just a warning shot, but shot at us with a .22. He's threatened us before to shoot us, so—.

RP at 301-02.

A recording of Mr. Hoadrea's 911 call was also played for the jury. Mr. Hoadrea did not object. In relevant part, it captured the following exchanges:

> OPERATOR: . . . [W]hat is it that you're reporting there today?
>
> CALLER: Jack Simmons was told not to pound his stakes for the fence on my property. He's out there pounding stakes again . . . [a]fter he removed my fence line.
>
> . . . .
>
> CALLER: . . . [T]his is crap because I'm not supposed to talk to them. He's out there yet again. You guys do nothin', the cops do nothing . . . [he] doesn't get off my property and I did fire a warning shot. But he's just out there—pounding away.

RP at 302-03.

After Mr. Simmons testified and Ms. Simmons's and Mr. Hoadrea's recorded 911 calls were played, the prosecutor called Detective Schumacher to testify. She asked him about his interview of Ms. Simmons, but focused on Ms. Simmons's demeanor, not what Ms. Simmons had said. No objection was made until the detective volunteered one of Ms. Simmons's statements:

Q I want to talk specifically about your interview with Ms. Simmons. Now,—when you started talking with her in—how was she—what was her demeanor like.

A She was generally shook up. A bit of time had passed since—the initial 9-1-1 'cause we'd driven all the way from Colville, to talk to her and her husband. But she was animated, she was a bit emotional, her voice was shaky. I mean, she was definitely nervous about what had happened. I know she was frustrated because there's been a pattern for the last several years with—the property line and the two neighbors and,—and what-not.

Q Okay. Did she come across as upset to you[?]

A Yes, definitely.

Q Okay. Did she come across as not only upset about the past but specifically about what happened that day.

A She was fairly—she was fairly rattled from that day.

Q Okay.

A —worked up, for sure.

Q Did she come across as scared specifically of Mr. Hoadrea?

A She told me directly she was.

[DEFENSE COUNSEL]: Objection.

RP at 309-10.

The prosecutor responded to the objection by arguing that Ms. Simmons's statement was an excited utterance. After a bit more foundation as to the timing, the trial court overruled the objection.[1]

[1] During the next recess, the trial court informed counsel that his ruling on Ms. Simmons's statement to the detective was based on his pretrial review of case law on the excited utterance exception. He identified several precedents that supported the exception's application to statements made several hours after a startling event.

In renewing her line of questioning, the prosecutor's last question to the detective about his interview of Ms. Simmons dealt only with her demeanor:

> Q So, other than things she's telling you, I guess, did her body—language make you believe that she was in fact fearful of Mr. Hoadrea.
>
> A She was sitting down. But she was—I mean,—and granted, some people speak with—with their hands, but her hands were everywhere—she was very animated in what she was telling me.

RP at 310.

Both parties offered considerable evidence about Mr. Hoadrea's gun collection and use of firearms. During voir dire, the State and defense counsel had quizzed potential jurors about their attitude about firearms, and a number of jurors volunteered the importance to them of their Second Amendment rights.

The State offered pictures of Mr. Hoadrea's guns and ammunition into evidence without objection. Deputies Feldner and Frizzell testified about the weapons recovered when they searched Mr. Hoadrea's home. Detective Frizzell stated that most of the firearms were properly stored in a gun safe.

Mr. Hoadrea testified that he was a veteran, range training-qualified, had served as a firearm instructor, and had invested in his firearm collection for 40 years. He emphasized his attentiveness to firearm safety. He testified that his warning shot was fired far away from the Simmonses, at a 90-degree angle into a hillside he used as a

"target hill," characterizing it as "[n]owhere where the Simmonses were at." CP at 336, 351.

During closing arguments, defense counsel framed the case as presenting an issue of defense of property and emphasized the Second Amendment implications of the case:

> We talked about the Second Amendment and the right of the people to keep and bear arms and how it shall not be infringed. And that was—important to a number of members of the panel. But I would submit to you that this is exactly how the Second Amendment protections are infringed. This right here is how the state takes away your guns. You all heard testimony about how this man defended his property, protecting his rights and his home, firing a warning shot . . . [a]nd the state just wants—to come in and take all of his weapons, which he's been collecting for thirty years, and arrest him.

RP at 418.

The jury found Mr. Hoadrea guilty as charged. The trial court imposed a 104-month sentence. The court found Mr. Hoadrea indigent, but did not strike boilerplate language in the felony judgment and sentence that imposed costs of supervision as a condition of community custody. Mr. Hoadrea appeals.

ANALYSIS

Mr. Hoadrea assigns error on appeal to (A) the trial court permitting evidence of testimonial statements by Ms. Simmons in violation of his Sixth Amendment right to confrontation, and alternatively, to his trial lawyer's failure to object in the trial court, which he contends was ineffective assistance of counsel; (B) the trial court permitting the parties to offer "highly prejudicial and irrelevant" photos of firearms, violating his right

to a fair trial, Br. of Appellant at 1; (C) insufficient evidence to support his convictions for harassment; and (D) the trial court imposing costs of supervision despite finding him to be indigent.

We can summarily address Mr. Hoadrea's fourth assignment of error. We have previously rejected the argument that supervision costs are a type of "cost" that cannot be imposed on indigent defendants. *E.g.*, *State v. Geyer*, 19 Wn. App. 2d 321, 332, 496 P.3d 322 (2021); *State v. Spaulding*, 15 Wn. App. 2d 526, 536-37, 476 P.3d 205 (2020). Nevertheless, an intervening change in the law that applies to cases on direct appeal requires that the imposition of costs of supervision be struck, which we will order done. *See State v. Wemhoff*, 24 Wn. App. 2d 198, 200-02, 519 P.3d 297 (2022) (citing SECOND SUBSTITUTE H.B. 1818, 67th Leg., Reg. Sess. (Wash. 2022)).

We address the remaining assignments of error in turn.

I. TRIAL COURT AND ATTORNEY ERROR RE: CONFRONTATION

A. Objection on confrontation grounds was waived

Mr. Hoadrea's first assignment of error is that Ms. Simmons's recorded 911 call and Detective Schumacher's testimony that Ms. Simmons told him she feared Mr. Hoadrea were testimonial, and therefore, given Ms. Simmons's unavailability at trial, they were admissible under the confrontation clause of the Sixth Amendment to the United States Constitution only if he had a prior opportunity for cross-examination, which was not the case. Br. of Appellant at 14 (citing *Davis v. Washington*, 547 U.S.

813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). The confrontation clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

The State responds that Mr. Hoadrea's confrontation right was waived at trial when he failed to object to the testimony, relying on the Washington Supreme Court's 2019 decision in *State v. Burns*, 193 Wn.2d 190, 438 P.3d 1183 (2019). While some Washington decisions had previously held that an objection on confrontation clause grounds was unpreserved but reviewable if shown to be a manifest error affecting a constitutional right, *see* RAP 2.5(a)(3), *Burns* held that the failure to object at trial *waived* the objection: "Where a defendant does not object at trial, 'nothing the trial court does or fails to do is a denial of the right, and if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.'" 193 Wn.2d at 211 (quoting *State v. Fraser*, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012)). Mr. Hoadrea did not object on confrontation grounds at trial, so his right to confront was waived and there is no "error" to serve as a basis for appeal.

We know from Mr. Hoadrea's supplemental briefing that he believes *Burns* was incorrectly decided and should be reconsidered. But "reconsidering" *Burns* exceeds our authority. We are bound to follow majority opinions of our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

B. Ineffective assistance of counsel is not demonstrated

In a supplemental brief that we granted leave for Mr. Hoadrea to file, he reframes the alleged confrontation clause violations as ineffective assistance of his trial lawyer, for failing to object.

The Washington and United States Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. *See* CONST. art. I, § 22; U.S. CONST. amend. XIV, § 1; *see also State v. Sardinia*, 42 Wn. App. 533, 538, 713 P.2d 122 (1986). To demonstrate ineffective assistance, the defendant must show both that trial counsel's representation was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 117 (2009). To be deficient, representation must fall below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Conduct that can be characterized as "legitimate trial strategy or tactics" cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Prado*, 144 Wn. App. 227, 248, 181 P.3d 901 (2008). There is a strong presumption that trial counsel's performance was reasonable. *Id.*

Prejudice requires the defendant to demonstrate a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been

different." *Kyllo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)).

A difficulty often faced by an appellant asking us to review an unpreserved confrontation objection as ineffective assistance of counsel is demonstrating that the choice not to object was not tactical. Lawyers commonly refrain from objecting to relevant testimony that is not harmful, lest it appear to jurors that they are trying to hide something. *See, e.g.*, *United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986) (common concern that "too-frequent objecting will irritate the jury or make it think the defendant is trying to hide the truth").

No information was established by Ms. Simmons's 911 call that could not be established through Mr. Simmons, and the material content of the call was largely consistent with Mr. Hoadrea's own 911 call and his testimony at trial. Potentially helpful to the defense was that, when asked by the 911 operator "You guys okay?" Ms. Simmons answered, "Yeah," and, "He said it was just a warning shot." RP at 302. In addition to failing to show that his trial lawyer's choice not to object was not tactical, Mr. Hoadrea fails to demonstrate how the admission of the call prejudiced him—proof essential to his ineffective assistance claim.

The other piece of evidence Mr. Hoadrea contends should have been challenged on confrontation grounds was Detective Schumacher's testimony that Ms. Simmons told him she was scared of Mr. Hoadrea. This testimony was offered after Mr. Simmons had

already testified to his wife's non-testimonial expression of fear to him immediately after the shot was fired. Mr. Simmons had also already testified about her anxiety and fearful behavior in the weeks that followed Mr. Hoadrea firing the shot. It appears from the framing of the prosecutor's questions to Detective Schumacher that she sought to elicit his observations of Ms. Simmon's *fearful and agitated demeanor*, not her statement. The testimony about her physical manifestations of fear was not objectionable on confrontation clause grounds.

Defense counsel's failure to object on confrontation grounds to this evidence does not appear to have been tactical, since he did object on hearsay grounds. But here again, in light of other sufficient evidence that Ms. Simmons was placed in reasonable fear by Mr. Hoadrea's shot, no prejudice is shown by the admission of Detective Schumacher's testimony about her statement.

II. PHOTOGRAPHS OF MR. HOADREA'S GUNS DID NOT VIOLATE DUE PROCESS, AND INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO THEM IS NOT SHOWN

Mr. Hoadrea next contends the trial court erred by permitting the presentation of evidence about Mr. Hoadrea's gun ownership, including photographs of the 15 guns seized in executing the search warrant. He characterizes it as a due process violation. No objection was made by the defense to any of this evidence at trial; indeed, it was elaborated on by the defense. Mr. Hoadrea argues that his trial lawyer's failure to object constituted ineffective assistance of counsel.

Due Process

We first examine Mr. Hoadrea's invocation of due process. Since no due process objection was made at trial, the error is unpreserved unless he demonstrates manifest constitutional error under RAP 2.5(a)(3). RAP 2.5(a)(3) "serves a gatekeeping function that will bar review of [most] claimed constitutional errors to which no exception was made." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). To determine whether an error is practical and identifiable (i.e., manifest), an appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (citing *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009)).

The case law on which Mr. Hoadrea relies does not support his claim of a due process-related error. Two cases on which he relies—*State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980), and *Moody v. United States*, 376 F.2d 525 (9th Cir. 1967)—make no mention of due process. They were routine appeals of evidentiary rulings on timely objections raised in the trial court.

Oughton is a murder case in which a deputy sheriff was permitted to testify, over ER 401 and 403 objections, to the discovery in defendant's car of a knife that the State admitted outside the presence of the jury could not be tied to the charged crime. 26 Wn. App. at 83. Although the appellate court described the knife as "of highly questionable relevance as it tended to impugn defendant's character or suggest the propensity for using

knives as a 'weapon,'" it declined to decide whether the objected-to admission of the knife was reversible error. *Id.* at 84.

Moody is a decision in which the appellate court held it had been error, in a narcotics smuggling case, for the district court to overrule an objection to evidence of a loaded revolver and cartridges found in the glovebox of defendant's car and witness testimony that the revolver and cartridges belonged to the defendant. 376 F.2d at 530. The appellate court held that if evidence had been offered that the defendant claimed not to know of the presence of heroin being transported in the car, the revolver might have been relevant on the issue of whether the defendant knew he was engaged in an illegal venture and had the revolver along for that purpose. *Id.* at 531-32. Since that was not the situation presented, however, it held the loaded revolver should not have been admitted. *Id.* *Oughton* and *Moody* are inapposite to this case, in which no timely evidentiary objection at trial is the basis for appeal.

The only case cited by Mr. Hoadrea that deals with due process is *State v. Rupe*, 101 Wn.2d 664, 703-08, 683 P.2d 571 (1984), in which Rupe challenged the admission of evidence of his gun collection in his death penalty sentencing proceeding. The Washington Supreme Court cited *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), also a death penalty case, for the proposition that due process is violated if, in such a proceeding, the State draws adverse inferences from the exercise of a constitutional right. *Rupe*, 101 Wn.2d at 705-07. Stated differently, Rupe was "entitled

. . . to possess weapons without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use." *Id.* at 707.

Mr. Hoadrea's briefing points to nowhere in the record where the State invited the jury to draw an adverse inference from his mere possession of firearms or otherwise used the fact of mere possession against him. He points to no contention by the State that the evidence of his gun possession proved anything more than that he possessed firearms. Possession of a firearm was an essential element of most of the charged crimes and all of the charged enhancements.[2] Not only does Mr. Hoadrea fail to demonstrate any due process error that is manifest; he fails to demonstrate any due process violation at all.

Ineffective assistance of counsel

Appellate counsel baldly asserts that "no legitimate strategy or tactic can explain counsel's failure to object to the admission of the photos and testimony about the firearms" because the evidence of firearms beyond the .22 revolver used to fire the warning shot "was unduly prejudicial" and "[t]he sheer number of firearms had great potential for some jury members to view Mr. Hoadrea as a dangerous man." Br. of

[2] Mr. Hoadrea was charged, among other offenses, with two counts of second degree assault while armed with a firearm in violation of RCW 9A.36.021(1)(c), one count of unlawful aiming or discharge of a firearm in violation of RCW 9.41.230(1), violation of a protection/no-contact order while armed with a firearm in violation of RCW 26.50.110(4), and three firearm enhancements under RCW 9.94A.533(3).

Appellant at 29-30. The State's counsel counters that this argument is "culturally tone deaf" given that Stevens County is one of Washington State's "most conservative, remote, and pro-gun counties." Resp't's Br. at 10, 22.

It is reasonable in assessing a dispute over tactical strategy that turns on prevailing attitudes in Stevens County to take judicial notice that it is a rural county, in which only 9.400 percent of the population lives within its six incorporated cities.[3] It is reasonable to take further judicial notice that it is, as the State argues, demonstrably one of the State's most politically conservative counties. Even more to the point, the voir dire, which was transcribed, supports the State's argument that there was a tactical basis for a Second Amendment-themed defense and undercuts Mr. Hoadrea's argument that there was no tactical basis for counsel's actions. During voir dire, the State asked if any of the potential jurors had strong feelings about firearms. Seven jurors volunteered that they were gun owners and cared deeply about the Second Amendment to the United States Constitution. One juror admitted to being a nongun owner and to being "very sad" about the amount of gun violence happening in the country but stated, "I understand [that in] Stevens County everyone has one. I get it. Hunting's a fine thing." RP at 169. Defense counsel later followed up on the State's question and commented that "it seemed pretty

[3] *See About Stevens County*, STEVENS COUNTY, WASH., https://www.stevenscountywa.gov/pview.aspx?id=449&catid=29 (last visited Apr. 28, 2023).

clear that most people in this room are in favor of having their rights to their firearms, and using those firearms." RP at 183.

Mr. Hoadrea fails to demonstrate that his trial lawyer's choice not to object to the evidence of his firearm ownership was not legitimate trial strategy.

III. SUFFICIENCY OF THE EVIDENCE TO PROVE THE HARASSMENT CHARGES

Mr. Hoadrea's final assignment of error is that the evidence was insufficient to prove him guilty of the harassment charges. The jury was instructed that with respect to the charges for harassment of Mr. and Ms. Simmons, four elements must be proved beyond a reasonable doubt:

> 1. That on or about May 19, 2020, the defendant knowingly threatened:
>   a. To cause bodily injury immediately or in the future to Jack[/Elaine] Simmons, or
>   b. maliciously to do any act which was intended to substantially harm Jack[/Elaine] Simmons with respect to his[/her] physical health or safety;
> 2. That the words or conduct of the defendant placed Jack[/Elaine] Simmons in reasonable fear that the threat would be carried out;
> 3. That the defendant acted without lawful authority; and
> 4. That this act occurred in the State of Washington.

CP at 71-72.

"In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Circumstantial and direct evidence

are considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009). The standard of review for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hampton*, 143 Wn.2d 789, 792, 24 P.3d 1035 (2001).

Mr. Hoadrea's challenge to his conviction for harassment of Elaine Simmons is based on his contention that the only evidence of her reasonable fear was inadmissible as violating the confrontation clause. We have already rejected that contention and identified the sufficient admissible evidence of Ms. Simmons's reasonable fear that was offered through Mr. Simmons and the observations of Detective Schumacher.

Mr. Hoadrea's challenge to his conviction for harassment of Jack Simmons also focuses on the required element that the person threatened must experience reasonable fear that the threat will be carried out. He argues that the State presented no evidence from which the jury could find that element proved as to Mr. Simmons.

When asked "[W]ere you scared when—when the shot went off," Mr. Simmons answered, "No, because I've . . . been shot at before. If he'd have hit me then I'd have been damn scared, but I was . . . scared of the ricochet. Who knows where . . . a ricochet will go[?]" RP at 239-40. He also testified, however, that following the "warning shot" incident, he began carrying his gun with him whenever he went near the disputed

property line, which the prosecutor argued in closing was the relevant evidence demonstrating his fear from the threat that was implicit in the "warning shot." He also referred to his position at the time of the shooting as that of a "sitting duck." RP at 249.

Jurors knew from Mr. Simmons's background testimony that he had lived on and worked a ranch from 1976 until selling it in 2018. They could infer from his background and demeanor that he would not lightly admit to being afraid. The jury was properly instructed that "circumstantial evidence" is "evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." CP at 60; *accord State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008). They could infer from their common sense and experience that having a "warning shot" fired in one's direction would be fear inducing for most people.

We trust jurors to infer whether a victim was placed in "reasonable fear" with the victim's characteristics in mind. Some victims will be completely forthcoming about their fear, while others will make only limited or qualified admissions and perhaps reveal fear mostly through their actions. Taken together, Mr. Simmons's testimony, the evidence of his actions, and the inferences that can be drawn from the fact that a .22 caliber revolver was shot in his direction, is sufficient.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Hoadrea raises four.

SAG 1: Mr. Simmons's trial testimony was not based on his personal perception, but solely on hearsay, and counsel's failure to object was ineffective assistance of counsel

Mr. Hoadrea argues that according to the probable cause statement, Mr. Simmons told responding officers that he did not hear a shot because he was pounding stakes for the fence, but at trial Mr. Simmons stated he *did* hear the shot. He argues that Mr. Simmons's trial testimony that he heard the shot must have been based on his wife's observations and was therefore impermissible hearsay. He argues that his trial lawyer performed ineffectively by failing to object on this basis.

Mr. Hoadrea's argument is based on a misreading of the declaration of probable cause. The reports from Deputy Feldner and Detective Schumacher attached to the declaration of probable cause do not state that Mr. Simmons denied hearing the shot. Moreover, if the deputies misunderstood Mr. Simmons in preparing their reports, he would still be expected to testify to what he *actually* saw and heard at trial. At trial, he testified that although he did not see the gun, he heard Mr. Hoadrea yelling, and he heard when the shot was fired. The probable cause statement does not conflict with Mr. Simmons's trial testimony so there was no basis on which to object.

SAG 2: The State violated Mr. Hoadrea's right to a fair trial by bringing up his custodial status

Mr. Hoadrea next contends that the State "violated my right to a fair trial" by bringing to jurors' attention that he had been in jail prior to the shooting. SAG at 5. The

authority on which he relies, however, addresses appellate review of timely evidentiary objections (*State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997)) or, where no objection was made, review of a claim of ineffective assistance of counsel (*State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021)). Washington cases hold that for jurors to hear that a defendant was in jail does not, on its own, violate the right to a fair trial. *State v. Mullin-Coston*, 115 Wn. App. 679, 694, 64 P.3d 40 (2003), *aff'd*, 152 Wn.2d 107, 95 P.3d 321 (2004). ER 609, which Mr. Hoadrea touches on, is not at issue; he was not questioned about prior convictions (he had none).

Mr. Hoadrea points out that his jail time served prior to the offense conduct on May 19 was first raised by Mr. Simmons, the State's first witness. In answering a question about the history of the parties' dispute, Mr. Simmons stated in passing, "Mr. Petru—whatever you call him, got bailed out of jail when I was about half done with [the fence] . . . ." RP at 225. The defense did not object. Mr. Hoadrea complains that the prosecutor later implied that *Mr. Hoadrea* brought up the fact of the recent jail time, an "implication [that] is untrue," when she asked, "[Y]ou had mentioned this, that you were getting out of jail. That's what you went to jail for, was this altercation with these two—these surveyors?" SAG at 6 (quoting RP at 344). The defense did not object to the prosecutor's question.

Mr. Hoadrea *had* brought up his release from jail when he was questioned about the events of May 19. His testimony appears in the transcript 10 pages before the prosecutor's question:

> Q When—What happened when Mr. Simmons started building his fence.
>
> . . . .
>
> A I have no idea when he started building his fence because I was in jail—
>
> Q Okay.
>
> A When I returned home and I went to bed because I couldn't sleep at all in jail, I got woken up by like—pounding,—metal pounding, and —on my property[.]—The way that it is because of the—(inaudible) is amplified. So it woke me up. I came out to investigate, what this pounding was. And then—I saw—two people building a fence on my property.

RP at 334.

Also germane to this issue is the pretrial discussion and ruling on the State's fifth motion in limine, which sought the court's permission to offer historical background on the protection order, the surveys, and the competing fence construction. The State conceded that some of it "may be considered [ER] 404(b) evidence," but it was admissible for the permissible purpose of explaining the friction between the parties and the Simmonses' reasonable fear. CP at 41. At the hearing on the motion, even defense counsel stated:

> [T]he state and I are each prepared to have witnesses testify to a degree about prior incidences between the Simmonses and the defendant because

> otherwise the incident that is alleged to have taken place will have no context and will make no sense. . . . And I understand what the state is seeking to allow Mr. Simmons to testify about. And we had talked a little . . . about how we're certainly not going to be getting into character evidence in conformity with one witness and not another.

RP at 109-10.

The trial court granted the State's motion to offer testimony from Mr. Simmons "to prior incidences with the defendant," CP at 44, and essentially reserved ruling on the broader issue discussed at the hearing, observing that "I don't want to preclude the parties from putting on the case that they believe is their best case," and "[I]f there's some objection that . . . we're getting beyond where we need to go, . . . then we'll deal with it." RP at 112.

Not having objected at trial to Mr. Simmons's testimony or the prosecutor's questioning of Mr. Hoadrea, Mr. Hoadrea must rely on a claim of ineffective assistance of counsel. Yet he only conclusorily addresses the twin prongs of such a claim, stating "[t]here is no tactical reason for my counsel to not object, and . . . as a result, there is reasonable probability that the result of the trial would be different." SAG at 7. A choice not to draw attention to fleeting mention of evidence that is not particularly damaging is a classic and legitimate tactical reason for not objecting, however. *E.g.*, *State v. Gladden*, 116 Wn. App. 561, 567-68, 66 P.3d 1095 (2003) (defense counsel did not object to witness statement about defendant moving "when he got out of prison"). Mr. Hoadrea does not demonstrate ineffective assistance of counsel.

SAG 3: The trial judge should have recused himself

Mr. Hoadrea next complains that Judge Lech Radzimski had presided over a separate civil trial between the Simmonses and himself, resulting in "a high probability of prejudice and bias against me." SAG at 7. He also notes that Judge Radzimski not only presided at trial but was the sentencing judge, and asks, "Is it not standard practice to use different judges for trial & sentencing?" *Id.* The answer to this latter query is "no"; it is the norm for the trial judge to serve as sentencing judge, although it is not constitutionally or statutorily required. *See, e.g.*, *State v. Sims*, 67 Wn. App. 50, 56, 834 P.2d 78 (1992) (citing RCW 2.28.030(2)).

The doctrine of waiver applies to bias and appearance of fairness claims. *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) (citing *State v. Bolton*, 23 Wn. App. 708, 714, 598 P.2d 734 (1979); *In re Welfare of Carpenter*, 21 Wn. App. 814, 820, 587 P.2d 588 (1978)). Mr. Hoadrea would have been entitled to a different judge upon filing a timely notice of disqualification, but he did not file one. *See* RCW 4.12.050(1)(a) and CrR 8.9. Although it would not avoid his waiver of the issue, we also observe that Mr. Hoadrea has not supported his claim with evidence of any actual prejudice.

SAG 4: Ineffective assistance for failure to object

Finally, Mr. Hoadrea argues that trial counsel performed ineffectively by failing to object in "numerous situations." SAG at 8. Only two occurrences are identified,

however. *See* RAP 10.10(c) (SAG must inform us, at a minimum, of the nature and occurrence of alleged errors; we are not obligated to search the record).

The two failures to object that Mr. Hoadrea identifies are his trial lawyer's failure to object when Mr. Simmons mentioned Mr. Hoadrea's getting bailed out of jail, and the prosecutor bringing up his being in jail and questioning him about the reasons why. As previously addressed, it was a legitimate tactical choice not to draw attention to these fleeting references to information that was not very damaging.

We affirm the convictions but remand with directions to strike the costs of supervision imposed at subsection 4.2(B)(7) of Mr. Hoadrea's judgment and sentence.

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.

Siddoway, J.

WE CONCUR:

Pennell, J.

Staab, J.

CERTIFICATE OF SERVICE

I, Marie Trombley, hereby certify under penalty of perjury under the laws of the State of Washington that on July 24, 2023, I electronically served, by prior agreement between the parties, a true and correct copy of the Petition for Review to Stevens County Prosecuting Attorney at prosecutor.appeals@stevenscountywa.gov.

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