IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA RAY PHILLIPS, Appellant.	No. 41393-1-II UNPUBLISHED OPINION

Worswick, C.J. — Joshua Ray Phillips appeals his convictions for solicitation to commit first degree murder, second degree robbery, and second degree theft. Phillips argues that (1) the trial court lacked jurisdiction because a judge pro tempore presided over his trial and Phillips himself did not explicitly consent to the judge pro tempore's authority, and that (2) the trial court violated his right to be present during all critical stages of his trial because it discussed logistics of closing arguments and jury instructions with the State and his counsel in his absence.

In a pro se statement of additional grounds (SAG), Phillips alleges that various participants in his trial caused seven varieties of error or misconduct. First, Phillips argues that (1) the jury committed reversible misconduct when it continued deliberating after the trial court instructed it to go home for the evening. Phillips further argues that the trial court erred (2) by denying his proposed missing witness instruction, (3) by overruling his evidentiary objections, (4) by denying his motion for a mistrial, and (5) by denying his motion to dismiss for insufficient evidence at the close of the State's case-in-chief. Next, Phillips argues that (6) the State committed prejudicial prosecutorial misconduct during closing argument. He finally argues that (7) this court must reverse his convictions because corrections officers' radios broadcasted jail

communications on two occasions during trial and thus undermined the presumption of his innocence. We affirm.

FACTS

I. Background Facts

Around noon on October 28, 2008, as Ann Jacobs walked down an alleyway in Longview, Washington, a man hit her on the head with a PVC (polyvinyl chloride) pipe and demanded her purse. Jacobs yelled, "No," and the man ran away without taking anything from her. 3 Report of Proceedings (RP) at 339-43. Two hours later, as Terri Coxson walked from the bus stop to her appointment at St. John's Cancer Treatment Center in Longview, a man grabbed her purse out of her hand and ran away with it. Coxson described the man as tall, thin, young, and white. Among the items inside Coxson's purse was her ATM (automated teller machine) card. Shortly thereafter cameras at two separate ATM machines photographed Phillips attempting to use Coxson's debit card. According to a detective who interviewed Phillips on November 3, 2008, Phillips appeared tall, very thin, white, and male.

Phillips confided in Levi Hunt, whom Phillips had met while both were incarcerated. Phillips told Hunt that he tried hitting someone over the head with a pipe but ran away without stealing anything. Hunt shared this information about the attempted robbery with authorities.

Longview police arrested Phillips on November 3. While incarcerated, Phillips approached fellow inmate Glen Jordan. Although both Phillips and Jordan shared a gang affiliation, Jordan had never met Phillips before. Phillips explained to Jordan that he was concerned because Hunt could testify about Phillips's statements to him. Phillips asked Jordan if

he could "arrange to have something done about Mr. Hunt." 4B RP at 684. Specifically, Phillips asked Jordan if he could have Hunt "green lighted," or killed.[1] 4B RP at 685.

Jordan alerted jail officials and the Longview police. Police arranged for Jordan to continue discussions with Phillips while wearing a body wire. Wearing the wire, Jordan met with Phillips in jail and recorded a conversation wherein Phillips again sought Jordan's assistance in killing Hunt.

The State charged Phillips with, inter alia, solicitation to commit first degree murder, attempted first degree robbery, second degree robbery, and second degree theft.[2]

II. Procedural Facts

Both the State and Phillips's counsel signed a written agreement consenting to have a member of the bar preside over the trial as a judge pro tempore. This order stated: "It is agreed that Lisa Tabbut may hear the above-entitled matter as Judge Pro Tempore." Clerk's Papers (CP) at 114 (emphasis omitted). Judge Pro Tempore Tabbut executed the oath of office and Cowlitz County Superior Court then entered an order appointing her as a judge pro tempore for this case. On the record, when the State, Phillips, and his counsel were all present, Judge Tabbut stated that she was "sitting here today as a judge pro tem. Both attorneys have signed off on that. I understand that [Phillips's counsel] has talked to Mr. Phillips and gotten Mr. Phillips'[s] agreement." 3 RP at 288-89. Phillips did not respond to that statement.

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[1] Jordan testified that "everybody is pretty familiar with green light is to go, have somebody killed or disciplined." 4B RP at 685. He later explained, "[I]f I was to discipline somebody, it wouldn't be somebody that wasn't in my gang. So, when [Phillips] said he wanted to green light Mr. Hunt, obviously, it wasn't a disciplinary action." 4B RP at 742.

[2] Phillips also pled guilty to possession of 40 grams or less of marijuana.

Before trial, the court entered an order in limine barring Jacobs and Coxson from making an in-court identification of Phillips because neither victim could identify Phillips as their attacker when presented with a photomontage, but both recognized Phillips as the person arrested for attacking them according to newspaper coverage. Phillips also moved to suppress all evidence the State obtained with the body wire, arguing that the State's application to intercept and record the conversation lacked a specific justification and instead merely recited boilerplate. The trial court disagreed and denied Phillips's motion, concluding that the body wire recording was admissible.

The case then proceeded to a jury trial. On the first day of trial, a radio belonging to one of the corrections officers assigned to transport Phillips inadvertently went off and broadcast jail communications in the jury's presence. Phillips did not request any curative instruction, but his attorney and the trial court asked the officers to keep their radios from making noise in the courtroom.

The State sought to introduce a recording of a 911 call Hunt made on November 1. In this 911 call, Hunt reported that Phillips had just called him and threatened to kill him. Because Hunt began the call by stating, "This is not a big emergency," Phillips moved to exclude the recording as inadmissible hearsay. 3 RP at 421-34. The trial court noted, "[E]ven though [Hunt] characterize[d] it as not an emergency . . . he [did] sound very, very excited and [was] talking . . . rapidly about events that he says just occurred, which was just this phone call that he received." 3 RP at 431. Accordingly, the trial court concluded that the recording satisfied the excited utterance exception to the hearsay rule. The trial court admitted the 911 recording as evidence.

Over Phillips's objection, the trial court admitted the body wire recording of a conversation in jail between Jordan and Phillips in which they discussed killing Hunt. In addition to this body wire recording itself, the State offered a transcript of the recording prepared by a police transcriptionist.

Phillips also objected to the transcript, arguing that it contained many inaccuracies. The trial court acknowledged that the parties did not stipulate to the transcript's accuracy, but it listened to the recording, following along with the transcript. The trial court concluded that, even though the transcript was not perfect, "it [was] an important listening aid." 4B RP at 603. Accordingly, the trial court allowed the State to present the jury with the transcript in court while the body wire recording played, but ruled that it would not admit the transcript as evidence and that the jury could not use the transcript in its deliberations. The trial court instructed the jurors that the transcript was not a substitute for the recording.

Jordan testified that Phillips offered tattoo work—in addition to a cash payment—to Jordan in exchange for Hunt's murder. Later, during cross-examination of a defense witness, the State elicited testimony that Phillips owned tattooing equipment and performed tattoo work for others. Phillips objected that this testimony exceeded the scope of direct examination, and the trial court agreed that the questioning exceeded the scope. "[B]ut in the interest of expediency and not having to call [the witness] necessarily back as a witness tomorrow," the trial court allowed the State to proceed on this line of inquiry under the rules of direct examination.

Sometime during the second day of testimony, one corrections officer's radio again briefly broadcast jail communications in the jury's presence. Again, Phillips did not request a curative

instruction.

Thereafter, the State elicited testimony from Longview Detective, Mark Langlois, that he presented Jacobs with a montage that included Phillips's photo. After Detective Langlois testified that Jacobs identified someone from the photomontage, the State asked him if Jacobs "sa[id] that she recognized [Phillips] as being the person [who attacked her] or that she recognized him from somewhere else?" 5B RP at 884. Based on the motion in limine prohibiting the State from eliciting Jacobs's in-court identification of Phillips, Phillips objected and moved for a mistrial. The trial court denied Phillips's motion for mistrial but sustained the objection and allowed the State to elicit Detective Langlois's testimony that Jacobs did not identify Phillips as her attacker. The State did elicit that testimony.

At the close of the State's case-in-chief, Phillips moved to dismiss all four counts, arguing the State presented insufficient evidence to establish a prima facie case for each charge. The trial court denied that motion, finding that there was sufficient evidence for each of the four counts to proceed.

The State sought in closing argument to present the jury with a PowerPoint[3] slide show that excerpted the transcript of the body wire recording of the conversation between Jordan and Phillips. Phillips objected, arguing that the transcript of the recording had not been admitted as evidence. The trial court overruled the objection, concluding that the attorneys could argue what they believed the evidence established, including presenting quotes of that evidence. Moreover,

[3] "'PowerPoint' is a registered trademark of a Microsoft graphics presentation software program." *In re Pers. Restraint of Glasmann*, --- Wn.2d ---, 286 P.3d 673, 676 n.1 (Oct. 18, 2012).

the trial court stated that the jury was "not going to be provided with the transcript when they go back for deliberations. And, of course, the defense can remind the jury in closing that . . . what they heard is all important, rather than the notes that the prosecutor puts [on display]." 6A RP at 1184.

In closing argument, the State summarized Jordan's testimony about his conversations with Phillips. In recalling that Jordan did not wish to help Phillips kill Hunt, the State said, "[Jordan] [i]s honest now." 6B RP at 1214. After Phillips had criticized the police in his closing argument, the State in its rebuttal said, "[W]as the investigation perfect? It wasn't. Was it a good investigation? Yes, it was." 6B RP at 1269. Phillips objected to both statements.

With the jury and Phillips out of the courtroom, the trial court and counsel discussed jury instructions and the presentation of closing arguments. This brief discussion of closing argument established only that the State wished to use a projector to display PowerPoint slides. Phillips's counsel objected to the slides' reproduction of the transcript, and the trial court immediately changed the topic of discussion to the proposed jury instructions. The trial court did not take up the topic of the prosecutor's slides again until after Phillips had returned to the courtroom.

Later, while the jury was deliberating, the court, the State, and Phillips discussed how late to keep the deliberations going. They decided to let the jury deliberate uninterrupted until 5:30 pm, when they would ask jurors if they would like dinner. Deliberations continued beyond 5:30 pm, though, and the court had dinner delivered to the jurors around 7:00 pm. About an hour later, the trial court sent the jury a note asking whether it had "reached a unanimous verdict on each count." CP at 38. The jury replied that it had reached a unanimous verdict on three of the

four counts.

The court then sent another note to the jury, stating: "You need to continue deliberating. Would you like to go home for the evening and continue deliberations at 10:00 [am] tomorrow morning?" CP at 36. The jury responded "no." CP at 36. Nonetheless, the bailiff relayed the presiding juror's remark that the jury seemed unlikely to reach a unanimous verdict on the remaining count. Accordingly, the court sent the bailiff to excuse the jury for the evening; counsel and the judge left the building. But 20 to 25 minutes later, the bailiff called the judge and informed her that the jury had reached a unanimous verdict on the remaining count. The judge and counsel immediately returned to court and the jury delivered its verdicts. Phillips did not object.

The jury found Phillips guilty of solicitation to commit first degree murder, second degree robbery, and second degree theft.[4] The trial court polled the jury and each juror confirmed the verdict. The court sentenced Phillips as a persistent offender to life in confinement without the possibility of early release. Phillips appeals.

ANALYSIS

I. Standard of Review

Phillips's appeal presents issues of constitutional and statutory interpretation, which we review de novo. *State v. Elmore*, 154 Wn. App. 885, 904-05, 228 P.3d 760, *review denied*, 169 Wn.2d 1018 (2010).

II. Authority of Judges Pro Tempore

[4] Phillips was convicted of robbery and theft as to Coxson only. Phillips was acquitted of attempted first degree robbery of Jacobs.

Phillips first argues that this court must reverse his conviction and remand for a new trial because, even though his counsel signed a written agreement to trial by a judge pro tempore, he did not explicitly consent in writing or on the record to the pro tempore judge's authority. We disagree.

Washington law allows members of the bar to preside over trials in superior court as judges pro tempore. Wash. Const. art. IV, § 7; *In re Dependency of K.N.J.*, 171 Wn.2d 568, 578, 257 P.3d 522 (2011). A member of the bar may preside over a trial as a judge pro tempore when "agreed upon in writing by the parties litigant *or their attorneys of record*, and the member is approved by the court and sworn to try the case." Wash. Const. art. IV, § 7 (emphasis added); RCW 2.08.180. Thus, the express language of the constitutional and statutory provisions defining the authority of judges pro tempore contemplates allowing the parties' attorneys to consent to trial by a judge pro tempore and thereby confer jurisdiction on the judge pro tempore. *State v. Osloond*, 60 Wn. App. 584, 586, 805 P.2d 263 (1991); *see also K.N.J.*, 171 Wn.2d at 578.

Phillips overlooks the express language of our constitutional, statutory, and decisional authority establishing that a judge pro tempore has jurisdiction to preside over a case in superior court when either the parties or their attorneys consent. Instead, Phillips relies on *State v. Sain*, 34 Wn. App. 553, 663 P.2d 493 (1983), a Division Three opinion, for the proposition that, in a criminal case, only the defendant himself or herself has the authority to consent to trial by a judge pro tempore. Phillips bases this argument on the general premise that only a criminal defendant, not his or her attorney, has the authority to waive a substantive constitutional right.

While Phillips is correct that in general only a criminal defendant, but not his or her

attorney, has the authority to waive a substantive constitutional right, Phillips's analogy to *Sain* and his argument here fail because the Washington constitution specifically contemplates permitting a party's attorney of record to confer jurisdiction on a judge pro tempore. Wash. Const. art. IV, § 7; *see also State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389, *review denied*, 169 Wn.2d 1008 (2010).

Sain is distinguishable. In *Sain*, a criminal defendant's attorney orally consented to trial by a judge pro tempore without the defendant's consent, then withdrew from the case. 34 Wn. App. at 554-55. The defendant's new counsel stipulated to trial by a judge pro tempore but "with the understanding [that] the question of the defendant['s] consent would be raised the following morning before trial." *Sain*, 34 Wn. App. at 555. Although the defendant made it clear before trial that he did not consent, the judge pro tempore declined to recuse himself, executed the oath of office, and moved the case to trial over the defendant's objection. *Sain*, 34 Wn. App. at 555. The *Sain* court held that the judge pro tempore did not have jurisdiction to preside over the trial. 34 Wn. App. at 557. But the facts here are different.

This case is similar to *Osloond*, 60 Wn. App. at 584. Osloond's counsel entered a written stipulation to appoint a judge pro tempore to preside over the case, the superior court properly entered an order appointing that judge pro tempore, and, although Osloond did not personally give his consent, he did not argue that his attorney lacked authority to consent on his behalf. 60 Wn. App. at 586-87. Because Osloond did not challenge his attorney's authority to stipulate to trial by the judge pro tempore and because the constitutional and statutory provisions defining the authority of judges pro tempore expressly allow a party's attorney to consent, Division One of

this court held that Osloond could not challenge the validity of the written stipulation consenting to trial by a judge pro tempore. 60 Wn. App. at 586-87.

Here, as in *Osloond*, Phillips's counsel entered a written stipulation to trial by a judge pro tempore. The judge pro tempore executed the oath of office and the Cowlitz County Superior Court entered the appointment order. Then, just before trial, the judge pro tempore said on the record: "I am sitting here today as a judge pro tem. Both attorneys have signed off on that. I understand that [Phillips's counsel] has talked to Mr. Phillips and gotten Mr. Phillips'[s] agreement." 3 RP at 289. Phillips did not respond. Accordingly, because Phillips does not challenge the validity of his attorney's written stipulation consenting to trial by the judge pro tempore, he cannot challenge that judge's authority. Thus, Phillips's argument fails.

III. Criminal Defendant's Right To Be Present at Every Critical Stage of Trial

Phillips next argues that this court must reverse his convictions and remand for a new trial because he was not present in the courtroom for several minutes while the court, the State, and his counsel discussed issues relating to the State's use of a projector during closing arguments and jury instructions. We disagree.

The Washington Constitution grants criminal defendants "the right to appear and defend in person," meaning that an accused person has a constitutional right to be present "when evidence is being presented" and "'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" Wash. Const. art. I, § 22; *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). A defendant, then, has the right

to be present at every critical stage of a criminal proceeding. *State v. Bremer*, 98 Wn. App. 832, 834, 991 P.2d 118 (2000). But a criminal defendant "does not have a right to be present during . . . conferences between the court and counsel on legal matters, at least where those matters do not require a resolution of disputed facts." *Lord*, 123 Wn.2d at 306 (citations omitted).

Phillips acknowledges that, "[n]ormally," discussion of jury instructions is "not deemed a 'critical stage' in the proceedings that require the defendant's presence because they only involve the resolution of legal issues." Br. of Appellant at 24-25. Phillips argues, however, that during his brief absence from the courtroom, the court, the State, and his counsel discussed jury instructions "along with the admissibility of certain evidence and the prosecutor's use of evidence in front of the jury during closing argument." Br. of Appellant at 26. Phillips misstates the record.

Here, the record shows that Phillips was not present in the courtroom when the court, the State, and his counsel discussed purely logistical matters relating to the State's use of a projector during its closing argument and proposed jury instructions. When the State mentioned that it intended to use quotes from the transcript of the body wire recording in a slide show, Phillips's counsel objected and the trial court immediately postponed that conversation until after Phillips returned to the courtroom. Otherwise, the trial court and counsel discussed only proposed jury instructions in Phillips's absence. Because the court, the State, and Phillips's counsel limited their conversation to logistical and legal issues when Phillips was absent from the courtroom, the trial court did not violate his right to be present during all critical stages of the proceeding. Thus, this argument fails.

SAG

I. Jury Misconduct

In his SAG, Phillips first argues that the jury committed reversible misconduct when it disobeyed the trial court's instruction to go home for the evening and, instead, continued deliberating for 20 to 25 minutes, until it reached a unanimous verdict on all counts. We decline to reach this issue because Phillips failed to preserve it for appellate review.

Appellate courts review a trial court's investigation into alleged jury misconduct for an abuse of discretion. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). But where a defendant did not object to alleged jury misconduct at trial, the trial court did not have the opportunity to investigate and there is nothing for an appellate court to review. *See State v. Stott*, 4 Wn. App. 494, 497-98, 483 P.2d 162 (1971).

Here, the record shows that the court provided the deliberating jury with dinner at approximately 7:00 pm. Around that time, the bailiff informed the court that the jury had reached unanimous verdicts on three of the four counts. In response, the court sent the jury a note reading, "You need to continue deliberating. Would you like to go home for the evening and continue deliberations at 10:00 [am] tomorrow morning?" CP at 36. The jury responded "no" but the presiding juror also mentioned to the bailiff that the jury was unlikely to reach a unanimous verdict that evening on the remaining charge. After hearing that the jury was unlikely to reach a unanimous verdict that evening, the judge told the bailiff to send the jury home. The judge and counsel then left for the night. Within 25 minutes of the judge and counsel leaving, the bailiff called and said the jury had reached a unanimous verdict. Counsel and the judge returned

to court and, without objection by Phillips, the jury delivered its unanimous verdicts on all four counts. Because Phillips did not object or allege the jury committed misconduct by not stopping deliberations for the evening, he did not preserve this issue for appeal. Thus, his argument fails.

II. Missing Witness Jury Instruction

Phillips next argues that the trial court erred in denying his proposed missing witness jury instruction. We disagree.

We review a trial court's denial of a defendant's proposed jury instruction for an abuse of discretion. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A trial court abuses its discretion if it exercises its discretion based on untenable grounds or for untenable reasons. *State v. Smith*, 124 Wn. App. 417, 428, 102 P.3d 158 (2004). A missing witness instruction informs the jury that it may infer a person's testimony would have been unfavorable to a party if that person was available to a specific party, could have been a witness at trial on an important issue, it appears to be in the best interests of the party to call that person as a witness, the party does not satisfactorily explain why it did not call the witness, and the inference that the person's testimony would have been unfavorable to the party is reasonable under all of the circumstances. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.20, at 177 (3d ed. 2008) (WPIC). Accordingly, a missing witness instruction is not appropriate where the person's testimony would be cumulative or when the party satisfactorily explains the witness's absence. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991); WPIC 5.20 note on use at 177.

Here, the State called Detective Mark Langlois, the lead detective on the case, to testify about the police investigation of the crimes it alleged. Then, on cross-examination, Phillips's

counsel repeatedly asked Detective Langlois about reports and investigative work performed by another officer, Detective Taylor. The State objected based on hearsay and argued that the defense was improperly trying to impeach Langlois with Taylor's work. The State further clarified that it did not plan to call Detective Taylor because her testimony would be cumulative to Detective Langlois's testimony and because Detective Taylor may have been on vacation.[5] Thus, because the State explained that it did not need Detective Taylor's testimony and that she was probably unavailable, the trial court did not abuse its discretion in refusing to give a missing witness jury instruction. Thus, this argument fails.

III. Evidentiary Rulings

Next, Phillips argues that the trial court erred by (1) denying his motion to suppress a recording made while a police informant wore a body wire, (2) allowing the jury to use a transcript as a listening aid while the recording played in court, (3) permitting the State to exceed the scope of cross-examination, and (4) admitting a recording of Hunt's 911 call. We disagree.

We review evidentiary rulings for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds or made for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons when it rests on facts unsupported by the record or a misapplication of the legal standard. *Rohrich*, 149 Wn.2d at 654. A decision is manifestly unreasonable if the court adopts a view that no reasonable person would take and the decision is outside the range of

[5] At the time of trial, Detective Taylor was a school officer, and schools were closed for the summer.

acceptable choices. *Rohrich*, 149 Wn.2d at 654.

A. *Motion to Suppress the Body Wire Recording*

First, Phillips argues that the trial court erred in denying his motion to suppress evidence of a conversation recorded by body wire between him and Jordan, the police informant, because the State's application to intercept and record the conversation relied on boilerplate language instead of specific allegations. We disagree.

We review a trial court's conclusions of law in denying a motion to suppress de novo. *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004). In general, it is illegal for any person or entity, including the State, to record private communications between two or more people without the consent of the persons being recorded. RCW 9.73.030(1). A recording made in violation of this rule is not admissible as evidence, unless an exception to the rule applies. RCW 9.73.050. The trial court found that Phillips's consent to the recording was not necessary for two reasons. First, the State properly applied for and obtained an order authorizing the body wire recording. Second, because Phillips conveyed an unlawful request or demand, the general rule did not apply. Both reasons are sound.

1. *Sufficiency of the Application*

A law enforcement officer may apply for and obtain an order authorizing a recording with only one party's consent "if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony." RCW 9.73.090(2). The application must include "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to

succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f). Phillips argues that the State's application relied on boilerplate justifications and failed to include the requisite particularity. We disagree.

"The reviewing court's role is not to review the application's sufficiency de novo, but 'to decide if the facts set forth in the application were minimally adequate to support the determination that was made.'" *State v. Knight*, 54 Wn. App. 143, 150-51, 772 P.2d 1042 (1989) (quoting *United States v. Scibelli*, 549 F.2d 222, 226 (1st Cir. 1977)). "[A]n application that contains 'nothing more than general boilerplate'" must fail for lack of particularity, but the mere use of *some* boilerplate language does not taint the entire application. *State v. Constance*, 154 Wn. App. 861, 881-82, 226 P.3d 231 (2010) (quoting *State v. Manning*, 81 Wn. App. 714, 720-21, 915 P.2d 1162 (1996)), *review denied* 170 Wn.2d 1026 (2011).

Here, the trial court determined that "the facts of this case, as related in the [application], are minimally adequate" to support the magistrate's order. 2 RP at 284. In describing the facts, the application stated that Phillips mentioned solicitation for murder to Jordan while both were in jail. The trial court concluded that the jail setting was "an inherent dangerous situation" where normal techniques would be impractical. 2 RP at 284. The application contained adequate facts to establish its particularity, even if it also used boilerplate language.[6] *See Constance*, 154 Wn. App. at 882; *Knight*, 54 Wn. App. at 150. This argument fails.

[6] The application also stated, "Normal investigative techniques reasonably appear to be unlikely to succeed to obtain convincing, accurate, unimpeachable evidence of the crime." CP at 24.

2. *Unlawful Request or Demand*

Moreover, Phillips does not address the trial court's second reason for denying the motion to suppress. Conversations that "convey threats of . . . bodily harm, or other unlawful requests or demands . . . may be recorded with the consent of [only] one party to the conversation." RCW 9.73.030(2)(b). Conversations recorded with a body wire between a police informant and a criminal suspect in which they planned the logistics of committing arson and discussed "the possibility of a bonus if somebody in the building was killed" fall squarely within this exception. *State v. Caliguri*, 99 Wn.2d 501, 504, 507, 664 P.2d 466 (1983); *see* RCW 9.73.030(2)(b).

Here, Phillips sought to suppress a conversation recorded in jail with a body wire between him and Glen Jordan in which they plan how Jordan can help Phillips get someone outside to kill Hunt, a likely witness against Phillips. The trial court concluded that the recorded conversation conveyed a threat of bodily harm and other unlawful requests and, thus, required the consent of only one party. Jordan's consent to the recording was sufficient. RCW 9.73.030(2)(b); *Caliguri*, 99 Wn.2d at 507.

B. *Use of a Transcript as a Listening Aid*

Next, Phillips argues that the trial court erroneously allowed the jury to use an inaccurate transcript as a listening aid while hearing the recording.[7] We disagree; further, if there was an error, it was harmless.

1. *Accuracy of the Listening Aid*

[7] To evaluate Phillips's arguments, we ordered the State to supplement the record with the body wire recording, the transcript, and the slides shown during closing argument. Order to Supplement Record, *State v. Phillips*, No. 41393-1-II (Wash. Ct. App. Aug. 28, 2012). The State complied. State's Designation of Clerk's Papers (Wash. Ct. App. Aug. 31, 2012).

Where the offering party makes a "'foundation showing of [the transcript's] accuracy,'" a trial court has broad discretion to allow the jury to use the transcript as a listening aid while hearing the recording on which it is based. *State v. Clapp*, 67 Wn. App. 263, 273, 834 P.2d 1101 (1992) (quoting 5B Karl B. Tegland, *Washington Practice: Evidence* § 483(3) (3d ed. 1989)). But a trial court errs if it allows the use of a transcript as a listening aid and the transcript's accuracy is neither stipulated nor proven. *State v. Cunningham*, 93 Wn.2d 823, 835, 613 P.2d 1139 (1980).

Here, the transcript's accuracy was not stipulated, but the trial court apparently accepted that its accuracy was proven. Phillips asserted that the transcript misattributed other people's statements to Phillips and that words rendered as "unintelligible" might have been understandable. The trial court, along with Phillips's attorney and the prosecutor, listened to the recording and compared it to the transcript. After this review, the trial court explained:

> There are a couple of errors that [Phillips's counsel] pointed out . . . . where he thought the recording [sic: transcription] was inaccurate. There are a few instances in the recording where it is documented as unintelligible so I can't say—well, there is surely no agreement that this is an accurate recording [sic: transcription]. And, as everyone has noted, even the best transcriptionist doesn't always get it right. There is never a perfect transcription.
>
> With that said, I think it is still probably helpful for the jury to be able to follow along . . . with the transcript as—as an aid to what they are hearing.

4B RP at 602-03. Although the trial court did not make an explicit finding as to the transcript's accuracy, the trial court reviewed the transcript's accuracy before allowing it as a listening aid. By clear implication, the trial court was satisfied that the transcript was proven to be sufficiently accurate.

We review the admission of a transcript as a listening aid for an abuse of discretion. *Cunningham*, 93 Wn.2d at 835 (quoting *United States v. Turner*, 528 F.2d 143, 167-68 (9th Cir. 1975)); *State v. Forrester*, 21 Wn. App. 855, 865, 578 P.2d 179 (1978). Neither *Cunningham* nor subsequent cases decide how accurate a listening aid must be. In *Cunningham*, our Supreme Court listened to the audio tape evidence "with great care" and compared it to the challenged transcript. 93 Wn.2d at 835. The court then decided that the transcript was accurate, "[w]ith but very few exceedingly insignificant mistakes, on irrelevant matters." 93 Wn.2d at 835.

We have compared the recording and transcript at issue here and have found that it contains two kinds of mistakes. First, in five different places, the transcript uses a word that clearly differs from the one heard in the recording.[8] Second, the transcript misidentifies the speaker at least once and possibly twice. The transcript clearly errs in attributing to Phillips a one-word statement, "Hunt," that Jordan made in the recording.[9] Ex. 36 at 14 min., 47 sec.—14 min., 48 sec.; Ex. 40 at 11. Separately, another part of the transcript identifies Phillips as the person

[8] The transcript uses an incorrect word in five instances: (1) "crypt" in the place of "Crip," (2) "MA" in the place of "inmate," (3) "I'm gonna know" in the place of "I wanna know," (4) "announce" in the place of "I know it's," and (5) "And to get" in the place of "And get." Ex. 40 at 8 (line 31), 9 (line 2), 10 (line 10), 11 (line 7, 15); Ex. 36 at 10 min., 31 sec.—10 min., 32 sec.; at 11 min., 33 sec.—11 min., 36 sec.; at 13 min., 40 sec.—13 min., 41 sec.; at 14 min., 45 sec.—14 min., 46 sec.; at 15 min., 10 sec.—15 min., 11 sec.

[9] The statement occurs in this passage of the transcript:

> [Jordan]: . . . announce [sic: I know it's] Levi, what's his last name again?
> [Phillips]: Hunt
> [Jordan]: Okay, uh, address is the only thing I'm lackin' right now. . . .

Ex. 40 at 11 (lines 7-11). In the recording, Jordan speaks the word "Hunt" and thus answers his own question. Ex. 36 at 14 min., 45 sec.—14 min., 48 sec.

speaking to Jordan, but we cannot say that the speaker's voice in this part is or is not the one attributed elsewhere to Phillips; it is possible that a third person made the statements in this part, but the transcript is not clearly mistaken.[10]

Despite the transcript's mistakes, the trial court did not abuse its discretion in determining that the transcript was accurate. The parties disputed the accuracy of the transcript and the trial court resolved the dispute after a careful comparison and a candid acknowledgement that the transcript was imperfect. The trial court's determination that the transcript was sufficiently accurate was not manifestly unreasonable or based on untenable grounds or made for untenable reasons. *See Rohrich*, 149 Wn.2d at 654. Accordingly, we hold that the trial court did not abuse its discretion when allowing the transcript as a listening aid.

2. *Harmless Error*

Moreover, even if the trial court had erred in allowing the jury to use the transcript as a listening aid, the error would be harmless in light of the trial court's instructions to the jury.

The erroneous admission of a transcript as a listening aid is not a constitutional error. *Cunningham*, 93 Wn.2d at 831, 835. Therefore the error is harmless unless it is prejudicial. *Cunningham*, 93 Wn.2d at 831, 835. The error is prejudicial if, within reasonable probabilities, its

[10] This part begins with an abrupt reduction in the volume of the speaker's voice, suggesting that the speaker may have been significantly further from the body wire than Phillips was while talking to Jordan. The speaker's voice sounds similar to Phillips's but uses a noticeably faster cadence than Phillips does in other parts of the recording. This part of the dialogue shifts away from the topic of Phillips and Jordan's plan, instead concerning (1) the exclusion of other inmates from the area where Jordan and Phillips talked and (2) an exchange of "milks" and commissary items between Jordan and the speaker. All the while, Jordan's voice continues at its usual volume. Phillips's voice is then clearly heard restoring the topic to Phillips and Jordan's plan, with a higher volume and slower cadence than immediately before.

occurrence materially affected the outcome of the trial. *Cunningham*, 93 Wn.2d at 831.

Here, any possible prejudice caused by the transcript would have been cured by the trial court's instructions to the jury. "A jury is presumed to follow the court's instructions." *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). After the distribution of the transcript for use as a listening aid, but before the State played the recording for the jury, the court admonished the jurors that "it is important that you are aware that what you are reading is not any sort of replacement for what you are hearing." 4B RP at 704. Further, the trial court emphasized that the jurors had no obligation to use the listening aid at all. At the close of trial, the court instructed the jury,

> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted . . . then you are not to consider it in reaching your verdict.

CP at 45. During deliberations, the jury requested a copy of the transcript, and the trial court refused. The trial court's instructions would have cured any possible prejudice resulting from erroneous use of the transcript as a listening aid.

C. *Scope of Cross-Examination*

Phillips appears to argue that the trial court erred by allowing the State to exceed the scope of cross-examination when it elicited prejudicial testimony that Phillips was a tattoo artist. This argument fails.

We review claimed errors on an improper scope of examination for a manifest abuse of discretion. *State v. Hakimi*, 124 Wn. App. 15, 19, 98 P.3d 809 (2004). Washington trial courts have "broad discretion 'to conduct [a] trial with dignity, decorum and dispatch and [to enable it

to] maintain impartiality.'" *Hakimi*, 124 Wn. App. at 19 (quoting *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969)). In defining the scope of cross-examination, trial courts should limit it "to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." ER 611(b).

Here, because the State's theory of its solicitation charge was that Phillips offered a tattoo in exchange for Hunt's murder, evidence that Phillips owned tattooing equipment and gave tattoos was directly on point. Phillips cannot show that the trial court abused its discretion in allowing the State to elicit this testimony. Thus, this argument fails.

D. *Hearsay*

Phillips also argues that the trial court erred in admitting the recording of Hunt's call to 911. Phillips argues that because Hunt stated in the 911 call that it was "'not a big emergency,'" his call is not an excited utterance, but rather inadmissible hearsay. SAG at 4 (quoting 3 RP at 421). We disagree.

We review a trial court's admission of a hearsay statement as an excited utterance for an abuse of discretion. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). A hearsay statement is admissible as an excited utterance if it is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). The proponent of the evidence must establish that (1) the startling event actually occurred, (2) the declarant made the statement while still under the stress of the startling event, and (3) the statement relates to the startling event. *State v. Hardy*, 133 Wn.2d

701, 714, 946 P.2d 1175 (1997). The proponent of the evidence may satisfy these three requirements with direct or circumstantial evidence. *Young*, 160 Wn.2d at 809. Although "the bare words of the utterance" itself are not enough, the circumstantial evidence derived from context and the declarant's behavior may establish that the startling event actually occurred. *Young*, 160 Wn.2d at 809.

Here, the trial court did not abuse its discretion in admitting the 911 recording because the State satisfied the three-prong test established in *Hardy*. The State presented evidence that the startling event actually occurred—other than the statement itself—because Hunt testified that Phillips called him and threatened to kill him. The State also established that Hunt made the statements recorded in the 911 call while under the stress of the startling event because it presented evidence that he was out of breath, speaking rapidly, initially reported an incorrect address, and stated that he felt threatened and was afraid for his life. Clearly, the 911 call relates to this threat. Accordingly, the trial court acted within its discretion when it admitted the recording of Hunt's 911 call in accordance with *Hardy*. Thus, this argument fails. Phillips's evidentiary arguments provide no grounds for reversal.

IV. Motion for Mistrial

Phillips next argues that the trial court committed reversible error when it denied his motion for a mistrial based on the State's alleged motion in limine violation. We disagree.

"We review [a trial court's] denial of a mistrial motion for abuse of discretion, giving great deference to the trial court because it is in the best position to discern prejudice." *Smith*, 124 Wn. App. at 428. A trial court abuses its discretion when it exercises it on untenable grounds or

reasons. *Smith*, 124 Wn. App. at 428. A trial court should grant a motion for mistrial only when a "defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Here, the trial court entered an order in limine prohibiting Coxson, Jacobs, and two other witnesses from making an in-court identification of Phillips because, when shown a photomontage, these witnesses were not able to identify Phillips as their attacker. Instead, these witnesses identified Phillips as the person arrested for the crimes, according to a photo of Phillips they had seen in a newspaper article. Detective Langlois was not among the witnesses prohibited from making an in-court identification of Phillips.

At trial, the State asked Detective Langlois whether Jacobs had identified anyone when he showed her the photomontage; he answered in the affirmative. Phillips objected and moved for mistrial based on the State's alleged violation of an order in limine. The trial court concluded that the testimony would not prejudice Phillips so long as Detective Langlois stated that Jacobs did not identify him as her attacker. Then, the State continued to examine Detective Langlois and he testified that Jacobs had not been able to identify Phillips as her attacker based on the photomontage.

Because the substance of Detective Langlois's testimony accurately reflected the results of his photomontage and did not violate the order in limine, this testimony could not have prejudiced Phillips. Thus, the trial court did not abuse its discretion in denying Phillips's motion for a mistrial. Accordingly, Phillips's argument fails.

V. Sufficiency of the Evidence

Next, Phillips argues that the trial court erred when it denied his motion to dismiss for the State's failure to present a prima facie case of any of the charges. We disagree.

When a defendant appeals the denial of his motion to dismiss at the conclusion of the State's case-in-chief, we review that appeal as a challenge to the sufficiency of the evidence. *See State v. Jackson*, 82 Wn. App. 594, 608-09, 918 P.2d 945 (1996). In reviewing a challenge to the sufficiency of the evidence, we consider the evidence and all reasonable inferences from it in the light most favorable to the State. *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010). Evidence is sufficient to support a conviction if any rational fact finder could have found that the defendant committed the crimes charged beyond a reasonable doubt. *McPhee*, 156 Wn. App. at 62. A defendant admits the truth of all the State's evidence by challenging its sufficiency. *McPhee*, 156 Wn. App. at 62. In analyzing the sufficiency of the evidence, circumstantial evidence is equally reliable as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

A. *Solicitation To Commit First Degree Murder*

In order to prove solicitation to commit first degree murder as charged here, the State had to prove that

> with intent to promote or facilitate the commission of [the murder], [Phillips] offer[ed] to give or [gave] money or any other thing of value to [Jordan] to engage in specific conduct that would constitute [the murder] or would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

CP at 52; *see* CP at 53.

Here, taking the evidence and all reasonable inferences from it in the light most favorable

to the State, its evidence was sufficient to support Phillips's solicitation to commit first degree murder conviction. The State established that Phillips approached Jordan while both were incarcerated, Phillips expressed his concern that Hunt was the only witness against him in the State's robbery charges, Phillips asked Jordan to "green light"—i.e., to kill—Hunt, and Phillips offered Jordan tattoo work and cash in exchange for Jordan's assistance. Because the State's evidence supported each element of the crime of solicitation to commit first degree murder, the State's evidence was sufficient.

B. *Second Degree Robbery*

In order to convict Phillips of second degree robbery as charged here, the State had to prove that, with the intent to commit theft, Phillips

> unlawfully took personal property from the person of another . . . against the person's will by [his] use or threatened use of immediate force, violence or fear of injury to that person . . . [in order] to obtain or retain possession of the property or . . . to overcome resistance to the taking.

CP at 64.

Here, the State presented sufficient evidence of its second degree robbery charge. Coxson testified that a young, tall, thin, white man grabbed her purse out of her hand. Inside the purse was Coxson's ATM card. About 20 minutes later, ATM security photos showed Phillips attempting to use Coxson's card. Phillips's physical characteristics fit Coxson's description of the person who stole her purse. Viewing the evidence in the light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that Phillips committed second degree robbery.

C. *Second Degree Theft*

In order to convict Phillips of second degree theft as charged here, the State had to prove that Phillips "wrongfully obtained or exerted unauthorized control over property of another, and . . . [t]hat the property was an access device[, of which Phillips] intended to deprive the other person." CP at 66. Here, the State presented sufficient evidence of every element of second degree theft because it established that Phillips wrongfully took Coxson's purse, which contained her ATM card, and later used her card at two ATMs around Longview. Accordingly, the trial court did not err in denying Phillips's motion to dismiss that charge after the State rested. Thus, Phillips's sufficiency of the evidence arguments fail.

VI. Prosecutorial Misconduct

Next, Phillips argues that the State committed prosecutorial misconduct in two ways, when it (1) included excerpts from the State's transcript of the body wire recording in a slide show it presented during closing argument because the trial court only allowed that transcript as a listening aid and the State did not properly authenticate its slides and (2) vouched for the credibility of a witness and of the police investigation. We disagree with both claims.

To establish prosecutorial misconduct, Phillips has the burden to show that (1) the prosecutor committed misconduct by making inappropriate remarks and (2) those remarks had prejudicial effect. *See State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). Where, as here, a defendant objected at trial to improper conduct, his burden on appeal is to show that the State's misconduct "resulted in prejudice that 'had a substantial likelihood of affecting the jury's verdict.'" *Emery*, 174 Wn.2d at 760.

A. *State's Slides*

Phillips argues that the State committed prosecutorial misconduct during closing argument by displaying PowerPoint slides that reproduced excerpts of the transcript of the conversation between Phillips and Jordan. While not the pinnacle of clarity, Phillips's SAG can be read to assert two forms of misconduct: (1) use of the slides at all, given that the trial court did not admit the transcript into evidence and only allowed its use as a listening aid, and (2) use of the slides despite their inaccurate reproduction of the transcript. We hold that the prosecutor's use of the PowerPoint slides was not misconduct.

In closing argument, a prosecutor does not commit misconduct by making statements supported by evidence. *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011). But a prosecutor commits misconduct when displaying PowerPoint slides that contain evidence so altered as to become "the equivalent of unadmitted evidence." *In re Pers. Restraint of Glasmann*, --- Wn.2d ---, 286 P.3d 673, 678 ¶ 19 (Oct. 18, 2012).

1. *Use of the Slides in Closing Argument*

Phillips appears to argue that the prosecutor committed misconduct by showing the jury slides excerpting portions of the body wire transcript, which was not admitted as evidence. We disagree.

When a trial court admits an audio recording into evidence and allows the jury to use a transcript as a listening aid without admitting the transcript as evidence, the prosecutor may quote the transcript during his closing argument. *State v. Brown*, 132 Wn.2d 529, 567, 940 P.2d 546 (1997). In *Brown*, the prosecutor read aloud from a listening aid during his closing argument. 132 Wn.2d at 567. There, the trial judge instructed the jury that only the recording was evidence

and any discrepancy between the recording and the listening aid should be resolved in favor of the recording. 132 Wn.2d at 567. Because the jury heard the recording during trial, the prosecutor did not prejudice the defendant by repeating portions of it during closing argument. 132 Wn.2d at 567.

Brown's reasoning shows that the State's use of slides was not improper because it caused no prejudice. Here, the prosecutor copied excerpts of the listening aid into slides, which he displayed to the jury during his closing argument. Like the judge in *Brown*, the trial judge here instructed the jury that the transcript "is not any sort of replacement for" the recording. Unlike the prosecutor in *Brown*, the prosecutor here reproduced the listening aid in a visual medium as well as an aural one: that is, he showed the excerpts while also reading them aloud. But the jury had already seen the listening aid during trial; thus the prosecutor's slides conveyed information that the jury had previously received in the manner that the jury previously received it. Thus, the prosecutor's slides did not prejudice Phillips.

2. *Inaccuracies in the Slides*

Phillips further argues that the prosecutor committed misconduct because the slides were a "very inaccurate" reproduction of the transcript. SAG at 3. We disagree.

A prosecutor's closing argument cannot include prejudicial statements that are not supported by the record. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). Here, the differences between the prosecutor's slides and the transcript did not cause any prejudice or amount to unadmitted evidence. Of the prosecutor's nine slides, six deviate in some way from the transcript. However, none of the variations has an appreciable effect on the transcript's meaning,

and none is prejudicial.[11]

As we discussed above, the transcript is a sufficiently accurate account of the recording, which was admitted into evidence. The very slight differences between the transcript and the PowerPoint do not turn the PowerPoint into unadmitted evidence. *See Glasmann*, 286 P.3d at 678 ¶ 19. This argument fails.

[11] All but two of the variations involve the use of contractions (e.g., "nothing" instead of "nothin'"), punctuation, and capitalization. The remaining two variations omit the words "hey" and "yeah," but these omissions have no effect on the transcript's meaning.

B. *Vouching*

Phillips next argues that the State committed misconduct when it vouched for the credibility of one of its witnesses and of the investigation during closing argument. We disagree.

While it is improper for the State to vouch for the credibility of a witness or of the investigation, the State has "wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Accordingly, the State commits improper vouching only when "'it is *clear and unmistakable* that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.'" *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)) (emphasis partially omitted). A reviewing court must examine challenged statements in context. *McKenzie*, 157 Wn.2d at 53.

Phillips asserts that the State expressed two personal opinions, concerning Jordan's credibility and the credibility of the investigation itself. First, the State described Jordan's role in informing and cooperating with police. The State explained that Jordan, an incarcerated gang member, chose not to help Phillips kill Hunt because "[Jordan] [i]s honest now." 6B RP at 1214. Although in isolation the word "honest" could express an opinion of Jordan's credibility, the context shows that it explains why Jordan refused to help kill Hunt. Accordingly, the statement is not a clear and unmistakable expression of the prosecutor's personal opinion about Jordan's credibility. *See McKenzie*, 157 Wn.2d at 53-54. To the contrary, the State's explanation is a reasonable inference from Jordan's testimony that he wanted to avoid additional criminal

responsibility because "I got my own family and my own life to look after and nobody really needs to die over something so petty." 4B RP at 688. Therefore the State did not vouch for Jordan's credibility.

Second, the State's rebuttal argument responded to Phillips's criticism of the investigation. The State said: " [W]as the investigation perfect? It wasn't. Was it a good investigation? Yes, it was." 6B RP at 1269. Here, it is even more clear that the State did not express a personal opinion about the investigation's credibility or goodness; instead, the State argued that the investigation was of acceptable quality. Because neither of the State's comments clearly and unmistakably expressed the prosecutor's personal opinion but instead argued inferences from the evidence, Phillips fails to establish misconduct. Accordingly, his argument fails.

VII. Presumption of Innocence

Lastly, Phillips argues that we must reverse his conviction because corrections officers' radios broadcasted jail communications on two occasions during trial and, thus, undermined his presumption of innocence. We cannot evaluate this argument on direct review.

The record before us does not disclose the content of the two radio communications or indicate whether they were inadvertent. On direct appeal, we do not review matters outside the trial court record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). And the record before us is insufficient to review this claim.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Van Deren, J.