

NO. 47291-1-II

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

STATE OF WASHINGTON, Respondent

v.

NICHOLAS ANDREW OXFORD, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02397-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. Oxford Received Effective Assistance of Counsel 1

STATEMENT OF THE CASE..... 1

ARGUMENT 8

 I. Oxford Received Effective Assistance of Counsel 8

 a. There was sufficient evidence to authenticate
 the jail recordings. 12

 b. The statements were not hearsay..... 15

 c. There was no Confrontation issue as the
 statements were non-testimonial and not offered
 for the truth of the matter asserted..... 18

CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	19
<i>In re Pers. Restraint of Theders</i> , 130 Wn.App. 422, 123 P.3d 489 (2005)	18, 19, 20
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).....	11
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	10
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2011)	9
<i>State v. Danielson</i> , 37 Wn. App. 469, 681 P.2d 260 (1984).....	13
<i>State v. Doerflinger</i> , 170 Wn.App. 650, 285 P.3d 217 (2012)	19
<i>State v. Esposito</i> , 223 Conn. 299, 613 A.2d 242, 251 (1992).....	18
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994)	10, 11
<i>State v. Hurtado</i> , 173 Wn.App. 592, 294 P.3d 838 (2013).....	19
<i>State v. Jackson</i> , 113 Wn. App. 762, 54 P.3d 739 (2002)	13
<i>State v. Kylo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009)	10, 11
<i>State v. Mason</i> , 127 Wn.App. 554, 556 n. 26, 110 P.3d 245 (2005)	19
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10
<i>State v. Michael</i> , 160 Wn. App. 522, 247 P.3d 842 (2011)	12
<i>State v. Moses</i> , 129 Wn.App. 718, 119 P.3d 906 (2005).....	19
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	10
<i>State v. Renfro</i> , 96 Wn.2d 902, 639 P.2d 737 (1982)	10
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	9, 11
<i>State v. Williams</i> , 136 Wn. App. 486, 150 P.3d 111 (2007).....	13, 15
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	9, 10, 11, 12
<i>U.S. v. Jimenez Lopez</i> , 873 F.2d 769, 772 (5th Cir. 1989)	13

Other Authorities

5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE sec. 900.2, at 175; sec 901.2, at 181-82 (4th Ed. 1999).....	12, 13
---	--------

Rules

ER 801 17
ER 801(c) 15, 18
ER 901 12, 13

Constitutional Provisions

Article I, section 22 of the Washington Constitution 9, 19
Sixth Amendment to the United States Constitution 9, 19

RESPONSE TO ASSIGNMENTS OF ERROR

I. Oxford Received Effective Assistance of Counsel

STATEMENT OF THE CASE

The State agrees with Oxford's Statement of the Case with the following additional details regarding the contents of the jail phone calls.

During the phone calls, the female caller (who the State purported to be Dawn Bushek) discussed the night of the first incident, waiting at the room for the male caller (who the State purported to be Oxford), that the male caller's father was "a dick," and about how to get the no-contact order rescinded. RP 291-93. On another call it is obvious the female caller and the male caller are discussing that the male caller would like the female caller not to appear in court from the following exchange:

MALE VOICE: All right. So let's say -- you remember Tim (inaudible), right?

FEMALE VOICE: Yep.

MALE VOICE: Okay. Will you tell him not -- like, I don't want to see him at any sort of hearing or anything that I have or any court thing. You know what I mean?

FEMALE VOICE: Okay. Yeah, I do. But why can't he go?

MALE VOICE: Well, because he -- because you probably asked to go.

FEMALE VOICE: Oh, okay.

MALE VOICE: And if I never – I don't know how to say this. It was – I talked to somebody and they said that they – it was never confirmed that it was him or not. You know what I mean?

FEMALE VOICE: Oh, I know what you're saying. Right. I mean, lots of people look alike, right?

MALE VOICE: Right. Exactly. And so he is – so a lawyer today that I talked to told me to – told me to tell him that.

FEMALE VOICE: Okay. I'll make sure that I get – pass that along. Definitely.

MALE VOICE: And that way –

FEMALE VOICE: Okay.

MALE VOICE: And his number doesn't – his phone number doesn't get to anybody, too, because that's very important.

RP 294-95.

During the jail phone calls the callers discussed having someone lift the no-contact order, clearly referring to the usual process of having the victim move to rescind the no contact order.

MALE VOICE: So that was taken care of?

FEMALE VOICE: Oh, my God.

MALE VOICE: Right.

FEMALE VOICE: So – oh, fuck. I don't remember what I was about to say. Oh, did he think that you can ask about, like, us getting the no-contact order dropped – or you and that person?

MALE VOICE: Yeah. It happens from the other end, not my end a lot. To – that's, like, the big way to go, I guess.

FEMALE VOICE: So what can I pass along to somebody to do?

MALE VOICE: You can't, because I can't third-party contact anybody. But I don't know –

FEMALE VOICE: Oh, I see.

MALE VOICE: -- (inaudible) you just have to – you have to get on the docket somehow, and I don't know how to do that or anything.

FEMALE VOICE: Hypothetically speaking, though, so there is something that can be done on this end?

MALE VOICE: Right. Yeah, absolutely, there is. Because I've already talked to people around here, and that's how their people have gotten no-contacts dropped –

FEMALE VOICE: Oh –

MALE VOICE: -- I mean, while they're in here.

FEMALE VOICE: -- okay. So I didn't – I mean, I just need to figure out getting on the docket somehow and just looking into that.

MALE VOICE: I don't know. Yeah, hypothetically.

FEMALE VOICE: Let's just – hypothetically, somebody knows –

MALE VOICE: Right.

RP at 296-97.

The female caller and male caller later express their mutual love for one another:

MALE VOICE: --but I just wanted to tell you I love you and thank you so much and just be strong.

FEMALE VOICE: You're welcome. I will. I love you so much, baby. I'm just waiting but missing you so bad. So bad. God, is there any reason—you're all I think about.

MALE VOICE: I love you.

RP 300-01.

The callers also discuss the female doing something to her hair:

FEMALE VOICE: Oh, that's good. I got that hair (inaudible) thing worked out, so...

MALE VOICE: The what?

FEMALE VOICE: The hair, remember?

MALE VOICE: Oh, really. Good.

FEMALE VOICE: Yeah. Yeah.

MALE VOICE: Okay.

RP 301.

The callers later discuss a notice of a court date for December 11:

FEMALE VOICE: That's good. Did you get your notice about the 11th?

MALE VOICE: About what?

FEMALE VOICE: About the 11th.

MALE VOICE: Yes, I did. I saw that. That's awesome. Not – we shouldn't probably talk about that or anything or write about that at all, but that's awesome. It's really good. I'll really happy about it.

FEMALE VOICE: Oh, right.

MALE VOICE: Right.

FEMALE VOICE: Well, I mean (inaudible). You know if you'll be there?

MALE VOICE: What?

FEMALE VOICE: You know if you'll be there?

MALE VOICE: I can barely understand you.

FEMALE VOICE: Do you know if you're going to be there?

MALE VOICE: If I'll be there?

FEMALE VOICE: Yeah. Yeah.

MALE VOICE: I haven't been subpoenaed or anything. I don't know.

FEMALE VOICE: I mean, possibly – I mean, I just didn't know – like, it really didn't say if (inaudible). I mean, I think you are, but –

MALE VOICE: Yeah. I don't know.

FEMALE VOICE: I mean, I just didn't know if you were going to be going over there (inaudible) –

MALE VOICE: I – I – I honestly don't know. I have no idea how that works.

FEMALE VOICE: Okay. (Inaudible) –

MALE VOICE: I don't know. It's not like I have a choice.
You know what I mean? Like, they're either going to –

FEMALE VOICE: I know. I know.

MALE VOICE: -- bring me there or not, so...

FEMALE VOICE: Yeah, I know. That's what I'm thinking
Have you talked to anybody about it?

MALE VOICE: What?

FEMALE VOICE: Have you talked to anybody about it?

MALE VOICE: No. Oh, yeah, yeah. I have. There's – yeah.
I mean, yeah. There – my lawyer was like, 'Well, why
wasn't this done before?' And I was like, 'Well, I don't
know.'

FEMALE VOICE: I didn't know it was on me.

MALE VOICE: I didn't either –

FEMALE VOICE: -- (inaudible) –

MALE VOICE: -- I didn't know. I know

RP 310-12.

Detective Aldridge testified that she had contact with Dawn
Bushek at court on December 11 and recognized her as the woman from
the DOL photo, but her hair had been dyed darker. RP 218-20.

Later on December 11, there is a telephone call between the same
male and female where they discuss something not good having happened:

FEMALE VOICE: Hi.

MALE VOICE: Hey.

FEMALE VOICE: That really sucked.

MALE VOICE: Yeah. It's okay.

FEMALE VOICE: I'm so sorry.

MALE VOICE: It's okay.

FEMALE VOICE: I'm still working on my end.

MALE VOICE: Okay. You're beautiful. Thank you.

FEMALE VOICE: No, you are. And my heart is so broken.
You don't even know.

MALE VOICE: It's okay. It will be all right.

FEMALE VOICE: It's not okay. No, it is not. None of it is
okay.

MALE VOICE: It will work out.

RP 321.

On another date the two callers again reference the female's hair:

MALE VOICE: Okay. I love your pictures. They're
beautiful.

FEMALE VOICE: Oh, you got it okay?

MALE VOICE: Yeah.

FEMALE VOICE: Okay. Good. You think it's really bad.

MALE VOICE: Huh?

FEMALE VOICE: You think it's going to cause any issues?

MALE VOICE: You did what?

FEMALE VOICE: Are the pictures going to cause you any issues?

MALE VOICE: I don't think so. Uh-huh.

FEMALE VOICE: Okay. Good.

MALE VOICE: Thank you. They're beautiful.

FEMALE VOICE: Okay. Did you like my black hair?

MALE VOICE: Yeah. Yeah, I did. It looked good.

FEMALE VOICE: It's different, huh?

MALE VOICE: Yeah.

RP 331.

ARGUMENT

I. Oxford Received Effective Assistance of Counsel

Oxford claims that his defense lawyer was ineffective for failing to object to the admission of the jail phone calls based on authenticity, hearsay, and Confrontation. An attorney need not object to frivolous issues in order to be effective. There was no validity to an argument that the jail phone calls were not authentic, that the victim's statements were hearsay,

or that they were testimonial and violated Oxford's right to Confrontation. Oxford's counsel was not ineffective for failing to make these objections.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *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). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91. Therefore, in order for Oxford to prevail on his claim, he must show that but for his attorney's failure to object to authentication, hearsay or Confrontation issues, the outcome of the trial would have been different.

- a. There was sufficient evidence to authenticate the jail recordings.

Oxford alleges his trial counsel was ineffective for failing to object to the admission of the jail phone calls on an authentication basis. There was more than sufficient evidence presented to show these calls were what they were purported to be and defense counsel was not ineffective for failing to object on this basis. Even if counsel had objected the court would have properly overruled the objection and found the calls to be authentic.

"Authentication is a threshold requirement designed to assure that evidence is what it purports to be." 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE sec. 900.2, at 175; sec 901.2, at 181-82 (4th Ed. 1999). The State satisfies ER 901, the evidence rule which requires that documents be authenticated or

identified, when it introduces sufficient evidence to allow a reasonable juror to find in favor of authenticity or identification. *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). Furthermore, to establish authentication, the court is not bound by the rules of evidence and may rely upon lay opinions, hearsay, or *the proffered evidence itself* in making its determination. TEGLAND, *supra*, sec. 104.5 at 98 (emphasis added).

Importantly, ER 901 does not limit the type of evidence allowed to authenticate a document; it simply requires that some evidence sufficient to support a finding that the evidence in question is what a proponent claims it to be is introduced. *U.S. v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989). “A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic.” *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111 (2007) (citing to *State v. Jackson*, 113 Wn. App. 762, 769, 54 P.3d 739 (2002)).

In *Williams*, the court on appeal found the authentication was sufficient when the judge heard the declarant’s voice in person and on the recording, and the recording listed the declarant’s address and the facts of the events recounted were consistent with those testified to by another witness. *Williams*, 136 Wn. App. At 501. The court’s ruling in *Williams*

shows that a trial court may listen to the recording and use the contents of said recording to authenticate it. The calls in the instant case are authenticated in a similar manner.

On appeal, Oxford contends that case law requires three conditions precedent to any finding of authenticity of a voice recording. However, this is an inaccurate recitation of the law. Though the cases Oxford cites do have findings of authenticity where the declarant identifies himself or herself in the recording, shows knowledge of facts and indicates they're returning a call, these cases do not hold that these are requirements of authenticity. Merely, these cases analyzed the cases on a case-by-case basis and found the authenticity to be sufficient. There is no requirement of self-identification precedent to a finding of authenticity as Oxford claims.

The issue here is not whether the trial court properly admitted the recording, but whether defense counsel was ineffective for failing to object on a basis of authenticity. The main issue of authenticity here was the identity of the callers. The contents of the jail phone calls themselves clearly show the identity of the parties. The victim refers to the defendant by his first name; they discuss his arrest, the no contact order, getting the order dropped, her dyeing her hair, and their love for one another. These statements within the jail phone calls added to evidence from witnesses

about the arrest, the existence of and the victim's attempts to rescind the no-contact order and her recent change in hair color corroborate her identity and authenticate the phone call. As in *Williams*, the contents of the call may be used for authentication purposes and the trial court properly did so here. Furthermore, counsel was not ineffective for failing to object on a losing argument and it could be a reasonable trial tactic to object to on a more likely winning argument. Oxford has also failed to meet the second prong of the test, to show prejudice. Even with a defense objection on the basis of authentication, the evidence clearly shows the trial court would have allowed admission of the phone calls and properly found the authentication sufficient. Oxford cannot show he was prejudiced by his counsel's failure to object. His claim fails.

b. The statements were not hearsay.

Oxford's next claim is that his counsel was ineffective for failing to object to the admission of the jail phone calls on the basis that the victim's statements within the phone calls were inadmissible on a hearsay basis. The statements were clearly not hearsay and counsel was not ineffective for failing to object. Oxford's claim fails.

ER 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Not every out-of-

court statement offered into evidence is “hearsay.” It also must satisfy the second prong and be offered into evidence for the truth of the matter asserted. For example, the statement “it is raining” could be hearsay if offered into court to prove that it was raining at the time the statement was made. However, it is not “hearsay” if it is offered to show why someone went back inside to get an umbrella, because instead of being offered for the truth of the matter asserted (that it is raining) it was offered to show the effect on the listener (why the listener went back inside). In this case, the statements made by the victim on the jail phone calls were not offered to prove the truth of the matter therein. Therefore they are simply not hearsay.

Oxford states in his brief, “the recorded conversations were introduced for the sole purpose of proving that the female on the recordings was Bushek....” Br. Of Appellant at 8. As Oxford states earlier in his brief, Bushek never identifies herself on the phone calls; therefore there is no statement of identity that was offered to prove the truth of the matter. The statements contained within the phone calls include things like:

“Oh no. Your dad—I was so waiting for you at the room and your dad was such a dick. Oh, my God.”

RP at 291.

“I’m so sorry. Oh, my God. Is there any hope of getting this no-contact order lifted ever?”

RP at 292.

“I love you so much baby. I’m just waiting but missing you so bad. So bad.”

RP at 300-01.

“The hair thing worked out.”

RP at 301.

“That really sucked.”

RP at 321.

“Did you like the black hair?”

RP at 331.

These statements were clearly not admitted for the truth of the matter asserted- the State did not attempt to show that the declarant loved the defendant or that her coloring her hair was a good choice or that it “sucked” about losing the NCO rescission hearing. That is what the State would have had to be proving if it was attempting to admit the victim’s statements on the jail phone calls for the truth of the matter asserted.

In interpreting ER 801 and the definition of hearsay, this Court has previously found that “the matter asserted” is the “matter set forth in the writing or speech on its face, not the matter broadly argued by the

proponent of the evidence.” *In re Pers. Restraint of Theders*, 130 Wn.App. 422, 432, 123 P.3d 489 (2005) (citing *State v. Esposito*, 223 Conn. 299, 613 A.2d 242, 251 (1992)).

Instead, the State sought admission of these phone calls to prove that a crime occurred- the phone call was the crime as it was each conversation that was alleged to be a violation of the no contact order. The specific statements of the victim were also admitted to prove her identity when linked up with other verifiable facts showing it was indeed the same person. Thus there was no hearsay admitted, only statements not offered for the truth of the matter asserted which, pursuant to ER 801(c), is not hearsay and the rules against hearsay do not apply.

Oxford’s attorney was not ineffective for failing to make a losing argument. These statements by the victim were clearly not “hearsay” as defined by the evidence rules and therefore the ban against the admission of hearsay into evidence did not apply to these statements. Oxford’s claim of ineffective assistance of counsel fails.

- c. There was no Confrontation issue as the statements were non-testimonial and not offered for the truth of the matter asserted.

Oxford’s last claim is that his attorney was ineffective for failing to object to the statements based on his right to confront witnesses. The statements that were offered from the victim were all non-hearsay and

non-testimonial and therefore the Confrontation Clause was not implicated. Oxford's claim fails.

A defendant has the constitutional right to confront witnesses against him under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington State Constitution. Under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), this constitutional right has been interpreted to apply to "testimonial" statements made out of court. However, the Confrontation Clause is not implicated where out-of-court statements are not offered for the truth of the matter asserted. "When out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise." *Theaders*, 130 Wn.App. at 495 (quoting *State v. Mason*, 127 Wn.App. 554, 556 n. 26, 110 P.3d 245 (2005) and *State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005)). As discussed above, the statements made by the victim in this case were not offered for the truth of the matter asserted and thus the Confrontation Clause is not implicated. Oxford's rights were not violated.

Furthermore, these statements were not testimonial. The Confrontation Clause applies only to testimonial statements or materials. *State v. Hurtado*, 173 Wn.App. 592, 598, 294 P.3d 838 (2013) (citing *State v. Doerflinger*, 170 Wn.App. 650, 655, 285 P.3d 217 (2012)). What

is and is not a “testimonial statement” is not clearly drawn out, but case law has continued to interpret this phrase and has found that statements such as these are clearly not testimonial statements.

In *In re Pers. Restraint of Theders*, 130 Wn.App. 422, 123 P.3d 489 (2005), the Court on appeal addressed whether out-of-court statements made by a co-defendant were non-hearsay and whether their admission violated the defendant’s right of Confrontation. The statements that were offered were out-of-court statements that were not offered for the truth of the matter asserted and therefore were non-hearsay. The Court found when “out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise.” *Theders*, 130 Wn.App. at 433. The same is true in the case at hand. The statements were not offered for the truth of the matter asserted and therefore there is no confrontation issue.

In evaluating ineffective assistance of counsel claims, there is a strong presumption that counsel was adequate and made his decisions while exercising reasonable professional judgment. *Theders*, 130 Wn. App. at 434. Not every possible objection must be made. It is reasonable for counsel to evaluate his strongest arguments and make only those objections. It is clear that the statements were non-testimonial and not

offered for the truth of the matter asserted. Oxford's claim of ineffective assistance of counsel fails.

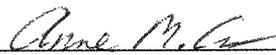
CONCLUSION

Oxford received the benefit of effective assistance of counsel. His claim of ineffective assistance has no merit and his convictions should be affirmed.

DATED this 13th day of January, 2016.

Respectfully submitted:

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January 13, 2016 - 3:30 PM

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