

**NO. 47295-3-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TRISTAN FELEPADIUDE BRIGHT, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Ronald Culpepper

No. 14-1-02370-9

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were defendant's prior convictions for violation of a no contact order admissible when defendant's guilty plea was constitutionally valid based on a knowing, voluntarily, and intelligently made?
2. Did the trial court properly admit audio records of defendant's telephone calls to the victim from jail?

B. STATEMENT OF THE CASE.

1. Procedure

Tristan Felepadiude Bright ("defendant") was charged with two counts of domestic violence court order violation on June 19, 2014. CP 1-2. On January 21, 2015, the State filed an amended information adding three additional counts of domestic violence court order violation. CP 35-38.

The case was called for trial on January 15, 2015. 1 RP 4. Defendant filed a motion to exclude his prior convictions for violation of a protective order. CP 40-44. The State responded to the motion, including the transcript from the plea in its response. CP 45-155. The trial court excluded defendant's Tacoma Municipal Court conviction. 2 RP 136. However, with regard to defendant's two other prior convictions in the Pierce County Superior Court, the trial court found that the guilty plea was a "valid, knowing, intelligent guilty plea made by the defendant." 2 RP 126.

The jury found defendant guilty as charged. CP 191-205. The trial court sentenced defendant to 36 months, an exceptional sentence below the standard range based on the mitigating circumstance that the victim was allowing contact. 02-06-15 RP 28. Defendant filed this timely appeal. CP 259.

## 2. Facts

Lakesha Edwards lives in Tacoma, Washington. 2 RP 196. Defendant is her boyfriend and they have a child together. 2 RP 197.

In June of 2014, defendant knocked on her door at about 6:00 am. 2 RP 198. She let him in, but defendant was yelling at her. 2 RP 198. She got scared and ran out of the house. 2 RP 198. Defendant followed her. 2 RP 198.

Edwards ran to the parking lot and asked a neighbor to help her. 2 RP 199. Defendant was “just going crazy” and grabbed her leg and was pulling her leg. 2 RP 199. The police arrived and she was able to run back to her house. 2 RP 199.

Edwards’ phone number is 253-279-1987. 2 RP 198. Defendant called her from jail on June 18, 2014, and probably on other dates as well. 2 RP 199.

Molaja Atinsola-Moronto is Lakesha Edwards’ neighbor. 2 RP 230-231. In June of 2014, he was in his car in the parking lot of his apartment building. 2 RP 231. Edwards came out and told him to call the

cops because something was about to happen to her. 2 RP 232. As he was talking to her, defendant came out. 2 RP 232. He had blood on his chin. 2 RP 232. Defendant was trying to open the car door and drag her out of the car, but Edwards was trying to shut herself in the car. 2 RP 233. The police eventually arrived. 2 RP 235-236.

Tacoma Police Officer Jeffrey Robillard was dispatched to Lakesha Edwards' apartment complex on June 18, 2014. 2 RP 158. When he arrived at the scene, he observed a female in the driver's seat of a car and the defendant standing at the driver's door, "aggressively trying to pull the female out of the car." 2 RP 159. When defendant saw Officer Robillard, he stopped and started walking towards him. 2 RP 159. Officer Robillard order him to the ground, but defendant refused to comply and kept walking. 2 RP 159. Defendant said, "What are you going to do, shoot me?" Officer Robillard informed defendant that he would be tazed if he did not comply. 2 RP 160. Defendant still failed to comply and was tazed. 2 RP 160.

Officer Robillard interviewed Molaja Atinsola-Moronto and Lakesha Edwards. 2 RP 162. Officer Robillard then ran defendant's name through records and learned of two no contact orders prohibiting defendant from having contact with Edwards. 2 RP 165; Exhs. P8, P9.

Pierce County Sheriff Deputy Don Carn is the SECURUS systems administrator. 2 RP 175. SECURUS is the inmate telephone system for the jail. 2 RP 175. Three telephone calls, made using defendant's unique PIN number, were made from the jail to 253-279-1987. 2 RP 179-180. SECURUS identified the phone number as Edwards' phone number. 2RP 181. The first call was made on June 18, 2014. 2 RP 180, Exh. P4. The second call was made on June 19, 2014. 2 RP 180, Exh. P4. The third call was made on July 22, 2014. 2 RP 180, Exh. P4.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY RULED THAT DEFENDANT'S PRIOR CONVICTIONS WERE ADMISSIBLE.

The constitutional validity of an order is a question of law for the court to resolve. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005)(the validity of an order is a preliminary question for the court, not a factual element for the jury). Whether defendant's previous convictions for violation of a no contact order were issued under one of the specific RCW chapters listed in former RCW 26.50.110(5) is a threshold question of law for the trial court to determine. *State v. Case*, --- P.3d --- (August 11, 2015). Once the State submits this evidence to the trial court, the trial court can allow the State to submit this evidence to the jury. *Id.*

In challenging the constitutional validity of a conviction, the defendant “bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction.” *State v Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993). The burden then shifts to the State to prove beyond a reasonable doubt that the conviction is constitutionally valid. *Id.*

A “court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). To be constitutionally valid, a guilty plea must be “intelligently and voluntarily made and with knowledge that certain rights will be waived.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). To determine whether a plea is knowingly, intelligently, and voluntarily made, the court must consider the totality of the circumstances. *Id.* Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant’s signature on the plea form is strong evidence of a plea’s voluntariness.” *Branch*, 129 Wn.2d at 642. If the trial court orally inquires into a matter that is on the plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Id.*; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant

has orally confirmed statements in this written plea form, that defendant “will not now be heard to deny these facts.” *In re Keene*, 95 Wn.2d 203, 207, 622 P.2d 13 (1981). The constitutional requirements for a voluntary plea include defendant’s awareness that he is waiving 1) the right to remain silent, 2) the right to confront his accusers, and 3) the right to a jury trial; further 4) that the defendant is aware of the essential elements of the crime with which he is charged; and 5) defendant is aware of the consequences of pleading guilty. *In re Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985).

CrR 4.2(d) requires a factual basis for a charge before the court accepts the plea, however, this is a procedural requirement and not a constitutional requirement. “To be made sufficiently aware of the nature of the offense, the defendant must be advised of the essential elements of the offense; he must be given ‘notice of what he is being asked to admit.’” *State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845, 847 (1980) *citing Henderson v. Morgan*, 426 U.S. 637, 647, 96 S. Ct. 2253, 2258, 49 L. Ed. 2d 108 (1976). The CrR 4.2(d) requirement that the court find a factual basis for the plea is not the same as the constitutional requirement that defendant understand the nature of the charge. *See Hilyard*, 39 Wn. App. At 726-7. “[The] factual basis is not an independent constitutional requirement and is constitutionally significant only in so far as it relates to the defendant’s understanding of his or her plea.” *State v. Hews*, 108 Wn.2d 579, 592, 749 P.2d 983 (1987). The requirement is intended

simply to enable the trial court to verify the accused's understanding of the charges. *Hilyard*, 39 Wn. App. At 726-7. The lack of a factual basis only affects the voluntariness when the defendant is unable to understand how the law relates to the facts in the defendant's case. *Hews*, 108 Wn.2d at 592.

At trial defendant argued that his prior convictions under Cause No. 11-1-03470-6 should be excluded because the *Alford* plea language was insufficient. CP 40-44, 2 RP 110-117. The trial court rejected this argument and found that defendant's prior guilty plea under Pierce County Cause No. 11-1-03470-6 was "sufficient to ensure a valid guilty plea, valid, knowing, intelligent guilty plea made by defendant at the time." 2 RP 126. Based on this guilty plea, the court determined that the State had proven defendant's two prior convictions.

Defendant then stipulated that he had two prior convictions for violating court orders issued under RCW, chapters 10.99 or 26.50. CP 156-157, 207-208, 209-210. Defendant's stipulation waived his right to assert the government's duty to present evidence to the jury regarding these prior convictions. *State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006).

On appeal, defendant now argues that even though he pleaded guilty to two misdemeanor counts of violating a protective order, he did not

understand that he would be guilty of both counts because the Second Amended Information omits that the orders he violated were issued under RCW 25.50.110(1)(a). Brief of Appellant, 9-10.

However, the Second Amended Information specifically references RCW 25.50.110(1):

That TRISTAN FELEPADIUDE BRIGHT, in the State of Washington, on or about the 24th day of September, 2011, with knowledge that the Pierce County Superior Court had previously issued a foreign protection order, protection order, restraining order, no contact order, or vulnerable adult order pursuant to state or tribal law in Cause No.08-1-03837-0 and/or 10-1-01528-2 and/or 11-1-03470-6, did unlawfully violate said order by knowingly violating the restraint provisions therein by contacting Lakesha Edwards, and/or by knowingly violating a provision excluding him other from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and/or by knowingly violating a provision of a foreign protection order for which a violation is specially indicated to be a crime;, contrary to RCW 26.50.110(1), a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

CP 111-12. The Second Amended Information also lists the various cause numbers where defendant has had protection orders issued against him, including Cause No. 11-1-03470-6. Contrary to defendant's assertion, the Second Amended Information complies with *City of Seattle v. Termain*, 124 Wn. App. 798, 103 P.3d 209 (2004) as it identifies the order(s) the defendant is alleged to have violated, along with the victims' name so that it "fairly impl[ies] what actual conduct was being charged." *Id.* at 806.

In Pierce County Cause No. 11-1-03470-6 , defendant was advised that he was being charged with two counts of violating a presentence no contact order and he indicated that he understood the charges. CP 62. Defendant also admitted that he understood everything in the guilty plea form. CP 62. The court confirmed that defendant still wished to plead guilty after its colloquy with him. CP 66. The court then reviewed the declaration of probable cause and found a factual basis for defendant's pleas. CP 66. The court found that defendant's pleas were given knowing, voluntarily, and intelligently. CP 66.

The trial court correctly found that defendant's prior guilty pleas under Pierce County Cause No. 11-1-03470-6 were "sufficient to ensure a valid guilty plea, valid, knowing, intelligent guilty plea made by defendant at the time." 2 RP 126. This Court should affirm defendant's convictions.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING AUDIO RECORDINGS OF DEFENDANT'S TELEPHONE CALLS TO THE VICTIM FROM JAIL.

a. **Defendant waived his objection to the authenticity of the phone calls by failing to object at trial on that basis.**

An appellate court generally will not consider a claimed error that was not raised in the trial court. *See* RAP 2.5(a). One exception to this rule is when the claimed error is a "manifest error affecting a

constitutional right.” RAP 2.5(a)(3). To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* at 935. The purpose of this rule is to allow the trial court the opportunity to consider all issues and arguments and correct any errors, in order that unnecessary appeals will be avoided. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The court has “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Stevens*, 58 Wn. App. 478, 485-6, 794 P.2d 38 (1990); *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). If the specific basis for the objection at

trial is not the basis the defendant argues at the appellate level, then the defendant has lost their opportunity for review. *Guloy* at 422.

In the present case, the defense attorney was not objecting to authentication of the phone calls:

With respect to Mr. Carn's testimony from long ago this morning, **the defense doesn't have any issue with the authentication of the calls** and the processing and that sort of thing, that the number that we're dealing with was assigned to Mr. Bright, that sort of thing, or that the 253 number that we discussed was the number that was called, but what the defense is objecting to allowing Mr. Carn to testify or the records come in is the information, the testimony that the phone number is Lakesha Edwards' phone number. That seems pretty far attenuated, and nothing that the officer testified to shows that that would come in appropriately through him.

It doesn't sound as though actual phone records were obtained. Those could have been subpoenaed from the cell provider. I believe it's a cell phone, or whoever the provider is, and presented to court that way. That wasn't done. These sound like they were records made by SECURUS in setting up the payment for those phone calls, and he acknowledged that. He doesn't know whether or not that was done by Lakesha Edwards or who did it. He doesn't have that information, so **I don't think those are appropriate business records that are kept by the jail that could be admissible**, like the information about Mr. Bright's PIN number.

1 RP 62-63 (emphasis added).

As defendant's objection at trial was that these were not business records, defendant cannot now appeal based on authenticity as that was not the basis for the objection in the trial court.

**b. Even if this issue were not waived, the trial court properly admitted the phone calls.**

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). ER 901 requires authentication or identification as a condition precedent to admissibility of evidence. ER 901. For a telephone conversation, ER 901(b)(6) offers an illustration:

Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

ER 901.

The identity of a party to a telephone conversation may be established by direct or circumstantial evidence. *State v. Danielson*, 37 Wn. App 469, 472, 681 P.2d 260 (1984). The trial court should admit the evidence if there is sufficient proof to permit a reasonable juror to find in favor of authentication, or identification. *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171, 758 P.2d 524, 527-28 (1988), *citing* comment to ER 901. 5 A. K. Tegland, Wash.Prac., Evidence § 452 (2d ed. 1980). Courts routinely find a call to be authenticated when self-identification is combined with virtually any circumstantial evidence. *Id.*

In the case at bar, Deputy Carn testified at a motion in limine regarding the three calls admitted into evidence. The three calls were made using defendant's telephone PIN number. 1 RP 39. In addition, defendant says his name, "Tristan" on each call. 1 RP 43-44.

SECURUS, the phone system used by the jail, identified the phone number called as Lakesha Edwards' phone number. 1 RP 40-41. The BNA report, which is a billing name and address associated with SECURUS, shows that Lakesha Edwards set up this account. It was part of an Advance Connect Account where someone created a prepaid collect calling system so defendant could call Edwards. 1 RP 41. In addition, a Justice Exchange phone data lookup also showed that the phone number called belonged to Edwards. 1 RP 47.

The trial court inquired of Deputy Carn:

THE COURT: I want to clarify just one or two things, Deputy Carn. So the BNA information, that is provided to SECURUS by Ms. Edwards in this case?

THE WITNESS: Yes, Your Honor.

THE COURT: So she would have to contact them and say "please set up an account for me or for the inmate"?

THE WITNESS: Your Honor, they can either do it over the telephone or they do it online. They set up an account.

THE COURT: But she contacts them to set it up?

THE WITNESS: Yes, Your Honor.

The content of the calls also demonstrates their authenticity. On the June 18<sup>th</sup> call, the people are talking about how the woman ran out and had gotten the neighborhood involved. 1 RP 56, 95. In the second call, there is conversation about the no-contact order. 1 RP 56. There is also a point in the phone calls where defendant has a conversation with his son, which is pertinent because he and Edwards have a son together. 1 RP 56. In addition, the defendant is telling the child to ask his mother, presumably Edwards, about getting him out of jail. 1 RP 57. The content of these calls is circumstantial evidence that the callers are defendant and Edwards.

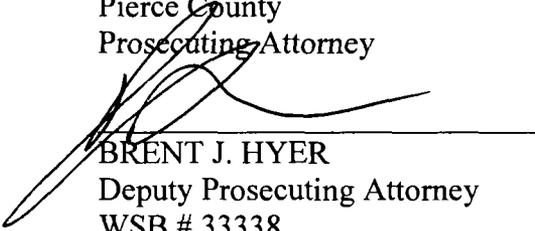
Based on the account information showing that this was defendant's PIN number making these calls, his self-identification, the SECURUS account information showing the account belonged to Edwards, and the content of the calls, that there was sufficient circumstantial evidence showing the identity of the callers in order for the trial court to find that the evidence had been authenticated. Defendant has failed to show that the trial court abused its discretion in admitting these calls into evidence. This Court should dismiss the appeal and affirm defendant's convictions.

D. CONCLUSION.

The Court should uphold all five of defendant's convictions. The trial court did not err in finding that defendant's prior convictions for violation of a no contact order were knowingly made and constitutionally valid. The trial court also did not abuse its discretion in admitting three phone calls made by defendant to the victim while in jail. The phone calls were properly authenticated.

DATED: October 6, 2015.

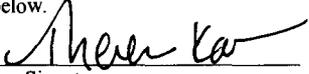
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-6-15   
Date Signature

**PIERCE COUNTY PROSECUTOR**

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