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

STATE OF WASHINGTON,
Respondent,

v.

JAMES THOMAS III,
Petitioner.

COA NO. 39164-III

AMENDED PETITION FOR REVIEW

A. IDENTITY OF MOVING PARTY

Petitioner James Thomas III, through his attorney, Shawn P. Hennessy, asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Thomas requests review of the Court of Appeals April 4, 2024, ruling affirming his convictions for assault in the fourth degree, intimidating a witness, tampering with a witness, and violation of a

no contact order of protection. A copy of the decision is attached in the Appendix. Specifically, Mr. Thomas challenges the Court of Appeals decision pertaining to his intimidating a witness conviction, which was procured as a result of an abuse of discretion by the trial court in allowing a recording of an unavailable witness Danashia's conversation with the Mr. Thomas.

C. ISSUES PRESENTED FOR REVIEW

a. The Court of Appeals' characterization of a comments made by the unavailable third-party Danishia, as non-testimonial statements for purposes of a *Crawford v. Washington* violation under Confrontation Clause was erroneous.

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b. The Court of Appeals based its decision on the First Circuit case, *United States v. Castro-Davis*, which was wholly dissimilar to Mr. Thomas' case on both the facts and the law

c. The Court of Appeals' contention that Mr. Thomas did not site case law in support of his Right to Confrontation argument on appeal is misleading, because no such case law exists in Washington, and this is a matter of first impression

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D. STATEMENT OF THE CASE

Overview

Police arrested petitioner Mr. Thomas for assault in the fourth degree, assault in the second degree, unlawful imprisonment, intimidating a witness, tampering with a witness, and violation of a no

contact order of protection. All the charges involved Georgia Barton ("Ms. Barton"), who Mr. Thomas was in a relationship with. After trial, a jury acquitted Mr. Thomas of the assault in the second-degree charge and the unlawful imprisonment charge. The jury found Mr. Thomas guilty on the remaining charges.

The trial court sentenced Mr. Thomas and imposed three 60-month periods of concurrent incarceration on the tampering, unlawful imprisonment, and violation on the no contact order convictions. The trial court also sentenced Mr. Thomas to 120 months incarceration on the intimidation conviction, to be run concurrent with the other three charges. Mr. Thomas filed a timely notice of appeal, and the appeal was perfected.

Background

Mr. Thomas and complainant Ms. Barton dated for nearly two-and-a-half years and lived together. *RP 281*. Ms. Barton had a three-year-old daughter that lived with them. Ms. Barton had a methamphetamine addiction and Child Protective Services ("CPS") placed the daughter in foster care when the drug was detected in her after the child was immediately born. *RP 331*. CPS returned Ms. Barton's daughter to her

9 months later, after Ms. Barton completed rehabilitation and was deemed a fit parent. *Id*.

Ms. Barton relapsed while dating Mr. Thomas and began using methamphetamine again. *RP 455-456*. Mr. Thomas and Ms. Barton began fighting and as a result, police arrested Mr. Thomas for Assault in the fourth degree on October 4, 2021, for Assault in the second degree on November 10, 2021, and for Unlawful Imprisonment. *CP 5*. Both arrests were made as Domestic Violent offenses due to their intimate relationship. *Id*.

While incarcerated on the charges, Mr. Thomas made twelve phone calls to his children, Tyler Thomas and Deneisha Thomas between November 11, 2021, and December 10, 2021. *RP 52-53*. Due to the content of the jail calls, the State charged Mr. Thomas with Tampering and Intimidating a Witness. *Id.* The State also charged Mr. Thomas with a violation of the order of protection after he called a friend's phone and spoke with Ms. Barton, who called herself "Gigi".

The State's pretrial motion to use jail calls between Mr. Thomas and his children, Danashia Thomas, and Tyler Thomas.

The State submitted a motion to the trial court seeking to introduce recordings of jail phone calls made from Mr. Thomas to Tyler Thomas, Danashia Thomas, Amber Kaio, and Ms. Barton. The calls occurred on: November 10, 2021, at 10:44 pm; November 10, 2021, at 11:06 pm; November 16, 2021, at 9:39; November 19, 2021, at 1:58 pm; November 20, 2021, at 4:25 pm; November 23, 2021, at 6:50 pm; November 23, 2021, at 7:26 pm; November 30, 2021, at 5:03 pm; and December 10, 2021, at 2:27 pm. *CP 85-86, 222-334*. The State alleged that through the calls, Mr. Thomas formulated a plan to engage in witness intimidation and the tampering with Ms. Barton, as well as violating the order of protection.

The State specifically charged that Mr. Thomas, through his two children, attempted to intimidate Ms. Barton to recant her statement made to police against him. *RP 103-104*. The State's theory was that through a coordinated effort with his children, Mr. Thomas threatened to send photos he had on his phone of Ms. Barton using methamphetamine to CPS, so they would remove her daughter from

her. *RP 116*. The Prosecutor argued that in the November 10th and November 16, 2021, calls:

> Ms. Danashia Thomas tells her father she intends to call CPS on Georgia Barton because her father was arrested. The defendant then immediately talks to Danashia Thomas about the photographs on his phone. So, he gets arrested; that very night he gets on the phone with his daughter. He calls her from the jail and they start talking about reporting her to CPS and he says "get my phone" I'm paraphrasing, but says "get my phone to get the pictures off.

To prove tampering, the State sought to introduce jail phone call conversations from November 30, 2021, at 5:03 p.m. between Mr. Thomas and Tyler Thomas about taking a vehicle from Ms. Barton and then giving it back if "she recants". *RP 108*. The Prosecutor argued

> James Thomas gives his children [permission] to have possession of the truck, and he can do so as registered owner. So, when Danashia Thomas and Tyler Thomas take possession, they're not stealing the truck; not breaking any laws, but you don't have to -- witness tampering does not require an illegal act. The tampering is the illegal act, but underlying conduct does not have to be illegal. So, when they take the truck away from her legally, and then offer to give it back to her if she recants, that's tampering.

Id.

Defense counsel objected that the calls violated Mr. Thomas right to confrontation as held in *Crawford v Washington* because neither

Danashia Thomas nor Tyler Thomas were available as witnesses. *RP 128*. Defense counsel contended "we're starting to get into an issue of state of mind, right, of the particular witnesses. I'm not sure how that's not subjected to *Crawford*." *RP 129*. Defense counsel further argued that

> there's no way for Mr. Thomas or myself to cross-examine the witnesses about what they were thinking when they had the conversation with Mr. Thomas. Did they act on their own accord? What were their motives? Do they have a deep hatred for Ms. Barton? I don't know, but we won't get to ask that.

Id.

The trial court held that Danashia and Tyler may be co-conspirators because they do have some type of an agreement with their father. Specifically, the trial court found that there was a conspiracy between Mr. Thomas, Danashia Thomas, and Tyler Thomas to deprive Ms. Barton of the vehicle and to contact CPS to show them photographs of her using drugs unless she recants. The Court found that that the evidence was sufficient to allow the admission of the recordings if the State laid a proper foundation for them. *RP 136-137*. The calls were also

subject to redaction of certain information that was either too prejudicial or irrelevant. *RP 137*.

The Jury Trial

Ms. Barton testified that she was the in a relationship with Mr. Thomas for two-and-a-half years. *RP 281*. Ms. Barton also had a young child that lived with her and Mr. Thomas. *RP 288*. However, due to methamphetamine use, Ms. Barton had prior interactions with CPS that resulted in her child being placed in foster care. *RP. 288*. Ms. Barton was "clean" for 2-3 years and then began using methamphetamine again. This led to domestic issues with Mr. Thomas. Ms. Barton alleged that Mr. Thomas punched her on October 4, 2021, and then attacked and choked her on November 10, 2021. *CP 1*. Subsequent to Mr. Thomas' arrest, Ms. Barton had interactions with Tyler Thomas in which he both took a truck that she co-owned with Mr. Thomas and threatened to call CPS on her for her drug use. *RP 296-298*.

Ms. Barton had difficulty recollecting many of the domestic incidents she had with Mr. Thomas because of methamphetamine use. *RP 324-330*. Prior to Mr. Thomas' arrest for assault, CPS attempted to

contact her “four or five times”, but she hid from them because she was using methamphetamines. *RP 332*.

Investigator Erica Rivas testified that she interviewed Ms. Barton’s mother Renae, prior to the trial. *RP 339*. Renae told Ms. Rivas that she “fudged” her statements to CPS so Ms. Barton could maintain custody of her child. *RP 440*.

Mr. Thomas testified that when he first became involved with Ms. Barton, her child had been taken from her by CPS because of methamphetamine use. *RP 453*. Ms. Barton stopped using drugs and CPS returned her daughter to her. *Id*. However, Ms. Barton relapsed and began using methamphetamine again. *Id*. Mr. Thomas had a number of conversations with Ms. Barton about how her drug use would result in “CPS … taking the kid away again and that he did not want her “to go through that" again. *RP. 456*. Mr. Thomas stated that he never threatened Ms. Barton with calling CPS to take her child away. *RP 457*. Mr. Thomas also did not instruct Tyler Thomas or Danashia Thomas to threaten Ms. Barton or call CPS on her. *Id*.

Mr. Thomas bought a Dodge Durango and put Ms. Barton’s name on the title so she could learn how to drive and get her driver’s license.

RP 458. However, she did not contribute financially to purchasing the vehicle. Id. Mr. Thomas admitted that he did ask Tyler Thomas and Danashia Thomas to retrieve the Dodge Durango from Ms. Barton. *Id*. Mr. Thomas testified that he did so because the vehicle had a safe in it where he kept his SSI card, titles to other vehicles, his spare keys, and other valuables. *RP 458-459*. Mr. Thomas also wanted to reclaim the truck because he paid for it and "because [he did] not have much, he tried to keep what little [he did] have." Id. Ms. Barton offered to trade Mr. Thomas' SSI card back to him if she could keep the truck. RP 459. Ms. Barton had been withdrawing money from Mr. Thomas' card and he wanted to get it back. *Id*.

Mr. Thomas admitted to asking Ms. Barton to recant the statement she made to police that led to his arrest for the assault committed in November 2021. *Id*. He did so because he was trying to get her to just tell the truth on what happened that night because he "didn't choke her, didn't assault her." Mr. Thomas "just wanted [Ms. Barton] to tell the truth because…the statement that she had given that night was false". *RP 460-461*.

E. WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4 (b)(3) & (4) because the Court of Appeals decision involves a significant question of law under both the Constitution of the State of Washington and of the United States and this petition involves a substantial public interest, *to wit*, are recorded phone conversations between a jailed defendant and another testimonial or non-testimonial statements for the purposes of the Confrontation Clause and *Crawford v. Washington*. There is no case law in Washington on this issue.

Mr. Thomas presented the following authority in support of his argument:

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

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

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)

Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887, 144

L.Ed.2d 117 (1999)

Saecho v. Oregon, 249 Fed.Appx. 6782007 WL 2888620 (2007)

State v. Barnes, 85 Wn. App. 638, 932 P.2d 669 (1997)

State v. Bluford, 188 Wn.2d 298, 393 P.3d 1219 (2017)

State v. Bradford, 60 Wn. App. 857, 808 P.2d 174, *rev. denied*, 117 Wn.2d 1003, 815 P.2d 266 (1991)

State v. *Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990)

State v. Dent, 123 Wa.2d 467, 869 P.2d 39 (1994)

State v. Graham, 198 Wa. App. 1059, 2017 WL 1533245 (2017)

State v. Hudlow, 182 Wn. App. 266, 331 P.3d 90 (2014)

State v. Kitt, 9 Wa.App.2d 235442 P.3d 1280 (2019)

State v. Loew, 13 Wa.App.2d 1133, 2020 WL 4195973 (2020)

State v. MacDonald, 122 Wn. App. 804, 95 P.3d 1248, 1254 (2004)

State v. Nguyen, 10 Wn. App. 2d 797, 450 P.3d 630 (2019),

State v. Palomo, 113 Wn.2d 789, 783 P.2d 575 (1989)

State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)

State v. Salinas, 118 Wn.2d 192, 829 P.2d 1068 (1992)

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009)

State v. Trey M., 186 Wn.2d 884, 383 P.3d 474 (2016)

State v. Wallace 183 Wn. App. 1023, 2014 WL 4437702 (2014)

State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989)

State v. Whitaker, 133 Wn. App. 199, 222, 135 P.3d 923 (2006)

State v. Wilcoxon, 185 Wn.2d 324, 373 P.3d 224 (2016)

Statutes

Cr.R. 4.3(a)

ER 801(d)(2)(v)

RCW 9A.72.110(1)

U.S. Const. Amend. VI

Argument

a. The Court of Appeals' characterization of a comments made by the unavailable third party Danishia, as non-testimonial statements for purposes of a *Crawford v. Washington* violation under Confrontation Clause was erroneous.

At the trial of Mr. Thomas, the State introduced three phone conversations between Mr. Thomas and Danashia that were recorded by the jail. Mr. Thomas did not have the opportunity to cross-examine Danashia at trial because the State did not call her to testify. Nonetheless, the trial court allowed the jury to hear the phone calls because it considered the statements "non-testimonial", and thus not a violation of the Confrontation Clause as stated in the seminal case, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The first call played by the State occurred on November 30, 2021:

> [TYLER]: All right, man. I—I (unintelligible) help you (unintelligible).
>
> [DANASHIA]: No, make her write on a fucking piece of paper.
>
> [MR. THOMAS]: Anyways . . .

[DANASHIA]: Make her write a fucking contract.

[MR. THOMAS]: Yes. You can—when—when you give her the keys you can always say, “Hey, look, write out a statement saying that you” —write out a statement that she meets—she’s recanting her statement.

[DANASHIA]: To say that—yeah, I know. And she even sent mom a message saying the only way she’s helping you out is if she gets the truck back, so there’s also another piece of proof. But . . .

R.P. 312-113.

The second call between Mr. Thomas and Danashia occurred on December 2, 2021:

[MR. THOMAS]: . . . And then, uh, sent you, um, a letter. Basically, it’s not really a letter. It’s just a, uh, [an example] on how to write out a statement, or—or do a statement to the police and then, uh, you know, for recanting a statement.

[DANASHIA]: A what—for what?

[MR. THOMAS]: All right. Do you know what—you know what recanting means, right?

[DANASHIA]: No. . . .
. . . .
[MR. THOMAS]: All right. Um, for example if I—if I make a statement to police, um, you know, if I filed a report or whatever on somebody? And then . . .
(Unintelligible).
. . . and then they got somebody or— or, you know, or—or whatever. And they do whatever they’re gonna do, file charges or whatever. All right. Well, to—if I want that

> statement to go away, I would have to recant it. In other words, everything I said, I take it back. Is basically what it means. And then they can't use that statement.
>
> [DANASHIA]: Of what, you saying that she can't drive the truck?
>
> [MR. THOMAS]: No, but it—no, that's—I'm just saying for example. Like, uh, let's say—all right. Let's use [G.B.] for an example. All right. Now, the statement that she made to the police the night that I got arrested, okay? Um, if she was to call crime check and recant her statement, you know, if you—and they would basically have no choice but to drop the charges against me.

CP at 323.

The third call between Mr. Thomas and Danashia that the State played at trial occurred on December 10, 2021:

> [MR. THOMAS]: I know that you and Tyler are mad at [G.B.] and everything what's going on.
>
> [DANASHIA]: Okay.
>
> [MR. THOMAS]: But you guys can't be bothering her anymore.
> . . . .
> [DANASHIA]: You realize the only reason . . .
>
> [MR. THOMAS]: And . . .
>
> [DANASHIA]: . . . why we talked to her is because of you?
>
> [MR. THOMAS]: Because these new charges are saying that you guys were like—the—the cops are—whoever

talked to [G.B.] and her mom, the cops are making it sound like that I'm having you guys chase her around town, terrorizing her. That's what these new charges are for.

. . . .

[DANASHIA]: . . . The only thing that we did was get your

. . .

[MR. THOMAS]: Um . . .

[DANASHIA]: . . . truck back.

. . . .

[DANASHIA]: But then you writing—yeah the rest of it, I'm sure you can think of why else you got that. Because I know me and Tyler, we don't care about her. We don't talk to her. On our own time. The only reason why we talked to her is if we're asked to. And then tampering . . .

[MR. THOMAS]: Yeah.

[DANASHIA]: . . .with a witness, if anything that's—if anything that should fall back on her. Because she said that the only way she's gonna help you out is if, um, she gets the truck back, so. They just know what they're doing. It doesn't even matter anymore because either way you're not looking great.

[MR. THOMAS]: You should just give her truck back.

[DANASHIA]: No, we're definitely not giving her the truck back now. Now, why would we do that? Because obviously she's not helping you out, nothing. She's just making things worse.

[MR. THOMAS]: Actually, no, this is her mom. I'm reading this. And then in the report, in the police reports where actually shows G.B. trying to drop the charges.

C.P. at 328-29.

Based solely on these statements, the State convicted Mr. Thomas with intimidating a witness, a class B felony. On appeal, Mr. Thomas argued that the State deprived him of his right to Confrontation because Danashia did not testify at trial, yet her conversations with him were played at trial for the jury to hear. As a result, the State violated his Right to Confrontation under *Crawford*. Mr. Thomas argued that the incriminating statements made by Danashia were testimonial because the call took place while he was incarcerated. The call was proceeded by an automated warning that the conversations would be recorded and monitored by the prison. Although the warning did not explicitly state that the conversations were recorded because they could be used as evidence against the accused, logic, and common-sense dictate that the sole purpose of recording conversations involving an accused would be for police and the Prosecution to gather potential evidence. On appeal, the Court of Appeals affirmed the witness intimidation conviction and found that the trial court's ruling in allowing the recordings into

evidence was proper because the statements made by Danishia were “non-testimonial”, as defined by *Crawford*.

In *Crawford v. Washington*, the seminal United States Supreme Court on the Right to Confrontation, the Supreme Court gave examples of testimonial statements:

> [v[arious formulations of this core class of “testimonial” statements exist: “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .” Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.

Crawford 541 U.S. at 51-52 (2004). Given the definition of testimonial in *Crawford*, any jail call recorded by law enforcement and then used by the Prosecution as evidence in a trial is testimonial. There can be no doubt that these recorded calls fall under the ambit of” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement

would be available for use at a later trial." *Id*. In its decision, the Court of Appeals ostensibly hand-waves Mr. Thomas argument that he was denied the right to confrontation because the "record does not disclose whether Danashia knew that the jail recorded the conversations with her father". *App. 32-33*. Thus, because Mr. Thomas "may have only heard the warning", the right of confrontation does not apply to Danashia's statements because the record is unclear if she heard the warning also. *Id.* There was no evidence showing that Mr. Thomas was the only individual that heard the warning. Any inference that Danishia did not hear the same recording is conjecture. Given the magnitude of the Constitutional right being deprived by Mr. Thomas, a ruling based on caprice and chance is not enough.

b. The Court of Appeals based its decision on the First Circuit case, *United States v. Castro-Davis,* which was wholly dissimilar to Mr. Thomas' case on both the facts and the law

The Court of Appeals denied Mr. Thomas' appeal in part because there was no case law that he cited in support of his argument that Danishia's testimony violated the Confrontation Clause. In its decision, Division Three held that "that no case law

adopts [Mr. Thomas'] contention that Danishia's statements were testimonial. *App. 32*. While true, the Court of Appeals failed to point out *that there also is no Washington case law* (emphasis added) that adopts its position either. Citing the First Circuit[1] case from the United States' territory of Puerto Rico, Division III held that "[j]ailhouse calls are not statements to a police officer, during the course of an interrogation, nor in a structured setting designed to elicit responses intended to be used in court." *United States v. Castro-Davis*, 612 F.3d 53, 65 (1st Cir. 2010). However, even an informal reading of *Castro-Davis* shows that the facts in that case are very dissimilar to those in this matter and thus, inapplicable.

In *Castro-Davis*, co-defendant Alberto made incriminating statements to his mother over a jail phone regarding a murder that resulted from a carjacking with co-defendant Gabriel. During the recorded phone call, Alberto told his mother that the police "have a picture of Gabriel and everything. I saw it". *Castro-Davis*, 612 F.3d at 59. At trial, a recording of Alberto's telephone conversation with

[1] It should be noted that the First Circuit encompasses the Districts of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. https://www.ca1.uscourts.gov/

his mother was introduced over both Alberto's and Gabriel's objections. *Id*. The judge allowed the recording to be played and did not limit either the relevance of Alberto's recorded conversation. *Id*. Alberto was unavailable for cross-examination because he invoked his right not to testify. *Id*. A jury ultimately convicted all of the defendants. *Id*.

Gabriel appealed the district court's decision to allow introduction of Alberto's recorded statements from his telephone call with his mother. *Castro-Davis*, 612 F.3d at 64. Gabriel argued that because Alberto was repeatedly warned that his telephone conversations were recorded, a reasonable person in Alberto's shoes would know that the conversation was being recorded, and "would thus expect that anything he said could be used to prosecute him, making the statements testimonial." *Id*.

The First Circuit dismissed that argument holding that Alberto's statements were not made under circumstances that render them testimonial because "they were not 'solemn declarations made to government officials in circumstances that resemble the repudiated civil-law mode of interrogation' and thus cannot be treated as

testimonial". *Castro-Davis*, 612 F.3d at 65. (citing *United States v. Brito*, 427 F.3d 53, 68 (1st Cir.2005) (quoting *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354)).

Division Three's reliance on *Castro-Davis* was erroneous because the facts in that matter were entirely different from the ones here. Mr. Thomas argument was predicated on the unavailability of Danashia, who was not charged, despite making incriminating statements comments over the phone to Mr. Thomas. This difference was even recognized by Division Three in its opinion: "[t]his appeal concerns out-of-court statement of Danashia Thomas." *App. 33*. Unlike here, the co-defendant's statements in *Castro-Davis*, were the ones at issue, not statements made from his mother to him. Moreso, all three co-defendants were tried together in *Castro-Davis*. Accordingly, the co-defendant exercised his right under the Fifth Amendment to not incriminate himself.

Unlike *Castro-Davis*, Danashia was not a co-defendant in this matter; Mr. Thomas was the lone defendant. In its opinion, the Court of Appeals surmised that Danashia's unavailability was based on Fifth Amendment concerns:

> [w]e assume that Danashia Thomas did not testify at her father's trial because her testimony could implicate her in the crimes of intimidating and tampering with a witness, if not also aiding in the violation of a no-contact order. The Fifth Amendment provides one the right against self-incrimination. U.S. CONST. amend. V. Sometimes this right and the confrontation right create tension when the State seeks introduction of a statement of a coconspirator. A conflict arises when a coconspirator mouths a statement outside of court that implicates the defendant and then the coconspirator refuses to testify. The accused lacks the opportunity to cross-examine the actual speaker of the out-of-court statement.

App. 29. However, there was nothing in the record supporting this statement. There was no indication if the State made overtures to Danashia for her testimony. Given that she was uncharged, the State could have given her immunity to testify. However, it did not. Nonetheless, the record is unclear as to why Danashia did not testify, despite the Court of Appeals' conjecture that it was based on Fifth Amendment concerns.

Regardless, Division Three's affirmance of Mr. Thomas' conviction based on a factually dissimilar case bears review by this Court, given the Constitutional Rights implicated in this matter. Moreover, the Court of Appeals' reliance on *Castro-Davis* is also misplaced because the First Circuit decision is at best, a secondary

persuasive authority, and not binding authority in Washington. Notably, no such binding authority presently exists in the State of Washington. Thus, an opportunity is presented to this Court to review this case and create binding authority for similar cases in the State of Washington

c. The Court of Appeals' contention that Mr. Thomas did not site case law in support of his Right to Confrontation argument on appeal is misleading, because no such case law exists in Washington, and this is a matter of first impression

The Court of Appeals' decision chides Mr. Thomas for not citing case law in support of his argument. However, no case law regarding the testimonial nature of statements made by an unavailable third-party in recorded prison calls currently exists in Washington. If so, the Court of Appeals would have relied on it instead of the unpersuasive *Castro-Davis* case.

Further, a review of this Court's decisions regarding Crawford issues in the context of testimonial/nontestimonial statements shows that this issue has not been one decided by this Court. As a result, the issue raised here appears to be one of first impression. A search of case Supreme Court of Washington case law shows that this Court has reviewed the testimonial nature of such issues such as 911 calls (*State*

v. Koslowski, 166 Wn. 2d 409, 209 P.3d 479 (2009); *State v. Davis*, 154 Wn.2d 291 111 P.3d 844 (2005)); driving records (*State v. Jasper*, 174 Wn.2d 96, 271 P.3d 87 (2012)); marital privilege (*State v. Watt*, 160 Wn.2d 626, 160 P.3d 640 (2007)); out-of-court statements by codefendant who did not testify at trial (*State v. Wilcoxon*, 185 Wn.2d 324, 373 P.3d 224 (2016); and statements of a victim made to medical personnel (*State v. Scanlon*, 193 Wn.2d 753 445 P.3d 960 (2019), *State v. Burke*, 196 Wn.2d 712, 478 P.3d 1096 (2021)). No such review has been given on legally similar issues involving recorded jail calls.

Given the State's pervasive use of recorded 911 phone calls as evidence at criminal trials throughout Washington, there is a need for review by this Court, given the implication of *Crawford v. Washington* on such evidence. Mr. Thomas respectfully requests this Court to grant review on this matter, as it involves an issue of substantial public interest.

F. CONCLUSION

For the reasons stated herein and in the referenced opening brief on appeal, this Court should accept review under RAP 13.3(b)(2), (3).

I, SHAWN P. HENNESSY certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4,950 words, as calculated by the Microsoft Word "Word Count" function. The font size is Arial 14 pt.

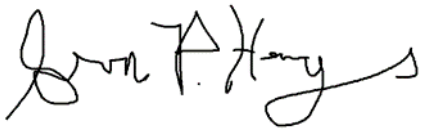
DATED this 6th day of May 2024.

Respectfully submitted,

Shawn P. Hennessy, WSBA NO.: 50981
Attorney for Petitioner
LAW OFFICES OF LISE ELLNER

CERTIFICATION

I, Shawn P. Hennessy, a person over the age of 18 years of age, served to the Spokane County Prosecutor (scpaappeals@spokanecounty.org) and James Thomas, Washington Corrections Center, PO Box 900, Shelton, WA 98584 a true copy of the document to which this certificate is affixed, On May 6, 2024. Service was made electronically to the prosecutor and via U.S. Postal to Mr. Thomas.



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Shawn P. Hennessy
Attorney for Mr. Thomas

APPENDIX

FILED
APRIL 4, 2024
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,	)	
	)	No. 39164-7-III
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JAMES THOMAS, III,	)	
	)	
Appellant.	)	

FEARING, J. — James Thomas III appeals his convictions for assault in the fourth degree, intimidating a witness, tampering with a witness, and violation of a no contact order of protection. The victim of all charges was Thomas' girlfriend, G. B. On appeal, Thomas claims the trial court erred when denying his motion to sever charges, the court erred under the hearsay rule when it allowed the playing of a recording of a coconspirator's out-of-court statement, the State violated the confrontation clause when playing the recording, and insufficient evidence supported a conviction for intimidating a witness. We affirm all four convictions.

FACTS

This prosecution arises from the relationship between James Thomas, age 45 at the time of the underlying facts in late 2021, and his girlfriend G.B., then age 25. Thomas has two children from a previous relationship: Tyler, then age 27, and Danashia, then age 20.

G.B. bore a daughter, through another relationship, in 2018. At the time of the birth of the daughter, G.B. suffered a methamphetamine addiction. Child Protective Services (CPS) placed the daughter in foster care because medical personnel, at the time of the birth, detected the drug on G.B. CPS returned G.B.'s daughter to her nine months later after G.B. completed rehabilitation.

G.B. and James Thomas met in 2020, at a time when G.B. remained sober. The two dated for two-and-a-half years and lived together. After the two cohabitated, G.B. reengaged in methamphetamine use.

On some unidentified date before October 5, 2021, R.B., G.B.'s mother, overheard James Thomas threatening to furnish CPS with incriminating photographs of G.B. using controlled substances if she ever reported him to law enforcement for assaulting her.

On October 5, 2021, James Thomas confronted G.B. because of his belief that she cheated on him. The two argued. Thomas struck G.B. and walked away. G.B. sustained a bruise to her face. Video captured the assault. G.B. declined to call law enforcement because of her love for Thomas. She soon forgot about the incident because, at the time,

she was high on methamphetamine and marijuana. R.B. photographed her daughter's face the following day.

On November 10, 2021, G.B. left James Thomas asleep at their residence as she went to her father's house. When she returned at 8:30 p.m., Thomas confronted G.B. again about her purported cheating. According to a police report, Thomas yelled, slammed G.B. to the ground, and choked her with two hands. Based on the way Thomas eyed her while strangling her, G.B. believed she would die. In self-defense, G.B. flung Thomas from her body with her feet. G.B. attempted to escape, but Thomas stood in the doorway. Thomas eventually allowed G.B. to exit the residence, and she ran outside and called the police. While she was on the phone, Thomas pointed at his cellphone in an attempt to show G.B. something. She could not see what Thomas intended to show her, but concluded that he sought to threaten to show pictures of her to CPS.

Spokane Police Department Officer Brian Blankenstein arrived at James Thomas' and G.B.'s residence thirty to forty-five minutes after G.B.'s call. G.B. presumably had returned to the residence. She shook and struggled to catch her breath. Tears streamed down her face. G.B. repeatedly grabbed her throat. Officer Blankenstein noticed that G.B. suffered from a cold. With the combination of the cold and having been strangled, G.B. encountered difficulty breathing.

During his interview of G.B. on the night of November 10, Officer Brian Blankenstein asked G.B. questions outlined in a "strangulation supplemental" checklist. Report of Proceedings (RP) (July 14, 2022) at 336-37. G.B. responded to the questioning

with complaints of shortness of breath, panting, a headache, and a tingling sensation in her fingertips. G.B. commented that, even after James Thomas released the pressure to her throat, she needed time to regain the ability to comfortably breathe. Officer Blankenstein observed a small amount of petechial hemorrhaging on G.B.'s neck, which he photographed. G.B. admitted she was high on methamphetamine and marijuana that evening.

On the night of November 10, law enforcement officers arrested James Thomas. On the arrest of Thomas, G.B. left the couple's residence and drove to her mother's apartment in a Dodge pickup truck. Thomas purchased the truck but had placed title in both his and G.B.'s names.

At 10:40 p.m. on November 10 and after the arrest of James Thomas, Thomas' son Tyler appeared at G.B.'s mother's apartment in an attempt to remove the pickup truck from G.B. G.B. called 911 again. The call prevented Tyler from appropriating the truck.

At trial, the State played recordings of numerous calls initiated by James Thomas from jail to his daughter Danashia, his son Tyler, and G.B. The conversations formed the basis for the intimidating and tampering with a witness, G.B., and violating the no-contact order. When Thomas began each call, a message warned him that the jail was recording the conversation. The message intoned:

> This call is not private. It will be recorded and may be monitored. If you believe this should be a private call, please hang up and follow facility instructions to register this number as a private number. To consent to this recorded call, press 1. To disconnect press—thank you for using Securus. You may start the conversation now.

Clerk's Papers (CP) at 220.

At 10:44 p.m. on November 10, the night of his arrest, James Thomas called, from jail, his daughter, Danashia. During that call, Danashia commented to her father: "I'm calling CPS on her [G.B.] tomorrow. I'm done. I'm dealing with her shit." CP at 223. Thomas then referenced compromising photos of G.B. in connection with Danashia calling CPS.

James Thomas telephoned Danashia a second time on November 10 at 11:06 p.m. The father and daughter discussed the photographs Danashia intended to provide CPS. Thomas remarked that he stored the photographs on his Google account or on his phone, which rested in police custody. Danashia reminded Thomas to complete the paperwork needed to authorize the jail's release to her of the phone.

On November 12, 2021, the superior court entered a protection order prohibiting James Thomas from contacting G.B. Also on November 11, Danashia called CPS and reported G.B.'s lack of care for her daughter.

On a day between November 11 and 15, 2021, Tyler Thomas approached G.B. while she was inside a vehicle. G.B. video recorded the encounter. Tyler tapped on the car window and yelled to G.B.: "they are looking for your daughter." Ex. P9 00:08-00:08. Tyler pointed to his cellphone and told G.B. that he had the phone number for CPS. Ex. P9 00:11-00;15. Tyler added: "You're fucked. You're literally fucked. Do

you think you're gonna get me locked up? No. We're gonna pin a record on you." Ex. P9 00;16-00:24. Tyler contacted CPS on November 15, 2021.

On November 16, the State charged James Thomas with felony fourth degree assault predicated on two earlier convictions for domestic violence, second degree assault by strangulation, and unlawful imprisonment, all as domestic violence offenses. Also on November 16, Thomas placed a third call to daughter Danashia. During the call, Danashia reported that she had retrieved her father's phone but could not unlock it because she lacked the password. Thomas disclosed the password. During the November 16 telephone call, with Thomas in jail, Danashia remarked that she had reported G.B. to CPS, and CPS had removed G.B.'s daughter from G.B.

> [DANASHIA]: Um, well [G.B.'s daughter] got taken by CPS last night.
> [MR. THOMAS]: Right now?
> [DANASHIA]: Mm. I said, um, whatcha you want to call it?
> [MR. THOMAS]: Yeah.
> [DANASHIA]: . . . got taken by, um, CPS last night.
> [MR. THOMAS]: What happened?
> [DANASHIA]: Uh, CPS came and got, um, [the daughter].
> [MR. THOMAS]: They came and got her?
> [DANASHIA]: Yeah.
> [MR. THOMAS]: From where?
> [DANASHIA]: Um, her mom's?
> [MR. THOMAS]: From her mom's?
> [DANASHIA]: Yeah.
> [MR. THOMAS]: All right. I mean how—why?
> [DANASHIA]: Because she's just been dropping off her kid with people and just not taking care of her. (Tyler) called CPS. I called CPS. Jenny called CPS. Even her mom called CPS.
> [MR. THOMAS]: Well, cause I know her mom's called CPS (unintelligible).
> [DANASHIA]: Yeah, I know. Yeah, I know. And then that bitch

> got you put in jail. So I called CPS on the dumb bitch. And so did Tyler.
>
> . . . .
>
> [MR. THOMAS]: . . . what happened?
>
> [DANASHIA]: . . . uh, well I was just telling you that. Um, we haven't seen her. We haven't seen your truck either or whatever. And since, um, you released your keys to me when I do—when I do see your truck, uh, me and Tyler are gonna go try to buy a steering lock and put it on the truck. So she can't take it no more. Cause she's been driving it, and we haven't seen her with the truck in like almost a week now. Or I'd say about like 5 days or whatever.

CP at 241-42 (emphasis added) (some alterations in original).

During the November 16 phone call, James and Danashia Thomas also discussed tracking the truck and taking the truck from G.B.

> [MR. THOMAS]: . . . know where the truck's at, huh?
>
> [DANASHIA]: Yeah. We don't know where it's at. And then we don't know where, yeah, we just don't know. Yeah.
>
> [MR. THOMAS]: Well anyway when you turn the phone on, um, hit the letter, you know, you just do the Z. And then, um, basically the—the—the tracking app is—it—it—it say, uh, I think Life 360 or something like that.
>
> [DANASHIA]: Mm-hm. Yeah. I looked—I looked or whatever, and it says she's at the apartment. But I bet you she's not. . . .
>
> . . . .
>
> [DANASHIA]: Well if you write a letter to me and send it to mom's house or whatever. And say I give my daughter permission to take my truck. Then that'll save my ass when I try to take your truck.

CP at 242-45 (some alterations in original).

During the November 16 call, Danashia Thomas told her father that CPS removed G.B.'s daughter from G.B. on November 15. This report was incorrect. CPS attempted to locate the daughter beginning on November 11, when an anonymous caller reported G.B.'s failure to care for the daughter. Danashia called CPS on November 11 such that

she may have been the anonymous caller. On November 17, Danashia forwarded, to CPS, photographs of G.B. looking intoxicated and smoking an unidentified substance.

CPS took G.B.'s daughter into custody on November 19, 2021. Danashia and Tyler Thomas assisted CPS in locating the daughter by furnishing phone numbers of people associated with G.B., one of whom then cared for the daughter in her home.

On November 19, James Thomas spoke with both of his children by phone. Thomas confirmed he had mailed a letter authorizing his children to seize the truck from G.B. During the call with Tyler, the father gave Tyler directions to G.B.'s father's home with instructions about taking the truck.

In a November 20, 2021, telephone conversation between James Thomas and his son Tyler, Tyler commented: he "almost punched [the] window out just trying to punch her." He was referring to his confrontation with G.B. on November 15 or earlier while G.B. rode in a car. Ex. P14 (11/16/21) at 3:40. Tyler commented that he had not yet procured the truck. Ex. P14 (11/20/21). Tyler appropriated the truck sometime between November 20 and 23.

James Thomas spoke by jail phone to daughter Danashia on November 23. Danashia declared that if G.B. "wasn't a cop callin' bitch, [she'd] fuckin' dog walk her." CP at 297.

Despite the protection order prohibiting contact, James Thomas spoke with G.B. on the telephone. The jail recorded the conversations.

On November 22, 2021, James Thomas called G.B.'s neighbor, Amber Kaioa, who then summoned "Gina" to the phone. "Gina" was a name contrived for G.B. in an attempt to hide the violation of the protection order. During the November 22 call, Thomas acknowledged the protection order:

> [MS. G.B.]: There's a no contact order we cannot talk so I gotta get off the phone.
> [MR. THOMAS]: Um, that's why I'm talking to Gina right?

CP at 271 (some alterations in original).

The November 22 conversation with "Gina" continued:

> [MR. THOMAS]: Listen to me everything's gonna be okay. I hope.
> [MS. G.B.]: (Unintelligible). I didn't want that.
> [MR. THOMAS]: What? Me arrested?
> [MS. G.B.]: That's 15 years.
> [MR. THOMAS]: Well, I didn't know I was gettin'—gettin' arrested no. . . .
> [MS. G.B.]: Yeah, you hurt me a lot so.
> [MR. THOMAS]: What[?]
> [MS. G.B.]: You hurt me. I wasn't gonna do it anymore.
> [MR. THOMAS]: All right well I have court tomorrow.
> . . . .
> [MR. THOMAS]: I don't think—at this point I'm not getting' out.
> [MS. G.B.]: No, when you get out, I still will be here to talk. . . .
> . . . .
> [MR. THOMAS]: Do you understand if I'm found guilty for this, I'm gonna get 15 years right?

CP at 272-76 (some alterations in original).

James Thomas spoke with "Gina" again on November 23.

> [MS. G.B.]: Did you give them permission?
> [MR. THOMAS]: My kids, for the—to get the truck?
> [MS. G.B.]: Yeah.

[MR. THOMAS]: Yes.
[MS. G.B.]: Why would you do that?
. . . .
[MR. THOMAS]: Because I was losing everything.
[MS. G.B.]: I wasn't gonna do that to you?
[MR. THOMAS]: I didn't . . .
[MS. G.B.]: Now, it's hard for me to see my . . . kids. Thank you very much.
. . . .
[MR. THOMAS]: Wait a minute. I don't understand. You don't have your kids?
[MS. G.B.]: They took my kids. They got my kid taken from me. Your kids did this.
. . . .
[MS. G.B.]: Take that permission back, 'cause I (unintelligible).
[MR. THOMAS]: I went to court today.

CP at 279 (some alterations in original).

The November 23 conversation continued:

[MR. THOMAS]: And, um, got a report here from (G.B.), interesting. Uh . . .
. . . .
[MS. G.B.]: Who you talking to? She's . . .
[MR. THOMAS]: I'm talking to you. I'm just telling you that I had gotten a report from, uh—the police report, uh, one from (G.B.), saying that I was trying to kill her.
[MS. G.B.]: You were choking her pretty hard.
[MR. THOMAS]: Any ways. Um, and, then, I got new charges.
[MS. G.B.]: Something about hostage, I think. And I did not . . . want that. I didn't. It's just how they took it—what I was saying.
[MR. THOMAS]: What my kids sayin'?
[MS. G.B.]: You wouldn't . . .
. . . .
. . . let her out of the room.
[MR. THOMAS]: Uh, yeah. I don't know.
[MS. G.B.]: You don't remember any of it, because you were . . .
[MR. THOMAS]: I don't remember . . .

> [MS. G.B.]: . . . too high?
> [MR. THOMAS]: . . . any of it.
> [MS. G.B.]: You were way too fucked up, and you sound like the guy I, you know, fell in love with. Probably gonna . . .
> [MR. THOMAS]: Yeah. I know.
> [MS. G.B.]: . . . fuck this (unintelligible).
> [MR. THOMAS]: I do you know that—all I know is that earlier that day I took a bunch of—I took a couple of Clonazepams, and I was fucked up.
> [MS. G.B.]: Yeah you were, but now my life . . .
> [MR. THOMAS]: I don't even remember.
> [MS. G.B.]: . . . is fucked up (unintelligible).

CP at 280-81 (some alterations in original).

James Thomas continued the November 23 conversation from jail:

> [MR. THOMAS]: I don't know—it's—I mean, the only thing that I can hope for is (G.B.) to drop the statement.
> [MS. G.B.]: How?
> [MR. THOMAS]: To withdraw the statement. How could she do it?
> [MS. G.B.]: Yeah.
> [MR. THOMAS]: How can it—or how can the statement be dropped?
> [MS. G.B.]: Yeah.
> [MR. THOMAS]: The best way to have it done, would be to call my attorney, which you probably don't know who that is yet.
> [MS. G.B.]: Well you need to . . .
> [MR. THOMAS]: Uh . . .
> [MS. G.B.]: . . . get it to where I have the truck, because I can't go anywhere or do anything.
> . . . .
> [MR. THOMAS]: That's gonna—that's gonna be hard.

CP at 281-82 (some alterations in original).

During the November 23, 2021 telephone conversation, G.B., aka Gina, handed the phone to her neighbor Amber Kaioa, and James Thomas spoke to Kaioa.

> [MR. THOMAS]: So, I have what? One, two, three felonies right

> now.
>
> [MS. KAIOA]: Yeah.
>
> [MR THOMAS]: And so, the only thing I can hope for is, like, the—the last two—that I'm not worried about the—the—the . . .
>
> . . . .
>
> . . . too much on the assault that her mom called in . . .
>
> [MS. KAIOA]: Uh-huh.
>
> [MR. THOMAS]: . . . but the other one, the most recent, well, that one it's—it's, um, if one of us can get a hold of (G.B.), and have her call my attorney . . .
>
> [MS. KAIOA]: Yeah.
>
> [MR. THOMAS]: . . .and have, uh, her statement, uh, what do you call it, recant? . . .
>
> . . . .
>
> [MS. KAIOA]: Where—where—where do I go down to the office—to your attorney and tell her to give 'em a statement?
>
> [MR. THOMAS]: Well . . .
>
> [MS. KAIOA]: So they can drop the charge . . .
>
> [MR. THOMAS]: . . . are you talkin' about . . .
>
> [MS. KAIOA]: . . .they can drop the charges? You know?

CP at 283-84 (some alterations in original).

An unidentified male entered the conversation, and James Thomas played attorney with him. Thomas commented that, if a pummeled girlfriend recants a previous statement that the boyfriend hurt her, the State necessarily must dismiss any charges.

> [MR. THOMAS]: Well, they—if—if she was to recant her statement, yeah. They were—they would have no choice but to drop the charges.
>
> . . . .
>
> [UNKNOWN MALE]: Sure. I can—I can try to talk to her and tell her to do that.
>
> [MR. THOMAS]: Do what now?
>
> [UNKNOWN MALE]: I can—I can try to contact (G.B.) and tell her to do that.
>
> [MR. THOMAS]: Well, I mean, if she—if you—if she can—if (G.B.) was willing to do that, that'd be one thing, but I can't ask you to talk to her.

[UNKNOWN MALE]: Yeah.
[MR. THOMAS]: But if I asked you to talk to her, I mean, that's the explaining of it.
[UNKNOWN MALE]: Yeah, yeah, yeah, yeah. You can't ask, right?
[MR. THOMAS]: But, um, that—so—but right now that's the only thing I can hope for . . .
[MS. KAIOA]: Right.
[MR. THOMAS]: . . . is if, you know—if she rec—if she recants her statement, then, yeah. They will drop all the charges immediately.
[UNKNOWN MALE]: Yeah.
[MS. KAIOA]: Yeah.
[UNKNOWN MALE]: Yeah. I can check see.
[MR. THOMAS]: But, um, trying to . . .
(Unintelligible).
uh, yeah. I'm gonna . . .
[MS. KAIOA]: Because I asked you and . . .
[MR. THOMAS]: . . . ask. I have the report number that she'll need.
. . . .
[MR. THOMAS]: Yeah. This is the report number that she would need.
[MS. KAIOA]: So, say she go in . . .
[MR. THOMAS]: Okay.
[MS. KAIOA]: . . . and talk to the, uh—your attorney then, and redo her statement, and that would be pretty . . .
[MR. THOMAS]: Yeah.
[MS. KAIOA]: . . . important. Wow.
[MR. THOMAS]: Yeah. I can find out who my attorney is and everything tomorrow.

CP at 284-86 (some alterations in original).

G.B., alias Gina, returned to the November 23 telephone conversation:

[MR. THOMAS]: The hard part is going to be trying to get my kids to give up the truck.
[MS. G.B.]: Yeah, because I think that's what they wanted for—ever since you went in. They don't think I can . . .
[t]hat she can take care of it, when she plans on it.
[MR. THOMAS]: Well, I'm worried about it, because, I mean . . .
[MS. G.B.]: Now, listen . . .

[MR. THOMAS]: . . .I've lost everything.

CP at 289 (some alterations in original).

James Thomas telephoned to talk to G.B. a third time on November 24, 2021. To make sure that the State would drop charges, Thomas spelled r-e-c-a-n-t for G.B.

> [MR. THOMAS]: . . . you are basically—you are calling to confirm (unintelligible) message with them that you're recanting all statements made on November 10.
>
> [MS. G.B.]: 'Kay.
>
> [MR. THOMAS]: You get all that?
>
> [MS. G.B.]: Yeah.
>
> [MR. THOMAS]: (Unintelligible) trying to take notes?
>
> [MS. G.B.]: Yeah.
>
> [MR. THOMAS]: All right. Well, like I said, (unintelligible) say it one more time. . . . She would have to give a birthday. Say, "I'm leaving this message (unintelligible) report number"—give that report number. You know, and all officers involved that you're leaving the message to recant your statement, is what (unintelligible).
>
> [MS. G.B.]: Restate my statement?
>
> [MR. THOMAS]: Recant—R-E-C-A-N-T.
>
> [MS. G.B.]: Recant my statement.
>
> . . . .
>
> [MR. THOMAS]: C-A-N-T. Recant. It's one word. All right? And what that means is anything you said in that report . . .
>
> [MS. G.B.]: All right.
>
> [MR. THOMAS]: . . . uh, no longer valid . . .
>
> [MR. THOMAS]: And then that would be the first—I'm just saying. This would be the first thing that needs to be done. And then the second thing that would need to be done is, well, I mean, you can go down to the courthouse. Um, (unintelligible). But I'm just saying this would be one of the easiest ways . . .
>
> [MS. G.B.]: Yeah.
>
> [MR. THOMAS]: But over the phone, you can pretty much say whatever you want to say, and get off the phone. Because that's all there—there is. It's all recorded. And you call Crime Check.
>
> . . . .
>
> [MR. THOMAS]: And that's pretty much it. No reason—they—they don't ask—say, "Oh. Well, why are you recanting?" "I made a

> mistake." That's all there is to it. And that's it. That's all they have to know.

CP at 306-08 (some alterations in original).

In a November 28, 2021 fourth call from jail, James Thomas conceded to G.B. that he had threatened in the past to report her to CPS.

On November 30, James Thomas spoke with his daughter and son about G.B. recanting and returning the truck to her:

> [TYLER]: All right, man. I—I (unintelligible) help you (unintelligible).
> [DANASHIA]: No, make her write on a fucking piece of paper.
> [MR. THOMAS]: Anyways . . .
> [DANASHIA]: Make her write a fucking contract.
> [MR. THOMAS]: Yes. You can—when—when you give her the keys you can always say, "Hey, look, write out a statement saying that you" —write out a statement that she meets—she's recanting her statement.
> [DANASHIA]: To say that—yeah, I know. And she even sent mom a message saying the only way she's helping you out is if she gets the truck back, so there's also another piece of proof. But . . .

CP at 312-13 (some alterations in original). In the remainder of the call, the three discussed placing a tracking device in the Dodge pickup truck.

On December 2, 2021, James Thomas spoke with daughter Danashia again:

> [MR. THOMAS]: . . . And then, uh, sent you, um, a letter. Basically, it's not really a letter. It's just a, uh, [an example] on how to write out a statement, or—or do a statement to the police and then, uh, you know, for recanting a statement.
> [DANASHIA]: A what—for what?
> [MR. THOMAS]: All right. Do you know what—you know what recanting means, right?
> [DANASHIA]: No. . . .
> . . . .
> [MR. THOMAS]: All right. Um, for example if I—if I make a

> statement to police, um, you know, if I filed a report or whatever on somebody? And then . . .
>
> (Unintelligible).
>
> . . . and then they got somebody or— or, you know, or—or whatever. And they do whatever they're gonna do, file charges or whatever. All right. Well, to—if I want that statement to go away, I would have to recant it. In other words, everything I said, I take it back. Is basically what it means. And then they can't use that statement.
>
> [DANASHIA]: Of what, you saying that she can't drive the truck?
>
> [MR. THOMAS]: No, but it—no, that's—I'm just saying for example. Like, uh, let's say—all right. Let's use [G.B.] for an example. All right. Now, the statement that she made to the police the night that I got arrested, okay? Um, if she was to call crime check and recant her statement, you know, if you—and they would basically have no choice but to drop the charges against me.

CP at 323 (some alterations in original).

Danashia and James Thomas spoke again on December 3. Thomas informed Danashia of an agreement reached whereby Danashia and Tyler would return the pickup truck to G.B. in exchange for her recanting her statement made to police. On December 5, James Thomas called Tyler and spoke to him about the same deal. Pursuant to the agreement, G.B. signed a statement of recantation.

On December 10, 2021, the State of Washington filed additional charges against James Thomas in a cause number separate from the initial charges. The State alleged Thomas had intimidated a witness, tampered with a witness, and violated a no contact order.

James Thomas called Danashia on the afternoon of December 10, 2021.

> [MR. THOMAS]: I know that you and Tyler are mad at [G.B.] and everything what's going on.
>
> [DANASHIA]: Okay.

[MR. THOMAS]: But you guys can't be bothering her anymore.
. . . .
[DANASHIA]: You realize the only reason . . .
[MR. THOMAS]: And . . .
[DANASHIA]: . . . why we talked to her is because of you?
[MR. THOMAS]: Because these new charges are saying that you guys were like—the—the cops are—whoever talked to [G.B.] and her mom, the cops are making it sound like that I'm having you guys chase her around town, terrorizing her. That's what these new charges are for.
. . . .
[DANASHIA]: . . . The only thing that we did was get your . . .
[MR. THOMAS]: Um . . .
[DANASHIA]: . . . truck back.
. . . .
[DANASHIA]: But then you writing—yeah the rest of it, I'm sure you can think of why else you got that. Because I know me and Tyler, we don't care about her. We don't talk to her. On our own time. The only reason why we talked to her is if we're asked to. And then tampering . . .
[MR. THOMAS]: Yeah.
[DANASHIA]: . . .with a witness, if anything that's—if anything that should fall back on her. Because she said that the only way she's gonna help you out is if, um, she gets the truck back, so. They just know what they're doing. It doesn't even matter anymore because either way you're not looking great.
[MR. THOMAS]: You should just give her truck back.
[DANASHIA]: No, we're definitely not giving her the truck back now. Now, why would we do that? Because obviously she's not helping you out, nothing. She's just making things worse.
[MR. THOMAS]: Actually, no, this is her mom. I'm reading this. And then in the report, in the police reports where actually shows G.B. trying to drop the charges.

CP at 328-29 (some alterations in original).

PROCEDURE

As previously written, the State of Washington, on November 11, 2021, charged James Thomas with felony fourth degree assault as a result of his altercation with G.B. on

October 4. The State also charged Thomas with second degree assault by strangulation and unlawful imprisonment as a result of the November 10 confrontation.

On December 10, 2021, the State filed charges, in a separate cause number, against James Thomas based on his phone calls to his son, daughter, and G.B. The State accused Thomas of the crimes of intimidating a witness, tampering with a witness, and violation of a no contact order.

On May 19, 2022, the State moved, under CrR 4.3(a), to join the two cases for trial. The superior court granted the motion.

On June 23, 2022, James Thomas moved, pursuant to CrR 4.4(b), to sever charges for purposes of trial. Thomas sought to place count 2 and count 3 into one trial and the remaining counts, counts 1 and 4-6, into a separate trial. Counts 2 and 3 related to the assault and unlawful imprisonment on November 10. Count 1 involved the October 4 assault, while counts 4 through 6 concerned the phone calls. According to Thomas, the State possessed stronger evidence to support counts 1 and 4 through 6, and the jury should not be swayed by the evidence on those charges when deciding guilt on counts 2 and 3. Counts 2 and 3 solely relied on G.B.'s testimony. Thomas emphasized that the evidence favoring counts 1 and 4 through 6 would not be admissible in a trial solely on counts 2 and 3 and a limiting instruction directing the jury to ignore the evidence for purposes of some counts while considering the evidence for other counts would not cure the prejudice. Presenting all charges in one trial presented Thomas with the quandary of

whether to testify with regard to counts 2 and 3. In the alternative, Thomas asked for severing the fourth degree assault from the remaining charges for purposes of trial.

The trial court denied James Thomas' motion to sever. The trial court highlighted that the counts involved the same victim and defendant, the tampering and witness intimidation charges arose from the assault charges, probable cause existed for each charge, the State tendered strong evidence of all charges, Thomas had filed no *Knapstad* motion, all evidence of one charge would be cross-admissible on the other charges, the jury would be instructed to consider each count separately, and juries sometimes return guilty verdicts on some counts while rendering acquittals on others.

Before trial, the State moved to admit and play the jail calls that James Thomas initiated to his children, G.B., and Amber Kaio. The State argued Danashia's statements were admissible as coconspirator statements. According to the State, Thomas and his two children conspired to take the Dodge truck and to return the truck to G.B. only if she recanted. The trio also plotted to intimidate G.B. to recant by reporting her to CPS.

James Thomas objected to the playing of the recorded phone calls with Tyler and Danashia Thomas. According to Thomas, the coconspirator hearsay exception did not apply because the State could not prove, independent of the phone calls, a conspiracy. The defense also claimed the jail calls were testimonial because of the warning of the recording at the beginning of the calls, a State agency recorded the calls, and the State sought to use the calls as substantive evidence at trial. Thomas contended the calls, as

testimonial statements, were not admissible under the confrontation clause unless Danashia testified.

The trial court granted the State's motion to admit the jail calls between Danashia and James Thomas. The court reasoned that the calls were not testimonial and the State held sufficient evidence independent of the calls to find that Danashia was a coconspirator.

Danashia Thomas did not testify. James Thomas did not renew his motion to sever during the course or at the end of trial.

The jury found James Thomas guilty of felony fourth degree assault for the October 4 altercation, intimidation of a witness, tampering with a witness, and violation of the no contact order. The jury acquitted Thomas of second degree assault and unlawful imprisonment based on the November 10 confrontation. The jury returned special verdicts finding Thomas and G.B. were intimate partners and that each of the crimes of which he was found guilty qualified as aggravated domestic violence offenses, based on the thirteen earlier convictions for domestic violence.

LAW AND ANALYSIS

On appeal, James Thomas claims the trial court erred when denying his motion to sever charges, the court erred under the hearsay rule when allowing the playing of a recording of a coconspirator's out-of-court statement, the State violated the confrontation clause when playing the recording, and insufficient evidence supported a conviction for intimidating a witness. We reject each assignment of error.

Severance

On appeal, James Thomas renews his contention that the superior court should have severed counts two and three, the assault and false imprisonment on November 10, from counts one, assault on October 4, and four through six, violation of a no-contact order and witness interference, for purposes of trial. Thomas contends that the strength of the State's evidence supporting the charges varied from one count to another. According to Thomas, the State possessed weaker evidence on counts two and three because his accuser, G.B., only witnessed the attack. He maintains that his defenses from one set of charges to another were inconsistent and the limiting jury instruction did not cure the prejudice.

We question characterizing the evidence for the November 10 assault as weaker when the police responded to the November 10 confrontation and noticed injuries to G.B. and when no third party witnessed the October 4 altercation. But James Thomas correctly predicted the strength of the evidence of the respective charges because the jury acquitted him of counts two and three, which counts he wanted severed from the other counts. So, the principal prejudice that Thomas feared did not materialize.

The State responds that the trial court did not abuse its discretion when denying the motion to sever. The State also contends that James Thomas waived any right to severance by failing to renew the motion during trial. Thomas does not respond to the State's waiver contention. We agree with the State's waiver argument. Therefore, we do not address the merits of Thomas' assignment of error.

CrR 4.4(a) controls a criminal defendant's motion to sever charges for trial. The rule reads with regard to waiver:

> Timeliness of Motion—Waiver.
> (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.
> (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. *Severance is waived by failure to renew the motion.*

(Emphasis added) (boldface omitted).

The law does not favor separate trials. *State v. Huynh*, 175 Wn. App. 896, 908, 307 P.3d 788 (2013). Nevertheless, on motion of a defendant, the trial court shall grant severance if the court "determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). The defendant bears the burden of showing severance is necessary. *State v. Emery*, 174 Wn.2d 741, 752, 278 P.3d 653 (2012).

If the trial court overrules a defendant's pretrial motion for severance, the accused may renew the motion before or at the close of all the evidence. CrR 4.4(a)(2). A defendant waives the severance issue if he or she fails to properly renew the motion at trial. CrR 4.4(a)(2); *State v. Emery*, 174 Wn.2d 741, 754 (2012); *State v. McDaniel*, 155 Wn. App. 829, 859, 230 P.3d 245 (2010). When a court considers a pretrial motion to sever, the court considers the potential for prejudice based on the expected evidence. The law requires a renewal by the end of the testimony in order to give the court an

opportunity to assess actual prejudice based on the evidence presented. *State v. McCabe*, 26 Wn. App. 2d 86, 95, 526 P.3d 891, *review denied*, 1 Wn.3d 1032, 534 P.3d 806 (2023); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.3(d) at 58 (4th ed. 2015).

Admissibility of Phone Call Recordings

James Thomas next assigns error to the trial court's allowing the State to play the recording of his calls to his daughter Danashia. He does not challenge the playing of the recordings of calls to his son Tyler, Amber Kaioa, G.B., or Gina. In challenging the playing of the Danashia calls, he relies on both evidentiary rules and his constitutional right to confront witnesses. We address the rulatory argument first.

James Thomas argues that Danashia's recorded comments constituted hearsay and no hearsay exception applies. Nevertheless, the evidence rules remove from the definition of "hearsay" statements of coconspirators. ER 801 declares:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if—
>
> . . . .
>
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Boldface omitted.)

Statements made in the course and furtherance of a conspiracy, by coconspirators, do not qualify as hearsay. *State v. Palomo*, 113 Wn.2d 789, 783 P.2d 575 (1989). Before admitting a coconspirator statement, the trial court must independent of the statement

determine that (1) a conspiracy existed, and (2) the defendant was a member of the conspiracy. *State v. Whitaker*, 133 Wn. App. 199, 222, 135 P.3d 923 (2006). Under ER 801(d)(2)(v), the State must establish by a preponderance of the evidence a conspiracy, namely an agreement by two or more persons confederating to do an unlawful act. *State v. Halley*, 77 Wn. App. 149, 154, 890 P.2d 511 (1995). The defendant must have participated in "a concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose." *State v. Whitaker*, 133 Wn. App. 199, 223 (2006). The conspiracy need not be a formal agreement. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 643, 145 P.3d 406 (2006).

A conspiracy may be shown by circumstantial evidence. *State v. Whitaker*, 133 Wn. App. 199, 223 (2006). When assessing the needed evidence to find a conspiracy by a preponderance of evidence, the trial court may rely on evidence otherwise inadmissible before the jury. *State v Guloy*, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). We review the admissibility of coconspirator statements for an abuse of discretion. *State v. Whitaker*, 133 Wn. App. 199, 223 (2006).

The State charged James Thomas with intimidating G.B. through his two children. According to the State, the three worked in concert to report her conduct to CPS if she did not withdraw the charges against him. The trio also applied pressure on her to recant by withholding possession of the truck until she did so. The State not only intended to prove the crime by the recorded statements of Danashia Thomas, but recorded statements among James Thomas, Tyler Thomas, Amber Kaioa, and G.B.

James Thomas argues that, under the independent source rule, the State remained barred from introducing Danaisha's statements during the phone calls. Thomas' argument, however, does not recognize that Thomas himself also uttered inculpatory words during the phone conversations and conversations with G.B. and Tyler and that those words confirmed an agreement to intimidate G.B. as a witness.

James Thomas impliedly concedes that the State may employ, when establishing a conspiracy, his own comments uttered to Danashia during the phone calls. Nevertheless, Thomas contends that his remarks to Danashia did not establish that he asked Danashia to threaten G.B. with calling CPS unless she dropped charges. According to Thomas, the calls showed that Danashia decided on her own to threaten G.B. and to call CPS. According to Thomas, the worst that can be drawn from the phone calls is that he failed to dissuade Danashia from contacting CPS, facts short of proving by a preponderance of evidence an agreement or a concert of action.

Ample evidence outside of Danaisha's comments, including James Thomas' own comments during the calls, supported the trial court's finding, for purposes of ER 801(d)(2)(v), of a conspiracy. During the November 10 calls between James Thomas uttered comments that confirmed a concert of action in supplying photos of G.B. to CPS. The father told his daughter that he stored the photos on his Google account and identified how Danashia may access the pictures. Thomas also told his daughter that he would release his phone to her from his jail property so that she could access the compromising photos.

During the November 16 call between Danashia and James Thomas, Thomas gave Danashia the password to his cellphone so that Danashia could unlock photos of G.B. Thomas' own words implicated him with directing concerted action to harm G.B. CPS confirmed that it received the compromising photographs after Danashia and Thomas' conversation.

During the November 28, 2021 call to Amber Kaioa and G.B., Thomas informed G.B. that he would direct Tyler to return the truck with her cooperation in recanting. Thomas mentioned that Danashia told him G.B. would not help him get out of jail if the children failed to return the pickup. G.B. lamented CPS removing her daughter. Thomas lied about knowledge that his children shared photographs with CPS. But Thomas conceded to G.B. that he, in the past, had shared the photographs with others. Thomas admitted he had also earlier threatened to report G.B. to CPS. Thus, Thomas' own words showed a motive to report G.B. to CPS and coincided with his conversation with Danashia about how Danashia can gain access to the photographs.

James Thomas wrote a letter giving Danashia and Tyler Thomas permission to remove the truck from G.B.'s possession. This letter confirmed concerted action to interfere in G.B.'s access to transportation unless she recanted.

In a December 3, 2021 telephone conversation with Danashia, James Thomas commented on an agreement whereby his children would return the pickup truck to G.B. if she recanted her accusations against him. In a December 5 call to Tyler Thomas, Thomas instructed Tyler to relinquish the truck to G.B. if she recanted.

James Thomas told Tyler and Danashia to return the truck when G.B. signed a written statement recanting. Thomas confirmed he desired this plan. As a result, G.B. attempted to recant.

Confrontation Clause

James Thomas also challenges the introduction of Danaisha's comments on the recorded jail calls based on the United States Constitution's confrontation clause. Because Danashia did not testify, Thomas could not cross-examine her about those out-of-court statements. We reject the contention.

Both the federal and state constitutions afford an accused the right to face witnesses presenting evidence against him or her. The United States Constitution declares:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be *confronted* with the witnesses against him.

U.S. CONST. amend. VI (emphasis added). The United States Supreme Court incorporated Sixth Amendment protections to apply to state prosecutions under the due process clause of the Fourteenth Amendment. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

Under the state constitution,

> [i]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him *face to face*.

WASH. CONST. art. I, § 22 (amendment 10) (emphasis added). RCW 10.52.060 confirms the right of every person accused of a crime "to meet the witnesses produced against him or her face to face."

According to the United States Supreme Court, the confrontation clause ensures the reliability of evidence against a criminal defendant by subjecting the evidence to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The word "confront," after all, means a clashing of forces or ideas, thus manifesting the notion of adversariness. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The confrontation clause also serves the symbolic goals of fairness and reliability in a prosecution. *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).

The accused deserves the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him or her to stand face to face with jurors so that jurors may look at the witness and judge by the witness' demeanor on the stand and manner of testimony whether the witness deserves belief. *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S. Ct. 337, 39 L. Ed. 409 (1895). In light of these considerations, the confrontation clause demands a witness be placed under oath, cross-examined, and subjected to observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 851 (1990).

According to the United States Supreme Court, face-to-face confrontation forms the core value furthered by the constitutional confrontation right. *Maryland v. Craig*, 497

U.S. 836, 847 (1990). Thus, the confrontation clause prefers a face-to-face confrontation during trial. *Ohio v. Roberts*, 448 U.S. 56, 64, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Nevertheless, the right to face-to-face confrontation between the accused and witnesses is not an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. *Maryland v. Craig*, 497 U.S. 836, 849-50 (1990). A literal reading of the confrontation clause would abrogate hearsay exceptions, a result deemed extreme. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Considerations of public policy and necessities of the case, in narrow circumstances, may preempt the right of a physical face-to-face encounter. *Maryland v. Craig*, 497 U.S. 386 (1990).

We assume that Danashia Thomas did not testify at her father's trial because her testimony could implicate her in the crimes of intimidating and tampering with a witness, if not also aiding in the violation of a no-contact order. The Fifth Amendment provides one the right against self-incrimination. U.S. CONST. amend. V. Sometimes this right and the confrontation right create tension when the State seeks introduction of a statement of a coconspirator. A conflict arises when a coconspirator mouths a statement outside of court that implicates the defendant and then the coconspirator refuses to testify. The accused lacks the opportunity to cross-examine the actual speaker of the out-of-court statement.

The United States Supreme Court addressed this conflict in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The Court found that the

admission of an out-of-court statement by a nontestifying codefendant violated the defendant's confrontation right. The government prosecuted Bruton and a man named Evans jointly for an armed postal robbery. Before trial, a postal inspector interrogated Evans in jail. Evans confessed to the crime and implicated Bruton. At trial, Evans did not take the stand but the postal inspector testified that Evans confessed to committing the crime with Bruton. The trial court instructed the jury to disregard the confession as to Bruton's guilt or innocence. The jury convicted Bruton. The Court reversed, holding that the use of Evans' confession violated Bruton's confrontation right, even with the limiting instruction. It reasoned that Evans' confession added "critical" weight to the case against Bruton, in a form that was not subject to cross-examination.

The United States Supreme Court has since refined its confrontation clause jurisprudence by limiting its scope to testimonial statements. In 2004, the Supreme Court effectively changed the landscape of its confrontation clause analysis in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court considered the admission of an out-of-court recorded statement made to police against Crawford and held that the confrontation clause barred its admission because the statement was "testimonial." The Court examined the historical lineage of the defendant's right to prior cross-examination of an unavailable witness presented against him. Based on a textual approach, it reasoned that the confrontation clause applies to "witnesses" against the accused, that is those who "bear testimony." 541 U.S. 36, 51

(2004). Thus, the Supreme Court concluded that the confrontation clause was primarily concerned with testimonial statements.

In *Davis v. Washington*, 547 U.S. 813, 821-24, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Supreme Court distinguished *Crawford* when ruling that "nontestimonial statements" fall outside of the rubric of the Confrontation Clause. Only testimonial statements render the out-of-court declarant to be a "witness" within the meaning of the confrontation clause. The Court held the confrontation clause permits nontestimonial statements regardless of a lack indicia of reliability. Only after a court concludes that a given statement is testimonial should the court proceed to analyze the confrontation clause.

Crawford and *Davis* advised generally on how to assess whether a statement is testimonial. When the statement is functionally trial testimony, it is testimonial. A testimonial statement seeks to establish or prove some past fact or is a weaker substitute for live testimony at trial. *Davis v. Washington*, 547 U.S. 813 (2006). When the out-of-court declaration is just a casual statement made to a friend, it is nontestimonial. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

In *Crawford v. Washington*, the United States Supreme Court gave examples of testimonial statements:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";

> "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ."
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.

Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (citations omitted).

James Thomas categorizes Danashia's phone comments as testimonial statements due to the automated warning at the beginning of each jail call informing the caller that the call would be recorded and monitored. As such, according to Thomas, the recorded statements substituted for in-court testimony. He recognizes that no case law adopts his contention.

One court has adjudged jail house calls to be nontestimonial statements even with warnings of the calls being recorded. *United States v. Castro-Davis*, 612 F.3d 53, 65 (1st Cir. 2010). Jailhouse calls are not statements to a police officer, during the course of an interrogation, nor in a structured setting designed to elicit responses intended to be used in court. *United States v. Castro-Davis*, 612 F.3d 53, 65 (1st Cir. 2010). The conversants during the call generally do not wish to have the conversation repeated in court. Another court ruled that comments made to loved ones or acquaintances are not the kind of memorialized evidence created by the judicial process and thus are not deemed testimonial. *United States v. Manfre*, 368 F.3d 832, 838 n.1(8th Cir. 2004).

Often the declarant of the out-of-court statement knows that the statement can or will be used in a legal proceeding. This knowledge presumably renders the utterances

testimonial in nature. This appeal concerns out-of-court statement of Danashia Thomas. The record does not disclose whether Danashia knew that the jail recorded the conversations with her father. James Thomas may have only heard the warning. The State does not argue that Danashia never heard the warning.

Insufficient Evidence – Intimidating a Witness

The jury convicted James Thomas with intimidating a witness. On appeal, Thomas challenges the sufficiency of evidence for the conviction.

RCW 9A.72.110 defines intimidation of a witness, in part:

> (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
> (a) Influence the testimony of that person;
> (b) Induce that person to elude legal process summoning him or her to testify;
> (c) Induce that person to absent himself or herself from such proceedings; or
> . . . .
> (3) As used in this section:
> (a) "Threat" means:
> (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
> (ii) Threat as defined in RCW 9A.04.110(27).
> (b) "Current or prospective witness" means:
> (i) A person endorsed as a witness in an official proceeding;
> (ii) A person whom the actor believes may be called as a witness in any official proceeding; or
> . . . .
> (5) For purposes of this section, each instance of an attempt to intimidate a witness constitutes a separate offense.

The legislature amended RCW 9A.04.110 in 2011 c 166 § 2 by changing subsection (27) to subsection (28). RCW 9A.04.110(28) declares:

> "Threat" means to communicate, directly or indirectly the intent:
> . . . .
> (e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
> (f) To reveal any information sought to be concealed by the person threatened; or
> . . . .
> (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships;

A claim of insufficiency admits the truth of the State's evidence and all inferences reasonably drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence carry equal weight. *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016). Reviewing courts give deference to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Trey M.*, 186 Wn.2d 884, 905 (2016).

James Thomas contends that, even when admitting the truth of the State's abundant evidence, the evidence fell short of convicting him of intimidating G.B. to recant her statement about the assault and unlawful imprisonment. According to Thomas, the State presented no evidence that he threatened to call CPS on G.B. for her drug use if she did not repudiate her allegations to the police. Thomas mentions a statement he uttered to his daughter Danashia about retrieving photographs from his cell phone, but he maintains that the conversation never identified the photographs or how Danashia would employ the pictures. The recorded call, according to Thomas, also evidenced no direction from Thomas to his daughter to harm G.B. Instead, Danashia initiated the topic

of G.B. In short, during the telephone conversations, Thomas, as the argument proceeds, never solicited or sanctioned threats by Danashia.

We disagree with James Thomas and conclude that ample direct and circumstantial evidence supported a finding of intimidating a witness. The State presented evidence that Thomas knew G.B. had previously lost custody of her daughter due to her substance use. G.B. had recently relapsed in methamphetamine use. Thomas stored photographs of G.B. using substances on his phone. Before the October 5 altercation, G.B.'s mother overheard Thomas threatening G.B. with furnishing CPS those photos if she reported him to law enforcement. The photographs revealed embarrassing information and endangered G.B.'s relationship with her daughter.

James Thomas admitted in a call to G.B. that he had threatened to call CPS in the past. In the context of this conversation soliciting a recantation, a jury could reasonably conclude that Thomas' reminder to G.B. of his past conduct impliedly threatened to report her again if she did not cooperate.

After the assault on November 10, James Thomas pointed to his phone while G.B. called 911. G.B. concluded that Thomas intended to threaten her by distributing photographs of her.

Later on November 10, James Thomas spoke with his daughter and offered up the photographs after Danashia expressed a desire to call CPS. This phone call occurred as G.B. called 911 because Thomas' son chased her. Thomas thereafter released his phone

to Danashia. During a later phone call, Thomas disclosed his password to Danashia so she could unlock the photographs.

Several days later, Tyler Thomas confronted G.B. in her car. In fulfillment of the adage of like father like son, Tyler pointed to his phone while impliedly threatening to call CPS. Tyler, Danashia, and James Thomas consummated their conspiracy when fulfilling the threat to disclose photographs to CPS. Thereafter, in an attempt to regain the pickup truck, G.B. wrote a retraction.

James Thomas suggests the State must show an overt, threatening, action made by the defendant toward a testifying witness. Nevertheless, RCW 9A.72.110 does not limit a qualifying threat to an overt threat. Nor need the defendant utter the threat directly to the victim. Instead, RCW 9A.72.110(3)(a)(i) and RCW 9A.04.110(28) reference an indirect communication.

The term "threaten" can include all threats, whether or not verbalized. *State v. Pinkney*, 2 Wn. App. 2d 574, 579, 411 P.3d 406 (2018). A person may direct a threat and thereby intimate a witness without that threat being communicated to the threat's target; the threat may be transmitted to a third party. *State v. Ozuna*, 184 Wn. 2d 238, 247, 359 P.3d 739 (2015).

CONCLUSION

We affirm James Thomas's convictions for assault in the fourth degree, intimidating a witness, tampering with a witness, and violation of a no contact order of protection.

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.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Staab, J.

LAW OFFICER OF LISE ELLNER, PLLC

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