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NO. 84973-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHANE MARSTON,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT

THE HONORABLE JASON POYDRAS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion when it found that the State had sufficiently authenticated 911 calls and jail calls through testimony and exhibits?

2. Did the court properly exercise its discretion when it found that a jail phone call between Marston and his victim did not contain hearsay because Marston adopted the victim's responses and her responses provided context for Marston's own statements which were admissions by a party-opponent?

3. Should this court remand for the limited purpose of striking the victim penalty assessment?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

As of July of 2022, defendant Shane Marston was prohibited from contacting his prior girlfriend, Jessica Ramsey,

via a domestic violence no-contact order. 11/16/22 RP 279-24.¹

Following Marston's release from treatment he went to stay at a residence where Ramsey was living despite the existence of the no-contact order. Ex. 20.

Shortly before midnight on July 4, 2022, Ramsey called 911 for help when Marston was trying to enter her residence by force. Ex. 14. At the beginning of the call, Ramsey explains that Marston was outside the residence. Ramsey's tone escalates from one of concern to one of alarm as she exclaims "oh my god! He's coming back into my house!" Id. A dog begins to bark and men's elevated voices can be heard in the background. Id. At one point Ramsey can be heard verbally confronting Marston. Id. Ramsey tells dispatch, "He assaulted my dog, and my friend!" Id. Ramsey's friend and roommate, Gavin Minden, was the person Marston assaulted and can be heard in the

¹ As the transcripts are not sequential, the State employs the same naming convention as appellant by adding the date of the proceedings to all transcript references.

background. Id. During the 911 call Ramsey provides the address of her residence to dispatchers and identified herself and Marston by name. Id. She explains there is an NCO in place and that Marston is not supposed to be there. Id.

Eventually Marston leaves the residence because, according to Ramsey, “he’s scared” and going “off the bridge to the park.” Id. She describes Marston as wearing “white t-shirt, black jeans, black and white shoes.” Id. Police officers arrive while Ramsey was still on the phone with 911. Id.

Seattle Police Officer Tyler Speer was dispatched due to the 911 call and contacted Minden (the roommate) near the residence. 11/14/22 RP 66-70. Minden pointed out the direction Marston had fled but police were unable to locate Marston. Id. Following the initial unsuccessful attempt to apprehend Marston, Officer Speer returned to the residence to gather more information and determine if Ramsey or Minden needed medical attention. 11/14/22 RP 69-70. Minden’s face was

bleeding at the time. 11/14/22 RP 83; Ex. 13.² Minden recounted that Marston struck him as he tried to repel Marston from the residence. Id. A K9 unit was called in to track Marston in a nearby park. 11/14/22 RP 86-87.

Following unsuccessful tracking attempts by the K9 unit, Ramsey called 911 again and reported that Marston was again at her home – this time in her garage. Ex. 14. Two minutes into that call Ramsey advised dispatch that Marston was fleeing again via her backyard. Id. Shortly thereafter, a nearby neighbor named Melanie Engle called 911 to report that a shirtless man was hiding in her backyard. Ex. 11.

Officers located Marston attempting to hide up in a tree in Engle's backyard. 11/14/22 RP 32-34. Over the next seven hours, Marston stayed in the tree intermittently breaking off branches and throwing them at police officers down below.

² Seattle Police officers were equipped with body-worn cameras that captured interactions they had with Minden, Ramsey, and Marston on July 4 and 5, 2022. Pretrial Ex. 2, 9; Ex. 5, 6, 13.

11/15/22 RP 223-36. Eventually police were able to convince Marston to come down from the tree on a fire department ladder. Id. Marston was booked into the King County Jail following his arrest and treatment for a dog bite from Ramsey's dog. Id.

While in custody, Marston called Jessica Ramsey on July 9, 2022 in violation of no-contact orders. Ex. 20. The two talked about the July 4th incident and Marston apologized for slapping Ramsey. Id. He advised her that he wouldn't be calling again because of the no-contact order. Id.

On other jail calls in August and September, Marston is heard asking an associate of his, Sally Gromlin, to contact Ramsey and advise her about how serious these charges are and tell her she needs to change her statement. Id. On a call to Gromlin, Marston also talks about an angry letter he sent to Ramsey using caustic language telling her that if she doesn't "fix this" their relationship is over. He says that he told Jessica to retract her statement in the letter, and that they are divorced,

broken up until she, quote, fixes this. Id. “This” being this trial, being the charges that he’s accused of, because he believes she is lying. Id. On other jail calls to Gromlin, Marston can again be heard talking about the letter he wrote to Ramsey, and asking Gromlin to contact Jessica on his behalf and get her to change her statement, to retract her statement, so that he could be “set free.” Id.

2. PROCEDURAL FACTS.

Marston was charged with first-degree burglary (Count 1), residential burglary (Count 2), domestic violence felony violation of a court order -assault prong (Count 3), assault in the fourth degree against Gavin Minden (Count 4), and obstructing a law enforcement officer (Count 5) for the July 4th incident. Marston was charged with misdemeanor violation of a domestic violence no-contact order misdemeanor (Count 6) for the jail call he placed to Ramsey on July 9th. CP 29-32.

Marston was charged with tampering with a witness (Count 7) for his efforts to tamper with Ramsey via calls to Gromlin in

August and September. During trial in November of 2022, Marston was additionally charged with tampering with a witness (Count 8) and misdemeanor violation of a domestic violence no-contact order misdemeanor (Count 9) for a letter he sent to Gromlin from jail (in the middle of trial proceedings) asking Gromlin to reach out to Ramsey to convince her to retract her prior statement. *Id.*

During a CrR 3.5 motion regarding the admissibility of Marston's statements and motions *in limine* regarding the applicability of hearsay exceptions and the confrontation clause to the statements of others, the court admitted and reviewed several body-worn videos. 11/1/22 RP 123-218; Pretrial Ex. 2, 5, 9. Marston and Ramsey were both identified on these videos by Officer Speer and both can be visually seen and audibly heard on the videos. 11/1/22 RP 146-47; Pretrial Ex. 2, 5, 9. Portions of these body-worn videos were determined to be admissible and were later admitted at trial. Ramsey can be seen

and heard on trial Ex. 5 and Marston can be seen and heard on trial Ex. 6.

The State also moved *in limine* for a determination on the admissibility of three 911 calls from the July 4 incident with respect to the applicability of hearsay exceptions and the confrontation clause. 11/2/22 RP 331-35; Pretrial Ex. 10, 11, 12. Hearing the State's argument, and no objection by the defense, the trial court ruled the 911 calls to be admissible subject to authentication.

During the trial testimony of Officers Weiss and Speer, the trial court admitted recordings of the 911 calls. 11/14/22 RP 37-57, 74-76; Ex. 11, 14.³ One of the calls was made by a neighbor who called to report that an unknown shirtless male had hopped a fence into her backyard. Ex. 11, 12. Marston, who matched the description from the 911 call, was ultimately located up in the caller's backyard tree. 11/15/22 RP 224-27.

³ Ex. 12, 15, and 16 are transcripts of the 911 calls which had previously been marked as Pretrial Ex. 10, 11, and 12.

The two other 911 calls were made by Ramsey. Ex. 14, 15, 16. These calls were made contemporaneous to, and shortly following the burglary at Ramsey's home. Id. In the calls Ramsey gives her name, Marston's name, a description of the events and the location. Id. Officer Speer, who had identified and spoke with Ramsey in person was able to identify her voice on these 911 calls. 11/14/22 RP 74-76. Id. Further, Ramsey's voice could be heard on the officer's body-worn video and matches her voice heard on the two 911 calls. Ex. 5, 14.

During the trial testimony of King County Jail Sergeant Graves, the court admitted recordings of jail calls made by Marston. Ex. 20. Marston objected to the admission of all the calls on foundational grounds but only asserted hearsay objections to the one call Marston placed to Ramsey on July 9, 2022.⁴ 11/14/22 RP 102-04; 11/15/22 RP 152-55. Prior to admission of the jail calls, Sergeant Graves explained that while

⁴ The other admitted calls were made by Marston's associate, Gromlin.

the jail contracted with Securus for telephone equipment and for an automated recording service, he and other officers were custodians of record who could query the system by inmate, recipient phone number, or other category and pull recordings from storage. 11/14/22 RP 117-21. Sergeant Graves further explained that the jail's voice biometric system requires an inmate to say his name and match his voice to a sample provided by the inmate to initiate each call as well as use the inmate's unique booking and pin numbers. 11/14/22 RP 123-26; 11/15/22 RP 175-77.

Marston said his name to initiate each of the phone calls he made from the King County Jail. Ex. 20. Additionally, each of the calls was placed using Marston's unique BA and PIN numbers, which were only assigned to him. 11/15/22 RP 175-87; Ex. 22, 23. Sergeant Graves also confirmed that each call was placed from a location in the jail where Marston was assigned at the time of the calls. 11/15/22 RP 187-91, 198-204; Ex. 24. Marston's voice can further be matched to his voice

heard on officer body-worn video from the incident. Ex. 6, 20.

On the July 9th call, Ramsey's voice can be matched to her voice recorded both on officer body-worn video as well as her 911 calls. Ex. 5, 14, 20. The call between Marston and Ramsey discusses a portion of the July 4th incident, specifically the allegation that Marston slapped Ramsey. Ex. 20, 25.

After being subpoenaed for trial, and the prosecutor having arranged transportation to court for both Ramsey and Minden, Ramsey sent a message to the prosecutor claiming to be ill. 11/15/22 RP 139-40. Ramsey and Minden stopped returning the prosecutor's calls and messages thereafter. Id. A material witness warrant was issued for Minden but neither Ramsey nor Minden appeared for trial. 11/15/22 RP 238-44.

For the July 4th incident Marston was found guilty of residential burglary and obstructing but was acquitted of the charges that included any assault element (first-degree burglary, felony violation of a no-contact order, and fourth-degree assault). CP 33-41. For the crimes he was alleged to have

committed from jail, Marston was found guilty of two misdemeanor violations of a no-contact order and one count of tampering, but acquitted of the second tampering charge. *Id.* In a bifurcated proceeding, the jury rejected Marston's claim of self-defense on the counts for which he was acquitted. CP 97. He was sentenced and timely appealed.

C. ARGUMENT

1. MARSTON'S 911 CALLS AND JAIL CALLS WERE SUFFICIENTLY AUTHENTICATED.

Marston challenges the trial court's decisions to admit recordings of 911 calls and jail calls, arguing that the recordings were not properly authenticated.⁵ This claim should be rejected.

⁵ Marston failed to designate any exhibit on appeal. The State has since designated the challenged exhibits as well as other exhibits relevant to Marston's claims. The 911 calls were admitted as Ex. 11 and 14. Transcripts of 911 calls were marked as Pretrial Ex. 10, 11, and 12 and trial Ex. 12, 15, and 16. Jail calls are Ex. 20 and a transcript of the primary challenged call is Ex. 25. Note: When undersigned counsel viewed the exhibits it appeared that the King County Clerk's Office switched exhibits 14 and 20 into the envelopes of one another. The record below demonstrates that Ex. 14 contained

The trial court did not abuse its discretion by ruling that the State had presented sufficient evidence of authenticity.

Authentication is a threshold requirement designed to assure that evidence is what it purports to be. State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003) (citing 5C Karl B. Tegland, Washington Practice: Evidence, § 900.2, at 175, § 901.2 at 181- 82). Washington's evidence rules provide:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

ER 901(a).

The rule then lists a non-exclusive list of examples of authentication or identification that conform with the requirements of the rule. ER 901(b). Such examples include comparison by the court, appearance, internal patterns or

the two 911 recordings from Ramsey and Ex. 20 contained the jail call recordings.

distinctive characteristics, or identification of a voice by one who has heard the voice before. ER 901(b)(3), (4) and (5).

Authenticity is normally a preliminary determination, and the trial court may consider otherwise objectionable evidence to determine the question of authenticity. ER 104(a); ER 1101(c)(1); State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). “Rule 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.” State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007), quoting United States 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.” Williams, 136 Wn. App. at 500. The identity of a speaker on a telephone call may be established through direct or circumstantial evidence. Danielson, 37 Wn. App. at

472. Authentication may be established through a declarant's message during the telephone conversation and their self-identification. Id. at 471. While self-identification on a telephone call is, alone, insufficient, "courts routinely find a call to be authenticated when self-identification is combined with virtually any circumstantial evidence." Passovoy v. Nordstrom, 52 Wn. App. 166, 171, 758 P.2d 524 (1988).

The proponent of the evidence need only make a *prima facie* showing of authenticity in order for evidence to be admitted; the opposing party is free to then challenge or argue its authenticity to the trier of fact. Payne, 117 Wn. App. at 108. Authentication is a low burden to admissibility. Karl Tegland, Courtroom Handbook on Washington Evidence, 465 (2017-18 ed.) ("The requirement of authentication or identification is easily satisfied in most situations. The applicable rules are designed only to assure that the evidence meets minimum requirements for relevance."). A trial court's decision on authenticity is reviewed for abuse of discretion. Payne, 117 Wn.

App. at 110 (citing State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997)). Marston cannot demonstrate any abuse of discretion predicated on the trial court's determination that the State had made a *prima facie* showing that the 911 recordings and jail recordings were authentic.

a. The 911 Recordings.

The trial court did not abuse its discretion by admitting the 911 recordings here because there was ample evidence that the recordings were authentic. The callers both self-identified and the contents of the 911 calls matched the information that the testifying police officers experienced and observed on scene.⁶

With regard to Ramsey's two calls, Ramsey self-identified, provided her address to the 911 operator, and

⁶ Marston's appeal lacks clarity on whether he is challenging admission of all three 911 calls or just the 911 call made by a neighbor. Opening Brf. at 9 (alternatively using the singular "jail call" and plural "jail calls"). The State assumes that Marston's challenge is to all three calls consistent with his objections below.

identified Marston and the existence of a no-contact order protecting her from him. Ex. 14. All of that information was corroborated by officers when they arrived to Ramsey's home and contacted her. 11/9/22 RP 1006-25; Ex. 5. Additionally, the State attempted to introduce evidence that the two 911 calls came from Ramsey's known phone number via the police CAD log as Ramsey was captured on video providing her phone number to Seattle police officers in person during the search for Marston. Ex. 5 (clip 327-432 at 58 seconds in); Ex. 3; 11/9/22 1023-24; 11/14/22 RP 50.⁷ While the trial court incorrectly sustained an objection on hearsay grounds, such foundational information provided further authentication of Ramsey's two 911 calls.⁸

⁷ Sergeant Graves from the jail also testified to Ramsey's known phone number without objection. 11/16/22 RP 295.

⁸ Foundational information must be reliable, but need not be admissible. City of Bellevue v. Mociulski, 51 Wn. App. 855, 860, 756 P.2d 1320 (1988).

Further, Marston fails to mention the two strongest pieces of evidence that authenticated Ramsey's 911 calls. First, Officer Speer, who spoke with Ramsey in person, identified her voice on the 911 calls. 11/14/22 RP 74-76. Additionally, the trial court had the opportunity to see police body-worn video both at trial and in pre-trial motions. Ramsey was seen and heard on the body-worn video such that the trial court itself was able to compare Ramsey's voice on the video and the voice on the 911 recording. Compare Ex. 5, 14. The pretrial and trial evidence sufficiently authenticated Ramsey's 911 calls. ER 901(b)(3), (4), (5) and (6).

With regard to the 911 call placed by the neighbor, Ms. Engle, the State likewise provided sufficient evidence of its authenticity. Engle called 911 while Marston was attempting to hide in her backyard. She self-identified, provided her address, described how the unknown male intruder had to have jumped multiple fences to get into her secluded backyard, and provided a description of the intruder (white, bald, shirtless male).

Ex. 11. She likewise reported that a police car was in front of her house. Id. The caller told the 911 operator that the male was initially hiding next to a large maple tree in her backyard and then seeing flashlights shine on the other side of her backyard police corroborated her observations when they entered her backyard and found Marston hiding in Engle's large maple tree. Id. What Engle reported to the 911 operator was corroborated by the officers' own observations when they located Marston hiding up in Engle's tree. The State made a *prima facie* showing of authenticity. ER 901(b)(4) and (6).

Marston's reliance on State v. Jackson, 113 Wn. App. 762, 54 P.3d 739 (2002), in support of his claim of abuse of discretion is misplaced. In Jackson, Division Two of this Court held that a proponent can authenticate a tape recording ... by calling a witness who has personal knowledge of the original conversation and the contents of the tape; who testifies that the tape accurately portrays the original conversation; and who identifies each relevant voice heard on the tape. Jackson, 113

Wn. App. at 743. This holding, however, does not require such a procedure in order to admit a 911 recording in every case. Indeed, the Court of Appeals was careful to note that such a “method is not exclusive, and a proponent may also use any other [method] that produces evidence sufficient to support the basic findings of identification and authentication.” Jackson, 113 Wn. App. at 743. The methods used in Marston’s case -- while not identical to those used in Jackson -- were certainly sufficient to establish the authenticity of the recording that was admitted at trial.

Multiple cases support the State’s position that all the calls were sufficiently authenticated. Williams, 136 Wn. App. at 501 (recorded 911 call properly authenticated where speaker identified herself and provided facts which were consistent with those provided by another witness); Danielson, 37 Wn. App. at 472 (defendant’s phone call properly authenticated based on self-identification and the caller’s disclosure of personal facts consistent with his identity); Passovoy, 52 Wn. App. at 171

(call properly authenticated where caller identified herself and demonstrated familiarity with the facts of the incident). In each of the cases, self-identification paired with additional circumstantial evidence was sufficient for authentication. Id. Like those cases, the 911 callers self-identified here and the State presented additional circumstantial evidence of authenticity.

Even if this Court were to find that the trial court abused its discretion by admitting the recording of Engle's call, any error was undoubtedly harmless. Non-constitutional evidentiary error is harmless where, within reasonable probability, the outcome of the trial would not have been materially affected absent the error. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

The contents of Engle's call did not implicate Marston in any charged crime and thus could not reasonably have affected the verdict. Engle merely provided evidence of Marston's possible location that was duplicative of the observations of

police officers who were shining flashlights into Engle's backyard in search of Marston. Notably while on the call with 911 Engle lost sight of Marston and tells the operator that she believes the intruder must have hopped a fence and left her backyard. Ex. 11. The evidence of Marston's actual location and discovery, and his acts of obstruction, came from the testimony of the officers themselves, not from Engle's 911 call. Even if erroneous, the admission of Engle's 911 call was harmless because it did not reasonably have an impact on any verdict.

b. The Jail Recordings.

Marston's claim that jail calls were not properly authenticated borders on frivolous as it ignores a whole host of evidence and relies on mischaracterizations of Sergeant Graves' testimony.⁹ While the County contracts with a vendor (Securus)

⁹ Marston seemingly challenges authentication of "jail calls" (plural) made to Ramsey. As there was only one jail call made to Ramsey, the breadth of Marston's authentication challenge on appeal is unclear. In an abundance of caution, the State

who provides the equipment that records jail calls and the storage medium for the calls, Graves and other jail sergeants are the custodians of records of these recordings.¹⁰ 11/14/22 RP

117-21. The jail sergeants directly query the automated recording system to pull recorded calls from servers based on the parameters they seek (defendant, location, recipient phone number, etc.) – they do not need to involve Securus to access these recordings which belong to the jail. *Id.*

As the testimony and exhibits revealed, Marston entered his unique BA and PIN numbers to initiate each jail call, identified himself at the beginning of each jail call, and had his voice biometrically confirmed by the system each time.

11/14/22 RP 123-26; 11/15/22 RP 175-77. Marston's voice on

assumes Marston's authentication challenge pertains to all jail calls consistent with his objections below.

¹⁰ Marston also incorrectly asserts that the calls were admitted as business records. Opening Brf. at 20. The recordings were admitted as statements of a party-opponent and authenticated through the testimony of a records custodian but were not admitted as business records.

each call can also independently be matched to his voice heard on body-worn video from the July 4th incident. Compare Ex. 6, 20.

The substance of Marston's call with Ramsey likewise confirms its authenticity as they discuss details of the July 4th incident. Ex. 20. Once again, Ramsey's voice can be matched to both her 911 calls and her statements on body-worn video. Compare Ex. 5, 11, 20. Similarly, the contents of the calls with Gromlin, referring to efforts to reach Ramsey and convince her to retract her report also confirm authenticity. Ex. 20. The trial court did not abuse its discretion in admitting jail calls where the State provided more than enough evidence to make a *prima facie* showing of authentication.

2. MARSTON FAILS TO DEMONSTRATE ANY ABUSE OF DISCRETION IN THE TRIAL COURT'S HEARSAY DETERMINATION .

Marston's claim that the trial court abused its discretion in admitting a jail call to Ramsey because it constituted

inadmissible hearsay is unsupported in law and in fact.¹¹

Hearsay is “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). A statement made by a party-opponent is not hearsay. ER 801(d)(2). Where a statement is not offered for the truth of its contents but for another relevant purpose, the statement is not hearsay and is admissible. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). A trial court’s hearsay ruling is reviewed for an abuse of discretion. State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

The short jail call between Marston and Ramsey consists primarily of statements made by Marston, which as statements of a party-opponent, are not hearsay. ER 801(d)(2). Ramsey’s

¹¹ Marston again alternates between using the term “jail call” and “jail calls” even though only one jail call to Ramsey was offered at trial. Because Marston’s hearsay argument is specific in challenging only Ramsey’s statements, and his objection below was only to the one call, the State assumes Marston’s hearsay challenge on appeal is so limited.

responses to Marston's statements are clearly adopted by Marston and are non-hearsay adoptive admissions. ER 801(d)(2)(ii). Statements of Ramsey that are arguably not-adopted by Marston are not substantive evidence and were offered solely to provide the context of Marston's statements. A review of the call demonstrates that Ramsey's portion of the call was admitted because it was necessary for the jury to understand Marston's portion of the conversation.¹² Without Ramsey's responses, Marston's statements, standing alone, would not make sense. See State v. Mills, 16 Wn. App. 2d 1008 (2021)¹³ (explaining that a third party's statements on a jail call are not hearsay where the defendant's own statements, rather than those of the third party, are being offered by the State to prove a crime).

¹² Both the State and the trial court used the term *res gestae* below but it is apparent from the context that they were not describing excited utterances and were instead attempting to describe that Ramsey's portion of the call provided context for Marston's statements on the call.

¹³ Cited for persuasive value per GR 14.1.

A statement by another that is somehow adopted as a party's own statement is admissible against the party as an admission, as long as the proponent of the evidence can produce facts from which the jury can reasonably conclude that the defendant heard, understood, and acquiesced in the statements. State v. Neslund, 50 Wn. App. 531, 749 P.2d 725 (1988). In contrast to Marston's claim, jury instructions regarding adoptive admissions are not required where a trial court finds that, under the circumstances, the defendant heard, understood, and acquiesced in the statements. State v. Hill, 6 Wn. App. 2d 629, 647, 431 P.3d 1044 (2018). Such instructions are warranted where the adoption is asserted via the defendant's acquiescence via silence. See Hill, supra (instruction warranted where the defendant fails to respond to the victim's allegation via text message and his next text message involves a change of subject).

In this case, Marston calls Jessica Ramsey from jail despite pending charges against him for burglary and violating a pre-existing no-contact order. During the call, Marston brings up the July 4 incident and Ramsey says “You don’t slap a girl in the face” and “You slapped me in the face twice.” Marston does not remain silent and affirmatively responds: “I was playing around with---with a piece of chocolate. I was just playing around like ha ha, I got through your defenses. I know, cause you’re always like, I could have killed you, I could have killed you.” He continues, “It just- it was meant in total play. There was nothing aggressive about it. It wasn’t.” While Marston clearly attempts to minimize his acts, he affirmatively adopts Ramsey’s statements by accepting the allegation that he slapped her, albeit he claims in jest. Indeed, he ultimately apologizes: “Listen. I apologize ...”

There is no question that Marston heard, understood and acquiesced in Ramsey's statements alleging assault by responding verbally. See State v. Jones, 14 Wn. App. 876, 881, 545 P.2d 1210 (1976) (defendant adopted another's statements by direct responses and additions or by an indication of assent). As the trial court's determination of adoptive admissions rested on Marston's express admissions, and not on acquiescence by silence, the call was admissible without any instruction required on adoptive admissions. Marston has failed to demonstrate that the trial court's hearsay determination was unreasonable or untenable.

Even assuming error in the court's hearsay determination, admission of Ramsey's side of the conversation was harmless. An asserted evidentiary error requires reversal only if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Wade, 98 Wn. App. 328, 337, 989 P.2d 576 (1999). The only portions of Ramsey's side of the conversation that potentially

incriminated Marston was her accusation that Marston had slapped her. Marston was acquitted of first-degree burglary and felony violation of a no-contact order (but convicted of residential burglary); the jury did not find that an assault occurred beyond a reasonable doubt. Where the substance of Ramsey's statements on the jail call did not cause Marston to be convicted of any offense, the admission of her statements, even if erroneous, was unquestionably harmless.

3. THE STATE DOES NOT OBJECT TO A
REMAND LIMITED TO STRIKING THE
VICTIM PENALTY ASSESSMENT.

Marston relies on State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), and its progeny for his request that this Court apply post-disposition amendments to the Victim Penalty Assessment ("VPA") statute, RCW 7.68.035, to this case. The State does not concede that the VPA and DNA fee are "costs" within the meaning of RCW 10.01.160(3) and, as a result, the State does not concede that Ramirez necessarily controls here.

However, because remand to strike the VPA will not require a hearing in the trial court, and because it appears Marston would be entitled to have this fee stricken upon motion to the trial court pursuant to RCW 7.68.035(5), in the interest of efficiency, the State does not oppose remand for the limited purpose of striking the VPA. This can be done as a ministerial task that does not require a hearing. See State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (“[W]hen a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present.”).

D. CONCLUSION

For the foregoing reasons, the State requests this court affirm in all respects other than ordering remand for the limited purpose of entering an agreed order striking the victim penalty assessment.

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DATED this 19th day of January, 2024.

Respectfully submitted,

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