73062-2

FILED
December 10, 2015
Court of Appeals
Division I
State of Washington

NO. 73062-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROY BELL, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Federal:

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. To establish a violation of the right to public trial, an appellant must demonstrate that the right attaches to the proceeding at issue and that a closure actually occurred. Our supreme court has held that the public trial right does not attach to sidebar conferences on traditional subject areas that are promptly memorialized, and that no closure occurs when the public can observe proceedings at the bench, even if they cannot hear the discussion. Here, the trial court considered, then promptly memorialized, a mistrial motion at a sidebar without excluding anyone from the courtroom. Has Bell failed to establish any violation of his right to public trial?

2. Unlike the interrogation proviso of Washington's Privacy Act, audio recordings corresponding to video images from patrol car cameras need not include a recitation of the subject's constitutional rights. Instead, the applicable Privacy Act provision requires only that the subject be informed at some point that a sound recording is being made. Officers twice notified Bell that he was being recorded during his arrest and transport. Did the trial court properly determine that there was no Privacy Act violation?

3. Lay opinion testimony that identifies a person is admissible if based on the witness's perception and helpful to the finder of fact. Here, Detective Freutel testified that she recognized Bell's voice on a recording based upon her review of other recordings in which Bell was the known speaker. Was the trial court within its discretion to allow this testimony? If not, was any error harmless?

4. The Confrontation Clause does not bar admission of statements made to police under circumstances objectively indicating that the primary purpose of the interaction is to enable police assistance to meet an ongoing emergency. Here, the trial court admitted statements made to police who were responding to a 911 call of domestic violence and actively searching for the suspect who was at large and likely to return. Did the trial court correctly rule that these statements were admissible?

5. An instructional error may be harmless. Here, the trial court gave the jury a pattern instruction defining "prolonged period of time" to mean "more than a few weeks" for purposes of the pattern of abuse aggravator. That instruction has since been held to be an improper comment on the evidence that is prejudicial when the evidence established that abuse occurred just longer than a few

weeks. Here, the evidence established that the abuse had occurred for more than two years. Additionally, the sentencing court indicated that it would impose the same exceptional sentence based upon either the pattern of abuse or recent recidivism aggravators. Was any error in providing the pattern instruction harmless?

6. A mistrial should be granted only when there is no other way to ensure the defendant receives a fair trial. The trial court addressed and adequately remedied the errors alleged in the mistrial motion. Did the court act within its discretion in denying the extreme remedy of mistrial?

7. Cumulative error may justify reversal even though each error, standing alone, is harmless. The doctrine does not apply when the errors are few and have little effect on the trial. Here, any errors were few and did not affect the fairness of the trial. Should this Court decline to apply the cumulative error doctrine?

8. Clerical errors in a judgment and sentence can be corrected on remand. The State concedes that Bell's judgment and sentence reflects the wrong date for one of his offenses. Should this Court remand for correction of the judgment and sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Roy Bell, Jr. with four counts of Domestic Violence Felony Violation of a Court Order. CP 82-85. Count 1 alleged that Bell violated an order protecting Teigisti Gerense on December 25, 2013, (a) by intentionally assaulting Gerense, (b) by reckless conduct that created a substantial risk of death or serious physical injury to Gerense, or (c) by having two or more prior convictions for violating a no contact order (VNCO). CP 82. Count 2 alleged that Bell violated an order on February 10, 2014 while having two or more prior VNCO convictions. CP 83. Count 3 alleged that Bell violated an order on March 15, 2014 (a) by intentionally assaulting Gerense, (b) by reckless conduct that created a substantial risk of death or serious physical injury to Gerense, or (c) by having two or more prior convictions for violating a no contact order. CP 83-84. Count 4 alleged that Bell violated an order between March 15 and March 16, 2014 while having two or more previous VNCO convictions. CP 84. The State further alleged that each count was aggravated by two factors: each offense was part of an ongoing pattern of abuse occurring over a prolonged period of time, and the

offenses were committed shortly after Bell was released from incarceration. CP 82-84.

Following its case in chief, the State agreed there was insufficient evidence to support Count 2, and the trial court dismissed that count. 8RP 948.[1] The State further agreed to remove the "substantial risk of death or serious injury" alternative from Count 3. A fourth amended information removed that alternative as well as the February 10 charge, and renumbered the charges. CP 74-76.

The jury convicted Bell as charged. CP 77-81. After a bifurcated trial on the aggravating factors, the same jury found that each charge was part of a pattern of abuse and occurred shortly after Bell was released from incarceration. CP 113-15.

The State recommended an exceptional sentence of 90 months. 14RP 7. Bell requested an exceptional sentence below the standard range. 14RP 10. To reflect the two aggravating factors, the trial court added 10 months to the standard-range 60-month sentence. 14RP 28. The court structured the sentence

[1] The State adopts the appellant's citation convention set out at page 4, note 2 of the Brief of Appellant.

so that Bell received concurrent 60-month sentences on Counts 1 and 2 and a 10-month sentence plus 12 months' community custody on Count 3, to be served consecutively to Counts 1 and 2. 14RP 29; CP 142-51. The trial court indicated that it would impose the same sentence on the basis of either of the aggravating circumstances. CP 143. A clerical error on the judgment and sentence referred to Count 2 as having occurred on February 10, 2014. CP 142.

2. SUBSTANTIVE FACTS

On December 25, 2013, police responded to a 911 call that captured an assault by a man against a woman as it occurred. 7RP 639; 8RP 926-31. The woman, later identified as Gerense, declares that she is bleeding, begs the man to let her go and to leave her alone, and indicates that she is having trouble breathing. 8RP 926-27. The call is disconnected as the police arrive at Gerense's apartment, and when the 911 operator calls back, Gerense states that the man left. 8RP 929-30. The call ends as Gerense begins to speak with the officers at the scene. 8RP 921.

Officer Jason Tucker was one of the officers who responded to the Christmas day incident. 7RP 639. When he arrived, he saw Gerense flagging the officers down from her window as a man ran down the stairwell. 7RP 643. Officers were unable to catch the fleeing man, who was only seen at a distance through a window, but described him as a "Black male, five eight, dreads or braids, wearing a black jacket, blue shirt or possibly jersey" with a medium build. 7RP 645, 650, 657-58. Bell loosely resembled that description as an African American man with dreadlocks. 7RP 659. Gerense told the officers that the person who assaulted her was her child's father.[2] 7RP 653. Bell later stipulated that he is the father of Gerense's child. 8RP 922. Gerense said that Bell had been "punching, kicking, saying you're going to die today." 7RP 652. She did not know where he might have gone; "[h]e knows everybody around here." 7RP 652-53. Although officers observed injuries to Gerense's face and neck, she refused to go to the hospital for treatment, to allow police to photograph the injuries, or to give a written statement. 7RP 653-54.

[2] Gerense actually identified Bell by name, but that portion of her statement was excluded. 3RP 96.

On March 15, 2014, police responded to another 911 call from Gerense's apartment. 7RP 664. Gerense told the operator that there was no emergency, but she needed help getting Bell out of her apartment. 8RP 932, 935. Gerense said she wanted to avoid "a big hassle" and asked the operator not to make it a "big deal" because "he'll be angry at me." 8RP 934, 937. Gerense admitted that she had "been getting beat up," and had been hit that day, but she did not want to talk about it and just wanted Bell removed. 8RP 933, 935.

When police arrived, Gerense did not immediately open the door to them, and she seemed apprehensive and reluctant to talk about what had happened. 7RP 668, 689. Bell came out of the bedroom and was taken into custody. 7RP 690. Officers warned Bell and Gerense that the interaction was being recorded. 7RP 701. Bell was "somewhat defiant," demanded a kiss from Gerense, and made numerous unsolicited and "verbally combative" recorded statements as he was escorted to a patrol car and transported to the station. 7RP 693, 702, 829, 834, 850-52, 882.

Bell called Gerense several times from jail following his arrest. In these calls, which give rise to Count 3, Bell called Gerense a liar, snitch, and idiot; blamed her for opening the door to police; told her that he should kill her and she should burn in hell; and threatened to have someone beat her. 7RP 764-804.

Neither Bell nor Gerense testified at trial.[3]

C. ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE BELL'S RIGHT TO A PUBLIC TRIAL.

Bell contends that the trial court violated his right to public trial by considering a mistrial motion at sidebar. Because Bell fails to demonstrate that the sidebar implicated the public trial right or constituted a "closure," this Court should reject his claim.

a. Relevant Facts.

During Officer Ian Walsh's testimony about responding to the March 15, 2014 incident, the State published a portion of an audio recording of Bell's arrest. 7RP 696. Despite efforts to make

[3] Gerense's absence from the trial did not discourage defense counsel's effort to convey her testimony to the jury. In counsel's egregiously inappropriate closing argument, he "play[ed] the role of Ms. Gerense and the attorney" in a fictitious direct examination in which he asked and answered dozens of questions while introducing facts not in evidence. 9RP 1062-82. For example, counsel testified (as Gerense) that Gerense was jealous of Bell, that Bell came over on March 15 at her invitation to see his daughter, that Gerense obtained a no-contact order to control Bell, and that Gerense did not tell Bell about the no-contact order. 9RP 1064, 1066, 1069, 1070, 1071.

appropriate redactions to the many recordings offered at trial,[4] the jury heard an officer on the tape remark that Bell had "a couple of warrants," and later direct someone to "go ahead and verify this warrant." 7RP 700, 703. Following Walsh's direct testimony, defense counsel indicated he had a motion, which the trial court entertained at sidebar. 7RP 707. After another sidebar at the end of Walsh's testimony, the court instructed the jury to disregard entirely the remarks about Bell's warrant: "Whether or not there were any warrants in existence pertaining to Mr. Bell is immaterial to any of the issues before you and, therefore, you should not consider it and you should not discuss it during your deliberations." 7RP 717.

At the next break, the trial court and counsel put the content of the two sidebar conferences on the record. At the first sidebar, the trial court asked counsel whether he was moving for a mistrial, counsel confirmed that was his motion, and the court stated that it would not grant the motion but offered to give a limiting instruction. 7RP 721. During the second sidebar, the trial court asked whether counsel really wanted a limiting instruction, given that it might draw the jury's attention to the fact of the warrants, and counsel indicated

[4] With respect to this recording, the State had asked defense counsel whether he had proposed redactions. Counsel responded that he had none. 7RP 723.

that he wanted the instruction, which was given. 7RP 721. Judge Bruce Heller explained, "the reason why the court is denying the motion for a mistrial is that the court believes that the jury is going to follow the explicit instruction that the court gave and that that cures any prejudice that might have resulted from the inadvertent inclusion of the word warrant at least once or twice in the video or on the audio." 7RP 723.

b. Sidebar Conferences Do Not Implicate The Public Trial Right.

The state and federal constitutions afford criminal defendants the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); U.S. CONST. amend. VI; Wash. CONST. art. I, § 22. Whether a defendant's public trial right has been violated is a question of law, reviewed de novo. Id.

The first step in evaluating a claimed violation of the right to public trial is to determine whether the proceeding at issue even implicates that right. State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014). Washington courts employ the "experience and logic test" to make that determination. Id. at 514. The "experience" portion of the test asks whether the proceeding at issue has historically been open to the press and public; the "logic" portion

asks whether public access plays a significant positive role in the proceeding. Id. The appellant bears the burden of establishing that the public trial right attaches to the proceeding at issue. State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015).

In Smith, our supreme court recently applied the experience and logic test to conclude that sidebar conferences that are limited to traditional subject areas and are promptly memorialized on the record do not implicate the public trial right. 181 Wn.2d at 515-19. With respect to the experience prong, the court reasoned that the evidentiary issues usually at issue in a traditional sidebar are mundane matters implicating little public interest, and distinguished these from pretrial suppression hearings with a significant impact in the community. Id. at 516. The court emphasized the difference between pretrial suppression hearings and sidebar discussions about a party's adherence to pretrial rulings: "A helpful analogy is the difference between setting ground rules prior to a baseball game versus the umpire calling balls and strikes during the game. Pretrial motions set the rules of a trial while a judge's rulings on evidence determine whether a party has strayed outside those rules." Id. at 517 n.11.

The Smith court also concluded that the logic prong supplied no justification for applying the public trial right to sidebars. Rather, since "traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness," and since memorializing the sidebars on the record "negat[es] any concern about secrecy," the court held that "no logic compels the conclusion that sidebars must be conducted in open court." Id. at 518-19.

Bell seeks to distinguish sidebar conferences that involve a mistrial motion from those at issue in Smith. He relies on Division Two's decision in State v. Burdette, 178 Wn. App. 183, 313 P.3d 1235 (2013), which predates Smith. In Burdette, the appellant argued, inter alia, that his right to public trial was violated when the trial court failed to discuss two jury communications in open court. 178 Wn. App. at 193. In one of these, the jury suggested that it was deadlocked on one issue. Id. at 195. Division Two rejected Burdette's claim: "Given the procedures that govern how a trial court addresses a jury's claim that it is deadlocked, neither the experience prong nor the logic prong demonstrates that the public trial right attached." Id.

Despite having resolved the issue on grounds that the proceeding did not implicate the public trial right, Division Two went on to observe that a jury deadlock "may result in the trial court declaring a mistrial." 178 Wn. App. at 195. Citing no authority, and without the benefit of any appellate briefing on the issue, Division Two baldly asserted that a "motion for a mistrial has historically been heard on the record in open court." Id. at 196. The court opined that the public trial right would require a mistrial motion to be heard in open court, but emphasized that no mistrial motion had been made in that case. Id. at 196. A statement is dicta when it is not necessary to the court's decision in a case and as such is not binding authority. Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013). Because the case involved no mistrial motion, Burdette's unsupported dictum on the public trial implications of a mistrial motion is not binding.

Moreover, the hypothetical mistrial motion described in Burdette is distinguishable from the one at issue in this case. Here, although Bell sought an extreme remedy, the sidebar discussion was a standard "balls and strikes" determination of whether the State had violated the pretrial "ground rules" and what type of remedy would be appropriate. See Smith, 181 Wn.2d at 517 &

n.11. Even if the trial court had granted a mistrial in that scenario, the State could continue its prosecution with a new trial. In contrast, when the trial court declares a mistrial over defendant's objection because of jury deadlock, as in the Burdette hypothetical, double jeopardy may preclude a new trial. State v. Robinson, 146 Wn. App. 471, 478-79, 191 P.3d 906 (2008). Given the disparate implications of mistrials in the two scenarios, any suggestion in Burdette that mistrial motions must be done in open court should be limited to the deadlock mistrial scenario contemplated there.

Bell argues that his case is like State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006), which the Smith court distinguished in holding that sidebar motions do not implicate the right to public trial. In Easterling, the trial court closed the courtroom during a codefendant's combined motion to sever and dismiss based on allegations that the State had conducted plea negotiations in bad faith. Id. at 172 & n.7. The Smith court observed that the Easterling closure clearly implicated Easterling's rights "because of the appearance of impropriety" that stemmed from the exclusion of Easterling and his counsel "along with the rest of the public." 157 Wn.2d at 517. There was no such appearance

of impropriety in Smith, because, like here, "Smith's counsel was present at and participated in every sidebar." Id.

Bell argues that his case is more like "the misconduct motion in Easterling than the evidentiary sidebars in Smith" because Bell's mistrial motion was based on the State's violation of a pretrial ruling. Brief of Appellant (BOA) at 18. But there is no support in the record for the notion that the failure to redact references to Bell's warrants in the audio exhibit was attributable in any way to the State's bad faith or intentional misconduct. Rather, the record indicates that the State solicited redaction requests from defense counsel and received none (unlike for other of the many audio and video exhibits in the case). Although this nevertheless resulted in violation of a pretrial ruling, it is not analogous to the circumstances in Easterling.[5]

Under Smith, a sidebar conference pertaining to evidentiary matters that is memorialized on the record does not implicate or violate the right to public trial. The mistrial motion here was based

[5] Further, the Easterling closure was of a pretrial motion ("setting the ground rules," in Smith's vernacular), not a sidebar conference to determine whether the order had been violated ("calling balls and strikes"). The Smith court considered the distinction between these two types of proceedings significant. 181 Wn.2d at 517 & n.11.

on violation of an evidentiary ruling and its content was promptly memorialized on the record. There was no public trial violation.

c. Bell Has Established No Closure.

The second step in evaluating a claimed violation of the right to public trial is to determine whether the courtroom was ever actually closed. It is the appellant's burden to make that showing. State v. Andy, 182 Wn.2d 294, 301, 340 P.3d 840 (2014).

Bell does not argue, and the record does not support, that the courtroom was ever closed in this case or that any person was removed or excluded from the courtroom. Rather, he relies on Division Two's decision in State v. Anderson, 187 Wn. App. 706, 350 P.3d 255 (2015), which held that a sidebar constituted a closure because its purpose was to prevent anyone but the participants from hearing what was said. BOA at 19-20. Bell argues that Anderson "makes sense and controls." Id. But Anderson is of dubious precedential value given our supreme court's order remanding the case for reconsideration in light of State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015). State v. Anderson, No. 91814-7, 2015 WL 6829047 (November 4, 2015).

In Love, counsel concluded jury selection by making for-cause challenges orally at the bench and then exercising

peremptory challenges silently by exchanging the list of jurors and alternatingly striking names from it. 183 Wn.2d at 601. Our supreme court rejected the argument that a closure occurred simply because the public could not hear the challenges or see the struck jury sheet. Id. at 606. Rather, "observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury." Id. at 607. Additionally, the record, including the transcript as well as the struck juror sheet, was available for public review. Id. "The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right[.]" Id.

Similarly here, while the public likely could not hear the sidebar conference as it occurred, anyone present could see the court and counsel confer, hear the resulting limiting instruction, and scrutinize the mistrial motion and decision when the trial court and counsel promptly memorialized the discussion in detail on the record. Where nothing is concealed from the public, which is present for and able to scrutinize the proceedings, no closure is

shown. Love, 183 Wn.2d at 607. Where no closure is shown, a public trial claim fails. Id.

2. OFFICERS COMPLIED WITH THE PRIVACY ACT.

Bell next contends that the trial court erred by refusing to suppress recorded statements that he asserts were taken in violation of Washington's Privacy Act. This Court should reject Bell's claim because he mistakenly relies on subsection (1)(b) of the statute, the "custodial interrogation proviso," when it is subsection (1)(c) that controls under the facts of this case. Under the appropriate subsection, no violation occurred.

The Privacy Act generally prohibits a person from recording private communications without first obtaining the consent of all participants. RCW 9.73.030(1). Any information obtained in violation of RCW 9.73.030 is generally inadmissible. RCW 9.73.050. However, these general provisions of the statute do not apply to police under the circumstances described in RCW 9.73.090, because those conversations are not private.[6] Although

[6] Indeed, because RCW 9.73.030 applies only to "private" communications, the Privacy Act's suppression provision does not apply when non-private statements are recorded. RCW 9.73.050 ("Any information obtained in violation of RCW 9.73.030 ... shall be inadmissible"). Statements made to a known police officer in the course of his or her duties are not private, so recording those statements cannot violate RCW 9.73.030. Lewis v. State, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006).

police-recorded statements of an arrested person are not private, the statute requires that the arrested person be informed that the recording is being made, that the recording begin and end with an indication of the time, and that the person be advised of his or her constitutional rights. RCW 9.73.090(1)(b).[7] Our supreme court refers to this subsection as "the custodial interrogation proviso." Lewis v. State, 157 Wn.2d 446, 467, 139 P.3d 1078 (2006).

The Privacy Act also contains notification requirements for non-private conversations between police and citizens when police use "a sound recording device that makes recordings corresponding to videos recorded by video camera mounted in law enforcement vehicles." RCW 9.73.090(1)(c). In that circumstance, the statute requires the recording to include the officer telling the person that a sound recording is being made. Id. This subsection of the statute contains no requirement to advise the subject of his or her constitutional rights. Id. Officers must strictly comply with this provision, Lewis, 157 Wn.2d at 467, but if the provision is violated, only the recording itself is inadmissible; officers may still testify to what they heard and observed. State v. Courtney, 137 Wn. App. 376, 383, 153 P.3d 238 (2007).

[7] The complete text of RCW 9.73.090(1) is included as an appendix to this brief for easy reference.

All three of the recordings at issue in this case were made on March 15, 2014, when police responded to Gerense's 911 call, arrested Bell, and transported him to the station.[8] All of the recordings were made by microphones on the officers' bodies that corresponded to the video recording system mounted in the patrol car. 7RP 694-95; 8RP 835-36. Although the recordings were presented in three separate exhibits, they substantially overlap and capture a single, continuous interaction between Bell and the officers.

In the first recording, Officer Kale's body microphone recorded the police arriving at Gerense's apartment and arresting Bell.[9] 7RP 695-703; Ex. 6. During the recording, an officer informs Bell and Gerense that they are being recorded. 7RP 701. The recording ends as Bell is escorted from the apartment. 7RP 703.

The second recording contains audio of Bell being arrested, and audio and video of him being escorted to the patrol car and searched incident to arrest. 8RP 831-33; Ex. 15. As they approach the patrol car, an officer informs Bell, "We got a camera on. Having

[8] Bell made numerous statements during this period. See 7RP 697-703; 8RP 839-61. Bell does not discuss the content of these statements, which is immaterial to the Privacy Act claims, so they are not set forth in this brief.

[9] The video portion of this recording captures nothing relevant, as the officers were not near their patrol car when they went inside Gerense's apartment building.

you recorded at this point." 8RP 845. This recording ends once Bell is placed in the back of the patrol car. 8RP 847. The third recording picks up there and contains audio and video of Bell as he is placed in the back of the patrol car and during his short transport to the south precinct. 8RP 847; Ex. 16. At no point in any of the recordings was Bell interrogated.

a. The Privacy Act's "Custodial Interrogation Proviso" Does Not Apply.

The trial court concluded that subsection (1)(c), and not (1)(b), applies to the recordings at issue here. 5RP 401-04. Bell argues that was error and that this Court should apply subsection (1)(b), which he argues required the officers to advise Bell of his Miranda[10] rights at the beginning of each of the three recordings. Whether subsection (1)(b) or (1)(c) controls involves an interpretation of the statute, a question of law reviewed de novo. Courtney, 137 Wn. App. at 382.

Subsection (1)(c) applies to "sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles." The statute clarifies that this section applies to recordings made by a "sound recording device" worn by

[10] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a uniformed officer. RCW 9.73.090(1)(c). Since all three recordings challenged by Bell were made by the officers' body microphones and corresponded to video recorded by the video camera mounted in a patrol car, subsection (1)(c) plainly applies. The trial court did not err in applying that section.

Bell argues that subsection (1)(b) applies instead because that provision governs "recordings ... made of arrested persons ... before their first appearance in court," and Bell was an arrested person.[11] BOA at 24. This interpretation is belied by the context in which the statute was enacted and amended, as well as judicial interpretations to which the legislature has acquiesced.

The substance of subsection (1)(b) was enacted in 1970, soon after Miranda and before patrol cars were equipped with video cameras. LAWS OF 1970, Ex. Sess., ch. 48, § 1. The supreme court observed that the provision is "specifically aimed at the specialized activity of police *taking recorded statements* from arrested persons" who are in custody, a situation in which "consent alone has been deemed insufficient." State v. Cunningham, 93

[11] Officers arrested Bell approximately one minute after entering Gerense's apartment. 5RP 400. Bell argues that he was in fact under arrest "from the moment [the officers] arrived at Gerense's apartment because protective order violations are mandatory arrests." BOA at 27. Bell offers no authority for the proposition that the fact that a person must be arrested means that he is in fact arrested as soon as officers make contact.

Wn.2d 823, 829, 613 P.2d 1139 (1980) (emphasis added). The phrase "taking recorded statements" implies some effort by the officer to elicit a statement from the arrested person in custody. Subsection (1)(b) thus reflects the legislature's acknowledgment that the Fifth Amendment guarantees protections to those undergoing custodial interrogation that are not afforded in other circumstances.

In contrast, the legislature added subsection (1)(c) in 2000 to "help ensure officer safety, provide an important evidentiary tool, and create a checks and balances system for officer conduct." Wash. H.B. Rep., 2000 Reg. Sess. H.B. 2903, February 3, 2000. After the legislature added subsection (1)(c), our supreme court described subsection (1)(b) as "the custodial interrogation proviso." Lewis, 157 Wn.2d at 465-67. Although the legislature has amended the statute since Lewis, it has not corrected the supreme court's interpretation and should be deemed to have agreed with it. State v. Berlin, 133 Wn.2d 541, 558, 947 P.2d 700 (1997) (failure of legislature to amend a statute to change its judicial construction is reflective of legislative acquiescence in court's interpretation).

Although there is inevitable overlap between subsections (1)(b) and (1)(c) where an individual is arrested by a uniformed officer

wearing a body microphone, it seems clear that the legislature contemplated subsection (1)(b) to apply to the formal taking of a recorded statement by an arrested person while in custody. That is evident from subsection (1)(b)'s requirement that a person first be advised of his or her Miranda rights – rights that do not apply outside the custodial interrogation context. Miranda, 384 U.S. at 478-79. Equally clear by the legislative history of subsection (1)(c) is that the recording of arrestees and others by cameras mounted in patrol cars is designed to protect the police and to monitor officers' conduct for the public's protection. The fact that an arrestee may volunteer a statement in a patrol car equipped with a video/sound camera does not render subsection (1)(c) inapposite.

b. Officers Complied With The Privacy Act.

If this Court agrees that subsection (1)(c), rather than (1)(b), applies to the three recordings at issue, it follows that the trial court correctly determined that the officers complied with the law.

Subsection (1)(c) does not require officers to advise the subject of his constitutional rights or to begin and end the recording with an indication of the time. It requires that the officer "inform any person being recorded by sound ... that a sound recording is being

made and the statement so informing the person shall be included in the sound recording[.]" RCW 9.73.090(1)(c).

In this case, the officers informed Bell in the first recording that he was being recorded. 7RP 701; Ex. 6. Although Bell complains that the officer did not provide that information until nearly two minutes into the recording, nothing in RCW 9.73.090(1)(c) requires the warning to occur at any particular time. Compare RCW 9.73.090(1)(b)(ii), (iii) (requiring indication of time and warning of constitutional rights to appear "at the commencement of the recording"). Officers again warned Bell that he was being recorded as they escorted him to the patrol car in the second recording. 8RP 845.

Bell concedes that the police properly informed him that he was being recorded in the first two recordings. He argues that the third recording – taken while Bell was in the patrol car – should have been suppressed because the officers did not inform him for a third time once he was being "recorded by a different microphone and camera." BOA at 28. This argument should be rejected.

First, although Bell analyzes each recording separately, all three were part of a single continuing interaction between Bell and the officers. Indeed, the first and second recordings overlap

substantially, with each capturing Bell's arrest. Our supreme court has treated successive interrogations as "one transaction" for purposes of assessing compliance with RCW 9.72.090, even when administered by two different officers and separated by about one minute. State v. Rupe, 101 Wn.2d 664, 684-85, 683 P.2d 571 (1984). In Rupe, because the first officer properly informed the defendant of his rights at the beginning of the first recording, it was unnecessary for the second officer to re-advise him during the second taped interview. Id. Here, officers properly informed Bell that he was being recorded twice – in the apartment and on the way to the patrol car – so it was unnecessary to advise him for a third time once he entered the patrol car.

Further, in State v. Jones, our supreme court held that no Privacy Act violation occurred even though a tape did not contain the required statement that a recording was being made. 95 Wn.2d 616, 628 P.2d 472 (1981). In coming to that conclusion, the court considered the circumstances surrounding the recording, including other references to taping the conversation and the fact that the tape recorder was visible to the defendant. Id. at 627. Since the circumstances indicated that the defendant knew that the statements were being recorded, the court concluded that the

recording conformed to the statute. Id. See also Rupe, 101 Wn.2d at 681 (citing this analysis with approval). Here, the circumstances even more clearly demonstrate that Bell knew he was being recorded because he had been told so, twice. Thus, all three of the recordings conformed to the statute and were properly admitted.

c. Any Violation Was Harmless.

Even if this Court concludes that the trial court erred in admitting the recordings, any error was harmless. Admission of evidence in violation of the Privacy Act is not a constitutional violation. Cunningham, 93 Wn.2d at 831. Accordingly, reversal is unwarranted unless the admission of the evidence materially affected the outcome of the trial. Id. Because the evidence of Bell's March 15-16 offenses was overwhelming, any error in admitting the three recordings was harmless.

To prove the crime of felony violation of a court order as charged in Count 2, the State had to prove that a no-contact order existed on March 15, 2014, that Bell knew of the order, that he knowingly violated that order, and that either his conduct was an assault or that he had been twice convicted for violating the provisions of a court order. CP 106. The evidence established that there were two no-contact orders in place on March 15, 2014 that

prohibited Bell from contact with Gerense. 8RP 906; Ex. 17, 18. Bell's signature on both orders established that he knew about them. 8RP 911. The officers' testimony that they arrested Bell inside Gerense's apartment demonstrates that Bell violated the orders. See, e.g., 7RP 692. In addition to the stipulation that Bell had two previous VNCO convictions, 8RP 922, Gerense's 911 call established that Bell had assaulted her that day. 8RP 934. Given this evidence, any error in admitting the March 15 recordings was harmless.

Bell contends that the recordings were not harmless because the first two provided direct evidence that Bell was at Gerense's apartment on March 15 and depict Bell as "difficult and defiant." BOA at 32. But even if the recordings were inadmissible, nothing precluded the officers from testifying about what they each saw and heard. Lewis, 157 Wn.2d at 472; Courtney, 137 Wn. App. at 383. Here, the officers testified that Bell was in Gerense's apartment and described his demeanor as defiant, hostile, and verbally combative. 7RP 692-93; 8RP 817-18, 828, 834. Likewise, officers testified about Bell demanding a kiss from Gerense and offering them money to let him go. 7RP 693, 8RP 834. Since this evidence was admissible even if the recordings were not, Bell

cannot show that the recordings themselves materially affected the outcome of his trial.

Bell also argues that admitting the recordings was prejudicial because they allowed Detective Freutel to identify Bell's voice on the December 25, 2013 call to 911, where identity of the male voice was at issue.[12] Brief of Appellant at 34. But Detective Freutel also listened to Bell's jail calls and could have identified his voice from those. 8RP 942-43. Further, the jury would almost certainly have inferred that Bell was the person at Gerense's apartment, given her statement identifying that person as her child's father, Bell's stipulation that he is the father of Gerense's child,[13] and his resemblance to the person seen running from her apartment. Given the evidence in this case, this Court should conclude that any Privacy Act violation was harmless.

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[12] Identity was an issue only because the trial court suppressed part of the recording where Gerense identified him by name. See 3RP 96.

[13] Bell argues that there was no evidence that Gerense had only one child with one man and could have been referring to another father of another child. Any such inference has no support in the record.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED DETECTIVE FREUTEL'S OPINION THAT SHE RECOGNIZED BELL'S VOICE.

Bell contends that the trial court improperly permitted Detective Freutel to give lay opinion testimony that it was Bell's voice on certain audio recordings because this opinion invaded the province of the jury. To the extent that any such error occurred and has been preserved,[14] it was harmless given the overwhelming evidence of Bell's guilt. This Court should affirm.

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[14] Bell argues that he preserved the issue despite failing to make a contemporaneous objection because he had moved in limine to preclude police witnesses from giving their opinion on his guilt and to exclude officer testimony identifying Bell as the speaker in the jail calls. BOA at 39. He did not move to exclude officer testimony identifying Bell as the male voice on the December 911 call. A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Further, Detective Freutel's testimony that she recognized Bell's voice in the December 911 call was not an opinion on his guilt; it was evidence of one element of the charged offense that the jury was free to disbelieve. See State v. Hardy, 76 Wn. App. 188, 191, 884 P.2d 8 (1994) (officer's opinion of identity of man in videotape did not invade province of the jury; jury was free to reach its own conclusion about identity); Kirkman, 159 Wn.2d at 936 (admission of witness opinion testimony on an ultimate issue is not automatically reviewable as manifest constitutional error). If this Court concludes that the issue has not been preserved, it should decline to reach the merits under RAP 2.5(a). As explained below with respect to harmless error, any violation of ER 701 in this case had no probable effect on the outcome of the trial and was therefore not "manifest" error under RAP 2.5(a). The lack of prejudice renders Bell's argument that defense counsel was constitutionally ineffective for failing to object to the testimony similarly unavailing. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (if defendant fails to make a sufficient showing of either deficient performance or resulting prejudice in an ineffective assistance of counsel claim, reviewing court need not consider remaining prong).

A lay witness may give opinion testimony if it is rationally based on perception and helpful to a clear understanding of the evidence. ER 602, 701. A witness may not offer opinion testimony concerning the defendant's guilt, directly or by inference. State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The fact that an opinion supports a finding of guilt, however, does not make the opinion improper. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). "'[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.'" Id. (alteration in original) (quoting State v. Wilber, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989)). The trial court is accorded broad discretion to determine the admissibility of opinion testimony bearing on an ultimate issue, and this Court has "expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt." Heatley, 70 Wn. App. at 579. An abuse of discretion occurs only when a trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

In the context of photographs, a lay witness's opinion testimony as to the identity of a person is admissible if "there is

some basis for concluding that the witness is more likely to identify the defendant ... than is the jury." State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). No published Washington case addresses lay opinions as to voice recognition under ER 701. But because the federal version of the rule is identical, federal cases are instructive. Hardy, 76 Wn. App. at 190.

In United States v. Bush, 405 F.3d 909 (10th Cir. 2005), the court rejected a claim that Rule 701 precluded a detective from identifying the defendant's voice on a recording. The court observed that the rule governing lay opinion testimony has been liberally interpreted, with courts relying on juries to properly assess the weight of the opinion in light of the basis on which it is made:

> When addressing the admissibility of lay identification testimony, courts have been liberal in determining the extent of perception required to satisfy the first requirement of Rule 701. Courts have likewise preferred to leave to juries any assessment of the weight to be given to such testimony when there exist questions regarding the quantity or quality of perception.

Id. at 915-16. This is as intended by the drafters of Rule 701. As the Bush court points out, the Advisory Committee Notes to Rule 701 emphasize that any inadequacies of the admitted opinion testimony can be highlighted through cross examination and

argument. Id. (citing Fed.R.Evid. 701, Notes of Advisory Committee on Proposed Rules). Accordingly, the detective's identification testimony was admissible, but Bush was "entitled to argue to the jury that the detective had inadequate contact with him and therefore was simply wrong in his identification, or that other evidence undermined the credibility of the detective's identification testimony." Id. at 917.

In this case, Detective Freutel's opinion that Bell's was the male voice in the December 911 call was based upon her review of recordings where Bell was known to be the speaker, including the March 15 in-car video and the jail call made with Bell's personal identifier. 8RP 943-44. This satisfies ER 701's low bar that the witness's opinion be rationally based on her perception. See Bush, 405 F.3d at 918-19 ("Similar to Rule 701's requirement, voice identification testimony is permissible under Rule 901 where there exists any basis for identifying the voice, leaving all questions of weight and credibility for the jury.") (internal quotations and alteration omitted). While Bell was free to cross-examine Freutel on her familiarity with his voice,[15] and to argue that she lacked an

[15] Defense counsel elected not to engage in a lengthy cross-examination of Detective Freutel, asking only three questions. 8RP 945. All three of these questions went to Freutel's familiarity with Gerense's voice.

adequate basis to correctly identify his voice,[16] it was for the jury to determine how much weight to give Freutel's opinion.

Bell also contends that Detective Freutel's opinion was unhelpful to the jury and invaded the jury's province because it was based on audio recordings that the jury could evaluate for itself. In United States v. Cruz-Rea, 626 F.3d 929 (7th Cir. 2010), the court rejected the same argument. Id. at 935. There, a federal agent was permitted to identify the defendant's voice on 24 recordings based upon his review of a 15-second voice exemplar. "Although Rule 701 requires that testimony be 'helpful,' we have never held that testimony is unhelpful merely because a jury might have the same opinion as the testifying witness." Id. Rather, the detective had listened to the voice exemplar many times, making his opinion on identity helpful to the jury even though the jury could have listened to the same material and come to the same conclusion. Similarly here, Detective Freutel had the opportunity to listen to and compare the voices on the various recordings before they were redacted at trial. This presumably gave her a better basis on which to make the identification than the jury, which only heard the

[16] Defense counsel's closing argument emphasized that Freutel had never spoken with Bell and would not know what Gerense sounded like on the phone. 9RP 1081.

redacted recordings during trial. The fact that the jury agreed with the detective's conclusion does not demonstrate that her opinion was unhelpful or inadmissible under ER 701.

In any event, any error in admitting Detective Freutel's opinion testimony is not grounds for reversal unless it prejudiced Bell's defense. See State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005). This Court applies the non-constitutional harmless error standard to violations of an evidentiary rule. Id. Under that rule, "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id. (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

Bell argues that Freutel's testimony was prejudicial with respect to Count 1 because whether Bell was actually at Gerense's apartment on December 25 was contested, and Freutel's testimony that she recognized Bell's voice on the recording was the only evidence admitted to prove he was there. That is not so. As explained above, Freutel's was not the only evidence that Bell was at Gerense's apartment. Bell also loosely matched the description of the man running from Gerense's apartment, and Gerense identified her assailant as her child's father, which Bell later

stipulated he is. Further, the State did not mention or rely upon Detective Freutel's identification testimony with respect to Count 1 in its closing argument. Instead, the State invited the jury to compare the recordings for itself. 9RP 1047. In these circumstances, there is no reasonable likelihood that the detective's opinion testimony materially affected the outcome of the trial as to Count 1.

Bell also argues that Freutel's testimony was prejudicial with respect to Count 3, which pertained to the series of calls Bell made from jail. As he points out, only one of the jail calls was made using Bell's PIN number; the rest came from the booking area that Bell shared with others. But that does not mean there was any question that it was Bell's voice on the jail calls. Indeed, defense counsel admitted in closing argument that Bell had made those calls. 9RP 1072, 1075-76. Bell's defense to Count 3 was not that he did not call Gerense from jail; it was that he "didn't know about the no-contact orders in this case on March 15th or on March 16th," despite having just been arrested for violating the orders. 9RP 1063. And even if identity had been in dispute, the content of the calls makes it clear that Bell was the caller. For example, in the first call from jail, the caller blames the recipient for calling the

police about the "no-contact order and all that bullshit." 8RP 764. Soon after, the recipient refers to the caller as "Roy." 8RP 765.

The trial court did not abuse its discretion by allowing Freutel to testify that she recognized Bell's voice on the recordings, and even if it had, reversal is inappropriate because there is no reasonable probability that the outcome of trial would have been different but for Freutel's identification testimony. This Court should reject this claim.

4. ADMITTING GERENSE'S NONTESTIMONIAL STATEMENTS TO POLICE DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Bell next contends that the trial court violated his right to confrontation by admitting certain of Gerense's statements to police officers who responded to her 911 call on December 25, 2013. Because those statements were nontestimonial, they did not implicate the Confrontation Clause and their admission did not violate Bell's rights.

a. The Statements At Issue.

Police officers responded to Gerense's apartment on December 25, 2013, while she was still on the phone with 911. Her 911 call captured an assault in progress, with Gerense declaring that she was bleeding and having trouble breathing and repeatedly

begging Bell to let her go and leave her alone.[17] Bell fled before the police arrived. Officer Jason Tucker's body microphone recorded his interaction with Gerense while other officers were actively searching for Bell. 3RP 95. In this recording, Gerense made several statements that were excluded by the trial court, including Bell's name, that he had been harassing her, that he had assaulted her before, and that he did so this time because he was angry that she was calling her sister. 3RP 95-98. The only portion of this conversation that was admitted at trial is as follows:

> MALE VOICE: Hi, ma'am. What's going on?
>
> FEMALE VOICE: Well, he (unintelligible). Came over for the holiday. He came here, was drinking and he's (unintelligible) cheating on me and (unintelligible).
>
> MALE VOICE: Did he beat on you, or ...
>
> FEMALE VOICE: Yeah, yeah. Punching, kicking, saying you're going to die today.
>
> MALE VOICE: (Unintelligible.) I'm going to go. I'm going to go check around.
>
> MALE VOICE: Do you know where he might be headed right now? Does he have anywhere around here he might go?

[17] Bell does not argue that admitting Gerense's statements during the assault violated the Confrontation Clause.

FEMALE VOICE: He knows everybody around here.

7RP 652-53.[18]

b. Nontestimonial Statements And Ongoing Emergencies.

The Confrontation Clause of the Sixth Amendment applies only to testimonial hearsay. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Whether statements in response to police questioning are "testimonial" for Confrontation Clause purposes depends upon the purpose of the communication:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.'" Michigan v. Bryant, 562 U.S. 344, 360, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). Although the existence of an

[18] The State agrees with Bell that the question "Did he beat on you?" was inaccurately transcribed in the record as "Did he hit on you?" See BOA at 45 n.11; Ex. 1 (11:22).

ongoing emergency is not the only circumstance bearing on the "primary purpose" of an interrogation, it is "among the most important." Id. at 361.

In Davis, the Court explained the ongoing emergency factor in a primary purpose analysis by comparing the circumstances in which two victims in separate cases of domestic violence made statements to law enforcement. The Court considered four relevant characteristics of the encounters: the timing relative to the events discussed, the threat of harm posed by the situation, the need for information to resolve a present emergency, and the formality of the interrogation. Davis, 547 U.S. at 827-32.

The Court concluded that the statements to a 911 operator during an assault in progress in Davis were nontestimonial because the declarant was speaking about the events as they were actually happening; the statements were "plainly a call for help against a bona fide physical threat"; the nature of what was asked and answered, including the name of the assailant, was necessary to resolve the emergency; and the statements were not made in a "tranquil, or even ... safe" environment. 547 U.S. at 827-28. In contrast, the statements at issue in the companion case, Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224

(2006), were testimonial because the statements were made "some time after the events described were over," there was no emergency in progress, the victim told police that she was fine and there was no threat to her person, and the interrogation was "formal enough" because it was conducted in a separate room and the victim "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." Id. at 830.

In Bryant, the Court further examined the ongoing emergency circumstance outside of the domestic violence context. There, the Court pointed out that an emergency does not necessarily end simply because the defendant stopped assaulting the victim and left the premises. 562 U.S. at 363. The physical separation that was sufficient to end the emergency in Hammon is not sufficient to end the threat in all situations. Id. at 373. One such situation was presented by the facts in Bryant, where the defendant fatally wounded the victim, neither the victim nor police knew the defendant's location, and the victim's statements "gave no reason to think that the shooter would not shoot again if he arrived on the scene." Id. at 377.

Likewise, the fact that the suspect had left the area did not end the emergency in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). There, two minors were subjected to racial slurs and obscene gestures by a man in a passing car who returned twice and drove onto the sidewalk in an apparent attempt to hit the minors. Id. at 5-6. In determining whether the statements of one of the minors, who did not testify at trial, were admissible, the court aptly summarized the critical difference between Davis and Hammon with respect to ongoing emergency. Id. at 13-14.

> What distinguishes the two situations is that in Davis, the perpetrator posed a threat to the declarant, while in Hammon, the perpetrator was under police control, "actively separated" from the declarant. ... Thus, **the critical consideration is not whether the perpetrator is or is not at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an on-going emergency.**

Ohlson, 162 Wn.2d at 15 (emphasis added, internal citation omitted).

Applying the four "primary purpose" considerations, the Ohlson court noted that the minor's statements to police were made "within minutes of the assault," not "some time after the events described were over." Id. at 17. Considering the threat of harm, the court pointed out that, given Ohlson's repeated and escalating

conduct, "there is no way to know, and every reason to believe, that Ohlson might return a third time and perhaps escalate his behavior even more." Id. at 18. The court also concluded that the minor's statements were necessary to resolve the present emergency because "[a]t least until [the officer] completed her initial triage of the situation, which in this case necessitated the information obtained from L.F. and D.L., the situation presented an ongoing emergency." Id. at 18. Finally, with respect to formality, the court noted that, unlike Hammon, where the victim was questioned in a separate room from the secured defendant and deliberately recounted how the assault began and progressed, the minor's interrogation was "conducted in an unsecured situation that 'was not tranquil, or even ... safe.'" Id. (quoting Davis, 547 U.S. at 827).

c. Gerense's Statements Were Not Testimonial.

The circumstances surrounding Officer Tucker's encounter with Gerense objectively indicate that the primary purpose of her statements was to enable police assistance to meet an ongoing emergency.

First, with respect to timing, Gerense's statements to Officer Tucker were made within minutes of the assault. Indeed, Gerense was still speaking with the 911 operator when police responded to

her call. This is unlike Hammon, where the statements in question were made "some time after the events described were over," during the officer's second questioning of the declarant. 547 U.S. at 830. Although Gerense's statements to the responding officers were not given while the assault was still occurring, they were made soon enough after to be considered "contemporaneous with the events described." See Ohlson, 162 Wn.2d at 17 (concluding minor's remarks to officers responding to 911 call minutes after the assault were "contemporaneous with the events described").

This case also differs from Hammon with respect to the formality of the encounter. In Hammon, police moved the victim to a separate room, questioned her twice during which she "deliberately recounted" how the incident began and progressed, and had her sign an affidavit. 547 U.S. at 830. In contrast, here, Gerense spoke to police in an unsecured situation while Bell was at large – hardly a "tranquil, or even ... safe" environment. Id. at 827.

But the most important difference between this case and Hammon is with respect to the threat of harm. In Hammon, the threat subsided when police arrived and kept the defendant and victim physically separated. Hammon's victim also greeted police by stating that "things were fine" and that "there was no immediate

threat to her person." 547 U.S. at 830. That did not happen here. When police arrived, Gerense flagged them down, even though Bell had already run away, indicating that she still needed help. 7RP 643. Unlike Hammon, Bell was not in police custody, and thereby unable to further harm Gerense. He was at large and probably still in the immediate vicinity, given that he had only just fled the scene on foot[19] and Gerense suggested he would stay in the area because "he knows everyone around here." 7RP 653. Indeed, police were actively searching for him when Gerense spoke to Officer Tucker. 3RP 95. Further, Bell did not only beat Gerense, he told her, "[Y]ou're going to die today." 7RP 652. Under the circumstances, "there is no way to know, and every reason to believe" that Bell would return to assault Gerense or worse. See Ohlson, 162 Wn.2d at 18.

This case is also not like State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009). There, the perpetrator of a home invasion robbery had fled the scene in a car before police arrived. Id. at 415. The responding officers took the victim's detailed statement. Id. In concluding that those statements were testimonial, the court gave great emphasis to the fact that "there is no evidence of any

[19] See 3RP 113 (Gerense told 911 operators during the February 10, 2014 incident that Bell had no car).

ongoing situation or relationship with [the victim] that might suggest she was still in danger from [the robbers]." Id. at 422. See also id. at 423 ("nothing in the record indicates there was any reason to think that she faced any further threat after the robbers left, she was able to free herself, and the police arrived and were present to protect her"), 426 ("[t]here is no evidence suggesting that police would encounter a violent individual at the residence and no evidence that the defendant or the other men were still in the vicinity"). Here, in contrast, there was every reason to believe that Bell was nearby and would return to further harm Gerense.

Finally, the nature of the questions and answers demonstrates that the interrogation was necessary to resolve the present emergency. Officer Tucker's questions were, "What's happening?", "Did he beat on you?", and "Do you know where he might be headed right now?". 7RP 652. These were "the exact type of questions necessary to allow police to 'assess the situation, the threat to their own safety, and possible danger to the potential victim' and to the public." Bryant, 562 U.S. at 376 (quoting Davis, 547 U.S. at 832). "In other words, they solicited the information necessary to enable them 'to meet an ongoing emergency.'" Id. See also Ohlson, 162 Wn.2d at 18 ("At least until [the officer]

completed her initial triage of the situation ... the situation presented an ongoing emergency").

Because the circumstances here objectively demonstrate that the primary purpose for Gerense's statements to Officer Tucker was to enable police assistance to resolve an ongoing emergency, her statements were not testimonial. Accordingly, there was no Confrontation Clause violation.

5. THE ERROR IN PROVIDING A LATER-DISAPPROVED INSTRUCTION DEFINING A "PROLONGED PERIOD OF TIME" AS "LONGER THAN A FEW WEEKS" WAS HARMLESS WHERE EVIDENCE ESTABLISHED A PATTERN OF ABUSE SPANNING MORE THAN TWO YEARS.

The State alleged that each instance of Felony Violation of a Court Order was aggravated by two factors: that Bell committed each offense shortly after being released from incarceration[20] and that each "offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim or multiple victims manifested over a prolonged period of time." CP 74-76. In the bifurcated trial on the aggravators, the trial court gave the jury a pattern instruction providing that, "The term 'prolonged period of time' means more than a few weeks[.]" CP 121; 12RP 1236;

[20] The trial court dismissed the rapid recidivism aggravator with respect to Counts 2 and 3. 12RP 1221.

WPIC 300.17. Bell did not object to the instruction. 12RP 1226. The jury found that each offense was aggravated by the prolonged pattern of abuse and that Count 1 was also aggravated by rapid recidivism. CP 113-15, 140-41.

Our supreme court subsequently disapproved that pattern instruction, holding that it "constituted an improper comment on the evidence." State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213 (2015). In light of Brush, the State concedes that it was error to give the instruction. Reversal is not required, however, because the error was harmless.

Although judicial comments are presumed to be prejudicial, that presumption may be rebutted where the record shows that no prejudice could have resulted. Id. (quoting State v. Levy, 156 Wn.2d 709, 721-22, 132 P.3d 1076 (2006)). The Brush court concluded that the State could not rebut the presumption in that case because "[t]he abuse occurred over a time period just longer than a few weeks," so "defining a 'prolonged period of time' as 'more than a few weeks' likely affected the jury's finding on this issue." Id. at 559. That is not so here. Rather, the evidence here was that Bell's abuse of Gerense spanned *more than two years*. In addition to the assaults underlying Counts 1 and 2 (committed on

December 25, 2013 and March 15, 2014, respectively), the State introduced evidence of assaults that occurred on January 30, 2012; February 26, 2012; and July 1, 2013. 12RP 1175-83, 1186-94, 1200-07. Given that evidence, the erroneous instruction likely had no impact on the jury's verdict.

Moreover, the trial court indicated that each of the aggravators "is a substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed," and that its sentence would be the same based on either one of the factors. CP 141, 143. "An exceptional sentence may be upheld on appeal even where all but one of the trial court's reasons for the sentence have been overturned." State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Remand for resentencing is necessary only when it is not clear that the trial court would have imposed the same sentence on the basis of other aggravators. Id. Because the trial court was clear that it would have imposed the same sentence based on either of the aggravating factors, remand is unnecessary.

Bell nevertheless argues that resentencing is appropriate, relying on State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993), overruled on other grounds, State v. Hughes, 154 Wn.2d 118, 110

P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). There, the supreme court held that remand for resentencing was appropriate after it overturned two of the four factors on which the exceptional sentence was based. Id. at 58 & n.8. Although the court entered findings similar to those here, the supreme court noted that the trial court had exceeded the standard range by almost six times. Id. "Given the great disparity between the presumptive sentence and the exceptional sentence, it is unclear whether the trial judge [really] would have imposed the same sentence had he considered only the two valid aggravating factors." Id. at 58. Here, in contrast, the presumptive sentence was 60 months on each count. The total sentence imposed was 70 months – a 10 month (17 %) increase above the presumptive sentence. This hardly presents the scenario addressed in Smith, and this Court can be reasonably certain that the trial court would, as it said, impose a sentence of the same length based upon rapid recidivism alone. Remand is unnecessary.

Bell also argues that remand is necessary because "the trial court imposed an exceptional sentence only on Count 3, which no longer has a valid aggravating factor." Brief of Appellant at 59. He

is mistaken. The trial court could not add time to the presumptive sentence for any of the three counts because Bell, with an offender score of 11, had to be sentenced to the 60-month statutory maximum. CP 143. To arrive at a total sentence of 70 months, the trial court imposed concurrent 60-month sentences on Counts 1 and 2, and imposed only 10 months on Count 3. CP 145; 14RP 29. What makes the sentence exceptional is not the amount of time imposed on Count 3, but the court's decision to make that term consecutive to the other counts. RCW 9.94A.535 (a departure from standards governing whether sentences are to be served consecutively or concurrently is an exceptional sentence).

6. CUMULATIVE ERROR DID NOT DEPRIVE BELL OF A FAIR TRIAL.

Bell contends that the trial court erred in denying a mistrial based upon cumulative error. Separately, he argues that this Court should reverse his conviction because of cumulative error. This Court should reject both claims.

a. The Trial Court Properly Denied A Mistrial.

A trial court should grant a motion for mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be fairly tried. State v. Emery, 174 Wn.2d

741, 765, 278 P.3d 653 (2012). Reviewing courts examine a trial court's denial of a mistrial motion for abuse of discretion and "find abuse only when no reasonable judge would have reached the same conclusion." Id. (internal quotations omitted). To determine the effect of a trial irregularity, the reviewing court considers (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

Bell contends that the trial court should have granted his motion for a mistrial based on an accumulation of errors. Cumulative error may warrant reversal, even where each error standing alone would otherwise be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." Id.

Bell primarily argues that the erroneous admission of certain evidence accumulated to deprive him of a fair trial. He first points to Officer Tucker's testimony that officers responding to Gerense's December 911 call did not know which apartment in the large complex was hers, but that they "found a probable apartment that

had a lot of history at it." 7RP 639-40. That remark suggests that Gerense had prior contacts with police at her apartment, but does not implicate Bell in those contacts. Further, the trial court struck the remark and instructed the jury to disregard it. 7RP 640-41. Since juries are presumed to follow instructions, this minor error had no effect on the outcome of the trial.

Second, Bell points to Tucker's testimony that Gerense did not talk freely about the assault, but had "mentioned that it had happened before." 7RP 671. In the context of this prosecution, which included multiple assaults and violations of domestic violence no contact orders, and where the evidence included Bell's stipulation to two domestic violence no contact order violations, this remark was cumulative of other evidence and did not likely affect the jury's verdict. Likewise, Officer Irwin's testimony that he might have identified Bell from a previous booking photo, while indicating that Bell had been previously arrested, could not have prejudiced him given his stipulation to his two previous convictions.

Bell also points to three times where the State inadvertently failed to redact certain material from audio recordings admitted at trial. One recording contained references to Bell having warrants.

The court properly instructed the jury that whether Bell had warrants was immaterial to the issues before it and to disregard the remark entirely. 7RP 717. The jury is presumed to have followed this instruction.

In the video recording of Bell's transport after arrest, the State inadvertently failed to redact Bell's remark about having to "deal with DOC," which means "three days in jail." 8RP 861. But shortly before this testimony, the court had instructed the jury that "it is normal after an arrest for someone to be held in a jail for up to three days[.]" 8RP 743-44. In denying a mistrial based on Bell's DOC remark,[21] the trial court reasonably concluded that the remark was not very prejudicial in light of the "very strong" evidence in the case and the unlikelihood that average jurors would understand DOC to refer to "Department of Corrections," let alone understand that DOC administers prison rather than jail or that having to "deal with DOC" indicated that Bell was on supervision for some other

[21] Although the court indicated that it would be "a closer question" in the context of the aggravator phase of the trial, 8RP 873, it does not appear that defense counsel asked the court to revisit its decision at that time.

crime.[22] 8RP 871-73. Moreover, the jury was provided with a properly-redacted exhibit to review in its deliberations. 8RP 863-64; 9RP 1104. Thus, there is little chance that this evidence affected the verdict.

Bell argues that his remark during one of the jail calls that he might be in custody "month after month" was prejudicial because it implied that he was dangerous and guilty of the offense for which he had been arrested. Brief of Appellant at 51. This remark needs to be viewed in the context of all of the jail calls. Throughout the calls, Bell and Gerense discuss many times when and how he might be released. 8RP 765, 767, 768, 774, 775, 784, 787, 794-95, 802, 803. Although Bell at one point speculates that he "(unintelligible) sitting here month after month because of your fucking hell ass lies," at other times, he suggests he may be released on Monday, "unless God lets me out tomorrow." 8RP 768, 774-75. Bell asks Gerense to get him out of jail and asks her for another person's phone number so that person can bail him out. 8RP 768, 787. What Bell and Gerense repeatedly conclude is that they cannot know when he will be released until his court

[22] Indeed, Judge Heller pointed out that he misunderstood the difference between jail and prison until he became a judge. "This is not common knowledge." 8RP 872-73.

appearance on Monday. 8RP 765, 784, 787, 794-95, 802-03. In this context, Bell's passing speculation that he might be in custody for months caused no prejudice.

Finally, Bell argues that juror misconduct further added to the accumulation of errors and justified a mistrial. Following the trial court's reading of the stipulation to Bell's two prior convictions, Juror 4 was concerned that he did not hear or understand the stipulation. 9RP 993-94. Juror 4 asked the bailiff if the judge would re-read the stipulation, and whether the stipulation meant that Bell had admitted guilt. 9RP 996-97. The bailiff told the juror that she could not talk to him about it, but would bring it up with the judge, at which point Juror 4 turned and asked if any of the other jurors were confused about the stipulation. 9RP 996-97. The jurors "stared at him, presumably understanding that they can't talk about it." 9RP 964. The bailiff admonished them not to discuss the case and brought the matter to the court's attention. 9RP 997.

The trial court was justifiably concerned that Juror 4 had not adhered to the court's instructions not to discuss the case. 9RP 965. The court dismissed Juror 4 and addressed the rest of the jurors. 9RP 1000, 1002-04. The remaining jurors confirmed that no discussions or questions had been raised about any aspect

of the case during any part of the trial, that none of them had had conversations with anyone outside the courtroom or received information other than the evidence and opening statements, and that none would find it difficult to keep an open mind or to presume Bell innocent. 9RP 1003-04, 1007. The court provisionally denied Bell's mistrial motion, but indicated it would revisit the issue after the parties had the opportunity to address the stipulation in closing argument. 9RP 1009. Satisfied that the State's argument had accurately conveyed the stipulation's relevance, the court denied the mistrial motion. 9RP 1100-01.

Although there were some irregularities in Bell's trial, the trial court in each case acted within its discretion to remedy the errors without declaring a mistrial. Bell has not demonstrated that the court's decision was unreasonable or based on untenable grounds, or that no other reasonable judge would have taken the same action. Because there was no abuse of discretion, this Court should reject Bell's claim that the trial court erred by refusing to grant a mistrial on grounds of cumulative error.

b. Cumulative Error Still Does Not Merit A New Trial.

In addition to his claim that the trial court erred by failing to grant him a mistrial, Bell asserts that this Court should reverse his conviction and remand for a new trial because of the combined effect of the other errors alleged on appeal. Brief of Appellant at 59. Although Bell argues that each individual error caused him prejudice, he makes no further argument as to why the combined effect of the alleged errors justifies reversal if none of them individually caused prejudice. See Weber, 159 Wn.2d at 279 (cumulative error argument fails when appellant fails to show how combined irregularities affected outcome of trial). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (discovery violations, three kinds of bad acts improperly admitted, hypnotized witnesses, improper cross-examination of defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for victim's credibility). Here, as argued above, any trial errors were

minor and unlikely to affect the verdict in light of the overwhelming evidence. Bell's argument should be rejected.

7. THE STATE AGREES THAT A CLERICAL ERROR ON THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

The judgment and sentence erroneously lists Count 2 as having been committed on February 10, 2014 instead of March 15, 2014. CP 142. The State agrees that the remedy is to remand for correction of the judgment and sentence. In re Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005); CrR 7.8(a) (clerical mistakes in judgments may be corrected by the court at any time).

8. THE STATE DID NOT CHARGE BELL WITH THE FEBRUARY 10 VIOLATION IN THE OPERATIVE INFORMATION, SO THE COURT DID NOT ERR IN FAILING TO SET FORTH DISMISSAL OF THE CHARGE ON THE JUDGMENT AND SENTENCE.

The State filed four amended informations in this case. CP 6-8 (first amended), 20-23 (second amended), 82-85 (third amended), 74-76 (fourth amended). The first three of the four included as Count 2 a charge of Domestic Violence Felony Violation Of A Court Order arising from an incident on February 10, 2013. CP 7, 21, 83. But the State agreed there was insufficient evidence to support Count 2 and filed a fourth amended information

omitting that count. 8RP 948; CP 74-76. From that point, there was no charge related to the February 10, 2013 incident. Accordingly, its dismissal need not be reflected on the judgment and sentence.

D. CONCLUSION

For the reasons expressed above, the State respectfully requests this Court affirm Bell's convictions.

DATED this 10th day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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Appendix

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.73. Privacy, Violating Right of (Refs & Annos)

West's RCWA 9.73.090

9.73.090. Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080--Standards--Court authorizations--Admissibility

Effective: July 22, 2011
Currentness

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations, licensed emergency medical service providers, emergency communication centers, and poison centers;

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities;

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9. 73.050.

(4) Authorizations issued under subsection (2) of this section shall be effective for not more than seven days, after which period the issuing authority may renew or continue the authorization for additional periods not to exceed seven days.

(5) If the judge or magistrate determines that there is probable cause to believe that the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW, the judge or magistrate may authorize the interception, transmission, recording, or disclosure of communications or conversations under subsection (2) of this section even though the true name of the nonconsenting party, or the particular time and place for the interception, transmission, recording, or disclosure, is not known at the time of the request, if the authorization describes the nonconsenting party and subject matter of the communication or conversation with reasonable certainty under the circumstances. Any such communication or conversation may be intercepted, transmitted, recorded, or disclosed as authorized notwithstanding a change in the time or location of the communication or conversation after the authorization has been obtained or the presence of or participation in the communication or conversation by any additional party not named in the authorization.

Authorizations issued under this subsection shall be effective for not more than fourteen days, after which period the issuing authority may renew or continue the authorization for an additional period not to exceed fourteen days.

Credits

[2011 c 336 § 325, eff. July 22, 2011; 2006 c 38 § 1, eff. June 7, 2006; 2000 c 195 § 2; 1989 c 271 § 205; 1986 c 38 § 2; 1977 ex.s. c 363 § 3; 1970 ex.s. c 48 § 1.]

Notes of Decisions (70)

West's RCWA 9.73.090, WA ST 9.73.090
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T. Swift (swiftm@nwattorney.net), the attorney for the appellant, Roy Bell, Jr., containing a copy of the Brief of Respondent in State v. Roy Bell, Jr., Cause No. 73062-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

12-10-15

Date

Done in Seattle, Washington