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AUG 31 2009

King County Prosecutor
Appellate Unit

NO. 62971-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLIA GOLODIUC,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Washington's constitutional mandate to conduct all proceedings in public.
2. The court erred when it admitted hearsay testimony without a foundation adequate to support the relied upon exception.
3. Lack of a unanimity instruction on four counts of witness tampering violated Appellant's fundamental right to a jury trial.

Issues Pertaining to Assignments of Error

1. The court held a number of hearing in chambers, which were later placed on the record. At least one of these hearing involved a substantive trial issue. At no time did the court conduct the prescribed inquiry required to conduct legal proceedings outside of the open court. Under the analysis of State v. Bone-Club, In re Orange, et al., is remand for a new trial required?

2. The emergency room physician who treated the complainant testified to her statements under the hearsay exception for statements made for the purpose of medical diagnosis or treatment. The complainant was not a native English speaker, and the record demonstrates she required the assistance of a translator or interpreter to make herself understood. The physician, however, could not account for whether the complainant's statements came directly from her or through

the words of an interpreter. Did the court err by permitting the physician to repeat words ascribed to the complainant without an adequate foundation on personal knowledge?

3. The State charged four counts of witness tampering based on four letters ascribed to Appellant and found in the complainant's apartment. Both the information and the jury instructions addressed all three means of committing the offense. The evidence, however, is insufficient to establish all three means for each count. No unanimity instruction was given, and the trial prosecutor never made an explicit election. Does lack of a unanimity instruction require reversal of the four witness tampering charges?

B. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor charged Nicolai Golodiuc by third amended information with:

Count I – DV felony violation of a court order (RCW 26.50.110(1), (4)), committed on December 2, 2007 with an alleged assault on Nataliya Visharenko, his estranged wife, and with an aggravator allegation – a domestic violence offense with evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time (RCW 9.94A.535(h)(i));

Count II – misdemeanor violation of a court order (DV) (RCW 26.50.110(1), committed on January 22, 2008 against Visharenko;

Count III – first-degree burglary (DV) (RCW 9A.52.020), committed on February 17, 2008, with an alleged assault on Visharenko, and with an allegation of the DV ongoing pattern aggravator;

Count IV – second-degree assault (DV) (RCW 9A.36.021(1)(a)), committed on February 17, 2008 against Visharenko, and with an allegation of the DV ongoing pattern aggravator;

Count V – tampering with a witness (RCW 9A.72.120), committed on March 25, 2008;

Count VI – tampering with a witness, committed on July 11, 2008;

Count VII – tampering with a witness, committed on July 18, 2008; and

Count VIII – tampering with a witness, committed between February 18 and August 18, 2008.

CP 28-32.

A jury trial was held, in which the court bifurcated the trial on the substantive charges from the aggravating factors.¹ 2RP 4; 5RP 29-30.

Following the State's case in chief, the court granted Golodiuc's motion to dismiss Count II. 7RP 65-67. The jury found Golodiuc guilty of the remaining charges. CP 68-74.

Following receipt of the jury's verdict on the substantial charges, but before the jury heard evidence on the alleged aggravator, the court granted the State's motion to file a fourth amended information. Supp. CP

¹ The court actually reserved its ruling at this point in the record, but indicated how it was likely to decide. Subsequently, after Visharenko proved less than cooperative, the State asked to introduce the evidence of the prior DV incidents to explain her recantation. 6RP 32-37. The court, however, denied the State's request, finding Visharenko had actually

___ (sub no. 73, Motion and Order Permitting the Filing of a Fourth Amended Information (filed November 20, 2008)). That information repeated the seven felony allegations in the third amended information, but without the DV ongoing pattern aggravator allegation. CP 64-67.

Pursuant to a plea agreement, the fourth amended information added a new Count II – DV misdemeanor violation of a court order, committed on December 5, 2007. CP 64-65; 9RP 3. This charge replaced the previous Count II, which had alleged the same offense but committed on a different date. CP 29; 7RP 65-67. Under the plea agreement, Golodiuc pled guilty to the new Count II, in exchange for the State dropping the aggravator allegations. Supp. CP ___ (sub no. 78, Statement of Defendant on Plea of Guilty (Non-Felony) (filed December 5, 2008)).

At sentencing, the court imposed high-end standard range sentence on all counts, the longest being the 89-month term for the first-degree burglary. CP 84; 9RP 15-16. On the misdemeanor conviction, the court imposed a twelve-month term and ordered all terms to be served concurrently. CP 91; 9RP 15-16. The court also imposed a 24-to-48 month term of community custody. CP 85; 9RP 16. In addition, the court issued a separate no-contact order forbidding Golodiuc from contacting

recanted very little and had already provided a reason for her unwillingness to testify in her own testimony. 6RP 34-36.

Visharenko for life. Supp. CP ____ (sub no. 88, Order Prohibiting Contact (filed February 3, 2009)). This appeal timely follows. CP 94-107.

2. Substantive Facts

Nataliya Visharenko (Visharenko) came to the United States with her family – including her daughter from a previous marriage, L.V.² – from Latvia in 1999. 6RP 8, 11. Golodiuc and Visharenko met on the Internet sometime around 2003. 6RP 8-9. They dated and lived together for approximately a year, eventually married, and had two children. 6RP 9. During the period at issue here, Visharenko lived in the same apartment building as her mother. 5RP 46-47. Visharenko and, initially, Golodiuc had an apartment on the fourth floor, while her mother lived on the third floor. 5RP 47. L.V. would stay at either apartment, but usually lived with her grandmother on the third floor. 5RP 47.

Visharenko's first language is Russian, and she required the assistance of a translator to testify at trial. 1RP 4-5. L.V. acted as an interpreter for her mother during her contacts with police. 6RP 68-71; 7RP 43.

There was a history of violence in the marriage, including two prior incidents documented by police. CP 3. During the period relevant

² Because Visharenko's daughter was under eighteen throughout these proceedings, she will be referenced by her initials.

here, Golodiuc and Visharenko were separated, and Visharenko was the protected party of a no contact order issued by Seattle Municipal Court on December 4, 2006, with an expiration date of December 4, 2008. CP 3; 6RP 16-17. L.V. was also protected by a similar order issued at the same time. CP 3. Both orders prohibited Golodiuc from contacting either Visharenko or L.V., and from coming within 500-feet of their home, workplace or school. CP 3. Visharenko, however, testified she still loved Golodiuc and did not want him to get into trouble. 6RP 21.

a. Events Of December 2, 2007.

According to the certification for probable cause, Visharenko called 911 and reported Golodiuc had been at her apartment. CP 3. Visharenko reported she had come home the night before to find Golodiuc asleep with another woman. Id.

At trial, L.V. testified she was in her grandmother's third-floor apartment when they received a call from Visharenko complaining Golodiuc had been cheating on her. 5RP 48-49. They told her to come down to the third floor apartment, and L.V. said here mother was crying to the point of panic, hardly able to talk. 5RP 48. Visharenko spent the night with them. 5RP 49. The next morning, Visharenko went upstairs to see if Golodiuc and the other woman were still there. 5RP 50. After a few

minutes, Visharenko called L.V. in tears to come upstairs. 5RP 50.

Visharenko then showed L.V. a cut on her finger. 5RP 50-51.

According to L.V., Visharenko said Golodiuc and the other woman were both still in the apartment when she returned. 5RP 51. Visharenko attempted to get them out of the house, and as they were running out, Golodiuc grabbed a knife and stabbed her in the finger. 5RP 51. The police were called. 5RP 51. They took statements and pictures of Visharenko's fingers, and advised her to go to the hospital, but she did not seek medical attention. 5RP 51.

Officer Leroy Outlaw, III of the Seattle Police Department contacted Visharenko and found her upset and nervous. 7RP 37-38. Outlaw said they had to work through "a slight language barrier." 7RP 37. Outlaw also spoke with L.V. 7RP 43. He found Visharenko with an inch-long laceration on her finger of indeterminate depth, still bleeding. 7RP 39-40. Outlaw offered her transport to the hospital, but Visharenko said she could transport herself. 7RP 40-41. Outlaw also verified the no contact order restricting Golodiuc from contact with Visharenko. 7RP 41-43. The police, however, did not contact Golodiuc. 5RP 52; 7RP 44.

Visharenko, however, testified Golodiuc was alone in the apartment when she encountered him on the night of December 1st. 6RP 13. She said Golodiuc was having a bath when a woman called him on the

telephone and Visharenko found out he was “fooling around.” 6RP 14. Visharenko said she became upset and started crying. 6RP 14. Visharenko went down to her mother’s apartment to spend the night because she wanted Golodiuc to leave her apartment. 6RP 15. The next morning, Visharenko returned to her apartment and found Golodiuc sleeping as if nothing had happened. 6RP 15. She told him to leave or she would call the police. 6RP 15. Visharenko said she called the police and left without speaking with Golodiuc again that day. 6RP 17-18.

Visharenko said she did not remember speaking with the police that day, but denied Golodiuc had slashed at her and cut her finger. 6RP 18-19. Rather, she said Golodiuc had made some food the night before and put the knife with the sharp point upward in the dish drainer. 6RP 18-19. Visharenko said she did not notice the knife’s position and accidentally cut herself. 6RP 19. Visharenko denied Golodiuc cut her with a knife and denied telling L.V. Golodiuc cut her. 6RP 19, 43.

b. Events Of December 5, 2007.³

According to the probable cause statement, a detective visited Visharenko at home on the morning of December 5, 2007 and

³ This incident formed the basis for Count II in the Fourth Amended Information, to which Golodiuc pled guilty pursuant to the plea agreement. CP 64-65; Supp. CP ____ (sub no. 78, Statement of Defendant on Plea of Guilty (Non-Felony) (filed December 5, 2008)).

photographed her lacerated finger. CP 4. During the visit, Visharenko and a friend who had been present told the detective they had awoken at approximately 1:00 a.m. to find Golodiuc in the apartment. CP 4. They told the detective Golodiuc removed two small bags, presumably containing his personal items. CP 4.

c. Allegations Regarding January 22, 2008.⁴

According to the probable cause statement, Visharenko came home on the evening of January 22, 2008 and found Golodiuc inside the apartment sitting on the couch. See Supp. CP ____ (sub no. 64, State's Trial Memorandum (filed November 5, 2008)) (appended probable cause statement by Detective Elizabeth Ellis, dated February 21, 2008).

Visharenko told Golodiuc she was calling the police, and he responded they should come and get him. Id. After she hung up with 911, Golodiuc left. Id. Police responded but did not locate him. Id.

At trial, Visharenko said she did not remember calling the police and denied she would have done so just because Golodiuc was inside the apartment without her permission. 6RP 22-23, 46-47.

⁴ At trial, the State questioned Visharenko regarding an incident on January 2, 2008, which was not charged and about which she disclaimed memory. 6RP 21-22. It appears the incident being referred to, however, is the charged misdemeanor violation of a court order alleged to have occurred on January 22, 2008, and charged as Count II in the Third

d. Events Of February 17, 2008.

L.V. testified she was in the bedroom of her grandmother's apartment, putting the kids to bed around midnight, when she heard a knock on the door, followed by urgent whispers. 5RP 53. L.V. came out of the bedroom and found Visharenko crying on the couch. 5RP 53. Visharenko's face was swollen, and she could hardly speak. 5RP 53. L.V. attributed this speech difficulty to a presumed fractured jaw. 5RP 53, 59. According to L.V., Visharenko said Golodiuc came home after work, locked her in the room, and started hitting her for two hours, mostly on her face, but also on her hands. 5RP 53-54. Visharenko's face was badly bruised. 5RP 54. Visharenko was taken to the hospital, and Golodiuc was arrested. 5RP 54.

Seattle Police Officer David Sullivan said he responded to the call and met Visharenko and L.V. in the apartment building lobby. 6RP 67. He found Visharenko bloody and beaten with injuries to her face, and swelling to her face and other parts of her body. 6RP 68. Visharenko appeared very emotional, crying, distraught and fearful. 6RP 68. Sullivan said Visharenko spoke to officers "in broken English," and L.V. helped them understand what had happened. 6RP 68. Sullivan, however, was unable to testify as to which statements came directly from Visharenko

Amended Information. CP 29. Apparently, either the trial deputy misspoke or there is a

and which came from L.V.'s translation. 6RP 71. Sullivan did say, however, he received information leading him to believe the person responsible for Visharenko's injuries was her apartment. 6RP 71.

Sullivan, accompanied by other officers, went to the apartment and arrested Golodiuc. 6RP 85-86. Golodiuc was asleep when officers came to the apartment, and he seemed confused when they woke him. 6RP 86. Golodiuc smelled of alcohol, but was not combative and remained calm. 6RP 86, 92. Sullivan said Golodiuc denied assaulting anybody and told the officers he had not done anything criminal. 6RP 68. Sullivan did not note any injuries to Golodiuc. 6RP 86-87. Sullivan also confirmed the existence of the no-contact order. 6RP 88.

After Visharenko went to the hospital, Sullivan obtained a statement from her with the assistance of L.V., who would "jump in" when either Visharenko or Sullivan had difficulty understanding each other. 6RP 79-80. Sullivan said Visharenko smelled heavily of alcohol, but did not seem confused. 6RP 82-83.

Dr. Marc DiJulio, the emergency room physician who treated Visharenko, had limited memory of her and her case. 7RP 9-10. Specifically, he did not remember whether there were any language issues or whether he had to use a translator or interpreter. 7RP 10. Over

misprint in the transcript.

objection, DiJulio testified to hearsay statements, attributed to Visharenko, asserting she was assaulted by her estranged spouse. 7RP 13. DiJulio testified Visharenko told him she had been hit multiple times with fists and kicks over a two-hour period. 7RP 13. DiJulio also said Visharenko told him she could not remember a period of time, but she did recall being awakened when her assailant threw water on her and then continued the assault. 7RP 13.

DiJulio said Visharenko's injuries were consistent with being struck in the face. 7RP 14. In addition, her nose was very tender, but she did not have any nose bleed at the time. 7RP 14. A CT scan showed Visharenko's nose was broken in a manner consistent with being hit straight on. 7RP 16-17. The radiologist, however, could not establish the date of the fracture based on the CT scan. 7RP 19. Visharenko smelled of alcohol, and her blood alcohol level was .301, which given her relatively unaltered mental status at the time, indicated she was an alcoholic. 7RP 18, 26-27. Visharenko's physical injuries were "self-limited" and did not require specific medical interventions. 7RP 19. DiJulio's primary discharge recommendations addressed her alcohol and domestic violence issues with AA and DV counseling referrals. 7RP 20.

Visharenko testified Golodiuc came to visit her in her apartment. 6RP 23. He knocked on the door, and she let him in. 6RP 23, 47-48. The

two of them drank a considerable amount of alcohol while they talked about their family situation and the classes he had to finish before they would go to court to have the no-contact order removed. 6RP 23-24.

Visharenko was drunk by the end of the evening. 6RP 48-50.

Visharenko did not remember the actual assault. 6RP 30, 48-50.

Rather, she testified she awoke to a pain in her face, came out of her room and saw Golodiuc asleep in the living room. 6RP 24-25. Visharenko said she ran to her mother's apartment and told them Golodiuc had "probably" beat her up. 6RP 25. Visharenko also said, however, she was not sure who had done it. 6RP 25. Visharenko said she had been drunk and did not remember what she had said to L.V. and her mother. 6RP 31.

Visharenko denied giving L.V. details of the assault at that time because her mother was present and she would not discuss such matters in her mother's presence. 6RP 26. In regard to the statements to police, Visharenko denied making any statements and said L.V. told police everything. 6RP 27. When pressed regarding specific allegations in the police report, Visharenko said she did not remember. 6RP 27. In regard to statements to the treating physician, Visharenko said she said something but she did not have an interpreter. 6RP 27-28. Ultimately, Visharenko denied any memory of the assault or Golodiuc involvement. 6RP 44.

e. Witness Tampering Letters.

Golodiuc was charged with four counts of witness tampering based on four letters found by L.V. in Visharenko's apartment. 5RP 61-62.

L.V. said she heard Golodiuc was sending Visharenko letters and decided to find them. 5RP 60. These letters, written in Russian, were attributed to Golodiuc. 5RP 60-62. Three of the letters had envelopes and at least two were addressed to Golodiuc's two-and-a-half-year-old son. 5RP 72-73.

The fourth letter did not have an envelope, and that count was alleged between the date of Golodiuc's arrest and the date L.V. found the letters. CP 31-32, 67; 5RP 77; 8RP 27.

Visharenko acknowledged she received the letters from Golodiuc. 6RP 37. Visharenko, however, denied the March 25, 2008 letter was written to her. 6RP 38. Rather, Visharenko said the letters were meant for Golodiuc's mother. 6RP 40-41. Visharenko also said generally she did not know what Golodiuc meant by the letters. 6RP 40-43. In regard to L.V.'s actions, Visharenko said she took them without permission, and this amounted to stealing the letters. 6RP 52-53.

At trial, L.V. read the letters in Russian while the interpreter translated her reading into English for the jury.

The letter dated March 25th said in part:

Hello, mamuska [sic]. I don't know. What are we going to do next? As you might remember, I asked you not to call. And now – now we have to correct errors, mistakes. I will be locked up for half a year. Then they might add to it. But everything depends on you. You know that you should not show up in court. And you shouldn't talk to anyone on the phone. And, also, you have to change your home phone number right away. Call the company and ask for another number. This has to be done urgently. Then we will be able to talk on the phone. You will write the phone number later.

....

Well if you decided that you don't need me anymore, then confirm your testimony in court, and I will get two years. And they will deport me. But, of course, it is much better if I could be with kids.

SRP 65-66.

The letter dated July 11, 2008 said in part:

There is one guy here. He's in jail with me. And he had a jury trial. And there was a witness at the jury trial in the courtroom, but he declined to testify. He was released immediately. They let him go home. And that's what I thought; that you could do the same if you are called to court. Tell them that you decline speaking and nothing will happen to you because you showed up at the trial. And then they will exonerate me and let me go. And then no schools will be necessary, and the restraining order will be quashed. That's what happened to him, he told me. Think about it and write to me.

SRP 71-72.

The letter dated July 18, 2008 said in part:

Finally, I received a letter from you. I even started worrying if something had happened to you or to the

children. But now I can see that everything is okay. And my fears were in vain. Thank God everything is all right. Hopefully everything will be okay with your job, too. And especially if you do what I asked you of in the last letter. Then I will get out soon, and I will be able to improve the financial situation of our family. And I'm asking you not to discuss this issue with anyone. Just trust me at least once, and do what I'm asking you to do.

After you've have changed your testimony, the prosecutor doesn't have any chance of a victory. They already offered me three months and school – classes. But I declined and asked them to close the case. The prosecutor said that he will think about it, and he will give his answer in August. So I can get out of here any time when I wish to. Just, I have to plea, and that's all. But I want to win or at least to make – or at least to get them to close the case. I'm asking you one more time, help me. In case of a jury trial – of a trial say in court that you refuse to speak. That's it. Nothing will happen to you and it will be good for me.

And there is more good news. I wanted to write to you right away. In case I win in court, they will have to pay me 5,000 for every month in jail. This is one more reason why the prosecutor didn't want to – didn't want the trial – the jury trial in this case.

....

They think that if I spend two months behind bars, then I will want to get out. And then I will agree to any terms, to any theirs – that's why – that's why the hearings are continued all the time. When they realize that they cannot break me, they will give me what I'm looking for. They will try to influence you so that you – so that you actually will lock me up for the full term. That's what's going on, mommy. I hope you understood me and I was able to explain everything to you.

If you don't understand something, then write to me and ask. I will respond. Don't worry about the letters, and just don't worry. Nobody reads them. This is forbidden by law. This is confidential, confidentiality of correspondence.

5RP 74-76.

The letter introduced without an envelope, but attributed to the period between February 18, 2008 through August 18, 2008 said in part:

Why don't you write to me a reply? I need to know what is your mood and what are you planning to do so that I know how to behave myself at the trial. I can get quite a lot for each of your calls, up to one year, and you call too much. So it's about ten years. But so far they didn't consider half of it. They just left only five. And I have to prove somehow that at least on three or four cases – three or four incidents, I was not – it was not my fault. Maybe I will get just one year. And if God helps me, maybe they won't deport me.

I am asking you one more time; try not to testify against me even if they try to threaten you that they will lock you up in jail for giving false testimony. Don't believe them. The only thing they can do is to fine you. But they will threaten you for sure. You'll see. It will be even better if you change your phone number and don't talk to anyone. This will help me a lot.

Write to me how are you doing, how are the kids, how is the work. I'm waiting for your letter. I kiss all of you. Nicolai. My address is on the envelope. And also let me know if they already talked to you and what did you tell them.

And, also, did they take pictures of you on the day when I was detained? In case just – in case just tell them that on that night you were in the bar and some black woman beat you up and you were very angry. And when you came home, you saw me at home, that I was asleep, and decided to have your revenge because I didn't come to the bar. So you called and said that I beat you up.

....

This is the only option that will help me if you come to the trial.

SRP 78-80.

The court read a stipulation that L.V.'s translations were accurate, but the jury received only the original Russian letters as exhibits. CP 75-76; SRP 63, 70, 74, 78; 8RP 9.

C. ARGUMENT

1. VIOLATION OF GOLODIUC'S FUNDAMENTAL RIGHT TO A PUBLIC TRIAL REQUIRES REVERSAL.

Both the Washington and United States constitutions guarantee a defendant the fundamental right to a public trial. Const. art. I, § 22; U.S. Const. amend. IV; State v. Bone-Club, 128 Wn.2d 254, 259-60, 906 P.2d 325 (1995); In re Personal Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004); State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). In addition, Article 1, § 10 of the Washington Constitution expressly guarantees the public and the press the right to open court proceedings.⁵ Easterling, 157 Wn.2d at 174. And the First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Washington's constitution provides, at minimum, the same protection of a defendant's right to a fair trial as the Sixth Amendment. Bone-Club, 128 Wn.2d at 260.

⁵ Article I, § 10 of the Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay."

Washington courts strictly watch over both the accused's, and the public's, right to open criminal proceedings. Easterling, 157 Wn.2d at 175. No majority of the Washington Supreme Court has ever found a violation of the public's right to open proceedings to be de minimis, and violations are not subject to harmless error analysis. Easterling, 157 Wn.2d at 180-81. "While a defendant may not herself be harmed by a hearing in a closed courtroom, there is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis." Easterling, 157 Wn.2d at 186 (Chambers, J., concurring).

Where there is a violation of the open public trial doctrine, prejudice is presumed. Orange, 152 Wn.2d at 814. The remedy is reversal of the conviction and remand for a new trial. Orange, 152 Wn.2d at 814. Review is de novo. Brightman, 155 Wn.2d at 514; State v. Duckett, 141 Wn. App. 797, 802, 173 P.3d 948 (2007), rev. pending, 2008 Wash. LEXIS 745 (2008); State v. Frawley, 140 Wn. App. 713, 719, 167 P.3d 593 (2007), rev. pending, 2008 LEXIS 602 (June 4, 2008).

The right to a public trial is not absolute, but a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before closing any part of a trial to the public, a

trial judge must first apply, on the record, the five factors set forth in

Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting Allied

Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848

P.2d 1258 (1993)).

In addition to hearing witness testimony at trial, the public trial right extends to pretrial proceedings. Easterling, 157 Wn.2d at 174. Further, the process of jury selection is included in the public trial right because it is "a matter of importance, not simply to the adversaries but to the criminal justice system." Frawley, 140 Wn. App. at 719 (quoting Orange, 152 Wn.2d at 804).

Here, the court held a number of conferences in chambers, which were later placed on the record. At the start of trial, the court said, "The record should reflect that before we went on the record, counsel and I met

in chambers briefly to see where we were with regard to actually starting this case in earnest.” 2RP 3. Arguably, this description falls under the “ministerial” exception to the public trial rule in Bone-Club. That chambers discussion however, also included discussion of at least one of Golodiuc’s motions in limine – a request for notice of incidents the State intends to offer under ER 404(b). 2RP 10.

Another indication of legal discussions during this initial chamber’s conference appears during a discussion in open court regarding bifurcation. The court said,

The Court: When we first met about the information and I pointed out to both of you that the citations were wrong for the aggravators in the information – do you remember that Mr. Santos?

Mr. Santos: Right.

The Court: And you looked at it and you agreed that it had the wrong citations for the aggravating factors that were alleged.

Mr. Santos: Right.

The Court. So we figured that out.

SRP 22.

Perhaps the most significant violation of the right to a public trial, and the public’s right to open court proceedings, occurred in regard to the State’s request to inquire into prior instances of DV given Visharenko’s

“recantation” and inability to remember. 6RP 33-36. During the State’s direct examination of Visharenko, the trial deputy requested a sidebar, which was not recorded. 6RP 32. The court then came back on the record and released the jury for the morning recess. 6RP 32. Following the recess, the court and prosecutor discussed a memo regarding the State’s position and put the contents of a chamber’s discussion on the record.

The Court: Let’s get that filed so that the argument is preserved. I will say for the record that we chatted about this in chambers. I pointed out to you, Mr. Santos, that I made very detailed notes about the testimony of Ms. Visharenko. And although you kept framing your questions with regard to whether or not she was denying something, she denied very little. What she kept saying was she didn’t remember or she didn’t recall and so on and so forth. I think there’s a distinction to be had there.

6RP 34.

Clearly, the court heard substantial argument and made a significant ruling during a chamber’s discussion. That hearing alone violates Golodiuc’s fundamental right to a public trial.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Waller, 467 U.S. at 46 (citations omitted); see also Bone-Club, 128 Wn.2d at 259 (the public trial right operates as “an essential cog in the

constitutional design of fair trial safeguards'). The public had a right to observe all facets of Golodiuc's trial, and Golodiuc has a fundamental right to have an open public proceeding. Violation of the public trial right requires reversal. Orange, 152 Wn.2d at 814.

There are currently a number of cases stayed in the Supreme Court pertinent to this issue.⁶ In State v. Frawley, Division Three of this Court reversed a conviction for first-degree felony murder for violation of the open trial right when the court conducted part of the voir dire in chambers. Frawley, 140 Wn. App. at 721. In Frawley, the trial court conducted a two- part voir dire, the first consisting of private individual questioning in chambers, and the second in the courtroom. Frawley, 140 Wn. App. at 718. Frawley waived his right to be present during the private voir dire, but the court never asked whether Frawley or the public would waive their right to have the public present. Frawley, 140 Wn. App. at 718.

Again, while Frawley waived his right to have the public present during the second part of the voir dire conducted in the courtroom, the court never asked the members of the public whether they would waive their right to a public trial. Frawley, 140 Wn. App. at 718. In regard to

⁶ Among the cases pending in the Supreme Court are: State v. Frawley, 140 Wn. App. 713, 719, 167 P.3d 593 (2007), rev. pending, 2008 Wash. LEXIS 602 (June 4, 2008); State v. Momah, 141 Wn. App. 705, 711-12, 171 P.3d 1064 (2007), rev. granted, 163 Wn.2d 1012 (2008); State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007), rev.

Frawley's waiver of his public trial right, however, the Court noted there was no discussion about excluding the public, and Frawley was never presented an opportunity to make a knowing and intelligent waiver of that right. Frawley, 140 Wn. App. at 720.

This Court, however, has criticized Division III's decision in Frawley. In State v. Momah, 141 Wn. App. 705, 711-12, 171 P.3d 1064 (2007), rev. granted, 163 Wn.2d 1012 (2008), this Court rejected a claimed violation of the public trial right, finding no evidence the trial court ever closed the proceedings or excluded the public from the in-chambers voir dire. In Momah, the trial court, with the agreement of both attorneys, conducted part of the voir dire in chambers to avoid contamination of the venire by those who had prior knowledge of the case. Momah, 141 Wn. App. at 709-11. The court went into chambers with both attorneys, the defendant, the court reporter, and an individual juror, and announced on the record the door was closed. Momah, 141 Wn. App. at 710. Following a lunch recess, the court reconvened in a different courtroom, with the members of the panel sitting in the courtroom and the individual voir dire conducted in the jury room. Momah, 141 Wn. App. at 711.

pending, 2008 Wash. LEXIS 745 (July 9, 2008); and State v. Strode, Supreme Court case number 80849-0.

The Momah Court noted nothing in the record established the trial court expressly closed the voir dire or actually excluded any member of the public or press. Momah, 141 Wn. App. at 711-12. Discussing the Bone-Club criteria, the Court read that case and its progeny to require an express ruling to trigger the analysis. Momah, 141 Wn. App. at 712-14. Because there was no explicit ruling imposing a closure, the Momah Court did not require the State to overcome the presumption the courtroom was closed. Momah, 141 Wn. App. at 713-14.

Discussing Frawley, the Momah Court noted the decision to close the voir dire in that case was motivated by a desire to shield the voir dire from other members of the public, while the decision in Momah was motivated by a desire to shield the members of the venire from other members with prior knowledge of the case. Momah, 141 Wn. App. at 715. The Momah Court then said, “To the extent that Frawley holds that all in chambers proceedings are per se closed to the public, we decline to follow Division Three’s reasoning in that case.” Momah, 141 Wn. App. at 716.

Clearly, the chambers conferences in this case were not presaged by explicit orders of closure. Golodiuc, however, urges this Court to reject Momah’s reasoning. Momah’s reliance on the absence of an express trial court order excluding the public from certain proceedings to

distinguish its facts from those in Bone-Club, and its progeny, creates a distinction without a difference. The core holding of the Supreme Court's cases is a trial court may not conduct trial proceedings outside of the public eye unless the court creates a record sufficient for appellate review by addressing the Bone-Club criteria. Bone-Club, 128 Wn.2d at 261-62 (absent a trial court record, the Court cannot determine whether closure warranted, reversal for new trial required); Orange, 152 Wn.2d at 812 (adopting Bone-Club holding -- failure to conduct five-step closure test violated defendant's public trial right); Brightman, 155 Wn.2d at 518 (Court cannot determine if closure warranted because trial court failed to consider defendant's public trial rights under Bone-Club -- remand for new trial); Easterling, 157 Wn.2d at 175 (trial court may not close proceedings without first applying and weighing Bone-Club criteria and entering specific findings to justify closure).

No Washington court until Momah has conditioned a defendant's right to a public trial challenge on the existence of an express closure order. The proper inquiry is whether the trial court's procedure effectively barred public observation, not whether the court expressly ordered the procedure.

Momah's strict construction of the language of the trial court's declaration of closure prohibits reviewing courts from making reasonable

presumptions or drawing inferences from that language. Such slavish adherence to a trial court's words is contrary to Orange, where the Court held the nature of the closure is defined by "the presumptive effect of the plain language of the ruling itself[.]" Orange, 152 Wn.2d at 808; see also State v. Duckett, 141 Wn. App. at 807 n.2 ("To the extent that the State's argument is that the court did not enter a closure order, we look to the record to determine the presumptive effect of the court's directive. The trial judge stated she intended to interview the selected jurors in a jury room. The State bears the burden on appeal to show that, despite the court's ruling, a closure did not occur.").

The Momah Court refused to consider the presumptive effect of the trial court's use of its chambers, and ignored the nature of a court's chambers and the reasons for conducting business in chambers. See Houston Chronicle Pub. Co. v. Shaver, 630 W.S.2d 927, 932 (Tex. Crim. App. 1982) (conducting part of hearing in chambers "is the functional equivalent of closing the court to spectators and news reporters."); B.H. v. Ryder, 856 F. Supp. 1285, 1290 (N.D. Ill. 1994) ("The privacy of the judge's chambers historically has provided an atmosphere conducive to candor and conciliation. No one who knows anything about litigation is unfamiliar with this phenomenon."). Simply stated, proceedings occur in chambers to facilitate privacy.

The Momah Court ignored the practical reality of in-chambers proceedings. The decision in Momah is illogical and contravenes the Supreme Court's intent to foster open proceedings. Rather, Momah permits judges to close trials to the public at will, simply by not issuing an explicit order.

Where a trial court obviously holds proceedings in chambers, the burden should be on the State to show the proceedings were open. Duckett, 141 Wn. App. at 807 n.2. The Momah Court erred by shifting the burden to the defendant because "the trial court simply never ordered the proceeding be closed to any spectators or family members." Momah, 141 Wn. App. at 714.

Recognizing this issue will most likely be stayed pending the Supreme Court decisions in Momah, Strode, Frawley, and Duckett, Golodiuc asks this Court to find a violation of the constitutional requirement for open public trials and to reverse.

2. THE COURT'S ADMISSION OF PHYSICIAN HEARSAY WITHOUT ANY MEANINGFUL FOUNDATION FOR HOW THE WITNESS ACQUIRED HIS INFORMATION REQUIRES REVERSAL.

The record here establishes Visharenko had very limited English language skills, and she required the assistance of an interpreter in every contact recorded below. The emergency room physician who treated her

acknowledged an interpreter or translator would normally be used for patients who could not converse in English. The physician, however, had no specific recollection of treating Visharenko, including no recollection of whether he had access to an interpreter, and if so, the identity of that interpreter. Over Golodiuc's objection, the court permitted the physician to repeat words attributed to Visharenko in his medical chart of the case. The court improperly permit the physician to give details of the assault on Visharenko, including identifying Golodiuc as the assailant, without establishing the foundation for his knowledge. Reversal is therefore warranted.

In general, hearsay – extra-judicial statements offered for the truth of the matter asserted – is not admissible. ER 801(c);⁷ ER 802.⁸ One exception to the rule excluding hearsay is provided for statements made for purposes of medical diagnosis or treatment. ER 803(a)(4).⁹ Thus,

⁷ ER 801(c) defines 'hearsay' as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

⁸ ER 802 provides, "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."

⁹ ER 803(a)(4) provides:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or

medical professionals are permitted to testify regarding statements made by their patients, which are pertinent to diagnosis or treatment. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). In general, the identity of an assailant is not considered pertinent to treatment, and such testimony is precluded. Redmond, 150 Wn.2d at 496. Washington courts have expanded the physician hearsay exception in cases involving domestic assaults, however, to include such identifications on the theory they are pertinent to potential treatment protocols. State v. Ngo Tho Huynh, 107 Wn. App. 68, 75, 26 P.2d 290 (2001); State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995).

It is, however, a foundational requirement for the witness to be able to identify the sources of information for the statements. See State v. LeFever, 102 Wn.2d 777, 786-87, 690 P.2d 574 (1984) (overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) and overruled on other grounds by State v. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989)) (insufficient evidence to support finding of personal knowledge when defense witness could not specify exact sources of proposed testimony). The burden of laying a foundation that the witness had adequate opportunity to observe the facts to which he testifies is on

sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

the proponent. LeFever, 102 Wn.2d at 787. Where the witness cannot remember these sources or the pertinent events, the proffered testimony is properly rejected. LeFever, 102 Wn.2d at 787; see also Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (in summary judgment, where witness initially states he does not recall an event, he is incompetent for lack of personal knowledge to testify as to whether that event occurred).

As a general rule, witnesses are incompetent to testify to extrajudicial statements made by another person when it is necessary to have the statements translated before the witness could understand it. State v. Lopez, 29 Wn. App. 836, 839, 631 P.2d 420 (1981). Testimony based on an out of court translation is clearly hearsay because the witness can only testify to what the interpreter asserts the other party said. Lopez, 29 Wn. App. at 839. When testimony is based solely on translation rather than an independent understanding of the declarant's own words, it is not admissible for the truth of the matter asserted unless the interpreter can be shown to be an agent of, or authorized to speak for, the declarant. State v. Garcia-Trujillo, 89 Wn. App. 203, 207, 948 P.2d 390 (1997).

As noted, Visharenko had limited English skills, and she required the assistance of a translator at trial. 1RP 4-5. Detective Sullivan noted the necessity of L.V.'s assistance at the hospital to take a statement from

Visharenko regarding the same incident Dr. DiJulio testified to. 6RP 78, 80.

Dr. DiJulio did not have an independent personal recollection of her ability to communicate in English. 7RP 9-10. He said an interpreter or translator would have been used if he had trouble communicating with Visharenko. 7RP 9-10.

DiJulio also said, “Additional information would have been obtained from the pre-hospital or EMS people, information they would have gathered at the scene. And I don’t recall if police officers were there. But if they were there, they might have provided information as well.” 7RP 9. After confirming DiJulio did not have an independent recollection of every patient, the trial deputy asked what he was told by Visharenko, counsel objected to hearsay, and the court sustained. 7RP 10. After a sustaining a second hearsay objection, the court suggested the prosecutor “lay some foundation as to whether this came directly from her or through some intermediary or something of the sort.” 7RP 11.

Q. Let me ask you: If you were to obtain information through a third party other than the patient would you have noted that in your medical report, in the chart?

A. Most of the time – for example, if a paramedic said that the patient told them something, I would confirm that with the patient. So in my notes it wouldn’t say, well, EMS personnel said the patient said this and she verified it. I wouldn’t just say the patient said this because she did. I

mean, the EMS guy just directed me where to go, and I confirmed it with the patient.

Q. So let me ask you that question. What information did you confirm with the patient?

A. Well, everything in my record. If I made the statement that states she was assaulted, it means she stated she was assaulted.

Q. That's what I want to ask you about. What exactly did she confirm with you in your conversation with her as to what happened to her?

A. She stated that she was assaulted by her estranged spouse –

Ms. Murphy: I'm going to object, again, as to hearsay, Your Honor.

The Court: I'm going to overrule the objection. Go ahead.

Ms. Murphy: Your Honor, if I could be heard at sidebar?

The Court: Sure.

(Sidebar discussion between the Court and counsel; not reported.)¹⁰

¹⁰ After the court released the jury to the jury room, this sidebar was placed on the record. The legal basis of counsel's objection was State v. Redmond, 150 Wn.2d 489, 78 p.3D 1001 (2003), where the Supreme Court noted it was error to admit statements made to a physician identifying an assailant under the medical diagnosis and treatment hearsay exception. 7RP 47-48. Analyzing the limits of the exception, the Redmond Court said, "For example, the statement 'the victim said she was hit on the legs with a bat' would be admissible, but 'the victim said her husband hit her in the face' would not be admissible." Redmond, 150 Wn.2d at 496. The court below, however, noted Redmond was not a domestic violence case, and distinguished it. 7RP 48-49. The court also disagreed with the Redmond Court's statement of the law and discounted the case because the Court had not explicitly overruled cases that had found such statements admissible. 7RP 49-50.

The Court: The objection is overruled. Go ahead, Mr. Santos.

Mr. Santos: Thank you, Your Honor.

Q. Doctor, again, can you tell us what the patient confirmed with you as to what happened to her?

A. The patient stated that she was assaulted by her estranged spouse. She stated that he gained access to her apartment. When she was entering the apartment –

Ms. Murphy: I will object as to hearsay on this, Your Honor.

The Court: I'll sustain as to the second part of the Doctor's testimony, strike that portion of the testimony, and instruct the jury to disregard. Maybe you can help the doctor out a little bit, Mr. Santos.

7RP 11-13.

The court permitted the prosecutor to lead, and DiJulio told the jury Visharenko had "confirmed" she had been assaulted by multiple blows from fists and kicks over a two-hour period. 7RP 13. DiJulio also said Visharenko said she did not remember the entire event, but she recalled being awakened when he threw water on her and continued with the assault. 7RP 13.

The error raised here, however, is based on the lack of foundation on which of Visharenko's statements came to DiJulio via her own words and which came through an intermediary, either a hospital interpreter or L.V., a clear hearsay issue. Hearsay was raised in counsel's original objections on the record, and the court's direction to lay a foundation indicates the court was aware of the nature of counsel's objection. 7RP 10-11.

What DiJulio testimony failed to establish is whether he had assistance of an interpreter in confirming the statements of the police or EMS personnel. Given Visharenko's apparent inability to communicate independently in English, the State as proponent of the statements was required to establish the basis for DiJulio's knowledge of the contents of Visharenko's statements. LeFever, 102 Wn.2d at 787; see also ER 602.¹¹ DiJulio, however, testified he did not remember any of the specifics of his communications with Visharenko, her degree of English skills, or whether a translator was used. 7RP 9. Thus, the State failed to lay an adequate foundation for personal knowledge regarding the sources of DiJulio's information.

The trial court erred when it admitted DiJulio's recounting of Visharenko's purported statements without an adequate foundation to ensure they were her statements and not those of an unnamed translator. Because the only other source for statements attributed to Visharenko, L.V., demonstrated obvious bias against Golodiuc, DiJulio's recitation provided the State with crucial support. If, however, DiJulio only came by his versions of Visharenko's statements through L.V.'s translation, then

¹¹ ER 602 provides in part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

his testimony merely amplifies L.V.'s biased testimony. See State v. Phu V. Huynh, 49 Wn. App. 192, 203-04, 742 P.2d 160 (1987), rev. denied, 109 Wn.2d 1024 (1988) (noting translation of defendant's words may be questionable where interpreter was related to victim). The court's error in admitting DiJulio's recitation of statements attributed to Visharenko was prejudicial. This Court should reverse those convictions to which this testimony applied – the first-degree burglary in Count III and the second-degree assault in Count IV.

3. LACK OF A UNANIMITY INSTRUCTION REQUIRES REVERSAL OF THE WITNESS TAMPERING CONVICTIONS.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21;¹² State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 331 (1994). Where the evidence is insufficient to support any alternate means of committing the charged offense submitted to the jury, the defendant has the right to an express assurance that he was convicted based on a means for which there was sufficient evidence. Ortega-Martinez, 124 Wn.2d at 707-708. The right to a unanimous jury is derived from the fundamental constitutional right to a trial by jury, and the issue

¹² Const. art. 1, § 21 provides in pertinent part, "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record"

can be raised for the first time on appeal. State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066, rev. denied, 126 Wn.2d 1025 (1995).

In Washington, there is a strong preference to instruct juries regarding unanimity on alternative means. Ortega-Martinez, 124 Wn.2d at 717 n.2. Where such instruction has not been given, two distinct lines of analysis are applied to determine jury unanimity: (1) where the verdict was clearly based on only one of the alternative means and substantial evidence supported that means, unanimity may be presumed; and (2) where substantial evidence supports each alternative means charged, unanimity as to guilt alone is sufficient. State v. Lobe, 140 Wn. App. 897, 903-04, 167 P.3d 627 (2007) (addressing two counts of witness tampering). Where, however, the jury is instructed on all three alternative means to commit witness tampering; where evidence is given, and argument presented, to support only two, but no evidence or argument is presented as to the third; and where the jury was also improperly instructed on another similar count, the foundation is too unstable to permit an appellate court to affirm. Lobe, 140 Wn. App. at 906.

Here, the offense of witness tampering, RCW 9A.72.120,¹³ is an alternative means offense. Lobe, 140 Wn. App. at 902-03. The offense

¹³ RCW 9A.72.120 – Tampering with a witness – provides:

can be committed if a person attempts to induce a witness: (1) to testify falsely or to withhold testimony; (2) to absent herself from an official proceeding; or (3) withhold information relevant to a criminal investigation. RCW 9A.72.120.

Here, the State charged Golodiuc under all three alternative means for each of the four counts of witness tampering. CP 30-32, 65-67. The court instructed the jury on all three alternative means for each count. CP 58-61. The court, however, failed to give a unanimity instruction regarding the witness tampering charges. Thus, these convictions must be reversed unless the record in relation to each count clearly shows substantial evidence supporting all three means or the evidence and argument addressed only one means, and that means was established by substantial evidence. Lobe, 140 Wn. App. at 903-04. The record in this

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

(2) Tampering with a witness is a class C felony.

case supports neither showing, and the witness tampering convictions must be reversed.

With the exception of the dates, the information alleged all four counts of witness tampering with all three alternative means:

That the defendant Nicolai Golodiuc in King County, Washington, [allegation of date], did attempt to induce a witness he has reason to believe is about to be called as a witness in any official proceeding, or a person whom he has reason to believe may have information relevant to a criminal investigation, to testify falsely or, without right or privilege to do so, to withhold any testimony or absent himself or herself from such proceedings, or withhold from a law enforcement agency information which he or she has relevant to a criminal investigation[.]

CP 30-32, 65-67.

In like manner, the court instructed the jury on all three alternative means for witness tampering in all four counts. Thus, the first element of the “to convict” instructions for each count of witness tampering said:

(1) That [DATE], the defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation[.]

CP 58-61.

In its argument to the jury on the witness tampering charges, the prosecutor started by repeating the three alternative means for committing witness tampering. 8RP 23. Then the prosecutor said, “Basically the

State must prove that the defendant attempted to induce a person to testify falsely or withhold testimony or absent herself from court.” 8RP 24.

Thus, there was no election, and the State did not alert the jury to the need for unanimity as to means.

The evidence of witness tampering came solely from the letters found by L.V. in Visharenko’s apartment. None of these letters contain substantial evidence that would support all three means by which witness tampering may be committed.

For example, in the letter of March 25th, which formed the basis for Count V, admonishes only that Visharenko “not show up in court” and “not talk to anyone on the phone” and “change your home phone number right away.” 5RP 65. It also tells her to confirm her testimony in court if she wants him jailed for two years with deportation, but suggests, “it is much better if I could be with kids.” 5RP 66.

Discussing this letter in argument, the prosecutor said, “On count five – this is the March 25th letter, the defendant – did the defendant attempt to induce a person to testify falsely or withhold testimony?” 8RP 24. Clearly, the prosecutor has introduced the “testify falsely” means for which the letter does not provide substantial information. The prosecutor then elaborated:

These clearly show what he was trying to do. He's trying to get her not to show up. Trying to go so far as asking her, encouraging her to change her number so it would be more difficult to get a hold of her. And then said, you know what, but if you've decided you don't need me anymore, go on in and testify. But our children need their father. Count five, March 25th letter, clearly tampering.

8RP 25.

There is nothing in this evidence suggesting offering false testimony. In addition, the beginning of the letter refers to her telephone calls to him, and suggests he may be locked up for uncharged violations of the no contact order. 5RP 65. Thus the references to changing the telephone number are not clearly indicative of withholding information from law enforcement regarding matters currently under investigation.

In the letter of July 11, 2008, which formed the basis for Count VI, Golodiuc tells about a man who was in jail and was released immediately when the witness appeared at trial but declined to testify. 5RP 71. The letter continues, "And that's what I thought; that you could do the same if you are called to court. Tell them that you decline speaking and nothing will happen to you because you showed up at the trial." 5RP 71-72. This letter could be suggesting an inducement to withhold testimony, but it could also suggest an inducement to withhold information. In argument, however, the prosecutor made no election at all. 8RP 25. He merely repeated the letter and said, "Again, his own words. Going back to one of

the other charges, whether or not he knew about the restraining order, the no-contact order, he wrote about it. Count six, proven.” 8RP 25.

The letter of July 18th, which forms the basis for Count VII, says:

And especially if you do what I asked you of in the last letter. Then I will get out soon, and I will be able to improve the financial situation of our family. And I’m asking you not to discuss this issue with anyone. Just trust me at least once, and do what I’m asking you to do.

After you’ve have changed your testimony, the prosecutor doesn’t have any chance of a victory. . . . I’m asking you one more time, help me. In case of a jury trial – of a trial say in court that you refuse to speak. That’s it. Nothing will happen to you and it will be good for me.

. . . .

They will try to influence you so that you – so that you actually will lock me up for the full term. That’s what’s going on, mommy. I hope you understood me and I was able to explain everything to you.

5RP 74-75.

Arguing this count to the jury, the prosecutor said “Defendant again, he attempted to induce her to testify falsely or withhold testimony.” 8RP 26. The question here is which alternative means did the jury find in their verdict. “Testify falsely” is clearly at odds with “withhold testimony,” and the mere reference to “after you’ve changed your testimony” is scant proof of an attempt to induce false testimony.

The letter without an envelope, which formed the basis for Court VIII starts by addressing the jeopardy Golodiuc feels he is being placed in by Visharenko's calls to him in jail. 5RP 78-79. He then says:

I'm asking you one more time; try not to testify against me even if they try to threaten you that they will lock you up in jail for giving false testimony. Don't believe them. The only thing they can do is to fine you. But they will threaten you for sure. You'll see. It will be even better if you change your phone number and don't talk to anyone. This will help me a lot.

....

And also, did they take pictures of you on the day when I was detained? In case just – in case just tell them that on that night you were in the bar and some black woman beat you up and you were very angry. And when you came home, you saw me at home, that I was asleep, and decided to have your revenge because I didn't come to the bar. So you called and said that I beat you up. This is the only option that can help me if you will be at the trial.

5RP 79-80.

In argument, the prosecutor pointed out the withholding testimony means as well as the false testimony means. 8RP 28. The prosecutor did not mention the reference to changing the telephone number and not speaking with anyone, which could be scant evidence of attempting to induce Visharenko to withhold information. It could, however, also be related to his concern about Visharenko's telephone calls to him in jail and the jeopardy those calls placed him in.

What is most concerning for jury unanimity, however, is the request in the letter of July 18th to “do what I asked you of in the last letter.” 5RP 74. That reference can be either to the letter of July 11th, regarding which the prosecutor made no election among the alternative means, or – as the trial deputy argued – to the letter without an envelope, in which there was a request to falsify testimony by alleging an attack by a black woman in a bar. 8RP 27. That reference to “the last letter” permits the jury to ascribe all three means of committing witness tampering to at least three of the four letters.

In Lobe, the Court said, “In the context of a case where the jury was also improperly instructed on another similar count and where simple changes in the jury instructions could have avoided the error, we find there is too unstable a foundation to permit us to affirm the conviction.” Lobe, 140 Wn. App. at 906. The instability of the foundation here is multiplied by the factor of four counts compounded by the cross-referencing evidence. This Court should reverse all four of the witness tampering convictions.

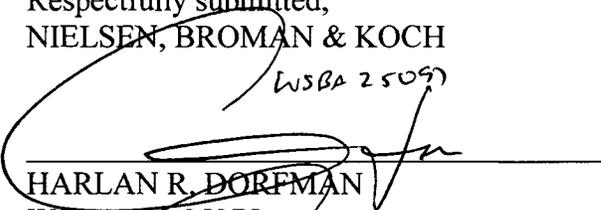
D. CONCLUSION

Because the trial court conducted significant portions of the trial in chambers, reversal is required. Because the court permitted hearsay without a proper foundation for its admission, reversal of the burglary and second-degree assault convictions is required. Because no unanimity instruction was given regarding four counts of witness tampering, reversal of those convictions is required.

DATED this 31st day of August 2009.

Respectfully submitted,
NIELSEN, BROMAN & KOCH

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62971-9-1
)	
NICOLIA GOLODIUC,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NICOLIA GOLODIUC
DOC NO. 327322
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST, 2009.

x *Patrick Mayovsky*

2009 AUG 31 11 PM 19:27
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I