

No. 47295-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

TRISTAN FELEPADIUDE BRIGHT,

Appellant.

---

On Appeal from the Pierce County Superior Court  
Cause No. 14-1-02370-9  
The Honorable Ronald Culpepper, Judge

---

OPENING BRIEF OF APPELLANT

---

STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

**TABLE OF CONTENTS**

**I. ASSIGNMENTS OF ERROR ..... 1**

**II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR..... 1**

**III. STATEMENT OF THE CASE..... 1**

    A. PROCEDURAL HISTORY..... 1

    B. SUBSTANTIVE FACTS ..... 3

**IV. ARGUMENT & AUTHORITIES ..... 5**

    A. THE TRIAL COURT SHOULD HAVE EXCLUDED EVIDENCE OF BRIGHT’S PRIOR PROTECTION ORDER VIOLATION CONVICTIONS BECAUSE THE STATE FAILED TO ESTABLISH THAT THE CONVICTIONS WERE CONSTITUTIONAL..... 5

    B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED AUDIO RECORDINGS OF JAILHOUSE TELEPHONE CALLS WITHOUT ANY EVIDENCE AUTHENTICATING THE IDENTITY OF THE FEMALE VOICE HEARD ON THE RECORDINGS. .... 10

**V. CONCLUSION ..... 14**

## TABLE OF AUTHORITIES

### CASES

<u>Bousley v. United States</u> , 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).....	9
<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) .....	8
<u>City of Seattle v. Termain</u> , 124 Wn. App. 798, 103 P.3d 209 (2004).....	10
<u>In re Hews</u> , 108 Wn.2d 579, 741 P.2d 983 (1987).....	8
<u>In re PRP of Hews</u> , 99 Wn.2d 80, 660 P.2d 263 (1983).....	9
<u>In re PRP of Keene</u> , 95 Wn.2d 203, 622 P.2d 360 (1980) .....	8, 9
<u>In re PRP of Thompson</u> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	9
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) .....	8
<u>State v. Carmen</u> , 118 Wn. App. 655, 77 P.3d 368 (2003).....	5
<u>State v. Chervenell</u> , 99 Wn.2d 309, 662 P.2d 836 (1983).....	9
<u>State v. Danielson</u> , 37 Wn. App. 469, 681 P.2d 260 (1984).....	12
<u>State v. Jackson</u> , 113 Wn. App. 762, 54 P.3 739 (2002) .....	12, 13
<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	12
<u>State v. Newton</u> , 87 Wn.2d 363, 552 P.2d 682 (1976).....	8
<u>State v. Osborne</u> , 102 Wn.2d 87, 684 P.2d 683 (1984) .....	9
<u>State v. Summers</u> , 120 Wn.2d 801, 846 P.2d 490 (1993).....	6

State v. Swindell, 93 Wn.2d 192, 607 P.2d 852 (1980) .....6

State v. Williams,  
136 Wn. App. 486, 150 P.3d 111 (2007)..... 12, 13, 14

**OTHER AUTHORITIES**

ER 901 ..... 12, 14

RCW 26.50.110 .....5

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it admitted evidence of Tristan Bright's prior protection order violation convictions without sufficient proof of their constitutional validity.
2. The trial court erred when it admitted the audio recordings of jailhouse telephone calls without any evidence authenticating the identity of the female voice heard on the recordings.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court improperly admit evidence of Tristan Bright's prior protection order violation convictions, where the documents presented by the State showed that the guilty pleas that resulted in the two convictions were not made knowingly, intelligently and voluntarily? (Assignment of Error 1)
2. Did the trial court improperly admit the audio recordings of jailhouse telephone calls when there was no evidence or testimony that authenticated the identity of the female voice heard on the recordings? (Assignment of Error 2)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Tristan Felepadiude Bright with five felony

counts of violation of a domestic violence protective order (RCW 26.50.110(5). (CP 35-38) The State also alleged that all five offenses were domestic violence incidents. (CP 35-38)

Over Bright's objection, the trial court admitted redacted jailhouse recordings of three conversations the State claimed occurred between Bright and the alleged victim, Lakesha Edwards. (CP 28-31; 1RP 57-63, 66, 69)<sup>1</sup> Bright also objected to the admission of prior convictions for violation of a protective order. (CP 40-44; 2RP 109-14) The trial court agreed with Bright that the State failed to establish the constitutional validity of a prior Tacoma Municipal Court conviction, but found that two Pierce County Superior Court convictions were valid. (2RP 126, 135-36)

The jury found Bright guilty as charged. (CP 191, 193, 194, 194, 196, 197, 199, 200, 202, 203, 205; 2RP 279-80, 286-87) The trial court found that counts one and two were the same criminal conduct, and also found sufficient mitigating circumstances to warrant an exceptional sentence below the standard range.<sup>2</sup>

---

<sup>1</sup> The transcripts labeled volumes 1 and 2 will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

<sup>2</sup> Bright objected to the previously challenged convictions being included in his offender score, but acknowledged that, even excluding these convictions for the purposes of sentencing, his offender score was still over nine points. 02/06/15 RP 4-5, 6-7, 14)

(02/06/15 RP 12, 28; 240, 241) The court imposed a sentence of 36 months and, after inquiring about Bright's employment prospects after release, imposed \$1,300 in legal financial obligations. (CP 242, 244; 02/06/15 RP 28-29) This appeal timely follows. (CP 259)

B. SUBSTANTIVE FACTS

Lakesha Edwards lives in an apartment complex at 7101 East I Street in Tacoma. (2RP 196) She and Tristan Bright dated and have a young child together. (2RP 198) On the morning of June 18, 2014, Bright knocked on Edwards' door and, after she let him in, Bright began yelling at her. (2RP 157, 198) Edwards ran outside and contacted a neighbor, Molaja Atinsola-Moronto, who was just arriving home in his car. (2RP 198-99, 321)

Edwards asked for help and asked Atinsola-Moronto to call the police. (2RP 198-99, 232) Then Atinsola-Moronto saw Bright approaching. (2RP 232) Edwards got into Atinsola-Moronto's car and started to close the door, but Bright tried to open the door and pull Edwards back out of the car. (2RP 199, 232-33, 236)

Tacoma Police Officer Jeffrey Robillard responded to a 911 call reporting the incident. (RP 158, 235) When he arrived in the parking lot of the apartment complex, he saw Edwards in a car and saw Bright "violently" tugging on her. (2RP 157, 159, 164) Bright did

not comply with Officer Robillard's commands to lay on the ground, so he tased Bright and took him into custody. (2RP 159, 160)

Officer Robillard ran Bright's name through a law enforcement database and learned that there were two existing no-contact orders prohibiting Bright from contacting Edwards. (2RP 165; Exhs. P8, P9) Edwards confirmed the existence of the orders and identified Bright's signature on both documents when she testified at trial.<sup>3</sup> (2RP 200)

Also at trial, the State introduced recordings of three telephone calls made to 253-279-1987 from the Pierce County Jail using the unique PIN number assigned to Bright. (2RP 176, 179, 186) The first call was made on June 18, 2014 at 12:59 PM.<sup>4</sup> (2RP 180; Exh. P4) The second call was made on June 19, 2014 at 7:06 PM.<sup>5</sup> (2RP 180; Exh. P4) The third call was made on July 22, 2014 at 8:34 PM.<sup>6</sup> (2RP 180; Exh. P4)

On the recordings, a male and female discuss a number of topics, including an incident that sounds similar to the one that occurred on June 18 at Edwards' apartment complex. (Exh. P4)

---

<sup>3</sup> This incident was the basis for Count 1 and Count 2. Count 1 alleged a violation of the terms of one protection order and Count 2 alleged a violation of the terms of the other protection order. (CP 35-36)

<sup>4</sup> This call was the basis for Count 3. (CP 36)

<sup>5</sup> This call was the basis for Count 4. (CP 36-37)

<sup>6</sup> This call was the basis for Count 5. (CP 37)

When she testified at trial, Edwards confirmed that her telephone number is 253-279-1987, and that she received a call from Bright on June 18 and possibly on other dates as well. (2RP 198, 199)

#### **IV. ARGUMENT & AUTHORITIES**

- A. THE TRIAL COURT SHOULD HAVE EXCLUDED EVIDENCE OF BRIGHT'S PRIOR PROTECTION ORDER VIOLATION CONVICTIONS BECAUSE THE STATE FAILED TO ESTABLISH THAT THE CONVICTIONS WERE CONSTITUTIONAL.

RCW 26.50.110 criminalizes violations of the terms of a protective order issued under “[chapter 26.50,] chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, any temporary order for protection granted under chapter 7.40 RCW pursuant to chapter 74.34 RCW, or . . . a valid foreign protection order as defined in RCW 26.52.020[.]” The crime is elevated from a gross misdemeanor to a felony “if the offender has at least two previous convictions for violating the provisions of an order.” RCW 26.50.110(5).

The State has the burden of establishing the constitutional validity of the prior convictions before they can be presented to the jury for consideration. State v. Carmen, 118 Wn. App. 655, 665, 77 P.3d 368 (2003). “[O]nce a defendant calls attention to the alleged unconstitutionality of a plea of guilty to a prior [crime] sought to be

used by the State to support a charge . . . the State must prove beyond a reasonable doubt, that the plea was made voluntarily.” State v. Swindell, 93 Wn.2d 192, 197, 607 P.2d 852 (1980); State v. Summers, 120 Wn.2d 801, 812, 846 P.2d 490 (1993).

In this case, Bright challenged the constitutional validity of his 2012 guilty plea to two counts of violating a protective order. (CP 40-44; 2RP 109-14) In response, the State provided the trial court with a number of court documents, which established the following. In 2012, Bright entered an Alford plea to a Second Amended Information charging five crimes, including two counts of misdemeanor violation of a no contact order. (CP 59-66, 111-13, 115) That Information alleged:

with knowledge that the Pierce County Superior Court had previously issued a foreign protection order, restraining order, no contact order, or vulnerable adult order pursuant to state or tribal law in Cause No. 08-1-03837-0 and/or 10-1-01528-2 and/or 11-1-03470-6, did unlawfully violate said order by knowingly violating the restraint provision excluding him from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and/or by knowingly violating a provision or a foreign protection order for which a violation is specially indicated to be a crime; contrary to RCW 26.50.110(1)[.]

(CP 111-12)

On his written Statement of Defendant on Plea of Guilty,

Bright states that the elements of the crimes to which he would plead guilty were “set out in the 2nd amended Information.” (CP 115) In the written statement and at the plea hearing, Bright acknowledged that he reviewed the amended Information and the evidence with his attorney and believes he would be convicted at trial. (CP 60-61, 62-63, 122)

Bright also allowed the 2012 trial court to review the Probable Cause declaration to determine whether there existed a factual basis for the plea. (CP 122) The 2012 trial court reviewed the declaration (CP 65-66), which states that “Pierce County Superior Court previously entered two domestic violence orders prohibiting the defendant from contacting Lakesha Edwards,” and that Bright violated those orders by contacting Edwards at her home. (CP 90) The 2012 trial court found a sufficient factual basis, and accepted the plea as knowing and voluntary. (CP 66)

The trial court in this case reviewed the documents presented by the State, and found sufficient proof that Bright’s 2012 plea was knowing and voluntary and therefore constitutionally valid. (2RP 126) The court was incorrect, because the record fails to show that Bright understood that, to be guilty of the crime of violating a protection order, he must have violated an order issued under one of

the statutes specifically listed in RCW 26.50.110(1).

In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the Supreme Court held that a defendant may enter a plea of guilty, waiving his constitutional right to a trial, even though the defendant does not admit to having committed the charged crime. This is known as an Alford plea. The Washington Supreme Court adopted this rationale in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). When a defendant makes an Alford/Newton plea, the trial court must exercise extreme care to ensure that the plea satisfies constitutional requirements. See Newton, 87 Wn.2d at 373.

Due process requires that any guilty plea be knowing, voluntary, and intelligent. In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A guilty plea is not truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). “Due process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary. Real

notice of the nature of the charge is 'the first and most universally recognized requirement of due process.'" State v. Osborne, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984) (quoting Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)).

Thus, a guilty plea cannot be knowing and intelligent if the defendant does not understand the elements of the offense. See Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (plea invalid when defendant unaware his conduct failed to satisfy element of offense); In re PRP of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) (plea invalid when defendant did not know that charge to which he pleaded was enacted after his criminal conduct); In re PRP of Hews, 99 Wn.2d 80, 660 P.2d 263 (1983) (defendant must understand that his alleged criminal conduct satisfies the elements of the offense); State v. Chervenell, 99 Wn.2d 309, 318-19, 662 P.2d 836 (1983) (plea involuntary if defendant lacks understanding of law in relation to facts); Keene, 95 Wn.2d at 209 (same).

There was no evidence in the documents presented by the State in this case that showed Bright understood, when he pleaded guilty to the two misdemeanor protective order violation charges, that he would only be guilty of both counts if the orders he violated were

issued under the specific statutes listed in section (1)(a) of RCW 26.50.110. This essential requirement is omitted from the Second Amended Information,<sup>7</sup> and there was no mention or discussion of this critical element in either Bright's written plea statement or at the plea hearing.

Because the record presented by the State fails to show that Bright was aware of the nature and elements of the crimes to which he was pleading guilty, the State failed to meet its burden of establishing the constitutional validity of the two prior protection order convictions. The trial court should not have allowed these convictions to be presented to the jury. Without these two convictions, there is insufficient proof that Bright has been previously convicted of two protective order violations, and his current convictions should be reduced to gross misdemeanors.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED AUDIO RECORDINGS OF JAILHOUSE TELEPHONE CALLS WITHOUT ANY EVIDENCE AUTHENTICATING THE IDENTITY OF THE FEMALE VOICE HEARD ON THE RECORDINGS.

Bright's counsel filed a motion in limine before trial seeking to

---

<sup>7</sup> See *City of Seattle v. Termain*, 124 Wn. App. 798, 806, 103 P.3d 209 (2004) (holding that the charging document was inadequate because, among other things, "it does not recite the specific statute pursuant to which the underlying order was issued").

exclude several jailhouse recordings of conversations between Bright and an unidentified female. (CP 29; 1RP 57-63) Bright and the female discuss a number of issues, and refer to an incident where the female ran outside and had “gotten the neighbors involved” and to a no-contact order. (CP 30-31; 1RP 57)

At a hearing to determine the admissibility of the recordings, the State called inmate telephone system administrator Don Carn, who testified that: each inmate receives an individualized PIN number that is entered before each call; that there are three calls made to telephone number 253-279-1987 using Bright’s PIN; the caller introduces himself as “Tristan” at the beginning of each recording; an account had been previously set up registering 253-279-1987 with the inmate phone system; the individual associated with that number was listed as Lakesha Edwards; and the address associated with that number matched the address on file for Edwards with the Department of Licensing. (1RP 34-44) However, Carn did not know if the female voice was in fact Edwards. (1RP 49)

The trial court ruled that the State could play these recordings for the jury and “[w]hether this is Ms. Edwards is something the State is going to have to prove[.]” (1RP 66) This was an abuse of the trial courts discretion because, as a prerequisite to admitting a voice

recording, the person speaking must be identified.<sup>8</sup>

Authentication is a threshold requirement designed to assure that evidence is what it purports to be. State v. Williams, 136 Wn. App. 486, 499-500, 150 P.3d 111 (2007) (citing 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 900.2, at 175; § 901.2, at 181-82 (4th ed.1999)). The State satisfies ER 901, which requires that documents be authenticated or identified, if it introduces sufficient proof to permit a reasonable juror to find in favor of authenticity or identification. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984).

ER 901 applies to sound recordings. ER 901(a), (b)(5). Accordingly, if the proffered evidence “records human voices, a foundational witness (or someone else with the requisite knowledge) usually must identify those voices.” State v. Jackson, 113 Wn. App. 762, 767, 54 P.3 739 (2002); see also ER 901(b)(5). In this case, the State failed to call a single witness to identify the female voice on the recordings as belonging to Edwards.

A party can also authenticate a voice recording by presenting

---

<sup>8</sup> A trial court's admission of evidence is reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Magers, 164 Wn.2d at 181.

other evidence sufficient to support basic findings of identification and authentication. Jackson, 113 Wn. App. at 769. For example, in Williams, the trial court admitted a recording of victim Makeba Otis' 911 call following a break-in at her home. 136 Wn. App. at 491. On appeal, Williams argued that the recording was not properly authenticated because the State did not offer the testimony of anyone who participated in the call. 136 Wn. App. at 499. The appellate court disagreed, noting:

Here, the trial court had both spoken to Otis in court and listened to the recording of the 911 call before it made the ruling on the recording's authenticity. The trial court was, therefore, in the best position to determine if Otis' voice matched that on the recording and to require any additional necessary authenticating evidence. Other factors, including the recital of Otis' address by the 911 caller, the fact that Otis admitted calling 911 when questioned by the court, and the fact that the events recounted by the caller were consistent with those testified to by [second victim Leslie] Johnson, all support the trial court's decision as to authenticity.

136 Wn. App. at 501.

Unlike Williams, there is no evidence in this case that the trial court had ever heard Edwards' voice before trial, and therefore the court was unable to compare it to the woman's voice on the telephone call recordings. And, unlike Williams, the State presented no evidence or testimony before trial that Bright admitted to calling

Edwards or that Edwards confirmed receiving calls from Bright.

While there may have been sufficient evidence that the calls were placed by Bright to a telephone number associated with Edwards, there was no evidence presented before trial to establish the identity of the female speaker. The recordings were therefore not properly authenticated, and should not have been admitted.

Before a trial court can admit a recording as evidence, the party introducing the recording must authenticate or identify it by presenting “evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901; Williams, 136 Wn. App. at 499. That required step was not taken in this case, and the trial court therefore abused its discretion when it admitted the recordings over Bright’s objection.

The trial court’s error in admitting the jailhouse recordings was not harmless, because it was the only evidence presented by the State to establish that Bright actually contacted Edwards on June 18, July 19 and July 22, 2014. Accordingly, Bright’s convictions for counts 3, 4 and 5 must be reversed.

## **V. CONCLUSION**

The trial court should have excluded evidence of Bright’s 2012 protection order violation convictions because the State failed to

establish that Bright's plea in that case was made with a full understanding of the nature of the charges and the facts necessary to prove those charges. His convictions in this case should therefore be reduced from felonies to gross misdemeanors.

Additionally, the trial court abused its discretion when it admitted the recordings of the jailhouse calls because there was no evidence to authenticate or identify the female voice on the recording as belonging to Edwards. The trial court should not have admitted the recordings, and Bright's convictions relating to these calls should be reversed.

DATED: August 7, 2015



---

STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Tristan F. Bright

**CERTIFICATE OF MAILING**

I certify that on 08/07/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Tristan F. Bright, DOC# 818330, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001.



---

STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**August 07, 2015 - 1:17 PM**

## Transmittal Letter

Document Uploaded: 3-472953-Appellant's Brief.pdf

Case Name: State v. Tristan F. Bright

Court of Appeals Case Number: 47295-3

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: [sccattorney@yahoo.com](mailto:sccattorney@yahoo.com)

A copy of this document has been emailed to the following addresses:

[pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us)