No. 98722-0
COA No. 36498-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TEDDY ROOSEVELT SIBLEY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Teddy Sibley asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Teddy Roosevelt Sibley*, No. 36498-4-III (May 14, 2020). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The Confrontation Clause of the United States and Washington Constitutions bars the admission of a declarant's testimonial out of court statements whose primary purpose is to create a substitute for trial testimony. Kara Jo Finley's recorded statements made during an argument with Mr. Sibley were made with the primary purpose of memorializing for the police the events as they occurred for later use in Mr. Sibley's prosecution. Did Mr. Sibley lodge a sufficient objection to the violation of the Confrontation Clause or is the error a manifest error, requiring reversal of Mr. Sibley's convictions and remand for a new trial?

2. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and where the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

3. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available

statutory maximum. Does a judicial finding found by a preponderance of the evidence that a defendant had two prior most serious offenses, thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole violate the Sixth and Fourteenth Amendment?

D. STATEMENT OF THE CASE

Teddy Sibley and Kara Jo Finley had been involved in a tempestuous on-off romantic relationship. RP 469. Mr. Sibley was the father of Ms. Finley's two young sons. RP 469. On March 22, 2018, Ms. Finley was allowing Mr. Sibley to stay at her residence so he could see his sons. RP 471.

On that date, Jacqueline Finley, Kara Jo Finley's sister-in-law, received a call from Ms. Finley. RP 471. Jacqueline Finley hung up and redialed Kara Jo Finley's number. RP 472. Jacqueline Finley could hear the voices of Mr. Sibley and Kara Jo Finley in the background of the call. RP 472. Jacqueline Finley also heard a baby crying. RP 472. Based upon what she heard, Jacqueline Finley called the police and drove to Kara Jo Finley's house. RP 472-73.

When Jacqueline Finley arrived at Kara Jo Finley's home she met Mr. Sibley on the front porch. RP 474. Jacqueline Finley saw Kara

Jo Finley lying on the floor just inside the door. RP 474-76. Despite Mr. Sibley's demand that Jacqueline Finley leave, she continued to argue with Mr. Sibley. RP 474-75.

Jacqueline Finley drove to a neighbor's house and again called the police. RP 477. She returned the house and saw Kara Jo Finley's daughter from a prior relationship, 13 year-old Zalisa, who appeared to be loading items into a car. RP 479. Mr. Sibley got into the car and drove away with his sons in the car with him. RP 482-83.

Mr. Sibley was stopped by the police at a nearby gas station. RP 618-20. Mr. Sibley was arrested for an outstanding warrant and also for driving with a suspended license. RP 617-23.

Kara Jo Finley was taken to the hospital in Colville where she was treated for fractures of her left tibia and fibula. RP 891.

Unbeknownst to Jacqueline Finley, when she left her house to go to Kara Jo Finley's, her daughter, 16 year-old Elizabeth, heard the open phone line and heard yelling and crying. RP 533. She recognized the voices as Kara Jo Finley and Mr. Sibley. RP 533. Elizabeth Finley took her cellphone and recorded about 12 minutes of the phone call. RP 534. Elizabeth Finley later told her mother about the recording, who provided it to the police. RP 535.

Elizabeth Finley's recording was sent to the Federal Bureau of Investigations (FBI) crime laboratory in Portland. RP 613-14. Justin Lazenby, a digital evidence forensic examiner cleaned up the audio file of Elizabeth Finley's recording and enhanced the voices. RP 597-99.

Mr. Sibley was subsequently charged with two counts of second degree assault, two counts of fourth degree assault (one involving Kara Jo Finley, one involving Zalisa), two counts of first degree kidnapping, one count of felony harassment, a count of interfering with reporting, one count of reckless endangerment, and one count of third degree driving while license suspended. CP 120-26.

Prior to trial, the State sought admission of the recording of the phone call. CP 33-34, 61-63, 287 (Exhibit 40), 290 (Exhibit 88); RP 248-62. The State contended that the recording did not violate the Privacy Act, and since it dealt with an emergency, it did not violate the Confrontation Clause. CP 33-34; RP 249-59. Mr. Sibley objected to the admission, arguing among other reasons why the recording should not be admitted, that it violated Mr. Sibley's right to confrontation under *Crawford v. Washington.*[1] RP 252-58. The trial court agreed to admit the recording:

[1] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

> Now, this is maybe a little closer question than it appears at first glance. Because I think the -- the weight of authority under 9.73 would say that this is one of those emergent circumstances, because I think we look at it in the eye of the caller. And everything that I'm hearing -- again, without having been there or seeing any of the tapes or -- listening to any of the tapes or seeing any -- photographs -- are that this is the complaining witness making a recording of a conversation or communication, wire communication, of an emergency nature -- fire, medical emergency, crime.
> . . .
> So, -- [it] will be admissible.

RP 259-62. The recording and the enhanced recording were admitted and played for the jury. CP 287 (Exhibit 40), 290 (Exhibit 88); RP 537, 598-600, 610.

At the conclusion of the trial, Mr. Sibley was acquitted of the one of the second degree assault counts, and found guilty of the lesser degree offense of fourth degree assault. CP 209. He was also acquitted of the kidnapping counts and the interfering count. CP 212, 217-20. Mr. Sibley was convicted of the remaining second degree assault count, and all of the remaining counts. CP 210-11, 213-16, 221-25.

At sentencing, the trial court found that Mr. Sibley had two prior qualifying convictions, found him to be a persistent offender, and imposed a life without the possibility of parole sentence. CP 231-35; RP 1193-95.

The Court of Appeals ruled Mr. Sibley waived his challenge to his confrontation rights as he did not specifically object on those grounds. Decision at 7. The Court did find that imposition of a conviction for one of the fourth degree assault counts violated double jeopardy and ordered it stricken. Decision at 10-11.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The admission of Ms. Finley's testimonial statements violated Mr. Sibley's right to confrontation.

Admission of statements made by a non-governmental witness whose primary purpose is testimonial violate the defendant's right to confrontation. *Ohio v. Clark,* ––– U.S. ––––, 135 S.Ct. 2173, 192 L. Ed. 2d 306 (2015); *State v. Scanlan,* 193 Wn.2d 753, 764-65, 445 P.3d 960 (2019), *cert. denied,* 140 S.Ct. 834 (2020). The primary purpose of admitting the recording of Ms. Finley's phone call to her sister-in-law was to memorialize what was happening between her and Mr. Sibley for use by the police and ultimately as testimony at Mr. Sibley's trial.

The Court of Appeals ruled Mr. Sibley never objected on confrontation grounds, thus he cannot challenge the violation of his right to confrontation. Decision at 7, *citing State v. Burns,* 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). The State sought admission of the

recording pretrial, arguing among other things, the recording was not testimonial, thus Mr. Sibley's right to confrontation was not violated. CP 29-30, 57-59. The trial court posited about the issue of Mr. Sibley's right to confrontation:

> What about *Crawford*. I mean, a number of these statements are by the complaining witness.
> . . .
> And to the extent that -- she's obviously recording for the purpose of memorializing what occurs -- for law enforcement, presumptively -- and there are statements on there which implicate Mr. Sibley. Why wouldn't that implicate *Crawford*.

RP 256. The State contended the recording was not testimonial, thus not a violation of Mr. Sibley's right to confrontation as announced in *Crawford*. RP 256-57. The court ultimately admitted the recording.

While Mr. Sibley did not explicitly state "right to confrontation," the issue was fully argued on confrontation grounds and the basis for the judge's ruling was sufficient for this Court to review. *See Burns*, 193 Wn.2d at 211 (an objection merely provides "judicial efficiency and clarity, and provides a basis for appellate courts to review a trial judge's decision"). To rule otherwise would be promoting formality over function.

Further, the trial court's error is a manifest error affecting Mr. Sibley's constitutional right to confrontation, thus allowing this Court

to review the issue. RAP 2.5(a)(3) provides that "a party may raise ... for the first time in the appellate court ... manifest error affecting a constitutional right." Therefore, appellate courts will reach the merits of any unpreserved claim under that rule, when they are satisfied that the claim is "truly of a constitutional magnitude" and that the alleged trial court error is "manifest" in the record. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). The purpose of RAP 2.5(a)(3) is to encourage timely objections while also providing a remedy for unpreserved, yet obvious errors that "result in serious injustice to an accused." *Id.* at 583.

Thus, to demonstrate that an unpreserved error is "manifest" for purposes of RAP 2.5(a)(3), the appellant must show that the trial court could have prevented the error, notwithstanding counsel's failure to object. *See Kalebaugh*, 183 Wn.2d at 584 (unobjected jury instruction on "reasonable doubt" standard was "manifest error" because trial court should have known it misstated the law). This standard ensures that there is an adequate record for determining the merits of the unpreserved claim on appeal. *See State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) ("manifest error" inquiry must focus on "whether the error is so obvious on the record that the error warrants

appellate review"); *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2007) ("If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted.").

Here, the violation of Mr. Sibley's right to confrontation is so obvious from the record that it warrants review. Ms. Finley's primary purpose in phoning Jacqueline Finley during her argument with Mr. Sibley was to memorialize the events happening for the police and that her statements would be used against Mr. Sibley in investigating or prosecuting a crime arising out of the actions on that night. Plainly her statements were testimonial and their admission violated Mr. Sibley's right to confrontation.

Mr. Sibley did not waive his right to confrontation and the issue was sufficiently briefed and argued for the Court of Appeals to review. This Court should grant review and either find a sufficient objection was made or that the error was a manifest error allowing review under RAP 2.5(a)(3).

2. The classification of the Persistent Offender finding as an "aggravator" or "sentencing factor," rather than as an "element," deprived Mr. Sibley of the equal protection of the law.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 541 U.S. 909 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, this Court has held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in *Roswell* elevated the offense from a misdemeanor to a felony, it "actually alters the crime that may be charged," and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id*. While

Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed "sentencing factors," is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the United States Supreme Court has said "merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court has also noted:

> *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed.2d 466 *(*2006). Beyond its failure to abide by the logic of *Apprendi*, the distinction *Roswell* draws does not accurately reflect the impact of the recidivist fact in either *Roswell* or the cases the Court attempts to distinguish.

There is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification violates the

equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994), *abrogated by, Apprendi*, 530 U.S. at 476-77. A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thorne*, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. *Id.*

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

This Court has described the purpose of the Persistent Offender Accountability Act (POAA) as follows:

> to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an "element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, "if Roswell

had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes." 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction - the prior offense merely alters the maximum punishment to which the person is subject. *Id*. So, too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. The trial court violated Mr. Sibley's right to equal protection.

3. The judicial finding that Mr. Sibley had suffered a qualifying conviction which rendered him a Persistent Offender violated his rights to a jury trial and to due process.

The Due Process Clause of the Fourteenth Amendment ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the

defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111-15, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Blakely v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi*, 530 U.S. at 476-77; *State v. Allen*, 192 Wn.2d 526, 534, 431 P.3d 117 (2018).

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant or the mandatory minimum. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id*. at 304-05; *see Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above

the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

In *Alleyne*, the Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, ruling that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." 570 U.S. at 111.

Finally, the Supreme Court has recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, 567 U.S. 343, 359, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304-05.

As noted above, this Court has embraced this principle in *Roswell*: where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *Roswell*, 165 Wn.2d at 192; *see also Allen*, 192 Wn.2d at 534. And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* does not apply. *Id.* at 193 n.5. Thus, under *Alleyne*, *Blakely*, *Apprendi* and *Roswell*, the judicial finding of Mr. Sibley's prior conviction and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.

F. CONCLUSION

For the reasons stated, Mr. Sibley asks this Court to grant review and reverse his convictions and/or sentence.

DATED this 1st day of July 2020.

Respectfully submitted,

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. TEDDY ROOSEVELT SIBLEY, Appellant.	No. 36498-4-III UNPUBLISHED OPINION

MELNICK, J. — Teddy Sibley appeals his conviction for one count of assault in the second degree, three counts of assault in the fourth degree, felony harassment, and reckless endangerment stemming from an altercation involving his domestic partner, Kara Finley. Sibley argues that the court erred in admitting an audio recording of the assault in violation of his right of confrontation. He also argues that three of his assault convictions are a violation of double jeopardy. Finally, he argues his sentence as a persistent offender violated his right to equal protection, and his rights to jury trial and due process were violated when the trial judge found the existence of two qualifying prior convictions under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, by a preponderance of the evidence. Sibley also makes additional assertions in his statement of additional grounds (SAG).

We remand to the trial court to vacate one count of assault in the fourth degree. We otherwise affirm.

FACTS

On the evening of March 22, 2018, Jacqueline Finley, Kara's[1] sister-in-law, received a call on her home phone from Kara's cell phone, but nobody responded on the other end. Jacqueline hung up and redialed the number. She heard Kara's and Sibley's voices and a crying baby. Jacqueline did not know if Kara meant to call. She went to Kara's house to see if they needed help.

After Jacqueline left, her daughter heard yelling, crying, screaming, and swearing coming from the still-connected phone call. After listening to the call for about five minutes, the daughter began recording the house phone with her cell phone. Nobody asked her to take this action, but she made the recording because "This thing happened before" and she "just hoped if [she] recorded it this one time it would stop." Report of Proceedings (RP) at 535.

Upon arriving at Kara's house, Jacqueline observed Sibley, acting belligerent, aggressive, and irate. He stood on the front porch. Kara laid on the floor just inside the front doorway. Jackie smelled "intoxicants" on Sibley. RP at 475. After a brief exchange with Sibley, Jacqueline left the house long enough to go to the neighbor's house to call the police. When she returned, Jacqueline observed Kara's daughter from a prior relationship loading items into a car. Sibley got in the car with his and Kara's two sons and drove away.

[1] Because Jacqueline and Kara Finley share a last name, this opinion uses their first names to avoid confusion. No offense is intended.

The police arrested Sibley shortly after for an outstanding warrant and driving with a suspended license.

Immediately after Sibley left, Kara called 911 and told the dispatcher that Sibley had broken her leg "right off the bat," beaten her up, strangled her, beaten her daughter, taken her two sons and threatened to kill them if the police went after him. RP at 728. She also told the dispatcher that she had received help after dialing her phone and sliding it underneath the couch, without Sibley's knowledge. Kara had tried calling others, including her father and her sister, but they had not answered.

Kara went to the hospital for treatment of her injuries. She told the emergency room doctor that her domestic partner broke her leg when he threw her to the ground. She also said he struck her with open hands and fists, and manually strangled her. Kara had significant bruising to the left side of her face, a raspy voice, bruising on her neck, and internal inflammation consistent with manual strangulation.

The State charged Sibley with one count of assault in the second degree for Kara's broken leg, one count of assault in the second degree for strangulation, one count of assault in the fourth degree for striking Kara, and one count of assault in the fourth degree for striking Kara's daughter. The State also charged interfering with domestic violence reporting, felony harassment, two counts of kidnapping in the first degree, reckless endangerment, and driving with a suspended license (DWLS).

The State sought a pretrial ruling on the admission of the phone recording and a surveillance video of Kara's front porch. The surveillance video showed Jacqueline

arriving, talking with Sibley, and departing. It then showed Sibley walking in and out of the house several times to put items into the car, Jacqueline's second arrival, and Sibley's departure. Sibley objected to the admission of the phone recording, arguing that it violated the privacy act[2] and contained hearsay. The court raised the issue of a possible confrontation clause violation sua sponte and discussed it with the State. Sibley did not argue a confrontation clause violation existed. The court ruled the recording admissible.

At trial, the State played the recording for the jury. It included the following:

> Sibley: I'm not playin! I'm not f***ing playing!
> Kara: No! No! No! My leg's broke! My leg! [Inaudible] Oh my god!
> Sibley: Sit up right now! Hurry up! . . . f***ing drink! Are you f***ing serious?!
> Kara: I can't get up Ted, my leg's broke!
> Kara: The bags right there and there's diapers right there.
> No no no no, Ted. No no no! No Ted! Ted, no! Leave her alone! Ted, no! Leave her alone! Leave her alone! Ted! Jackie! Jackie, go! Jackie, go! Leave her alone! Ted, leave her alone! Jackie, go! Go, Jackie, go! Jackie, Jackie go! Jackie go! Jackie go! Jackie go! Jackie, GO! Jackie, go! He's gonna hurt you!
> . . . .
> Sibley: Get your ass up here! . . . get the f***ing bottles right now, I'm leaving! Hurry up!
> Kara: No, Ted. No, Ted. No. No, Ted, no. [screaming]
> Sibley: Hurry up! Hurry up! I'm fucking going. F*** this shit. Take this stuff out to the car right now. F*** the car seat let's go! Go, go, GO!
> Daughter: I'm not doing anything!
> Sibley: Get your ass up here!
> Daughter: I'm sorry! I'm sorry!
> Sibley: Hurry up! Hurry Up!
> . . . .
> Kara: No, no, no Ted!

[2] Ch. 9.73 RCW.

> Sibley: Right f***ing now! Where's my money? Where's my f***ing money? Where's my money? Where's my money? Where's my money? (x5) Where's it at?
>
> Kara: It's in my purse! It's in the truck, it's in the truck! She brought it out to the car!

Ex. 40, 88.

At trial, a detective testified that he listened to the recording and observed that "[t]here was a moment where . . . Sibley was asking for his money, and there's no response, and then the next response you hear from [Kara] is very raspy, and you can't really hear it . . . and as time goes by her voice comes back to normal and then she starts responding where . . . she can find his money." RP at 750. The detective concluded that the change in voice and evidence of the injury to Kara's neck indicated that the strangulation took place at that point.

On the second day of trial, the parties discussed Kara's potential as a witness. Both sides had subpoenaed her. Sibley's lawyer decided not to call Kara.[3] He also stated that because Kara had observed the trial, he could no longer call her. The State explained that because of her emotions, Kara could not and would not testify. Kara did not testify.

In closing argument, the State played a version of the audio recording that was "synched" to match the surveillance video. Sibley objected, arguing that the combination of the two exhibits could be misleading to the jury, because nothing verified that the audio and video matched up. The court agreed with Sibley and instructed the jury to disregard

[3] Although Sibley's lawyer said Sibley agreed with this decision, Sibley claims in his SAG that he wanted Kara to testify.

what they had observed in the last four minutes, "and counsel may use exhibits that have been admitted but this was not admitted as an exhibit." RP at 1106.

The jury found Sibley guilty of assault in the fourth degree as a lesser included offense of assault in the second degree for the broken leg, assault in the fourth degree for striking Kara with open hands and fists, and assault in the second degree for strangulation. In addition, the jury found him guilty of one count of assault in the fourth degree for assaulting Kara's daughter, one count of felony harassment, reckless endangerment, and DWLS 3.

At sentencing, the State presented certified copies of the judgment and sentences of Sibley's prior qualifying convictions under the POAA. The court sentenced Sibley to life in prison without the possibility of release on the assault in the second degree count. Sibley appeals.

ANALYSIS

I. CONFRONTATION CLAUSE

Sibley argues that the court admitted Kara's statements in the recorded call in violation of the Sixth Amendment confrontation clause. He argues that the recorded statements are testimonial and that the error in admitting the statements was not harmless.[4] Sibley acknowledges that he did not explicitly object on confrontation grounds at trial, but

[4] He also argues that the court erred by relying on the privacy act to find that the recording was admissible and did not violate the confrontation clause. This argument is based on a misreading of the transcript. The court did not rely on the privacy act to make a determination about admissibility under the confrontation clause.

argues the parties sufficiently discussed it to allow us to review it. Because Sibley is raising the confrontation clause issue for the first time on appeal, he has waived the argument.

The Sixth Amendment confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The confrontation clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless [s]he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). We review confrontation clause challenges de novo. *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006).

In *State v. Burns*, 193 Wn.2d 190, 210–11, 438 P.3d 1183 (2019), the court adopted "a requirement that a defendant raise an objection [based on the confrontation clause] at trial or waive the right of confrontation." The court explained that "[w]here a defendant does not object at trial, 'nothing the trial court does or fails to do is a denial of the right, and if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.'" *Burns*, 193 Wn.2d at 211 (quoting *State v. Fraser*, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012)).

Sibley did not object to the admission of the recorded call based on the confrontation clause. He objected, claiming that it violated the privacy act and the hearsay rule. Because Sibley did not object at trial, he has waived this issue. *Burns*, 193 Wn.2d at 210-11.

II. DOUBLE JEOPARDY

Sibley argues that the second degree assault conviction and the two fourth degree assault convictions involve the same victim and a single course of conduct, and therefore violate double jeopardy. We agree in part and disagree in part. The conviction for assault in the fourth degree for striking Kara violates double jeopardy; however, the assault in the second degree for strangulation and the assault in the fourth degree, originally predicated on the broken leg act, do not.

As applicable here, the constitutional guarantee against double jeopardy protects defendants from being punished multiple times for the same offense. U.S. CONST. amend. V; WASH. CONST. art 1, § 9; *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). We review double jeopardy claims de novo. *Mutch*, 171 Wn.2d at 661-62. When a conviction violates the prohibition against double jeopardy, we must reverse and remand with instructions to vacate the lesser punished crime. *State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 8, 304 P.3d 906 (2013). A defendant must affirmatively establish that he has been punished twice for the same offense. U.S. CONST. amend. V; *State v. Haye*, 72 Wn.2d 461, 464, 433 P.2d 884 (1967).

When a defendant is convicted of two crimes under the same statute, we apply the unit of prosecution test. *State v. Villanueva-Gonzalez*, 180 Wn.2d at 980. The unit of prosecution test examines the specific act or course of conduct the statute defines as the punishable act. *Villanueva-Gonzalez*, 180 Wn.2d at 980. Although second degree assault

and fourth degree assault are different statutes, the unit of prosecution test applies to convictions for different degrees of assault. *Villanueva-Gonzalez*, 180 Wn.2d at 981-82.

Assault is a course of conduct crime. *Villanueva-Gonzalez*, 180 Wn.2d at 984-85. Thus, if multiple assaults constitute only one course of conduct, then double jeopardy protects against multiple convictions. *Villanueva-Gonzalez*, 180 Wn.2d at 985. No bright-line rule exists for when multiple assaultive acts constitute one course of conduct. *Villanueva-Gonzalez*, 180 Wn.2d at 985.

Instead, we consider the following five factors in determining whether multiple assaults constitute one course of conduct: (1) the length of time over which the acts occurred, (2) the location of the acts, (3) the defendant's intent or motivation for the assaultive acts, (4) whether the acts were uninterrupted, and (5) whether there was an opportunity for the defendant to reconsider his acts. *Villanueva-Gonzalez*, 180 Wn.2d at 985. No single "factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors." *Villanueva-Gonzalez*, 180 Wn.2d at 985. We review the evidence taking into consideration these factors.

Kara attempted to call several people prior to successfully calling Jacqueline. Jacqueline left her home, and her daughter began recording the still-connected phone call after listening for approximately 5 minutes. The recording lasted 12 minutes. The assault, therefore, took place over a period of approximately 30 minutes. All of the acts occurred

at the same location. We do not have evidence to know if Sibley's motivation changed or remained the same throughout the event.

The assault involved interruptions. The assault involving Kara's broken leg occurred before the recording began and before Jacqueline arrived. Kara told the 911 dispatcher that her leg broke "right off the bat." RP at 728. The strangulation assault occurred after the assault predicated on the broken leg, between when Jacqueline first arrived and when she returned from going to the neighbor's house to call the police. In addition, approximately 9 minutes into the recording, Sibley repeatedly asks Kara "where's my money." Ex. at 40. Kara did not respond. A detective testified that Kara's voice sounds normal prior to the gap in her statements. He opined that is when the strangulation occurred because Kara's voice sounded hoarse and scratchy after.

There is a clear temporal break between the assault predicated on the broken leg and the strangulation assault. Between them, Sibley walked in and out of the house and to the car. He assaulted Kara's older daughter and had a heated conversation with Jacqueline. Between these assaults, Sibley had ample time to reconsider his actions.

Relying on the five factors enumerated above, we conclude that the convictions for assault in the fourth degree originally predicated on the broken leg and the assault in the second degree for the strangulation assault do not violate double jeopardy.

We also conclude that the assault in the fourth degree conviction, which was not the lesser degree conviction, and which involved Sibley striking Kara, occurred at various times throughout the whole event. It violates violate double jeopardy and must be vacated.[5]

III. EQUAL PROTECTION

Sibley argues that the classification of the persistent offender finding as an "aggravator" or "sentencing factor" rather than as an "element," deprived him of the equal protection of the law. Br. of Appellant at 22. He contends that there is no rational basis for treating a prior conviction as an element to be proven to the jury in certain circumstances and an "aggravator" in others that only must be proven by a preponderance of the evidence. We disagree.

We have previously rejected the exact equal protection claim Sibley raises. *State v. Reyes-Brooks*, 165 Wn. App. 193, 206-07, 267 P.3d 465 (2011); *State v. Langstead*, 155 Wn. App. 448, 456-57, 228 P.3d 799 (2010); *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174 (2010). We adhere to our precedent and again reject Sibley's claim.

IV. DUE PROCESS

Sibley argues that his right to a jury trial and to due process have been violated because the judge found the existence of his qualifying prior convictions under the POAA by a preponderance of the evidence, rather than beyond a reasonable doubt. We disagree.

[5] The State did not specify in its arguments or elect a time when the slapping and punching occurred.

In *State v. Witherspoon*, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014), the court said,

> [F]or the purposes of the POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence. In [*State v. Manussier*, 129 Wn.2d 652, 681-84, 921 P.2d 473 (1996)], we held that because other portions of the SRA utilize a preponderance standard, the appropriate standard for the POAA is by a preponderance of the evidence. We also held that the POAA does not violate state or federal due process by not requiring that the existence of prior strike offenses be decided by a jury. [*Manussier*, 129 Wn.2d at 682–83]. . . . This court has consistently followed this holding. We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes. *See State v. McKague*, 172 [Wn.2d] 802, 803 n. 1, 262 P.3d 1225 (2011) (collecting cases); *see also In re Pers. Restraint of Lavery*, 154 [Wn.2d] 249, 256, 111 P.3d 837 (2005) ("In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.").

At sentencing, the State presented certified copies of the judgment and sentences of Sibley's prior qualifying convictions under the POAA. The judge found the existence of two prior qualifying convictions under the POAA by a preponderance of the evidence. Well settled precedent supports a conclusion that there is no due process or jury trial violation in Sibley's sentence. *See State v. McKague*, 172 Wn.2d at 802; *Manussier*, 129 Wn.2d at 681-84.

Sibley, like the appellant in *Witherspoon*, relies on *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), where the Court held that any fact that increases a mandatory minimum sentence for a crime is an element of the crime that must be submitted to the jury. However, the court in *Witherspoon* rejected this argument, stating "nowhere in *Alleyne* did the Court question *Apprendi*'s exception for prior convictions. It

is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise." *Witherspoon*, 180 Wn.2d 892. Accordingly, we reject Sibley's argument.

STATEMENT OF ADDITIONAL GROUNDS

I. PROSECUTORIAL MISCONDUCT

Sibley asserts that the prosecutor committed misconduct during closing when she synchronized the audio recording exhibit and the surveillance footage exhibit, and this misleading evidence affected the outcome of his trial. We disagree.

To establish prosecutorial misconduct, the defendant first bears the burden to establish that a prosecutor's conduct was improper. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). The defendant must then show that the improper conduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760-61.

Counsel cannot argue facts not in evidence, but they may argue facts in evidence and reasonable inferences therefrom. *State v. Schierman*, 192 Wn.2d 577, 640, 438 P.3d 1063 (2018).

The jury is presumed to heed instructions of the court. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991).

The prosecutor presented two exhibits introduced separately at trial and synched them for closing argument. Sibley objected. The court sustained the objection and instructed the jury to disregard the prosecutor's argument. The jury is presumed to have

disregarded the argument. Sibley does not explain how prejudice resulted. No prosecutorial misconduct occurred.

II. CONFRONTATION

Sibley asserts that his right to confront a witness against him was violated because "the state failed to produce Kara Finley . . . at trial." SAG at 1, 5-6.

Although Sibley is "not required to cite to the record or authority," he must "still 'inform the court of the nature and occurrence of alleged errors.'" *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012) (quoting RAP 10.10(c)). He fails to point to any particular testimonial statements made by Kara that violated his right to confrontation, but instead argues that his right had been violated by her not testifying at trial at all. We reject this assertion.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Sibley asserts that he received ineffective assistance of counsel because his counsel (1) failed to move for a mistrial after the prosecutor improperly synched the two exhibits discussed above and (2) failed to move for a material witness warrant from the court to require Kara to testify. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). "Deficient performance is performance falling 'below an objective standard of reasonableness based on consideration of all the circumstances.'" *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

CrR 4.10(a) states, in pertinent part:

> The [material witness] warrant shall issue only on a showing . . . that
> (1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or
> (2) The witness has refused to obey a lawfully issued subpoena; or
> (3) It may become impracticable to secure the presence of the witness by subpoena.

Sibley claims that he received ineffective assistance of counsel because his attorney failed to move for a mistrial in closing argument after the prosecutor combined two exhibits. Sibley fails to explain how not moving for a mistrial was deficient given that his attorney asked for and received a curative instruction. Also, as previously discussed, Sibley has failed to explain how the use of the improper exhibit prejudiced him. Because Sibley cannot show either deficient performance or resulting prejudice, his claim fails on this issue.

Sibley also claims that his attorney was ineffective for failing to move for a material witness warrant. Both the State and Sibley had subpoenaed Kara. A material witness warrant would not have issued. To the extent Sibley asserts that the only way to procure Kara's testimony was with a material witness warrant, he fails to allege what effect, if any, Kara's testimony would have on the verdict if she had testified. He has therefore not shown any prejudice.

IV. OTHER ARGUMENTS

Sibley argues that his right to be present was violated because he was not brought to court to appear for a hearing on June 18, 2018. At this hearing, Sibley's counsel represented him telephonically. The parties briefly discussed discovery and preliminary evidentiary matters. Sibley has mistaken the right to a public trial as a right to be present at all minor pretrial hearings. We reject this argument.

Sibley argues that the court's decision to schedule the final day of trial on November 14, 2018 rather than November 13, 2018 was an intentional tactic to prejudice the jury against him. This argument is without merit.

Sibley argues that the court erred by allowing a juror to remain on the jury, after the juror informed the court after jury selection that he had mistakenly answered a question incorrectly during voir dire. Sibley does not explain what, if any, effect this had on his trial. This argument is without merit.

We remand to the trial court to vacate one count of assault in the fourth degree. We otherwise affirm.

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.

Melnick, J.[6]

WE CONCUR:

Korsmo, A.C.J.

Lawrence-Berrey, J.

[6] The Honorable Richard Alan Melnick is a Court of Appeals, Division Two, judge sitting in Division Three under CAR 21(a).

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 36498-4-III
v.	)	
	)	
TEDDY SIBLEY,	)	
	)	
Appellant.	)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JULY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	TEDDY SIBLEY 732271 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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