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Supreme Court No. 99719-5
(Court of Appeals No. 80907-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WESLEY YOUNG,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L. Ed. 891 (1956). Yet Washington has created a two-tiered system of justice in which indigent accused persons are held in jail while presumed innocent, recorded without a warrant, and subject to having those recorded personal conversations used against them at trial. Defendants with money are afforded trials without having their personal conversations recorded and admitted against them at trial.

Regardless of the wisdom of cash bail or the authority of jails to monitor phone calls, the admission of recorded personal conversations of indigent defendants *at trial*—where such conversations could not be introduced against defendants with money—violates article I, section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment. The Court of Appeals concluded otherwise, but this Court should grant review and reverse. Defendants held in jail are disproportionately Black and uniformly poor. Washington must afford these defendants the same trial protections enjoyed by wealthy White defendants. This case presents a significant constitutional issue of substantial public interest implicating the commitment to equity this Court espouses.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Wesley Young, petitioner here and appellant below, asks this Court to review the opinion of the Court of Appeals in *State v. Young* (No. 80907-5-I, April 12, 2021), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Article I, section 12 of the Washington Constitution prohibits granting privileges or immunities to one class of citizens that are not equally granted to all. Indigent defendants are held in jail before trial and subject to having their personal conversations recorded, while wealthy defendants do not have their conversations recorded by the government without a warrant. Did the trial court's admission of a recorded conversation between Wesley Young and his sister violate article I, section 12, where wealthy defendants are afforded trials without their personal conversations being used against them? RAP 13.4(b)(3), (4).

2. The equal protection clause of the Fourteenth Amendment requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, and it prohibits discrimination on account of poverty in criminal trials. Did the trial court's admission of a recorded conversation between Wesley Young and his sister violate the Fourteenth Amendment, where wealthy defendants are afforded trials

without their personal conversations being used against them? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

1. Mr. Young was jailed pretrial because he could not afford the $2500 bond. The government could not have recorded his personal conversation otherwise.

Wesley Young grew up in the South "with limited resources" and "started working as a laborer" as soon as he turned 18. RP 984. He worked on fiberoptic conduit jobs, which was "back-breaking" and required travel to different cities. RP 984. He developed a drug addiction and struggled to maintain employment and housing. RP 984. He eventually moved to the Northwest and had "periods of employment," but no sustained success. RP 985.

One day in 2019, Mr. Young was riding the light rail with his backpack on the seat next to him. RP 503-05. The train was somewhat crowded, and when a woman named Michelle Jennings boarded, she asked Mr. Young to move his backpack so she could sit on the seat. RP 698. Mr. Young refused to move the backpack and directed a racist slur at Ms. Jennings, who was African American. RP 524. According to Ms. Jennings, Mr. Young also threatened to spray her with pepper spray if she sat next to him, RP 699, though no one else heard such a statement. RP

502-44, 558-87, 595-608, 640-62, 672-94. Ms. Jennings walked to the other end of the car. RP 702.

Another passenger, Alonzo Boyles, approached Mr. Young to tell him he shouldn't treat people the way he treated Ms. Jennings. RP 599. According to Mr. Boyles, "I guess [Mr. Young] felt, you know, like I was going to press him, and he sprayed me" with pepper spray. RP 599. As other passengers yelled at him, Mr. Young then stopped the train between stations and got off. RP 535.

The State eventually charged Mr. Young with one count of malicious harassment for allegedly threatening to pepper spray Ms. Jennings based on her race. CP 1. The State also charged Mr. Young with one count of assault in the third degree for pepper spraying Mr. Boyles. CP 1-2.

Although he was presumed innocent, Mr. Young was held in jail before trial because he could not afford to pay a $2,500 bond. CP 98. The jail records all inmates' personal conversations without a warrant based on a rationale of protecting institutional safety. CP 98-99. But the jail also provides recordings to prosecutors upon request. CP 99. Mr. Young discussed the facts of his pending case on a recorded jail call with his sister. RP 187, 822-23.

2. Mr. Young moved to suppress the jail's recording of a personal phone call under article I, section 12 and the Fourteenth Amendment, but the trial court denied the motion.

The prosecution informed the defense it planned to introduce the recorded conversation between Mr. Young and his sister against him at trial. CP 99. Such conversations would not be admitted at the trial of an accused person who could afford bail. CP 98.

Mr. Young objected under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. CP 97-104; RP 177-82. He noted the state constitutional provision is more protective than its federal counterpart, but that under either provision, the admission of the recorded call would violate Mr. Young's right to equal protection. CP 99-104. The use of jail recordings at trial creates a two-tiered system of justice whereby the class of defendants unable to post bond are afforded trials inferior to those afforded wealthier defendants. CP 101.

The court rejected the argument and admitted the recording. RP 177-82, 821-23. In so doing, it relied on a Court of Appeals' case addressing the differences between prison and jail, not the difference between poor defendants and rich defendants. RP 178-80 (citing *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012)).

The jury found Mr. Young guilty of both counts, and he was sentenced to 50 months in prison. CP 157-60.

3. The Court of Appeals affirmed, ruling there was no equal protection problem because poor people in jail can choose not to speak to their loved ones.

On appeal, the court acknowledged Mr. Young's arguments:

> Young contends that by admitting a recorded jail call, the trial court violated article I, section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment. He asserts that the admission of the recording treated him differently than a wealthier defendant, who could afford to pay bail and be released pretrial, and whose pretrial calls would accordingly not be recorded and admitted at trial.

Slip Op. at 4.

The court further recognized Mr. Young "contend[ed] that … he was not able to pay bail when a wealthier person in his position could have, and thereby avoided having his personal telephone conversations recorded and admitted at trial." Slip Op. at 7. But the court insisted, "[Mr.] Young himself could have avoided this scenario, regardless of his wealth and his pretrial detention. He had simply to choose not to have a personal conversation on a telephone after he was warned that the call was subject to recording." Slip Op. at 7.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case presents an important equal protection issue affecting all indigent defendants held in jail pretrial.

This case presents an important equal protection issue of first impression: whether the admission of jail recordings violates the state and federal equal protection clauses where defendants who can afford bail do not have such recordings introduced against them at trial. The admission of such recordings creates a two-tiered system of justice based on wealth.

Moreover, because defendants of color are grossly overrepresented in pretrial detention populations, the issues presented here implicate not just economic inequality, but also racial inequity. For instance, a recent audit found that in the King County Jail, where Mr. Young was held pre-trial, Black people make up over 36% of the incarcerated population even though they represent only 7% of the overall population. King County Auditor's Office, *Racial Disparities Exist in Housing, Discipline*, 27 (April 6, 2021).[1] Black accused persons are also held in jail 40% longer than others in custody. *Id.* The disparate trials afforded people caged in jail pre-trial relative to those who are free presents an important equal protection issue this Court should address. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

[1] Available at: https://assets.documentcloud.org/documents/20584848/kc-jail-safety-audit.pdf.

1. The admission of the recording violated article I, section 12, which is concerned with "avoiding favoritism toward the wealthy."

Article I, section 12 of the Washington Constitution provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. I, § 12. This clause, like the federal equal protection clause, addresses differential treatment of individuals under the law. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 805, n.10, 83 P.3d 419 (2004)("*Grant County II*").

But the state constitutional provision requires an independent analysis. *Id.* at 805; *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007). It is "more protective than the federal equal protection clause[.]" *Schroeder v. Weighall*, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014).

Article I, section 12 has both a "privileges and immunities" component and an "equal protection" component. *Schroeder*, 179 Wn.2d at 572-77 (invalidating a new statute under a "privileges and immunities" analysis); *id.* at 577-79 (holding the new statute also "raise[d] concerns" under an equal protection analysis). Under either mode of analysis, the admission of the recorded jail calls violates this state constitutional provision.

a. The admission of the recording violated the privileges and immunities clause of article I, section 12.

Courts apply a two-part test to determine whether a challenged action violates the state constitutional prohibition on privileges and immunities. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 519, 475 P.3d 164 (2020). First, the court asks whether the government grants a "privilege" or "immunity"—i.e. benefits implicating fundamental rights of state citizenship. *Id.* If the answer is yes, the court asks whether there is a reasonable ground for granting that privilege or immunity to a particular class and not another. *Id.* This test is "more exacting than rational basis review." *Schroeder*, 179 Wn.2d at 574.

With respect to the privilege prong, article I, section 12 is especially concerned with "avoiding favoritism toward the wealthy." *Grant County II*, 150 Wn.2d at 808. That favoritism, of course, must be caused by state action: "For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens." *King v. King*, 162 Wn.2d 378, 396, 174 P.3d 659 (2007). Thus, in *King* the Court rejected an argument that a court's refusal to appoint counsel for an indigent parent in a divorce action violated article I, section 12, where the non-indigent parent hired his own attorney. *Id.* at 397. The court noted, "This is a purely private matter initiated by the parties." *Id.* "Nothing

affirmatively done by the State in this matter facilitated the respondent's litigation or hindered the appellant's ability to litigate." *Id.*

Here, in stark contrast, the case is a public matter initiated by the government. The State charged Mr. Young with crimes, affirmatively recorded Mr. Young's telephone calls, and affirmatively introduced those calls at trial to facilitate the State's case and hinder Mr. Young's defense. The State grants a special privilege to non-indigent defendants, whose personal conversations are not monitored by the government (absent a warrant) and not introduced against them at trial. Stated differently, the government affords wealthy defendants an immunity against having their personal conversations used against them at trial, while withholding that immunity from poor defendants.

With respect to the "reasonable ground" prong, there is no reasonable basis for the differential treatment at trial. Whether the jail must record calls for safety reasons is irrelevant. Mr. Young challenges the *admission* of those recordings against him at trial, where a non-indigent defendant is afforded a trial without his personal conversations being introduced against him.

A Fifth Amendment case is instructive on this point. *See State v. DeLeon*, 185 Wn.2d 478, 374 P.3d 95 (2016). In *DeLeon*, the defendants were charged with assault and booked into jail pending trial. *Id.* at 481-83.

In order to protect inmates, the jail officers fill out "Gang Documentation Forms" indicating whether an individual is in a particular gang and cannot be housed in the same unit as members of rival gangs. *Id.* at 483-84. The defendants stated they were affiliated with the Norteños gang and could not be housed with members of the Sureños gang. *Id.* at 484. These statements were later admitted at trial, over the defendants' objections. *Id.*

This Court held the trial court should not have admitted the statements. *Id.* at 487. The Court emphasized that the *jail* did not violate the defendants' rights by asking the questions, and that indeed the questions were appropriate to maintain safety in the institution. *Id.* However, a "constitutional violation occurred when the State then used the statements gathered under these circumstances against the defendants at their trial." *Id.*

The same is true here. Even assuming the jail may record the personal conversations of poor people in jail as a safety measure, there are no reasonable grounds to use these recorded statements against poor defendants at a trial wholly unrelated to that safety concern, where wealthy defendants are entitled to trials without warrantless recordings of their personal conversations being admitted against them. *See id.* The admission of the recorded phone call in Mr. Young's trial violated the privileges or immunities clause of the Washington Constitution.

b. The admission of the recording violated the equal protection clause of article I, section 12.

The admission of the recording also violated article I, section 12 under an equal protection analysis. *See Schroeder*, 179 Wn.2d at 577-79. While the privileges or immunities clause is concerned with granting benefits for favored groups, article I, section 12 also prohibits discrimination against vulnerable groups. *Id.* at 577; *Martinez-Cuevas*, 196 Wn.2d at 526-27 (González, J., concurring).

As with the Fourteenth Amendment, courts apply different levels of scrutiny to equal protection claims under the state constitution. *Id.* Intermediate scrutiny is appropriate where state action burdens both "an important right and a semi-suspect class not accountable for its status." *Schroeder*, 179 Wn.2d at 578 (internal quotations omitted). Under this level of scrutiny, the state's disparate treatment of two classes must further a "substantial interest" in order to pass constitutional muster. *State v. Phelan*, 100 Wn.2d 508, 513, 671 P.2d 1212 (1983).

Thus, in *Schroeder*, this Court held intermediate scrutiny was appropriate where a new statute burdened the important right to file a medical malpractice claim by eliminating the ability for minors to toll the statute of limitations. *Schroeder*, 179 Wn.2d at 578. Not only was the right at issue important, but the legislation had "the potential to burden a

particularly vulnerable population not accountable for its status." *Id.* This was so because the children affected by the law were those whose parents lacked the sophistication to file timely claims. *Id.*

In *Phelan*, this Court applied intermediate scrutiny to hold that defendants had to receive credit against their discretionary minimum prison terms for time served in jail pre-trial. *Phelan*, 100 Wn.2d at 509, 513-14. The Court recognized that liberty is an important right and "the poor, while not a suspect class, cannot be said to be fully accountable for their status." *Id.* at 514. "Since a denial of credit for presentence jail time involves both a deprivation of liberty in addition to that which would otherwise exist, and a classification based solely on wealth, we will apply an intermediate level of scrutiny in the present case." *Id.* The practice did not pass the test, and the Court expanded its decision in a prior case which recognized:

> Fundamental fairness and the avoidance of discrimination … dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence.

Id. at 511 (quoting *Reanier v. Smith*, 83 Wn.2d 342, 346, 517 P.2d 949 (1974)).

Here, as explained below in the Fourteenth Amendment section, Mr. Young submits that admission of jail calls is unconstitutional without resort to a levels-of-scrutiny analysis. But at worst, intermediate scrutiny applies as in *Schroeder* and *Phelan*. Admitting government recordings of indigent defendants' personal phone calls burdens the fundamental right to a fair trial guaranteed by the due process clause and article I, section 22. Const. art. I, §§ 3, 22; *cf. Schroeder*, 179 Wn.2d at 578 (enforcing statute of limitations instead of permitting tolling burdens important right to file medical malpractice claim). And poor people who are incarcerated pretrial are a semi-suspect class. *Phelan*, 100 Wn.2d at 514.

The disparate treatment at issue here fails intermediate scrutiny, because it does not further a substantial governmental interest. Indeed, the government has *no* interest in creating a two-tiered system of justice where the type of trial a person has depends on wealth. *See Jafar v. Webb*, 177 Wn.2d 520, 529, 303 P.3d 1042 (2013) (quoting *Griffin*, 351 U.S. at 19) ("[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). For this reason, too, this Court should grant review and hold the admission of the recorded jail phone calls—obtained only because a defendant was too poor to afford bail—violates article I, section 12 of the Washington Constitution.

2. The admission of the recording violated the equal protection clause of the Fourteenth Amendment, which prohibits disparate treatment of persons similarly situated with respect to the legitimate purpose of the law.

This Court should also review the issue under the Fourteenth Amendment, which states, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV. It requires that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Phelan*, 100 Wn.2d at 512.

Poor people charged with crimes and wealthy people charged with crimes may not be "similarly situated" in society, but they are similarly situated "with respect to the *legitimate purpose of the law*." *See id.* Accordingly, courts violate the equal protection rights of indigent accused persons by admitting warrantless government recordings of their personal phone calls, where such recordings may not be introduced against defendants with money.

a. The admission of the recording violated equal protection under *Griffin, Williams,* and other cases, without resort to levels of scrutiny.

As mentioned above, courts sometimes apply different levels of scrutiny—strict, intermediate, and rational basis—in equal protection cases. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L.

Ed. 2d 465 (1988); *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). But where the issue involves disparate treatment of defendants in criminal trials based on wealth, the U.S. Supreme Court has repeatedly forbidden such disparate treatment without resort to a levels-of-scrutiny analysis. *E.g. Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Griffin*, 351 U.S. at 20).[2] These cases could arguably be characterized as applying strict scrutiny without using the term, but the result is the same regardless: defendants may not be treated differently at trial based on wealth.

In *Griffin*, two co-defendants were convicted of crimes and wished to appeal. *Griffin*, 351 U.S. at 13. They were indigent and asked to be given the necessary record without cost, but the court denied the motion. *Id.* at 13-14. Defendants with money were able to pay the necessary fees to acquire the transcripts and other records. *Id.* at 13. The case made its way to the Supreme Court, which reversed. *Id.* at 20.

[2] In *Maher v. Roe*, which addressed a state's withholding of Medicaid for abortions, the Court noted that "financial need alone" does not create a "suspect class" in other contexts, but it reaffirmed the analysis of *Griffin* and *Douglas* for cases that "are grounded in the criminal justice system, a government monopoly in which participation is compelled." *Maher v. Roe*, 432 U.S. 464, 471 n.6, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977).

The Court acknowledged that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem." *Id.* at 16. But the Fourteenth Amendment "emphasize[s] the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." *Id.* at 17 (internal quotations omitted). The Court announced:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

Id. at 17-18.

Douglas followed *Griffin* and held States that give criminal defendants a right to appeal must also provide indigent defendants counsel at no cost, without requiring a "preliminary showing of merit" as California had done. *Douglas*, 372 U.S. at 357. Acknowledging that "[a]bsolute equality is not required," *id.*, the Court described the "evil" California's policy inflicted as the same as that in *Griffin*: "discrimination against the indigent." *Id.* 355.

In *Williams*, the Court held that indigent defendants could not be imprisoned beyond the statutory maximum for a crime as a means of

"working off" unpaid fines and court costs. *Williams*, 399 U.S. at 236, 240-41. The Court was willing to assume the "work off" system was a "rational means" of protecting its interest in collecting revenue. *Id.* at 238. But that did not resolve the issue. *Id.* at 239. Extending imprisonment based on involuntary nonpayment created "an impermissible discrimination that rests on ability to pay[.]" *Id.* at 240-41.

Similarly here, the admission of indigent defendants' personal phone calls in criminal trials creates an impermissible discrimination that rests on ability to pay cash bail.

b. In the alternative, intermediate scrutiny applies under *Plyler* and *Phelan*.

In the alternative, intermediate scrutiny applies because the state action at issue here burdens both an important right and a semi-suspect class not accountable for its status. *Phelan*, 100 Wn.2d at 513-14. Under this level of scrutiny, the state's disparate treatment of two classes must further a "substantial" governmental interest in order to pass constitutional muster. *Plyler v. Doe*, 457 U.S. 202, 223-24, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1986).

In *Plyler*, the Court applied intermediate scrutiny and held Texas violated the equal protection clause by denying state funds for the education of children who had not been legally admitted to the country.

Plyler, 457 U.S. at 205, 230. Such children were a semi-suspect class because they were not fully accountable for their status, and education was an important right even if not fundamental. *Id.* at 223. The Court noted that state action "imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Id.* at 218 n.14. "The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." *Id.* at 219.

The practice at issue in Mr. Young's case burdens the fundamental right to a fair trial and creates a "class or caste" system of justice. Defendants with money can bail out of jail and never have their personal conversations introduced against them, while personal conversations of defendants in the indigent class are admitted against them at trial. The government has no interest, let alone a substantial interest, in this disparate treatment. This two-tiered system of justice fails intermediate scrutiny.

c. In the alternative, the differential treatment fails rational basis review.

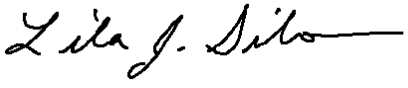
Even under the lowest level of review, the admission of indigent defendants' personal phone calls against them at trial violates equal protection. Under this level of scrutiny, the disparate treatment in question

must be rationally related to a legitimate government interest. *Clark*, 486 U.S. at 461. Admitting in criminal trials the personal phone calls of poor people who cannot afford bail, while not using such calls against defendants with money, is not rationally related to any legitimate government interest. On the contrary, the government's legitimate interest is to ensure equal justice, not to create a system whereby the type of trial a person receives depends upon the amount of money they have. The practice at issue here fails rational basis review.

F. CONCLUSION

Equal protection of laws must not be an empty promise. In Washington, poor defendants, who are disproportionately Black, are subjected to trials in which their personal conversations, recorded by the jail without a warrant, are admitted against them. Wealthy defendants are afforded trials without having their personal conversations recorded without a warrant and admitted against them. This differential treatment undermines the dignity of the individuals and the legitimacy of the system. This Court should grant review.

DATED this 30th day of April, 2021.



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WESLEY BURGESS YOUNG, Appellant.	DIVISION ONE No. 80907-5-I UNPUBLISHED OPINION

DWYER, J. — Wesley Young appeals from the judgment entered on a jury's verdicts finding him guilty of malicious harassment and assault in the third degree. He contends that (1) the admission of a jail telephone call recording violated his equal protection rights, (2) he was denied effective assistance of counsel with regard to self-defense jury instructions, and (3) the jury instruction defining "true threat" was constitutionally insufficient. Because he has not shown any entitlement to relief, we affirm.

I

Wesley Young, who is white, was riding a crowded Sound Transit train with his backpack on the seat next to him around 9:00 a.m. on March 21, 2019. Michelle Jennings, an African-American woman, boarded the train and asked Young to move his backpack so she could sit down. Young stated that he did not

want "no [n word]"[1] sitting next to him. Jennings again asked him to move the bag. Young told Jennings that if she tried to sit down, he would pepper spray her, and put his hand in his pocket. Jennings began to move away. Young yelled after her using racial slurs, stating that he was "sick and tired of these [n word]s" and calling Jennings a "bald-headed [n word]."

An African-American high school student, Alonzo Boyles, overheard this interaction. Boyles heard Young yelling racial slurs at Jennings, and approached Young. Boyles told Young that Young "shouldn't be talking to [Jennings] like that." Young responded by pepper spraying Boyles. Young then hit the emergency stop button, "pried open the doors," and exited the train between stops.

The incident was recorded by the train's surveillance video. Additionally, another passenger, Victoria Gardner, made a video recording on her cell phone.

Young was in custody on another matter when he was identified as the suspect by a detective with the King County Sheriff's Office. He was eventually charged with malicious harassment and assault in the third degree. At his bail

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[1] Harvard Law Professor Randall Kennedy has summarized the significance of this particular racial epithet as follows:

> It is a profoundly hurtful racial slur meant to stigmatize African Americans; on occasion, it also has been used against members of other racial or ethnic groups, including Chinese, other Asians, East Indians, Arabs and darker-skinned people. It has been an important feature of many of the worst episodes of bigotry in American history. It has accompanied innumerable lynchings, beatings, acts of arson, and other racially motivated attacks upon blacks. It has also been featured in countless jokes and cartoons that both reflect and encourage the disparagement of blacks. It is the signature phrase of racial prejudice.

Randall Kennedy, A Note on the Word "Nigger," HARPWEEK, http://blackhistory.harpweek.com/1Introduction/RandallKennedyEssay.htm [https://perma.cc/3JH9-CZQ4]

hearing on this matter, Young stated that he had stable employment and earned $4,000 a month but, with child support obligations, had "no means right now to make any kind of bail." The trial court determined that given the nature of the offense and Young's criminal history—which included "at least 20 warrants since 2014"—bail would be set at $25,000. Young did not post bail and remained in custody.

Young made a telephone call to his sister from jail, and uttered these remarks:

> He said he was going to smash my face. Some lady told me to move my backpack and then I told her there are other seats available and she came back and was like being a bitch and then I told her, and I told her, I said, "Fuck you [n word]. Fuck you, [n word] bitch." And then this other guy came up and was like, "I'm going to smash your face." So I pepper-sprayed his ass and then I hit e-stop on the light rail and jumped off, right?

The call was recorded. Consistent with the requirements of the Washington privacy act, chapter 9.73 RCW, the beginning of the call announced that the call was subject to monitoring and recording. Over his objection, the recording was admitted at trial.

With respect to the assault charge, the parties agreed that the jury should be instructed on the lawful use of force in self-defense and that the jury should be instructed that a "first aggressor" cannot claim self-defense. The jury was not instructed that a person has no duty to retreat when threatened in a place he has a right to be, nor did either party request such an instruction.

Young was convicted on both counts. He now appeals.

II

Young contends that by admitting a recorded jail call, the trial court violated article I, section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment. He asserts that the admission of the recording treated him differently than a wealthier defendant, who could afford to pay bail and be released pretrial, and whose pretrial calls would accordingly not be recorded and admitted at trial.

A

As an initial matter, Washington's privacy act, chapter 9.73 RCW, is not violated by the recording and admission of jail telephone calls. State v. Modica, 164 Wn.2d 83, 90, 186 P.3d 1062 (2008). We have also previously determined that the King County Correctional Facility's policy of recording telephone calls, as compared to the policies in place in the Department of Corrections' facilities, does not violate equal protection guarantees. State v. Haq, 166 Wn. App. 221, 254-55, 268 P.3d 997 (2012).

Young does not challenge the recording statute, or the jail's practice of recording calls but, rather, only the trial court's decision to admit the recording. Relying on State v. Juarez DeLeon, 185 Wn.2d 478, 374 P.3d 95 (2016), Young contends that the lawfulness of recording the call does not indicate that the admission of the recorded call at trial is constitutional. However, Juarez DeLeon is inapposite.

In Juarez DeLeon, our Supreme Court determined that when jail staff ask suspects about their gang affiliations upon booking (so as not to house rival gang

members together for safety reasons) no constitutional violation occurs. But the court further determined that admitting the resulting statements against defendants at trial did violate the Fifth Amendment protection against self-incrimination, because the statements could not be considered voluntary. Juarez DeLeon, 185 Wn.2d at 487. Thus, the admission of compelled statements at trial violated the defendants' Fifth Amendment rights, although the compulsion of the statements for safety reasons did not. Juarez DeLeon, 185 Wn.2d at 487. Here, Young's speech recorded on the call to his sister was not compelled. Juarez DeLeon does not apply.

Nevertheless, we review his claims of constitutional violations.

B

Young asserts that the admission of the recording violated the state constitution's privilege and immunities clause because such admission "grants a special privilege to non-indigent defendants, whose personal conversations are not monitored by the government (absent a warrant) and not introduced against them at trial." Because the trial court's decision to admit the recording does not grant either a privilege or an immunity, we disagree.

Our state constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." CONST. art., I § 12. The purpose of article I, section 12 is to "prevent favoritism and special treatment for a few, to the disadvantage of others." Ockletree v. Franciscan Health Sys., 179 Wn.2d 769, 776, 317 P.3d

1009 (2014). Although we often construe article I, section 12 in a manner consistent with the federal equal protection clause, whether a law implicates a "privilege or immunity," requires an independent analysis. Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc., 196 Wn.2d 506, 518-19, 475 P.3d 164 (2020). A "privilege" or "immunity" for the purposes of our state constitution are benefits that implicate fundamental rights of citizenship. Martinez-Cuevas, 196 Wn.2d at 519.

Here, the admission of a legally recorded telephone call is not a law, nor does it grant any privilege or immunity to any person or class of persons. The admission of the telephone recording in his case has no impact whatsoever on any other defendants. Accordingly, Young's assertion to the contrary fails.

C

Young also contends that the admission of the recording violates the equal protection clauses of both article I, section 12 and the Fourteenth Amendment. Specifically, he asserts that the trial court violated his right to equal protection under the law by admitting a recording of a personal telephone call, when "such recordings may not be introduced against defendants with money." We disagree. Because any similar recordings that exist may be introduced against any defendant, regardless of wealth, Young fails to establish a violation of his equal protection rights.

To show a violation of his equal protection rights, Young must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of

intentional or purposeful discrimination. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Accordingly, Young must first establish that he was treated differently from others who were similarly situated. Osman, 157 Wn.2d at 485. He fails to do so.

Young concedes that some indigent defendants are released pretrial and that some wealthy defendants are not. He contends that, nevertheless, he was not able to pay bail when a wealthier person in his position could have, and thereby avoided having his personal telephone conversations recorded and admitted at trial. However, Young himself could have avoided this scenario, regardless of his wealth and his pretrial detention. He had simply to choose not to have a personal conversation on a telephone after he was warned that the call was subject to recording.

Even if we accept Young's contention that he remained in custody pretrial because he is indigent,[2] defendants who are similarly situated for the purposes of equal protection analysis are those who, like Young, have made incriminating statements on legally recorded telephone calls of which the State has been made aware. Young sets forth no reason to believe that any defendant under these circumstances would not be subject to admission of the recording at trial.

Certainly, defendants who are in jail awaiting trial are subject to greater surveillance than those who are not, and it surely is so that some people who remain in custody do so because they cannot afford to post bail. But the

[2] The record includes evidence that Young was employed, that he made $4,000 a month when bail was set, that the Department of Public Defense determined that Young was indigent, and that Young was in custody on another matter when this cause was filed. It is not altogether clear from this evidence precisely why Young remained in jail awaiting trial.

fundamental fairness of a system which allows people to "lose the right to liberty simply because that person can't afford to post bail,"[3] is not here at issue. We need not address the wisdom of bail in general to conclude that the admission of Young's recorded telephone call did not violate his equal protection rights.

III

Young next contends that his attorney's decisions regarding self-defense jury instructions on the assault charge constituted constitutionally ineffective assistance of counsel. We disagree.

In order to succeed on an ineffective assistance of counsel claim, the defendant must show that (1) the attorney's performance was deficient and (2) the defendant was prejudiced by that deficient performance. In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015) (quoting State v. Borsheim, 140 Wn. App. 357, 376, 165 P.3d 417 (2007)). "Deficient performance is that which falls below an objective standard of reasonableness." State v. Weaville, 162 Wn. App. 801, 823, 256 P.3d 426 (2011). "Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different." Weaville, 162 Wn. App. at 823 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). We presume adequate representation when there is any "'conceivable legitimate tactic'" that explains counsel's performance. Hatfield, 191 Wn. App. at 402 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

[3] In re Humphrey, No. S247278, slip. op. at 2 (Cal. Mar. 25, 2021) https://www.courts.ca.gov/opinions/documents/S247278.pdf (unconstitutional to detain individuals pretrial because they cannot pay bail).

A

Young asserts that his counsel provided ineffective assistance by failing to object to the trial court's issuance of a first aggressor instruction. Because the evidence presented at trial supported such an instruction, Young's contention fails.

An aggressor instruction may be given when it is "called for by the evidence." State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). To determine whether the evidence adduced at trial was sufficient to support giving a particular jury instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Grott, 195 Wn.2d 256, 270, 458 P.3d 750 (2020) (quoting State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005)).

The use of force is lawful and justified when a person has a "subjective, reasonable belief of imminent harm from the victim." State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). When a defendant meets the initial burden of producing some evidence suggesting that his or her actions amounted to self-defense, the State assumes the burden of proving the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). First aggressor instructions are used to explain to the jury one way in which the State may meet its burden: by proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense. Grott, 195 Wn.2d at 268-69.

"[T]he right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation." Grott, 195 Wn.2d at 266 (quoting Riley, 137 Wn.2d at 909). This is because a claim of self-defense is only available against lawful force. Grott, 195 Wn.2d at 266 (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.7(e), at 657-58 (1986)). The use of force is lawful "[w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary." RCW 9A.16.020(3).

In cases in which the defendant undisputedly engaged in a single aggressive act, and that act was the sole basis for the charged offense, a first aggressor instruction is inappropriate. Grott, 195 Wn.2d at 272. "One cannot simultaneously engage in an act of first aggression and an act of lawful self-defense because an act of first aggression is an 'intentional act reasonably likely to provoke a belligerent response' *by* the victim, while lawful self-defense requires a 'subjective, reasonable belief of imminent harm *from* the victim.'" Grott, 195 Wn.2d at 272 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4th ed. 2016)). However, when the defendant engaged in a course of aggressive conduct, rather than a single aggressive act, a first aggressor instruction may be justified. Grott, 195 Wn.2d at 271. The provoking act cannot be directed at one other than the

actual victim, unless the act was likely to provoke a belligerent response from the actual victim. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

Here, Young's aggressive course of conduct began when he threatened Jennings, which caused Boyles to approach him. Citing State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989), Young contends that, as the provoking act was directed at someone other than the victim of the assault (Boyles), a first aggressor instruction was improper. However, a jury could reasonably conclude that Young's conduct toward Jennings constituted a requisite provoking act. It is hardly surprising that Young's actions—loudly threatening an African-American woman while repeatedly using a pernicious racial slur on a crowded train—was likely to provoke a response from a bystander, such as Boyles. See Kidd, 57 Wn. App. at 100 (first aggressor instruction was appropriate for assault on police officers when provoking act was assault of others followed by flight because assaulting individuals and fleeing is likely to result in an armed police response). Accordingly, the evidence at trial was sufficient to support the court's issuance of a first aggressor instruction.

In terms of his ineffective assistance of counsel claim, Young cannot show prejudice because the first aggressor instruction was supported by the evidence presented at trial. Thus, any objection interposed by counsel would have been properly overruled. Grott, 195 Wn.2d at 272. Accordingly, Young does not demonstrate that his counsel provided constitutionally ineffective assistance.

B

Young also asserts that his counsel provided ineffective assistance by failing to request a "no-duty-to-retreat" instruction. We disagree.

Because of Young's physical position during his assault of Boyles—seated on a crowded train while Boyles stood facing him—he could not have retreated. Indeed, in requesting a self-defense instruction, counsel described Young as "in a defensive position up on his chair." The State never argued that Young had a duty to retreat but, instead, asserted that Boyles' behavior did not necessitate self-defense. Under these circumstances, a "no-duty-to-retreat" instruction would have been superfluous and potentially confusing to the jury. See State v. Frazier, 55 Wn. App. 204, 208, 777 P.2d 27 (1989). Accordingly, defense counsel's decision not to request the instruction was neither below the standard of care (because the evidence did not warrant the instruction) nor prejudicial (it is not established that the court would have given the instruction, if requested). Young's claim fails.

IV

Young next contends that the jury instruction defining "threat" was inconsistent with the requirements of the First Amendment. Because the alleged error is not properly preserved for appeal, appellate relief is not warranted.

Young's counsel proposed the instruction he now asserts is improper. The instruction included the following language regarding the mental state of a person making a threat:

> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the

> position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

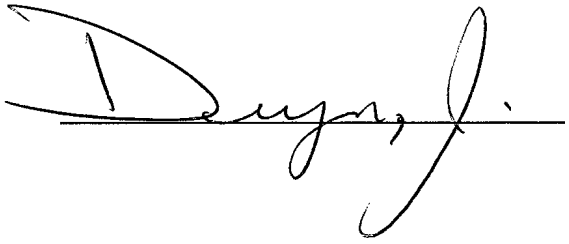
Jury Instruction 11.

First, this claim of error is barred. Because defense counsel proposed the instruction, any error constitutes invited error. Even a constitutional error can be barred by the invited error doctrine. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009).

Second, Young cannot avoid the invited error bar by claiming ineffective assistance of counsel. The instruction offered by defense counsel and issued by the trial court was consistent with our Supreme Court's decision in State v. Trey M., 186 Wn.2d 884, 893, 900, 383 P.3d 474 (2016). Thus, two principles control: (1) a lawyer does not act below the standard of care by proposing an instruction that accords with applicable legal authority, State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), and (2) a lawyer does not act below the standard of care by declining to advance a novel legal argument. Maryland v. Kulbicki, 577 U.S. 1, 4-5, 136 S. Ct. 2 (2015). Both principles apply here.

Thus, the claim of error is not properly presented in this appeal.

Affirmed.



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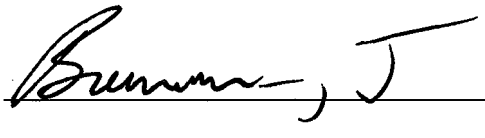

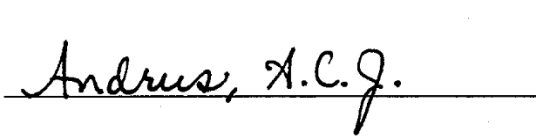

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