

correct coa #
472911

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICHOLAS A. OXFORD,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COURT
The Honorable Scott Collier, Judge
Cause No. 14-1-02397-9

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	1
D. ARGUMENT	4
OXFORD WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO PROPERLY OBJECT TO THE ADMISSION OF EVIDENCE OF THE RECORDED TELEPHONE CALLS FROM THE CLARK COUNTY JAIL FOR LACK OF SUFFICIENT AUTHENTICATION AND VIOLATION OF HEARSAY AND RIGHT OF CONFRONTATION	4
E. CONCLUSION	11

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>Passovoy v. Nordstrom, Inc.</u> , 52 Wn. App. 166, 758 P.2d 524 (1988), <u>review denied</u> , 112 Wn.2d 1001 (1989).....	6, 7, 8
<u>State v. Danielson</u> , 37 Wn. App. 469, 681 P.2d 260 (1984).....	7, 8
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996)	5
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <u>review denied</u> , 123 Wn.2d 1004 (1994)	5
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	9
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	6
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	5
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995)	5
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	5
<u>State v. Jackson</u> , 113 Wn. App. 762, 54 P.3d 739 (2002)	5
<u>State ex. rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	6
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009).....	9
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <u>aff'd</u> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	10, 11
<u>State v. Pugh</u> , 167 Wn.2d 825, 835, 225 P.3d 892 (2009).....	9
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	5
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	5

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972) 5

State v. Williams, 136 Wn. App. 486, 150 P.3d 111 (2007) 7

Federal Cases

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 9, 10

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 4

Constitutional

Sixth Amendment 4, 9

Art. I, sec. 22 of the Washington Constitution 4, 9

Statutes

RCW 10.99.020 2

RCW 26.50.110 2

Rules

ER 801(c) 8

ER 802 8

A. ASSIGNMENTS OF ERROR

01. The trial court erred in permitting Oxford to be represented by counsel who provided ineffective assistance by failing to object to the admission of recorded telephone calls for lack of sufficient authentication of the voice of the female caller.
02. The trial court erred in permitting Oxford to be represented by counsel who provided ineffective assistance by failing to object to the admission of recorded telephone calls as hearsay.
03. The trial court erred in permitting Oxford to be represented by counsel who provided ineffective assistance by failing to object to the admission of recorded telephone calls as a violation of right of confrontation.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether Oxford was prejudiced as a result of his counsel's failure to properly object to the admission of the recorded telephone calls from the Clark County Jail for lack of sufficient authentication and violation of hearsay and right of confrontation?
[Assignments of Error Nos. 1-3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Nicholas A. Oxford was charged by amended

information filed in Clark County Superior Court January 16, 2015, with nine counts of felony domestic violence court order violation, contrary to RCWs 10.99.020 and 26.50.110(5). [CP 3-7].

Oxford's pretrial statements were ruled admissible following a CrR 3.5 hearing [RP 51-54], and trial to a jury commenced January 28, the Honorable Scott Collier presiding.

Oxford was found guilty as charged, given an exceptional sentence below his standard range, and timely notice of this appeal followed. [CP 38-46, 51-52, 65-68].

02. Substantive Facts

Prior to November 14, 2014, Oxford had two prior convictions for violating provisions of a protection order, and three no-contact orders had been issued restraining him from having any contact whatsoever with Dawn Bushek from August 5, 2013 to well beyond the charging period in this case. [RP 159, 170, 181-84, 186-89]. He was on supervision for this and had initiated the process to transfer his supervision to Oregon. [RP 103].

02.1 Count I: November 14, 2014

While at a hotel November 14, 2014, Oxford was observed in the presence of a person later identified as Bushek, who had blonde hair. [RP 99, 104, 108-111]. Following his arrest five days

later, he admitted that Bushek was the person in the hotel and that he was aware of the order prohibiting him from having any contact with her. [RP 120-24, 198-99].

02.2 Counts II-IX: Calls from Jail

Between November 19 and December 23, 2014, 10 telephone calls were made from the Clark County Jail, where Oxford was incarcerated, to one number, 917-281-0633.¹ [RP 255, 258-260]. There was a male and a female voice on each call [RP 255], two of which were made on Oxford's jail account [RP 290, 330] and the remaining eight on two other inmates' accounts. [RP 293, 299, 301, 308, 313, 317, 320, 330].

During the calls, the male and female expressed, among other things, their mutual love for one another [RP 300], their desire to get the no-contact order modified or rescinded [RP 292, 296, 301], the fact that the female had dyed her hair black [RP 301, 320], their hopes of moving to Oregon [RP 317], and the fact that the motion to modify or rescind the no-contact order had been filed with the court. [RP 304]. A copy of the motion was admitted as State's Exhibit 6 [RP 306], and listed Bushek as the protected party, Oxford as the restrained party, and "on the line

¹ Eight of the 10 calls occurred within the charging period of 11/19/14 through 12/11/14. [CP 3-7]. And each call included notice that the call was subject to recording and monitoring. [RP 290, 293, 299, 301, 309, 313, 317, 321, 327].

‘Signature of Protected Person,’ it (was) signed Dawn Bushek [RP 305(.)]” with a listed phone number of 917-281-0633. [RP 306]. A police report dated July 2014 associated this number with Bushek. [RP 335]. During a call on December 23, which was outside the charging period, the female declared that she was “on the phone with Nick.” [RP 332].

On December 11, 2014, Bushek’s motion to rescind the no-contact order was denied at a hearing attended by Bushek and Oxford. A video of the court proceeding was played to the jury. [RP 352-55]. At the time, Bushek’s hair was “almost black.” [RP 320].

Oxford rested without presenting evidence. [RP 421].

D. ARGUMENT

OXFORD WAS PREJUDICED BY HIS
COUNSEL’S FAILURE TO PROPERLY
OBJECT TO THE ADMISSION OF
EVIDENCE OF THE RECORDED TELEPHONE
CALLS FROM THE CLARK COUNTY JAIL
FOR LACK OF SUFFICIENT AUTHENTICATION
AND VIOLATION OF HEARSAY AND RIGHT
OF CONFRONTATION.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82

Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

01. Authentication

As a condition precedent to the admissibility of a recording, the proponent must present evidence sufficient to support a finding that the recording is what it purports to be. See ER 901(a). The person speaking on a recording must be identified: “a foundational witness (or someone else with the requisite knowledge) usually must identify those voices.” State v. Jackson, 113 Wn. App. 762, 767, 54 P.3d 739 (2002). However, a voice recording can also be authenticated by evidence sufficient to support the identification, with no requirement of direct identification of the voice by a participant in the call. State v. Williams, 136 Wn. App. 486, 499-501, 150 P.3d 111 (2007). In such a case, self-identification combined with circumstantial evidence is usually sufficient. Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 171, 758 P.2d 524 (1988), review denied, 112 Wn.2d 1001 (1989). In Williams, where the State failed to produce any participant in the admitted voice recording, Division III of this court found the recording of the victim’s 911 call properly authenticated:

(T)he trial court had both spoken to Otis (victim) in court and listened to the recording of the 911 call before it made the ruling on the recording’s authenticity. The trial court

was, therefore, in the best position to determine if Otis' voice matched that on the recording and to require any additional authenticating evidence. Other factors, including the recital of Otis' address by the 911 caller, the fact that Otis admitted calling 911 when questioned by the court, and the fact that the events recounted by the caller were consistent with those testified to by (a second victim), all support the trial court's decision as to authenticity.

State v. Williams, 136 Wn. App. at 501.

Here, in contrast, insufficient evidence was presented identifying the voice of the female caller. As no witness was familiar with her voice, no comparison could be made. Critically, the female caller never self-identified as Bushek and no evidence was advanced that that Bushek admitted she was the caller, as happened in Williams. Under Passovoy, Division I of this court ruled that the circumstantial evidence was sufficient to authenticate a telephone call where there was testimony that the caller had self-identified as the person in question, the caller was returning a call as requested, and the caller demonstrated familiarity with the facts of the incident. Passovoy, 52 Wn. App. at 171. Similarly, in State v. Danielson, 37 Wn. App. 469, 681 P.2d 260 (1984), Division I again found sufficient authentication of a recording where the caller self-identified himself, knew personal information, and had returned a call as requested. Danielson, 37 Wn. App. at 472-73. Three conditions satisfied, each time.

The evidence in this case fell short of the three conditions adhered to in Passovoy and Danielson. Since there was no evidence of self-identification or a returned call from the female on the recordings, and given that 8 of the 10 calls were made on two other inmates' accounts, the evidence, either direct or circumstantial, was insufficient to support a finding of identification, with the result that the recording was not properly authenticated and should not have been admitted.

02. Hearsay

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions, none of which apply in this case. ER 802.

The recorded conversations were introduced for the sole purpose of proving that the female on the recordings was Bushek, and that Oxford was thus violating no-contact order prohibiting him from telephoning Bushek. For this reason, the statements of the female caller were offered for the truth of the matter asserted in order for the jury to find beyond a reasonable doubt that Oxford was in fact talking to Bushek, for otherwise the conversations were irrelevant.

//

03. Right of Confrontation

The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with witnesses against him.” Similarly, article I, section 22 of the Washington State Constitution asserts that “[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face.” Const. art. I, § 22 (amend. 10). In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)), our Supreme Court concluded that article I, section 22 is more protective than the Sixth Amendment with regard to a defendant’s right of confrontation.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment’s Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59. On appeal, the State has the burden of establishing that statements are nontestimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

In this case, there was no showing that the female caller was unavailable for trial or subject to prior cross-examination. The recordings

captured her extended comments, the content of which was used to establish her identity and thus demonstrate that Oxford had knowingly violated a provision of the no-contact order alleged in counts II-IX. Given that she was aware the calls were subject to recording and monitoring, her statements were made “under circumstances which would lead an objective witness reasonably to believe that the statement(s) would be available for use at a later trial,” Crawford, 541 U.S. at 52, which they were. It cannot be doubted that the substance of the conversations, and not the mere fact that they took place, was imperative to the State’s case because it was used to establish Bushek as the female caller. Under these circumstances, Oxford was entitled to “be confronted with” the person giving this testimony at trial. Id. at 54.

04. Ineffective Assistance of Counsel

The record does not and could not reveal any tactical or strategic reason why trial counsel either invited error or failed to object to the above inadmissible evidence that implicated Oxford in counts II-IX. Had counsel properly objected, the trial court would have granted the objection under the law argued herein.

To establish prejudice a defendant must show a reasonable probability that but for counsel’s deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270

(1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” Leavitt, 49 Wn. App. at 359.

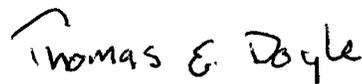
The prejudice here is self-evident and not harmless. The improper admission of the recorded calls was not of minor significance, for it was the key piece of evidence presented by the State to demonstrate that Oxford had violated the no-contact order on the eight occasions encompassed in counts II-IX. His convictions on these count must be reversed, for without the challenged evidence the State could not prove its case vis-à-vis counts II-IX.

Counsel’s performance was deficient, which was highly prejudicial to Oxford, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions in count II-IX and remand for retrial.

E. CONCLUSION

Based on the above, Oxford respectfully requests this court to reverse his conviction in counts II-IX and remand for new trial.

DATED this 23rd day of September 2015.



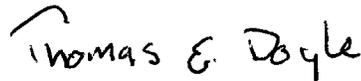
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Anne M. Cruser	Nicholas A. Oxford #372718
Prosecutor@Clark.wa.gov	A.H.C.C.
	P.O. Box 1899
	Airway Heights, QA 99001-1899

DATED this 23rd day of September 2015.



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

September 23, 2015 - 3:08 PM

Transmittal Letter

Document Uploaded: 4-473135-Appellant's Brief~2.pdf

Case Name: State v. Oxford

Court of Appeals Case Number: 47313-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:

Prosecutor@Clark.wa.gov