NO. 45933-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNIE MURREL COOLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin, Judge

No. 13-1-00268-1

BRIEF OF RESPONDENT

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2. Although the issue is not ripe for review and was not properly preserved at trial, did the trial court properly exercise its discretion in ordering legal financial obligations when it considered defendant's former work as an educator and defendant's expressed determination to earn a living as evidence of his future ability to pay?

B. STATEMENT OF THE CASE.

1. Procedure

On January 18, 2013, the Pierce County Prosecutor's Office charged the appellant, Johnnie Murrel Cooley ("defendant"), with four counts of domestic violence court order violation. CP 1-3; *see,* RCW

26.50.110.[1] All counts were domestic violence incidents as defined by RCW 10.99.020. CP 1-3. The case proceeded to trial in front of the Honorable Judge Thomas Larkin. Defense counsel made several motions in limine, including one in which counsel moved to exclude a portion of the 911 tape arguing it was hearsay. 2RP 52.[2] The trial court denied the motion on the hearsay basis at that time, but reiterated that the State would need to lay the proper foundation for the tape at trial. 2RP 55, 57.

The jury found defendant guilty as charged. CP 30-37. With an offender score of eight, the trial court sentenced defendant to a standard range sentence of 60 months. CP 52. The court imposed the following legal financial obligations: $500 crime victim assessment, $100 DNA database fee, $1,500 for Department of Assigned Counsel, and $200 criminal filing fee. CP 50. Defendant filed this timely appeal. CP 58.

2. Facts

Defendant and the victim, Amy Lutter, were in a relationship filled with discord for twelve years, from which they have two daughters. 3RP 71. Due to this discord, there were protection orders in place from March of 2010 and July of 2011 prohibiting defendant from contacting Lutter for five years. Ex. 2; Ex. 3; 3RP 73. Both orders prohibited defendant from coming near Lutter or having any contact with her whatsoever, including

[1] Counts I and II are for incidents on January 13, 2013; Counts III and IV are for incidents on January 17, 2013.
[2] The verbatim report of proceedings will be referred to by the volume number, RP, and the page number (#RP #).

by telephone. Ex. 2; Ex. 3.

On January 13, 2013, Lutter received several threatening text messages from defendant on her cell phone. 3RP 91. These messages included the following: "You r going to die I will get you I will wait for days you will die;" "Collateral damages as long as you die I don't care who goes with you;" "I've got enough fire power to light up your house like axmas tree;" "It's either come outside or everyone dies;" "Your choice first I'll start with pumping CO2 THROUGH THE INTAKE AIR FOR THE FURNACE WHEN THAT KNOCKS YOU OUT THEN BLOW UP THE GAS METER;" and "The freedom I will have when you die will be worth every day I spend behind bars." Ex. 11.

On January 17, 2013, Lutter was at home--she had been living with her parents since she separated from defendant--but left to walk the half-mile to defendant's house. 3RP 95, 3RP 78. Lutter was headed to defendant's house to ask defendant's roommate to tell defendant to stop calling Lutter's parents' house. 3RP 79. Defendant had been calling Lutter's parents' house all night and sending threatening text messages. 3RP 78.

As Lutter was walking along on the sidewalk, she saw defendant's truck come around the corner and head right toward her. 3RP 79. Defendant swerved onto the sidewalk where Lutter was standing, she jumped out of the way, and fell to the ground. 3RP 79. As he pulled away, Lutter picked up a rock and threw it at his truck, damaging the rear

window. 3RP 79. Responding officers testified at trial that they observed tire marks indicating that the body of the vehicle would have encompassed the sidewalk area. 3RP 137; 3RP 191. As one officer stated, "[T]he vehicle straddled the sidewalk." 3RP 192.

According to the responding officer, who testified at trial, a call was placed to 911 from a man reporting his ex-wife, Amy Lutter, had thrown a rock at his vehicle window. 3RP 148; Ex. 1. The reporting party identified himself as Johnnie Cooley. *Id.* The number used to call 911, as listed on the CAD, was (253)-906-7459. 3RP 167. When the 911 operator asked for the phone number, the caller was unsure what his number was. 2RP 52; Ex. 1. The operator then read the incoming call number from the screen to the caller. *Id.* The caller affirmatively replied that if that is what the operator had, that must be his number. *Id.* Defendant admitted to officers, who testified at trial, that he had called 911 that day. 3RP 169. Lutter also testified at trial that the voice on the call was defendant's. 3RP 93.

An officer attempted to locate defendant in response to his 911 call, but was not successful. 3RP 125. The officer instead found Lutter on the scene who was "upset and agitated, just looked disturbed." *Id.* Lutter accompanied the officer back to the station for an interview, and while there she received three to four phone calls from the same (253)-906-7459 number used to call 911. 3RP 129-30. Lutter answered one of the incoming calls on speakerphone to allow the officer to hear. 3RP 131. The

male voice on the phone said: "You're as good as dead, bitch," and "I'm going to break all the windows at your parents' house" before hanging up. 3RP 131. Lutter recognized the voice as defendant's and told the officer it was him. *Id.* Lutter then showed the officer the text messages defendant had sent her. 3RP 132-33; Ex. 11.

Approximately two hours after the interview with Lutter, the officer located defendant walking on the street near defendant's and Lutter's parents' homes. 3RP 135. The officer detained defendant, read him his Miranda rights, and asked why he was in the area. 3RP 136-37. Defendant responded that he was going to Lutter's parents' house to get money for his broken window. 3RP 137.

Defendant did not testify at trial. 4RP 228.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE 911 TAPE THAT CONTAINED AN ADOPTED ADMISSION BY DEFENDANT AND THUS WAS NOT HEARSAY. FURTHER, ANY ERROR WOULD HAVE BEEN HARMLESS, AND DEFENDANT FAILED TO SATISFY EITHER PRONG NECESSESARY TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL.

a. The trial court properly admitted the 911 tape because it was an adopted admission by defendant, not hearsay.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. ***State v. Thach***, 126 Wn. App. 297, 310, 106

P.3d 782 (2005). Deference must be given to the sound discretion of the trial court; the test is "whether there are tenable grounds or reasons for the trial court's decision." ***State v. Kinard***, 109 Wn. App. 428, 432, 36 P.3d 573 (2001); ***State v. Harris***, 97 Wn. App. 865, 870, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017, 5 P.3d 10 (2000).

Evidence Rule 801(c) defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible, except as provided by the rules of evidence, by other court rules, or by statute. ER 802.

Evidence Rule 801(d)(2) provides that a statement is not hearsay if: "The statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth." ER 801(d)(2). Adoption of a statement can be manifested by words, gestures or complete silence. ***State v. Cotten***, 75 Wn. App. 669, 689, 879 P.2d 971 (1994); ***State v. Neslund***, 50 Wn. App. 531, 550, 749 P.2d 725, *review denied,* 110 Wn.2d 1025 (1988). An adoptive admission is attributed to the defendant and becomes his own words. Therefore, the right of confrontation is not implicated. ***Cotten***, 75 Wn. App. at 689; ***Neslund***, 50 Wn. App. at 554. Adoptive admissions also necessarily require admission of the statements to which the defendant acquiesces. ***Neslund***, 50 Wn. App. at 555.

During motions in limine, defense counsel moved to prohibit the State from using the 911 tape in its case. 2RP 52. Defendant argued the

tape contained hearsay. On the tape, the 911 operator asked defendant his phone number. 2RP 52; Ex. 1. When defendant was unable to recall his number, the 911 operator read the incoming call number from the screen, and asked if that was his number. *Id.* Defendant replied that if that was what the operator had, that must be his number. *Id.* The State explained that the tape was admissible because it was an adopted admission by defendant:

> And just to be clear, what the 911 operator asks is they look at their screen, they say, "Is this your phone number," and they repeat the number. But it's the defendant's admission, "Yes, that's my number," that's what makes it admissible. Had the defendant been silent on the phone call about as to is that my number, then counsel is correct, because then you have a statement in and of itself by the 911 operator announcing this is the number.

2RP 55. The court agreed stating: "I think it's admissible for the limited purpose of showing what the defendant did." 2RP 55.

The court stated multiple times, and the State agreed, that the admission of the tape depended on the State laying the proper foundation. 2RP 55; 2RP 58. If the State established the voice on the call was defendant's, then it would be adopted admission rather than hearsay. *Id.* Lutter identified the voice on the 911 tape as defendant's well before it was played for the jury. 3RP 93-94. Lutter also identified the phone number as belonging to the defendant well before the tape was played. 3RP 84. The tape was also authenticated by a tape research analyst for

South Sound 911 before being played in open court. 3RP 182. Defendant did not object to the admission or publishing of the tape. *Id.*

The trial court in this case admitted the 911 call not for the truth of the matter asserted by the 911 operator; rather, the court admitted the call for: "what the defendant did as a result of that." 2RP 57. The 911 operator read the incoming call phone number, which may be hearsay when taken alone; however, it was defendant's affirmative statement immediately following that made the 911 operator's statement part of the adopted admission. Admitting the 911 operator's statement was necessary to understand the defendant's adopted admission. Because the operator's statement was admitted as part of defendant's adopted admission under ER 801(d)(2), and not for the truth of the matter asserted, it was not hearsay. Therefore, the judge did not abuse his discretion by admitting that portion of the 911 because it was part of an adopted admission by defendant.

b. Any error was harmless because of the overwhelming evidence that the (253)-906-7459 phone number belonged to defendant.

Even if this Court finds the 911 tape was hearsay and its admission was an error, it should still affirm defendant's conviction because the error would have been harmless. It is well established that constitutional errors may be so insignificant as to be harmless. ***State v. Guloy***, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); ***State v. Davis***, 154 Wn.2d 291, 305, 111 P.3d 844 (2005) *aff'd,* 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006). To find a harmless error, the court must be convinced beyond a reasonable

doubt that any reasonable jury would have reached the same result without the error. ***State v. Smith***, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

To determine if the same result would have been reached, the court applies the "overwhelming untainted evidence" test. *Id.* Under this test, "we consider the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt." *Id.*; ***State v. Beadle***, 173 Wn.2d 97, 119, 265 P.3d 863 (2011); ***Guloy***, 104 Wn.2d at 412. If the erroneous admission of evidence is of minor significance in reference to the overwhelming evidence as a whole, the error is harmless. ***State v. Magee***, 143 Wn. App. 698, 703, 180 P.3d 824 (2008), *rev'd on other grounds,* 167 Wn.2d 639, 220 P.3d 1224 (2009).

There was a significant amount of other untainted evidence proving defendant's phone number was (253)-906-7459. First, Lutter identified the number (253)-906-7459 and the voice on the 911 tape as belonging to defendant, a man whom she intimately knew for twelve years. 3RP 84-85, 3RP 89, 3RP 93-94. Second, there was testimony from Lutter and police who saw the threatening text messages sent by defendant to Lutter. 3RP 88, 3RP 91-93, 3RP 132-33. There are photographs of these text messages which display the (253)-906-7459 phone number. Ex. 11. Third, police were present with Lutter when she received threatening phone calls from defendant, and police could both hear the call and see the calls were from the (253)-906-7459 phone number. 3RP 129-131. Lastly, defendant himself admitted to police that he had called 911. 3RP 169.

Therefore, even if the Court were to find the trial court erred in admitting the portion of the 911 tape with the defendant's number, any error was harmless because there was an overwhelming amount of other untainted evidence that (253)-906-7459 was defendant's phone number.

Defendant's reliance on ***State v. Aaron*** is misplaced. 57 Wn. App. 277, 787 P.2d 949 (1990). In ***Aaron***, the hearsay admitted was the primary piece of evidence linking the defendant to the crime, and the court found no other purpose for the evidence than to suggest to the jury that the jacket containing stolen items belonged to the defendant. *Id.* at 280. First, in the case at hand, the number was not hearsay. Second, there was substantial untainted evidence that the phone number was defendant's. Unlike in ***Aaron***, the 911 operator's statement on the tape recording is not the only piece of evidence connecting defendant to the phone number, as explained above. *See*, 3RP 84-85, 3RP 89, 3RP 93-94; 3RP 129-131; 3RP 169.

Defendant, on appeal, erroneously attempts to call into question the credibility of the victim, Lutter, in her testimony identifying the (253)-906-7459 number as belonging to defendant. App. Br. p. 9. The jury is the sole judge of witness credibility, and "[o]nly with the greatest reluctance and with clearest cause should judges--particularly those on appellate courts--consider second-guessing jury determinations or jury competence." ***State v. Kirkman***, 159 Wn.2d 918, 938, 155 P.3d 125 (2007). The first instruction the jury was given stated:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 10. The jury saw firsthand Lutter's testimony and was properly instructed on its role in determining credibility. This Court should not second-guess the jury acting within its proper role.

c. Defendant has failed to show ineffective assistance of counsel because counsel was not unreasonable for failing to propose a limiting instruction that was not needed and no prejudice has been shown.

To demonstrate ineffective assistance of counsel, defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. ***McFarland***, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; ***State v. Brett***, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). The failure of a defendant to show either deficient performance or prejudice defeats his claim. ***State v. Emery***, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Defendant has failed to show that counsel's representation fell below an objective standard of reasonableness by failing to propose a limiting instruction for the 911 recording. *See,* Ex. 1. A court must give a limiting instruction where the evidence is admissible only for a limited purpose and an appropriate limiting instruction is requested. ER 105; ***Aaron***, 57 Wn. App. at 281. As explained above, the 911 tape was admitted as an adopted admission, not as hearsay. The evidence was not admitted for a limited purpose. Therefore, there was no need for a limiting instruction. Defendant has failed to show his counsel was ineffective for failing to propose a limiting instruction for evidence that was not admitted for a limited purpose.

Defendant has also failed to show prejudice because, as discussed above, there was a significant amount of evidence that the (253)-906-7459 number belonged to defendant even without the admission of the 911 operator's statement. Therefore, defendant has failed to show both deficient performance and prejudice.

2. DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED BECAUSE IT IS NOT RIPE FOR REVIEW, WAS NOT PRESERVED FOR APPEAL, AND FAILS ON ITS MERITS.

Trial courts may require a defendant to pay costs associated with bringing a case to trial pursuant to RCW 10.01.160. There are two limitations in the statute to protect defendants:

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs . . .

RCW 10.01.160.

a. <u>This Court should decline to review the issue of legal financial obligations because the issue is not ripe for review until the State attempts enforcement.</u>

Challenges to orders establishing legal financial obligations (LFOs) are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013); *see also,* ***State v. Smits***, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In the present case, there is nothing in the record showing that the State has

attempted to enforce the LFOs. Therefore, the issue is not yet ripe for review, and this Court should decline to review it.

Defendant erroneously relies on ***State v. Bahl*** to assert his claim is ripe. 164 Wn.2d 729, 193 P.3d 678 (2008). However, the court in ***Bahl***, held: "a defendant may assert a preenforcement *vagueness challenge* to sentencing conditions if the challenge is sufficiently ripe." *Id.* at 751 (emphasis added). The court specifically contrasts a vagueness challenge, which may be ripe for review before enforcement, with challenges to the imposition of LFOs, which are not ripe. *Id.* at 749. Defendant fails to argue why this Court should address the LFOs under a vagueness challenge, and thus the issue is not ripe for review.

b. <u>This Court should decline to review the issue of legal financial obligations because the issue was not properly preserved for appeal.</u>

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See,* ***State v. Lindsey***, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

Defendant had an opportunity to object to the LFOs imposed and provide information of extraordinary circumstances that would make

payment inappropriate in paragraph 2.5 of the Judgment and Sentence. CP 49. Defendant failed to object. Defendant also failed to object during the sentencing hearing held on February 21, 2014. 6RP 282-290. Defendant failed to properly preserve the issue at the trial level.

The appellate court may grant discretionary review for three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also,* ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); ***State v. Sisouvanh***, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). Defendant does not claim relief under any of these three grounds, and therefore this Court should decline to review the issue for the first time on appeal because defendant failed to object below.

Defendant attempts to persuade the Court to accept review on policy grounds: that the process for requesting the modification of an LFO order when it is enforced is unduly burdensome on defendants. Br. of App. 19-22. However, defendant mischaracterizes the legal processes required. Although the legal system may be daunting to those without professional training, thousands of people across Washington State file motions pro se every day. A motion is simply required to be in writing, state the grounds for relief, and the relief sought. CR 7. Making a motion to modify LFOs is no more complicated than challenging a traffic citation or changing one's name. Further, defendant was afforded an opportunity to easily object in

paragraph 2.5 of the Judgment and Sentence, which required no more than a check mark and a sentence of explanation. *See,* CP 49. Defendant failed to take the opportunity to object, and this Court should decline to allow him to object for the first time on appeal.

c. The trial court properly exercised its discretion in imposing the legal financial obligations by considering defendant's work history and determination to earn a living.

Even if the Court were to reach the issue, the imposition of LFOs should be affirmed because there is sufficient evidence in the record that the trial court considered defendant's ability to pay. Although formal findings of fact about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. ***State v. Bertrand***, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied,* 175 Wn.2d 1914, 287 P.3d 10 (2012).

The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. ***Lundy***, 176 Wn. App. at 105. A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); ***Sisouvanh***, 175 Wn.2d at 619. If the appellant fails to meet this burden, the trial decision stands. ***State v. Tracy***, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005) *aff'd,* 158

Wn.2d 683, 147 P.3d 559 (2006). Therefore, the defendant has the burden of showing the trial court judge improperly exercised his discretion by showing an affirmative error.

A review of the record in the present case shows the trial court considered defendant's ability to pay the LFOs when he imposed them. At sentencing, counsel said defendant was a teacher at Curtis Junior High School before becoming involved with methamphetamine. 6RP 286. The court was able to consider this evidence of defendant's education level and general employability upon release from prison. Defendant also told the court, in relation to child support for his daughters, "So the sooner I can get out and get back to work, the quicker I'll be able to give them the means of support." 6RP 188. This determination to earn an income provided adequate evidence that defendant may have the ability to pay his LFOs in the future.

Most significantly, the trial court actually reduced the amount of LFOs by $1,000. After considering the evidence presented, the court imposed $1,000 less than the State's recommendation stating: "Those daughters could use that money when you get out." 6RP 289. The evidence in the record and the modifications by the court show the trial court did actually consider defendant's financial situation as required by the statute. Defendant has failed to show the trial court judge acted in a clearly erroneous manner.

D. CONCLUSION.

The trial court judge did not abuse his discretion by admitting the 911 tape because it was admitted for the affirmative adoption of defendant, not the truth of the matter asserted by the 911 operator. Further, any error was a harmless error when viewed with the overwhelming amount of untainted evidence that the (253)-906-7459 phone number belonged to defendant. Defendant has failed to prove his counsel was ineffective for failing to propose a limiting instruction to evidence that was not admitted for a limited purpose. Defendant has also failed to show the trial court improperly exercised discretion in the imposition of LFOs because the record shows the judge considered defendant's ability to pay as required by the statute. The State respectfully request this Court affirm defendant's conviction for the foregoing reasons.

DATED: September 24, 2014.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

9/26/14 Theresa Kelly

Date Signature

PIERCE COUNTY PROSECUTOR

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