Supreme Court No. 102395-2
COA No. 84269-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COLTON NOE,

Petitioner.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

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TABLE OF AUTHORITIES

UNITED SATES SUPREME COURT CASES

WASHINGTON CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

A. IDENTITY OF PETITIONER

Colton Noe was the appellant in COA No. 84269-2-I.

B. COURT OF APPEALS DECISION

Mr. Noe seeks review of the Court of Appeals decision issued August 21, 2023. Appendix A.

C. ISSUES PRESENTED ON REVIEW

1. Whether the trial court violated Mr. Noe's right to equal protection under article I, section 12 of the state constitution.

2. Whether the trial court violated Noe's right to equal protection under the Fourteenth Amendment.[1]

D. STATEMENT OF THE CASE

Charging, conviction and sentencing. Colton Noe, age 20, was charged with second degree assault and was sentenced to three months incarceration, following a trial where the jury

[1] The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. 14.

rejected an additional charge of unlawful imprisonment. CP 22-23, CP 146-48; RP 510, RP 533.

A deputy had arrested Mr. Noe and taken him to the jail. RP 349-351. Seeking to secure his client's freedom pending trial, on April 11, 2022, defense counsel noted that Mr. Noe had no prior criminal history, no history of failing to appear, and urged the court to apply the presumption in CrR 3.2(a) that a person in a criminal case of this level should be released. RP 5-6. The court set bail in the amount of $25,000. RP 7-8. Unable to make that bail, Mr. Noe remained in jail where the deputy had deposited him.

E. ARGUMENT

Equal protection is violated where the State subjects defendants awaiting trial in jail to mandatory phone tapping, but does not surveil or record the telephone calls of defendants who can can post bail and await trial "on the outside" by virtue of their financial resources.

1. Review is warranted under RAP 13.4(b)(3)

Article I, section 12 of the Washington Constitution prohibits granting privileges or immunities to one class of

citizens that are not equally granted to all. Defendants who cannot afford to post bail have their telephone conversations recorded. In contrast, by law, defendants with the means to remain free pending trial do not have their conversations recorded, absent a warrant.

The issue whether the trial court's admission of recorded telephone conversations between Mr. Noe and his family / supporters violated article I, section 12, where only indigent defendants like him are subjected to the circumstances of forced no-cause recordings of their telephone calls, presents a significant constitutional question under RAP 13.4(b)(3).

Further, where the equal protection clause of the Fourteenth Amendment, which requires that persons similarly situated with respect to the legitimate purpose of a law must receive like treatment, and prohibits discrimination on account of pauperism in criminal trials, did the trial court's admission of recorded conversations between Mr. Noe and his family / supporters violate the Fourteenth Amendment, where affluent

defendants do not have their telephone conversations recorded from the time of arrest to conviction, to be used against them?

2. Mr. Noe challenged the admission of his recorded jail calls.

Mr. Noe's jail calls were recorded and admitted at trial. CP 5-6, CP 120-27; RP 398. This was error. As a criminal defendant, Mr. Noe is protected by the equal protection clause of the Fourteenth Amendment, and article I, section 12 of the Washington Constitution. Article I, section 12 provides different and stronger protections than the Fourteenth Amendment. Madison v. State, 161 Wn.2d 85, 94, 163 P.3d 757 (2007); Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 813, 83 P.3d 419 (2004).

Exclusion is required. Plyler v. Doe, 457 U.S. 202, 217, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1986); State v. Phelan, 100 Wn.2d 508, 671 P.2d 1212 (1983)). Even under rational basis review, equal protection barred admission of the calls. This Court should reverse.

3. Binding Washington precedent.

Our courts have recognized in similar circumstances that incarcerated individuals cannot be singled out for unequal treatment, without violating equal protection. Thus, in the context of procedures required before involuntary mental commitment, an equal protection violation was found by the trial court, and affirmed on appeal in Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537, 539 (1978). Addressing the fact that several statutes allowed that incarcerated defendants - in contrast to a range of individuals who were not incarcerated - could be committed to a mental health facility without notice, an attorney, or a hearing, the Court held that this disparate treatment was a denial of the guaranties of equal protection accorded under the Fourteenth Amendment and Const. art. 1, sec. 12. Harmon v. McNutt, 91 Wn.2d at 131 (citing Bresolin v. Morris, 88 Wn.2d 167, 558 P.2d 1350 (1977)).

In Mr. Noe's case below, the State relied on the Harmon Court's statement, "We need not address defendant's contention

that there is a rational basis for classification between prisoners and nonprisoners as to the procedures to be followed in committing persons to mental health facilities." See Harmon v. McNutt, at 130; CP 126 (State's trial briefing arguing that Harmon rejected an equal protection claim).

However, the defendant in Harmon was the State - i.e., Harlan McNutt, DSHS Secretary. Harmon, at 127. The appellant was prisoner and detainee Harmon, who argued that his equal protection rights were violated by RCW 72.68.031 where he, as an incarcerated person, was not entitled to notice and a judicial proceeding prior to commitment. Harmon, at 128. All individuals not incarcerated, such as civil committees and persons in other categories, were entitled to notice, an appointed attorney, and a hearing, under the provisions of RCW 71.05 and RCW 71.06. The court held this disparate treatment was unconstitutional. Harmon, 91 Wn.2d at 131.

Here, subjecting defendants who cannot post bail to mandatory phone recording is different treatment compared to

all other individuals - most insidiously, treating jailed defendants unequally as against those who are to be jailed, but avoid custody by financial means. Justice Dolliver commented:

> I think equal protection affords them the same type of proceeding that a citizen would be entitled to since a citizen on the outside is entitled to have this determined in a judicial setting.

Harmon, 91 Wn.2d at 129. In the context of equal protection between the Harmon Court's identified class, on the question whether incarcerated defendants could be treated differently in respect of the rights during pre-commitment from those not incarcerated, the court stated they could not. Id. Harmon applies.

Unlike affluent criminal defendants who are able to post bail and walk free, defendants of inadequate economic means like Mr. Noe are saddled with the Hobson's choice of having either a recorded personal conversation with family and supporters, or having no such private communications at all. Equal protection was violated, absent a showing by the

State of Washington that the ruling in that case was incorrect and harmful. See State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108, 1110 (2016).

4**. Article I, section 12.**

Article I, section 12 of the Washington Constitution provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. I, § 12. This clause, like the federal equal protection clause, addresses differential treatment of individuals under the law. Grant County, 150 Wn.2d at 805 n. 10.

This state constitutional provision requires an independent constitutional analysis. Grant County at 805; Madison, 161 Wn.2d at 94. It is "more protective than the federal equal protection clause." Schroeder v. Weighall, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014).

Article I, section 12 has both a "privileges and immunities" component and an "equal protection" component. Schroeder, 179 Wn.2d at 572-79 (invalidating a new statute under a "privileges and immunities" analysis); Id. at 577-79 (holding the new statute also "raise[d] concerns" under an equal protection analysis). Under either mode of analysis, the admission of the recorded calls in Mr. Noe's case violated this state constitutional provision.

(i). The admission of the recording violated the privileges and immunities clause of article I, section 12.

Courts apply a two-part test to determine whether a challenged action violates the state constitutional prohibition on privileges and immunities. Schroeder, 179 Wn.2d at 572-73. First, the court asks whether the government grants a "privilege" or "immunity" - *i.e.*, benefits implicating fundamental rights of state citizenship. Id. at 573. If the answer is yes, the court asks whether there is a reasonable ground for

granting that privilege or immunity to a particular class and not another. Id.

This test is "more exacting than rational basis review" under a strict equal protection analysis. Id. at 574. Further, article I, section 12 is especially concerned with "avoiding favoritism toward the wealthy." Grant County, 150 Wn.2d at 808. The State cannot, by its actions, confer a privilege to an economic class of citizens. King v. King, 162 Wn.2d 378, 396, 174 P.3d 659 (2007).

The Court of Appeals relied See State v. Young, No. 80907-5-I (Wash. Ct. App. Apr. 12, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/809075.pdf, review denied, 198 Wn.2d 1004, 493 P.3d 736 (2021) (cited pursuant to GR 14.1(a)), to conclude that the trial court's admission of the jail telephone calls are not a law and does not grant a privilege or immunity to a class of citizens. Decision, at p. 5. But the Washington Supreme Court has unequivocally held that the Evidence Rules fall within the court's constitutional and

statutory authority, City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), and the language of ER 101 makes clear that the Evidence Rules prevail in the event of an irreconcilable conflict between a rule and a statute. ER 101 ("These rules govern proceedings in the courts of the state of Washington".).

Here, the privilege must be one conferred by the government by law. Thus in King the Court held that a trial court's refusal to appoint counsel for the one parent who could not afford one in a civil divorce action did not violate article I, section 12. Id. at 397. The Court noted, "This is a purely private matter [and [n]othing affirmatively done by the State . . . facilitated the respondent's litigation or hindered the appellant's ability to litigate." Id.

In contrast, a criminal case is a public matter initiated by the government. The State charged Mr. Noe with assault and unlawful imprisonment, affirmatively recorded his telephone calls to family and supporters, and affirmatively introduced

those calls at trial to facilitate the State's case and hinder Colton's defense. Bail was set at $25,000, and Mr. Noe could not post bail. RP 7-8.

The Court of Appeals incorrectly determined that no privilege or immunity is implicated. Decision, at pp. 5-6. But noting that "the jail records all phone calls," mistakes the context of the violation. Persons able to post bail can discuss their case openly, pursue investigation, and have private conversations with family and associates free of being recorded, solely because they could post bail. The State thus withheld a privilege from an indigent defendant, which it would grant to a defendant who could post bail - the privilege of not having personal conversations recorded by the government and introduced against him or her at trial. Stated differently, the government affords wealthy defendants an immunity against having their personal conversations <u>used against them at trial</u>. Whether the jail must record calls for internal safety

reasons is irrelevant. Cf. State v. Haq, 166 Wn. App. 221, 254–56, 268 P.3d 997 (2012).

(ii). State equal protection.

The admission of the recorded calls also violated article I, section 12 under an equal protection analysis. See Schroeder, 179 Wn.2d at 577-79. While the privileges or immunities clause is concerned with granting benefits to favored groups, article I, section 12 also addresses state actions that "burden vulnerable groups." Id. at 577.

Courts apply different levels of scrutiny to equal protection claims. Id. Intermediate scrutiny is appropriate where state action burdens both "an important right and a semi-suspect class not accountable for its status." Id. at 578. Under this level of scrutiny, the State's disparate treatment of two classes must further a "substantial interest" in order to pass constitutional muster. State v. Phelan, 100 Wn.2d 508, 513, 671 P.2d 1212 (1983).

Thus in Schroeder, the Court held intermediate scrutiny was appropriate where a new statute burdened the important right to file a medical malpractice claim by eliminating the ability for minors to toll the statute of limitations. Schroeder, 179 Wn.2d at 578. Not only was the right at issue important, but the legislation had "the potential to burden a particularly vulnerable population not accountable for its status." Id. This was so because the children affected by the law were those whose parents lacked the sophistication to file timely claims. Id.

In Phelan, the Court applied intermediate scrutiny to hold that defendants had to receive credit against their discretionary minimum prison terms for time served in jail pre-trial. Phelan, 100 Wn.2d at 509, 513-14. The Court recognized that liberty is an important right and "the poor, while not a suspect class, cannot be said to be fully accountable for their status." Id. at 514. "Since a denial of credit for presentence jail time involves both a deprivation of liberty in addition to that which would

otherwise exist, and a classification based solely on wealth, we will apply an intermediate level of scrutiny in the present case." Id. The practice did not pass this scrutiny, and the Court expanded its decision in a prior case which recognized:

> Fundamental fairness and the avoidance of discrimination ... dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence.

Phelan, at 511 (quoting Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974)).

Here, intermediate scrutiny applies as in Schroeder and Phelan. Admitting government recordings of indigent defendants' personal phone calls burdens the fundamental right to a fair trial guaranteed by the due process clause and article I, section 22. Const. art. I, §§ 3, 22; cf. Schroeder, 179 Wn.2d at 578 (enforcing statute of limitations instead of permitting tolling burdens important right to file medical malpractice

claim). The Court of Appeals relied on Young to conclude that the distinction that results in a defendant's telephone calls being recorded is the defendant's decision to make the call. Decision, at p. 8 (citing Young, Slip Op at 7). While some wealthy defendants are jailed prior to trial, only persons who can afford to post bail can avoid being jailed when bail is ordered. Poor people who are incarcerated pretrial are a semi-suspect class. Phelan, 100 Wn.2d at 514.

The disparate treatment at issue here fails intermediate scrutiny, because it does not further a substantial governmental interest. Indeed, the government has no interest in creating a two-tiered system of justice where the type of trial a person has depends on wealth. See Jafar v. Webb, 177 Wn.2d 520, 529, 303 P.3d 1042 (2013) (citing Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L. Ed. 891 (1956)) ("[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the rights of pretrial detainees to demand that all telephone calls be private. State v. Archie, 148 Wn. App. 198, 204, 199 P.3d 1005 (2009). It does not follow from this goal, however, that recorded calls may be admitted in a criminal trial on the crime being prosecuted, for purposes beyond offenses such as tampering with a witness or like crimes, or punishment for acting to disrupt security. Action taken on such efforts, detected before they may be brought to fruition is also of course proper. But admitting the phone call as evidence beyond these circumstances has no rational justification, except to make it easier to convict defendants who cannot post bail. This Court should hold the admission of Mr. Noe's recorded phone calls - obtained only because Mr. Noe was not among the financially able to pay for their freedom - violated article I, section 12 of the Washington Constitution.

d. <u>The admission of the recording violated the equal protection clause of the Fourteenth Amendment, which prohibits disparate treatment of persons similarly situated with respect to the legitimate purpose of the law</u>.

Although the Court need not reach the issue if it reverses under the state constitution, the admission of the recorded conversation also violated the equal protection clause of the Fourteenth Amendment. That provision states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV. It requires that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." <u>Phelan</u>, 100 Wn.2d at 512. Poor people charged with crimes and wealthy people charged with crimes may not be "similarly situated" in society, but they are similarly situated "with respect to the legitimate purpose of the law." <u>See id</u>. Accordingly, as explained below, courts violate the equal protection rights of indigent accused persons by admitting warrantless government recordings of their

personal phone calls, where such recordings may not be introduced against defendants with money.

(i). The admission of the recording violated equal protection under Griffin, Williams, and other cases, without regard to levels of scrutiny.

As mentioned in the state constitutional section above, courts apply different levels of scrutiny - strict, intermediate, and rational basis - in equal protection cases. See, e.g., Clark v. Jeter, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988); United States v. Carolene Products Co., 304 U.S. 144, 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). As shown by Harmon, distinguishing between incarcerated defendants and individuals not incarcerated, and denying the former the ability to engage in untapped telephone conversations, violates equal protection. Harmon v. McNutt, 91 Wn. 2d at 131.

A greater degree of scrutiny should be employed, however, to guide like cases going forward. Where the issue involves disparate treatment of defendants in criminal trials based on economic wealth, the Supreme Court has repeatedly

forbidden such disparate treatment without resort to a levels-of-scrutiny analysis. E.g. Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); Griffin, 351 U.S. at 20).

These cases effectively applied strict scrutiny without using the term, but the analysis and result are the same. Defendants may not be treated differently at trial based on economic means. In Griffin, two co-defendants were convicted of crimes and wished to appeal. Griffin, 351 U.S. at 13. They were indigent and asked to be given the necessary record without cost, but the court denied the motion. Id. at 13-14. It was undisputed that defendants with the financial ability to pay the costs necessary to acquire the transcripts and other records of their case, short or long, easily so obtained them. Id. at 13. The Supreme Court rejected this practice, and stated:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. Plainly the

> ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

Griffin, at 17-18.

Douglas held that States that give criminal defendants a right to appeal must also provide indigent defendants counsel at no cost, without requiring a "preliminary showing of merit" as California had been doing. Douglas, 372 U.S. at 357. This was rightly deemed "discrimination against the indigent." Id. 355.

And in Williams, the Court held that indigent defendants could not be imprisoned beyond the statutory maximum to "work off" unpaid fines and court costs. Williams, 399 U.S. at 236, 240-41. It was not enough, for the Supreme Court, that this system was a "rational means" of protecting its interest in collecting revenue. Id. at 238. Extending imprisonment based on lack of economic means created "an impermissible discrimination that rests on ability to pay[.]" Id. at 240-41.

In this case, the fact that recording jail telephone calls allows the State to intercept unlawful conduct such as witness tampering, or threats of harassment, and the jail staff to detect planned insurrections, does not justify admitting the case-related statements of the poor at trial. This Court should hold that the admission of the jail's recordings of Mr. Noe's personal conversations violated the equal protection clause of the Fourteenth Amendment.

(ii).In the alternative, intermediate scrutiny applies Under Plyler v. Doe and State v. Phelan.

As noted above, intermediate scrutiny is appropriate where state action burdens both an important right and a semi-suspect class not accountable for its status. Phelan, 100 Wn.2d at 513-14. Under this level of scrutiny, the state's disparate treatment of two classes must further a "substantial" governmental interest in order to pass constitutional muster. Plyler v. Doe, 457 U.S. at 223-24. While the State has an interest in prosecuting witness tampering and squashing jail

uprisings, it has no substantial interest in stacking the odds against defendants who lack financial resources.

In Plyler, the Court held that Texas violated the equal protection clause by denying state funds for the education of children who had not been legally admitted to the country. Plyler, 457 U.S. at 205, 230. Such children were a semi-suspect class because not fully accountable for their status, and education was an important right even if not fundamental. Id. at 223. The Court noted that state action "imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." Id. at 218 n. 14. "The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." Id. at 219.

The practice at issue in Mr. Noe's case similarly burdens the fundamental right to a fair trial and creates a "class or caste"

system of justice. Defendants with means can bail out of jail and never have their personal conversations introduced against them, while personal conversations of defendants in the indigent class are admitted against them at trial. The government has no interest, let alone a substantial interest, in this disparate treatment. Because this two-tiered system of justice does not satisfy intermediate scrutiny, this Court should reverse.

(iii). In the alternative, the differential treatment fails rational basis review.

Even under the lowest level of review, the admission of indigent defendants' personal phone calls against them at trial violates equal protection. Under this level of scrutiny, the disparate treatment in question must be rationally related to a legitimate government interest. Clark, 486 U.S. at 461. Admitting the personal phone calls of poor people who cannot afford bail, while not using such calls against other defendants, is not rationally related to a legitimate government

interest. On the contrary, the government's interest is to ensure equal justice, not to create a system where the type of trial a person receives depends on their ability to front a financial amount. The practice at issue here fails rational basis review. The jail calls were inadmissible.

5. <u>The error requires reversal</u>.

The Court of Appeals recognized the inculpatory nature of the recorded calls. Decision, at pp. 2-3. In opening statement, the prosecutor's summary of the evidence ended with telling the jury that Mr. Noe, at the Snohomish County Jail, had the opportunity use the phone to call friends and family members, and "those phone calls are recorded." RP 198. At trial, the jail calls that Mr. Noe made were deemed admissible, and were played for the jury, which heard Mr. Noe apologize for what he did, state that "I did hurt her," and I kept her from getting out of the car," and "I know what I did was really wrong." RP 393-95, 408-10. Then, in final closing argument, after concluding argument by playing the jail call

recordings yet again, the prosecutor told the jury it need only convict the defendant by relying on "the defendant's own words." RP 506-076. The error was not harmless beyond a reasonable doubt where Mr. Noe testified and denied the serious allegations against him. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967).

F. CONCLUSION

Based on the foregoing, Mr. Noe asks that this Court grant review, and reverse his judgment and sentence.

This pleading contains 4,276 words and is formatted in font Times New Roman size 14.

Respectfully submitted this 18th day of September, 2023.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. COLTON NORRIS NOE, Appellant.	No. 84269-2-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — A jury convicted Colton Noe of assault in the second degree (by strangulation), with a domestic violence designation, for choking his intimate partner, M.F.[1] Noe, who is indigent, now argues that the court violated multiple constitutional rights by admitting incriminating statements he made in recorded phone call conversations from jail. He asserts that the admission of the recordings treated him differently than a wealthier defendant, who could afford to pay bail and be released pretrial, and whose pretrial calls accordingly would not have been recorded and admitted at trial. He also appeals his $500 victim penalty assessment as excessive. We affirm Noe's conviction but remand to the trial court to examine Noe's ability to pay the $500 victim penalty assessment.

[1] M.F. is referred to by her initials to protect her privacy.

I. FACTS

During the pertinent time period, Noe and M.F. were both 20 years old and had an intimate relationship "off and on" for about three years, meeting a few times per week. On March 18, 2022, they met around 11:00 p.m. and drove around while drinking. During the car ride, Noe accused M.F. of cheating on him. At some point during their argument, Noe grabbed M.F.'s head and hit it against the steering wheel and dash several times. At another point, he strangled her for about 10 seconds. Eventually, Noe took M.F. home. M.F. did not immediately report her injuries to the police, but eventually did. Noe was subsequently arrested.

The State initially charged Noe with one count of assault in the second degree by strangulation and suffocation with domestic violence toward an intimate partner and one count of unlawful imprisonment with domestic violence toward an intimate partner. The court set Noe's bail for $25,000, noting that, although Noe had no prior criminal conviction history, "the assault is serious [,] . . . occurred over an extended period of time and resulted, according to the affidavit, [in] significant physical injuries." The court further explained that "bail is necessary to, not only assure Mr. Noe's presence at future court appearances, but also to protect the community."

While in jail, Noe made two inculpatory phone calls. In one phone call, he was asked "you didn't hurt her, did you?" and Noe answered "I did." In a different phone call, Noe was asked, "You do understand what you did . . . was wrong, right?" Noe responded, "Yeah . . . I do." Consistent with the requirements of

Washington's privacy act, chapter 9.73 RCW, the beginning of the call announced that the call was subject to monitoring and recording.

Before trial, Noe's counsel moved in limine to exclude the calls Noe made from jail because such calls disproportionally affect "the poor and disadvantaged" compared with out-of-custody pretrial detainees who "are not burdened with such complication. These challenges implicate and violate the Equal Protection Clause of the Fourth Amendment."

During motions in limine, Noe further argued that, "[d]ue to that disparate impact between a pretrial detainee and any other person who is allowed to remain out of custody, that detention disproportionately affects pretrial detainees." The court denied Noe's motion to exclude the jail calls.[2]

At trial, the State referenced Noe's jail calls in its closing argument:

> Where he says that yeah, he's been charged with Assault 2 and unlawful imprisonment and he and [M.F.] got into it, and "yeah, I kept her from getting out of my car," and "yeah, I did hurt her." And "yes, I know what I did was really wrong." And "yes, I'm very sorry about it." And "yes, we had a fight, and it was about my car."
>
> Those are all things that the defendant said to other people before this trial.

The jury convicted Noe of assault in the second degree, but acquitted him of false imprisonment. The sentencing court sentenced Noe to three months

[2] Noe also moved in limine to exclude the jail calls because they should have been subject to a CrR 3.5 hearing, but were not. This issue is not before us and therefore we do not examine it.

incarceration, and granted him credit for time served. Additionally, the court imposed a standard victim penalty assessment of $500. Noe timely appeals.[3]

II. ANALYSIS

A. Privileges and immunities

We conclude that the trial court's denial of Noe's motion in limine regarding the jail calls does not violate his privileges or immunities under the Washington State Constitution.

1. Law

Article 1, section 12 of the Washington State Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." WASH. CONST. art. I, § 12. That section was intended to "prevent favoritism and special treatment for a few to the disadvantage of others." Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc., 196 Wn.2d 506, 518, 475 P.3d 164 (2020).

Although article I, section 12 should be interpreted consistently with and ultimately is more protective than the federal equal protection clause, whether a law implicates as a threshold matter a "privilege or immunity" requires an independent analysis. Id. at 518-19. The court applies a two-step analysis: "First, we ask whether a challenged law grants a 'privilege' or 'immunity' for purposes of our state constitution. . . . If the answer is yes, then we ask whether there is a

[3] The State filed a notice of cross appeal, but did not file a cross appeal brief or designate any assignments of error in its response brief. We consider the cross appeal abandoned.

'reasonable ground' for granting that privilege or immunity." Id. at 519. A "privilege" or "immunity" for the purposes of our state constitution are benefits that implicate fundamental rights of citizenship. Id. "If there is no privilege or immunity involved, then article I, section 12 is not implicated." Ockletree v. Franciscan Health Sys., 179 Wn.2d 769, 776, 317 P.3d 1009 (2014).

2. Discussion

Noe argues that, because he was criminally charged, and due to his indigence could not post the $25,000 bail, the State withheld his privilege of private phone calls. Specifically, he argues the State "withheld a privilege . . . which it would grant to a defendant who could post bail . . . [S]tated differently, the government affords wealthy defendants an immunity against having their personal conversations used against them at trial."

Importantly, Noe does not challenge the recording statute, or the jail's practice of recording calls, but only the trial court's decision to admit this particular recording. Because the trial court's decision to admit the recording is not a law and does not grant either a privilege or an immunity to any person or class of persons, we find no violation. The admission of the telephone recording in his case has no impact whatsoever on any other defendants. See State v. Young, No. 80907-5-I (Wash. Ct. App. Apr. 12, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/809075.pdf, review denied, 198 Wn.2d 1004, 493 P.3d 736 (2021).[4] Stated otherwise, this trial court's decision to admit

[4] Although State v. Young is an unpublished opinion, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a

Noe's recording did not thereby grant a wealthier person the privilege to *not* have their phone calls recorded. The State acknowledged that the jail records *all* phone calls. Therefore, Noe does not adequately identify a privilege or immunity that was granted to anyone else simply because *his* calls were recorded and admitted. If there is no privilege or immunity involved, then article I, section 12 is not implicated—thus Noe's claim fails. Ockletree, 179 Wn.2d at 776.

B. Equal Protection

We conclude that the admission of Noe's jail calls did not violate the equal protection clause of the Washington State Constitution, nor did it violate that of the United States Constitution because any similar recordings that exist may be introduced against any defendant, regardless of wealth.

1. Law

Constitutional challenges are reviewed de novo. State v. Shultz, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999). Challenges based on the equal protection clause of the Washington State Constitution are reviewed with the same legal standards as challenges based on the equal protection clause of the United States Constitution. See, e.g., State v. Coria, 120 Wn.2d 156, 169, 839 P.2d (1992) (citing WASH. CONST. art. I, § 12).

"The equal protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution require that people similarly situated under the law receive similar treatment from the

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reasoned decision." GR 14.1(c). We adopt the reasoning of Young as stated in the text above.

State." State v. Haq, 166 Wn. App. 221, 253, 268 P.3d 997 (2012).

To show dissimilar or disparate treatment under the equal protection clause, and thus a violation of his equal protection rights, "[a] defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination." State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). "Although equal protection does not require that the State treat all persons identically, any classification must be relevant to the purpose for the disparate treatment." Id.

If a class is adequately identified, "[i]n order to determine whether a state action violates equal protection, one of three different bases of review is employed—strict scrutiny, intermediate scrutiny, or rational basis review. The appropriate level of scrutiny depends upon the nature of the alleged classification and the rights involved." Haq, 166 Wn. App. at 253.

The court applies "strict scrutiny if the individual is a member of a suspect class or the state action threatens a fundamental right." Osman, 157 Wn.2d at 484. We "apply intermediate scrutiny if the individual is a member of a 'semisuspect' class or the state action threatens 'important' rights." Id. However, "[i]f the state action does not threaten a fundamental or 'important' right, or if the individual is not a member of a suspect or semisuspect class, we apply a rational relationship or rational basis test." Id.

2. Discussion

Noe argues that "[a]dmitting government recordings of indigent defendants'

personal phone calls burdens the fundamental right to a fair trial guaranteed by . . . article I, section 22. Const. art. I, §§ 3, 22." Noe argues there is a semisuspect class of people unable to afford bail whose rights to a fair trial are impacted by having their calls recorded. He further avers that infringements on this right for this class should be viewed with intermediate scrutiny, a test which the government cannot meet. According to Noe, "the government has no interest in creating a two-tiered system of justice where the type of trial a person has depends on wealth."

Noe relies on State v. Phelan, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983), to argue that indigent people incarcerated pretrial are a semisuspect class. In Phelan, our Supreme Court held that, while physical liberty is a basic right, it is not a "fundamental" right; thus, a deprivation of that liberty which was solely determined by wealth warrants intermediate scrutiny. Phelan, 100 Wn.2d at 514. In applying intermediate scrutiny, the court concluded that "denial of credit against discretionary minimum terms for time actually served in jail prior to sentencing does not satisfy" the intermediate scrutiny test. Id. The key, however, in Phelan was that, while a fundamental liberty right was not implicated, there was a clearly defined class: people serving time in jail before trial. Id.

Here, we first conclude Noe fails to establish that he was treated differently from others who were similarly situated. Osman, 157 Wn.2d at 485. As must be acknowledged, some indigent defendants are released pretrial and some wealthy defendants are not. Noe contends that, nevertheless, he was not able to pay bail when a wealthier person in his position could have, and thereby would have avoided having his personal telephone conversations recorded and admitted at

trial. However, Noe "himself could have avoided this scenario, regardless of his wealth and his pretrial detention. He had simply to choose not to have a personal conversation on a telephone after he was warned that the call was subject to recording." Young, slip op. at 7.

Stated otherwise, not all defendants who are indigent are incarcerated. And, further, some affluent defendants *are* jailed to await trial. Of those defendants who are indigent and jailed, not all of them make incriminating statements when they call friends and family from jail. And some jailed people make incriminating statements from jail as well. Thus, it is not one's wealth that predicts whether they make incriminating statements that are later used against them. Specifically, it is not the State's motion to admit, or the court's order admitting, the statements, that creates the class: Noe's own actions did. Id. Thus, there is no similarly situated class of persons being *treated* disparately to which an equal protection analysis could apply.

Furthermore, even if we were to accept that there is a similarly situated class of defendants who could be subject to an equal protection analysis—that is, those who, like Noe, have made incriminating statements on legally recorded telephone calls, for the same reasons Noe did, of which the State has been made aware and which the State admitted (which would be a peculiar class)—Noe "sets forth no reason to believe that any defendant [wealthy or not] under these circumstances would not be subject to admission of the recording at trial." Id.

As this court recently stated:

> Certainly, defendants who are in jail awaiting trial are subject to greater surveillance than those who are not, and it surely is so that

> some people who remain in custody do so because they cannot afford to post bail. But the fundamental fairness of a system which allows people to "lose the right to liberty simply because that person can't afford to post bail," is not here at issue. We need not address the wisdom of bail in general to conclude that the *admission* of Young's recorded telephone call did not violate his equal protection rights.

Id. (emphasis added) (quoting In re Humphrey, 11 Cal. 5th 135, 142, 482 P.3d 1008, 276 Cal. Rptr. 3d 232 (2021)).

Even if a class of people could be identified, the practice of admitting such statements passes either intermediate or rational basis review. Taking them in reverse order, Noe argues there is no rational basis to admit personal phone calls from jail. However, in other similar cases, we have held that local policies requiring the recording of jail calls warranted and passed rational basis review. See, e.g., Haq, 166 Wn. App. at 254 ("[s]afety, security, and the right of government to reduce criminal activity are all legitimate ends that support the King County jail regulations" allowing the recording phone calls from jail). This is so because "a law will be upheld under rational basis review so long as it bears a rational relation to some legitimate end." Id. And once the jail calls are recorded for a legitimate end, the admission of those statements, under our well-established rules of evidence, is appropriate to the fact-finding mission of trials.

Next, should intermediate scrutiny apply, the practice of admitting the statements is still constitutionally sufficient. "We apply intermediate scrutiny if the individual is a member of a 'semisuspect' class or the state action threatens "important" rights." Osman, 157 Wn.2d at 484. In the event that Noe is a member of a semisuspect class, the State would still have a significant interest in ensuring

the safety of the community. Indeed, here, the trial court expressly set Noe's bail at $25,000 "to protect the community," including M.F. Further, the State has an interest in protecting its witnesses' physical safety and the integrity of their testimony, and thus would have an interest in monitoring and admitting calls, should, for example, Noe attempt to contact M.F. Thus, the State has demonstrated that these interests have a sufficient nexus with the monitoring and use of Noe's jail calls. Cf. Phelan, 100 Wn.2d at 514 ("The connection of a denial of jail time credit with only one of the various goals of discretionary minimum terms is insufficient under [intermediate scrutiny] review.").

Finally, Noe offers no authority for his bare assertion that the only admissible jail call recordings *should be* those involving witness tampering. Where a party fails to provide citation to support a legal argument, we assume counsel, like the court, has found none. State v. Loos, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) (citing State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017)).[5]

C. Victim penalty assessment

It is well established that historically, sentencing courts are constitutionally permitted to impose a victim penalty assessment regardless of indigency. RCW 7.68.035(1)(a); see, e.g., State v. Tatum, 23 Wn. App. 2d 123, 130, 514 P.3d 763, review denied, 200 Wn.2d 1021, 520 P.3d 977 (2022). However, in 2023, the

[5] Because the state equal protection clause is evaluated with the same legal standards as the federal equal protection clause, the panel may decline to conduct an analysis of the federal question. See Coria, 120 Wn.2d at 169 (citing WASH. CONST. art. I, § 12).

Washington state legislature eliminated the $500 victim penalty assessment for indigent persons. RCW 7.68.035(4). Now, upon motion by a defendant:

> [T]he court shall waive any crime victim penalty assessment imposed prior to the effective date of this section if:
>
> . . . .
>
> (b) [t]he person does not have the ability to pay the penalty assessment. A person does not have the ability to pay if the person is indigent as defined in RCW 10.01.160(3).

RCW 7.68.035(5). The new law became effective on July 1, 2023. LAWS OF 2023, ch. 449, § 27.

Here, the trial court imposed a $500 victim penalty assessment upon Noe in 2022. The court most recently deemed Noe indigent for purposes of appeal.

Noe initially challenged the victim penalty assessment as excessive in violation of the excessive fines clause of the Eighth Amendment of the United States Constitution. However, in his reply brief, Noe abandons this challenge and asks us to consider the victim penalty assessment under the newly enacted RCW 7.68.035(4). Specifically, Noe argues that, if even if his sentence may have been technically constitutionally appropriate at the time it was entered, this panel should still remand to instruct the trial court to examine whether he can pay the victim penalty assessment.

As in State v. Ramirez, we hold that, because Noe's case was on direct appeal at the time, it was not final when the new law became effective. 191 Wn.2d 732, 747, 426 P.3d 714 (2018). And thus, although Noe had been previously deemed indigent for other purposes, we remand with an instruction to the trial court to examine whether he has "the ability to pay" the $500 victim penalty

assessment.[6]

III. CONCLUSION

We affirm Noe's conviction but remand to the trial court to examine Noe's ability to pay the $500 victim penalty assessment.

Díaz, J.

WE CONCUR:

Feldman, J.

Chung, J.

[6] Following the noting date of this appeal, Noe moved this court to permit him to add an assignment of error regarding this issue. We find that procedural mechanism unnecessary at this point given how we resolve this assignment of error. Thus, we deny that motion as moot.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84269-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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