

63557-3

63557-3

NO. 63557-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN BATEMAN,

Appellant.

FILED
SUPERIOR COURT
JAN 12 11 42 AM '04

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court err in admitting alleged hearsay during the testimony of Tina Harris?
 - a. Was the testimony offered for a truth of the matter asserted?
 - b. Was the error, if any, harmless?

2. Was defense counsel ineffective for not objecting, pursuant to ER 403, to alleged hearsay during the testimony of Tina Harris?
 - a. Was the decision to object to the testimony on other grounds tactical?
 - b. Was the error, if any, harmless?

3. Was the alleged hearsay during the testimony of Tina Harris an improper judicial comment on the evidence?
 - a. Was the alleged hearsay a finding or conclusion in another proceeding?
 - b. Did the trial court's denial of the hearsay objection constitute a comment on the evidence?
 - c. Was the error, if any, harmless?

4. Do the witness intimidation and witness tampering charges constitute the same criminal conduct for the purpose of calculating the defendant's offender score?

- a. Were the two crimes committed at different times?
- b. Did the defendant formulate a different intent when committing each crime?

5. Should the Court accept the State's concession that the trial court erred in imposing as a condition of community custody a requirement that the defendant undergo a substance abuse evaluation?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Dustin Bateman was charged with witness intimidation (count I), assault in the fourth degree (count II), felony harassment (count III), and witness tampering (count IV). The victim of each of these crimes was Courtney Dickmeyer, Bateman's girlfriend and mother of his child. CP 748-49. Bateman was convicted by a jury as charged and received a standard range sentence. CP 843-47, 890-98. Bateman has filed a timely appeal. CP 899-911.

B. FACTUAL BACKGROUND.¹

In July of 2007, Dustin Bateman and Courtney Dickmeyer had been dating for approximately three years and had one child in common. 5RP 58-59. Bateman and Dickmeyer were living together in the City of Renton. 5RP 60-61. Previously, on March 23, 2007, an incident between them resulted in a criminal charge being filed against Bateman in Renton Municipal Court.² This charge named Dickmeyer as the victim. 5RP 65. On July 14, 2007, the charges against Bateman were still pending and the next court date (a “readiness” hearing) was July 17, 2007. 5RP 164-67.

On Saturday, July 14, 2007, Bateman and Dickmeyer went to a wedding reception. 5RP 66-67. While there, they both consumed alcohol. 5RP 67. At one point, Dickmeyer hugged a co-worker and Bateman became upset. 5RP 68. Bateman began to drink heavily and became intoxicated, loud, and angry. 5RP 68-69. Around 10:00 p.m., the pair left the reception. Because Bateman was intoxicated, Dickmeyer wanted to take a cab or call her mom to pick them up.

¹ The State adopts the method used by the appellant for referring to the verbatim report of proceedings.

² The facts of the Renton Municipal Court charge, while discussed in pre-trial briefing, were never presented to the jury and are not an issue on appeal.

Bateman refused and Dickmeyer got into his car because she did not want to cause a scene in front of her co-workers. 5RP 69-70.

As Bateman drove through downtown Kirkland, he began to speed and drive through red lights. 5RP 71. Bateman's voice was raised and he was angry. This was behavior Dickmeyer had seen before when Bateman was intoxicated. 5RP 69, 72-73. Dickmeyer was scared for her life and called her mother screaming and crying for her to help. 4RP 67-69.

When they arrived home, Bateman went inside and closed the door, locking Dickmeyer out. Dickmeyer tried to use her own keys to open the door. 5RP 73. She was eventually able to open the door. Bateman still refused to let her in. He grabbed Dickmeyer by the hair and pulled her outside onto the porch. 5RP 74. When Dickmeyer reached down to pick up some items she had dropped, Bateman kicked her in the back and pushed her off the porch.³ 5RP 74-76.

When Dickmeyer's mother (Susie May) received the phone call from Dickmeyer she drove with her boyfriend (Jim Adcox), and Dickmeyer's brother (Stephen) to Bateman and Dickmeyer's rental house. 4RP 111; 5RP 70. When they arrived they saw Dickmeyer's

³ This statement formed the basis of the assault charge (count II).

belongings strewn on the ground. 4RP 70-71. Bateman was there and he cursed and swore at them. 4RP 70-71; 5RP 76. When they got out of the car, Bateman yelled to Dickmeyer, “[T]hat’s it, you called your fucking family, you’re gonna die.”⁴ 4RP 74; 5RP 77, 89-90.

Dickmeyer told Bateman that if he didn’t stop acting like that, she would go to court against him on the pending charges. 5RP 77. In response, Bateman told Dickmeyer that if she did go to court he would “choke her with his dick.”⁵ 4RP 72, 81, 85, 88; 5RP 78. When he said this, his voice was angry and mad. 5RP 78.

A neighbor, Stephanie Burnett, saw what was happening and called 911. 5RP 15-38. The police responded to the scene. When Bateman heard the sirens he immediately got into his car and left the area. 4RP 76; 5RP 84-86.

Bateman’s actions that night made Dickmeyer feel both sad and scared. 5RP 79, 150. She loved Bateman and cared about him; she didn’t want these things to be happening. 5RP 79. But Bateman had said and done things in the past that made Dickmeyer afraid. Specifically, Bateman had told Dickmeyer that he and some friends

⁴ This threat formed the basis of the felony harassment charge (count III).

⁵ This statement formed the basis of the intimidating a witness charge (count I).

had beaten up a confidential informant so badly that he suffered brain or head injuries. Bateman had told Dickmeyer that he had kicked this individual while someone else hit him in the head with a handgun. 5RP 80-81. In addition, Dickmeyer was present when Bateman had gotten into a fight with his brother and then had hit his brother's girlfriend in the face, knocking her to the ground.⁶ 5RP 80-81.

These events happened before July 14, 2007. Dickmeyer was aware of them when Bateman said, "You've called your parents, now you are going to die." 5RP 81. As a result, Dickmeyer believed that Bateman was capable of carrying out this threat. 5RP 81-82. Dickmeyer summed up her feelings by stating at trial: "I know Bateman loved me. He wouldn't want to hurt me. I knew that he had been drinking, though. I knew he had done things in the past. It's a possibility he would." 5RP 83.

When police responded to the home, Dickmeyer initially refused to speak with them, and did not answer the door, because she did not want to get Bateman in trouble. 5RP 87. Eventually, her mother persuaded Dickmeyer to speak to the officers. But when she did so Dickmeyer denied that there had been any physical violence.

⁶ The admissibility of these incidents was considered pre-trial and admitted by the trial court pursuant to ER 404(b). 1RP 15-16; 2RP 9-65. The admissibility of this evidence has not been challenged on appeal.

When the officers asked her why her lip was swollen, she said it happened the day before. 5RP 87-89. Dickmeyer did not tell the officers what had happened because she still loved Bateman. 5RP 90.

The next day, Bateman and Dickmeyer spoke and Bateman asked her “not to go through with anything.” 5RP 90-91. Bateman continued to urge Dickmeyer not to go to court on the pending matter.⁷ 5RP 91-92. Dickmeyer did not go to the next court date (July 17, 2007; 3 days after the incident described above). She testified that she did not do so because she loved Bateman and did not want to get him into trouble. 5RP 92. She also stated, however, that in light of Bateman’s statement that if she went to court he would “choke her with his dick” she “didn’t know what would happen if she did” go to court. 5RP 92.

Bateman eventually moved out of the house, although he continued to visit with Dickmeyer’s consent. 5RP 93-96. When he visited, Bateman was often angry and upset. 5RP 99-100.

On July 17, 2007, the readiness hearing on the pending criminal case against Bateman in Renton Municipal Court was held.

⁷ These acts formed the basis of the witness tampering charge (count IV).

5RP 167. Dickmeyer did not attend, despite being under subpoena to do so. 5RP 165-67, 169-70. Because the City of Renton had been unable to confirm Dickmeyer as a witness, the charges against Bateman were dismissed without prejudice. 5RP 167.

Subsequently, on July 25, 2007, after speaking with her mother, Dickmeyer went to the Renton City Hall and sought a restraining order against Bateman. 5RP 97. She told Renton Detective Montemayer, Tina Harris (a domestic violence advocate), and a judge what had happened on July 14, 2009. 4RP 33-35, 53-54; 5RP 96-98. Detective Montemayer took pictures of the bruising on Dickmeyer's arms and legs, and the healed-up mark where her lip had been cut. Dickmeyer had sustained both these injuries on July 14, 2007. 4RP 35-38; 5RP 99-103.

Dickmeyer was granted a protection order, but she testified that she still wanted things to work out with Bateman because they had a daughter together. 5RP 104-05. Even though she loved Bateman, and didn't want him to get into trouble, his actions on July 14, 2007, nevertheless scared her. 5RP 150.

A prosecutor for the City of Renton testified that he subsequently learned new information concerning Dickmeyer's failure to appear in court on July 17, 2007. 5RP 170. The prosecutor

re-filed the case – with five days remaining on the speedy trial clock – and it went to trial. 5RP 170-71. Dickmeyer testified at this trial. 5RP 171. Bateman was acquitted by a jury.⁸ 5RP 171.

III. ARGUMENT

A. **THE TRIAL COURT PROPERLY ADMITTED ALLEGED HEARSAY DURING THE TESTIMONY OF TINA HARRIS.**

Bateman argues that the trial court erred in overruling his objections to alleged hearsay testimony by Tina Harris, a Renton Municipal Court domestic violence advocate. This argument is without merit. The trial court did not abuse its discretion in allowing this testimony because it was not offered for the truth of the matter asserted and thus was not hearsay. In any event, any error was harmless.

1. **Relevant facts: hearsay testimony.⁹**

On appeal, Bateman summarizes the alleged hearsay testimony by Tina Harris, which results in a somewhat distorted view of the record. Here is the relevant testimony of Tina Harris in

⁸ Again, the jury in this case was never informed of the charges or facts surrounding the trial in Renton Municipal Court.

⁹ These facts are also relevant to Bateman's next two arguments.

its entirety. The following testimony occurred during the prosecutor's direct examination.

Pros. Did you have a chance to meet and discuss with Dickmeyer on July 25th, 2007?

Harris: Correct.

Pros. Can you tell us how that happened?

Harris: I actually was at Renton River Days. It is a community festival that we have every year, a kid's day. I received a phone call from the court clerk asking that – stating that the judge requested that I come back to court to offer assistance to a petitioner, which was Dickmeyer, involving a case because they were concerned about her safety and concerned about the order.

Poisel: Objection, hearsay.

Court: Overruled.

4RP 53.

The rest of the direct examination, which was very brief, focused on Harris's impression and observations of Dickmeyer during her July 25th interview with Dickmeyer. 4RP 54-55.

On cross-examination, defense counsel established that Harris had been a domestic violence advocate for eighteen years, that she had not kept notes of her meeting with Dickmeyer, that she couldn't recall the details of the meetings she had before meeting with Dickmeyer, and that Harris could nevertheless remember

details of her conversation with Dickmeyer. 4RP 56-57. The clear implication was that Harris could not actually recall meeting Dickmeyer and was fabricating or embellishing her testimony.

On redirect examination, the prosecutor explored why Harris was able to recall her meeting with Dickmeyer:

Pros. Ms. Harris you were asked about remembering other case the same day or week. You told us you remember this in part because you were called away. Is there a particular thing about why you were called for this case that makes it stand out in your memory?

Harris: Yes. This was the first time I was called out on behalf of a judge for the severity of the case.

Poisel: Objection, as to opinion, your Honor.

Court: Overruled.

Pros. What judge called you on this case?

Harris: It was the court clerk who called me. And it was Judge Jurado who requested that I be called.

Pros. What was it about being requested that makes it stand out as opposed to other cases you have?

Harris: Because I've never had a judge have a court clerk call me to offer assistance to a victim.

Pros. Did you get information about what you were being called for?

Harris: I had knowledge of the case prior to that because we had her as a witness and she had not shown up. So I was familiar with the case. And when the court clerk told me she was there

obtaining a petition and that the judge was concerned due to –

Poisel: Objection, hearsay.

Court: Overruled.

Harris: – due to witness intimidation, I likewise was very concerned.

Poisel: Objection, confrontation, your Honor.

Court: Overruled.

Pros. I don't have anything further.

4RP 59-62.

2. The trial court did not abuse its discretion in admitting the alleged hearsay.

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Thus, out-of-court statements “may be admitted if offered for purposes other than to prove the truth of the matter asserted.” State v. James, 138 Wn. App. 628, 640, 158 P.3d 102 (2007); see also Betts v. Betts, 3 Wn. App. 53, 59, 473 P.2d 403 (1970) (statements offered to show mental state, rather than the truth of the assertions made, are not hearsay); Spokane County v. Bates, 96 Wn. App. 893, 900, 982 P.2d 642 (1999) (statements not offered to prove the truth of the matter asserted, but rather offered as a basis for

inferring something other than the matter asserted, are not hearsay); State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005) (not hearsay when officer investigating a shooting testified that “he interviewed an unidentified female who was with the shooting victims before they left for a walk, and that she heard six or seven shots and went in response to a victim's call for help” because not offered for truth of the matter asserted); State v. Redmond, 150 Wn.2d 489, 495-96, 78 P.3d 1001 (2003) (statements by unnamed students that defendant was upset and planned to confront him not hearsay, went to victim’s state of mind and motivation).

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. State v. Redmond, 150 Wn.2d 489, 495-96, 78 P.3d 1001 (2003); State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979); State v. White, 152 Wn. App. 173, 183-84,

215 P.3d 251 (2009). A trial court's evidentiary ruling may be upheld on any proper grounds that the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009).

In the present case, Harris's statements were not hearsay because they were not offered for the truth of the matter asserted (i.e., that a Renton Municipal Court judge was concerned about the case) but for the effect these statements had on Harris herself. First, on direct examination, the statement provided background information as to how Harris met Dickmeyer. Second, after cross-examination, the testimony established why Harris remembered this case so clearly two years later. Both statements went to Harris's state of mind and were admissible for that reason. In other words, the statements were relevant, having been heard by Harris, whether or not they were actually true.

This case is thus analogous to State v. Miller, 35 Wn. App. 567, 668 P.2d 606 (1983), in which testimony was offered that a co-conspirator had called the victim's employer and said that the victim was ill and would not be at work. As the Court stated: "Because the statement was not offered for the truth of what it asserted (that [the victim] was ill) but, rather, was offered to prove

Shirley's continuing involvement in the conspiracy, it was not hearsay and was properly admitted. ER 801(c)." Id. at 571. Likewise, the statements made by Harris in this case were not offered for the truth of the matter (that a judge was concerned about the case or believed Dickmeyer had been intimidated), but for their effect the statements had on Harris (that she had to come in on her day off to see Dickmeyer and that this fact was unusual and caused her to recall the incident with specificity).

The out-of-jurisdiction cases relied upon by Bateman to support his claim that the statements were hearsay are not on point. These cases involve the admission of judicial findings in one case as evidence in another case.¹⁰ See, e.g., Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 1 F.Supp.2d 320, 321 (E.D.N.Y., 2001) (proffer the factual findings of a judge of the Quebec Superior Court to impeach one of plaintiff's experts not allowed); U.S. Steel, LLC, v. Tiece, Inc., 261 F.3d 1275, 1286 (C.A.11, 2001) (factual findings in another case are hearsay).

¹⁰ In his brief on appeal, Bateman includes a paragraph opining that Harris's opinions on Dickmeyer's credibility as a witness was irrelevant and inadmissible. See App. Brief, p. 13. Leaving aside the fact that Harris did not in fact offer such an opinion (but rather testified as to Dickmeyer's demeanor while she sought the no contact order), Bateman has not assigned error to this testimony.

3. Any error in admitting the testimony was harmless beyond a reasonable doubt.

Assuming *arguendo* that the trial court erred in admitting the alleged hearsay testimony offered by Harris, the error was harmless. Bateman analyzes this issue under the simple non-constitutional harmless error standard. The better approach is to conduct a constitutional harmless error analysis because the testimony (were it considered for the truth of the matter asserted) arguably violated Bateman's constitutional right to confront witnesses.

It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Guloy, 104 Wn.2d at 425; State v. Wicker, 66 Wn. App. 409, 414, 832 P.2d 127 (1992). The "query is whether any reasonable jury would have reached the same result in the absence of the tainted evidence." State v. Benn,

161 Wn.2d 256, 266, 165 P.3d 1232 (2007) (quoting Guloy, 104 Wn.2d at 425). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Guloy, 104 Wn.2d at 425.

In determining whether the error was harmless, courts look to factors such as “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and. . . the overall strength of the prosecution’s case.” Saunders, 132 Wn. App. at 604, 132 P.3d 743 (alteration in original) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Here, a reasonable jury would have reached the same result beyond a reasonable doubt even without considering the alleged hearsay testimony offered by Harris. First, Harris’s testimony was of remarkably little significance in the context of this trial. At best, Harris established that Dickmeyer had come to court to request a protection order after July 17, 2007. This basic fact was established by Dickmeyer herself and also confirmed by Detective Montemayer. 4RP 33-38; 5RP 97-104.

Second, evidence on material points relevant to the charges against Bateman was not contradicted at trial and was corroborated by multiple witnesses. Dickmeyer and her mother testified that Bateman made the threat that Dickmeyer would die for calling her parents. 4RP 74; 5RP 77, 89-90. Dickmeyer's mother also confirmed that Bateman told Dickmeyer that he would "choke her with his dick" if she testified against him. 4RP 72, 85, 88; 5RP 78. The 911 call officer wrote in the CAD report that the individual who called 911 heard the "male bit the female" and that the pair was "now physically fighting in the front yard." 4RP 34. The bruising on Dickmeyer's arms was subsequently observed by Detective Montemayer. 4RP 33-38. Finally, it was undisputed that Dickmeyer chose not to appear at the July 17 hearing, in part because of Bateman's actions on July 14.

Third, the fact that a Renton Municipal Court judge expressed concern for Dickmeyer's safety was cumulative of the testimony of Tina Harris who, based on her own prior familiarity with the case, stated that she was concerned for Dickmeyer's safety. This was why Harris took the concerns communicated by the court clerk seriously. 4RP 59-60.

Fourth, in terms of credibility, the jury had a full and complete opportunity to evaluate Dickmeyer during the extensive direct and cross-examination.

Fifth, Bateman was provided a full opportunity to cross-examine Harris as well as all other prosecution witnesses. It is also significant that Bateman was able to establish that Bateman was found not guilty by a jury on the Renton Municipal Court charge. 5RP 167. This supported Bateman's theory of the case that Dickmeyer was fabricating her claims against him.

Finally, contrary to Bateman's assertion on appeal, there were no "comments by Judge Jurado" on Dickmeyer's credibility, the facts of the charges Bateman was facing in this case, or the merits of those charges. Harris made it clear that she was contacted by the Renton Municipal Court clerk. The court clerk simply communicated that the judge was concerned about Dickmeyer's safety and possible witness tampering. The fact that a judge expressed concern about a victim reporting domestic violence does not necessarily translate as an endorsement of that witness's claims.

In sum, the prosecution's case was strong and was not dependent on the references to why Tina Harris was asked to meet with Dickmeyer on July 25, 2007. The passing reference by Harris to

the fact that another judge asked a victim advocate to assist

Dickmeyer was harmless beyond a reasonable doubt.

B. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR RAISING AN ER 403 OBJECTION TO THE ALLEGED HEARSAY.

Bateman argues that his trial attorney was ineffective for failing to object pursuant to ER 403 to the alleged hearsay testimony offered by Tina Harris. Defense counsel objected to each alleged hearsay statement. The specific objection employed was clearly a tactical decision and not a basis for an ineffective assistance claim. In any event, as argued above, any error was harmless.

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both that counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The test for deficient representation is whether defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d. at 225. The prejudice prong of the test requires the defendant to show a "reasonable probability"

that, but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined based upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, the defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336; State v. Summers, 107 Wn. App. 373, 382, 28 P.3d 780 (2001).

To demonstrate that counsel was ineffective for failing to object, the defendant must show: (1) an absence of legitimate strategic or tactical reasons for failing to object; (2) that the trial court would have sustained an objection; and (3) that the result of the trial would have been different had the objection been sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Only where the testimony was central to the State's case will failure to object constitute deficient performance. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

In this case, Bateman's defense counsel objected to each statement by Tina Harris that might be considered hearsay. He chose to object on two specific grounds: hearsay and an alleged violation of the confrontation clause. Counsel was not ineffective in the sense that he let the introduction of this evidence pass by without comment.

More importantly, counsel's choice of objection was appropriate and tactical. The hearsay objection was far more likely to succeed than a general ER 403 objection. At first blush, the testimony might be characterized as hearsay (until the purpose of its introduction is considered in context). Simply asserting that the evidence was "more prejudicial than probative" would almost certainly have failed; particularly after defense counsel had opened the door to this testimony during cross-examination.

Indeed, one basic tactical reason for not making an ER 403 objection is that if it is denied the trial court has necessarily made an on the record ruling that the benefit of the testimony outweighs its prejudicial impact. Such a ruling, which would be reviewed under an abuse of discretion standard, essentially eliminates any possibility of raising the issue on appeal in all but the most extreme cases. Here, defense counsel wisely refrained from making an

objection that would almost certainly be unsuccessful and would limit his client's options on appeal if denied.

The out-of-jurisdiction cases cited by Bateman on appeal do not assist his argument. Each of these cases involves the introduction of prior judicial findings, order, or actual testimony by a judge into evidence. See Nipper v. Snipes, 7 F.3d 415, 417 (4th Cir. 1993) (judicial findings in a different case is hearsay); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 505 F.Supp. 1125, 1184-85 (D.C.Pa., 1980) (prior judicial finding not "law of the case" and also excluded pursuant to ER 803, 403 and 605)¹¹; State v. Donley, 216 W.Va. 368, 374, 607 S.E.2d 474, 480-81 (W.Va., 2004) (family court order containing numerous inflammatory and prejudicial statements); Chein v. Shumsky, 373 F.3d 978, 989 (9th Cir. 2004) (factual testimony in by judge in perjury prosecution criticized, but case decided on different grounds). By contrast, no prior judicial findings or orders were offered against Bateman in this case.

¹¹ This issue was not pursued on appeal. See In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 275 (C.A.Pa., 1983). Eventually, Zenith was reversed by the United States Supreme Court on different grounds. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 598, 106 S. Ct. 1348, 1362 (1986).

Finally, for the same reasons articulated in the previous section, Bateman has failed to show any prejudice from the actual introduction of this evidence. The argument concerning the lack of prejudice will not be repeated. In the context of an ineffective assistance of counsel claim, however, it is Bateman's burden to show prejudice and he has failed to do so.

C. THERE WAS NO IMPROPER JUDICIAL COMMENT ON THE EVIDENCE.

Bateman argues that the introduction of the hearsay testimony was an improper comment by the judge on the evidence. This argument is without merit.

Under article 4, section 16 of the Washington Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The purpose of this constitutional prohibition, however, is to prevent the jury from being influenced by the court's opinion of the evidence.

State v. Elmore, 139 Wn.2d 250, 275, 985 P.2d 289 (1999) (citing State v. Lord, 117 Wn.2d 829, 862, 822 P.2d 177 (1991)). The case facts and circumstances of the case are examined to see if an improper comment has been made. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). However, the comment violates the constitution only if those attitudes are "reasonably inferable from the nature or manner of the court's statements." Elmore, 139 Wn.2d at 276 (quoting State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)).

In this case, there was no comment on the evidence. First, and contrary to the assertions made by Bateman on appeal, there were no comments by Judge Jurado (the Renton Municipal Court judge) on the evidence or credibility of the witnesses in this matter. Judge Jurado never testified in this trial nor were any orders or rulings that he made introduced into evidence. The facts here are nothing like the cases relied upon by Bateman on appeal. In those cases, judicial order rulings in a prior case were introduced as

substantive evidence or a judge in a prior matter testified against a defendant.

Here, there were three brief references to the fact that a Renton Municipal Court clerk told Tina Harris that Judge Jurado wanted her to assist Dickmeyer with preparing a protection order and was concerned about the victim. No order, findings, or ruling by Judge Jurado were introduced into evidence. Indeed, it is difficult to see Judge Jurado's actions as anything more than prudent concern for a potential victim of domestic violence.

On appeal, Bateman – perhaps recognizing that Judge Jurado's action had little if any bearing on the merits of this case – also asserts that by allowing Tina Harris's testimony, the trial judge in this case (Judge Mary Roberts) was somehow commenting on the evidence. This is not correct. Judge Roberts simply ruled on an objection – literally saying no more than “overruled.” As discussed above, Harris's testimony was introduced for a proper, non-hearsay purpose. By ruling on the defense objection, Judge Roberts did not convert this testimony into a judicial comment on the evidence. If Bateman's argument were accepted, virtually any ruling from the bench would be a “comment on the evidence.”

Nothing in Judge Roberts's ruling implied that the testimony from Tina Harris was either particularly credible or important.

Finally, assuming for the sake of argument that Tina Harris's testimony can be considered a judicial comment on the evidence, its introduction was nevertheless harmless error. A judicial comment on the evidence is presumed prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met. State v. Levy, 156 Wn.2d 709, 725-27, 132 P.3d 1076 (2006).

The standard for harmless error for a judicial comment is thus the same as the constitutional harmless error standard. The argument concerning the lack of prejudice was presented above and will not be repeated. In addition, however, the jury was instructed by the trial court as follows:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of the testimony or other evidence. I have not intentionally done this. If it

appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard the apparent comment entirely.

CP 851. The jury is presumed to follow these instructions to have ignored any alleged comments by the trial judge on the evidence.

D. WITNESS INTIMIDATION AND WITNESS TAMPERING DO NOT CONSTITUTE THE “SAME CRIMINAL CONDUCT.”

Bateman argues that the intimidating a witness (count I) and witness tampering (count IV) convictions constitute the same criminal conduct for the purpose of sentencing and should not have been scored separately. Bateman is wrong; the charges do not constitute the same criminal conduct because they occurred at different times and because the statutory intent of the two crimes, and Bateman's objective intent when committing the crimes, was different.

1. Legal standard: same criminal conduct.

Under the Sentencing Reform Act multiple current offenses generally count separately in determining a defendant's offender score. RCW 9.94A.589(1)(a). However, if the sentencing court finds that two or more offenses encompass the same criminal conduct those offenses count as one for offender score purposes. RCW 9.94A.589(1)(a). Crimes constitute the same criminal

conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.”

RCW 9.94A.589(1)(a). Courts narrowly construe the statute to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

A sentencing court’s same criminal conduct determination will be reversed only where there is a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Bateman did not raise the issue of whether the intimidating and tampering charges constituted the same criminal conduct below.¹² When a defendant has not raised a same criminal conduct claim at sentencing, and the record contains no findings on any of the elements of the same criminal conduct analysis, the trial court’s calculation of the offender score is treated as an implicit determination that the offenses did not constitute the same criminal conduct. State v. Anderson, 92 Wn. App. 54, 61, 960 P.2d 975, 978 (1998). As in cases where the trial court explicitly considers

¹² Bateman did challenge whether the intimidating (count I) and harassment (count III) charges were the same criminal conduct and the sentencing court rejected that claim. 8RP 19-20.

A defendant may raise a same criminal conduct challenge for the first time on appeal, subject to the standard of review set forth above. State v. Nitsch, 100 Wn. App. 512, 518-26, 997 P.2d 1000 (2000).

the issue, this implicit determination will not be disturbed absent abuse of discretion or misapplication of the law. Anderson, 92 Wn. App. at 61; State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Review for abuse of discretion is a deferential standard. Anderson, 92 Wn. App. at 61-62; State v. Garza-Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993); State v. Porter, 133 Wn.2d 177, 184-86, 942 P.2d 974 (1997). Review for abuse of discretion is appropriate when the facts in the record are sufficient to support a finding either way on the presence of any of the three elements that constitute “same criminal conduct”: (1) same time and place; (2) same victim; and (3) same objective criminal intent. RCW 9.94A.400(1)(a); Anderson, 92 Wn. App. at 61-62; State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987).

2. The intimidation and tampering charges do not constitute the “same course of conduct.”

i. **Victim.** As a preliminary matter, the State agrees that the victim in the intimidating and tampering charges is the same. The victim for both convictions is the public at large and Dickmeyer. See, e.g., State v. Victoria, 150 Wn. App 63, 67-69, 206 P.3d 694 (2009).

ii. **Time.** Appellant's argument fails, however, because the two crimes took place at distinctly different times. The intimidation charge occurred on July 14, 2007, when Bateman told Dickmeyer that if she went to court he would "choke her with his dick." CP 875 (Instruction 23). The tampering charge took place from July 15 to July 17, 2007, when Bateman repeatedly asked Dickmeyer not to testify. CP 870 (Instruction 18).

The Supreme Court has rejected a requirement that the offenses occur at exactly the same time in order to be the same criminal conduct.¹³ State v. Porter, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997) (elements of the same criminal conduct test satisfied because the drug deliveries were part of a continuing, uninterrupted sequence of conduct). Unlike Porter, however, the facts of the present case do not demonstrate a "continuing, uninterrupted sequence of conduct." This becomes clear when comparing the holdings in State v. Price, 103 Wn. App. 845,

¹³ Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one category of cases where two crimes will encompass the same criminal conduct: "the repeated commission of the *same crime* against the same victim over a short period of time." 13A Seth Fine, Washington Practice § 2810 at 112 (Supp.1996). For example simultaneous delivery or possession with intent to deliver two different drugs constitutes the same criminal conduct. State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993). Bateman was charged with two *different* crimes and this exception to the general rule does not apply.

854-59, 14 P.3d 841 (2000), with that in State v. Tili, 139 Wn.2d 107, 119-20, 985 P.2d 365 (1999).

In Price, the court found that the defendant formed two different criminal intents because, in the short time between the two sets of shootings, he had the opportunity to understand that his first attempt to murder the victims was unsuccessful, and then to make the choice to pursue them and attempt to murder them a second time. Price, 103 Wn. App. at 854-59; see also State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (defendant's two different rapes of the same victim were separate and distinct because, upon completing the first act of intercourse, he had time to either cease his criminal activity or commit a further act, and, thus, form a new intent); In re Personal Restraint Petition of Rangel, 99 Wn. App. 596, 600, 996 P.2d 620 (2000) (upholding the consecutive sentences for multiple assaults of the same victims because the defendant had time to form new criminal intent).

By contrast, in Tili, the Washington Supreme Court has held that a defendant's conduct in committing three separate rapes of the same victim was the same criminal conduct. This was because the three penetrations of the victim were continuous, uninterrupted, and committed within a time frame of approximately two minutes.

Tili, 139 Wn.2d at 124. The Court distinguished Grantham because in that case the defendant's criminal conduct ended with the first rape; the defendant stood over the victim and threatened her not to tell before beginning an argument and forcing the victim to perform oral sex. Id. at 123.

The facts of the present case are far more akin to Price and Grantham, than to Tili. On July 14, Bateman threatened that he would choke Dickmeyer with his penis if she testified against him. He then fled the scene. Later that same night, Dickmeyer spoke with police and refused to tell them what had happened and denied that she had been hurt, injured, or threatened by Bateman. These events clearly "interrupted" the sequence of Bateman's actions. Starting the following day, Bateman ceased to threaten Dickmeyer and began to ask her not to appear in court. The delay in time allowed Bateman to formulate a new intent, and to adopt a new strategy, in his effort to convince Dickmeyer not to testify against him. The fact that Bateman's actions were sequential, that is that they happened on successive days, does not make them "uninterrupted or continuous." Moreover, unlike Tili, Bateman's actions did not occur within a very limited time frame that effectively precluded "re-meditation." In sum, Bateman's actions did not occur

within a sufficiently proximate time to meet this part of the same criminal conduct test.

The cases cited by Bateman on appeal do not support his argument. In State v. Thomas, 151 Wn. App. 837, 842, 214 P.3d 215 (2009), the court held that the unit of prosecution for witness tampering is each attempt to influence a witness's testimony" and not "each witness." The majority opinion rejected the dissent's "rule of lenity" argument relied upon by Bateman. As Bateman recognizes, this was also the result reached in State v. Hall, 147 Wn. App. 485, 490, 196 P.3d 151 (2008), review granted, 166 Wn.2d 1005 (2009). Neither case involves a same course of conduct analysis; nor do they support the suggestion that the rule of lenity must be applied.

iii. Intent. Bateman's intent also changed between the intimidating and tampering charges. The Supreme Court has held that in construing the "same criminal intent" prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). First, the underlying statute is objectively considered to determine whether the required intents

are the same or different for each count. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). If they are the same, the facts usable at sentencing are viewed objectively to determine whether a defendant's intent was the same or different with respect to each count. Hernandez, 95 Wn. App. at 484.

The defendant's intent is crucial in a same criminal conduct analysis. State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (1990). The focus is on the offender's objective criminal purpose in committing the crime. Id. at 811. The relevant inquiry is to what extent did the criminal intent, viewed objectively, change from one crime to the next. Tili, 139 Wn.2d at 123.

In the present case, the underlying statutes have different intents. The intimidating charge requires the use of a threat to induce a witness to absent herself from an official proceeding. RCW 9A.72.110. The tampering charge does not require a threat, merely an attempt to induce a witness or person to absent themselves, testify falsely, or withhold testimony. RCW 9A.72.120. The legislature, by creating two different crimes with two different intents, viewed these crimes differently.

This difference is reflected in Bateman's actions – and, objectively viewed, his intent – in this case. On July 14, 2007, in

response to Dickmeyer's direct suggestion that she was going to testify against him, Bateman tried to threaten and scare her into not pursuing the case against him. Indeed, the fact that Dickmeyer refused to describe what had happened that evening to the police is indicative that Bateman succeeded with his plan. Subsequently, over the next three days, Bateman's intent shifted from threatening Dickmeyer to asking or cajoling her not to testify. This played on the fact that Dickmeyer still cared for (even loved) Bateman. The efficacy of this approach can be seen from the fact that Dickmeyer did not appear in court on July 17, 2007.

Bateman argues that because his goal in committing both crimes was the same – to get Bateman to absent herself from the criminal proceeding – his objective intent was the same. But this argument sweeps too broadly. A criminal defendant's ultimate goal when committing many crimes may often be the same (i.e., get money, revenge, dissuade witnesses from testifying). But when he engages in different means to accomplish a general goal – each accompanied by a different intent – they should not be treated as the same course of criminal conduct. To put this another way, were Bateman's analysis accepted, it would not be possible to hold a

defendant accountable for both threats and non-threats to a witness that induce a witness not to appear at an official proceeding.

In any event, the absence of any one of the prongs prevents a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). In the present case, the time requirement was not satisfied and the two charges should be scored separately. This conclusion makes logical sense; if this were not the result then a defendant could make threats and/or inducements to not testify over virtually any period of time without additional consequences.

E. THE "SUBSTANCE ABUSE EVALUATION" COMMUNITY CUSTODY CONDITION MUST BE STRICKEN

Bateman argues that the trial court lacked authority to order a substance abuse evaluation as a condition of community custody. There is evidence in the record that Bateman used drugs and that this led to a lack of stability in his relationship with Dickmeyer. See Defendant's Trial Exhibit 13, p. 3-4. However, this evidence was not directly tied to the criminal acts with which Bateman was charged. Accordingly, for the reasons set forth in Bateman's brief, this community custody condition should be struck from the judgment and sentence. However, as Bateman concedes, the

requirement that he undergo an alcohol evaluation as a condition of community custody should remain in place.

IV. CONCLUSION

The State of Washington respectfully requests that Bateman's convictions for witness intimidation, assault in the fourth degree, felony harassment, and witness tampering be affirmed. The case should be remanded to strike the community custody condition mandating a substance abuse evaluation.

DATED this 12th day of February, 2010.

Respectfully submitted,

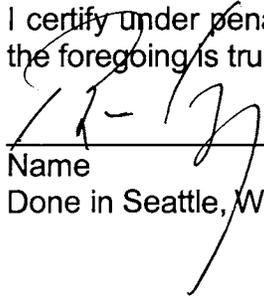
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to JENNIFER WINKLER, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief Of Respondent, in STATE v. DUSTIN BATEMAN, Cause No. 63557-3-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

02/12/10

Date

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