

No. 40093-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

STATE OF WASHINGTON,  
Respondent,  
v.  
Alan Niemi,  
Appellant.

---

FILED  
COURT CLERK  
APR 19 08  
11:19 AM  
CLERK'S OFFICE  
STATE OF WASHINGTON  
COUNTY

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

The Honorable, Judge Richard D. Hicks  
Cause No. 09-1-01463-2

---

BRIEF OF RESPONDENT

---

Heather Stone  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 1

    1. The evidence was sufficient beyond a reasonable doubt  
        to prove Mr. Niemi violated a no-contact order..... 1

    2. Mr. Niemi’s conviction was not obtained in violation of his  
        right to a jury trial under the Sixth Amendment and  
        Fourteenth Amendments, nor under Article I, Section 21 of  
        the Washington Constitution..... 18

D. CONCLUSION..... 50

## U.S. Supreme Court Decisions

<i>Phillips</i> , 433 F.2d 1366.....	33
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).....	42-43, 44

## Washington Supreme Court Decisions

<i>Dep't of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002) .....	14
<i>In re Personal Restraint Petition of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1996) .....	43
<i>In re Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986) .....	19
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997) .....	46
<i>State v. Abrams</i> , 163 Wn.2d 277, 178 P.3d 1021 (2008) .....	13, 14
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978) .....	43
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010) .....	22, 23, 24, 25
<i>State v. Ammons</i> , 136 Wn.2d 453, 963 P.2d 812 (1998) .....	11
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997), <i>cert. denied</i> , 128 S. Ct. 2964, 171 L. Ed. 2d 893 (2008).....	34
<i>State v. Boss</i> , 167 Wn.2d 710, 223 P.3d 506 (2009) .....	14

<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	2
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988) .....	33-34
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	2
<i>Dalluge</i> , 162 Wn.2d at 8203.....	33
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996) .....	26
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007) .....	37
<i>State v. Furth</i> , 5 Wn.2d 1, 15, 104 P.2d 925 (1940) .....	3
<i>State v. George</i> , 160 Wn.2d 727, 158 P.3d 1169 (2007) .....	14
<i>State v. Gossage</i> , 165 Wn.2d 1, 195 P.3d 535 (2008) .....	46
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	2
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996) .....	42
<i>State v. Hill</i> , 83 Wn.2d 558, 520 P.2d 618 (1974) .....	3, 4, 6, 10
<i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984) .....	37
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992) .....	19

<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	18, 19, 21, 23, 25, 26, 27, 30, 31, 32
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988)	34
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	39, 48
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995)	37
<i>State v. Mason</i> , 160 Wn.2d 910, 162 P.3d 396 (2007), <i>cert. denied</i> , 128 S. Ct. 2430 (2008)	36
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	17
<i>State v. Miller</i> , 156 Wn.2d 23, 123 P.3d 827 (2005)	12, 13, 14, 15
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008)	20, 31
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	34
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	2
<i>State v. Shultz</i> , 146 Wn.2d 540, 48 P.3d 301 (2002)	12
<i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001)	49
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998)	42

<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002) .....	37
<i>State v. Thomas</i> , 71 Wn.2d 470, 429 P.2d 231 (1967) .....	43
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	42
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970.....	46
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001) .....	30
<i>State v. White</i> , 81 Wn.2d 223, 500 P.2d 1242 (1972) .....	43
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999) .....	30
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007) .....	34

### **Decisions Of The Court Of Appeals**

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993), <i>review denied</i> , 123 Wn.2d 1011 (1994) .....	18, 19, 20, 22
<i>In re Det. of Bedker</i> , 134 Wn. App. 775, 146 P.3d 442 (2006).....	20
<i>Seattle v. May</i> , 151 Wn. App. 694, 213 P.3d 945 (2009).....	15, 17
<i>State v. Bradbury</i> , 38 Wn. App. 367, 685 P.2d 623 (1984).....	43

<i>State v. Coucil</i> , 151 Wn. App. 131, 210 P.3d 1058 (2009).....	26, 29, 30
<i>State v. Fredrick</i> , 45 Wn. App. 916, 729 P.2d 56 (1989).....	43-44
<i>State v. Gaddy</i> , 114 Wn. App. 702, 60 P.3d 116 (2002).....	46
<i>State v. Hayward</i> , 152 Wn. App. 632, 217 P.3d 354 (2009).....	22, 23, 33, 34
<i>State v. Huber</i> is misplaced. 129 Wn. App. 499, 119 P.3d 388 (2005).....	3, 4, 5, 6, 7, 10
<i>State v. Lillard</i> , 122 Wn. App. 422, 93 P.3d 969 (2004).....	37, 39, 48
<i>State v. Neidigh</i> , 78 Wn. App. 71, 895 P.2d 423 (1995).....	42
<i>State v. Snapp</i> , 119 Wn. App. 614, 82 P.3d 252 (2004).....	13, 14, 15, 17
<i>State v. Soonalole</i> , 99 Wn. App. 207, 992 P.2d 5451 (2000).....	47
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	2
<i>State v. Wilber</i> , 55 Wn. App. 294, 777 P.2d 36 (1989).....	27

### **Statutes and Rules**

ER 401 .....	36
ER 402 .....	36, 45, 47
ER 403 .....	36, 45, 47

ER 404(b).....	35, 36, 37, 39, 40, 45, 47, 48, 50
ER 702 .....	20
RCW 9.94A.701 .....	50
RCW 10.99.040.....	11
RCW 10.99.040(2) .....	11, 12
RCW 10.99.040(3) .....	12
RCW 10.99.040(5) .....	12, 16
RCW 10.99.050(5) .....	16
RCW chapters 7.90, 9.94.A, 10.99, 26.09, 26.10, 26.26, or 74.34.....	13
RCW 26.50.110(1) .....	13

**Other Authorities**

H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 829, at 1500-01 (John Lewis Niblack ed., 4 <sup>th</sup> ed. 1898).....	3
--	---

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence was sufficient to establish Mr. Niemi violated the no contact order pertaining to Dorothy Bennett.
2. Whether Detective Adams' identification testimony improperly invaded the province of the jury.
3. Whether the trial court abused its discretion in admitting ER 404(b) evidence.
4. Whether Mr. Niemi received ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights.
5. Whether Mr. Niemi's community custody sentences for the events occurring after July 26, 2009, must be remanded for corrected resentencing.

B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the case with the following corrections, clarifications, and additions: In the interest of space, all relevant facts necessary to the State's brief are cited and included in the main body of the argument.

C. ARGUMENT

1. The evidence was sufficient beyond a reasonable doubt to prove Mr. Niemi violated a no-contact order.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.) *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

- a. The evidence was sufficient to establish beyond a reasonable doubt the defendant, Alan Niemi, was the same person named in the restraining order.

The State submits the evidence introduced at trial overwhelmingly established the defendant in this case, Alan A. Niemi, was the same Alan A. Niemi named in the July 6, 2009, domestic violence no-contact order (NCO) and the defendant's reliance on *State v. Huber* is misplaced. 129 Wn. App. 499, 499, 119 P.3d 388 (2005). The State further submits that in making his argument, Mr. Niemi selectively omits the majority of the evidence introduced at trial.

To begin, in *Huber*, the State did not admit any evidence linking the defendant to the person named in the restraining order other than certified copies of the order itself. *Id.* at 500. This Court said, “[The State] must show, ‘by evidence independent of the record,’ that the person named therein is the defendant in the present action.” *Id.* at 502 (quoting *State v. Furth*, 5 Wn.2d 1, 15, 104 P.2d 925 (1940) (quoting H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 829, at 1500-01 (John Lewis Niblack ed., 4<sup>th</sup> ed. 1898))). It then quoted the Washington Supreme Court in *State v. Hill*, which held that, “[i]dentity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the

identity of a person should be received and evaluated.” *Huber*, 129 Wn. App. at 501-02 (quoting *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974)). In *Hill*, the Supreme Court found evidence of the defendant’s identity sufficient where there were “numerous references in the testimony to ‘the defendant’ and to ‘Jimmy Hill,’” in addition to testimony from the arresting officer that it was “‘the defendant’” (seated in front of him) whom he saw at the scene. *Hill*, 83 Wn.2d at 560. Consistent with the holding in *Hill*, this Court determined that “[d]epending on the circumstances,” evidence relevant to proving the fact of identity “may include . . . eyewitness identification, or, arguably, distinctive personal information.” *Huber*, 129 Wn. App. at 503.

Based on this case law, the facts of the instant case are distinct from *Huber* and more similar to those in *Hill*. First, the State introduced a certified copy of the July 6, 2009 No Contact Order (“NCO”) entered by the district court, Cause No. 9DV-708 TCP, which included the defendant’s full name and date of birth—November 22, 1966. [Exh. 1, Supp. CP]. The order was signed by Judge Susan A. Dubuisson in open court in the presence of the defendant, and included the name of the protected party as Dorothy A. Bennett with a date of birth of October 30, 1959. [Exh.1].

Second, and unlike in *Huber*, the State introduced a certified copy of the court hearing recording on July 6, 2009. [RP 230; Exh. 9]. In that recording, the jury heard evidence that the hearing was regarding entry of the NCO in district court where all parties agreed that the voice heard on the recording was that of Judge Dubuisson. [RP 232]. The jury heard Judge Dubuisson identify Mr. Niemi and inform him of the NCO conditions, including the prohibition against contacting or attempting to contact Dorothy Bennett from jail. *Id.* This information is consistent with the information, in context and substance, to that contained in the NCO.

Third, unlike the missing testimony in *Huber*, Deputy Clark testified he responded to Dorothy Bennett's residence after receiving a call reporting an incident of domestic violence on July 2, 2009. [RP 40] The State then introduced a certified copy of Dorothy Bennett's department of licensing (DOL) photo and driver's license, which confirmed Ms. Bennett's date of birth as October 30, 1959. [Exh. 5; RP 41-2]. Deputy Clark confirmed that not only was the DOL photo consistent with his memory of the person he spoke with at the scene, but that he also physically matched the DOL photo to Ms. Bennett at the time of the incident. [RP 41-42]. Deputy Clark then testified (based on information he received from Ms. Bennett

at the scene) he understood her boyfriend to be Alan Niemi. [RP 42]. He was unable to locate Mr. Niemi that same day. *Id.* The identifying information verified by Deputy Clark at the scene was consistent with the information contained in the July 6, 2009 NCO. Notably, Mr. Niemi did not argue otherwise or offer any evidence to the contrary, neither at trial nor on appeal. Thus, the jury was entitled to use this information in determining identity.

Fourth, and unlike in *Huber*, Deputy Goheen testified he had contact with Mr. Niemi in July 2009 in relation to an investigation and then, as in *Hill*, visually identified him in court as the defendant. [RP 46-47]. He further testified that through the course of his contact with the defendant, he became aware that the defendant's date of birth was November 22, 1966—the same birth date listed for Alan Niemi on the NCO. [RP 47]. He testified he personally transported him to and booked him in jail in July 2009, at which point he was provided, for the second time, with the same date of birth. [RP 48]. This identifying information was, again, consistent with the information provided in the July 6, 2009 NCO.

Moreover, Mr. Niemi, neither at trial nor on appeal, argues that the defendant's name or date of birth is incorrect. Mr. Niemi does not challenge that the defendant who appeared in court is the

same Alan Niemi whom Deputy Goheen transported to jail in July 2009. It was thus reasonable for the jury to use this information to confirm Mr. Niemi's identity.

Fifth, and unlike *Huber*, through the testimony of Captain Thompson, the State introduced evidence of detailed jail records which showed the identity of the inmates, as well as the housing location and movements of inmates throughout the day. [RP 49 – 52]. Captain Thompson testified that jail records showed an inmate by the name of Alan Niemi was housed in Post Six beginning July 21, 2009 until 1:15 pm on July 29, 2009. Records indicated that on the afternoon of July 29, 2009, he was moved to Post Five where he remained until August 6, 2009 (the period at issue in this case). [RP 53]. This information is consistent with the testimony of Deputy Goheen previously discussed in this brief.

Captain Thompson testified that during part of this time, Mr. Niemi had special phone privileges due to his position in Post Five. *Id.* Captain Thompson testified that the jail records included all phone calls made from the jail, as well as the originating location of the calls. *Id.* She emphasized the need for accuracy in the jail records, as well as describing personnel access to the logs [RP 50, 51]. This testimony emphasized the low probability of mistaking an

inmate's identity or location, as well as the security of the records from tampering. The jury was entitled to use this information in determining identity from the context of the other known facts and circumstantial evidence.

Finally, and most importantly, the jury listened to nine separate phone calls which further confirmed the identity that the Alan Niemi named in the NCO was the Alan Niemi present in court. All of the phone calls corresponded in date and time to Mr. Niemi's recorded jail location — and to the same individual Goheen identified as the Alan Niemi he transported to jail. [RP 46-48]. The records showed the same phone numbers in each call, featuring the same male and female voices—voices described by the prosecutor as “distinct” and which the jury personally heard as evidence. [RP 64-65, 70-71, 98, 115, 159, 252]. During the calls, Mr. Niemi gave a social security number only one number off from that of “Alan Niemi's,” [RP 144], and the callers repeatedly referred to each other as “Alan” and “Dorothy”—an improbable coincidence, especially in light of the overwhelming evidence otherwise. [RP 71, 76, 78, 99, 116, 118, 133, 159, 161-62, 164, 177, 185, 194, 203, 207].

In addition, details of the conversations remained consistent. The recorded calls almost always included the names of the same friends and family (e.g. Charlie, Mike, Cindy, Manny, Rick, etc.), [RP 77, 81, 85, 87, 94-96, 107, 122-23, 125, 126, 128-29, 134, 139-40, 146, 159, 161-63, 165, 174-75, 178, 188, 191-92, 195-98, 202, 204, 205-06, 208-10]; Alan's request for Dorothy to bring him shoes, money, and a particular set of trial clothing (black button-down shirt, black pants, and a yellow tie), [RP 89-96, 104, 122-23, 125, 138-40, 178, 190]; discussion of the couple's truck and trailer and who was allowed to use it, [RP 77, 85, 89-90, 94-96, 101-03, 122-23, 134-35, 164-65, 178-79, 190, 195-98, 200-01, 204, 208-209]; loving phrases and pet names, like "baby" and "honey," which reasonably indicate a romantic or intimate relationship, [RP 78, 80, 83, 85, 89, 95, 97, 100, 116, 162-64, 167, 170-71, 174, 176, 178-179, 182, 186, 190, 193, 195, 197-98, 203, 208, 211]; a marriage proposal—the form of which the jury was entitled to consider as indicative of and consistent with domestic violence,<sup>1</sup> [RP 172-73]; pending charges in Mason County, [RP 117, 122-23, 135, 146, 167-68, 174-75, 180, 210]; and a distinct speech pattern and word

---

<sup>1</sup> The State notes Mr. Niemi never actually asked Ms. Bennett to marry him. Instead, he informed her they were going to get married. He instructed her to obtain a marriage certificate in the same language he instructed her to bring him a pair of shoes.

choice. [RP 86, 89, 91, 105, 110, 114, 120, 140, 148, 183, 185, 187, 196, 198, 201-05, 211].

Unlike *Huber*, both Dorothy and Alan repeatedly refer to the pending NCO between them throughout the phone calls. The two discuss with whom the blame lies — Mr. Niemi seems to fault Dorothy’s daughter, saying no less than four times that Dorothy should, “beat her” for calling 911, [RP 187, 191]. They also discuss topics such as the impact on the charges if Dorothy, as the victim, did not appear to testify,<sup>2</sup> [RP 186], Dorothy’s repeated attempts to get the order lifted—e.g. “I just want to get this contact order lifted,” [RP 185], Alan’s admitted plan to deny he even knew anyone by the name of “Dorothy,” [RP 185], both parties’ concern Mr. Niemi would further violate the NCO if Dorothy visited him, [RP 97, 118], and finally, comments from Mr. Niemi consistent with domestic violence (i.e. the change in his demeanor from kind—“thank you for the shoes, baby” and “I love you”—to cruel—“I’m telling you, you do what I tell you to do, man, or beat it.”). [RP 176, 179, 204]. This is exactly the kind of extrinsic evidence of identity the Supreme Court determined sufficient in *Hill* and expressly lacking in *Huber*.

---

<sup>2</sup> Not surprisingly, Ms. Bennett failed to appear at the trial and thus did not testify against Mr. Niemi.

The jury was entitled to the totality of the evidence presented at trial. Mr. Niemi's argument never even mentions this evidence, and does not address the reasonable inferences drawn from it. The jury was not required to disregard their common sense and first-hand sensory impressions as Mr. Niemi seems to assert now. The jury's determination was reasonable and should not be disturbed.

- b. The state proved, beyond a reasonable doubt, that a valid restraining order was in effect on the alleged violation dates.

Mr. Niemi contends the evidence at trial was insufficient to prove there was a valid restraining order in effect, thus the State violated his Fourteenth Amendment right to due process. The State wholly disagrees.

The validity of a pretrial no contact order is a question of law, subject to a de novo review. *State v. Ammons*, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). The Revised Code of Washington (RCW) 10.99.040<sup>3</sup> authorizes trial courts to enter no-contact orders either pre-trial or post-conviction. RCW 10.99.040. RCW 10.99.040(2) says

[b]ecause of the likelihood of repeated violence . . . ,  
when any person charged with or arrested for a crime

---

<sup>3</sup> As of April 30, 2010, amendments to this statute become effective, however, those amendments do not affect the form or substance of the sections discussed in this brief.

involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. . . . [T]he court authorizing release may issue, by telephone, a no-contact order prohibiting the person charged or arrested from having contact with the victim . . . .

RCW 10.99.040(2). RCW 10.99.040(5) states that orders issued prior to charging “shall expire at arraignment or within seventy-two hours if charges are not filed.” RCW 10.99.040(5). Thus, “an order may be issued upon defendant’s release prior to arraignment, it *may* be extended or initially entered at arraignment, or (where the defendant is released after arraignment) it may be issued after arraignment and prior to trial.” *State v. Shultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002) (emphasis added) (emphasis omitted). In RCW 10.99.040(3), the legislature further explained that “the no-contact order shall terminate if the defendant is acquitted or the charges are dismissed.” RCW 10.99.040(3).

First and foremost, the validity of the no-contact order is not an element the statute requires the State to prove to a jury. *State v. Miller*, 156 Wn.2d 23, 32, 123 P.3d 827 (2005).<sup>4</sup> Rather, “whether

---

<sup>4</sup> In *Miller*, the defendant alleged the State had to prove to the jury the lawfulness of the no-contact order he violated. *Miller*, 156 Wn.2d at 23. Instead, the trial court gave a “to convict” instruction that only required the jury to determine

the order alleged to be violated is applicable and will support the crime charged” is an issue for the trial court to decide “as a threshold matter[.]” *Id.* at 31; *State v. Abrams*, 163 Wn.2d 277, 297, 178 P.3d 1021 (2008) (Chambers, J., concurring). The validity of a no-contact order (versus its existence) is a preliminary issue for the “trial court, as part of its gate-keeping function[.]” *Miller*, 156 Wn.2d at 31. The State is unclear whether Mr. Niemi’s intent is to allege that validity is an express or an implied element which the State needed to prove to the jury, but in either event, his assertion fails.

The express elements of violating a no-contact order include: (1) that there is a no-contact order issued under RCW chapters 7.90, 9.94.A, 10.99, 26.09, 26.10, 26.26, or 74.34; (2) that the restrained party knows of the order; and (3) that the restrained party violated the restraint provision(s). RCW 26.50.110(1). As the *Miller* court noted, the word “‘valid’ does not appear in any relevant sections of the statute.” *Miller*, 156 Wn.2d at 31. The word only appears relative to foreign protection orders, a type of order not at issue in this case. Likewise, case law overwhelmingly holds that validity is not an implied element of the crime. *Miller*, 156 Wn.2d at 31; *State v. Snapp*, 119 Wn. App. 614, 624, 82 P.3d 252 (2004);

---

whether the order, itself, existed. *Id.* The Washington Supreme Court held that the crime included an element of existence, but not lawfulness. *Id.* at 24.

see *State v. Boss*, 167 Wn.2d 710, 717-18, 223 P.3d 506 (2009) (reasoning of *Miller* applies with equal force to custody orders and holds that the validity of a court order is not an implied element). Thus, Mr. Niemi's argument that the State presented insufficient evidence to the jury regarding the lawfulness of the order has no merit because no such requirement existed. *Snapp*, 119 Wn. App. at 624 (there is no "require[ment] the State . . . prove the validity of the order to the jury beyond a reasonable doubt."); see *State v. George*, 160 Wn.2d 727, 744, 158 P.3d 1169 (2007). The State need only demonstrate the *existence* of a facially valid order to the jury, which it did in this case by presenting a certified copy of the order as Exhibit 1. *Abrams*, 163 Wn.2d at 297 (emphasis added).

In addition, Mr. Niemi fails to cite any legal authority or "evidence in the legislative history indicating intent that the validity of a no-contact order was intended to be an element of the crime[.]" *Miller*, 156 Wn.2d at 28; see *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002) (holding that where a statute is unambiguous, it is inappropriate to consult extrinsic sources to determine legislative intent). In contrast, and as previously stated, the Washington Supreme Court could not be any clearer, "We do not find support in the statute for the position that a

“valid” order is an element of the crime of violating a no-contact order.” *Miller*, 156 Wn.2d at 28. The State submits the lack of cited authority by Mr. Niemi is because no such authority exists and this Court should deny his argument for this reason alone.

Second, the order was valid and there is no basis for challenging it otherwise. “[V]alidity’ includes whether the order was facially adequate and complied with the underlying statutes.” *Seattle v. May*, 151 Wn. App. 694, 698 n.9, 213 P.3d 945 (2009) (quoting *Miller*, 156 Wn.2d at 31). “Protection orders are presumptively valid.” *May*, 151 Wn. App. at 698 n.9 (citing *Snapp*, 119 Wn. App. at 625-26). The district court had the authority to sign the order, it was facially adequate, and it complied with the underlying statutes. See *Miller*, 156 Wn.2d at 31. The State provided the trial court with a copy of the pretrial order, issued on July 6, 2009, with an expiration date of July 6, 2013, and signed by a Judge and the prosecuting attorney. The fact that it was lacking the defendant’s signature went purely to the issue of notice, not facial validity, especially in light of the certified recordings introduced by the State. By its terms, the order was in effect from July 6, 2009 to July 6, 2013 and the violations occurred both within that time period and prior to dismissing the underlying charges

upon which the court based the order. The trial court was correct in finding the order facially valid.

Additionally, the date of the order was consistent with the date of the hearing and entered within 72-hours of charging. The RCW 10.99.040(5) says that a no-contact order entered prior to charging, "shall expire at arraignment or within seventy-two hours *if charges are not filed.*" RCW 10.99.050(5). (Emphasis added). Here, the State filed charges within 72-hours. It would be highly unreasonable to conclude that an order entered on the date of the probable cause hearing for which the defendant was held in custody, and remained so for several months, was somehow the result of an uncharged, or untimely charged, crime.

Further, the State submits it was not required to submit to the court, let alone the jury, evidence of *when* the charges were filed as Mr. Niemi argues. The order was facially valid and "uniquely within" the trial court's province to determine as such. According to Mr. Niemi's logic, every time the State prosecuted a case it would have to prove to the jury it filed charges within 72-hours of a finding of probable cause. This is quite clearly not the legal burden carried by the State and Mr. Niemi is wrong to suggest so. Mr. Niemi does not even argue the order was not actually invalid, just that the State

provided insufficient evidence to prove to the jury it was valid. Where there is no timely substantive challenge to the validity of the order, there is no requirement for the State to presume invalidity, nor to prove validity to the jury. *Snapp*, 119 Wn. App. at 625.

Third, Mr. Niemi agreed the order was valid during motions *in limine* and any additional evidence required now to deal with the issue is outside the record, so this Court should not address his argument. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (19915); [RP 12-13]. During motions *in limine*, when asked for his comments regarding validity, defense counsel stated “we’re in agreement that [validity] is not an issue for us to bring up during this trial.” [RP 13]. While his challenge to validity of the order is not an impermissible collateral attack on appeal, if the no-contact order was somehow invalid, facially or by statute, then the appropriate time to raise the objection was prior to trial and the State was able to provide a response and evidence on the record for this Court to review. *May*, 151 Wn. App. at 698 n.9. The State submits, however, that the defendant purposefully did not raise the argument and expressly agreed to validity because the order is exactly as the court found it to be: valid.

2. Mr. Niemi's conviction was not obtained in violation of his right to a jury trial under the Sixth Amendment and Fourteenth Amendments, nor under Article I, Section 21 of the Washington Constitution.

Mr. Niemi alleges Detective Adams' testimony involved impermissible opinion testimony as an "almost" or "nearly explicit" comment on the defendant's guilt. The State disagrees. Mr. Niemi fails to provide any "analysis and cites no relevant authority for the proposition" that this is either a) improper opinion testimony or b) "the type of 'manifest error' contemplated by RAP 2.5(a)(3)." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 583, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994)). Additionally, the testimony at issue did not directly address credibility or the defendant's guilt and even if this Court deems any of it improper, the majority of Detective Adams' testimony was not objected to and did not constitute "manifest" constitutional error resulting in actual prejudice making it reviewable for the first time on appeal. Lastly, even if it this Court deems any of the objected to testimony improper, Mr. Niemi fails to demonstrate actual prejudice, presumably because he cannot; thus any error was harmless.

To begin, Mr. Niemi's fails to demonstrate in any way how his cited case law applies to the facts at issue. His entire analysis consists of restating his shortened version of the facts and then concluding that Detective Adams' testimony was a "nearly explicit" or "almost explicit" opinion of Mr. Niemi's guilt. [Appellant brief, 14].

Case law does not support his position that the testimony was improper. Nor does anything appear to extend his argument to classifying this testimony as the type of "manifest error" described by RAP 2.5(a)(3). *Kirkman*, 159 Wn.2d at 936 (quoting *Heatley*, 70 Wn. App. at 583). Stating authority without applying or arguing it is inappropriate and the court need not consider his argument on these grounds alone. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("Parties raising constitutional issues must present considered arguments to this Court. We reiterate our previous position: 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'") (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)); (original citations omitted). The simple fact that he couched his argument in the guise of the constitution does not make the error either constitutional or manifestly constitutional. Rather, for the reasons which follow, if any error in fact existed, then it was non-

constitutional and subject to a non-constitutional harmless error analysis.

a. Detective Adams' testimony was not improper.

Detective Adams' testimony was not improper testimony commenting on the credibility or guilt of Mr. Niemi. An expert witness may present an opinion to the jury where it is qualified by the expert's "knowledge, skill, experience, training, or education" and will provide "scientific, technical, or other specialized that will assist the jury in understanding the evidence or determining a fact at issue. ER 702. Expert testimony "that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *In re Det. of Bedker*, 134 Wn. App. 775, 778, 146 P.3d 442 (2006) (quoting *Heatley*, 70 Wn. App. at 578).

Further, trial courts have broad discretion in determining the admissibility of evidence and Washington courts have historically taken a narrow view of claims that testimony constitutes improper opinion commentary on guilt. *Id.*; *cf. State v. Montgomery*, 163 Wn.2d 577, 594-95, 183 P.3d 267 (2008) (holding that testimony

was improper where a police officer directly stated he believed the defendant was trying to get away).

In *Kirkman*, the court held that a doctor was not commenting either directly or indirectly on the victim's credibility or the defendant's guilt when he testified that although the results of a physical exam were normal, the victim's account of sexual abuse was not inherently inconsistent with his findings. *Kirkman*, 156 Wn.2d at 930. The *Kirkman* court said the doctor "did not come close to testifying that [the defendant] was guilty or that he believed [the victim's] account." *Id.* Nor, the court said, did another doctor,<sup>5</sup> "come close to testifying on any ultimate fact" because he "never opined [the defendant in that case] was guilty, nor did he opine [the victim] was molested or that he believed [her] account to be true." *Id.* at 933.

The court in *Kirkman* also reviewed the testimony of a detective who described his competency assessment of the child victim. *Id.* at 930. The detective testified that he found the child to be truthful, that she was able to distinguish between the truth and a lie, and that she promised to tell the truth. *Id.* The court held this testimony did not enter the sphere of opinion evidence as it was not

---

<sup>5</sup> *Kirkman* and *Candia* were the defendants in the consolidated case which challenged opinion testimony of the State's medical witnesses.

indicative “that he believed [the victim] or that she was telling the truth.” *Id.* at 931. Rather, the court found his testimony described police protocol used during the interviews, thus providing context to the jury. *Id.* The court noted that the detective’s testimony did not carry a “special aura of reliability” distinguishable from any other sworn witness, and that ultimately, the credibility of witness testimony rested with the jury. *Id.*

In another case, this Court held that although expert witnesses may not testify as to a defendant’s guilt, “testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide.” *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009). Rather, “[t]he fact that an opinion encompassing the ultimate factual issue *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt.” *Heatley*, 70 Wn. App. at 579. In *Hayward*, Division Two found that although a doctor’s testimony used a phrase which almost mirrored a question of fact for the jury to decide, the testimony was not improper because it “did not directly discuss Hayward’s guilt” or “his participation in the injury.” *Id.*

Similarly, in *State v. Aguirre*, the defendant argued the trial court erred in admitting an officer’s testimony because he said it

“impermissibl[y] vouch[ed] for the victim’s credibility[.]” 168 Wn.2d 350, 359, 229 P.3d 669 (2010). In evaluating the propriety of the testimony alone—meaning without touching on whether the defendant objected or the existence of manifest constitutional error, our state Supreme Court found the testimony proper, and affirmed the conviction. *Id.* at 360. The *Aguirre* court said,

“[W]hen Stines described the victim’s demeanor, she refrained from stating or implying that the victim had been a victim of domestic violence. (Citation omitted) . . . Such testimony was likely helpful to the jury in evaluating for themselves whether the victim had in fact been assaulted and raped. *It was not a direct comment on Aguirre’s guilt or the victim’s veracity.* It was based on Stines’ own inferences from the evidence.

*Id.* at 360 (emphasis added). These cases stand for the proposition that testimony which constitutes neither a direct comment nor an indirect comment on either a defendant’s guilt or a witness’s credibility is simply not improper. For reasons stated in *Hayward*, *Kirkman*, and *Aguirre*, the testimony in the instant case was not improper because it was neither a direct nor indirect comment on the defendant’s guilt (or credibility).

Detective Adams testified to her extensive training with the police force, including 15 years as a detective in Thurston County and her current assignment with the domestic violence team. [RP

56-57]. She then testified to her familiarity with the no contact order in place in the instant case. [RP 57-58].

She also testified extensively to information which was outside the knowledge of the jury, including the following: the capabilities and limitations of the jail telephone recording system, her personal knowledge and use of the jail phone system, the accuracy of the jail's inmate records, the phone numbers she used in identifying targets for her search, the actual numbers called, the jail location from where the numbers were called, the time and date of each call, the recorded admissions of the parties themselves during each call, the context of her inquiry, the context and consistent content of all nine phone calls, and the consistent voices of the participants throughout all nine calls. [RP 60-64].

Like many other experts, Detective Adams formed a professional opinion about the identity of the parties involved by relying on her training, experience, and the records provided to her. As with all expert opinions, it was within the jury's purview to assign the detective's identity opinion whatever weight it chose. The fact that she had never met the defendant personally did not make it inadmissible or improper. Like the detective in *Aguirre*, Adams' testimony "was based on [her] own inferences from the evidence"

and was not improper. Further, any weakness in that identification could and would come out on cross-examination. *Aguirre*, 168 Wn.2d at 360.

More importantly, however, as in *Hayward* and *Kirkman*, Detective Adams never opined the defendant violated the no-contact order. She simply testified it was her opinion, based on the direct and circumstantial evidence available to her, that the voices she heard on the tape were that of Alan Niemi and Dorothy Bennett. [11/16/09 RP 64-5]. It is often helpful to the court “to know whether a statement, condition, or alleged fact is consistent with the other evidence in the case or similar cases” and a statement that an “alleged fact is consistent” with the “expert’s observations or opinions may be comment on the reliability of the . . . fact, but is not a comment on the credibility of the witness” or the ultimate issue in the case. *Kirkman*, 159 Wn.2d at 939 (Chambers, J., concurring). While Detective Adams’ testimony embraced a question of fact for the jury to determine, identity, it did not comment on the ultimate issue at trial—whether Mr. Niemi violated the no-contact order. Thus, it was not improper and Mr. Niemi’s argument fails.

b. Even if the testimony was improper, any error is harmless.

Even if this Court were to find any of the testimony improper, the legal standards for analyzing improper testimony differ based on whether Mr. Niemi objected to the testimony during trial, as well as whether the error was constitutional or non-constitutional. In order to preserve error on testimony not objected to at trial (“unpreserved error”), the defendant must demonstrate both that the error was manifest constitutional error, meaning it was a “nearly explicit” comment on guilt or credibility, and that actual prejudice resulted, meaning “practical and identifiable consequences”. *Kirkman*, 159 Wn.2d 935-936; *State v. Coucil*, 151 Wn. App. 131, 133 n.1, 210 P.3d 1058 (2009). If he cannot satisfy both prongs, he fails to establish a reason for appellate review.

For preserved error, i.e. testimony that was objected to at trial, one of two harmless error standards will apply. If the error is constitutional, then the error is harmless only if the reviewing court is “convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). If the error is non-constitutional, then the evidentiary harmless error standard holds that “error is not prejudicial unless,

within reasonable probabilities, it materially affected the outcome of the trial.” *State v. Wilber*, 55 Wn. App. 294, 299, 777 P.2d 36 (1989).

- i. Because Mr. Niemi failed to object, he must demonstrate manifest error for an unpreserved objection, which he cannot do.

Like the witnesses in *Kirkman*, Detective Adams’ testimony did not result in manifest error which “could relieve [the defendant] of his duty to object.” *Kirkman*, 159 Wn.2d at 931. The Court in *Kirkman* noted that “[n]o case of this Court has held that a manifest error infringing a constitutional right *necessarily* exists where a witness expresses an opinion on an ultimate issue of fact that is not objected to at trial.” *Id.*, at 935. The Court further noted that because the “defendant[] failed to object or move to strike allegedly erroneous evidence and did not give the trial courts such an opportunity . . . [he] . . . [failed to] preserve[] the issue for appellate review.” *Kirkman*, 159 Wn.2d at 926. Therefore, unless Mr. Niemi can demonstrate manifest error based on improper opinion testimony and actual prejudice he has not preserved the issue for appeal.

In the instant case, the only objections Mr. Niemi raised during Detective Adams’ testimony was in response to testimony

regarding the second and fourth phone calls, and prior to the playing of the fifth phone call. In testifying to the second phone call (7/30/09 at 9:58 am), Mr. Niemi objected at the conclusion of Detective Adams' testimony and only to the State's question, not prior testimony. [RP 78]. The court responded, saying, "I'm going to initially sustain this objection, as long as the call is clear. . . . I mean clear technically, not clear context wise." [RP 79]. This indicates the court considered Detective Adams' testimony and found it proper.

In response to the fourth phone call, defense counsel objected on the same grounds when the State asked the witness to restate what was heard on the tape. Again, he did not object to her opinion based on the evidence; instead he objected to her restatement of the evidence on the basis that the jury heard it for themselves.<sup>6</sup> [RP 130]. The court sustained the objection on the basis that her expert opinion was not required. [RP 131]. Her opinion was never challenged by Mr. Niemi or recognized by the court as improper. [RP 131].

Mr. Niemi's last related objection occurred in response to a question by the State regarding how Detective Adams arrived at her opinion as to the identities of the people involved in the phone

---

<sup>6</sup> Presumably his intended argument was that the testimony was either irrelevant or cumulative, but not that it was improper.

calls. The defendant objected again on the same grounds, in addition to objection based on speculation. This time the court overruled the objection on the grounds that while an expert cannot speculate, she can point to evidence in the record and testify to how she formed her given opinion. [RP 156]. Thus, the defense failed to object to any of the witness's testimony on the grounds it was improper opinion testimony.

In *State v. Coucil*, 151 Wn. App. 131, 210 P.3d 1058 (2009), Division One held that because the defendant failed to object to testimony at trial and further failed to show it amounted to "manifest error affecting a constitutional right" he failed to preserve the issue for appeal. *Id.*, at 1059 n.1. The court noted that testimony stating that the defendant had "maliciously harassed" the "victim" did not equate to a "nearly explicit" statement of the defendant's guilt or the witness's belief in the victim's allegations. *Id.*

Likewise, the unpreserved error in the instant case, namely the majority of Detective Adams' testimony, did not rise to the level of a "nearly explicit" statement of Mr. Niemi's guilt. For example, in the first call she testified she was able to identify the voices "from listening to all the calls," "recogniz[ing] the voices from the previous calls," and that the caller identified himself as "Alan." [RP 66, 70-

71]. The witness also stated throughout her testimony she was able to identify the people in the calls as Alan Niemi and Dorothy Bennett because of her familiarity with the voices and content of the calls, in addition to reliance on the previous identity evidence discussed in this brief. [RP 115-16].

In light of *Coucil* and *Kirkman*, Detective Adams' statements did not amount to manifest error relieving the defense of the responsibility of objecting. The State submits that the witness statements in *Coucil* were much more indicative of guilt than any portion of Detective Adams' testimony. As a result, Mr. Niemi fails the first prong of the test by failing to demonstrate a manifest error.

Manifest error also "requires a showing of actual prejudice[.]" *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001), meaning "practical and identifiable consequences in the trial of the case." *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (original citation omitted). Mr. Niemi fails to make this showing and applies the wrong standard in his analysis. The constitutional harmless error analysis he cites does not apply to an actual prejudice analysis in a manifest error case. See *Kirkman*, 159 Wn.2d at 937.

“Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed.” See *Id.* In *Montgomery*, our Supreme Court cited its previous holding in *Kirkman* holding that prejudice did not exist because, “despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors ‘are the sole judges of the credibility of witnesses’ and that they ‘are not bound’ by expert witness opinions.” *State v. Montgomery*, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008) (quoting *Kirkman*, 159 Wn.2d at 937). Neither case applied the constitutional harmless error standard used by Mr. Niemi.

Just like in *Montgomery* and *Kirkman*, the instructions (referenced by both counsel) in this case informed the jury as to reasonable doubt, that there is no difference between circumstantial and direct evidence, that the jury should use all of the evidence presented to them, that the jury should use their common sense, and that the jury should use the context of all the evidence in arriving at a verdict. [RP 247, 249, 252, 257]; *Montgomery*, 163 Wn.2d at 596. These instructions negated any potential for prejudice. See *Kirkman*, 159 Wn.2d at 937. Further, Mr. Niemi has not demonstrated “[t]here was [a] written jury inquiry

or other evidence that the jury was unfairly influenced,” and this Court “should presume the jury followed the court’s instructions absent evidence to the contrary.” *Id.*; see *Kirkman*, 159 Wn.2d at 928.

“Only with the greatest reluctance and with the clearest cause should judges — particularly those on appellate courts — consider second-guessing jury determinations or jury competence. There is simply no evidence of actual prejudice to the jury based on the detective’s testimony, especially in light of the overwhelming weight of the content and context of the phone calls themselves.

Additionally, as in *Kirkman*, it appears defense counsel chose not to object to the testimony for tactical reasons. *Kirkman*, 159 Wn.2d at 937. First, the testimony was proper and any objection to it on those grounds likely would have been overruled. Second, defense counsel’s theory of the case was a lack of notice and lack of identification. He likely chose to avoid objecting repeatedly to the detective’s testimony in order to avoid drawing any excess attention to it and her position as an expert witness. Rather, he chose to use cross-examination to challenge the strength of her expert opinion, and in fact, presented evidence through that means to demonstrate her lack of personal contact

with the defendant. This method of cross examination most benefited the defendant because it put the proverbial spotlight on the points of her testimony he sought to highlight.

In sum, Mr. Niemi failed to demonstrate any explicit statements of guilt or comments on credibility, failed to demonstrate any actual prejudice, and failed to object to the same testimony at trial (for tactical reasons). *Id.* at 938. Thus, there was no manifest constitutional error.

- ii. Even if the testimony was improper and error construed, the appropriate standard of review is abuse of discretion.

Even if this Court determines some of Detective Adam's testimony was improper, constituted error, and was somehow preserved for appeal, the State submits the appropriate standard for review is abuse of discretion. This results in a non-constitutional harmless error analysis. For the reasons previously noted, simply couching the issue in terms of the constitution does not make any perceived error constitutional (and thereby indicate a constitutional harmless error analysis as Mr. Niemi requests). See *Dalluge*, 162 Wn.2d at 820; *Phillips*, 433 F.2d 1366. Rather, a trial court's decision to admit expert testimony is reviewed for abuse of discretion. *Hayward*, 152 Wn. App. at 651; *State v. Ciskie*, 110

Wn.2d 263, 280, 751 P.2d 1165 (1988); *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

As previously stated, “[w]here evidence is improperly admitted, the trial court’s error is harmless ‘if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.’” *Hayward*, 152 Wn. App. at 651 (quoting *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007)); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), *cert. denied*, 128 S. Ct. 2964, 171 L. Ed. 2d 893 (2008). In *Hayward*, the court determined the error was harmless because the evidence was overwhelming that the victim suffered a substantial bodily injury, regardless of the doctor’s comments to the same. *Id.* at 652. The court further held that “a reasonable jury would have reached the same determination,” thus any error in admitting the expert’s testimony was harmless. *Id.*

Likewise, in the instant case, the trial court’s decision to allow Detective Adams’ testimony was not an abuse of discretion. As stated in the previous section, the trial court addressed the issue several times and found the detective’s testimony was properly within the scope of her role as an expert witness. Even if her

testimony of belief as to identity was improper, the jury heard nine separate phone calls during which the callers repeatedly identified themselves, repeated similar topics of conversation, and even specifically referred to the no-contact order several times. [RP 175].

Contrary to Mr. Niemi's argument, the detective's testimony that she *believed* the voices belonged to Alan Niemi and Dorothy Bennett was not the State's primary evidence establishing contact; the callers' own statements of identification was the most damning evidence of contact.<sup>7</sup> The State was not required to produce the evidence now requested by Mr. Niemi. The standard of review is not whether any reasonable jury could have found Mr. Niemi innocent barring the challenged testimony (as the appellant argues), it is whether any reasonable jury could have found him guilty without the challenged evidence. Based on the foregoing, the State submits if any error actually occurred, then it was of a non-constitutional nature and harmless.

3. The trial judge did not abuse his discretion by admitting ER 404(b) evidence which was relevant and was not substantially more prejudicial than it was probative.

---

<sup>7</sup> Mr. Niemi argues neither the phone calls themselves nor the remainder of Detective Adams' testimony was improper. Therefore, even without her statements as to belief of identification, the jury could still rely on the remainder of her testimony.

The court will not disturb a trial court's ruling under ER 404(b) absent a manifest abuse of discretion, meaning that no reasonable judge would have ruled the same. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430 (2008).

Only relevant evidence is admissible. ER 402. Evidence is relevant if it has the tendency to make a fact more or less probable than it would be without the existence of that fact. ER 401. Because all evidence is prejudicial, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is

guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Before a trial court may admit 404(b) evidence, it must: 1) find by a preponderance of the evidence the misconduct occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value of the evidence against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). This analysis must be conducted on the record. *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004) (citing *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)), *review denied*, 154 Wn.2d 1002 (2005).

The trial court here engaged in a detailed discussion on the record with counsel prior to admitting portions of the jail phone calls not specifically related to the crime for which Mr. Niemi was on trial. First, the trial court expressly discussed the defendant’s criminal history, which included the Mason county warrants by reference. [RP 35]. The State submits that because the court accepted the

defendant's own admission as to the existence of those warrants, the trial court engaged in the first step of the analysis.

Even if the court's discussion of the prior offenses was not clear enough for this Court to find the first step met, the State submits any error was harmless because it did not materially affect the outcome. The trial court read a stipulation of prior qualifying offenses to the jury which, like the referenced prior offenses in the phone calls, did not specify the related crime. Thus, the references to his other felony acts did not "within a reasonable probability, materially affect the outcome of the trial because [he] admitted to [his prior offenses] . . . at trial." *Sublett*, 156 Wn. App. 197 (holding harmless error existed where the trial court failed to engage in an adequate discussion on the record because the failure did not materially affect the trial in light of the defendant's own admissions).

Further, the trial court allowed the tapes only for the limited purpose requested by the State, directly adopting the limiting instruction requested by defense counsel, which stated it was to establish the "identity of the participants in the telephone conversations, whether the defendant may have violated the no-contact order at issue in this case," [Jury Instructions RP 7]; [RP 30, 35]. The trial court recognized the relevance of the tapes to the

State in proving their case. [RP 35]. The court adopted the State's argument for admission of the calls in their entirety because it provided identity and context throughout the nine phone calls. [RP 30,33,35].

The challenged testimony also falls under the *res gestae* exception to 404(b). Under *res gestae*, "evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." *Lillard*, 122 Wn. App. at 432; *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). "Unlike most ER 404(b) evidence, *res gestae* evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged."

Mr. Niemi's telephone conversation with Frazier was, at a minimum, evidence of identity. More importantly, it completed the story of the phone calls. The references to Mason County and warrants linked separate phone calls, which better allowed the jury to follow the conversation and understand the relationship between the defendant and the victim.

Finally, the trial court specifically weighed the prejudicial value of the complained of testimony against the probative value of admitting the recordings in full. [RP 31-33]. As the trial court noted,

this evidence was relevant to the State's case and was not substantially prejudicial because the references included in the phone call were not specific enough to inform the jury of the cause of those warrants. The trial court stated,

[Turning down the volume at each of the references] could be more hurtful to the defendant than helpful because now the jury's going to speculate, what was so important that that little dance of off and on again real quick has to be done? . . . Sometimes it's better just to let it go by and not draw attention to it, but if you want a limiting instruction . . . I would give such an instruction to the jury.

[RP 33-34]. The trial court appeared to accept the State's argument the conversation did not discuss the specific crime in Mason County. The court observed the jury was "going to hear a stipulation that [Mr. Niemi] ha[d] two prior convictions, . . . one of [which] could be the Mason County thing. In point of fact, it's not; it's a Pierce County thing, but that would limit the prejudice it seems to me." [RP 31].

Even if this Court were to find the trial court failed to appropriately engage in a full analysis on the record before admitting evidence of the defendant's other bad acts, any error is harmless. The defendant's references to needing to quash warrants did not portray Mr. Niemi any less favorably than the other evidence

presented at trial, especially in light of the stipulation of his prior offenses. When viewed in context of all the evidence, any error in admitting the ambiguous references was not so egregious to warrant a new trial because it did not affect the verdict. There was simply no way for the jury to know the incidents he stipulated to were different incidents than those referenced in the calls.

Additionally, and in direct contrast to Mr. Niemi's claims to the contrary, the trial court indicated its intent from the very beginning of the trial to give a limiting instruction regarding the references and, in fact, gave such an instruction. [RP 32, 34-35]; [Jury instructions RP 6-7];[CP 34]. Any existing harm not addressed by the stipulation was addressed by the detailed and unambiguous limiting instruction, which defense counsel proposed and seemingly drafted, and which the jury both had read to them and which they received a copy. Thus, Mr. Niemi fails to show that overruling defense counsel's objections so prejudiced him that nothing short of a new trial could ensure him a fair trial.

The record strongly supports the conclusion that the trial court did an adequate analysis on the record, finding the tapes, in their entirety, highly relevant and hard to redact without creating a greater level of prejudice to the defendant. Further, the record

demonstrates any potential prejudice was cured by the combination of the limiting instruction and the vagueness of the warrant references in light of the stipulation read to the jury. The references were not so serious as to warrant a new trial.

4. Mr. Niemi was not denied effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v.*

*Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984);

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); *State v. Bradbury*, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). This does not mean that the defendant is guaranteed *successful* assistance of counsel, but rather assistance which “make[s] the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 690; *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. *In re Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). The focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Strickland*, 466 U.S. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. *State v. Fredrick*, 45

Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” *Strickland*, 466 U.S. at 697.

A. Defense counsel was not ineffective for failing to object to Detective Adams’ identification testimony.

Mr. Niemi fails to meet the *Strickland* standard. For the reasons previously stated in part 2 of this brief, Detective Adams’ testimony was not the only identifying evidence of the parties to the telephone call, nor was it improper. Nor was her testimony either a “nearly explicit” or “almost explicit” opinion as discussed in the same section.

First, even had defense counsel objected to Detective Adams’ testimony on the grounds specified, nothing in the record indicates his objection would have been sustained. Based on the court’s reaction to the two objections Mr. Niemi lodged during the testimony, it is likely the court would have sustained any additional objection only so far as to prevent Detective Adams from describing what the jury could hear for themselves. The court did not indicate there was any issue with the witness’s testimony otherwise.

Nothing in the transcript supports Mr. Niemi's position besides his own bare assertion.

Any number of legitimate trial strategies explain why defense counsel did not object: 1) it was evident to everyone in the room the parties were the same in each call and gratuitous argumentation may have reflected negatively on Mr. Niemi, 2) Detective Adams is an experienced officer, and counsel did not want to highlight her training in the course of an explanation of her basis for belief of the identity of the parties, or 3) defense counsel did not want to drag the several hours of tapes out any longer than necessary, in light of the potential impact on the jury and his client. All of these are legitimate strategies designed to gloss over unfavorable testimony and put the defendant in the best light possible. Thus, Mr. Niemi fails to overcome the presumption of effectiveness because he fails to show either objective unreasonableness or the existence of actual prejudice under *Strickland*.

B. Defense counsel was not ineffective for failing to object to ER 402, ER 403, and ER 404(b) evidence.

First and foremost, Mr. Niemi makes this blanket claim without providing any analysis or argument about the testimony he finds objectionable. He fails to identify on which grounds counsel

fell below an objective standard of reasonableness, and does not explain how he was prejudiced. Lacking a clear, specific, and coherent argument, the State is unsure of what harms and on what grounds Mr. Niemi is appealing this matter; this Court should disregard his argument for this reason, alone. See *State v. Gossage*, 165 Wn.2d 1, 9, 195 P.3d 535 (2008) (quoting *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 663, 935 P.2d 555 (1997)) (“Absent argument and authority, review is not proper.”); *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (appellate court does not review issues for which a party makes only passing treatment); *State v. Gaddy*, 114 Wn. App. 702, 709, 60 P.3d 116 (2002) (appellate court may decline to consider an arguments that does not contain citations to authority and does not provide analysis); (original citations omitted).

Second, other than the evidence regarding the DOC hold and warrants, Mr. Niemi did not object to the introduction of any of the remaining evidence in the tapes at trial, presumably because the trial court discussed the tapes at length with both defense counsel and the State. “In order to have a trial court err in the admission of testimony, or to preserve the issue for appeal, it is necessary for objections to be made at trial to allow the trial court

the opportunity to rule on such an objection.” *State v. Soonalole*, 99 Wn. App. 207, 214-15, 992 P.2d 5451 (2000). The trial court was not given that opportunity. Mr. Niemi now attempts to bootstrap his evidentiary claim as an ineffective assistance of counsel claim which may be raised for the first time on appeal. The State submits this Court should deny his request on these grounds as well.

Third, Mr. Niemi fails to cite any case law demonstrating how someone else’s actions in hitting the defendant’s truck, a friend’s arrest, or a discussion of thefts in which the defendant was not involved implicates Mr. Niemi’s rights under ER 402, ER 403, or ER 404(b). None of these events involved Mr. Niemi’s prior bad acts. The same is true of his coarse language complaint—it is not a 404(b) issue and there is no requirement either the State or defense counsel sanitize the vernacular of a defendant’s conversations and admissions. The State would submit that in light of the other overwhelming evidence, his use of coarse language was not significant. Again, he cannot now bootstrap a non-appealable error as ineffective assistance of counsel. Moreover, Mr. Niemi fails to explain (or cite any authority) why it was objectively unreasonable for defense counsel not to object. It is a legitimate strategy not to draw attention to a client’s shortcomings,

which is what the State would argue occurred here. Additionally, Mr. Niemi fails to show how he suffered any actual prejudice from it. There is simply no basis for his argument this information was used substantively or as propensity evidence and this Court should deny his argument on these grounds as well.

Fourth, the State submits all of the challenged testimony is either part of the *res gestae* of the crime or proper 404(b) evidence. Thus, not only was it relevant in the same vein and for the same reasons discussed previously in this brief, but it was also not possible to remove the references without taking the story out of context. “[E]vidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *Lillard*, 122 Wn. App. at 432; *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The events and vernacular surrounding the parties overlapped throughout all nine calls and it was relevant and necessary for the jury to hear the consistent topic thread in order to a) identify the parties, b) understand the context of the calls, and c) evaluate the evidence in a coherent format.

A limiting instruction was clearly given, contrary to Mr. Niemi’s claim otherwise, and there is no evidence the jury

disregarded it. [Jury Instruction No. 6, CP 34]; *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Likewise, Mr. Niemi fails to demonstrate or provide any evidence establishing how the jury used this information substantively or as propensity evidence. An objection to the court would not likely have been sustained, nor would it likely have altered the outcome of the trial.

Fifth, the State would note the arguments it made in part 3 of this brief are applicable to Mr. Niemi's complaints now about the warrants and DOC hold. The State notes defense counsel objected at length to the admission of this information during motions *in limine* and the court overruled him. The State would argue defense counsel's actions reflected a legitimate trial strategy. He chose not to renew his standing objection and specifically provided a limiting instruction to address his concerns. As a result, defense counsel did *not* fall below an objective standard of reasonableness and Mr. Niemi fails to demonstrate any resulting prejudice.

The same is true of the remainder of the complained of portions of the tapes: references to drug use and distribution (which, again, appears to be related to the actions of others—not the defendant), the defendant's claim he would be willing to assault a corrections officer (an event which had not actually occurred),

and references to Mr. Niemi getting in a fight (which would explain the timing of his phone call to Ms. Bennett). This information also fell under the res gestae of the phone calls and was admissible for that purpose and as proper 404(b) evidence for identification of the parties. It was not objectively unreasonable for defense counsel to avoid drawing the jury's attention to unfavorable evidence, since it is unlikely the court would have sustained his objection in light of the discussion held during motions *in limine*.

5. Mr. Niemi's sentence was improperly calculated.

The State concedes Mr. Niemi's judgment and sentence was improperly calculated based on RCW 9.94A.701 and should be remanded for resentencing of Counts III – VI, VIII, and X – XII, the post-July 26, 2009 offenses, in accordance with the statute.

#### D. CONCLUSION

For the reasons previously stated, the State respectfully requests this Court to affirm this conviction.

Respectfully submitted this 23<sup>rd</sup> of July, 2010.

  
\_\_\_\_\_  
Heather Stone, WSBA# 42093  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK  
COURT OF APPEALS, DIVISION II  
950 BROADWAY, SUITE 300  
MS-TB-06  
TACOMA, WA 98402-4454

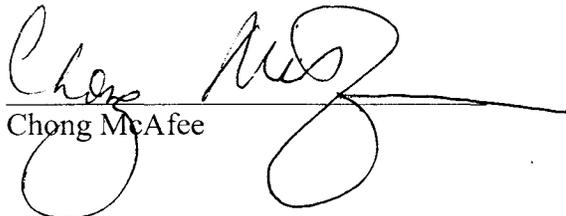
--AND--

TO: JODI R. BUCKLAND  
BACKLUND & MISTRY  
203 EAST FOURTH AVE, SUITE 404  
OLYMPIA, WA 98501

FILED  
COURT OF APPEALS  
10 JUL 26 AM 10:09  
STATE OF WASHINGTON  
BY [Signature]

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

Dated this 23<sup>rd</sup> day of July, 2010, at Olympia, Washington.

  
Chong McAfee