

69509-6

69509-6

NO. 69509-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NELDIN LICONA-RIVERA,

Appellant.

2011 JUN 11 11:02 AM  
COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Washington courts have repeatedly held that jail phone calls are not private and that jailed inmates have a lower expectation of privacy than ordinary citizens. For the first time on appeal, Licona-Rivera claims that his jail calls were private affairs obtained in violation of the Privacy Act and Article I, section 7 of the Washington Constitution. Where Licona-Rivera failed to preserve his claim, should this Court find that it is waived and, in any event, has no merit?

2. Courts have consistently held that jurors with an abiding belief in the truth of the charge are satisfied that the defendant's guilt has been established beyond a reasonable doubt. Here, the trial court instructed the jury using the abiding belief language contained in Washington Pattern Jury Instruction 4.01. Has Licona-Rivera failed to show that the jury was improperly instructed?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Neldin Licona-Rivera was charged by Information with one count of robbery in the first degree. CP 1-2. A jury found Licona-Rivera guilty as charged. CP 13. The trial court sentenced

him to a standard-range sentence of 36 months of incarceration.  
CP 36, 38.

## 2. SUBSTANTIVE FACTS.

On February 23, 2011, at approximately 7:30 p.m., Licona-Rivera and another man entered a small store in the Ballard neighborhood of Seattle; both men were armed with handguns and wore ski masks over their heads. 5RP<sup>1</sup> 8, 22.<sup>2</sup> Leslie Castellanos was the only employee working at the store and had her two-year-old daughter with her. 5RP 5, 7, 21. The store was owned by Castellanos' husband and sold products from Central America and provided money transfer services. 5RP 9. When the men entered, Castellanos was sorting products and her daughter was sitting in a chair watching television. 5RP 23.

Licona-Rivera approached Castellanos near the cash register while his accomplice stood in the doorway and pointed his gun at Castellanos. 5RP 22-23. Licona-Rivera told Castellanos, who was holding her daughter, to open the cash register and said:

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<sup>1</sup> There are 7 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Aug. 21, 2012); 2RP (Aug. 22, 2012); 3RP (Aug. 23, 2012); 4RP (Aug. 27, 2012); 5RP (Aug. 28, 2012); 6RP (Aug. 29, 2012); and 7RP (Sept. 21, 2012).

<sup>2</sup> Licona-Rivera's accomplice was not charged or tried along with him. CP 1-2. The accomplice was never identified by name in the record.

“Give me everything you got or your life ends here, you bitch.”

5RP 22-23.

After Castellanos opened the cash register, Licona-Rivera removed money and asked for the cash from the money transfers. 5RP 27. Once Castellanos showed him where the money was, Licona-Rivera took it, but he dropped a paper receipt onto the floor. 5RP 27, 46. After Licona-Rivera had the money, the two men left the store. 5RP 51.

The robbery was captured on video by the store’s surveillance camera. 5RP 29; Exhibit 5. Licona-Rivera was dressed in faded jeans and laced tennis shoes. 6RP 29; Ex. 5. Licona-Rivera was not wearing gloves on his hands; his accomplice wore gloves. 5RP 22. Castellanos, who is originally from Honduras, recognized Licona-Rivera’s accent as being Central American. 5RP 6, 25.<sup>3</sup>

Shortly after the robbery, Connie Toda, a latent fingerprint examiner for the Seattle Police Department, arrived at the store. 5RP 64, 71, 73. Toda viewed the surveillance video and lifted fingerprints from surfaces Licona-Rivera had touched with his ungloved hands. 5RP 84, 86, 91. Two fingerprints were identified

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<sup>3</sup> Although Castellanos could tell Licona-Rivera’s accent was not Mexican, she could not identify its specific country of origin. 5RP 25.

as belonging to Licona-Rivera: a print from the dropped paper receipt and a print from the glass door. 5RP 94, 117, 129.

After he was arrested, Licona-Rivera was interviewed by Detective Frank Clark of the Seattle Police Department. 6RP 11, 22. Licona-Rivera told the detective that he moved to Seattle from Honduras approximately one month before the robbery. Ex. 23. Although Licona-Rivera stated that he worked at a café near the robbery, he denied ever having been in the store. 6RP 32-33. When Licona-Rivera was shown a still image of himself wearing faded jeans and laced tennis shoes from the surveillance video, Licona-Rivera said he did not own any pair of shoes that had shoelaces. 6RP 24, 29. Detective Clark then showed Licona-Rivera a picture from his Facebook page. 6RP 29. The picture showed Licona-Rivera wearing faded jeans and laced tennis shoes similar to those worn during the robbery. 6RP 29; Ex. 5.

While he was in the King County Jail, Licona-Rivera placed phone calls to his girlfriend and mother. See Ex. 19. In one call, Licona-Rivera told his girlfriend:

... I'm here because of the stupid things I did, the bullshit, I did because I was crazy, love. Now I regret it and I swear to God that I will never do a stupid thing like this in my fucking life... when I return, I will stop

my bad habits... I will not do stupid shit again, never in my fucking life. I swear to God, never again.

6RP 48; Ex. 19 (audio of redacted jail phone calls); Ex. 29 (transcript of redacted jail phone call). In a jail phone call to his mother, Licona-Rivera told her:

Uh, more or less I've been doing bad. Things are not going well in court. They're charging me, well the-the person, I didn't in my... they're accusing me of theft, but the theft they're accusing me of only shows one of my fingers. A finger and... but supposedly, the person says that there was a gun during the theft and this and that, so now it is making my case bigger and bigger.

6RP 52; Ex. 19 (audio of redacted jail phone calls); Ex. 30 (transcript of redacted jail phone call).

At trial, Castellanos explained that she did not know Licona-Rivera by name. 5RP 39. However, she recognized him as a person she had seen before the robbery at a Central American restaurant where she worked. 5RP 39-40.

**C. ARGUMENT**

1. RECORDING JAIL PHONE CALLS DOES NOT VIOLATE THE PRIVACY ACT OR ARTICLE I, SECTION 7 OF THE STATE CONSTITUTION.

Licona-Rivera contends that his jail phone calls were private affairs obtained in violation of the Privacy Act and Article I,

section 7 of the Washington State Constitution. This issue was never raised below; it has not been preserved for review. Moreover, Washington Courts have repeatedly rejected this very argument. See State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008); State v. Hag, 166 Wn. App. 221, 268 P.3d 997, rev. denied, 174 Wn.2d 1004 (2012); State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009).

a. Relevant Facts.

The State played a redacted version of two phone calls made by Licona-Rivera from the King County Jail to his girlfriend and mother, respectively. 6RP 48-52; Ex. 19.<sup>4</sup> In both calls, Licona-Rivera identified himself by his first name. Ex. 19. In his call to his girlfriend, he expressed remorse for the actions that landed him in jail. Ex. 19; Ex. 29. In his call to his mother, he indicated that he was accused of theft that “only shows one of my fingers.” Ex. 19; Ex. 30.

A the beginning of both calls, a pre-recorded statement instructed Licona-Rivera “[f]or English press one”; a tone can be

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<sup>4</sup> Exhibit 19 is a redacted audio recording of both jail phone calls. Exhibit 29 is a transcript of the redacted jail phone call to Licona-Rivera's girlfriend. Exhibit 30 is a transcript of the redacted jail phone call to Licona-Rivera's mother.

heard after Licona-Rivera's selection and the pre-recorded statement continued in English. Ex. 19; Ex. 29; Ex. 30. Before allowing Licona-Rivera to dial a phone number outside the jail, the pre-recorded statement informed him: "This call is from a correctional facility and it is subject to monitoring and recording. After the beep, press one to accept this policy or press two to refuse and hang up." Ex. 19; Ex. 29; Ex. 30. Following this advisement, a tone can be heard on both calls after Licona-Rivera's selection and the phone system allowed Licona-Rivera to proceed and dial a phone number. Ex. 19; Ex. 29; Ex. 30. Once the phone call was connected, the pre-recorded statement informed the recipient of the call:

Hello. This is a prepaid debit call from: Neldin – an inmate at the King County Detention Facility. To accept this call press zero. To refuse this call[,] hang up or press one. To prevent calls from this facility press nine.

...

This call is from a correctional facility and is subject to monitoring and recording. After the beep, press one to accept this policy or press two to refuse and hang up.

Ex. 19; Ex. 29; Ex. 30. After this warning on both calls, a tone can be heard and the recipient of the call was connected to Licona-

Rivera. Ex. 19; Ex. 29; Ex. 30. The conversation between Licona-Rivera and his girlfriend was a mixture of both English and Spanish where both people used the two languages throughout. 4RP 44; Ex. 19; Ex. 29. The conversation between Licona-Rivera and his mother was primarily conducted in Spanish. Ex. 19; Ex. 30.

Before trial, Licona-Rivera submitted briefing and argued to the court that the calls should be suppressed. CP 7. In doing so, he raised very specific objections—none of which relates to the arguments he raises on appeal. CP 7. In his brief to the trial court, Licona-Rivera objected to the admission of the jail calls based on relevance, citing ER 801 and ER 803. CP 7. Licona-Rivera also argued that presenting English translations of the calls “presents hearsay and 6<sup>th</sup> Amendment problems” because part of the jail phone calls are in Spanish. CP 7. These theories were also the basis of Licona-Rivera’s argument before the trial court. 2RP 20-21.

b. Licona-Rivera Failed To Preserve This Issue For Appellate Review.

A reviewing court will not consider an issue raised for the first time on appeal unless the issue constitutes a “manifest” error

affecting a constitutional right. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Even if the claimed error is constitutional in nature, this Court will not review it unless it is also manifest. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). An error is manifest when the defendant shows “the asserted error had practical and identifiable consequences in the trial of the case.” Id. “‘Manifest’ means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. ‘Affecting’ means having an impact or impinging on, in short, to make a difference.” Id.

Absent proof by the defendant that the issue truly constitutes a manifest constitutional error, a party may assign evidentiary error only on the specific ground made at trial. Kirkman, 159 Wn.2d at 926. The purpose of this rule is to allow the trial court an opportunity to consider the issue and prevent or cure any error. Kirkman, 159 Wn.2d at 926. If the facts necessary to adjudicate a particular claimed error are not in the record on appeal, no actual prejudice can be shown and the error cannot be shown to be manifest. State v. McNeal, 98 Wn. App. 585, 595, 991 P.2d 649 (1999) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), aff’d, 145 Wn.2d 352 (2002)).

Licona-Rivera makes no attempt to explain why RAP 2.5(a) does not bar review. In fact, Licona-Rivera's own arguments highlight why he cannot raise this issue. In his brief to this Court and without citing to the record, Licona-Rivera claims that "the parties did not consent to the recording of the conversations," and that "none of the parties here were fluent in English," and that the calls were recorded "without a warrant or other court order." Brief of Appellant at 10, 15. Licona-Rivera can point to nothing in the record supporting these conclusory statements, because he never raised this issue below so no facts were developed to support his arguments. Thus, Licona-Rivera cannot make a showing to this Court that his claim of error is manifest. Likewise, as discussed below, the alleged error violates no constitutional right. The issue should not be considered on appeal.<sup>5</sup>

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<sup>5</sup> It should also be noted that the failure to bring a motion to suppress in the trial court is not necessarily deficient performance under a claim of ineffective assistance of counsel—if an ineffective assistance of counsel claim were raised. See McFarland, 127 Wn.2d at 336. Counsel can legitimately decline to seek suppression of evidence if there appears to be no viable ground for such a motion. State v. Nichols, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). Considering there are two published cases in direct conflict with the position the defendant now argues on appeal, it would not have been ineffective assistance to not raise the issue in the trial court.

c. Licona-Rivera's Jail Calls Were Legally Recorded.

Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” “Private affairs” are “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.” Archie, 148 Wn. App. at 201-02. Washington has a long history of extending strong protections to telephonic communications; those strong protections “do not, however, invariably apply in detention settings.” Id. at 202.

Under the Washington Privacy Act it is unlawful to intercept or record a private communication transmitted by telephone unless all parties to the communication consent. RCW 9.73.030. A “communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” Modica, 164 Wn.2d at 88.

In Modica, the Supreme Court held that jail phone calls are not private and that any expectation of privacy in the recorded calls

is not reasonable. 164 Wn.2d 83.<sup>6</sup> In Archie, this Court held that the recording of jail phone calls does not violate Article I, section 7 of the Washington Constitution or the Privacy Act. 148 Wn. App. 198. Accord Haq, 168 Wn. App. 221.<sup>7</sup>

In an attempt to distinguish these cases, Licona-Rivera makes several claims, which are not supported by, or are directly contrary to, the record. First, Licona-Rivera asserts that “the parties did not consent to the recording of the conversations.” Brief of Appellant at 10. In making this assertion, Licona-Rivera ignores the phone calls themselves. The pre-recorded statement at the beginning of each call instructed the caller *and* the recipient of the call: “press one” to continue and accept the recording of the phone call or “press two” to “refuse and hang up.” Ex. 19; Ex. 29; Ex. 30. After this instruction, a tone can be heard and the phone call continues, implying, because the calls were not disconnected, that each party consented to the phone call being recorded. Ex. 19; Ex. 29; Ex. 30. However, because Licona-Rivera did not raise this

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<sup>6</sup> See also State v. Hall, 168 Wn.2d 726, 729 n.1, 230 P.3d 1048 (2010) (“Phone calls made from the King County jail are automatically recorded. Given that all parties are very clearly informed of this, we held this practice does not violate a prisoner’s statutory right to privacy”).

<sup>7</sup> All of these cases involve jail calls placed by inmates at the King County Jail, the same institution where Licona-Rivera was held.

issue before the trial court, the information in the record is limited to the calls themselves.

Next, Licona-Rivera claims that he, his girlfriend, and his mother are not fluent in English. Brief of Appellant at 10. Again, because this issue was not raised before the trial court, there is little information in the record to support his claim. The record shows that Licona-Rivera understood some English.<sup>8</sup> The jail phone calls provide the only insight into the level of understanding of the English language for Licona-Rivera's girlfriend and mother.<sup>9</sup>

Finally, Licona-Rivera claims that the recordings were made without warrant or court order. Brief of Appellant at 15. Licona-Rivera can point to nothing in the record to support this claim. Because the jail phone calls were challenged below on wholly different grounds, the trial record does not reveal how the jail call recordings were obtained.

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<sup>8</sup> Licona-Rivera requested Spanish interpreters throughout his trial, but he admitted during pretrial hearings that he understood English "more or less." 1RP 24, 28. The trial court found Licona-Rivera "not credible" during the CrR 3.5 hearing. 1RP 59. The court did not specify whether it found Licona-Rivera's statements regarding his English language abilities credible or not. In his conversation with the detective, Licona-Rivera stated that he understood English, but didn't speak it and that he was attending English classes. 1RP 42, 51. At the beginning of the calls, Licona-Rivera chose to proceed with the automated recording in English. Ex. 19; Ex. 29; Ex. 30.

<sup>9</sup> Licona-Rivera's girlfriend conversed with him in a mixture of both English and Spanish during the phone call; his mother communicated with him in Spanish. Ex. 19.

d. Any Error Was Harmless.

Even if the recordings were inadmissible, any error in the admission of the calls was harmless. Admission of evidence seized in violation of Article I, section 7 is harmless error if the reviewing court is convinced beyond a reasonable doubt that any rational finder of fact would have reached the same result absent the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Here, absent the allegedly improperly admitted evidence, the result of the trial would have been the same. The recorded conversations admitted at trial were very limited. There was no “confession” on tape. Considering the identification of Licona-Rivera’s fingerprints at the scene, the surveillance video, eyewitness testimony, and circumstantial evidence of Licona-Rivera’s involvement in the robbery, any error was harmless.

2. THE TRIAL COURT DID NOT ERR WHERE IT INSTRUCTED THE JURY USING THE ABIDING BELIEF LANGUAGE CONTAINED IN WPIC 4.01.

Licona-Rivera argues that the court improperly instructed the jury on the burden of proof where the court used the traditional abiding belief language in Washington Pattern Jury Instructions: Criminal (WPIC) 4.01. This argument should be rejected. The use

of the challenged language has consistently been upheld as a proper statement of the law.

Jury instructions, when considered in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73, 25 L. Ed. 2d 368 (1970). It is reversible error to instruct the jury in a manner that would relieve the State of its burden. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). Challenged jury instructions are reviewed de novo and are evaluated in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Here, over Licona-Rivera's objection that "defense lawyers have never liked that language; we always argue against it[.]" the court instructed the jury using the abiding belief language. 6RP 56-57. The instruction given by the court mirrored WPIC 4.01; in relevant part, it stated:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *If, after such consideration, you have an*

*abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*

CP 21 (emphasis added); see 11 Washington Practice Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3<sup>rd</sup> ed. 2008).

The abiding belief language, as used in WPIC 4.01, has been repeatedly and consistently upheld as a correct statement of the law. See State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988); State v. Peterson, 35 Wn. App. 481, 667 P.2d 645, rev. denied, 100 Wn.2d 1028 (1983); State v. Price, 33 Wn. App. 472, 655 P.2d 1191 (1982); State v. Walker, 19 Wn. App. 881, 578 P.2d 83, rev. denied, 90 Wn.2d 1023 (1978); State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959). Moreover, the United States Supreme Court upheld a reasonable doubt instruction using the phrase “abiding conviction” where, similar to the instruction used here, the jurors were advised that their conclusion had to be based on the evidence of the case. Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Despite repeated confirmation of the abiding belief language, Licona-Rivera cites to State v. Emery to support his claim that the

challenged language encourages the jury to view its role as a search for the truth. 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Licona-Rivera's reliance on Emery is misguided. In Emery, the court did not address the use of abiding belief language, in jury instructions or otherwise. Rather, the court addressed burden shifting in the context of the prosecutor's closing argument that: "this entire trial has been a search for the truth. And it is not a search for doubt." Id. at 758.<sup>10</sup> Here, neither the prosecutors nor Licona-Rivera's trial counsel argued that the jury's duty was to search for the truth or that the abiding belief language could be equated to truth-seeking. In fact, neither party mentioned the abiding belief language during their arguments to the jury. 6RP 61-89. Licona-Rivera's argument is without merit. The jury was properly instructed on the burden of proof through the use of WPIC 4.01. This Court should deny Licona-Rivera's request for reversal of his conviction.

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<sup>10</sup> The Court found the prosecutor's "truth" statement improper, but found that any error had been cured by an instruction and had been waived by the defendant's failure to object. Emery, 174 Wn.2d at 760, 765.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Licona-Rivera's conviction.

DATED this 25 day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

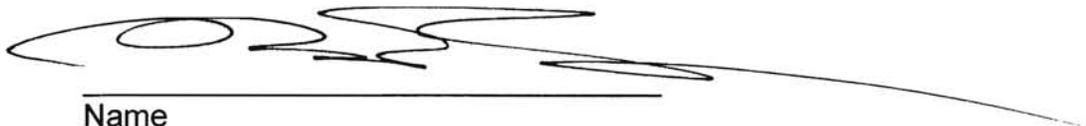
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. NELDIN LICONA-RIVERA, Cause No. 69509-6 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 25 day of October, 2013

A handwritten signature in black ink, appearing to be "Sarah Hrobsky", written over a horizontal line.

Name  
Done in Seattle, Washington