Supreme Court No. 93268-5
COA No. 75033-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VICTOR RUSSELL,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Victor Russell, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Russell seeks review of Division One's Unpublished Opinion dated June 13, 2016, in *State v. Russell*, No. 75033–0–I. No motion for reconsideration was filed in the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Did the court err in admitting the contents of two separate telephone conversations between police officers and a person purported to be Victor Russell where the State's evidence failed to properly identify the person on the telephone with police as the appellant? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On October 23, 2015, Russell filed a brief alleging that the trial court had erred in regards to the above-indicated issue. The brief set out facts and law relevant to this petition and are hereby incorporated herein by reference.

1. **Proceedings on Appeal.**

On appeal, Russell challenged his conviction for felony

violation of a no contact order on the grounds that the Trail Court erred by permitting two officers to testify regarding their telephone conversations with Russell. Brief of Appellant at 11-14. The Court affirmed the lower court. For the reasons set forth below, Victor Russell seeks review.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. **THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF LT. BRENNA AND DEPUTY HOVDA REGARDING THEIR TELEPHONE CONVERSATIONS**

Counsel for Russell objected to the testimony of Lt. Brenna and Deputy Hovda regarding their respective telephone conversations on the grounds the State failed to lay a proper foundation under ER 901(b)(6) for the admission of the testimony. 1RP at 143-59. Defense counsel argued that under ER 901(b)(6) the State was required to show that the officers either recognized Mr. Russell's voice, which neither could not do. 1RP at 148-52.

The court ruled that the officers' testimony that the speaker answered to the name Victor Russell and had knowledge of the contents to the notes or email messages was sufficient evidence of identity and therefore was admissible. 1RP at 158.

The trial court should not have admitted Mr. Russell's alleged telephone statements to the police officers because they were not properly authenticated and the speaker was therefore not properly identified. Authentication of the speaker is required. *State v. Deaver,* 6 Wn.App. 216, 218, 491 P.2d 1363 (1971). Evidence of identity of a party to a telephone conversation may be either direct or circumstantial. *Deaver*, 6 Wn.App. at 219, 491 P.2d 1363 (quoting *Young v. Seattle Transfer Co.*, 33 Wash. 225, 230, 74 P. 375 (1903)). See also, *State v. Mahoney*, 80 Wn.App. 495, 909 P.2d 949 (1996); *State v. Danielson*, 37 Wn. App. 469, 472, 681 P.2d 260 (1984).

ER 901(b)(6) states that telephone conversations may be authenticated by evidence that a call was made to the number listed to a particular person at the time of the call, when the person answering the call identifies himself as the person called. Washington case law does not set forth separate rules for outgoing versus incoming calls when determining sufficiency of evidence for

authentication. Our courts have determined that testimony that the person on the other end of the line has identified himself as the specific person called is, by itself, insufficient to authenticate the identity of the person called. *Passovoy v. Nordstrom, Inc.*, 52 Wn.App. 166, 171, 758 P.2d 524 (1988). However, telephone calls have frequently been authenticated when self-identification is combined with virtually any circumstantial evidence. *Id.*

Authentication may be accomplished by circumstantial evidence that points to a person's identity as the particular person called, if the conversation reveals knowledge of facts that only the particular person would be likely to know. *State v. Deaver*, 6 Wn.App. 216, 219, 491 P.2d 1363 (1971).

In *Danielson*, police received a call from a person identifying himself as *Danielson* and the officer was allowed to testify about the details of telephone conversation. The *Danielson* court held that circumstantial evidence sufficiently established the identity of the caller as *Danielson*. Thus, the trial court properly admitted the officer's testimony regarding the substance of the call. The *Danielson* court outlined that the evidence that supported identification is that the caller identified himself as the defendant; the birth date given by the caller matched that of the defendant and

was verified through Department of Licensing records and an existing field interview record; the address given by the caller matched the address for the defendant listed on the vehicle impound form; the caller stated that he was calling in response to a request by the passenger's father, who was named; and the caller stated that he did not stop because he had an outstanding warrant and did not want to go to jail. The investigating officer verified that there was indeed an outstanding warrant for the defendant. *Danielson*, 37 Wn. App at 472.

Here, although the person the officers spoke to identified himself as either "Victor" or "Victor Russell," there was no evidence the telephone number they called was assigned to Mr. Russell by the telephone company and there was no evidence that the officers had spoken to Mr. Russell before, and therefore neither were able to recognize his voice. As such, Mr. Russell's self-identification, by itself, was insufficient to authenticate the phone conversation.

A non-constitutional error merits reversal if there is a reasonable probability that the error affected the jury's verdict. *State v. Floreck,* 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). Here, although Lieutenant Brenna and Deputy Hovda testified that the person they called had knowledge of the contents of the notes and

emails, the "self-identification" is far short of that presented in Danielson. Because there was a reasonable probability the court's erroneous admission of the officers' testimony affected the outcome of the trial, this Court should reverse the convictions. entering plea).

The Court of Appeals' opinion affirming the convictions merits review by this Court.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E.

DATED this 8th day of July, 2016.

Respectfully submitted:

PETER B. TILLER, WSBA #20835
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on July 8, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. Richard Johnson, Division I, 600 University Street, Seattle, WA 98101-4170 and copies were mailed by U.S. mail, postage prepaid, to the following:

Carol La Verne Thurston County Prosecutor's Office 2000 Lkaeridge Dr SW Bldg 2 Olympia, WA 98502-6045 Lavernc@co.thurston.wa.us	Mr. Richard Johnson Division I 600 University Street Seattle, WA 98101-4170
Mr. Victor Russell DOC#336899 Washington State Penitentiary 1313 North 13th Ave. Walla Walla, WA 99362 **LEGAL MAIL/SPECIAL MAIL**	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 8, 2016.

PETER B. TILLER

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

STATE OF WASHINGTON, Respondent,	)	No. 75033-0-I
v.	)	UNPUBLISHED OPINION
VICTOR DANIEL RUSSELL, Appellant.	)	FILED: June 13, 2016

SCHINDLER, J. — A jury convicted Victor Daniel Russell of four counts of felony violation of a domestic violence no-contact order. Russell claims the court erred by allowing two investigating officers to testify about their telephone conversations with Russell, and his attorney provided ineffective assistance of counsel by failing to move to bifurcate the trial to exclude evidence of two prior convictions for violating no-contact orders. Because the decision not to move to bifurcate was strategic and Russell cannot show prejudice, we affirm.

FACTS

Victor Daniel Russell and Laurena Redford dated on and off for three and one-half to four years and lived together for a little over a year. Redford obtained a domestic violence no-contact order on October 31, 2013 prohibiting Russell from having contact with her. The no-contact order expires on October 31, 2018.

On January 18, 2015, Redford and her roommate William Nichols went in Redford's car to Walmart and Costco in Tumwater. Redford went into Costco and Nichols drove Redford's car next door to Walmart. When Nichols returned to the car after shopping, Russell was waiting at the car with two notes. Russell asked Nichols to give the notes to Redford. Nichols drove to Costco, picked up Redford, and gave her the notes.

On January 20, 2015, Redford went to the Tumwater Police Department and reported a violation of a no-contact order. Redford gave the notes to Lieutenant Bruce Brenna.[1] Lieutenant Brenna confirmed the existence and terms of the no-contact order between Russell and Redford. Lieutenant Brenna then called a telephone number for Russell that Redford had provided. A male answered the call and identified himself as "Victor Russell."[2] Lieutenant Brenna asked the person what happened at Walmart on January 18 and the person initially denied being at Walmart on that date. Lieutenant Brenna told the person that Walmart has surveillance cameras in the parking lot and that he had violated the no-contact order by giving the notes to Nichols. The person said he wanted to contact Redford because he was "broke" and Redford owed him "a lot of money." The person said he did not see Redford, "just put the notes on the car," and said "hi" to Nichols as he walked by. Lieutenant Brenna again advised that placing the notes on Redford's car violated the no-contact order. The person responded, " 'Yeah, I know. I'm guilty. I need my money though.' " Lieutenant Brenna then ended the call.

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[1] Redford initially contacted the Thurston County Sheriff's Office about the notes but because the matter was outside their jurisdiction, she was advised to report the incident to the Tumwater Police Department.

[2] Lieutenant Brenna did not attempt to corroborate the telephone number.

That same day, Redford gave Thurston County Sheriff's Office Deputy Randy Hovda e-mails and a letter from late 2014 and early 2015 that Russell had sent her. Russell's telephone number was in one of the e-mails. Deputy Hovda called that number in an attempt to contact Russell. A male answered the call and Deputy Hovda asked, "Victor?" The person answered "yes." The person then began to "ramble" about being on the phone with a friend, trying to make arrangements for someone to take care of his dog in case he went to jail. Deputy Hovda asked whether the person thought "he needed to go to jail" and the person said he did not know and ended the call. Deputy Hovda called the number again but no one answered. Deputy Hovda later discovered Russell's name and telephone number had already been entered into the Thurston County Sheriff's Office system.

Russell was charged with six counts of felony violation of a domestic violence no-contact order against a family or household member. Russell pleaded not guilty. The trial court dismissed one count and the jury found Russell not guilty of one count. The jury found Russell guilty of the four remaining counts of felony violation of a domestic violence no-contact order.[3]

ANALYSIS

Admission of Evidence of Telephone Calls

Russell argues the trial court erred by admitting the testimony of Lieutenant Brenna and Deputy Hovda about their telephone conversations because his alleged statements were not properly authenticated and the speakers were therefore not properly identified. We disagree.

[3] The jury returned a special verdict on the four guilty counts that Russell and Redford were members of the same household.

We review a trial court's admission of evidence for an abuse of discretion. State v. Bradford, 175 Wn. App. 912, 927, 308 P.3d 736 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Bradford, 175 Wn. App. at 927.

"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." ER 901(a). This requirement is met " 'if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification.' " Bradford, 175 Wn. App. at 928 (quoting State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984)). In making its determination as to authentication, the trial court is not bound by the rules of evidence. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007).

The identity of a party to a telephone call may be established by direct or circumstantial evidence. Danielson, 37 Wn. App. at 472. Alone, self-identification by the person on the other end of the line is insufficient to satisfy the requirements of ER 901. Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 171, 758 P.2d 524 (1988). "However, courts routinely find a call to be authenticated when self-identification is combined with virtually any circumstantial evidence." Passovoy, 52 Wn. App. at 171. Such circumstantial evidence may include the contents of the conversation itself. Danielson, 37 Wn. App. at 471. For example, in Passovoy, a telephone call was properly authenticated when in addition to identifying herself as a Nordstrom employee, the caller made the call in response to an earlier call and also demonstrated familiarity with the facts of the incident. Passovoy, 52 Wn. App. at 171. In State v. Deaver, 6 Wn.

App. 216, 218-19, 491 P.2d 1363 (1971), even though the recipient of a call did not recognize the caller's voice, the telephone call was authenticated based on the caller's self-identification and the content of the conversation.

By way of illustration only and not by way of limitation, ER 901 provides authentication or identification of telephone conversations conforming to the following requirements:

> [B]y evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called.

ER 901(b)(6)(i).

The trial court did not abuse its discretion by admitting evidence of Russell's telephone conversations with Lieutenant Brenna and Deputy Hovda. During both conversations, Russell identified himself. Additionally, the self-identification in both conversations was combined with circumstantial evidence. In the conversation with Lieutenant Brenna, the person who answered the call demonstrated familiarity with the facts of the incident at Walmart. For example, he admitted putting the notes on Redford's car and encountering Nichols. In the conversation with Deputy Hovda, the person answering the call demonstrated awareness that his prior actions could result in going to jail. The evidence also showed the telephone number Deputy Hovda called was listed as Russell's number in the e-mails from Russell to Redford. The Thurston County Sheriff's Office system also listed the telephone number as belonging to Russell.

Ineffective Assistance of Counsel

Russell argues he received ineffective assistance of counsel at trial because defense counsel stipulated to two prior convictions for violation of a no-contact order instead of moving to bifurcate the trial so the jury would not hear evidence of the prior convictions until after it decided the underlying charge. We disagree.

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element of the test is not satisfied, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. " 'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.' " State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). We will not find ineffective assistance of counsel if the actions of counsel go to trial tactics. Grier, 171 Wn.2d at 33. Counsel does not render ineffective assistance by refraining from strategies that reasonably appear unlikely to succeed. McFarland, 127 Wn.2d at 334 n.2.

The fact that a defendant has at least two prior convictions for violating a no-contact order is an element of the crime of felony violation of a no-contact order—the offense Russell was charged with. See RCW 26.50.110(5). "[W]hen a prior conviction

is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue." State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). Further, bifurcated trials are not favored. State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006). Because, it is unlikely a motion to bifurcate would have been successful, defense counsel's decision not to move to bifurcate did not fall below an objective standard of reasonableness.

Moreover, Russell was not prejudiced by his counsel's decision not to move to bifurcate. When introducing evidence of a prior conviction, the trial court can reduce any unnecessary prejudice where practical, such as by allowing a defendant to stipulate to the prior conviction and instructing the jury as to the limited purpose for which it may consider the prior conviction. Roswell, 165 Wn.2d at 198 n.6.

Here, the trial court read the parties' stipulation to the jury and gave an appropriate limiting instruction.

> The parties have agreed that certain facts are true. You must accept as true that the person before the Court who has been identified in the charging document as defendant, Victor Daniel Russell, was convicted on October 31st, 2013 of violation of no-contact, protection, or restraining order, domestic violence, in the State of Washington vs. Victor Russell in Thurston County Superior Court Cause Number 13-1-00529-1.
>
> You must also accept as true that the person before the Court who has been identified in the charging document as defendant Victor Daniel Russell was convicted on January 12th, 2011 of violation of post-conviction no-contact order, domestic violence, in State of Washington vs. Victor Daniel Russell in Thurston County Superior Court Cause Number 10-1-01556-0.
>
> This evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's two prior convictions for violating a court order. This evidence may be considered by you only for the purpose of deciding whether the defendant has two prior convictions for violating a court order. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

We presume the jury follows the court's instructions. State v. Perez-Valdez, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011). Russell cannot show prejudice by defense counsel's decision not to move to bifurcate the trial.

Affirmed.

WE CONCUR: