No. 92057-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNIE MURREL COOLEY,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 45933-7-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 13-1-00268-1
The Honorable Thomas Larkin, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is JOHNNIE MURREL COOLEY, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 45933-7-II, which was filed on July 21, 2015. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it admitted an out of court statement for a purpose other than the truth of the matter asserted, where the stated purpose was irrelevant to any matter at issue in the trial?

2. Did trial counsel provide ineffective assistance when he failed to request an instruction limiting the jury's consideration of an out of court statement admitted for a purpose other than the truth of the matter asserted, which allowed the jury to consider the statement for the improper purpose of establishing Johnnie Cooley's guilt?

3. Was the improper admission of an out of court statement, coupled with the lack of a limiting instruction, prejudicial where the statement was the only direct evidence tying Johnnie Cooley to the telephone number used to send threatening texts and place phone calls to the victim, and where the prosecutor used the statement in her closing argument as proof that Johnnie Cooley was guilty?

4. Did the trial court fail to comply with RCW 10.01.160(3)

when it imposed discretionary legal financial obligations as part of Johnnie Cooley's sentence, where there was no evidence that he has the present or future ability to pay?

5. Can Johnnie Cooley's challenge to the validity of the legal financial obligation order be raised for the first time on appeal?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Johnnie Murrel Cooley with four counts of violating a domestic violence court order (RCW 26.50.110). (CP 1-3) The State also alleged that the four offenses were domestic violence incidents (RCW 10.99.020). (CP 1-3) The jury found Cooley guilty as charged. (CP 30-37; 12/19/13 RP 3-4)[1] The trial court sentenced Cooley to a standard range sentence of 60 months, and imposed both mandatory and discretionary legal financial obligations. (02/12/14 RP 288-89; CP 50, 52) Cooley timely appealed. (CP 58) The Court of Appeals affirmed his conviction and sentence.

B. SUBSTANTIVE FACTS

Amy Lutter and Johnnie Cooley were romantically involved for twelve years, during which time they lived together and had two

[1] The transcripts will be referred to by the date of the proceeding contained therein.

daughters. (12/17/13 RP 71-72) The relationship did not end well, and Lutter obtained a protection order precluding Cooley from knowingly and purposefully contacting her in person or by any other means. (12/17/13 RP 73; CP 6-7; Exh. P2, P3)

In January of 2013, Lutter and her daughters were staying at Lutter's parents' house in South Tacoma. (12/17/13 RP 74) At the time, Cooley lived about a half-mile away, in the area of South 70th and South Sheridan Streets. (12/17/13 RP 74, 78) Around 8:00 on the morning of January 17, Lutter decided to walk from her parents' house to Cooley's home because, according to Lutter, Cooley had been calling and texting her, and she wanted to talk to Cooley's landlord because she thought he could make Cooley stop contacting her. (12/17/13 RP 78, 79)

As she neared Cooley's home, she saw Cooley's truck turn the corner and drive towards her. (12/17/13 RP 79) Lutter testified that Cooley was driving the truck, and that he drove up onto the curb towards her as she stood on the sidewalk. (12/17/13 RP 79) Lutter jumped out of the way and fell to the ground. (12/17/13 RP 79) As Cooley drove away, Lutter picked up a rock and threw it at his truck, cracking a window. (12/17/13 RP 79)

At 8:07 that morning, a call came into 911 dispatch, and a

male caller reported that his ex-girlfriend had broken his car window with a rock. (12/17/13 RP 177, 179, 123) The caller told dispatch that he would wait for police officers at the intersection of South L and South 70th Streets. (12/17/13 RP179)

When officers responded to that location, they found Lutter standing at the scene, and she appeared to be upset and shaken. (12/17/13 RP 124-25, 185) Lutter told them that her boyfriend had tried to run her over, and she showed the officers tire tracks that appeared to go from the street onto the planting strip and back to the street. (12/17/13 RP 125-26, 185)

Officer Christopher Yglesias escorted Lutter to a nearby police substation. (12/17/13 RP 83, 129) While they were there, Lutter's received multiple calls from telephone number 253-906-7459, which Lutter said was Cooley's number. (12/17/13 RP 84-85, 129) Officer Yglesias told Lutter to answer one of the calls and to turn on the speaker. (12/17/13 RP 88-89, 131) Officer Yglesias testified that he heard a male caller make threatening statements to Lutter. (12/17/13 RP 131) Lutter testified the male caller was Cooley. (12/17/13 RP 88-89)

Lutter also showed Officer Yglesias several threatening text messages that she claimed to have received from Cooley on

January 13, 2013. (12/17/13 RP 85, 86-87, 88, 91-93; 131-33) The State presented photographs of incoming calls and several threatening text messages sent to Lutter's phone from telephone number 253-906-7459. (Exh. P8-P11, P25; 12/17/13 RP 86-87, 88; 12/18/13 RP 206-07)

The State played an audiotape of the 911 call. (12/17/13 RP 182) On the recording, the 911 operator can be heard asking the male caller if he placed the call from telephone number 253-906-7459. (Exh. 1) The male caller indicates that the number is probably correct. (Exh. 1) Lutter testified that the voice of the male 911 caller belonged to Cooley. (12/17/13 RP 93-94)

Officer Yglesias eventually located Cooley walking in the neighborhood. (12/17/13 RP 135-36) Cooley told the Officer that he was walking to Lutter's parents' house to get money to fix the cracked truck window. (12/17/13 RP 137) He said the tire marks were made when he tried to swerve to avoid the rock thrown by Lutter. (12/17/13 RP 137) Cooley denied calling or texting Lutter, but did acknowledge calling 911. (12/17/13 RP 137, 169)

V. ARGUMENT & AUTHORITIES

The issues raised by Cooley's petition should be addressed by this Court because the Court of Appeals' decision conflicts with

settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. ADMISSION OF THE 911 OPERATOR'S STATEMENT CONFIRMING THE CALLER'S TELEPHONE NUMBER WAS PREJUDICIAL ERROR, BECAUSE IT WAS NOT ADMITTED FOR A RELEVANT PURPOSE AND NOT ACCOMPANIED BY A LIMITING INSTRUCTION.

Cooley objected to the portion of the 911 call where the operator asks the caller whether his telephone number is 253-906-7459, and the caller responds that if that is what the operator has as the number, "that must be it." (12/16/13 RP 54-55; Exh. 1) Cooley argued that the operator's statement is hearsay and its admission would violate his right to confront witnesses against him because the State did not plan to call the speaker to testify. (12/16/13 RP 54-55, 57) The trial court concluded that the operator's statement could be played for the jury, but not for the truth of the matter asserted. Instead, it was admissible to show "what the defendant did as a result of that [statement] or what he said." (12/16/13 RP 57) In its Opinion, the Court of Appeals did not decide whether or not admission of the operator's statement was error, only that any error was harmless. (Opinion at 8-9)

1. *Admission of the 911 operator's statement was error because the purpose for which it was admitted was not relevant to any fact at issue in this case.*

ER 801(c)[2] permits admission of statements that would otherwise be excludable as hearsay when they are not offered for the truth of their contents but for another relevant purpose. *See* State v. Aaron, 57 Wn. App. 277, 278-79, 787 P.2d 949 (1990). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The relevancy of evidence in a given case will depend on the circumstances of the particular case and the relationship of the facts to the ultimate issue. ER 401.

In Aaron, Division 1 found that the trial court abused its discretion in admitting evidence related by a 911 dispatcher to a police officer who testified at trial. 57 Wn. App. at 278-79. The officer was told by the 911 dispatcher that a burglary suspect used a blue jeans jacket to push through some bushes to retrieve stolen property. A blue jeans jacket and stolen goods were found in a car that Aaron occupied just before his arrest. 57 Wn. App. at 278-79.

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[2] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

At trial, Aaron challenged as hearsay the police officer's testimony that the dispatcher told him about the blue jeans jacket. The trial court overruled the hearsay objection and admitted the statement not for the truth of the matter asserted, but instead to show the officer's state of mind in explaining why he acted as he did. The trial court also refused to give a limiting instruction requested by the defense. 57 Wn. App. at 279-80.

On appeal, Division 1 reversed, reasoning that because the legality of the search and seizure preceding Aaron's arrest was not at issue, the officer's state of mind was also not at issue. Thus, the officer's state of mind was not relevant to any fact of consequence. The court went on to say that the true purpose of the evidence was "solely to suggest to the jury that the jacket containing [the stolen property] belonged to Aaron." 57 Wn. App. at 279-80.

In this case, the caller did not acknowledge that the number recited by the operator was in fact correct, so the caller's verbal response to the 911 operator's statement sheds no light on any fact at issue. Similarly, what the caller did in response to the dispatcher's statement was neither known nor relevant. The caller's response simply did not make "determination of the action more probable or less probable than it would be without the

evidence." ER 401. Accordingly, the dispatcher's statement was not relevant for the purpose cited by the trial court, or for any other purpose.

As in Aaron, the true purpose of the admission of the 911 operator's statements was to establish guilt. Its true purpose was to allow the State to connect Cooley to that specific telephone number. This purpose is evidenced by the fact that the prosecutor referred to the recording in closing statements as proof that Cooley called 911 from that exact cellular phone number. (12/18/13 RP 246)

Contrary to the Court of Appeals' decision, the improper admission of this evidence was highly prejudicial because it directly tied Cooley to the phone number used to text and call Lutter on January 13 and January 17, 2013. The only other evidence connecting Cooley to that telephone number came from Lutter herself. Cooley vigorously challenged Lutter's credibility throughout trial. (12/17/13 RP 103-09; 12/18/13 RP 255-72) The jury's determination of guilt or innocence rested on its opinion of Lutter's credibility. It is impossible to say that the jury would have necessarily found her testimony credible if it had not been improperly bolstered by the operator reciting the phone number

connected to the texts and calls.

2. *The error in admitting the 911 operator's statement was compounded because trial counsel failed to request that the jury be instructed on the limited purpose for which the evidence was supposed to have been admitted.*

When trial counsel failed to request an instruction limiting the purpose for which the jury could consider the statement, he failed to provide effective assistance of counsel. Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To show ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of his trial. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's error results in prejudice when there is a reasonable probability that the outcome of trial would have differed absent the errors. Thomas, 109 Wn.2d at 226. However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. Once again, the Court did not reach the question of whether

counsel was ineffective, instead finding that any deficient representation was not prejudicial. (Opinion at 9-10)

When evidence is admitted for a limited purpose and the party against whom it is admitted requests a limiting instruction, the court is obliged to give it. State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001); ER 105.[3] The 911 operator's statement was admitted for a limited purpose. (12/16/13 RP 57) Thus, if Cooley's trial counsel had requested a limiting instruction, it would have been given.

The limiting instruction would have prevented the jury from using the evidence as proof that Cooley owned or used a telephone assigned the number 253-906-7459, which was the number associated with the threatening texts and telephone calls. As noted in Aaron, "[w]hile there may be some doubt as to the efficacy of a limiting instruction in effectively controlling jury deliberations, it is of vital importance that counsel have the benefit of the instruction to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's

[3] "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105.

guilt." 57 Wn. App. at 281.

Trial counsel here opposed the admission of the operator's statement but failed to act to limit its impact on the jury. This failure fell below objective standards of reasonableness. The admission of the operator's statement was prejudicial, as argued above, and there can be no legitimate purpose for failing to limit its prejudicial impact.

The improper admission of the hearsay evidence, coupled with the lack of a limiting instruction, was therefore prejudicial error requiring reversal of Cooley's convictions. See Aaron, 57 Wn. App. at 282-83 (finding that the trial court's admission of irrelevant hearsay coupled with a failure to give a limiting instruction was prejudicial error requiring reversal of Aaron's convictions).

B. THE TRIAL COURT'S FAILURE TO CONSIDER COOLEY'S ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON DIRECT APPEAL.

1. *The record fails to establish that the trial court actually took into account Cooley's financial circumstances before imposing discretionary LFOs.*

At sentencing, the State asked the trial court to impose legal financial obligations (LFOs) totaling $3,300.00, including $2,500.00 in non-mandatory DAC attorney fees. (02/21/14 RP 284) Cooley

told the court that his child support payments to Lutter had recently been reduced to zero because he would be incarcerated with no ability to pay, and that he was concerned for the financial welfare of his children. (02/21/14 RP 288) The trial court ordered Cooley to pay legal costs in the amount of $2,300.00, which included discretionary costs of $1,500 for appointed counsel, stating only: "I've given you a thousand dollars there as well . . . [t]hose daughters could use that money when you get out." (02/21/14 RP 288-89; CP 50)

The Judgment and Sentence includes the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 49)

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [t]he court **shall not** order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Cooley's sentence if it did not first take into account his financial resources and the individual burdens of payment.

As this Court recently held:

> RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future

ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Cooley's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Cooley's ability to pay or ask it to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.[4] (RP 2390) While acknowledging that Cooley would have financial burdens that come with raising children when he is released from confinement, the trial court made no further inquiry into Cooley's financial resources, debts, or employability. There was no specific evidence before the trial court regarding Cooley's past employment or his future educational opportunities or employment prospects.

The boilerplate finding in section 2.5 of the Judgment and Sentence does not establish compliance with RCW 10.01.160(3)'s

[4] It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

requirements. Such a boilerplate finding is insufficient to show the trial court actually gave independent thought and consideration to the facts of Cooley's case. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). The Judgment and Sentence form used in Cooley's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. (CP 49) Rather, every time one of these forms is used, there is a pre-formatted conclusion that the trial court followed the requirements of RCW 10.01.160(3), regardless of what actually transpired. This type of finding therefore cannot reliably establish that the trial court complied with RCW 10.01.160(3). And the trial court made no contemporaneous statements at sentencing regarding Cooley's ability to pay. (02/21/14 RP 288-89)

In sum, the record fails to establish the trial court actually took into account Cooley's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the

remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). The record in this case does not expressly demonstrate the trial court would have found sufficient evidence of Cooley's ability to pay the LFOs. At sentencing, the State failed to point to any evidence establishing Cooley's past or future educational and employment prospects. It cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Cooley's individual financial circumstances. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93; see also Blazina, 182 Wn.2d at 839 ("[b]ecause the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings).

2. *Cooley's challenge to the LFO order should be reviewed for the first time on appeal.*

Even though this Court reached the LFO issue for the first

time on appeal in Blazina,[5] and even though Washington courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on appeal when the ruling in question is in violation of statutory requirements,[6] the Court of Appeals refused to consider the issue in Cooley's case. (Opinion at 10-11) But this issue can and should be reviewed on direct appeal regardless of whether the defendant objected below.

First, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non-payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at an unconscionably high 12% interest rate. RCW 10.82.090.

Furthermore, if the LFO order is not reviewed on direct appeal and is left for correction through the remission process, then

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[5] "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Blazina, 182 Wn.2d at 835.

[6] *See e.g.* State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) ("when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal"); State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999).

the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains with the State.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that may otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. *See* State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources).

For all these reasons, the Court of Appeals should have reached this issue on appeal. This Court should now reach this issue and remand Cooley's case to the Superior Court for consideration of his ability to pay LFOs.

VI. CONCLUSION

The trial court should not have admitted the 911 operator's statement because the purpose for which it was admitted was

irrelevant to any matter at issue in the trial. This error, coupled with trial counsel's ineffective performance in failing to request a limiting instruction, was prejudicial and likely impacted the outcome of the trial. Cooley's convictions should therefore be reversed.

Furthermore, the trial court's failure to comply with the sentencing statute when it imposed discretionary LFOs constitutes a sentencing error that may be challenged for the first time on direct appeal, and is ripe for review. Because the record fails to establish that the trial court did in fact consider Cooley's ability to pay before imposing discretionary LFOs, Cooley's case should be remanded for resentencing.

DATED: August 10, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Johnnie Murrel Cooley

CERTIFICATE OF MAILING

I certify that on 08/10/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Johnnie M. Cooley, DOC# 332624, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHNNIE MURREL COOLEY, Appellant.	No. 45933-7-II UNPUBLISHED OPINION

JOHANSON, C.J. — Johnnie Murrel Cooley appeals his jury trial convictions for four counts of domestic violence court order violation,[1] the special verdict domestic violence findings, and the imposition of legal financial obligations (LFOs). He argues that (1) the trial court erred in admitting a portion of a 911 recording in which the operator identifies the number the call originated from, (2) his trial counsel provided ineffective assistance of counsel when he failed to request a limiting instruction related to this portion of the 911 recording, and (3) the trial court erred when it failed to consider his ability to pay before imposing discretionary LFOs. In a pro se statement of additional grounds for review[2] (SAG), he raises several additional ineffective assistance of counsel claims and challenges jury instruction 17, which advised the jury how to complete the special verdict forms. We hold that the admission of the 911 operator's statement

[1] RCW 26.50.110(5); RCW 10.99.020.

[2] RAP 10.10.

was harmless, that Cooley does not establish ineffective assistance of counsel on any of his alleged grounds, that any potential error in jury instruction 17 was harmless, and that Cooley has waived his LFO argument. We affirm the convictions and sentence.

FACTS

I. BACKGROUND

Amy Lutter, who had been in a 12-year relationship with Cooley and had two children with him, obtained two protection or no contact orders prohibiting Cooley from having any contact with her, including telephonically or electronically; these orders were in effect in January 2013. In January 2013, Lutter and her daughters were living with Lutter's parents; Cooley lived about a half mile away. On January 13, Lutter received several threatening text messages and calls from Cooley on her cell phone.

On January 17, apparently after Cooley had called her parents' house "all night long" and sent threatening text messages, Lutter decided to walk to Cooley's home to ask his roommate, who was also his employer, to stop Cooley from contacting her. Report of Proceedings (RP) (Dec. 17, 2013) at 78. According to Lutter, as she was walking, Cooley drove around the corner in his truck, saw her, and drove straight at her. She jumped out of the way and fell to the ground. Cooley drove onto the curb and then pulled away. As he pulled away, Lutter threw a rock at the truck, damaging the rear window.

On January 17, at 8:07 AM, 911 received a call from a man reporting that his "[e]x-wife" had thrown a rock at his vehicle window; the caller identified himself as Johnnie Cooley. The caller stated that he would wait for the police at the intersection of South L and South 70th Streets. The 911 system listed the specific number the call came from. When the 911 operator asked the

caller what his number was, the caller was unsure. The operator then read the number from the 911 system to the caller, and the caller responded, "Yeah, I think that might be it." Ex. 1 at 1 min. 15 sec. through 1 min. 17 sec.

Tacoma Police Officers Patrick Thomas O'Neill and Chris Yglesias responded to the location given by the 911 caller. Although they were attempting to locate Cooley, they found Lutter at the location; she appeared upset and agitated. Lutter told the officers that her "boyfriend" had tried to run her down. RP (Dec. 17, 2013) at 185. The officers observed tire marks on the grassy area between the road and the sidewalk. It appeared as if the car had driven over the sidewalk and "straddled" it. RP (Dec. 17, 2013) at 192.

Lutter returned to the police station with Officer Yglesias. While at the police station, Lutter received several calls on her cell phone from the same number that had appeared on the 911 system. Officer Yglesias had Lutter answer one of the calls and put it on speakerphone so he could hear the call. According to Officer Yglesias, the male voice said, "You're as good as dead, bitch," and "I'm going to break all the windows at your parents' house" before hanging up. RP (Dec. 17, 2013) at 131. Lutter told Officer Yglesias that the number the call came from was Cooley's number, and she identified the caller's voice as Cooley's. Lutter also showed Officer Yglesias the text messages Cooley had sent her on January 13 and January 14. Based on the information on Lutter's phone, these text messages also originated from the same number that had called 911.

The officers later contacted Lutter and collected her cell phone. Lutter signed a consent form allowing them to search the phone. An officer then photographed several threatening text messages from Cooley's number that were sent on January 13.[3]

About two hours after interviewing Lutter, Officer Yglesias located Cooley walking down the street near Lutter's parents' home. When Cooley saw the police car, he turned and started to walk away.

Officer Yglesias stopped Cooley, read him his *Miranda*[4] rights, and asked him why he was in the area. Cooley responded that he was going to Lutter's parents' house to get money for his broken window. He also stated that the tire tracks Officer Yglesias has seen were from him (Cooley) swerving to avoid the rock Lutter had thrown at his truck. Cooley denied having called or texted Lutter. Cooley also told Officer Yglesias that he (Cooley) did not have a functioning phone with him and that his phone was at his house; but he admitted that he had called 911 that day and stated that he had "used another phone" to make that call. RP (Dec. 17, 2013) at 168.

II. PROCEDURE

A. CHARGES AND PRELIMINARY MOTIONS

The State charged Cooley with four domestic violence court order violations.[5] It further alleged that all four counts were domestic violence incidents.

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[3] These photographs were admitted at trial.

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] Counts I and II alleged the violations occurred on January 13. Counts III and IV alleged that the violations occurred on January 17.

Before trial, Cooley moved in limine to exclude a portion of the 911 tape as hearsay. Specifically, he objected to the portion of the recording in which the 911 operator asks the caller what number he is calling from, "the caller hesitates and is unable to recall the number, and the 911 operator gives that information to the caller, which the caller agrees to." RP (Dec. 16, 2013) at 52. Cooley argued that the 911 operator's identification of the number the call originated from was hearsay and that it was "testimonial evidence coming from the 911 operator, because the 911 operator is the one that actually said what phone number was that the caller was calling in from. Then the caller said that number must be it." RP (Dec. 16, 2013) at 52. The trial court stated, "I think it's admissible for the limited purpose of showing what the defendant did, not for the truth of the matter asserted by the 911 caller." RP (Dec. 16, 2013) at 55-56.

B. TRIAL TESTIMONY AND COOLEY'S STIPULATION

The State's witnesses testified as described above. Cooley did not present any evidence.

In addition, Lutter testified that she knew Cooley's voice in person and on the telephone. She further testified that she had listened to the 911 recording and that it was Cooley's voice on the recording.

Katrina Rahier, a tape research analyst for South Sound 911, also testified about the 911 call for the State. Rahier testified that the complaint history (CAD) logs provide the number for the incoming call, that the CAD log was a business record, and that the CAD log for this call showed what number the 911 call originated from.

Rahier also identified the 911 recording. The trial court admitted the 911 recording and played it for the jury. Cooley did not make any additional objections to the admission of the recording.

Detective John William Bair testified that he had photographed the text messages on Lutter's phone. On cross-examination, defense counsel asked Bair what "spoofing of a phone number" was. RP (Dec. 18, 2013) at 214. Bair testified that there are computer programs available that can make it look like a text was sent from a different number than it actually was sent from or you can pay a service to make your number appear to be somebody else's number. Bair admitted that given the information he was able to retrieve from Lutter's cell phone, he was unable to tell what device actually sent a message other than from the information on Lutter's phone itself. He admitted that someone could have used another phone or computer to spoof a number and send a text message that appeared to come from that number but did not. But he also testified that in the numerous phones he had examined, he had only encountered spoofing once. The trial court admitted several photographs of incoming calls and several threatening text messages from Lutter's phone that appeared to come from the same number related to the 911 call.

Cooley stipulated that before January 13 and 17, "there existed a protection order or no-contact order applicable to the defendant and that the protected party was Amy Lutter . . . , and that the defendant knew of the existence of the order, and that the defendant had twice been convicted for violating the provisions of a court order." Clerk's Papers (CP) at 7.

C. Jury Instructions and Verdict

The jury instructions did not include a limiting instruction related to the 911 call. Instruction 17 stated in part,

> In order to answer a special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously agree that the answer is "no" or cannot unanimously agree upon an answer, then you must answer "no."*

CP at 28 (emphasis added). Defense counsel did not object to any jury instructions.

The jury found Cooley guilty as charged and answered "yes" to each of the special verdict forms.

D. SENTENCING

At sentencing,[6] the State requested that the trial court impose the crime victim penalty assessment, $200 in court costs, the deoxyribonucleic (DNA) fee, and $2,500 "[Department of Assigned Counsel] DAC recoupment."[7] RP (Feb. 21, 2014) at 284. Neither Cooley nor his counsel argued that he should not pay any discretionary LFOs.

Although the State did not present any information about present or future ability to pay LFOs, defense counsel stated during the sentencing hearing that Cooley and Lutter had both been teachers until 2007 when they "ended up getting involved with methamphetamine, and as a consequence of that, their lives just fell apart." RP (Feb. 21, 2014) at 286. Additionally, in his allocution, Cooley mentioned that his child support payments had been modified to zero because he was going to be incarcerated and had no means to pay child support. He stated that Lutter and their children were now "homeless" and living with the children's grandparents. Additionally, he stated that he would like to be able to "get out and get back to work" as quickly as possible so he could provide support for his children. RP (Feb. 21, 2014) at 288.

The trial court sentenced Cooley to 60 months of total confinement. The trial court also imposed (1) restitution in an amount yet to be determined, (2) $500 crime victim assessment, (3) $100 DNA database fee, (4) $1,500 in court-appointed attorney fees and defense costs, and (5) a

[6] The sentencing hearing was held on February 21, 2014.

[7] The "DAC recoupment" is a discretionary cost. RCW 10.01.160(1), (3). The other costs are mandatory. RCW 7.68.035(1)(a); RCW 36.18.020(2)(h); RCW 43.43.7541.

$200 criminal filing fee, for a total of $2,300. The judgment and sentence contains the following boilerplate finding:

> ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP at 49. Even though the trial court did not discuss LFOs at length during the sentencing hearing, it stated that it was ordering only $1,500 in DAC recoupment because Cooley's "daughters could use that money when [he got] out." RP (Feb. 21, 2014) at 289.

Cooley appeals his convictions and LFOs. In his SAG, he also challenges his convictions and the special verdicts.

ANALYSIS

I. ADMISSION OF 911 OPERATOR'S STATEMENT

Cooley first argues that the trial court erred when it allowed the jury to hear the 911 operator's recitation of the number the 911 call originated from because this statement was not relevant to the purpose for which the trial court admitted it or any fact at issue and the caller never admitted that the number was his. He further argues that the admission of this evidence was prejudicial because there was no limiting instruction. We hold that any potential error in admitting this portion of the 911 call was harmless in light of the other evidence presented at trial.

We review for abuse of discretion a trial court's evidentiary rulings. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *Magers*, 164 Wn.2d at 181. An evidentiary error is grounds for reversal only if it is prejudicial. *State v. Neal*, 144 Wn.2d 600,

611, 30 P.3d 1255 (2001). An error is prejudicial if, within reasonable probabilities, it materially affected the outcome of the trial. *Neal*, 144 Wn.2d at 611. Notably, "'admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted . . . without objection.'" *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006) (quoting *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999)).

The admission of the part of the 911 call in which the 911 operator reads the telephone number from the 911 system was clearly harmless because the tape research analyst also testified that the CAD log for this call showed that the 911 call came from the same number, and Officer Yglesias testified that Cooley admitted to having called 911 that morning.[8] Because the jury heard testimony from other sources about the 911 call's origin without objection, Cooley does not show within a reasonable probability that the 911 operator's statement affected the outcome of the trial and this argument fails. *See Weber*, 159 Wn.2d at 276.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Cooley further argues that the error in admitting the 911 operator's recitation of the number the call originated from was compounded by his trial counsel's failure to request a limiting instruction. He contends that a limiting instruction would have prevented the jury from using this evidence as proof of Cooley's telephone number.

To demonstrate ineffective assistance of counsel, a defendant must show that his counsel's representation was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[8] Cooley did not object to any of this testimony.

Representation is deficient if it falls 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). Prejudice occurs when but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy either prong, we need not consider both prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Again, because the jury heard testimony from other sources about the 911 call's number of origin without objection, Cooley does not show within a reasonable probability that the 911 operator's statement affected the outcome of the trial and this argument fails. *See Weber*, 159 Wn.2d at 276.

III. LFOs

Cooley next argues that the trial court failed make an individualized determination on his ability to pay before imposing discretionary LFOs. The State argues that this issue is not ripe for review until the State attempts to enforce the LFOs, that the issue was not preserved for appeal, and that even if we choose to address this issue, the trial court properly considered Cooley's ability to pay. We hold that he waived this argument by failing to object during sentencing.

Our Supreme Court recently rejected the State's ripeness argument in *State v. Blazina*, 182 Wn.2d 827, 833 n.1, 344 P.3d 680 (2015). Accordingly, the fact that the State may not yet be attempting to collect Cooley's LFOs does not preclude our review of this issue.

But Cooley did not challenge the trial court's imposition of LFOs during sentencing so he may not do so on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827. Our decision in *Blazina*, issued before Cooley's sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. 174 Wn.

App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. *Blazina*, 182 Wn.2d at 830. We decline to exercise such discretion here.

IV. SAG ISSUES

In his SAG, Cooley argues that he received ineffective assistance of counsel when he failed to object to a variety of issues and that jury instruction 17, which instructed the jurors that they could answer "no" to the special verdict if they could not unanimously agree, was improper and prejudicial. These arguments all fail.

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

1. STANDARD OF REVIEW

As we noted above, to demonstrate ineffective assistance of counsel, Cooley must show that defense counsel's representation was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687. Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *McFarland*, 127 Wn.2d at 334-35. Prejudice occurs when but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. Thus, to succeed on an ineffective assistance claim that rests on defense counsel's failure to object, Cooley must show that it is likely that the trial court would have sustained the objection had it been made. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). Cooley fails to make this showing.

2. FAILURE TO OBJECT TO CLOSING ARGUMENT

In his SAG, Cooley appears to argue that he received ineffective assistance of counsel when defense counsel failed to object to significant portions of the State's closing argument.[9] Cooley fails to show that it is likely that the trial court would have sustained any of the objections he now contends defense counsel should have made.

Cooley objects to the following arguments, asserting that they were comments on his right to not testify:

> Now, this case has four counts. It's clear that the defendant violated this order because electronically he sent her text messages, telephonically he called her, and directly in person when he swerved towards her.

RP (Dec. 18, 2013) at 242.

> And when you look at Plaintiff's No. 3, which was admitted, a lot of the same language appears. This is from Tacoma Municipal Court. "It is ordered that defendant is prohibited from causing or attempting to cause physical harm," when he swerved at her, "by major assault including sexual assault," doesn't apply, "molesting, harassing, threatening or stalking, coming near or have any contact whatsoever in person or through others by mail, phone or any means directly or indirectly."

RP (Dec. 18, 2013) at 244.

> So let's talk a little bit about the facts and the credibility of witnesses. Well, at the beginning of this case I was reading the defendant's cell phone to you. And you've probably seen it more times. Some of you might even have it memorized by now. . . . And where does this number appear again and again and again?

[9] Cooley also directs us to portions of the argument from a CrR 3.5 hearing addressing the admissibility of his statements to Officer Yglesias during which defense counsel attempts to raise issues about the admissibility of the text messages and the call Lutter put on speakerphone at the police station. It is unclear why Cooley cites to this portion of the record, and we will not address it further. *See* RAP 10.10(b) (appellant's SAG argument must inform the court of the nature of the alleged error).

RP (Dec. 18, 2013) at 246.

> Now, moving then back to Count I and Count II, the text messages sent on January 13th. And you have those in Plaintiff's No. 11. And what you're going to see is, again, the defendant's cell phone number popping up time and time again. And what I'm going to do is I'm just briefly going to place them on the overhead projector.
>
> Starting on page 3, you work your way back and you will be able to kind of track the time because some of them are duplicates, but Bair had to scroll down to capture the entire text message.
>
> For example, so the bottom right of page 3 that first one comes in at 11:19 p.m. and it's from his number saying, "You're going to die. I will wait for days. I don't care. You will die." And that's kind of the general tone of the threatening text messages.
>
> And as you make your way to the other ones, you see that he's talking about "I've got enough fire power to light up your house like an Xmas tree," so they're kind of the constant harassing text messages that are coming in.
>
> Now, defense asks Detective Bair about the spoofing. Something that is possible. But again, folks, it's kind of like your neighbors playing the joke on you throwing snow on your yard. It's, of course, possible, but is it reasonable? Is it likely? It's certainly not reasonable doubt.

RP (Dec. 18, 2013) at 248-49.

> [Lutter] has known the defendant for 12 plus years. They have children in common. She knows his voice. She knows his voice on the telephone. She knows his voice in person. And so when she continues to get those calls again, calls at the police station that are witnessed by Officer Yglesias, independent officer with no personal bias, from the defendant's cell phone number, they finally get that one where they put it on speakerphone, she recognizes his voice. And what is said on that phone call that's overheard by Officer Yglesias? "You're as good as dead, bitch. I'm going to break all the windows at your parents' house." Very consistent in terms of the kind of threats that he's been making to her in text messages days earlier and also consistent with what occurred that morning, right. She cracked his Plexiglass in the back of his truck and he's basically going to retaliate and he's going to break her windows.
>
> What's also in that statement, again, reading between the lines? He knows that she's living at her parents' house. This isn't some random spoofing. He knows that that's where she's staying. How do we know that? That's where the officer sees him when he turns away.
>
> Now, in terms of phone calls, again, Ms. Lutter is the only one that's telling you that her phone was ringing repeatedly while at the station. Officer Ygelasias [sic] says, yes, this number keeps coming up. It's the same number that called 911.

RP (Dec. 18, 2013) at 250-51.

> Officer Yglesias is questioning him about the phone calls and threats made that morning. He was clear. Phone call and threats that morning and the defendant informed him that it was another phone when asked what phone did you use to call 911. He said it was another phone because he didn't have a functioning phone. It was the phone at home. Well, which phone did you use to call 911? He said he used another phone. So he admits to calling 911, so there should be no mistake as to who was on the phone.
>
> Now, you heard from Detective Bair. His role in this case was to retrieve text data. And normally you just plug in the USB and all that information comes up. It's a fairly simple phone. Pretty straightforward in that it's not a smart phone. I think he talked about that. And the best he could do in this case was to take pictures of it and that's why you have the pictures versus like the actual printout of the phone data itself.
>
> And he told him, yeah, spoofing is a possibility, but that doesn't arise to reasonable doubt because there's absolutely no evidence of spoofing whatsoever. And, in fact, the statements that the defendant makes at the scene, the states [sic] that he makes in the text messages, the statements that he makes when the call that's on speakerphone that is identified by [Lutter] as being him, they kind of tie everything together. In looking at the big picture, that's when you as the jury get to determine defendant is guilty of all four counts.

RP (Dec. 18, 2013) at 253-54.

> Defense counsel described a one-sided domestic breakup where essentially all the anger is attributed to [Lutter] and then neglects to include that that anger could also be the defendant, the anger why he swerved at her or why he sent her threatening text messages or why he's calling her and threatening her over the telephone.
>
> He also tells you not to speculate and then asks you to speculate to the point where you defy common sense. And an example of that is, he tells you, you know, that there's no evidence that his client is the individual who was identified by [Lutter] that called 911. Yet all of his statements that he makes to Officer Yglesias corroborates that.
>
> What's the likelihood that some unknown person is calling 911 describing that they're Johnnie Cooley that she just threw a rock that, you know, it's right by my house and, you know, she's at this location. I'm going to follow her. Okay. I'm not going to follow her.
>
> And then it just so happens that what, I think maybe 10:45 that morning when Officer Yglesias contact him, defendant's in the area, starts talking about why are you talking to me, you got to talk to her about the broken window; doesn't have an explanation as to the swerving but says why the tracks went towards her but then

> is talking about how he had to swerve out of the way. It defies common sense. The statements of Officer Yglesias corroborates that he's the person that called 911.

RP (Dec. 18, 2013) at 272-73.

> He wants you to essentially disregard all the other evidence that connects the dots for you, all the overwhelming evidence.
>
> And in terms of the defendant's statements, he wants you, again, to ignore the statements that he made about talking to her parents about the broken window. And then he tells you, common sense -- don't check your common sense at the door. And so he talks about when the officer's asking him about calling 911, and he says, well, I used another phone, defense wants you to believe that the defendant was talking about some other 911 call some other date. Officer Yglesias was clear they were talking about what had occurred that morning. That defies common sense, folks, beyond a reasonable doubt, beyond a reasonable doubt. Not any doubt whatsoever, not one hundred percent. Without any doubt whatsoever, beyond a shadow of a doubt, a reasonable doubt.

RP (Dec. 18, 2013) at 276-77.

In closing argument, the State has wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). These portions of the State's closing argument are based on reasonable inferences from the record and did not comment in any way on Cooley's right to remain silent. Thus, Cooley has not shown that any objection would have been successful and cannot establish ineffective assistance of counsel on this ground.

3. AUTHENTICATION OF TEXTS AND SPEAKERPHONE CALL

Cooley next argues that defense counsel failed to argue that the trial court should exclude the "cell phone evidence" because the State had not sufficiently identified or authenticated this evidence.[10] SAG at 8. Again, we disagree.

ER 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The proponent of the evidence meets this requirement "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). Identity of a party making a call may be established by direct or circumstantial evidence. *Danielson*, 37 Wn. App. at 472.

The evidence here showed that all of these communications originated from a specified number, Lutter identified the caller on the speakerphone as Cooley, the CAD log stated that the 911 call had originated from this same number as these calls, and Cooley admitted to Officer Yglesias that he (Cooley) had placed the 911 call. This is sufficient evidence to support a finding that the text messages and cell phone call Officer Yglesias heard over the speakerphone were what the State purported them to be, texts and calls from Cooley. Because there was sufficient evidence to satisfy ER 901(a), Cooley does not show that any objection to the admission of this evidence

[10] Cooley also mentions that defense counsel "inartfully" objected to the introduction of the text messages and "voice admissions" in the aforementioned CrR 3.5 hearing. SAG at 9. To the extent Cooley is attempting to argue that the trial court erred in not considering this objection, that argument fails. The trial court properly refused to consider these objections at the CrR 3.5 hearing because they were not relevant to whether Cooley's statements to Officer Yglesias were admissible.

on this ground would have been successful. Accordingly, he does not establish ineffective assistance of counsel.

4. AUTHENTICATION OF 911 CALL

Cooley further argues that defense counsel failed to argue that the 911 call was not properly authenticated. But "[a] sound recording . . . need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic." *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111 (2007). The identity of a party to a telephone conversation may be established by either direct or circumstantial evidence. *Danielson*, 37 Wn. App. at 472. Here, the 911 caller stated that his name was Johnnie Cooley, Lutter identified Cooley's voice on the tape, and Cooley admitted to Officer Yglesias that he had called 911. This evidence was sufficient to establish identity and it is not likely the trial court would have granted a motion brought on this ground. Accordingly, Cooley does not show that defense counsel's failure to raise this issue amounted to ineffective assistance of counsel.

5. PRIVACY ACT

Cooley next argues that defense counsel should have objected to the testimony about the speakerphone call because it was obtained in violation of the privacy act.[11] Again, we disagree.

Washington's privacy act prohibits the State from intercepting a private telephone communication by use of a device designed to record or transmit the communication without consent. RCW 9.73.030(1)(a). It does not prevent a police officer from listening in person to a

[11] Ch. 9.73 RCW.

communication he can hear because the phone is tilted his way or, as here, comes from a speakerphone. *State v. Corliss*, 123 Wn.2d 656, 662, 870 P.2d 317 (1994). That activity falls outside the privacy act because it does not involve a device used to record or transmit the communication. *Corliss*, 123 Wn.2d at 551. Accordingly, any potential motion challenging this evidence on this ground would have failed and Cooley does not establish ineffective assistance of counsel on this ground.

6. FOURTH AMENDMENT

Cooley further contends that defense counsel failed to argue that the testimony about the speakerphone call violated his (Cooley's) right to privacy under the Fourth Amendment because it was obtained without a search warrant. We disagree.

Relying on *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012), Cooley argues that Officer Yglesias's "intercept[ion]" of this conversation was an attempt to solicit a confession. SAG at 13. *Haq* addresses recordings of jail telephone calls as a violation of right to counsel. 166 Wn. App. at 249. But such violations require governmental effort to elicit incriminating statements from the appellant and that did not occur here, so *Haq* is not helpful to Cooley. 166 Wn. App. at 249-51. To the extent Cooley is also arguing that Officer Yglesias's listening in to the call was a violation of his right to privacy under article I, section 7 of the Washington Constitution, that argument was also expressly rejected in *Corliss*. 123 Wn.2d at 664. Thus, Cooley does not show that any motion challenging the speakerphone evidence on this ground would have succeeded, and he fails to establish ineffective assistance of counsel.

7. RIGHT TO REMAIN SILENT/RIGHT AGAINST SELF-INCRIMINATION

Cooley next argues that defense counsel failed to argue that the admission of the text messages and the testimony about the speakerphone call violated his (Cooley's) right to remain silent and his right against self-incrimination. Again, we disagree.

The right to remain silent and the right against self-incrimination prohibit the State from compelling the defendant to testify at trial or forcing him to participate in a custodial interrogation. *State v. Mendes*, 180 Wn.2d 188, 195, 322 P.3d 791 (2014), *cert. denied*, 135 S. Ct. 1718 (2015). A defendant's voluntary statements to a victim, such as the ones here, do not fall under those protections. Accordingly, Cooley has not shown that any motion based on this ground would have been successful and he fails to establish ineffective assistance of counsel.[12]

8. SIXTH AMENDMENT RIGHT TO COUNSEL

Citing *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004), Cooley also appears to assert that defense counsel should have challenged the evidence related to the speakerphone call as a violation of his Sixth Amendment right to counsel because Lutter was acting as an agent for the State by stimulating the conversation about the charged crime. Again, we disagree.

"Once a defendant's Sixth Amendment right to counsel has attached, the government is forbidden from 'deliberately eliciting' incriminating statements from the defendant." *Randolph*, 380 F.3d at1143 (quoting *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)). In *Randolph*, the court considered whether a jailhouse informant was acting as an

[12] Cooley also cites to *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-6, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). *Townsend* addresses admission of confessions not the admission of a defendant's voluntary statements to a victim, so it is not helpful here.

agent for the State when he obtained information about the defendant and, therefore, violated the defendant's Sixth Amendment right to counsel. 380 F.2d at 1143-44. Here, however, even assuming that Cooley's right to counsel had attached, Lutter did not initiate the contact at issue; she merely answered her phone and placed it on speakerphone. She did not act as an agent. Accordingly, Cooley does not show that a motion brought on this ground would have been successful, and he fails to establish ineffective assistance of counsel.

9. RIGHT TO CONFRONTATION

Cooley further argues that defense counsel failed to argue that the admission of the 911 call violated his (Cooley's) right to confront witnesses under article I, section 22 and the Sixth Amendment because he was not allowed to rebut the evidence authenticating the 911 tape—he appears to refer to Officer Yglesias's testimony that Cooley had admitted calling 911 the day of the incident. This argument also fails.

The state and federal confrontation clauses give a defendant a right to confront and cross-examine witnesses testifying against him. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. McDaniel*, 155 Wn. App. 829, 846, 230 P.3d 245 (2010). The confrontation clause prohibits admission of testimonial statements made by a witness *who did not appear at trial* unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54. Officer Yglesias testified at trial, so there was no violation of Cooley's confrontation rights. That Cooley chose not to testify was a voluntary waiver of his right to provide testimony challenging Officer Yglesias's testimony. Accordingly, there is no likelihood that the trial court would have granted a motion brought on this basis, and Cooley fails to establish ineffective assistance of counsel.

B. SPECIAL VERDICT FORMS

Finally, Cooley argues that jury instruction 17 was improper because it required the jury to be unanimous and did not allow the jury to leave the form blank if it did not come to a unanimous decision. We hold that Cooley failed to preserve this argument under RAP 2.5(a).

We generally decline to review claims that an appellant raises for the first time on appeal. RAP 2.5(a). We will, however, review an argument for the first time if it concerns a "manifest error affecting a constitutional right." RAP 2.5(a)(3). "A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal quotation marks omitted) (alteration in original) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)).

In Washington, defendants have a constitutional right to a unanimous verdict. *State v. Badda*, 63 Wn.2d 176, 181-82, 385 P.2d 859 (1963). A jury's inability to come to a unanimous agreement is not the equivalent of an acquittal for purposes of double jeopardy. *In re Pers. Restraint of Candelario*, 129 Wn. App. 1, 6, 118 P.3d 349 (2005) (quoting *State v. Despenza*, 38 Wn. App. 645, 654, 689 P.2d 87 (1984)). But even presuming, but not deciding, that jury instruction 17 was constitutionally defective because it allowed the jury to *reject* the special verdict even if it was not unanimous, Cooley does not show actual prejudice. The jury unanimously found that he and Lutter *were* members of the same family or household. Thus, the court's instruction

to the jury that it must answer "no" if it could *not* come to a unanimous decision played no role in the jury's decision and there was no risk the jury failed to reach a unanimous decision.

Apparently citing *State v. Bashaw*, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010), *overruled by State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012), Cooley argues that this alleged error was not harmless because when unanimity is required, a juror with reservations may not hold to his or her position or may not raise additional questions that could have led to a different result. *Bashaw* is not helpful here. *Bashaw* held that it was error to instruct the jury that the special verdict had to be unanimous, but our Supreme Court reversed this holding in *Nunez*. *Nunez*, 174 Wn.2d at 709-10. And to the extent we can still analogize to *Bashaw*'s harmless error analysis, the same concern expressed in *Bashaw* does not exist here because Cooley's jury was instructed that it was to vote "no" if it could not come to a unanimous decision, an option not available to the jury in *Bashaw*. Thus, unlike in *Bashaw*, there is no question here whether the jury's unanimous decision that Cooley and Lutter were members of the same family or household was a unanimous verdict. Because Cooley does not show a manifest error affecting a constitutional right, he has waived this issue.[13]

In sum, we hold that the admission of the 911 operator's statement was harmless, that Cooley does not establish ineffective assistance of counsel on any of his alleged grounds, that he

[13] To the extent Cooley is also raising this as an ineffective assistance of counsel claim, that argument would also fail because Cooley cannot establish prejudice.

has waived his LFO challenge, and that any potential error in jury instruction 17 was harmless. Accordingly, we affirm the convictions and sentence.

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

Johanson, C.J.
JOHANSON, C.J.

I concur:

Sutton, J.
SUTTON, J.

BJORGEN, J. (concurring) — For the reasons set out in my dissent in *State v. Lyle*, ___ P.3d ___, No. 46101-3-II, 2015 WL 4156773 (Wash. Ct. App. July 10, 2015), I would reach Johnnie Cooley's legal financial obligations' challenge, even though he did not raise it during sentencing. However, the majority in *Lyle*, a published decision, reached a contrary conclusion. *Lyle*, ___ P.3d ___, No. 46101-3-II, 2015 WL 4156773 (Wash. Ct. App. July 10, 2015). Unless *Lyle* is overturned or its bases questioned by subsequent case law, I shall observe its result under principles of stare decisis. Therefore, I concur in this decision with the reservation here expressed.

Bjorgen, J.
BJORGEN, J.

CUNNINGHAM LAW OFFICE

August 10, 2015 - 10:29 AM

Transmittal Letter

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