SUPREME COURT NO. 93289-1

NO. 73062-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROY BELL, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce Heller, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Roy Bell, Jr., the appellant below, asks this Court to grant review of the court of appeals' unpublished decision in State v. Bell, No. 73062-2-I, filed May 23, 2016 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

1. The trial court heard a motion for a mistrial from defense counsel at an inaudible, unrecorded sidebar. Is this a courtroom closure that violates Bell's constitutional right to a public trial?

2. Was Bell's Sixth Amendment right to confrontation violated when the trial court admitted hearsay statements by a non-testifying witness in which she described past events, the suspect had fled, and police were present at the scene?

3. The trial court admitted three recordings that did not include statements informing Bell of his constitutional rights. Does this violate the privacy act, RCW 9.73.090(1)(b), and require reversal?

4. Was Bell's jury trial right violated when a detective identified his voice based solely on three recordings, all of which were played for the jury, and the detective had never spoken to Bell?

5. Is a lay witness's identification of a criminal defendant's voice in an audio recording manifest constitutional error under RAP 2.5 because it is an explicit statement on an ultimate issue of fact?

6. Do double jeopardy principles necessitate remand where the trial court dismisses a charge for insufficient evidence, but fails to indicate that dismissal in the judgment and sentence or enter a separate written dismissal order?

C. STATEMENT OF THE CASE

The State charged Bell with four counts of domestic violence felony violation of a no-contact order (VNCO) protecting Teigisti Gerense, occurring on December 25, 2013; February 10, 2014; March 15, 2014; and March 15-16, 2014. Gerense did not testify at trial.

1. Pretrial Rulings

The trial court held a CrR 3.5 hearing, at which police officers testified that on March 15, 2014, they responded to a 911 call from Gerense reporting Bell assaulted her. 3RP 21-22, 38. Police arrested Bell inside Gerense's apartment and transported him to jail. 3RP 25-33, 48-49, 58. The entire encounter was recorded. 3RP 29-31, 43-58. Bell made several statements to police and to Gerense inside her apartment, captured on two recordings. 3RP 29-31; Ex. 6, 15. Bell was then placed in a patrol car and made continuous statements to police as he was transported to jail, captured on a third recording. 3RP 43-58; Ex. 16.

At no time was Bell advised of his Miranda rights. The police did not advise Bell he was being recorded until almost two minutes after their

initial contact with him. 5RP 400; Ex. 6. Nor did they advise him he was being recorded as he was being transported to jail. 8RP 847-61. The State conceded Bell was in custody throughout the encounter. 3RP 63.

Bell's counsel moved to suppress the recordings because they violated Washington's privacy act, chapter 9.73 RCW. 4RP 230-32. Counsel argued RCW 9.73.090 (1)(b) required Bell, as an arrested person, to be advised of his Miranda rights on the recordings. 4RP 230-32; 5RP 303-13. The trial court admitted the recordings, concluding Bell made the statements spontaneously and not in response to interrogation. 3RP 64-65. The court denied counsel's motion to suppress under the privacy act, reasoning RCW 9.73.090(1)(b) applied only to custodial interrogations, so Bell did not need to be advised of his Miranda rights on the recording. 5RP 402-06. However, the court instructed the State to redact references to Bell's criminal history and outstanding warrants in the recordings. 7RP 618.

The State also sought to admit three 911 calls Gerense made on December 25, 2013, February 10, 2014, and March 15, 2014. 3RP 81. Defense counsel argued all three recordings violated the confrontation clause. 3RP 88-91, 99-100, 114-18, 137-41. The trial court admitted the calls from December 25 and March 15, but excluded the February 10 call as testimonial. 4RP 188-99. The State did not present any evidence on the

February 10 charge during trial, so the trial court dismissed the charge for insufficient evidence. 8RP 948.

2. December 25, 2013 Incident

On December 25, 2013, the police received a 911 call in which a man's and woman's voice can be heard in the background. Ex. 19; 8R 926-31. The woman said things like, "I'm bleeding"; and "Leave me alone. Let me go." 8RP 926-27. The woman then told the dispatcher, "He just left"; "He went that way somewhere outside"; and then, "the officers are outside." 8RP 929; Ex. 19. The woman also said, "Yeah, (unintelligible) try to kill me, he told me." 8RP 930. The call ended when officers arrived at the woman's apartment. 8RP 931. Detective Nicole Freutal testified she believed the man's voice on the 911 call was Bell's. 8RP 942.

Officer Jason Tucker responded to Gerense's apartment. 7RP 636-39. He testified another officer arrived first and saw a man running down the stairwell of the apartment building. 7RP 643. The man was around 5'8" tall, with a medium build. 7RP 650, 655-58. Tucker agreed Bell did not match this description, being 6'2" tall and thin. 7RP 655-59; Ex. 7.

The State introduced a recording of the officers' interaction with Gerense, in which the police asked Gerense what's going on and she told them, "Well, he my baby's father. He came over for the holiday. He came here, was drinking and he's making up I'm cheating on him and

(unintelligible)." 7RP 647-52; Ex. 1. The police asked Gerense if he hit her and she responded, "Yeah, yeah. Punching, kicking, saying you're going to die today." 7RP 652. Officer Tucker testified to the same statements from his own recollection. 7RP 653.

3. March 15, 2014 Incident

On March 15, 2014, Gerense called 911 to ask police to remove Bell, who was sleeping, from her apartment. 8RP 932-41. Multiple officers responded. 7RP 687-88. They found Bell inside Gerense's apartment and immediately arrested him for VNCO. 7RP 690-93, 713-15.

The State played the three recordings from March 15 for the jury: the first of Bell's initial arrest inside Gerense's apartment, Ex. 6, 7RP 695-703; the second of the initial arrest and the police walking Bell to the patrol car, at which time he urinated himself, Ex. 15, 8RP 838-47; and the third of Bell being transported to the precinct and then to jail, Ex. 16, 8RP 847-61. On the second recording, played during Officer Ian Walsh's testimony, an officer tells Bell, "You're under arrest at this point. You've got a couple warrants and you're violating an order." 7RP 700-01. An officer can also be heard saying, "go ahead and verify this warrant." 7RP 703.

At the end of the State's direct examination of Officer Walsh, defense counsel informed the court he had a motion. 7RP 707. The court held an inaudible sidebar conference. 7RP 707. Defense counsel then

proceeded with cross-examination of Walsh, followed by redirect and recross. 7RP 707-17. The court called for another sidebar and subsequently instructed the jury to disregard evidence from the recording that Bell "had a warrant out on him or words to that effect." 7RP 717.

The jury was then excused, and the parties and the court put the two sidebars on the record. 7RP 718-20. Bell's counsel said at the first sidebar the court asked whether he was moving for a mistrial. 7RP 720. Counsel said yes and the court denied it. 7RP 720. Counsel informed the court the recording included unredacted references to Bell's outstanding arrest warrants, violating the court's ruling to redact that information. 7RP 720-22.

The court agreed with counsel's recollection: "The court noted in a sidebar that it wasn't inclined to grant the mistrial motion. In fact, it wouldn't grant it. Instead it would give a limiting instruction." 7RP 721. The court explained it held a second sidebar to ask whether defense counsel wanted a limiting instruction. 7RP 721. Defense counsel added:

> I pointed out in the sidebar that the State was aware of the court's rulings in limine that no mention of warrant shall be made during the course of the trial in evidence and that did happen here, at least twice. It was pointed out by the State the defense (unintelligible) propose any redactions to that video and summarizing what I said, I said the burden was on the State because they were aware of the court's rulings.

7RP 722.

4. March 15-16, 2014 Jail Calls

Sergeant Dean Owens testified regarding five jail calls the State alleged Bell made to Gerense: March 15 at 7:13 p.m. (8RP 762-72), March 15 at 7:48 p.m. (8RP 773-85), March 15 at 8:22 p.m. (8RP 785-90), March 15 at 9:02 p.m. (8RP 791-99), and March 16 at 5:17 p.m. (8RP 800-03). Owens explained King County Jail inmates are assigned a pin number for using the jail telephones. 8RP 746-47. He agreed it is common practice for inmates to trade pin numbers. 8RP 805. The first four calls were not placed using any pin number. Ex. 13. Instead Owens could only testify to the fact that the calls were placed from inside the booking area, where Bell was being held. 8RP 750-59. There were other inmates in the booking area at the time. 8RP 807. Only the March 16 call was made using Bell's assigned pin number. 8RP 800-01; Ex. 13.

On appeal, Bell argued the trial court violated his public trial right by considering a mistrial motion at an inaudible sidebar. Br. of Appellant, 14-20; Reply Br., 1-3. He argued admission of Gerense's statements to police at her apartment on December 25, 2013 violated the confrontation clause. Br. of Appellant, 41-49; Reply Br., 12-16. Bell further argued Detective Freutal's testimony identifying his voice on several recordings—particularly the December 25 911 call—despite never having spoken to him, was an opinion on an ultimate issue of fact for the jury. Br. of Appellant, 35-41;

Reply Br., 8-12. Finally, Bell argued the three March 15 police recordings should have been suppressed because he was never informed of his Miranda rights on the recordings, violating the plain language of RCW 9.73.090(1)(b). Br. of Appellant, 21-35; Reply Br., 3-8.

The court of appeals rejected all of Bell's arguments in a cursory fashion, and remanded only for correction of a clerical error in the judgment and sentence. Bell now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. CONSIDERING A MISTRIAL MOTION AT AN INAUDIBLE, UNRECORDED SIDEBAR CONSTITUTED A COURTROOM CLOSURE THAT VIOLATED BELL'S RIGHT TO A PUBLIC TRIAL.

The issue presented in this case is whether holding a mistrial motion at an inaudible, unrecorded sidebar implicates the public trial right and constitutes a courtroom closure. This Court's recent decisions in State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014), and State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015), leave this an open issue of law, warranting this Court's review under RAP 13.4(b)(3) and (b)(4). Division One's decision in this case also conflicts with a Division Two decision, further warranting this Court's review under RAP 13.4(b)(2).

In Smith, this Court held sidebars on evidentiary matters do not implicate the public trial right under the experience and logic test. 181

Wn.2d at 511. This Court cautioned, however, "that merely characterizing something as a 'sidebar' does not make it so." Id. at 516 n.10. Therefore:

> To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. Whether the event in question is actually a sidebar is part of the experience prong inquiry and is not subject to the old legal-factual test.

Id. This Court explained that "[p]roper sidebars . . . deal with mundane issues implicating little public interest." Id. at 516.

Division Two of the court of appeals has recognized that experience and logic require a mistrial motion to be heard in open court:

> A motion for a mistrial has historically been heard on the record in open court. Therefore, the experience prong of the Sublett test indicates that the public trial right would attach . . . Considering the important constitutional rights implicated by a motion for a mistrial, the logic prong would also require that the defendant's public trial right attaches.

State v. Burdette, 178 Wn. App. 183, 196, 313 P.3d 1235 (2013).

Though decided a year prior, Burdette is consistent with Smith. In concluding sidebars have historically occurred outside the public's view, the Smith court distinguished State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006). There, the courtroom was closed during a codefendant's combined motion to sever and dismiss. Easterling, 157 Wn.2d at 172. The hearing included a discussion about whether the State acted in bad faith. Id. at 172 &

n.7. The closure violated Easterling's public trial right because of the appearance of impropriety, and because courts have a strong interest in protecting the transparency and fairness of criminal trials. Id. at 178.

The mistrial motion in Bell's case is more analogous to the misconduct motion in Easterling than the evidentiary sidebars in Smith. Defense counsel moved for a mistrial because the State wrongly played a recording that included reference to warrants, violating the court's order to redact that information. 7RP 614-18, 700-01, 718-22. The State's violation of court rulings was a consistent problem during trial. Br. of Appellant, 50-55 (arguing cumulative error based on improper references to Bell's criminal history). This closely mirrors the allegation of bad faith in Easterling.[1]

"A motion for a mistrial is predicated upon the occurrence of an incident during the trial which allegedly would preclude a fair consideration of the case by the jury, or otherwise interfere with the fair and even-handed administration of justice." 13 Royce A. Ferguson, Jr., WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 4316 (3d ed. 2004). This is precisely the type of proceeding that must be subject to public scrutiny in order to assure fair trials and deter misconduct. State v. Wise, 176 Wn.2d 1,

[1] Compare CrR 7.5 (allowing a new trial due to prosecutorial misconduct or a trial irregularity "when it affirmatively appears that a substantial right of the defendant was materially affected"); with CrR 8.3 (allowing dismissal due to governmental misconduct "when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial").

5-6, 288 P.3d 1113 (2012) ("The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality.").

The mistrial motion raised substantial issues of public interest: whether the State was following the court's rulings and, more significantly, whether Bell was being denied a fair trial. Wise, 176 Wn.2d at 6; Easterling, 157 Wn.2d at 178. This exceeds the limited scope of Smith's evidentiary sidebars. Experience and logic demonstrate the mistrial motion should have been heard in open court. Burdette, 178 Wn. App. at 196.

The court of appeals nevertheless held "[t]he sidebars here were held to consider a routine evidentiary issue with no constitutional dimension. They were analogous to the sidebars in Smith and did not implicate the public trial right." Opinion, 15. The court further reasoned "[t]he commentary in Burdette should be recognized as limited to the context of dealing with deadlocked juries," even though Division Two did not so limit its reasoning. This Court should grant review to decide whether a mistrial motion can properly be held at an inaudible sidebar, like the routine evidentiary matters in Smith.

This Court should also grant review to clarify whether holding a mistrial motion at an inaudible sidebar constitutes a courtroom closure under

Love. The court of appeals did not reach this issue because it concluded the public trial right did not attach. See Opinion, 14-15.

In Love, this Court held there was no courtroom closure when for cause challenges were made at the bench and peremptory challenges were made by silently exchanging a written list of jurors. This Court reasoned:

> [O]bservers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empanelled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publicly available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Love, 183 Wn.2d at 607. This Court further explained, "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." Id.

Unlike the jury selection in Love, the public was entirely excluded from the mistrial motion. At the end of Officer Walsh's testimony, defense counsel informed the trial court, "Your Honor, I have a motion (inaudible)." 7RP 707. The public could not scrutinize the subsequent sidebar. In Love, the public could view the struck jurors leave the courtroom and could see the final empanelled jury. The State's and the defense's challenges were also filed in the public record, so the public

could find out exactly which party struck each juror. By contrast, the public had no idea what was being discussed at the sidebar, knowing only that it involved a motion. This secret discussion did not allow for accountability and transparency—twin goals of the public trial right. And because there was no contemporaneous recording of the sidebar, the public could never learn exactly what transpired. This Court should grant review to determine whether Love applies to sidebars like the one here.

2. THE TRIAL COURT ADMITTED TESTIMONIAL HEARSAY THAT VIOLATED BELL'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

Admission of Gerense's statements to police at her apartment on December 25, 2013, violated the confrontation clause and prejudiced the outcome of Bell's trial, necessitating reversal. This result is compelled by the U.S. Supreme Court's decisions in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Davis, 547 U.S. at 822. By contrast, statements are testimonial when the circumstances objectively indicate there is no such ongoing

emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id.

Davis involved a domestic dispute in which a woman called 911 because her former boyfriend was at her home assaulting her. Id. at 817-18. The relevant portion of the call ended when the woman told the 911 operator, "He's runnin' now." Id. at 818. The operator then told the woman to be quiet and asked her several questions. Id. The Court held the initial portion of the 911 call to be nontestimonial because it was "plainly a call for help against bona fide physical threat." Id. at 827. However, the Court explained, the emergency ended when the suspect left the premises: "It could readily be maintained that, from that point on, [the woman's] statements were testimonial." Id. at 828-29.

Bryant involved an armed gunman who had just fled after shooting another man. 562 U.S. at 349. The wounded man's statements were nontestimonial because the gunman posed an imminent threat to the public at large. Id. at 374. But the Bryant court explained that "'a conversation which begins as an interrogation to determine the need for emergency assistance'" can "'evolve into testimonial statements.'" Id. at 365 (quoting Davis, 547 U.S. at 828). This evolution occurs if "what appeared to be a public threat is actually a private dispute." Id. It also occurs "if a

perpetrator is disarmed, surrenders, is apprehended, or, as in Davis, flees with little prospect of posing a threat to the public." Id. (emphasis added).

This case involved a domestic dispute. During her initial 911 call, Gerense described events as they occurred. She was in immediate danger from the man in her apartment, as in Davis. But these nontestimonial statements evolved into testimonial statements once the man had fled and the police arrived. Gerense was then safe in police care. In fact, she was even more protected than the woman in Davis, where the police had not yet arrived. There was no indication the suspect was armed with a dangerous weapon. This is precisely the scenario recognized in Bryant, where the suspect in a private, domestic dispute flees with little threat to the public. Statements made after such a suspect flees, like here, are testimonial. Davis and Bryant control.

The court of appeals nevertheless held Gerense's statements were nontestimonial, claiming "[a] reasonable listener would recognize that TG was facing and ongoing emergency." Opinion, 5. The court acknowledged Gerense was no longer being assaulted, but reasoned the suspect "was at large and likely still in the immediate vicinity," suggesting "a continuing threat of harm" to Gerense. Opinion, 5. The court of appeals' holding cannot be squared with Davis and Bryant, and, indeed, the court did not distinguish those cases. Opinion, 5-6. This Court's guidance is needed to

clarify the scope of these cases when a suspect flees from a domestic dispute and there is no evidence he is dangerous to the public. This Court's review is therefore warranted under RAP 13.4(b)(3) because this is a significant question of constitutional law.

3. A DETECTIVE'S IDENTIFICATION OF BELL'S VOICE IN AUDIO RECORDINGS ABSENT ANY CONTACT WITH BELL VIOLATED BELL'S JURY TRIAL RIGHT.

The right to have factual questions decided by the jury is crucial to the jury trial right. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). As such, ER 701 permits lay opinion only when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. A lay witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. Nor may a witness offer an opinion, directly or by inference, regarding the accused's guilt. State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009).

When photographs or videos are admitted, the identity of the persons portrayed is generally a factual question for the jury. Id. at 118. Lay opinion as to the identity of a person in question is therefore inadmissible, unless "'there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'" Id. (quoting State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). For

example, lay opinion testimony may be appropriate if the witness is personally acquainted with the individual. Id.

In Hardy, police officers testified to the defendants' identities in videos of drug transactions. 76 Wn. App. at 189. The officers had known the individuals for several years, so they were more likely than the jury to correctly identify them. Id. at 191-92. In George, by contrast, an officer identified the defendants in a surveillance video based on their build, movements, and clothing. 150 Wn. App. at 119. It was error to admit the officer's identification because he had only seen the defendants briefly on the day of the crime. Id. These were not the type of extensive contacts, as in Hardy, that would give the officer a better basis than the jury for comparing the defendants' appearance at trial to the individuals on the video. Id.

Detective Freutal had even less contact with Bell than the officer in George. During Freutal's testimony, the State played a 911 call from December 25, 2013, in which a male and female voice can be heard. 8RP 925-31; Ex. 19. Freutal testified she "thought it sounded like Teigisti Gerense and Mr. Bell." 8RP 942. Freutal likewise testified she recognized Gerense's and Bell's voice in the jail calls. 8RP 942-43. Freutal explained the basis for her knowledge of Bell's voice came solely from listening to the December 25, 2013 911 call, the March 15, 2014 in-car video recording, and the jail calls. 8RP 943-44.

Freutal's identification of Bell's voice was based solely on recordings played for the jury. Freutal had no other contact with Bell, either in person or by telephone. She did not purport to be a voice identification expert. This is more extreme than George, where the officer at least interacted with the defendants on the day of the crime. Freutal was in no better a position than the jury to decide if Bell's was the male voice in the December 911 call and the jail calls. Because identification of the man's voice was an ultimate issue of fact, Freutal's opinion wrongly invaded the province of the jury.

The court of appeals inexplicably held, without any analysis, "Detective Freutal's testimony was not an opinion on guilt." Opinion, 7. The court of appeals did not explain how George is distinguishable or why George does not apply with equal force to voice identification. This Court's review is therefore warranted under RAP 13.4(b)(2) because the court of appeals' decision conflicts with George, as well as the rules of evidence. This Court's review is also warranted under RAP 13.4(b)(3), because whether Detective Freutal's identification of Bell's voice invaded the province of the jury is a significant question of constitutional law.

This Court's review is further necessary to clarify what constitutes manifest constitutional error under RAP 2.5(a)(3). Defense counsel moved in limine to preclude police witnesses from giving their opinion on Bell's

guilt. CP 32. However, Bell's counsel did not contemporaneously object to Detective's Freutal's opinion testimony. The court of appeals did not believe Bell's motion in limine preserved the issue for appeal. Opinion, 7.

This Court has previously stated that impermissible opinion testimony constitutes manifest constitutional error when there is an "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Despite this clear statement, basically no Washington court has found witness testimony to be an explicit statement on an ultimate issue of fact. This Court's guidance is therefore needed, warranting review under RAP 13.4(b)(3).

4. BELL WAS AN "ARRESTED PERSON," TRIGGERING ADDITIONAL PRIVACY ACT PROTECTIONS UNDER RCW 9.73.090(1)(b).

Conversations with police officers are not private, but recordings made by police must strictly conform to the requirements in RCW 9.73.090. State v. Cunningham, 93 Wn.2d 823, 829-31, 613 P.2d 1139 (1980); Lewis v. Dep't of Licensing, 157 Wn.2d 446, 466-67, 139 P.3d 1078 (2006).

RCW 9.73.090(1)(b) applies to video and/or sound recordings "made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court." (Emphasis added.) RCW 9.73.090(1)(b)(iii) specifies: "the arrested person

shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording."

RCW 9.73.090(1)(c) applies to "[s]ound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles." This subsection requires police to inform the person only "that a sound recording is being made and the statement so informing the person shall be included in the sound recording." There is no requirement the recorded person be informed of his or her constitutional rights.

Subsection (1)(b) unambiguously requires all arrested persons to be informed of their Miranda rights on the recording in order for the recording to be admissible at trial. The statute nowhere limits its application to custodial interrogations, as the trial court concluded. Although (1)(b) may commonly apply to custodial interrogations, the statute is not so limited. The legislature could have easily limited the statute to recordings made of arrested persons *during custodial interrogations*. Instead, the plain language applies to all recordings of arrested persons. Bell was an arrested person during the March 15 police recordings, triggering the additional protection of RCW 9.73.090(1)(b).

This Court's decision in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), supports this conclusion. Rupe gave a more typical confession to police in an interrogation room. This Court explained, however, that

subsection (1)(b) applies more broadly "to individuals who have been arrested." Id. at 683. Therefore, "[t]o apply this statute," courts "must resolve whether [the] defendant was arrested at the time" he made statements to the police. Id. Whether Rupe was subjected to custodial interrogation played no part in the court's analysis. See id. at 680-86. "Having concluded that [Rupe] was under arrest, it follows that RCW 9.73.090 applies to [the] defendant's statement to [the police]." Id. at 684. The same is true here: Bell was under arrest, so it follows that RCW 9.73.090(1)(b) applies to all his recorded statements to police on March 15, 2014.

The court of appeals declined to resolve whether subsection (1)(b) or (1)(c) applied to the recordings police made of Bell on March 15. Opinion, 11. Instead the court concluded any error was harmless. Opinion, 11. But error in admitting the recordings was not harmless. The nearly 15-minute long recording of Bell in the police vehicle painted him as belligerent, obstinate, and hostile. 8RP 847-61. Many jurors might have been offended by Bell swearing at and being rude to the police officers. The recordings were also prejudicial because they helped Detective Freutal identify Bell's voice in other, shorter recordings where the speaker's identity was at issue.

Finally, the recordings allowed the jury to see firsthand Bell handcuffed and restrained by police. Courts "have long recognized the substantial danger of destruction in the minds of the jury of the presumption

of innocence where the accused . . . is handcuffed or is otherwise shackled." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Such restraints are "'inherently prejudicial'" because they are "'unmistakable indications of the need to separate a defendant from the community at large.'" Id. at 845 (quoting Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)). This Court has recognized this threatens the accused's right to a fair trial. Id.

This Court's review is warranted under RAP 13.4(b)(4), because which provision of the privacy act applies is an issue of substantial public interest, particularly as police use body cameras with increasing frequency.

5. TO PROTECT HIS RIGHT TO BE FREE FROM DOUBLE JEOPARDY, BELL IS ENTITLED TO A WRITTEN ORDER DISMISSING THE FEBRUARY 10 CHARGE WITH PREJUDICE.

The trial court orally dismissed the February 10, 2014 charge for insufficient evidence, but never entered a written dismissal order. 4RP 203; 8RP 948; Hudson v. Louisiana, 450 U.S. 40, 42-44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (holding retrial is precluded after a trial court finds insufficient evidence to sustain a verdict). The judgment and sentence contains a blank space for the court to list dismissed charges, but it does not mention the February charge. CP 143.

Jeopardy had attached when the court dismissed the February 10 charge for insufficient evidence during trial. State v. George, 160 Wn.2d 727, 742, 158 P.3d 1169 (2007) ("[J]eopardy attaches in a jury trial when the jury is impaneled."). Bell is entitled to a remedy to honor his right to not be placed twice in jeopardy for the same crime. See State v. Womac, 160 Wn.2d 643, 664, 160 P.3d 40 (2007) (holding that vacating offenses, not conditional dismissal, is the proper remedy to avoid the threat of double jeopardy). Below, Bell requested either (1) remand for amendment of the judgment and sentence to reflect that the charge was dismissed with prejudice or (2) remand for entry of a separate order dismissing the charge with prejudice. Br. of Appellant, 60-61; Reply Br., 19-22.

The court of appeals denied Bell's request for remand, reasoning only that Bell "does not cite authority to support the need to amend a sentence that is neither erroneous nor illegal." Opinion, 21. The court of appeals did not answer the issue presented: whether double jeopardy principles necessitate a written order dismissing the charge with prejudice. This Court's review is therefore warranted under RAP 13.4(b)(3).

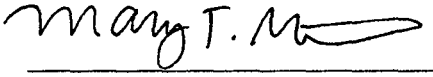
E. CONCLUSION

This Court should grant review, reverse Bell's convictions, and remand for a new trial.

DATED this 22nd day of June, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROY BELL, JR. Appellant.	)	No. 73062-2-I DIVISION ONE UNPUBLISHED OPINION FILED: May 23, 2016

BECKER, J. — Appellant Roy Bell Jr.'s right to confront witnesses against him was not violated when the victim's statements to an officer, made after Bell threatened to kill her and while he was still at large, were admitted. His right to a public trial was not violated when the court conducted off-the-record sidebars regarding a routine evidentiary objection and then promptly memorialized the sidebars on the record. Other alleged errors, even if they occurred, were not prejudicial. We affirm appellant's conviction on three felony counts of violation of a court order and remand for correction of a clerical error in the judgment and sentence.

FACTS

On December 20, 2013, the King County Superior Court entered a domestic violence no-contact order prohibiting Roy Bell Jr. from contacting TG. The order was valid for five years. Bell signed the order, acknowledging receipt.

Five days later, on December 25, 2013, TG called 911 as she was being assaulted by a man at her apartment. The man was not there when police officers arrived. TG identified the man to a responding officer as Bell.

Less than three months later, on March 15, 2014, TG again called 911 from her apartment. She told the operator there was no emergency but she needed help getting Bell out of her apartment. Responding officers found Bell in TG's apartment, arrested him, and took him to jail.

Bell called TG from jail several times on March 15 and 16, 2014.

The State charged Bell with three counts of domestic violence felony violation of a court order. Count 1 corresponds to the December 25 incident, count 2 to the March 15 incident, and count 3 to Bell's phone calls to TG from jail. The State charged two separate aggravating circumstances on all three counts.

Bell's trial occurred in October 2014. Neither Bell nor TG testified. The State played recordings of TG's December 25 911 call and her conversations with responding officers on that day, recordings of Bell being arrested at TG's apartment and taken to jail on March 15, and his phone calls from jail to TG. The State presented testimony from officers who responded to TG's 911 calls on December 25 and March 15. Bell stipulated that he had twice been previously

convicted of violating a court order protecting TG. The jury found Bell guilty on all three counts.

After a second phase of the trial, the jury found the two aggravating circumstances. The court imposed an exceptional sentence of 70 months, 10 months above the standard range sentence. Bell appeals.

CONFRONTATION CLAUSE

The recording of TG's December 25 911 call captures part of the assault as it happened, with TG saying she is bleeding and telling an unidentified male to "back off," "leave me alone," "let go of me," and "I need to breathe." A man's voice is heard on the call. At one point, he says, "Who is it? If it's the police, I'm not opening up. Is it the police? No, I don't open up to police. Police, no. No police come in here." TG tells the operator that the man left and police officers have arrived. The call ends with TG agreeing to go speak to the officers outside.

The officers' body microphones recorded their arrival at TG's apartment complex. The recordings show that as they arrive, one officer sees a man he believes is TG's assailant running down a stairwell in the building. As two officers continue searching for the assailant, Officer Jason Tucker goes to TG's apartment to speak with her.

Bell objected to the admission of TG's recorded conversation to Officer Tucker on the ground that it violated the confrontation clause. The trial court redacted statements TG made to the officer, indicating he had assaulted her before. The part of the recording where she identified Bell by name was not

admitted at trial. The court admitted the following portion of the recording of their conversation:

> [Officer Tucker]: Hi, ma'am. What's going on?
> [TG]: Well, he (unintelligible). Came over for the holiday. He came here, was drinking and he's (unintelligible) cheating on me and (unintelligible).
> [Officer Tucker]: Did he beat on you, or . . .
> [TG]: Yeah, yeah. Punching, kicking, saying you're going to die today.
> . . . .
> [Officer Tucker]: Do you know where he might be headed right now? Does he have anywhere around here he might go?
> [TG]: He knows everybody around here.

Officer Tucker testified to essentially the same statements from his own recollection of his conversation with TG. A detail added by his testimony was that TG told him the person who beat her up was her "baby's daddy."

Bell argues that the court erred in admitting TG's statements to Officer Tucker. Our review is de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008).

Under the Sixth Amendment, a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The confrontation clause bars the admission of testimonial statements, with certain exceptions not relevant here. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The United States Supreme Court has adopted the "primary purpose" test to determine whether a statement is testimonial. Under this test, statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation

is to enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The Washington Supreme Court has drawn from Davis four factors to determine whether the "primary purpose" of police interrogation is to enable assistance to meet an ongoing emergency: (1) whether a "reasonable listener" would conclude that the speaker was facing an ongoing emergency that required help; (2) whether the person was speaking about current events as they were actually occurring, requiring police assistance, or describing past events; (3) the nature of what was asked and answered; and (4) the level of formality of the investigation. State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009).

Because this is a domestic violence case, we focus on the threat to TG and assess the ongoing emergency from the perspective of whether there was a continuing threat *to her.* See Michigan v. Bryant, 562 U.S. 344, 363-64, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). "The critical consideration is not whether the perpetrator is or is not at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an ongoing emergency." State v. Ohlson, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007).

Although TG's assailant was no longer assaulting her, he was at large and likely still in the immediate vicinity, given that he had just left the apartment and TG said he knew "everybody" in the area. His reported statement to TG that "you're going to die today" indicated a continuing threat of harm to her. A reasonable listener would recognize that TG was facing an ongoing emergency. See Ohlson, 162 Wn.2d 1 at 18 (ongoing emergency because there was every

reason to believe the assailant might return again and perhaps escalate his behavior). Cf. Davis, 547 U.S. at 819-20 (defendant was still present and officers kept him physically separated from his wife in another room).

TG was speaking about events as they were happening. She was still on the 911 call when officers arrived. The officer's questions were generally designed to assess the current situation and find the assailant. And to the extent the conversation the officer had with TG was investigative, it was not formal. In light of the four factors identified in Davis, the trial court correctly concluded the primary purpose of TG's statements to the officer was to enable the officers to meet an ongoing emergency. TG's statements were nontestimonial, and their admission did not violate Bell's Sixth Amendment right to confrontation.

VOICE IDENTIFICATION TESTIMONY

Bell moved in limine to exclude witness opinions as to his guilt and officer testimony identifying his voice on the phone calls from jail. At trial, Detective Nicole Freutel testified that she thought the voices on the December 25 911 call "sounded like" TG and Bell. Bell did not object. On appeal, Bell argues that the detective's testimony should have been excluded under ER 701 and State v. George, 150 Wn. App. 110, 206 P.3d 697, review denied, 166 Wn.2d 1037 (2009).

One of the factors to consider in whether to admit lay opinion under ER 701 is whether it is helpful to the jury. A court must also consider the risk of invading the province of the jury and unfairly prejudicing the defendant. George, 150 Wn. App. at 118. For example, in George the admission of an officer's

testimony as to the identity of persons in a surveillance photograph was held to be error. There was no basis for concluding that the officer, who had observed the defendants briefly, knew enough about what they looked like to express an opinion that they were the robbers shown on the very poor quality surveillance video. George, 150 Wn. App. at 119.

Detective Freutel had interviewed TG in person, and her primary function as a witness was to identify TG's voice on the various recordings. She had no independent knowledge of what Bell's voice sounded like. Her basis of knowledge to recognize his voice came from listening to the recordings. Bell argues her testimony was prejudicial and should not have been admitted.

December 25 call

Bell takes particular issue with Detective Freutel's identification of his voice on the 911 call of December 25. Bell did not object when this testimony came in. He argues that his motions in limine preserved his right to raise the issue on appeal. We disagree. The motions in limine did not address the issue of testimony identifying the male voice on the 911 call. Detective Freutel's testimony was not an opinion as to guilt.

Bell contends that he can raise the alleged error for the first time on appeal due to ineffective assistance of counsel and because it constitutes manifest error affecting a constitutional right reviewable under RAP 2.5(a)(3). Claims of ineffective assistance of counsel and manifest error both require the defendant to demonstrate prejudice. See Strickland v. Washington, 466 U.S.

668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (ineffective assistance of counsel); State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007) (manifest error).

Detective Freutel's testimony was not the only evidence that Bell was the assailant in the December 25 incident. Officer Tucker testified that TG identified the man who beat her as her child's father. Bell later stipulated that he and TG had a child together. Another officer saw a man running away down the stairwell of the apartment building who loosely fit the description of Bell given by TG.

Significantly, the jurors heard the man's voice on the 911 call and the phone calls Bell made from jail. They could decide for themselves whether the man's voice from the 911 call was the same. In closing argument, the State invited jurors to compare the recordings for themselves. In light of the other evidence presented that he was the man in the apartment on December 25, Bell has not shown prejudice from the testimony by Detective Freutel.

Jail calls

Bell's motion in limine did request exclusion of officer testimony identifying his voice on the phone calls he made from jail. The court denied the motion. When Detective Freutel testified that she recognized Bell's voice on the phone calls he made from jail, Bell did not renew his objection.

Assuming Bell preserved the objection via the motion in limine, and assuming it was error, reversal is called for only if the error resulted in prejudice to Bell. State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005), review denied, 156 Wn.2d 1014 (2006). We apply the rule that "'error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been

materially affected had the error not occurred.'" Howard, 127 Wn. App. at 871 (internal quotation marks omitted), quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Bell admitted in closing argument that he talked to TG on the phone from jail. His defense was that when he made the calls, he did not know about the no-contact order or he believed that it had expired. Whether it was Bell's voice on the jail calls was not a contested issue. Even without Detective Freutel's testimony, the jury could not have seriously doubted that Bell's was the voice on the phone. We therefore conclude that any error was harmless.

WASHINGTON PRIVACY ACT

When police responded to TG's 911 call on March 15, 2014, they were wearing body microphones that corresponded to video cameras mounted in their patrol car. The equipment made three separate but overlapping recordings of the officers' interactions with Bell as he was arrested, put into a police car, and transported to jail. Bell's behavior and comments on the recordings showed him in a poor light. The recordings were played at trial, over Bell's objection that their admission violated the Washington privacy act, chapter RCW 9.73. Bell contends the recordings were prejudicial because they showed him handcuffed and restrained and behaving obnoxiously, and also because excluding them would have eliminated one of the points of comparison that supported identification of his voice on the 911 call on December 25.

Information obtained in violation of RCW 9.73.030-.040 is generally inadmissible. RCW 9.73.050. The act makes an exception for police and other emergency personnel in certain situations. RCW 9.73.090(1).

Two subsections of RCW 9.73.090(1) are pertinent here. Subsection (b) governs video and sound recordings "made of *arrested persons* by police officers responsible for making arrests or holding persons in custody before their first appearance in court." RCW 9.73.090(1)(b) (emphasis added). For a recording to be admissible under this subsection, which our Supreme Court has referred to as the "custodial interrogation proviso," the arrested person must be fully informed on the recording of his constitutional rights. RCW 9.73.090(1)(b)(iii); Lewis v. Dep't of Licensing, 157 Wn.2d 446, 467, 139 P.3d 1078 (2006).

Subsection (c) governs "sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles." RCW 9.73.090(1)(c). This subsection was added in 2000. The Supreme Court has referred to it as the "traffic stop proviso." Lewis, 157 Wn.2d at 467. When a sound recording of a person is made under subsection (c), the person must be informed on the recording that a sound recording is being made, but there is no requirement for advice of constitutional rights.

Bell argues that subsection (b) applies in his case. If so, it was error to admit the recordings of Bell because he was not informed of his constitutional rights on the recording. The State responds that subsection (c) applies.

It is undisputed that the recordings of Bell correspond to video images recorded by cameras mounted in the patrol cars. Subsection (c) governs this

specific and narrow category of recordings. But it is also undisputed that Bell was arrested shortly after the first recording began. Because he was an "arrested person" after that point, arguably the recording from then on falls under the plain language of subsection (b). And even if the recordings fall under subsection (c), Bell has an argument that the third recording contains no statement informing Bell that he was being recorded.

We need not resolve these issues, however, because even if the recordings of Bell were admitted in error, the error was harmless. Admission of evidence in violation of the Washington Privacy Act is not a constitutional violation. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Cunningham, 93 Wn.2d at 831.

To convict Bell of felony violation of a court order on March 15, 2014, the State had to prove that a no-contact order applicable to Bell existed on that date, that Bell knew the order existed and knowingly violated it, and that, in relevant part, he had twice been previously convicted for violating the provisions of a court order. See RCW 26.50.110(1). The State's evidence decisively established every element of the crime without the recordings.

Even if the recordings were inadmissible, the responding officers were still allowed to testify about what they saw and heard. The strict exclusion remedy of State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990), does not apply. When the interactions captured on the recording are not private conversations,

the recordings are inadmissible, but the court may admit "other evidence acquired at the same time as the improper recordings, such as the officer's simultaneous visual observations." Lewis, 157 Wn.2d at 472. Bell does not argue that his interactions with the officers on March 15 were private conversations.

The officers testified that Bell was defiant, verbally combative, offered to pay officers three million dollars to let him go, and urinated on himself. Since the recordings were generally cumulative of the officers' properly admitted testimony, Bell has not shown that the outcome of the trial was materially affected by the unattractive light in which the recordings portrayed him.

It is true that exclusion of the audio recordings of the arrest on March 15 would have eliminated them as one basis for comparison that allowed Detective Freutel and the jury to identify Bell's voice on the recording of the 911 call in the first count. But Bell's five lengthy phone calls to TG from jail on the day of his arrest and the next day would have remained as a strong foundation for identifying Bell's voice. We conclude the outcome of the trial would not have been materially affected if the challenged recordings had been excluded.

PUBLIC TRIAL RIGHT

The court granted a motion in limine to prevent the State's witnesses from mentioning that Bell had warrants. During an officer's direct testimony, the State played a recording of Bell's arrest on March 15. On the recording, an officer is heard to say, "You're under arrest at this point. You've got a couple warrants and you're violating an order" and later "go ahead and verify this warrant." At the

end of the officer's direct testimony, defense counsel stated that he had a motion. The court heard the motion at a sidebar off the record. At the end of the officer's cross-examination, the court called for another sidebar, again conducted off the record. Immediately after the second sidebar, the court instructed the jury to disregard any references to whether Bell had any warrants.

After a short recess, the court reconvened without the jury. Both sidebars were put on the record. The court and the parties agreed that at the first sidebar Bell moved for a mistrial and argued that the references to his warrants in the recording violated the ruling in limine. The court denied the mistrial motion but offered to give a limiting instruction. The court called the second sidebar to ask Bell whether he actually wanted the court to give a limiting instruction, and Bell said yes.

Bell contends that the trial court violated his right to a public trial by conducting the two sidebars off the record. An alleged violation of the right to a public trial presents a question of law that we review de novo. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014). Whether the proceeding at issue implicates the public trial right calls for the application of the "experience and logic" test. Smith, 181 Wn.2d at 514.

Sidebars on evidentiary objections during trial generally do not implicate the public trial right. Smith, 181 Wn.2d at 519. The Smith court cautioned that to avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, must be done only to avoid disrupting the flow of trial,

and must be conducted either on the record or promptly memorialized on the record. Smith, 181 Wn.2d at 516 n.10.

The purpose of the sidebars here was to address Bell's evidentiary objection, a traditional subject area. See Smith, 181 Wn.2d at 518. Both sidebars were conducted to avoid disrupting the flow of the officer's testimony and the trial as a whole. Both sidebars were promptly memorialized on the record, so the public was not prevented from knowing what occurred. See Smith, 181 Wn.2d at 518..

Bell argues that the sidebars implicate the public trial right because he requested a mistrial. He cites State v. Burdette, 178 Wn. App. 183, 313 P.3d 1235 (2013). In Burdette, the jury reported soon after beginning deliberations that it was deadlocked over several issues. After consulting with counsel, the trial court sent the jury a response asking them to continue deliberations. The record did not reflect where any discussions about the trial court's responses were held. Burdette, 178 Wn. App. at 189. On appeal, the defendant argued unsuccessfully that the court violated his public trial right by not discussing its responses to the jury communications in open court. Burdette, 178 Wn. App. at 189-90, 193.

The Burdette court reasoned that the trial court did not consider the jury's statement to be a genuine statement of hopeless deadlock, which would trigger consideration of a mistrial. Burdette, 178 Wn. App. at 196. The court opined, in dicta, that when a trial court considers declaring a mistrial on the basis that a jury is hopelessly deadlocked, a decision that has constitutional dimensions because

of double jeopardy implications, both prongs of the logic and experience test indicate that the public trial right would attach. Burdette, 178 Wn. App. at 196.

Burdette should not be understood as a blanket statement that all mistrial motions must be considered on the record. If that were so, no routine evidentiary objection accompanied by a motion for a mistrial could be handled in a sidebar, thus evading the rule of Smith that an evidentiary objection is a traditional subject area for a sidebar. The commentary in Burdette should be recognized as limited to the context of dealing with deadlocked juries.

The sidebars here were held to consider a routine evidentiary issue with no constitutional dimension. They were analogous to the sidebars in Smith and did not implicate the public trial right. We conclude Bell's right to a public trial was not violated.

CUMULATIVE ERROR

Bell moved the trial court for a mistrial based on cumulative error at least twice, based on a number of irregularities that occurred during the trial. The trial court denied both motions. Bell assigns error to that ruling. Our review is for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

To determine the effect of a trial irregularity, the court considers (1) the seriousness, (2) whether it was cumulative of other properly admitted evidence, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

First, Bell alleges prejudice from testimony that violated an order in limine prohibiting reference to Bell's prior bad acts. Officers testified that TG's apartment "had a lot of history at it," that Bell had a previous booking photo, and that TG said "it had happened before." The trial court struck the first two statements. On the March 15 recording of Bell's arrest and transport to jail, an officer referred to warrants out for Bell and Bell said to officers, "I know I got to deal with DOC." The trial court instructed the jury to disregard mention of any warrants out for Bell.

The vague references to Bell's prior arrests or convictions were cumulative of properly admitted evidence. Bell stipulated that he had twice been previously convicted for violating a court order protecting TG. The court either struck, redacted, or gave a limiting instruction regarding most of the testimony. We presume the jury followed these instructions and conclude they cured any prejudice.

The next irregularity concerns one of the calls Bell made to TG from jail. He told her, "You're going to burn in hell. (Unintelligible) sitting here month after month because of your fucking hell ass lies." The phrase "month after month" was supposed to have been redacted from the recording played to the jury in order to remove the implication that Bell was deemed dangerous enough to be kept in jail for months. This was not a serious irregularity. A reasonable juror listening to the phone calls would have realized that Bell expected to be bailed out within a few days and was exaggerating to make TG feel guilty.

Last, Bell alleges error based on juror misconduct. The trial court described the misconduct on the record. After the court read Bell's stipulation that he had two prior convictions for violation of a court order protecting TG, juror 4 approached the bailiff in the jury room. He told the bailiff that he did not understand the stipulation. The bailiff told him that she could not talk to him about it. The juror asked the bailiff if the stipulation meant that Bell already admitted he was guilty. The bailiff repeated that she could not talk to him. Juror 4 then turned to the other jurors and asked them if they thought that's what the stipulation meant. The other jurors all stared at him, "presumably understanding they can't talk about it." The bailiff said that they could not talk about the case. Juror 4 said that he wanted to talk to the judge. When he saw the judge on the bench as the jurors were leaving, he again said that he wanted to talk to the court about the stipulation. When Bell heard the court's account of what had happened, he moved for a mistrial.

The court excused juror 4 from the jury. The court brought in all the other jurors and questioned them at length. The court then denied the motion for a mistrial, finding that there was not sufficient evidence to indicate that the jury was tainted. The court reconsidered Bell's motion after closing arguments and again denied it because the closing arguments made clear that Bell's stipulation was not an admission of guilt.

We agree with the trial court that there was insufficient evidence that the jury was tainted. The trial court dismissed juror 4 and inquired adequately to

ensure that the rest of the jurors had not been tainted. We find no abuse of discretion.

Separately, Bell argues that the cumulative effect of the errors he has raised on appeal—the confrontation clause issue, the sidebar issue, the privacy act issue and the voice identification issue—deprived him of a fair trial. We reject this argument. As detailed above, we conclude as to most issues there was no error, and if there was error, no prejudice.

EXCEPTIONAL SENTENCE

The jury found that all three counts were aggravated by an ongoing pattern of abuse. See RCW 9.94A.535(3)(h)(i) (the offense "was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time"). The jury also found that count 1, for the incident on December 25, was also aggravated by rapid recidivism. See RCW 9.94A.535(3)(t) (jury may decide alleged aggravating factor that the defendant "committed the current offense shortly after being released from incarceration.")

The jury was given the pattern instruction regarding the aggravating factor of an ongoing pattern of abuse. The pattern instruction was recently disapproved because it erroneously included language defining the term "prolonged period of time" to mean "more than a few weeks." State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213 (2015). As a remedy for use of the erroneous instruction, Bell requests that we vacate his exceptional sentence and remand for resentencing.

At sentencing, the trial court entered a conclusion of law that: "Each one of these aggravating circumstances is a substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed. In the event that an appellate court affirms at least one of the substantial and compelling reasons, the length of the sentence should remain the same." On the judgment and sentence, the trial court checked a box stating "the court would impose the same sentence on the basis of any one of the aggravating circumstances."

An exceptional sentence may be upheld on appeal even when all but one of the trial court's reasons for the sentence have been overturned. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Remand for resentencing is necessary only if it is not clear that the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld. Gaines, 122 Wn.2d at 512.

Bell does not challenge the aggravating circumstance of rapid recidivism. It remains valid. Bell contends resentencing is necessary because the exceptional sentence was imposed only on count 3, while the valid aggravator of rapid recidivism applied only to count 1. He is mistaken. The exceptional sentence was not particularized to count 3.

Ordinarily, the sentences on all three counts would have been concurrent, RCW 9.94A.589(1)(a), but a court may run such sentences consecutively when there are grounds for an exceptional sentence. See RCW 9.94A.535. The court sentenced Bell to the maximum term of 60 months each on counts 1 and 2, to be

served concurrently, and 10 months on count 3, to be served consecutively. Bell's sentence is exceptional because the sentence on count 3 was made consecutive to the other counts, but this does not mean the exceptional sentence was imposed only on count 3. The court could have (and stated it would have) done the same thing even if there had been no finding of an ongoing pattern of abuse.

By making the sentence on count 3 consecutive, the trial court achieved a modest increase of 10 months over the presumptive standard range sentence for the three counts. Cf. State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993) (where exceptional sentence exceeded standard sentence by almost six times, it was unclear whether trial court would have imposed the same sentence if it had only considered the valid aggravating factors).

Remanding for resentencing is unnecessary because the trial court made clear that it would have imposed the same exceptional sentence on the basis of the rapid recidivism aggravating circumstance alone.

DISMISSAL OF FEBRUARY 10, 2014, CHARGE

The State initially charged Bell with a fourth count of domestic violence felony violation of a court order, arising from an incident on February 10, 2014. After the State rested its case-in-chief, Bell moved to dismiss this count because the State had not presented any evidence. The State did not object, and the court dismissed the February 10 count. Two days later, the State filed a fourth and final amended information omitting this count.

Bell requests that we remand to the trial court for amendment of the judgment and sentence to reflect the dismissal of the February 10 count or, alternatively, entry of an order dismissing it. He does not cite authority to support the need to amend a sentence that is neither erroneous nor illegal. We deny the request to remand for written dismissal of the charge.

CLERICAL ERROR IN JUDGMENT AND SENTENCE

Both parties agree that the judgment and sentence erroneously lists count 2 as having been committed on February 10, 2014, instead of March 15, 2014, the correct date. We remand to the trial court for correction of this clerical error. See, e.g., CrR 7.8 (clerical mistakes in judgments may be corrected by the court at any time); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 708, 117 P.3d 353 (2005) (remanding to trial court for correction of statutory citation clerical error in judgment and sentence).

Affirmed. We remand solely for correction of the clerical error in the judgment and sentence.

Becker, J.

WE CONCUR:

Trickey, J

NIELSEN, BROMAN & KOCH, PLLC

June 22, 2016 - 11:35 AM

Transmittal Letter

Document Uploaded: 730622-Petition for Review.pdf

Case Name: Roy Bell Jr.
Court of Appeals Case Number: 73062-2

Party Respresented:
Is this a Personal Restraint Petition? ◯ Yes ◉ No
Trial Court County: King - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
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  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
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Comments:

No Comments were entered.

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

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