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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TEDDY ROOSEVELT SIBLEY, APPELLANT

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

AMENDED BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The Trial Court violated Appellant's rights under the Confrontation Clause of the United States and Washington State Constitutions by erroneously admitting recorded statements of the victim, Kara Finley.

2. The Trial Court violated double jeopardy by erroneously entering convictions for one count of assault in the second degree and two counts of assault in the fourth degree against the same victim.

3. The Trial Court violated Appellant's right to equal protections by imposing a sentence of life imprisonment after a judicial determination of the existence of qualifying prior convictions.

4. The Trial Court violated Appellant's rights to trial by jury and due process by imposing a sentence of life imprisonment after a judicial determination of the existence of qualifying prior convictions.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Trial Court violated the Confrontation Clause of the United States and Washington State Constitution where it admitted a non-testimonial recording of the Appellant assaulting Ms. Finley?

2. Whether the Trial Court violated double jeopardy by entering convictions for multiple assaults against the same victim that stem from separate and discrete assaultive acts by the Appellant?

3. Whether the Trial Court deprived Appellant of equal protection under the law by determining the existence of Appellant's prior strike convictions by a preponderance of the evidence?

4. Whether the Trial Court deprived Appellant of the rights to jury trial and due process by determining the existence of Appellant's prior strike convictions by a preponderance of the evidence?

III. STATEMENT OF THE CASE

Summary

On November 14, 2018, Mr. Sibley was convicted of assault in the second degree – strangulation (domestic violence), felony harassment – threats to kill (domestic violence), three counts of assault in the fourth degree (two of which were domestic violence), reckless endangerment, and driving while license suspended in the third degree. These convictions stem from a prolonged incident involving his former intimate partner Kara Jo Finley, Ms. Finley's daughter from a previous relationship, Zalissa Sanfo, and Ms. Finley and Mr. Sibley's two sons, aged 5 years and 2 months. During this incident on March 22, 2018, Mr. Sibley picked Ms. Finley up and threw her – resulting in a broken leg. He then assaulted 12-year-old Zalissa Sanfo in the head and face before moving on to again brutally assault Ms. Finley by punching her repeatedly in the head and strangling her. Mr. Sibley then took their two sons, one of

whom was a mere 10 weeks old, over Ms. Finley's objection, and recklessly drove off, without turning on his headlights or securing either child in an appropriate seat. Parts of the altercation with Ms. Finley were audio recorded by way of a recorded phone call between Ms. Finley and her sister-in-law. Prior to trial, the Trial Court granted the State's motion to admit the audio recording.

After a five day trial, Mr. Sibley was convicted of the above-referenced offenses, but acquitted of two counts of kidnapping in the first degree and interfering with domestic violence reporting. The jury was hung on a second count of assault in the second degree (substantial bodily harm) but convicted on the lesser included offense of assault in the fourth degree. On December 17, 2019, Mr. Sibley was sentenced to life in prison, based on his current conviction for second degree assault as well as at least two prior convictions for "strike" offenses – attempted robbery in the first degree and burglary in the first degree.

Facts Presented at Trial

At trial, the State presented testimony from twelve witnesses. RP 3-5. The Defense declined to call any witnesses. Id. Witnesses called by the State were the victim's sister-in-law, Jacqueline Finley (RP 469-528; RP 684-715), the victim's niece, Summer Finley (RP 528-539), the victim's friend and one of the first responders, Chasity Swan (RP 540-550;

RP 951-953), the victim's neighbor, Joanne Signor (RP 559-567), Colville Tribal Police Officer Logan Hedden (RP 574-592), Federal Bureau of Investigation Forensic Examiner Justin Lazenby (RP 593-612), Ferry County Sheriff's Deputy Benjamin Cosby (RP 613-651), Colville Tribal Police Dispatcher Edmund Fenton (RP 715-742), Colville Tribal Police Detective David LaBounty (RP 742-761; RP 880), Radiologist Dr. Brian Rich (RP 862-879), Dr. Elizabeth Locascio (RP 880-936); and Radiologist Dr. Julie Kaczmark (RP 938-951). The facts presented are as follows.

Kara Finley¹ is a member of the Colville Confederated Tribes residing in Inchelium, Washington. RP 470; 473; 507. Defendant/Appellant Teddy Sibley was Kara's on-and-off again significant other for 9-10 years, as well as the father to her two sons, Owen (age 5) and Colin, (age 2 months). RP 469-470; 508-509; 542; 713. Kara also has a daughter, Zalissa Sanfo, from a prior relationship. RP 512; 587.

Throughout their less-than-healthy relationship, Mr. Sibley and Kara fought often. Id; RP 546. On a few occasions, this fighting necessitated that Kara flee and hide at the homes of her relatives. RP 512. On the date of March 22, 2018, Kara and Mr. Sibley had separated due to

¹ In this portion of this brief, the State may refer to Kara Finley as "Kara" rather than as "Ms. Finley" to avoid confusion with Jacqueline Finley or Summer Finley. The State will likewise refer to Jacqueline Finley and Summer Finley by their first names. No disrespect is intended.

his drinking, but Kara was allowing Mr. Sibley to stay in her house while he was in the process of moving to a different location in Colville, Washington. RP 471; 509; 713-714. In addition, Kara had just given birth two months prior and had been in and out of the hospital due to complications from a C-section. RP 547.

On the evening of Thursday, March 22, 2018, Jacqueline Finley, Kara's sister-in-law, received a phone call on her home phone. RP 469; 471; 486; 493-494. Initially, no one appeared to be on the other end of the call, so Jacqueline hung up the phone and redialed and discovered that the call had come from Kara's phone number. RP 471. Jacqueline then heard voices whom she recognized as belonging to Kara and Ted [Sibley], as well as a crying baby. RP 472. Jacqueline wasn't sure if the call to her number was intentional, but it sounded like they were "in trouble". Id. Jacqueline decided to go to Kara's residence to see if her help was needed before she called law enforcement. Id. Jacqueline then went straight to Kara's residence, leaving the phone call ongoing and on speakerphone. RP 473; 486. The phone was left in Jacqueline's living room, where Jacqueline's own four children were located, including her 15 year-old daughter, Summer Finley.² RP 486.

² Appellant mistakenly refers to Ms. Finley's niece, Summer Finley, as "Elizabeth" in his brief.

When her mother rushed out of the house without explanation, Summer had been lounging in the living room playing on her personal cell phone. RP 531-532. Upon hearing noise coming from the still-ongoing call on the house phone, Summer got closer and listened. RP 533. Over the house phone, Summer heard yelling, crying, screaming, and swearing. Id.; RP 536. Through her familiarity with the parties, Summer was able to identify the voices as belonging to her auntie Kara and Mr. Sibley. RP 529-530; 533. Her auntie Kara sounded worried and frightened and Mr. Sibley sounded angry. RP 535. She was also able to hear her baby cousin crying, her cousin Zalissa sounding “worried”, and the sounds of things being knocked over. RP 534-535. After listening for about five minutes, Summer began to record the incident on her personal cell phone. RP 535. Summer later provided that recording to her mother, Jacqueline. Id.

Meanwhile, upon arrival at Kara’s residence, Jacqueline observed Mr. Sibley standing on the front porch as well as Kara lying in the front doorway; the house was in disarray (couches and tables overturned) and the baby was crying in the background. RP 474; 690. Mr. Sibley appeared belligerent, aggressive, and irate and told Jacqueline to “get the fuck out of here”. RP 474-475. Jacqueline could smell intoxicants on Mr. Sibley. RP 475. Jacqueline did not want to leave because she was concerned for Kara and the kids due to Kara appearing fearful as well as

injured and immobile on the ground. Id.; RP 711. Mr. Sibley continued to argue with Jacqueline,³ and when she offered to take the boys, Mr. Sibley became more angry and stated “you’re never gonna see these fuckin’ boys again.” RP 475-474. At one point, Kara and Mr. Sibley’s five year-old son, Owen (Jacqueline’s nephew), came out on the porch and Mr. Sibley jerked him back and repeated that Jacqueline was “never gonna fuckin’ see him again.” RP 478. Jacqueline felt so threatened by Mr. Sibley getting in her face that she thought about grabbing a nearby wood axe for self-defense, but instead she drove to the house of her neighbor, Joanne Signor, to call law enforcement. RP 476-477; 687; 711. When Jacqueline stated that she was going to call law enforcement, Mr. Sibley responded “go ahead, call the cops. Charges will be dropped.” RP 712.

After Jacqueline reported the domestic dispute to dispatch, she returned to Kara’s house. RP 477-478. Upon her return, she observed Kara’s 12 year-old daughter, Zalissa (also known as “Z”), standing outside and appearing to put something in the car, whilst crying. RP 479; 561. When Mr. Sibley started to come out of the residence, Zalissa fearfully ran back inside. Id.; RP 480; Exhibit 41. Mr. Sibley approached Jacqueline in her vehicle and told her to “move the fuck out of the way” because he was leaving. Id. Jacqueline told Mr. Sibley that the white Nissan he evidently

³ Parts of these arguments can be heard on the recording made by Summer Finley. Exhibits 40, 88.

planned on taking did not belong to him, to which Mr. Sibley replied that he “didn’t give a fuck.” RP 480-481. Mr. Sibley then backed out, turned around, and drove off towards Inchelium on the snow-covered road without turning on his vehicle lights. RP 481-482; 521.⁴

After Mr. Sibley drove off, Jacqueline entered the residence to discover Kara still lying on the floor and Kara’s two sons absent. RP 482. Kara was crying and appeared extremely fearful and scared for her sons. RP 483. Jacqueline told Kara that she could not “do nothing” and that she had to go look for the boys. *Id.* While looking for Mr. Sibley and the boys, Jacqueline called 911 to report that she believed Mr. Sibley had fled the reservation with the boys. RP 483-484.

After Jacqueline left, Kara herself then called 911. RP 720; Exhibit 42. In that call, Kara told the dispatcher that Mr. Sibley had beaten her up, broken her leg, beaten her daughter, taken her kids, and was threatening to kill them if the police went after him. RP 726-738; Exhibit 42. Kara repeatedly stated that she was injured, scared, that Mr. Sibley had “just about killed her”, that she feared he would kill her if he returned, and that she had no way to defend herself. *Id.* Again and again, Kara expressed that she feared Mr. Sibley would kill “her kids”, “her babies” or “her boys”. *Id.* Midway through the call, Kara told her daughter to run to

⁴ This exchange can be seen on Exhibit 41, which is recorded video surveillance from Kara’s residence.

the neighbor's house and hide.⁵ Id. Kara repeatedly referenced her broken leg and needed immediate medical assistance. Id. The call ended when EMS arrived at Kara's home. Id.

After searching unsuccessfully for Mr. Sibley, Jacqueline returned to Kara's residence to discover that EMS had arrived, as well as Kara's brothers and some other friends, including Chasity Swan. RP 484. After talking to Kara as she was being loaded into an ambulance, Jacqueline called dispatch again to request an Amber Alert for Kara's and Mr. Sibley's sons. RP 487-488. Based on information received from Dispatch, Ferry County Sheriff's Deputy Benjamin Cosby was able to locate and stop the vehicle Mr. Sibley was driving and arrest Mr. Sibley some 40 miles away at the Noisy Waters gas station. RP 614-623; 647. Mr. Sibley appeared to be under the influence of alcohol. RP 628. Moreover, both of Kara's and Mr. Sibley's sons were unrestrained in the vehicle, and the two-month old was dressed only in a diaper and onesie. RP 623-624.

Kara went by ambulance to Mt. Carmel Hospital, in Colville, Washington, accompanied by her close friend, Ms. Swan. RP 488; 491; 544-545. During the 45-or-so minute bumpy ambulance ride, Kara was screaming from the pain of her leg, as well as crying and fearful over the

⁵ Kara's neighbor Joanne Signor testified that Zalissa did run over to her house, sobbing inconsolably, and hid behind her couch. RP 563-566.

fate of her as-of-then still missing children. RP 545. Jacqueline followed behind with Kara's daughter Zalissa. Id. However, while en route to the hospital, Jacqueline stopped at Noisy Waters gas station, where the boys had just been located, to pick them up. RP 489. Jacqueline then headed to the hospital where she stayed with Kara all night. RP 492. Some time later, Jacqueline learned that her daughter Summer had made a recording of the phone call between Kara's phone and Jacqueline's phone. RP 496. After listening to the call, Jacqueline provided it to Detective LaBounty of the Colville Tribal Police Department. RP 496. That audio was then provided to Justin Lazenby, a forensic examiner with the FBI, who was able to reduce the background noise and increase vocal clarity on the recording. RP 593-612.

At the hospital, Kara was seen in the emergency room by Dr. Elizabeth Locascio. RP 893. During that contact and while Dr. Locascio was gathering information for purposes of medical treatment, Kara appeared "shell-shocked" and disclosed that her domestic partner had assaulted her using open hands and fists, as well as had thrown her to the ground with great force, breaking her leg. RP 896; 906; 915; 919; 922. Kara also stated that she had been manually strangled. Id. Dr. Locascio noted bruising and scratches on Kara's body, as well as significant bruising to the left side of her face. Id. In addition, Dr. Locascio noted that

Kara had difficulty swallowing and a hoarse, raspy voice, as well as a swollen but intact airway (pharyngitis) and shortness of breath. RP 896-897; 902; 907. The bruises and marks on Kara's neck, as well as the internal swelling and pharyngitis, were consistent with manual strangulation. RP 901; 903; 908; 923. A second doctor, Dr. Kaczmark, noted that Kara had an enlarged and inflamed parotid and platysma, consistent with trauma to soft tissues on her neck by the jaw bone. RP 947-948. In addition to her neck wounds, Kara was diagnosed with a "severe orthopedic injury" – both bones in her lower left leg were broken in multiple places. RP 872; 875; 905.

When Kara had arrived at Mt. Carmel Hospital, she was initially too emotional to talk to law enforcement, but eventually was able to provide a statement to Colville Tribal Police Corporal Logan Hedden and Deputy Cosby. RP 577-578; 627-628. Cpl. Hedden recorded the statement and both officers took photos that documented the injuries on Kara, consisting of red marks and bruises on her neck, face, chest, and arms; scratches on her neck, injuries to her scalp, bruised elbow, badly swollen left eye, broken blood vessels in her eyes, and her leg, which was in a cast. RP 579; 581; 629; 632-633; Exhibits 4-5, 9, 20. Deputy Cosby specifically noted similar bruising on the left and right sides of Kara's neck, consistent with "force trauma injury". RP 633-634. Both officers

also took photos of injuries to Zalissa's face and head, including a "goose-egg" above her eye. RP 584-585; 629; 635; Exhibits 14, 23. Photos taken of Kara's residence show that the furniture was overturned doors ripped off of frames, and holes punched in doors. RP 684-701; Exhibits 54, 64, 67. In addition, Deputy Cosby's follow-up photos of Kara several weeks later showed that she still had visible scratches and bruises from the incident and that her leg was still in a cast. RP 638-640.

Procedural Facts

On March 26, 2018, Mr. Sibley was charged in Ferry County Superior Court by an Information alleging the following criminal offenses:

1. Assault in the Second Degree (Substantial Bodily Harm – Intimate Partner DV)
2. Assault in the Fourth Degree (Intimate Partner DV)
3. Assault in the Fourth Degree (DV)
4. Interfering with Domestic Violence Reporting
5. Felony Harassment (Threats to Kill – Intimate Partner DV)
6. Assault in the Second Degree (Strangulation – Intimate Partner DV)
7. Kidnapping in the First Degree (DV)
8. Kidnapping in the First Degree (DV)
9. Reckless Endangerment
10. DWLS 3

CP 1-7. Counts 1-8 also contained the aggravating factors that the offenses were committed with deliberate cruelty to the victim and furthermore were domestic violence offenses committed in the presence of minor children. Id. The State later filed an Amended Information which

removed the aggravating factors from Counts 2-4, as the aggravators did not apply to gross misdemeanors under the authorizing statute. CP 120-126. The State also removed the deliberate cruelty aggravator on Counts 1 and 5-8, leaving only the “committed in the presence of minors” aggravator. CP 120-126; RP 177.

Several pretrial status conferences were held on June 18, July 16, September 17, September 24, and October 22, 2018. RP 10-64. During the pretrial hearings, Defense made it very clear that it was not contesting the validity of the prior convictions. “We’re not contesting the validity of the priors. They exist. They’re valid convictions. I’m not seeking to collaterally attack those convictions.” RP 47.

Preparatory to trial, Motions in Limine were heard on October 29, 2018 and a second round of Motions in Limine were heard on November 2, 2018. RP 65-163; 164-199. During the October 29 hearing, the Trial Court addressed the State’s pretrial motions on the admissibility of several pieces of evidence. RP 65-163.

First, the Trial Court found that the victim’s (Kara’s) statements to medical personnel would be admissible as statements made for purpose of medical diagnoses under ER 803(a)(4) and relevant case law, so long as the appropriate foundation was laid by the State. RP 144; CP 26-28. The

Defense agreed that the statements were admissible, subject to appropriate foundation:

MR. TRAGESER: No. The – the statements were made that night, Judge, and they seem to fit within the rule and would be allowed to be elicited from the medical provider.

RP 144.

Second, the Trial Court found that Ms. Finley's 911 calls would be admissible under ER 803(a)(1) and relevant case law, so long as the appropriate foundation was laid by the State. RP 144-149; CP 28-32. The Defense also agreed that the 911 recordings were admissible, subject to possible redaction:

THE COURT: So, again, subject to scrubbing, and – you know, subject to presumably absent stipulation the 9-1-1 folks – somehow addressing the logs and the timing or some such thing, whatever the prosecutor has in mind, any – objection, then, Mr. Trageser?

MR. TRAGESER: No, Judge.

RP 148.

Third, the Trial Court found that a video of surveillance footage from a security camera located on Ms. Finley's porch would be admissible, so long as the appropriate foundation was laid. RP 150; CP 32-33. Again, the Defense agreed to the admissibility of this material.

THE COURT: ...13 is some surveillance footage. What's the defense response to that.

MR. TRAGESER: It's part of the res gestae. It records the volatility outside the front door, Judge. No objection.

RP 150; RP 500.

On November 5, 2018, the Trial Court heard a third round of pretrial motions. RP 200-270. At this time, despite having previously agreed on the admissibility of the 911 call, Defense objected to the admissibility of the 911 tape on Crawford grounds. RP 218-223. The Trial Court overruled Defendant's objection, finding that the contents of the 911 call were non-testimonial under the relevant analysis. RP 223-224. [Later at trial, after consultation with Mr. Sibley, Defense Counsel specifically stated that it had *no* objections to the 911 tape. RP 682-683; 726.]

The Trial Court also heard argument on the admissibility of a recorded phone call in which part of the actual assault can be heard occurring. RP 248-262. Initially, Defense Counsel had been in agreement, but then reconsidered on privacy grounds under RCW 9.73.030. RP 150-151. However, the Trial Court ruled that the phone call would be admissible as it was non-testimonial in nature due to it being a recording of an emergency nature, as well as a crime in progress, as well

as threats being made. RP 260-262; CP 61-63. At trial, Defense did not object to the admission of the recorded phone call. RP 537.

A jury trial was held on November 6-14, 2018. RP 3-5. The jury found Mr. Sibley guilty of Counts 2, 3, 5, 6, 9, and 10, as charged. RP 1143-1148. The jury acquitted on Count 1 as to Assault in the Second Degree with Substantial Bodily Harm, but found Mr. Sibley guilty of the lesser included offense of Assault in the Fourth Degree. Id. The jury acquitted Mr. Sibley on Counts 4, 7, and 8. Id.

At a Sentencing Hearing held on December 17, 2018, the Trial Court found by a preponderance of the evidence that Mr. Sibley had at least two qualifying prior strike offenses, to wit: Burglary in the First Degree and Attempted Robbery in the First Degree. RP 1158; 1187-1188; CP 248-284. Mr. Sibley also previously had another strike offense amended to non-strike offense pursuant to plea agreement. RP 1178. Mr. Sibley did not challenge the validity of those offenses. RP 1176. Mr. Sibley was sentenced under the Persistent Offender Accountability Act [“POAA”] to life in prison without the possibility of parole. RP 1194-1195. Defendant now appeals both his convictions as well as his sentence.

IV. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN ADMITTING A RECORDING OF AN EMERGENCY.

- a. Violations of the Confrontation Clause may not be raised for the first time on appeal.

Settling a dispute between the various Divisions of the Courts of Appeals, the Washington State Supreme Court has explicitly ruled that the defendant must raise an objection at trial or waive the right of confrontation. State v. Burns, 193 Wn. 2d 190, 210-11, 438 P.3d 1183 (2019).

Like the instant case, Burns involved a strangulation case where the complaining witness did not testify at trial. Id. at 198-201. At trial, two of the state's witnesses repeated out-of-court statements from the victim. Id. at 198. The trial court admitted a neighbor's statement that the victim said "he's trying to kill me" and "he choked me", over Burn's hearsay objection, finding them to be present sense impressions and excited utterances. Id. at 199. With no objection, the trial court also admitted a statement from a police officer that the victim told him about her history with Burns and that when she told him to leave he "snapped" and choked her to unconsciousness three separate times. Id. at 199-201. On appeal, Burns asserting for the first time on appeal that admission of the statements violated his constitutional right to confrontation. Id. at 201.

The Supreme Court held that requiring such an objection at trial is in the interests of judicial efficiency and clarity, and provides a basis for appellate courts to review a trial judge's decision. Id. at 211. Where a defendant does not object at trial, "nothing the trial court does or fails to do is a denial of the right, and if there is no denial of the right, there is no error by the trial court, manifest or otherwise, that an appellate court can review." Id.

Here, Appellant initially did not object to admission of the recorded phone call at all. RP 150. However, Appellant later objected to admission of the recording on grounds that it violated Washington's privacy act, RCW 9.73.030. RP 150-151; 251-254. Appellant also argued against admission of the recording on hearsay grounds. RP 258. Sua sponte, the Trial Court inquired as to whether Crawford might be implicated, but Appellant never objected to the admission of the recording on grounds that it violated the Confrontation Clause. RP 257. And, later on at trial, Appellant did not object to admission of the phone call at all, on Crawford grounds or otherwise. RP 537.⁶

⁶ Appellant did raise Crawford and the Confrontation Clause in regards to the 911 call. However, because admission of the 911 call is not the subject of this appeal, the State does not address it here. The State would be happy to provide additional briefing on that issue should this Court request.

Because Appellant did not challenge admission of the recorded phone call on Crawford or confrontation grounds at trial, Appellant has waived his right to raise a confrontation clause violation on appeal.

b. The conversation and noises contained on the recording are nontestimonial in nature.

Even had Appellant not waived his right to appeal admission of the phone recording on Crawford grounds, the Trial Court did not err by admitting the recording because the recording was non-testimonial in nature.

The confrontation clause bars the admission of “testimonial” hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Non-testimonial statements are not subject to the confrontation clause. State v. Wilcoxon, 185 Wn.2d 324, 332, 373 P.3d 224 (2016). A statement *cannot* fall within the confrontation clause unless its primary purpose was testimonial. Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015). Under the primary purpose test, the relevant inquiry is not the subjective or actual purpose of the individuals involved in the encounter, but the purpose reasonable participants would have had, ascertained from the statements and actions and the circumstances in

which the encounter occurred. Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). This inquiry is highly context-dependent. Id. In the police interrogation context, statements are nontestimonial when made under circumstances indicating that the primary purpose is to meet an ongoing emergency. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Washington Courts have held that the primary purpose test also applies to statements made to non-state actors in deciding whether such statements are testimonial. State v. Scanlan, 193 Wn.2d 753, 445 P.3d 960 (2019) citing Ohio v. Clark, 135 S. Ct. 2173 at 2182. This is because “statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers”. Id.

Four of the relevant factors are timing, whether the statements were necessary to resolve an ongoing emergency, whether there was a threat of harm, and level of formality of the interrogation. State v. Koslowki, 166 Wn.2d 409, 418-10, 209 P. 3d 479 (2009). In the end, the question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. State v. Scanlan, 193 Wn.2d at 767.

In applying the above factors to the instant case, the exact method of the recording bears some consideration. At trial, Jacqueline Finley indicated that she received a phone call but no one said anything. She then *called the number back*. So, to be clear, the phone call was not one made by the victim, but one made by Jacqueline to the victim's phone. To complicate matters still further, the recording of the phone call was made by neither Kara nor Jacqueline, but by Jacqueline's daughter, Summer because she recognized the sounds of an assault taking place. In addition, Summer could hear an altercation taking place involving her own mother, once Jacqueline arrived at Kara's house. Exhibits 40, 88.

Appellant argues that the recording must be testimonial in nature because "Kara Jo Finley's recorded statements made during an argument with Mr. Sibley were made with the primary purpose of memorializing for the police the events as they occurred for later use in Mr. Sibley's prosecution." Brief of Appellant, pgs. 2-3. This argument is based on the erroneous presuppositions that 1) Kara Finley even knew the phone call was ongoing, and 2) that Kara Finley knew the phone call and her statements were being recorded. The record reflects that neither of these are true. While Kara did state in her 911 call that she made a call for help and pushed her phone under the couch so that Mr. Sibley couldn't see it, that call was clearly disconnected as Jacqueline stated that she had to call

her *back*. In her call back, the sounds of distress were apparent, but no conversation with Kara ensued. Therefore, Kara Finley had no way of knowing that the call back had been made or connected. Moreover, large portions of the recorded call reflect events that occurred *after* Jacqueline Finley arrived on scene at Kara's residence. Certainly Kara Finley would have no way of knowing that a call made to Jacqueline's home would be recorded after and while Jacqueline was physically present at her house. Moreover, none of the parties could anticipate that 15-year-old Summer Finley would have the presence of mind to record the assault in progress on her own phone. The circumstances surrounding the making of the phone call and the creation of the recording are too spontaneous to be remotely characterized as having been done "for the primary purpose of memorializing for the police the events as they occurred" "to create a substitute for trial testimony". Defense itself acknowledged during pretrial motions that "Nobody knew it was being recorded except the recorder." RP 252. Because Kara had no way of knowing that the phone call of the assault was being recorded, the primary purpose of her statements (to the extent that her reactions to being violently assaulted could be called "statements") clearly could not have been to create an out-of-court substitute for trial testimony.⁷

⁷ The excerpt from the Court cited in Appellant's brief "And to the extent that she's

As alluded to above, the content of the phone call cannot fairly be characterized as memorializing events for later prosecution. In making this argument, Appellant seems to be conflating the 911 recording with the phone call recording. In the 911 call, Kara Finley does provide some narrative statements for purposes of describing what has occurred and facilitating a response. By contrast, the recorded phone call at issue consists in large part of statements from the Mr. Sibley himself, which are admissible as statements of a party-opponent and to which Crawford does not apply. To the extent that the recorded phone call does contain statements from Kara Finley, they are not, as in the 911 call, narrative-type statements, but rather reactionary statements to what is going on and regarding her physical condition.

SIBLEY: I'm not playing! I'm not fucking playing!

KARA: No! No! No! My leg's broke! My leg! [Inaudible] Oh my god!

SIBLEY: Sit up right now!

Hurry up!

...fucking drink!.....

Are you fucking serious?!

obviously recording for the purpose of memorializing what occurs –for law enforcement, presumptively” mischaracterizes the facts. Kara Finley did not make any recordings and had no way of knowing that a recording was being made. The “she” who recorded the assault was Summer Finley.

(Sounds of slapping)

SIBLEY: Get up!

KARA: I can't get up Ted, my leg's broke!

SIBLEY: Pack this shit up!

ZALISSA: The bags right there and there's diapers right there.

KARA: No no no no, Ted. No no no! No Ted! Ted, no! Leave her alone!

Ted, no! Leave her alone! Leave her alone! Ted! Jackie, Jackie! Jackie, go! Jackie, go!

Leave her alone! Ted, leave her alone! Jackie, go! Jackie, go. Go, Jackie, go!

Jackie go! Jackie go! Jackie go! Jackie go!

Jackie, GO! Jackie, go! He's gonna hurt you!

SIBLEY: ...the fuck outta here!

KARA: Ted, she was supposed to come get the boys, that's why I was packing the bags! (Repeat)

SIBLEY: I'm leaving, and you're not gonna see them. You're fucking with me right now. You're fucking with me.

KARA: She was supposed to come get the boys!

She packed their clothes, they're right here in the bag!

[Inaudible]... The kids' bags were already packed!

SIBLEY: Get your ass up here!

...get the fucking bottles right now, I'm leaving! HURRY UP!

KARA: No, Ted. No, Ted. No. No, Ted, no.

SIBLEY: Hurry up! Hurry up!

I'm fucking going. Fuck this shit. Take this stuff out to the car right now. Fuck the car seat, let's go! Go, go, GO!

ZALISSA: I'm not doing anything!

SIBLEY: Get your ass up here!

ZALISSA: I'm sorry! I'm sorry!

SIBLEY: Hurry up! Hurry Up!

KARA: No, no, no Ted!

SIBLEY: Right fucking now! Where's my money? Where's my fucking money? Where's my money? Where's my money? Where's my money? (X 5) Where's it at?

KARA: It's in my purse! It's in the truck, it's in the truck! She brought it out to the car!

SIBLEY: Where's my money?

KARA: It's in the truck!

SIBLEY: You playin' games? Give me the...

ZALISSA: (crying) I don't have nothing!

SIBLEY: What'd you go out there for?

ZALISSA: (crying) I was putting the stuff in the car! Like you told me to!

SIBLEY: You all playin'?

KARA: No, my purse is in the car. Ted, my purse is in the truck!
It's in the truck! I keep it in the... in the... right there.

SIBLEY: You will never see the boys. Get up here, Zalissa! When I
say get up here, you stay up here!

SIBLEY: You stay up here. You come after me, you understand that,
you will never wake your sons. You hear me? You bitch.
You fucking dirty bitch. Get your ass back to the fucking
wall.

KARA: Zalissa, did he pull out?

Exhibits 40, 88. Even Defense itself noted during pretrial motions

“[T]here was just recorded something. It wasn't a conversation.” RP 253.

It is difficult to compare the present case to most of the case law because this case is distinct in that the recording at issue is not *about* the crime but is actually a recording of the crime itself. However, to the degree that a comparison can be made, Kara's statements are similar to those in Scanlan in that they are “significantly less likely to be testimonial than statements given to law enforcement officers” because the person to whom they were made was not principally charged with uncovering and prosecuting criminal behavior. Scanlan, Id. at 967-68. In the 911 call, Kara stated that she had tried to call anyone who could bring her help (her brother, her father, etc. - Jacqueline picked up when Kara called her brother's home). The people she was trying to contact, unlike the police, were *not* tasked with investigation or prosecution.

Kara's primary purpose in initially dialing her brother/sister-in-law's number was to get help. To the extent that the recording was made because of and in response to her call, the recording and the statements contained therein were made for purposes of responding to an emergency. Summer Finley, the 15-year-old who made the recording stated that in making the recording she hoped she could get it to stop. RP 535.

Appellant argues that the Trial Court "relied on ...the Privacy Act to find that the recording was admissible and did not violate the Confrontation Clause". This is a misleading statement at its best. The reason the Trial Court analyzed the recording under the Privacy Act was because Appellant sought exclusion under the Privacy Act, not under Crawford. And, although Appellant *did not* raise the confrontation issue at trial or pretrial, the Trial Court *did* consider the issue, sua sponte. RP 256-262. Perhaps the reason why Appellant has confused the two issues is because both call for identical analyses, that is, whether or not the statements were made in response to an ongoing emergency. Id. It is clear, as the Trial Court agreed, that there was an ongoing emergency. In domestic violence cases, courts assess the presence of an ongoing emergency based on whether a continuing threat to the victim existed. State v. Reed, 168 Wn. App. 553, 567, 278 P.3d 203 (2012). Clearly, the situation was not contained, and was ongoing. The assaults and threats

were happening in real time and no one, least of all Summer Finley, knew what else might happen. Thus, in determining whether there was an ongoing emergency, the Trial Court answered both the Privacy Act and Crawford questions.

c. Any error in admission of the recording is harmless.

Even should this Court find that the Trial Court erred by admitting the recorded phone call, such error is harmless beyond a reasonable doubt because the outcome would remain the same, as in the context of the evidence presented at trial, the statements were largely unimportant to the State's case when the assaults and injuries were substantiated by independent photographic evidence and medical testimony, as well as by other unchallenged statements by the victim in her 911 call.

The recorded phone call contains no narrative as to what happened or who is to blame. Even the statement "my leg's broke" does not ascribe fault as to how the leg got broken. The bulk of the statements in the call are from Mr. Sibley himself, and so were admissible as a statement of a party opponent. Many of Kara's articulations are not so much "statements" as they are crying or gasping, which is non-testimonial and admissible. Her actual verbal statements consist of her discussing her broken leg, telling her sister-in-law to leave, discussing the kids' packed bags, and stating that her purse is in the car. The jury heard testimony

from three medical doctors that Kara's leg was broken; therefore, her statement that her leg was broken was cumulative. Kara's statements telling her sister-in-law to leave the residence and that her purse was in the car have no relevance whatsoever to the elements of the offenses of which Mr. Sibley was convicted and did not contribute to the jury's verdict.

The purpose of the recording was to place Mr. Sibley in the residence at the time the assaults occurred and to demonstrate his state of mind and demeanor at the time of the incident. These goals were accomplished by his own recorded statements, which were properly admitted. Kara Finley's statements in the recorded phone call merely demonstrated that she and Mr. Sibley were both in the residence when the incident occurred (and that therefore Mr. Sibley had opportunity to commit the offenses), that her leg was injured, that she was crying and scared. All of these things were proven elsewhere in the case through other compelling testimony and exhibits. Therefore, Kara's statements on the recorded call cannot be said to have affected the verdict beyond a reasonable doubt.

2. DOUBLE JEOPARDY IS NOT VIOLATED BY PERMITTING THE CONVICTION AND PUNISHMENT FOR ASSAULT IN THE SECOND DEGREE AND ASSAULT IN THE FOURTH DEGREE ON THE SAME VICTIM.

Mr. Sibley was charged with two counts of assault in the second degree; one for strangling Ms. Finley, and the other for breaking her leg in multiple places. In addition, Mr. Sibley was charged with assault in the fourth degree, for repeatedly punching and pummeling Ms. Finley in the face. The jury returned verdicts of guilty for the second degree assault (strangulation) and the fourth degree assault for the punching. The jury was hung on the second degree assault involving Ms. Finley's shattered leg, but found Mr. Sibley guilty of the lesser included offense of assault in the fourth degree. Mr. Sibley was also convicted of a third count of fourth-degree assault against Ms. Finley's 12-year old daughter, Zalissa Sanfo, but that conviction is not the subject of this appeal.

Appellant contends that since all of the assault convictions (excepting the one involving Ms. Sanfo) involve Ms. Finley, those convictions must be treated as a single course of conduct. Appellant further contends that imposition of convictions on all three assaults against Ms. Finley violates the constitutional prohibition against double jeopardy, requiring that the two fourth degree assault convictions be stricken. This

is a simplistic analysis that fails to correctly apply the relevant legal test to the facts of the case.

The double jeopardy provisions of the federal and state constitutions protect a defendant from being punished multiple times for the same offense. State v. Allen, 150 Wn. App. 300, 312, 207 P. 3d 483 (2009). However, the fact that multiple assaultive acts involving the same victim are alleged does not preclude multiple convictions. It is only when the acts underlying two (or more) assault convictions occur as part of the same course of conduct that they are part of the same unit of prosecution and may not be separately punished. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984, 329 P.3d 78 (2014). Therefore, in order to implicate double jeopardy concerns, it must first be shown that the assaults against Ms. Finley occurred as part of the same course of conduct. Id.

There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. Id. at 985. Rather, the analysis is a *highly fact-specific* one, generally taking into account the following factors:

- The length of time over which the assaulting acts took place,
- Whether the assaultive acts took place in the same location,
- The defendant's intent or motivation for the different assaultive acts.

- Whether the acts were uninterrupted or whether there were any intervening acts or events, and
- Whether there was an opportunity for the defendant to reconsider his or her actions.

Id. In Villanuava-Gonzalez, the defendant was upset with his girlfriend for going out dancing without him, so he pulled her out of their children's bedroom and "headbutted" her head with his forehead, breaking her nose in two places and causing profuse bleeding. Id. at 978. He then grabbed her by the neck and held her against some furniture, causing difficulties breathing. Id. Villanueva-Gonzalez was charged with two counts of second degree assault, one under the strangulation prong, and one under the substantial bodily harm prong. Id. at 979. At trial, the jury convicted him of second degree assault for breaking his girlfriend's nose, but only convicted him of assault four, the lesser-included offense of the second degree (strangulation) charge. Id. On appeal, Villanueva-Gonzalez claimed that his second- and fourth-degree assault convictions constituted one course of conduct. Id. at 985.

The Washington State Supreme Court analyzed the facts of the Villanueva-Gonzalez case in light of the five factors listed above, noting that "no one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors." Id. The Supreme Court ultimately held that under

the facts and factors in Villanueva-Gonzalez, Villanueva-Gonzalez's actions constituted one course of conduct because the two acts in question, head-butting the victim and then grabbing her neck, took place in the same location, over a short period of time, and there was no record of any interruptions or intervening events, and no evidence that would suggest a different intention or motivation for the actions or that the defendant had an opportunity to reconsider. Id. at 985-86.

The mere similarity between the charges in Villanueva-Gonzalez and the present case or the fact that both cases involve domestic disputes is not controlling.⁸ The court must apply analyze the relevant factors in light of the *specific* facts of this case. It is apparent from that analysis that Mr. Sibley's conviction, although involving the same victim and the same location, are not the same course of conduct and do not run afoul of the double jeopardy prohibition.

In contrast to Villanueva-Gonzalez, the assaultive acts in this case occurred over a relatively long period of time, during which Mr. Sibley

⁸ Indeed, appellate courts have since held that convictions for second- and fourth-degree assault on the same victim in the same location do not run afoul the prohibition against double jeopardy where the specific facts show that the assault occurred over a long period of time, was punctuated by interruptions, and where there was evidence that defendant had an opportunity to reconsider his actions and had different motives for each of the assaultive acts. State v. Aquiningoc, Court of Appeals, Div. 1, No. 71539-9-I, 2015 Wash. App. LEXIS 1428 (2015). See also GR 14.1 (Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the Court deems appropriate).

moved around the residence, to the porch, to the car, and back. Exhibit 41. And, unlike the continuous and uninterrupted assault in Villanueva-Gonzalez, Mr. Sibley's attack was punctuated by several instances of relative calm, quiet, or even absence, as Mr. Sibley went to and from the residence to the porch and the vehicle. At other times, Mr. Sibley turned his focus to other individuals, including Ms. Finley's daughter, Zalissa, or her sister-in-law, Jacqueline Finely. Exhibits 41, 42. Mr. Sibley also turned his attention to packing clothes for his and Ms. Finley's two sons and placing items in his vehicle in preparation of leaving with the two boys. Id. These interruptions show that Mr. Sibley had ample opportunities to reconsider his actions after the first assaultive actions took place. Finally, unlike the assault in Villanueva-Gonzalez, there is evidence that each of the acts underlying Mr. Sibley's assault convictions had a separate motive. The jury heard evidence that the first assault, involving breaking Ms. Finley's leg, occurred "right off the bat" after Mr. Sibley arrived home inebriated and upset. RP 922; Exhibit 42. Her leg was broken and she was immobile the first time Jacqueline Finley arrived at her residence. Significant argument happened between Jacqueline and Mr. Sibley before she left and the assault resumed (which can be heard on the phone recording and seen on the surveillance video). Exhibits 41, 42. The jury also heard evidence that Mr. Sibley pummeled Ms. Finley's face

repeatedly “punching and slapping” her when she could not get up. Exhibits 40, 42, 88. Finally, the jury heard evidence that Mr. Sibley strangled Ms. Finley because he believed she was hiding his money from him. Exhibits 42, 88.

Thus, while the State concedes that Mr. Sibley’s assaultive actions all took place in the same location, under the totality of the circumstances and the other four Villanueva-Gonzalez factors, this case is distinguishable from Villanueva-Gonzalez and this Court’s decision should reflect that. Because the assaultive acts were not part of a single course of conduct, but rather several separate, brutal, volitional acts, double jeopardy considerations are not implicated and Appellant’s convictions should stand.

It should be noted that a finding that two of the assaults constitute the same course of conduct does not necessitate a finding that all three assaults constitute the same course of conduct. Certainly, the Court may find that the convictions stemming from the punching attack to Ms. Finley’s face and the choking are more closely-related than the assault involving the broken leg. The assault involving the broken leg occurred before Kara called Jacqueline and before Jacqueline arrived. The punching/slapping and strangulation happened almost 17 minutes later, after Jacqueline had already come and gone. Thus, it is clear from the

record that the assaults occurring before and after Jacqueline's appearance are separate and distinct acts and the State asks this Court's decision to reflect that.

3. APPELLANT/DEFENDANT WAS NOT DEPRIVED OF EQUAL PROTECTION OF THE LAW WHEN HE WAS SENTENCED AS A PERSISTENT OFFENDER.

- a. The State has a rational basis for treating sentencing factors under the POAA differently than elements of a crime.

Appellant argues that the Trial Court violated his right to equal protection under the law by treating his classification as a persistent offender as an "aggravator" or "sentencing factor" rather than as an element of the crime. Appellant's argument rests on the principle that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment under the law. However, in attempting to equate sentencing factors to "elements", Appellant overlooks the decade-plus of binding precedent established by all three divisions of the Washington Court of Appeals which hold that recidivist statutes, such as the Persistent Offender Accountability Act ["POAA"], are distinguishable from elements and are not constitutionally infirm on equal protection grounds.

An appellate court reviews equal protection claims de novo. State v. Hirschfelder, 170 Wn.2d 536, 550-52, 242 P.3d 876 (2010). Equal

protection under the law is guaranteed by both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. The aim of equal protection is securing equality of treatment by prohibiting undue favor or hostile discrimination. Andersen v. King County, 158 Wn.2d 1, 15, 138 P.3d 963 (2006). The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved. Am. Legion Post No. 149 v. Dep't of Health, 1654 Wn.2d 570, 608, 192 P.3d 306 (2008). Absent a fundamental right or suspect class, or an important right or semi-suspect class, a law will receive rational basis review. Id. at 609. A statute survives rational basis review if the statute is rationally related to achieve a legitimate state interest and the classification does not rest on grounds that are wholly irrelevant to achieving the state interest. State v. McKague, 159 Wn. App. 489, 518, 246 P.3d 558 (2011). The burden is on the party challenging the classification to show that it is purely arbitrary. Id.

Appellant acknowledges that Washington's Supreme Court applies rational basis scrutiny when defendants sentenced under the POAA assert equal protection claims under article I, section 12 and the Fourteenth Amendment based on alleged disparate treatment under the POAA's provisions. State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514

(1996); see Brief of Appellant, pg. 26-27. This is because persons such as Mr. Sibley, who are persistent offenders under RCW 9.94A.570, are neither a suspect nor a semi-suspect class. State v. McKague, 159 Wn. App. 489 at 517, citing State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). Appellant further acknowledges that Washington courts have declined to require prior convictions necessary to impose a sentence under the POAA be proven by a jury. Brief of Appellant, pg. 22. Appellant nevertheless argues that this Court should disregard established precedent and find that there is no rational basis for treating sentencing factors under the POAA differently than elements of a crime. Brief of Appellant, pgs. 22-29. This precise argument has been made, and rejected, in all three divisions of Washington's Court of Appeals. Moreover, Appellant relies primarily upon State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008), and Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which have both been distinguished by the appellate courts several times over.

Similar to Mr. Sibley, the defendant in State v. McKague was sentenced as a persistent offender after being convicted of assault in the second degree. State v. McKague, 159 Wn. App. 489 at 496. On appeal, McKague made an argument, identical to Mr. Sibley's, that his right to equal protection had been violated by the trial judge's determination of his

prior convictions by a preponderance of the evidence, rather than beyond a reasonable doubt. Id. at 497. Specifically, as in the present case, McKague argued that the distinction between requiring a jury to find, beyond a reasonable doubt, the existence of a prior conviction as an element of an offense and allowing a judge to find, by a preponderance of the evidence, the existence of a prior conviction under the POAA was “wholly arbitrary”. Id. at 517. Division Two of the Washington Court of Appeals disagreed. Id.

In the McKague decision, the Court of Appeals specifically rejected McKague’s (and Mr. Sibley’s) argument that Apprendi requires that prior conviction under the POAA must be treated the same as prior convictions that are elements of offenses. Id. at 518-19.

“[I]t is well established that the weaker procedural safeguards given to “persistent offenders” during the fact-finding process of determining prior convictions do not violate any constitutional rights under Almendarez-Torres, Apprendi, or their progeny.”

Id. at 519. The McKague court also specifically found Roswell, here relied upon by Mr. Sibley, to be inapposite, as it concerned a criminal statute (RCW 9.68A.090(2)) which required, as an element, that the jury must find the existence of a prior sexual felony conviction beyond a reasonable doubt. Id.

Division Two addressed the equal protection argument again in 2012, finding that “there is a rational basis for distinguishing between persistent offenders and nonpersistent offenders under POAA” and that the purpose of the POAA is to improve public safety by placing the most dangerous criminals in prison and reduce the number of serious, repeat offenders by tougher sentencing.” State v. Witherspoon, 171 Wn. App. 271, 305, 286 P. 3d 996 (2012).

Division Three of the Washington State Court of Appeals addressed the same argument in State v. Williams, 156 Wn.App. 482, 234 P.3d 1174 (2010).⁹ The Williams court upheld the Roswell distinction between prior convictions serving as aggravating factors and prior convictions serving as essential elements of a crime, citing “a long history of similar distinctions for prior convictions.” Id. at 498. Importantly, the Williams court specifically concluded that finding proof of a prior conviction by a preponderance of the evidence is *not* entirely irrelevant to the purposes of the persistent offender statutes, which purposes are: “to protect public safety by putting the most dangerous criminals in prison, to reduce the number of serious repeat offenders, to provide simplified sentencing, and to restore the public trust in the criminal justice system.”

⁹ Division Three also rejected the equal protection argument as “without merit” in State v. Powell, 172 Wn. App. 455, 290 P.3d 353 (2012).

Id. The Williams court explicitly held that “a state is justified in punishing a recidivist more severely than it punishes a first offender”. Id.

Division One of the Washington State Court of Appeals likewise addressed this exact issue in 2010 in State v. Langstead, 155 Wn.App. 448, 228 P.3d 799 (2010), and again, distinguished the instant facts from Roswell. Id. at 454-55. The Langstead court held that recidivists like Langstead [and Mr. Sibley] are *not* similarly situated to recidivists like Roswell because recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense, which is not necessarily true of the recidivists whose prior offenses are required to be proven beyond a reasonable doubt as elements of their current offenses. Id. at 455-56. In rejecting Langstead’s equal protection challenge, Division One held that “recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or similar offense.” Id. at 456-57.

Washington’s appellate courts have been crystal clear: having the trial court find by a preponderance of the evidence that the defendant had a prior strike offense under the POAA does not violate a defendant’s right to equal protection. Mr. Sibley has not presented any compelling reason

to disregard this authority. While Appellant claims that “a recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 171 months to life”, Washington Courts have explicitly held otherwise, finding that elevation of misdemeanors to felonies based on prior convictions *is* distinguishable from elevating sentences for violent felonious repeat offenders. Furthermore, Washington precedent has repeatedly held that the POAA is rationally related to the legislature’s goals of improving public safety and reducing repeat offenses. Thus, we ask this Court to hold that Mr. Sibley’s right to equal protection was not violated when the trial court determined that he had two prior strike offenses under the POAA.¹⁰

4. APPELLANT/DEFENDANT’S RIGHTS TO JURY TRIAL AND DUE PROCESS WERE NOT VIOLATED WHEN THE TRIAL JUDGE FOUND THE EXISTENCE OF QUALIFYING PRIOR CONVICTIONS UNDER THE POAA BY A PREPONDERANCE OF THE EVIDENCE.

- a. The existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.

In addition to his claim that judicial determination of his prior convictions violates equal protection, Appellant makes the somewhat related claim that judicial determination of his prior convictions violated

¹⁰ Mr. Sibley actually has three convictions for qualifying “strike offenses” under the POAA, but the trial court found that two of the offenses had occurred at the same time and were therefore considered same criminal conduct.

his right to a jury trial and to due process. This argument has frequently been paired with the equal protection argument and so many of the same cases cited above with regard to the equal protection issue will also apply to this argument. See State v. Powell, 172 Wn. App. at 461 (Use of prior convictions at sentencing does not make prior convictions “elements”; prior conviction under the POAA need only be proven by a preponderance of the evidence); State v. Langstead, 155 Wn. App. at 453 (Because of exception for “the fact of a prior conviction” , there is no violate of the Sixth Amendment or the due process clause of the Fourteenth Amendment when a judge determined by a preponderance of the evidence that a defendant has two prior strikes for purposes of the POAA); State v. McKague, 159 Wn. App. at 513-15 (The Supreme Court has “unmistakably carved out an exception” and decided that the protections of the Sixth Amendment and the due process clause of the Fourteenth Amendment do not apply to determining the existence of prior convictions).

In making this argument, Appellant disregards over a decade of State and Federal case law which holds that judicial determination of the existence of a prior conviction for purposes of sentencing under the POAA does not violate the right to a jury trial or the right to due process, including precedent established by the Washington State Supreme Court.

In State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014), Alvin Witherspoon was sentenced to life in prison under the POAA, after being convicted of second degree robbery and the trial court determined that he had two prior strike convictions. Id. at 882. On appeal, the Washington State Supreme Court considered whether Witherspoon's previous strike offenses were required to be proved by a jury beyond a reasonable doubt. Id. at 891. As with Mr. Sibley, in support of his argument, Witherspoon relied upon Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). However, Appellant correctly notes in his opening brief that the Washington State Supreme Court rejected Witherspoon's argument as unsupported, finding that the exception in Appendi¹¹ went unchallenged and unchanged by Alleyne.

The Supreme Court further stated:

“It is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.” Witherspoon, 180 Wn. 2d at 893.

The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. Id. As with

¹¹ “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Appendi, 530 U.S. 466 at 490.

Witherspoon, Appellant here has not made this requisite showing and so Appellant's sentence must be upheld and his motion for resentencing within the standard range, denied.

V. CONCLUSION

The State respectfully requests that the Court deny Appellant's reverse his convictions and remand for a new trial, or to strike his fourth degree assault convictions on Kara Finley. The State additionally requests that this Court uphold Appellant's sentence under the POAA and deny Appellant's request to remand for resentencing within the standard range.

First, Appellant waived his right to challenge admission of the call between Ms. Finley and Jacqueline Finley by failing to object to it on confrontation clause grounds at trial. Moreover, the Trial Court properly admitted the recording of Ms. Finley's call to Jacqueline Finley because the call was nontestimonial in nature. And, even had the Trial Court erred in admitting the recorded call, such error was harmless beyond a reasonable doubt and therefore Appellant's confrontation rights were not violated.

Next, because separate facts supported each of Appellant's assault convictions, Appellant was properly convicted of each separate count.

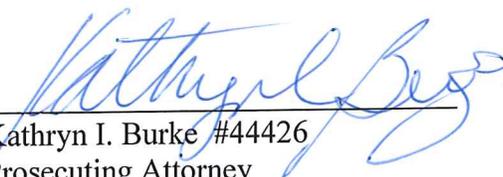
Finally, because the POAA is rationally related to a legitimate governmental interest of protecting public safety and reducing repeat

violent offenses, Appellant was not denied equal protection, due process, or the right to a jury trial when the Trial Court found the existence of his prior convictions by a preponderance of the evidence. Moreover, Defendant/Appellant made it clear on the pre-trial record that he was *not* collaterally attacking his prior convictions and explicitly stated that they were, in fact, valid convictions.

Therefore, the State respectfully requests that this Court enter an order denying Appellant's motions and affirming Defendant's convictions and sentence.

Dated this 18 day of December, 2019.

KATHRYN I. BURKE
Ferry County Prosecuting Attorney



Kathryn I. Burke #44426
Prosecuting Attorney
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on December 18, 2019, I e-mailed a copy of the Amended Brief of the Respondent in this matter, to:

Gregory Charles Link
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and e-mailed a copy to:

Court of Appeals, Division III
500 N. Cedar St.
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12/18/2019
(Date)

Republic, WA
(Place)



(Signature)

FERRY COUNTY PROSECUTORS OFFICE

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