

NO. 48305-0-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JOSE VILLAREAL, JR.,

Appellant.

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

The Honorable Mary Sue Wilson, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it admitted the audio recordings of jail telephone calls in the absence of sufficient evidence authenticating the identity of the female voices heard on the recordings.

2. The state failed to prove beyond a reasonable doubt that appellant Jose Villareal violated the no-contact order as alleged in Count 6.

3. The trial court erred in failing to grant Mr. Villareal's CrR 7.4 motion to arrest judgment in Count 6 where the State failed to present sufficient evidence to sustain that Mr. Villareal violated the no-contact order as alleged in Count 6.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Villareal was charged with seven counts of felony violation of a no-contact order. Did the trial court improperly admit the audio recordings of five jail telephone calls when there was no evidence or testimony that authenticated the identity of the female voices heard on the recordings? Assignment of Error 1.

2. With respect to Count 6, taken in a light most favorable to the state, the state proved only that a party using Mr. Villareal's Personal Identification Number assigned at the Nisqually jail called a phone number associated with the protected party, and spoke with a person

whom the state conceded was not the protected party. Did the appellant "contact" the protected party in violation of a domestic violence no-contact order? Assignment of Error 2.

3. Did the trial court err in failing to grant Mr. Villareal's CrR 7.4 motion to arrest the judgment where the state failed to show that he had contact with the protected party or that he conveyed a message to be transmitted to the protected party? Assignment of Error 3.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural facts:**

Jose Villareal, Jr was charged in Thurston County Superior Court by second amended information with seven counts of felony violation of a post-conviction no-contact court order, pursuant to RCW 26.50.110(5) and RCW 10.99.050. Clerk's Papers (CP) 38-40. The state alleged that Mr. Villareal had repeated contact with the protected party—Kristin Carter, with whom he has a three year old daughter—with knowledge of the existence of a valid no-contact order issued pursuant to Chapter 10.99 RCW on February 27, 2014, preventing him from contacting her, and that he had at least two prior convictions for violation of a no-contact order. CP 38-40.

The state alleged that Mr. Villareal had telephone contact with Ms. Carter seven times, including the following calls from the Nisqually jail:

Count	Date of Alleged Offense	Exhibit
III	September 12, 2015	Call 1, Exhibit 1
IV	September 13, 2015	Call 2, Exhibit 1
V	September 13, 2015	Call 3, Exhibit 1A
VI	September 13, 2015	Call 4, Exhibit 1
VII	September 16, 2015	Call 5, Exhibit 1

The state also alleged that the offenses were committed against a family or household member pursuant to RCW 10.99.020. CP 38-40. Over Mr. Villareal's objection, the trial court admitted redacted jail recordings of five conversations the state claimed occurred between Mr. Villareal and the alleged victim, Kristin Carter between September 12 and September 16, 2015. CP 38-40; 1RP at 147-49, 159. Exhibits 1 and 1A.

**a. Jury inquiries and verdicts in Counts 3-7**

The matter came on for jury trial on October 12 and 13, 14, and 15, 2015, the Honorable Mary Sue Wilson presiding. Report of Proceedings (RP) 5-340.<sup>1</sup>

After initially identifying the voice in Track 4 as being Ms. Carter, the state's primary witness--Community Corrections Officer Maria

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<sup>1</sup>The record of proceedings is designated as follows: RP – June 29, 2015, July 14, 2015, August 20, 2015, September 21, 2015, September 23, 2015, September 28, 2015, September 30, 2015; 1RP (jury trial, days 1 and 2); 2RP (jury trial, days 3, and 4); November 3, 2015; and November 19, 2015 (sentencing).

Cumero conceded that the speaker was not Ms. Carter. 1RP at 166, 187. The state declined to publish the call designated as Track 4 for the jury, although it appears to have been entered as part of Exhibit 1. 1RP at 160-61, 164-65. Defense counsel subsequently published Track 4 to the jury and Ms. Cumero conceded that she no longer believed that the voice was that of Ms. Carter. 1RP at 187.

Mr. Villareal stipulated that he was convicted of two counts of violation of a no-contact, protection, or restraining on October 13, 2013 in Thurston County District Court Cause No. 16319 TCP. 2RP at 220-21. The jury was instructed that the evidence was admitted for the limited purpose of deciding whether Mr. Villareal has two prior convictions for violation of a court order. 2RP at 221.

The jury submitted a question to the court asking to hear the recordings again. 2RP at 314-17; CP 131. The note stated: "May we have a device to play CD exhibits #1 and #1A (as well as view any visual time stamps on the CD's?)" CP 131-32. After discussion with counsel, the court prepared written instructions regarding listening to the audio recordings during deliberations. CP 132. The jury was brought into the courtroom and all other persons were excluded with the exception of the clerk and the bailiff. The clerk was instructed to play Exhibits 1 and 1A one time each without stop, pausing, or replaying the CDs. CP 132.

Jurors submitted a second inquiry at approximately 12:43 p.m. asking the following: “Is attempting any contact (i.e. the act of dialing the protected party’s number) a violation of the No-contact order, or does it require that the protected party answer?” 2RP at 320; CP 133. The court referred the jury to the court’s instructions. CP 133; 2RP at 321.

The jury found Mr. Villareal guilty of five counts of violation of a no-contact order as charged in Counts 3, 4, 5, 6, and 7. 2RP at 328-31; CP 141, 142, 143, 144, 145. Mr. Villareal was acquitted of Counts 1 and 2. CP 139, 140. The jury found by special verdict that Mr. Villareal and Ms. Carter are members of the same family or household.<sup>2</sup> CP 148, 149, 150, 151, 152.

**b. motion to arrest judgment, and sentencing:**

Before sentencing, Mr. Villareal, represented by new counsel, moved for arrest of judgment in Count 6 under CrR 7.4(a)(3), arguing that the state failed to present sufficient evidence that Mr. Villareal had direct or third party contact with Ms. Carter when he called and spoke with someone other than Ms. Carter on September 13, 2015, the fourth recording contained in Exhibit 1. CP 181-82; RP (11/19/15) at 9-11. The written motion noted that the state’s evidence in Count 4<sup>3</sup> consisted only

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<sup>2</sup>The jury marked “Yes” on the special verdict forms pertaining to Counts I and II, despite having acquitted him of both counts. CP 146, 147.

<sup>3</sup>Mr. Villareal was represented by new counsel for the motion to arrest judgment and

of a call to a number used by the protected party, but that Ms. Carter did not talk to Mr. Villareal nor was there any third party communication, and therefore there was insufficient proof of a material element of the offense. CP 181-82 (Defense Sentencing Brief, filed 11/18/15). The state conceded that Ms. Cumero testified that the female voice on the fourth recording was not Ms. Carter's voice. RP (11/19/15) at 11. The prosecutor argued that the motion should nevertheless be denied, stating "the fourth recording which is associated with count six, was not Ms. Carter's voice, it was Ms. Carter's phone number." RP (11/19/15) at 11.

The trial court denied the motion, stating that:

there was sufficient evidence for the jury to return a verdict on count six, which as I recall and as the state's counsel has clarified has—was related to evidence of a call from the Nisqually Jail from Mr. Villareal to the protected person but there wasn't an associated audio recording that was played for the jury or offered into evidence on that, but I think the other evidence is sufficient, and based upon my knowledge of the law and the charge I think that that's sufficient for the jury's verdict on count six[.]

RP (11/19/15) at 16-17.

The state calculated an offender score of "14" for each count, resulting in a standard range of 60 months. RP (11/19/15) at 18. Mr. Villareal requested that the court impose prison-based Drug Offender

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sentencing. Mr. Villareal's attorney incorrectly referred to Count 4 instead of Count 6 in the written motion. Defense counsel corrected this error during argument, clarifying that Mr. Villareal challenges the fourth call in Exhibit 1, which is designated as Count 6. RP (11/19/15) at 10, 11.

Sentencing Alternative and presented a current drug assessment. RP (11/19/15) at 29; CP 184, 188-89. The court denied the request for DOSA and sentenced Mr. Villareal to a standard range sentence of 60 months for each count, to be served concurrently. RP (11/19/15) at 36; CP 200.

Timely notice of appeal was filed and this appeal follows. CP 213.

**2. Trial testimony:**

Jose Villareal, Jr. and Kristin Carter were involved in a relationship and have a three year old daughter together. 2RP at 223. Mr. Villareal was convicted of an offense in which Ms. Carter was the victim in Thurston County Superior Court Cause No. 14-1-00001-8. The court entered a post-conviction no contact order on February 27, 2014 prohibiting Mr. Villareal from having contact with Ms. Carter. 1RP at 68. The no contact order is valid for five years. Exhibit 7.

Ms. Carter tried several times to have the order rescinded. 2RP at 224, 228. Although her attempts were unsuccessful, the no contact order was modified on August 20, 2015 to permit third party contact through Ms. Carter's mother so that Mr. Villareal could see their daughter while he is in a DOC facility. 1RP at 122, 2RP at 225, 228. Exhibit 8.

Community Corrections Officer Maria Cumero supervised Mr. Villareal. 1RP at 67. After being assigned the case, she determined that

Kristin Carter and their daughter were named as protected parties in the no-contact order. IRP at 68. Ms. Cumero called Kirstin Carter at 206-427-3580 and left a voice mail for her on June 15, 2015. IRP at 71. The telephone number was obtained by Ms. Cumero from a Department of Corrections visitor application form that Ms. Carter had completed in order to take their daughter to visit Mr. Villareal. IRP at 71, 72. Ms. Cumero stated that a person she defined as Kristin Carter called her from 206-427-3580. IRP at 74. She stated that she talked with Ms. Carter on June 16, twice on June 17, and again on June 26, 2015. IRP at 71, 197. She also spoke with Kathy Carter, who is Mr. Villareal's mother. IRP at 75. Ms. Cumero testified over objection that she could differentiate between Kristin Carter's voice and Kathy Carter's voice. IRP at 75.

Ms. Cumero met with Mr. Villareal in her office on June 25, 2015. IRP at 76. During that meeting she asked to see his cell phone and he stated that his cell phone was at his house. IRP at 76. She stated that five to ten minutes later she called the cell number he had provided and that Mr. Villareal answered the phone. IRP at 76. She stated that after she identified herself he hung up. IRP at 76. She called back second time and the phone went to voicemail. IRP at 76. She stated that she recognized his voice when she initially called. IRP at 76.

Mr. Villareal came to Ms. Cumero's office the following day for a

previously-scheduled appointment. 1RP at 77. She asked why he had hung up on her the day before. 1RP at 77. He denied that he received a call from her and she demanded that he produce his phone. He complied and she looked through the call history to show him that she had called the previous day. 1RP at 78. While scrolling through the listed calls on his phone, Ms. Cumero saw the phone had been used to call 206-427-3580 on June 24 and 25, 2015. 1RP at 79. She recognized that as the number used by Kristin Carter. 1RP at 79-80, 83.

While Mr. Villareal was still in her office, she called the number and she stated that a voice she recognized as Kristin Carter from calls on June 16 and 17, 2015 answered and asked who she was and “why do you have Jose’s phone.” 1RP at 85. Ms. Cumero asked why she was having contact with Mr. Villareal, and speaker denied that she was Ms. Carter and said that she just had Ms. Carter’s phone. 1RP at 86. Ms. Cumero stated that the person identified herself as Angela Stevens when asked her identity. 1RP at 86. Ms. Cumero told her that she knew that it was Ms. Carter and at that time the person hung up the phone. 1RP at 86. On cross-examination, Ms. Cumero said that the person who answered identified herself as “Angela” or “Sandra,” denied that she was Kristin Carter and said that she was a roommate. 2RP at 204, 205. Ms. Cumero told the person that she believed she was Kristen Carter. The person said

that Kristen has two phones. 2RP at 205. She said that she asked for the phone number of the other phone and the speaker said that she did not have it. 2RP at 205.

Following this exchange, Mr. Villareal taken into custody and later booked into the Nisqually jail on September 10, 2015, for violation of Department of Corrections restrictions. 1RP at 123, 2RP at 218.

Ms. Cumero looked at the list of calls that Mr. Villareal made from the jail, which she stated was standard when supervising someone with a history of domestic violence. 1RP at 124. She has access to the Telmate phone system used by the jail and can review each telephone number and inmate calls. 1RP at 124-25. Each inmate is issued a unique Personal Identification Number used to verify the caller's identification. 1RP at 124. The system also uses voice verification in which the person is required to speak their name in order to place a call. 1RP at 128. At the beginning of the call the recipient of the call is given notice that the calls can be recorded and monitored. 1RP at 127.

Ms. Cumero alleged that between September 12 and September 16, 2015, an inmate using Mr. Villareal's PIN called 206-427-3580 multiple times. 1RP at 133. Over defense objection, the state introduced testimony regarding five telephone calls made from the Nisqually jail with Mr. Villareal's PIN to 206-427-3580. 1RP at 152-53. There was a male and a

female voice on each call on Mr. Villareal's jail account, which Ms. Cumero identified as Mr. Villareal's voice and the voice of Ms. Carter. 1RP at 152-54.

The first call was made on September 12, 2015.<sup>4</sup> 2RP at 160, 165; Exh. 1. The second, third, and fourth calls were made on September 13, 2015.<sup>5</sup> 1RP at 161, 165; Exh. 1 and 1A. The fifth call was made on September 16, 2015.<sup>6</sup> 1RP 161; Exh. 1. During the calls, the female referred to the male as "Mexi," which Ms. Carter stated is a nickname she uses for Mr. Villareal, and also referred to their daughter. 1RP at 69, 2RP at 295. At one point a child is also heard on the call and refers to "daddy." 1RP at 295. The second call also refers to their daughter. 2RP at 296. In the third call, the persons argue and the male refers to "Kristin." 2RP at 296. The fourth call, which the state asserted was the last call on September 13, 2015, was admitted as Exhibit 1 but was not published to the jury by the prosecution. 1RP at 159. Ms. Cumero initially thought that the female voice was Ms. Carter, but testified that she no longer thought that it was Ms. Carter after she reviewed the recording on October 9, 2015. 1RP at 187.

The fifth call—on September 16, 2015—also contains references to their daughter by name. 2RP at 297.

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<sup>4</sup> This call is the basis for Count 3. (Exh. 1).

<sup>5</sup> These calls are the basis for Counts 4, 5, and 6. (Exh. 1 and 1A).

<sup>6</sup> This call was the basis for Count 7. (Exh. 1).

Kristin Carter stated that her primary telephone number that she used most often is 206-472-3580. 2RP at 223. She stated that the number is message phone and at the time she had roommates who also had access to the phone. 2RP at 228. She stated that she kept the phone at her house for anybody to use "half the time." 2RP at 228.

She stated that she knew that Maria Cumero was Mr. Villareal's community corrections officer, and that she had talked with Ms. Cumero on the phone two times. 2RP at 224. She stated that Ms. Cumero had left a message in June and that she had called her back. 2RP at 224. She stated that she did not remember if she had talked to Mr. Villareal when he was in the Nisqually jail. 2RP at 225, 226.

The defense rested without calling witnesses. 2RP at 262.

**D. ARGUMENT**

**1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED AUDIO RECORDINGS OF FIVE TELEPHONE CALLS FROM THE NISQUALLY JAIL WITHOUT ANY EVIDENCE AUTHENTICATING THE IDENTITY OF THE FEMALE VOICES HEARD ON THE RECORDINGS**

Mr. Villareal's counsel filed a motion in *limine* before trial seeking to exclude the recordings of conversations between a person at the Nisqually jail using Mr. Villareal's PIN assigned to him, and a female speaker identified by Ms. Cumero as Ms. Carter. CP 120-22; 1RP at 96-

103. The defense motion was ultimately denied and Ms. Cumero testified that each inmate at the Nisqually jail receives an individualized PIN that is entered before each call; that there are five calls made to telephone number 206-427-3580 using Mr. Villareal's PIN; Ms. Carter had previously provided that number to the Department of Corrections, and that the female on the calls refers to "Mexi," a nickname for Mr. Villareal. The trial court erred by admitting the recordings and permitting the state to play four of the five recordings for the jury. This was an abuse of the trial court's discretion because, as a prerequisite to admitting a voice recording, the person speaking must be identified.

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)). A condition precedent to the admissibility of a recording, the proponent must present evidence sufficient to support a finding that the recording is what it purports to be. 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). See ER 901(a), Appendix A. 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.3d 739 (2002). Under ER 901, The person speaking on a recording must be identified: "a foundational witness (or someone else with the requisite knowledge) usually must identify those voices." *Jackson*, 113 Wn. App. at 767.

However, a voice recording can also be authenticated by evidence sufficient to support the identification, with no requirement of direct identification of the voice by a participant in the call. *State v. Williams*, 136 Wn. App. 486, 499-501, 150 P.3d 111 (2007). In such a case, self-identification combined with circumstantial evidence is usually sufficient to support admission of the recording. *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171, 758 P.2d 524 (1988), review denied, 112 Wn.2d 1001 (1989).

In this case, insufficient evidence was presented identifying the voice of the female caller as Kristin Carter. Ms. Cumero stated that she had spoken with Ms. Carter on June 16 and June 17. 1RP at 71, 197. Ms. Cumero testified that she left a voicemail message for Ms. Carter on June 15. 1 RP at 71, 74. She testified that a person she identified as Ms. Carter called her twice on June 16 and twice on June 17, 2015, and that she called Ms. Carter on June 26, 2015. 1RP at 71. The calls on June 16 and

June 17 were initiated by a person whom Ms. Cumero identified as Ms. Carter. 1RP at 71. Based on those calls, Ms. Cumero was insistent that the person heard in calls 1, 2, 3, and 5 was Ms. Carter.

The record is clear, however, that Ms. Carter did not have exclusive control of the cell phone assigned to 206-427-3580. The person who answered the call made on June 26, 2015 from her office said that she was named "Angela" or "Sandra," and that she was roommate. 1RP at 197, 2RP at 204. Ms. Carter testified that she had roommates who used the phone and that the phone was left in her house for others to use. 2RP at 228. Ms. Cumero acknowledged that she had never met Ms. Carter in person.

The record shows that ultimately, Ms. Cumero was not as familiar with Ms. Carter's voice as she claimed. She testified that she initially believed that the call in Count 6 was Ms. Carter, but subsequently changed her mind and conceded that the call was not Ms. Carter. 1RP at 166, 187. Ms. Cumero's shakiness on authentication was understandable; she had never met Ms. Carter in person, her previous contact with her had been by telephone. No testimony was introduced regarding the listening conditions when she received the calls she asserts were from Ms. Carter, nor the quality of the phone used by the speaker or the quality of the phone she used when she received the calls. In addition, Ms. Carter was

not the only person who was expected to use the phone assigned to 206-427-3580. Ms. Carter said that when she called the number from her office on June 26, a woman identifying herself as “Sandra” or “Angela” Stevens answered, told Ms. Cumero that she was not Kristin Carter, and said that she was a roommate. IRP at 86. Angela Stevens is a person known to Ms. Cumero. Her notes report that on June 15, 2015 she called and “left a message with Ms. Carter’s roommate, Angela Stevens.” IRP at 198. She acknowledged that she had never spoken with Ms. Stevens and therefore had not heard her voice, but that she had instead left a message for her using the 206-427-3580. IRP at 198-99.

Under *Passovoy*, Division I of this Court ruled that the circumstantial evidence was sufficient to authenticate a telephone call where there was testimony that the caller had self-identified as the person in question, the caller was returning a call as requested, and the caller demonstrated familiarity with the facts of the incident. *Passovoy*, 52 Wn. App. at 171. Similarly, in *State v. Danielson*, 37 Wn. App. 469, 681 P.2d 260 (1984), Division I again found sufficient authentication of a recording where the caller self-identified himself, knew personal information, and had returned a call as requested. *Danielson*, 37 Wn. App. at 472-73. Evidence in this case fell short of the three conditions adhered to in *Passovoy* and *Danielson*. Here, Ms. Cumero stated that a person she

identified as Ms. Carter returned a call on June 16, 2015. However, there is no evidence of a returned call on the recordings. Moreover, Ms. Cumero demonstrated that she was unfamiliar with Ms. Carter's voice as shown by her misidentification of track four as being Ms. Carter.

The recorded calls contain references to their daughter, F., and references to "Mexi." However, the record is far from clear that the conversations could have been exclusively with Ms. Carter rather than someone she in a caretaking role. When "Kristen" is spoken, it is by the male speaker, not by the female speaker.

The evidence, either direct or circumstantial, was insufficient to support a finding of identification, with the result that the recordings were not properly authenticated and should not have been admitted. There may have been sufficient evidence that the calls were placed by Mr. Villareal to a telephone number associated with Ms. Carter, there was insufficient evidence presented at the court when making its ruling regarding authentication to conclusively establish the identity of the female speaker. The recordings were therefore not properly authenticated, and should not have been admitted.

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 Mr. Villareal actually contacted Ms. Carter on September

12, 13, and 16, 2015. Accordingly, Mr. Villareal's convictions must be reversed.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. VILLAREAL "CONTACTED" MS. CARTER AS ALLEGED IN COUNT SIX.

a. The State failed to present sufficient evidence of violation of a no-contact order in Count 6

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the state, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). This Court should hold the state to its burden and hold that the state did not present sufficient evidence to sustain a conviction in count 6 for violation of a no-contact order because the evidence does not show that Mr. Villareal had direct or indirect contact with Ms. Carter nor did she transmitted a message specifically to Ms. Carter, as was the case in *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003).

To prove the offense alleged in Count 6, the evidence must have

been sufficient to prove that on September 13, 2015, Mr. Villareal "knowingly violated a provision" of the order admitted as Exhibit 7 and modified order entered as Exhibit 8. CP 172 (instruction 17, "to-convict" instruction for Count 6). As applied to the evidence, the prohibited conduct at issue was directly or indirect contact with Ms. Carter. Exh. 7.

The evidence did not prove Mr. Villareal made "contact" with Ms. Carter. Ms. Carter testified that the phone associated with 206-427-3580 was a community message phone to which other people in her house had access. 2RP at 228. The prosecutor conceded that the speaker in Call 4 on September 13, 2015 was not Ms. Carter. 2RP at 297. Therefore, the state proved at most that Mr. Villareal called a message phone and spoke with a roommate or other person in the house. The prosecution acknowledged that the female speaker was not Ms. Carter and does not allege that Mr. Villareal called the person in order to get a message to Ms. Carter. 2RP at 297-98. Instead, the prosecution appears to argue that merely dialing 206-427-3580 was sufficient to commit the offense.

Accordingly, Mr. Villareal's conviction on Count 6 must be reversed and dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

*State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), is not dispositive authority in this case. In *Ward*, the court order at issue

prohibited co-petitioner Ricky Baker from having contact with the protected party "in person, by telephone or letter, through an intermediary, or in any other way." *Ward*, 148 Wn.2d at 809. The state alleged Baker violated the order when he telephoned the protected party's home. *Ward*, 148 Wn.2d at 809. The call was answered the wife of the protected party, and Baker told her that the protected party "had been leaving notes all over town asking him to call." *Ward*, 148 Wn.2d 809. Baker was convicted of violating the order by calling the complainant's home and on appeal, he contended the evidence was insufficient to sustain the conviction because he did not contact the protected party, but merely attempted to do so because there was no evidence that the message was conveyed to the protected party. *Ward*, 148 Wn.2d at 809-10, 815-16.

The Supreme Court disagreed, finding it was not necessary to determine whether the complainant learned about Baker's message that he was calling because the complainant had been "leaving notes all over town" for him to call. *Ward*, 148 Wn.2d at 816. The Court noted that "[t]he no-contact order prohibited Baker from contacting [the complainant] by telephone or through an intermediary, and the evidence shows that Baker telephoned [the complainant's] home and conveyed information about [the complainant] to his wife." *Ward*, 148 Wn.2d at 816.

Significantly when applied to the present case, the *Ward* Court did not hold the call itself constituted a violation; the criminal offense was instead completed only because Baker conveyed information about the protected party to his wife, i.e., an "intermediary," as forbidden by the order. Here, the state does not allege that Mr. Villareal gave information regarding Ms. Carter to the person who answered the call. 2RP at 297.

Instead, taken in a light most favorable to the state, the evidence shows that the call was made to 206-427-3580 from the jail in a manner that Ms. Carter described was usual for that phone—that it was used at least in part as a community "message phone" that she often left in the house for others to use, and that the caller spoke with a roommate or other person who had access to the phone. The element found in *Ward* that the protected party was the subject or reason for the call is not alleged by the state in this case. The state thus failed to prove beyond a reasonable doubt that Mr. Villareal violated the no-contact order as alleged in Count 6. The judgment for count 6 should be reversed and the charge dismissed with prejudice.

**b. The trial court erred in denying Mr. Villareal's motion to arrest judgment where the state failed to present sufficient evidence.**

Under CrR 7.4(a)(3), a defendant may bring a motion for arrest of judgment for "insufficiency of the proof of a material element of the crime."

In ruling on a motion to arrest judgment, the trial court does not weigh the evidence, but only examines the sufficiency thereof. *State v. Coleman*, 54 Wn. App. 742, 746, 775 P.2d 986 (sufficiency of the evidence is legally the same issue as insufficiency of the proof of a material element of the crime), rev. denied, 113 Wn.2d 1017 (1989). In reviewing a trial court's decision on a motion for arrest of judgment, this Court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. *State v. Longshore*, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), aff'd, 141 Wn.2d 414, 5 P.3d 1256 (2000). Evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. *Id.*

As discussed above, the state was required to prove Mr. Villareal had direct or indirect contact with Ms. Carter. Mr. Villareal's motion to arrest judgment centered on the state's failure to prove this essential element of the alleged offense. For the reasons set forth above, the trial court erred by denying Mr. Villareal's motion to arrest judgment.

#### **E. CONCLUSION**

The trial court abused its discretion when it admitted the recordings of the calls from the Nisqually jail because there was insufficient evidence to authenticate or identify the female voice on the

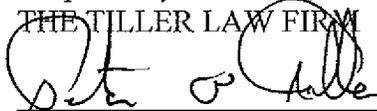
recording as belonging to Kristin Carter. The trial court should not have admitted the recordings, and Mr. Villareal's convictions should be reversed.

That remedy will not be necessary regarding Count 6 because the state failed to prove each element beyond a reasonable doubt. This Court should reverse Mr. Villareal's conviction for that count and remand for dismissal with prejudice.

DATED: May 24, 2016.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over the printed name of the law firm.

PETER B. TILLER-WSBA 20835

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Of Attorneys for Jose Villareal, Jr.

CERTIFICATE OF SERVICE

The undersigned certifies that on May 24, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 24, 2016.



PETER B. TILLER

## APPENDIX A

### RULE 7.4 ARREST OF JUDGMENT

(a) Arrest of Judgments. Judgment may be arrested on the motion of the defendant for the following causes: (1) Lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime.

(b) Time for Motion; Contents of Motion. A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.

The motion for arrest of judgment shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) New Charges After Arrest of Judgments. When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

(d) Rulings on Alternative Motions in Arrest of Judgment or for a New Trial. Whenever a motion in arrest of a judgment and, in the alternative, for a new trial is filed and submitted in any superior court in any criminal cause tried before a jury, and the superior court enters an order granting the motion in arrest of judgment, the court shall, at the same time, in the alternative, pass upon and decide in the same order the motion for a new trial. The ruling upon the motion for a new trial shall not become effective unless and until the order granting the motion in arrest of judgment is reversed, vacated, or set aside in the manner provided by law.

**RULE ER 901**  
**REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION**

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Court or Expert Witness. Comparison by the court or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. (Reserved. See RCW 5.44 and CR 44.)

(8) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

(11) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute or court rule.

**TILLER LAW OFFICE**

**May 24, 2016 - 4:52 PM**

**Transmittal Letter**

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**Comments:**

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