

NO. 63557-3-I

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

REC'D  
DEC 18 2009  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN BATEMAN,

Appellant.

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

The Honorable Mary Roberts, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred when it permitted hearsay testimony expressing a municipal court judge's opinion of the validity of allegations made by the complaining witness.

2. Defense counsel was ineffective for failing to object to the opinion testimony under ER 403.

3. The municipal court judge's opinion was an unconstitutional judicial comment on the evidence.

4. The sentencing court erred in failing to find appellant's witness tampering and witness intimidation convictions were the same criminal conduct.

5. The sentencing court erroneously imposed substance abuse evaluation and treatment as a condition of community custody.

Issues Pertaining to Assignments of Error

1. A domestic violence advocate heard the complaining witness's initial report to police 11 days after the incident giving rise to the charges in this case. The advocate was permitted, over defense counsel's objection, to recite a municipal court judge's double hearsay statements (relayed to the advocate by a court clerk) that (1) the judge was concerned about the safety of the complaining witness, (2) the judge felt the complaining witness had been a victim of witness intimidation, and (3) the

judge believed the case was a “severe” one. Did the trial court abuse its discretion in admitting such hearsay, and did the admission of the evidence likely affect the outcome at trial as to all counts?

2. In the alternative, was trial counsel ineffective for failing to object to the evidence on the ground that its unfair prejudice substantially outweighed its probative value under ER 403?

3. Did the municipal court judge’s opinions constitute an unconstitutional judicial comment on the evidence requiring reversal on all counts?

4. In the light most favorable to the State, the evidence supported a finding appellant's convictions for witness intimidation and witness tampering were the same criminal conduct for purposes of offender score calculation. Did the trial court err when it failed to find those offenses were the same criminal conduct and when it sentenced appellant based on an offender score of three rather than two?

5. No evidence showed appellant’s consumption of a controlled substance contributed to the charged crimes. Did the trial court therefore err when it ordered appellant to submit to a substance abuse evaluation and treatment as a condition of community custody?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Charge, Convictions, and Sentence

The King County prosecutor charged appellant Dustin Bateman with witness intimidation (count 1), fourth degree assault (count 2), felony harassment (count 3) and witness tampering (count 4). The State alleged the first three crimes occurred July 14, 2007 and tampering occurred the following three days, July 15-17. CP 748-49. The complaining witness as to each charge was Courtney Dickmeyer, Bateman's then-girlfriend and the mother of his child. CP 1-9

A jury convicted Bateman as charged. CP 843-47.

The sentencing court denied defense counsel's request to find felony harassment and witness intimidation were the same criminal conduct. CP 883-86; 8RP 20. Based on an offender score of three, the court sentenced Bateman to concurrent low-end standard range sentences of 26 months on count 1 and 9 months on counts 3 and 4. CP 890-98; 8RP 21. On count 2, a gross misdemeanor, the court sentenced Bateman to 12 months incarceration suspended on the condition he serve 24 months of probation. CP 887-89; 8RP 22-23.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 4/13/09; 2RP – 4/14/09; 3RP – 4/15/09; 4RP – 4/16/09; 5RP – 4/20/09; 6RP – 4/21/09; 7RP – 4/22/09; and 8RP – 5/15/09.

2. Pretrial Rulings Admitting Prior Bad Acts and Previous Acquittal

Before trial, the court ruled over Bateman's objection that it would admit evidence under ER 404(b) including that (1) Bateman allegedly assaulted Dickmeyer in March 2007; (2) Bateman confessed to Dickmeyer he assaulted a confidential informant in an unrelated case; (3) Dickmeyer witnessed Bateman punch his brother's girlfriend; and (4) immediately before the events in question, Bateman consumed alcohol and drove dangerously despite Dickmeyer's requests to get out of the car. 1RP 16-17; CP 721-47, 750-83. In response, Bateman, sought to introduce evidence a jury acquitted him of the March 2007 assault. 3RP 3-5; CP 784-807.

The court ruled each incident was relevant as to Dickmeyer's state of mind on all charges except assault. The court also ruled the events were admissible as to all counts to explain Dickmeyer's delayed disclosure and inconsistent statements. 2RP 62-65.<sup>2</sup> After the court ruled it was also

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<sup>2</sup> The court eventually instructed the jury as follows:

Evidence has been introduced in this case on the subject of prior incidents between [Dickmeyer and Bateman], and . . . Dickmeyer's knowledge of prior incidents, for the limited purpose of assessing . . . Dickmeyer's state of mind and her credibility. You must not consider this evidence for any other purpose.

likely to admit Bateman's acquittal, however, the prosecutor stated he would not introduce evidence of the March 2007 incident. Defense counsel then agreed he would not introduce the acquittal. 4RP 15-23.

The agreement eventually broke down, however. The State called Renton city prosecutor Shawn Arthur, who testified Dickmeyer was a witness in a criminal case against Bateman in which charges were pending between April 3, 2007 and July 17, 2007. 5RP 159-67. Believing this testimony was inadequately sanitized given the agreement, defense counsel notified the court it would introduce the acquittal. 5RP 168, 173-82.

The State then elicited testimony the charge Bateman faced was fourth degree assault - domestic violence, that Dickmeyer failed to show up for the first (though not the second) trial, and that after charges were dismissed, Arthur re-filed charges based on his belief someone tampered with Dickmeyer. 5RP 169-71. The State also asked permission to re-call Dickmeyer (who testified earlier) to testify about the details of the March incident, but the court ruled she could not be re-called because such testimony would increase the likelihood the jury would use the March 2007 incident for an improper purpose. 5RP 173-82; 6RP 3-23, 75.

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CP 857.

### 3. Trial Testimony

Dickmeyer met Bateman in second grade and they began dating many years later. Their daughter, Dickmeyer's third child and Bateman's second, was born in 2004. Dickmeyer, Bateman, and their children eventually moved into a home in Renton in April 2007. 5RP 59, 61. Dickmeyer was not on the lease. 5RP 62. Dickmeyer paid for food and utilities, but Bateman paid the \$1300 monthly rent. 5RP 63.

Dickmeyer was designated a witness in a court case around the time they moved in together; she knew she was a witness because she was the victim in that case and she received a subpoena to appear in court. 5RP 65.

Dickmeyer invited Bateman to the July 14, 2007 wedding of a coworker. 5RP 67. After Dickmeyer hugged another coworker at the reception, Bateman became angry and began to drink heavily. 5RP 68-69. Though Dickmeyer had less to drink than Bateman, she allowed Bateman to drive home because she did not want to cause a scene in front of coworkers. 5RP 70. Bateman refused Dickmeyer's demand they stop for gas and began running red lights. 5RP 70-72. Dickmeyer called her mother, Susie May, and asked her to meet them at home. 5RP 73.

Upon arrival, Bateman ran into the house and locked the door. 5RP 73. Dickmeyer, who also had keys, unlocked the door and tried to

push her way in, but Bateman pulled Dickmeyer outside by her hair. 5RP 74.<sup>3</sup> In the process, Dickmeyer dropped some clothes she was carrying on the front stoop. 5RP 75. As she bent to retrieve them, Bateman kicked Dickmeyer in the back and she fell into the bushes. 5RP 75-76. The fall caused a cut on the inside of Dickmeyer's lip. 5RP 75-76, 104.

After Dickmeyer's family arrived, Bateman told Dickmeyer, "you called your family, you're gonna die." 5RP 76-78. Dickmeyer was confident Bateman loved her and was saying irrational things because he was drunk. 5RP 77. However, because of Bateman's past behavior, including the assaults of the confidential informant and his brother's girlfriend, Dickmeyer believed there was a possibility Bateman would carry out the threat. 5RP 78-83.

Dickmeyer explained that since April, Bateman had repeatedly asked her not to go to court. After Bateman cursed at her family, however, Dickmeyer told Bateman she would go to court if he did not stop acting out. 5RP 77, 92, 136-38. Bateman laughed and told Dickmeyer that if she went to court he would "choke [her] with his dick." 5RP 78.

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<sup>3</sup> Although Bateman did not testify, the court granted the defense request to instruct the jury on self-defense given the evidence of the struggle at the door. 6RP 59-60; CP 878 (Instruction 26). In closing, defense counsel argued the struggle was born of Bateman's desire to escape Dickmeyer. 7RP 91-93, 97.

Dickmeyer acknowledged Bateman could not literally do that but she felt there was a possibility he would harm her. 5RP 83.

May heard Bateman, who appeared intoxicated, threaten Dickmeyer. 4RP 71, 74, 81, 82, 87-89, 112-13. May did not see physical contact between Bateman and Dickmeyer but later noticed Dickmeyer had a fat lip. 4RP 84, 118.

After yelling at Dickmeyer's family for a few minutes, Bateman got in his car drove away. 5RP 84-86. Meanwhile, a neighbor called 911 because she heard a loud altercation. 5RP 15-16, 21, 24, 36. The neighbor did not recall telling the 911 dispatcher she heard a man hit a woman and the woman yell "domestic violence," although the 911 dispatcher was permitted to read those statements into evidence from the computer aided dispatch (CAD) report. 5RP 31; 6RP 34. The neighbor acknowledged she told another prosecutor she feared testifying, but explained she was primarily afraid of testifying incorrectly given that two years had passed. 5RP 37-40.

Though police responded to the 911 call, Dickmeyer did not answer the door because she did not want Bateman to get in trouble. 5RP 87. Later that evening May persuaded Dickmeyer to go to Bateman's mother's house several blocks away after police responded to a report

Bateman's son D.B.<sup>4</sup> prowled a neighbor's car. 5RP 88. Dickmeyer spoke with a police officer at that time but denied physical violence. 5RP 89-90.

The following day, Bateman and Dickmeyer discussed the previous night's events, and Bateman again asked Dickmeyer not to go to court regarding the March 2007 incident. 5RP 91. Thereafter, Bateman discouraged Dickmeyer from going to court "every once in a while." 5RP 91. A few days after the incident, Bateman handwrote a notice seeking to evict Dickmeyer from their home despite agreement Dickmeyer and her children would be allowed plenty of time to find a new place to live. 5RP 94-95.

Dickmeyer sought a protection order on July 25 and at that time gave an account of the July 14 incident to authorities. 4RP 32-33; 5RP 99. Dickmeyer decided to go to authorities at that time because Bateman was slamming doors and acting angry, which scared Dickmeyer. 5RP 99. Dickmeyer acknowledged the protection order effectively excluded Bateman from their home and prevented Bateman from seeing their daughter. 5RP 107.

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<sup>4</sup> D.B., who lived Dickmeyer and Bateman, demonstrated alarming behavior such as urinating in public places and frequent cursing. 5RP 121. Dickmeyer acknowledged she feared D.B.'s behavior might rub off on her children. 5RP 121, 146-47.

Renton detective Peter Montemayor met with Dickmeyer when she sought the protection order. 4RP 32-33. Dickmeyer showed Montemayor faded bruising on her arm, lower lip, and knee. 4RP 35.

Tina Harris, a domestic violence victim advocate for the Renton Police Department, also met with Dickmeyer that day. 4RP 53. Harris helped Dickmeyer fill out the paperwork to petition for a protection order and discussed a safety plan. 4RP 54. According to Harris, Dickmeyer appeared scared and nervous. 4RP 54.

Harris was not scheduled to work that day but came in after she received a call from the municipal court clerk, who told her Judge Jurado, presumably a municipal court judge,<sup>5</sup> specifically requested her assistance for “petitioner” Dickmeyer because he was concerned about Dickmeyer’s safety. 4RP 53. The court overruled defense counsel’s hearsay objection to that testimony. 4RP 53. Harris later testified the clerk informed her Judge Jurado was concerned about Dickmeyer due to “witness intimidation.” 4RP 60. The court overruled defense counsel’s hearsay and confrontation objections to that testimony. 4RP 60. According to

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<sup>5</sup> Judge Jurado’s precise role in proceedings involving Dickmeyer and Bateman was never explained, although it may be inferred from Harris’s testimony the judge had some dealing with and/or knowledge of the March 2007 assault case. Despite extensive pretrial briefing and discussion of evidentiary matters, the State gave no warning it would seek to introduce Judge Jurado’s opinion.

Harris, it was the first time a judge called her because of the “severity of the case.” 4RP 59.

4. Closing Arguments

The State argued Dickmeyer initially did not accurately recount the July 14 events because she both loved and feared Bateman. 7RP 41. The prosecutor also noted Harris's testimony that she reported to work because Judge Jurado had information Dickmeyer had been tampered with in the previous case. 7RP 42. In rebuttal, the prosecutor again reminded jurors of the judge's special request that Harris come into work. 7RP 106.

Defense counsel argued in part that Dickmeyer was not credible and that her behavior following the incident indicated she did not take Bateman's threats seriously. 7RP 67, 84-88, 97-98. Counsel also argued that Dickmeyer eventually went to the police not because she feared Bateman but because of his threat to evict her. 7RP 67-68, 88, 98.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN PERMITTING HEARSAY TESTIMONY CONVEYING A MUNICIPAL COURT JUDGE'S BELIEF THE COMPLAINING WITNESS'S CLAIMS WERE VALID.

The trial court erred in admitting double hearsay containing Judge Jurado's comments to a clerk, relayed to the testifying domestic violence advocate, that (1) he was concerned about Dickmeyer's safety, (2) he felt

she had been a victim of witness intimidation, and (3) the case was a “severe” one. Because there is a reasonable probability the introduction of such damaging evidence affected the outcome as to all counts, this Court should reverse Bateman’s convictions.

a. The Judge’s Comments Were Inadmissible Hearsay.

Hearsay is an oral or written assertion, “other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802.

It is well-established that “[j]udicial findings in other cases proffered as evidence are generally characterized as inadmissible hearsay.” Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 141 F.Supp.2d 320, 323 (E.D.N.Y.2001) (quoting McCormick on Evidence § 318, at p. 894 (3d ed.1984)); see also In re Det. of Pouncy, 144 Wn. App. 609, 184 P.3d 651 (so holding), review granted, 165 Wn.2d 1007 (2008).

No specific exceptions apply to permit introduction of such evidence. See Blue Cross, 141 F.Supp.2d at 323 (discussing federal rules); see also U.S. Steel, LLC, v. Tieceo, Inc., 261 F.3d 1275, 1287 (11<sup>th</sup> Cir. 2001) (factual findings made in a separate case by another district court are hearsay that cannot be judicially noticed or admitted under the

public records exception to the hearsay rule) (citing United States v. Jones, 29 F.3d 1549, 1554 (11th Cir.1994)). There is, in addition, a great danger juries will give “exaggerated weight” to a judge’s assessment of the credibility of a witnesses. Blue Cross, 141 F.Supp.2d at 323.

No hearsay exception permitted introduction of the judge’s statements. This Court should, moreover, reject any argument the statements were admissible not for the “truth of the matter asserted”<sup>6</sup> but to show their effect on Harris.

Police department advocate Harris’s opinion on Dickmeyer’s credibility was irrelevant and inadmissible. See State v. Wilber, 55 Wn. App. 294, 298-99, 777 P.2d 36 (1989) (police officers’ testimony as to witness’s credibility is expert opinion testimony under ER 702); see also CP 18-19 (defense motions in limine 9 and 10 seeking to exclude improper lay opinion testimony and witness opinions on other witness’s testimony); 1RP 45-47 (court’s ruling substantially granting defense motions).

And even though defense counsel eventually challenged Harris’s ability to remember Dickmeyer’s demeanor at their interview, the State elicited Judge Jurado’s opinions – without warning it would do so despite

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<sup>6</sup> ER 801(c).

extensive pretrial discussion of evidentiary matters<sup>7</sup> – before defense counsel made any such challenge. This was error. See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (preemptive admission of prior bad acts by prosecutor, before defense made issue of delayed reporting, reversible prosecutorial misconduct). And the fact Harris was called in on her day off by court personnel would have been more than adequate to establish the event was memorable. The trial court therefore erred when it overruled defense counsel’s hearsay objections to the testimony.

b. Admission of the Comments Prejudiced Bateman.

Evidentiary error requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). Jurors are likely to defer to judges rather than to determine disputed issues for themselves. United States v. Sine, 493 F.3d 1021, 1033-34 (9<sup>th</sup> Cir. 2007). And while juries are typically instructed to disregard the *trial* judge’s opinions, the pattern instruction makes no mention of other judges. CP 851 (Instruction 1); 11 Washington Practice:

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<sup>7</sup> See, e.g., Supp. CP \_\_\_\_ (sub no. 121, State’s trial memorandum); CP 10-24 (defense trial memorandum); 1RP 16-56 (hearing on motions in limine and ER 404(b) evidence); 2RP 4-65 (further hearing on State’s proposed ER 404(b) evidence).

Washington Pattern Jury Instructions: Criminal 1.02, at 13-16 (3d ed. 2008).

Admission of the judge's statements to Harris prejudiced Bateman. Bateman demonstrated Dickmeyer had strong reasons to fabricate the accusations against him: Bateman, who unlike Dickmeyer was on the lease, had announced his intention to evict her from the home. 5RP 94-95. Moreover, Dickmeyer did not want her children around Bateman's son. 5RP 121, 146-47. Moreover, supporting this argument was the evidence Dickmeyer's reports to authorities were delayed and inconsistent. See, e.g., 5RP 89-90.

Judge Jurado's comments, on the other hand, unfairly undermined the defense theory and unfairly bolstered Dickmeyer's credibility, which was crucial to the State's case on all counts. The statements informed jurors that the judge had personal knowledge of the prior assault case involving Bateman and Dickmeyer, that it was a "severe" case of domestic violence, and that Bateman induced Dickmeyer not to testify (which strongly suggested Dickmeyer's claim was valid). The comments thus served to convey improper propensity evidence, which the court otherwise sought to avoid by prohibiting Dickmeyer from retaking the stand. They also conveyed to jurors that in this case too, the delayed reporting was the result of Bateman's tampering and not Dickmeyer's fabrication. The

State, recognizing the damaging nature of Jurado's opinions, relied on the statements in closing argument and rebuttal.

That May overheard Bateman's statements supporting two of the charges is of no moment. Despite this corroboration, Dickmeyer's credibility as to her *assessment* of Bateman's statements, *i.e.* whether she took Bateman seriously despite her belief he was drunk and acting irrationally, was a matter of great importance at trial. See 2RP 62-65 (ruling to admit prior bad acts to show Dickmeyer's state of mind as to all charges except assault). Similarly, evidence corroborating a physical struggle occurred does not undermine a claim of prejudice as to the assault charge. Given Bateman's self-defense claim, Dickmeyer's credibility as to the circumstances of the struggle was also essential to the State's fourth degree assault case.

Juries are likely to defer to a judge's resolution of witness credibility. Sine, 493 F.3d at 1033-34. And because Dickmeyer's credibility was key to all counts, this Court should reverse each of Bateman's convictions should be reversed.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT UNDER ER 403 TO THE TESTIMONY CONVEYING JUDGE JURADO'S OPINION.

In the alternative, defense counsel was ineffective for failing to object to Judge Jurado's statements on the ground that they were more prejudicial than probative.

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

More specifically, counsel's failure to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). "Any circumstance is relevant which reasonably tends to establish the theory of a party or to

qualify or disprove the testimony of his adversary." Kelly, 102 Wn.2d at 204. Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986).

Even relevant evidence is inadmissible, however, if its probative value is substantially outweighed by unfair prejudice. ER 403; Fisher, 165 Wn.2d at 745.

Other jurisdictions have recognized out-of-court statements by judges are unfairly prejudicial. See Sine, 493 F.3d at 1033-35, 1041 (government violated Federal Rule of Evidence (FRE) 403<sup>8</sup> by introducing judicial findings in another case, but reversal not required under the circumstances); Nipper v. Snipes, 7 F.3d 415, 418 (4<sup>th</sup> Cir. 1993) (excluding judicial findings in another case on FRE 403 grounds); Zenith Radio Corp v. Matsushita Elec. Indus. Co., 505 F.Supp. at 1185 (E.D.Pa. 1980) (excluding judicial findings under FRE 403 and FRE 605, prohibiting judges as witnesses); see also State v. Donley, 216 W. Va. 368, 378, 607 S.E.2d 474 (2004) (under analogous state court rule, court abused its discretion by permitting a family court order to be introduced into evidence at criminal trial where the danger of unfair prejudice substantially outweighed the probative value of the order); cf. Chein v. Shumsky, 373 F.3d 978, 989 n. 6 (9<sup>th</sup> Cir. 2004) (factual testimony from a

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<sup>8</sup> FRE 403 is identical to ER 403.

judge in perjury prosecution found likely to have unduly affected jury, as demonstrated by conviction on insufficient evidence).

The foregoing cases demonstrate Bateman's counsel was deficient for failing to object under ER 403.

Counsel's deficient performance prejudiced Bateman. An objection based on ER 403 would have been granted. Judge Jurado's opinion had little if any probative value, but, as demonstrated under heading 1. b., supra, the danger of unfair prejudice was extreme. Sine, 493 F.3d at 1033-34. Because counsel's failure to object for the proper reason permitted this evidence to reach the jury's ears, Bateman has shown prejudice, and this Court should reverse on each count.

3. JUDGE JURADO'S ASSESSMENT OF THE CHARGES AGAINST BATEMAN WAS ALSO AN UNCONSTITUTIONAL JUDICIAL COMMENT ON THE EVIDENCE.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "The touchstone of error . . . is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

A judge is not permitted to comment on a witness's credibility. Id. at 837-38. Nor may a judge criticize the evidence or assert that a fact is proven by means of such criticism. Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969). A judge who weighs and evaluates evidence for the jury runs afoul of "the well-supported principle that '[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.'" State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (citation omitted).

A judicial comment on the evidence is a manifest constitutional error that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). This Court should therefore review Bateman's claim even though his trial counsel did not raise the issue.

A judicial comment on the evidence does not cease to be one simply because the comment comes from a judge who is not presiding over the trial. If anything, the admission of municipal court Judge Jurado created a judicial comment of double magnitude. From the jury's perspective, trial Judge Roberts ratified the validity of Jurado's opinions when she overruled Bateman's objection their admission. See State v.

Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (trial judge's denial of defense counsel's objection lent aura of legitimacy to State's otherwise improper argument).

Once a judge's remarks are shown to constitute a comment on the evidence, the reviewing court presumes prejudice. Lane, 125 Wn.2d at 838-39. This presumption exists because the very purpose of prohibiting judicial comments is to prevent the trial judge's opinion from influencing the jury:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Id. (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)).

The record does not demonstrate the absence of prejudice. The statements informed jurors of Judge Jurado's opinion on the validity of Dickmeyer's claims, which, as discussed above, was likely critical to the jury's resolution of whether Dickmeyer's delayed reporting was the result of Bateman's tampering and Dickmeyer's fear rather than Dickmeyer's vindictive fabrication. Reversal on all counts is, therefore, required.

4. WITNESS INTIMIDATION AND WITNESS TAMPERING CONSTITUTE THE SAME CRIMINAL CONDUCT FOR PURPOSES OF OFFENDER SCORE CALCULATION.

The witness intimidation<sup>9</sup> and witness tampering<sup>10</sup> charges constituted the same criminal conduct. As such, the court should have sentenced Bateman based on an offender score of two rather than three.

The trial court's determination of what constitutes same criminal conduct is reviewed for an abuse of discretion or misapplication of the

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<sup>9</sup> RCW 9A.72.110(1)(c) provides, "A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to . . . [i]nduce that person to absent himself or herself from such proceedings[.] RCW 9A.72.110(3)(b) defines a "current or prospective witness" as:

- (i) A person endorsed as a witness in an official proceeding;
- (ii) A person whom the actor believes may be called as a witness in any official proceeding; or
- (iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation[.]

<sup>10</sup> RCW 9A.72.120 provides in part:

- (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[.]

law. State v. Haddock, 141 Wn.2d 103, 110, 3 P. 3d 733 (2000); State v. Dolen, 83 Wn. App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997). Although Bateman did not raise the issue of whether these two charges were same criminal conduct, he did refuse to agree to the offender score calculation. 8RP 18; cf. State v. Nitsch, 100 Wn. App. 512, 521-22, 997 P.2d 1000 (2000) (defendant waived same criminal conduct argument because he affirmatively agreed to state's calculation of his offender score). Bateman may therefore raise this claim for the first time on appeal. State v. Anderson, 92 Wn. App. 54, 61, 960 P.2d 975 (1998).

Where a defendant is convicted of two or more crimes, current offenses are treated as prior convictions for determining the offender score. Where, however, "the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). Multiple offenses encompass the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. Id.; State v. Williams, 135 Wn.2d 365, 367, 957 P.2d 216 (1998).

"Intent" as used under this statute "is not the particular mens rea element of the crime but rather the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d

1144, review denied, 114 Wn.2d 1030 (1990). If one crime furthered another and the time and place of the crimes remained the same, the defendant's criminal intent did not change and the offenses encompass the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

The witness intimidation and tampering constituted a single intent — to prevent Dickmeyer from going to court and testifying against Bateman in the fourth degree assault proceeding originating in April 2007 and ending July 17, 2007. 5RP 167, 169.

The second and third requirements for same criminal conduct are also satisfied. The intimidation and tampering charges involved the same victim, be it Dickmeyer or the public at large. State v. Bickle, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_\_, 2009 WL 3823337 at \*6 (Nov. 19, 2009).

The charging period for each was technically different — July 14 on the intimidating charge and July 15-17 on the tampering charge. But both the intimidation and tampering charges, which contain nearly identical language, are properly viewed under the rule of lenity as involving a continuing course of conduct. See State v. Thomas, 151 Wn. App. 837, 845-49, 214 P.3d 215 (2009) (Van Deren, J., dissenting); contra, State v. Hall, 147 Wn. App. 485, 196 P.3d 151 (2008), review granted, 166 Wn.2d 1005 (2009).

As charged in this case, both tampering and intimidation required “an attempt to induce” a witness to absent herself from a proceeding. RCW 9A.72.110(1)(c); RCW 9A.72.120(1). There was but one proceeding here, the assault case that was dismissed following a July 17 readiness hearing. 5RP 167, 169. Bateman’s acts between July 14 and 17 are therefore properly viewed as a continuing course of conduct aimed at the single objective of preventing Dickmeyer from testifying against him in that case. See 7RP 52 (State’s argument that jury should convict Bateman on tampering charge based on continuing requests between July 14 and 17 that Dickmeyer not go to court).

Because there was no substantial change in the nature of Bateman's criminal objective, and the time, place, and victim were the same, the tampering and intimidation charges should be considered the same criminal conduct. See State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999) (court abuses its discretion where there is no basis for find the defendant's conduct in committing the offenses was separate or distinct).

Accordingly this Court should remand for resentencing based on an offender score of two rather than three, which would result in a lower standard ranges on each of the felony counts. See RCW 9.94A.510 (based on offender score of two, standard range for count 3, crime with longest range, would be 21-27 months rather than 26-34 months).

5. THE COURT ACTED BEYOND ITS SENTENCING AUTHORITY BY ORDERING, AS A COMMUNITY CUSTODY CONDITION, THAT BATEMAN UNDERGO SUBSTANCE ABUSE EVALUATION AND FOLLOW RECOMMENDED TREATMENT WHERE ABUSE OF CONTROLLED SUBSTANCES PLAYED NO ROLE IN THE OFFENSE.

As a condition of community custody, the court ordered Bateman to “obtain substance abuse eval[uation] and follow recommended [treatment].” CP 898; 8RP 22. Former RCW 9.94A.700(5)(c) (2003)<sup>11</sup> allows the court to impose “crime-related treatment or counseling services” only if the evidence shows the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing impropriety of alcohol treatment).

There was ample evidence Bateman’s alcohol consumption preceded the July 14 incident, and RCW 9.94A.700(5)(c) and (e) authorized the court to order alcohol abuse evaluation and treatment as well to prohibit possession or use of alcohol.

The court went further, however, by ordering Bateman to obtain a substance abuse evaluation and to follow treatment recommendations. Substance abuse connotes use or abuse of non-prescribed drugs. See chapter 69.50 RCW (Uniform Controlled Substances Act). This condition

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<sup>11</sup> RCW 9.94A.700 was recodified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

could be imposed only if it reasonably related to the circumstances of Bateman's offense. Under Jones, 118 Wn. App. 199, it does not.

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, Jones's attorney explained that Jones was bipolar; off his medication at the time of the offenses; using methamphetamine at the time of his crimes; and that the combination obviously resulted in the crimes. Id. at 202.

The court sentenced Jones after accepting his pleas. Following the prosecutor's recommendation, the court imposed the condition that Jones not consume alcohol and participate in alcohol counseling. Yet there was no evidence, and the court made no finding, alcohol contributed to Jones crimes. Id. at 202-03.

On appeal, the Court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Id. at 207-08. In reaching this conclusion, the Court first observed former RCW 9.94A.700(5)(c) provides a trial court may order an offender to "participate in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The Court held the trial court erred by ordering Jones to participate in alcohol counseling because the evidence failed to show alcohol contributed to Jones's

offenses or the trial court's alcohol counseling condition was "crime-related." Id. at 207-08.

The Court also acknowledged RCW 9.94A.715(2)(b) permitted a sentencing court to order an offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. Jones, 118 Wn. App. at 208. But it held that permitting alcohol counseling under that provision would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Jones, 118 Wn. App. at 208.

Just as there was no evidence alcohol contributed to Jones's offenses, there was no evidence controlled substances contributed to Bateman's offenses. The community custody condition requiring Bateman to submit to a substance abuse evaluation and follow recommended treatment is too broad and not reasonably related to the circumstances of the offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana).

Sentencing errors may be raised for the first time on appeal. State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). For the foregoing reasons, this Court should order the sentencing court to strike the condition pertaining to substance abuse treatment on remand. State v. Lopez, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime).

D. CONCLUSION

This Court should reverse all convictions based on the erroneous admission of Judge Jurado's opinion as to the validity of allegations by Dickmeyer. Alternatively, this Court should remand for resentencing based on an offender score of two on all counts and for the superior court to strike the community custody condition related to controlled substances.

DATED this 17<sup>TH</sup> day of December, 2009.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63557-3-I
	)	
DUSTIN BATEMAN,	)	
	)	
Appellant.	)	

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**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 18<sup>TH</sup> DAY OF DECEMBER, 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] DUSTIN BATEMAN  
DOC NO. 867453  
WASHINGTON STATE REFORMATORY/MSU  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*

FILED  
2009 DEC 18 PM 12:55  
CLERK OF COURT  
STATE OF WASHINGTON