

65009-2

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NO. 65009-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW M. STEAN,

Appellant.

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

COURT OF APPEALS
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A. ASSIGNMENTS OF ERROR

1. The trial court denied the appellant his right to a public trial.

2. Trial counsel denied the appellant his right to effective representation by failing to object to inadmissible hearsay testimony that prejudiced his client.

Issues Pertaining to Assignments of Error

1. The trial court and parties had an off-the-record jury instructions conference in chambers. The trial court did not conduct a Bone-Club inquiry.¹ Did the trial court deprive the appellant of his right to a public trial as provided for in the United States and Washington constitutions?

2. The appellant's trial counsel failed to object as the prosecutor elicited damaging hearsay testimony from two state's witnesses. Did counsel's failure constitute ineffective assistance and thus deprive the appellant of his constitutional right to effective representation?

B. STATEMENT OF THE CASE

A group that included Matthew West, Travis Hansen, and Whitney Bartlett attended a party hosted by Amanda Olson in July 2007. 2RP 46-

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

48, 55-57, 66-67.² Olson had ended her relationship with her live-in boyfriend, Andrew M. Stean, earlier in the month. Stean moved out but left a car he was preparing to buy in Olson's carport with her permission. 2RP 46-49, 142-44. Stean was not at the party. 2RP 144.

At some point during the festivities, West jumped up and down on the car's hood and dented it. 2RP 49, 57, 67-68.³ A few days after the party, Stean went to Olson's residence, observed the damage to the car, and found out from a friend that West and Hansen were responsible. 2RP 145-46. A few days later, Hansen heard from someone Stean was mad and wanted money to fix the car. 2RP 69-71. Hansen "put out there to go through the grapevine" that if Stean presented him with a repair appraisal he would have the car fixed because West was unemployed and did not have money. 2RP 70-71.

Hansen never saw an appraisal. 2RP 71-72. West, who shared a home with Hansen, called him later in the week. When the prosecutor sought to ask Hansen what West said, Stean made a hearsay objection.

² In this brief, Stean refers to the 3-volume verbatim report of proceedings as follows: 1RP – 8/11/2008; 2RP – 1/26-27/2010; 3RP -- 3/3/2010.

³ West moved to Illinois earlier in the month of the trial and did not testify. 2RP 56.

2RP 72-73. The prosecutor explained she did not seek to offer the evidence for its truth, but rather to establish whether Hansen's reaction upon hearing the message was reasonable. The trial court granted the prosecutor's request and instructed jurors West's message may not be considered for its truth, but only for purposes of considering Hansen's reaction to what he was told. 2RP 73. West told Hansen that Stean had come by their home, displayed a gun, and told West if he did not pay for the damage by midnight, he would return and kill everybody who was there. 2RP 73-74. According to Hansen, West seemed to take Stean's threat seriously. 2RP 74-75.

Bartlett was with Hansen when West called. 2RP 59. It appeared to her West's message made Hansen nervous or scared. 2RP 60. When she and Hansen arrived at the house, both West and another housemate, Kristofer Elling, appeared to be nervous and fearful. The prosecutor then injected hearsay regarding Stean's purported threat into several questions to Bartlett:

Q: [D]id it appear they were taking *the threat* seriously?

Y: Yes.

Q: Were you comfortable based on *the threat* staying at the house that night?

A: I didn't stay there that night.

...

Q: Did you do that [stay with West at her parent's home] because of *Mr. Stean's threat*?

A: Yeah. I mean, I personally didn't but I know Matt was freaked out.

Q: Do you know if there were other precautions taken by the people in the house in terms of *the threat*, in terms of locking up or, you know, that kind of thing?

A: I know that . . . Kris' brother brought a gun over.

...

Q: Is that in response to *the threats*?

A: Yes.

2RP 61-62 (emphasis added). Stean's counsel did not object to these questions. Nor did the trial court limit the jury's use of the evidence.

Hansen testified that when he got home, West and Elling repeated what West had said on the phone. 2RP 75-76. Later that night, Stean's friend came to Hansen's home and the two men discussed Stean's request for reimbursement. Hansen also spoke with Stean on the friend's phone. Stean told Hansen if he did not get his money by midnight, he would come to the house and collect it one way or another. 2RP 77-78. Stean seemed to be serious. Hansen again offered to fix the car if Stean produced an estimate of repair costs, but Stean said he wanted money. 2RP 78.

As the friend left, he said Stean was on his way over. Elling called the police. 2RP 79-80, 115. Elling testified he had been at home with West when Stean came to the house earlier that day. 2RP 107. He heard West and Stean talking on the front porch and went out to see what was going on when he heard Stean speaking louder. 2RP 109-10, 120-21. Elling heard Stean tell West that if he did not have \$200 by midnight, he would come back and shoot everyone in the house. 2RP 110-111, 121. As Stean said this, he lifted his shirt and showed West a pistol in his pocket. 2RP 112-13.

Elling took the threat seriously. 2RP 113. West called Hansen immediately after Stean left. 2RP 113-15. After Hansen came home, a friend of Stean's came by the house. 2RP 117-18. The friend handed Hansen the phone, and Elling heard him tell someone on the phone he would have the car fixed if he saw a repair bill. 2RP 115, 117-18. When Hansen hung up the phone, he said Stean was on his way. 2RP 123-24. Elling called the police. 2RP 115. Elling's brother came by a short time later and Elling told him what had happened. Elling also loaded his shotgun and kept it nearby, locked the doors, and turned off the lights. He was prepared to stay up all night. 2RP 115-16. West and Bartlett went to Bartlett's parent's house. 2RP 116-17.

Shortly thereafter, Stean and a companion approached the house. Elling's brother, who was on the porch at the time, told them the police were coming. The visitors then left. 2RP 118-19.

Officer Jeremy Harper, who responded to Elling's call, testified Hansen, West and Elling said they were "in fear for their lives." 2RP 138. One said "they were going to be staying up all night to ensure their safety." 2RP 138. Stean's counsel did not object to the officer's testimony.

Stean testified in his own defense. He denied threatening anyone. Instead, he went to the house and asked West if he was ready to pay him. West feigned ignorance, then denied he had jumped on Stean's car. 2RP 147-48, 159-60, 167. When Stean told him one of his friends witnessed the act, West came clean. He agreed \$200 was a fair reimbursement and told Stean to come back in two hours because by then Hansen would be home from work with the money. 2RP 148, 163, 167. Stean did not see Elling during the conversation with West. 2RP 148-49, 165-66. He also did not talk with Hansen on the telephone. 2RP 150. He did not have a gun and did not threaten to kill anyone. 2RP 149-50, 162-63.

Stean returned at about the time West suggested with a different friend than the one who accompanied him on the first visit. 2RP 150. As they walked to the porch someone told them the police were on the way,

so they left. 2RP 150, 153-54. Stean explained he did not like to get involved with the police. 2RP 156. He had been harassed by police and falsely accused of breaking the law many times. 2RP 170-72.

The state charged Stean with three counts of felony harassment. CP 84-85. The state later filed an amended information, adding a count of bail jumping, after Stean failed to appear for a scheduled status hearing in May 2008. CP 79-81. After Stean did not return for the afternoon session of his first day of trial in August 2008, the state added a second bail jumping count. CP 63-65; RP 65-71.

Trial commenced in March 2010. During his testimony, Stean admitted he was guilty of each bail jumping charge. 2RP 172-73. After Stean rested his case, counsel met with the trial judge in chambers to discuss the jury instructions. 2RP 173-74. According to the clerk's minutes, this private conference occurred during a 30-minute "recess." Supp. CP __ (sub. no. 71B, at page 4). When back on the record, but still in chambers, both counsel adopted the instructions. 2RP 174.

The jury later found Stean him guilty of two of the three harassment counts (naming West and Elling as victims) and both bail jumping counts. CP 24-25. The trial court imposed concurrent standard range sentences of 17 months. CP 3-11.

C. ARGUMENT

1. THE TRIAL COURT DENIED STEAN HIS RIGHT TO A PUBLIC TRIAL BY HAVING THE JURY INSTRUCTIONS CONFERENCE WITH COUNSEL IN CHAMBERS.

The trial court held an off-the-record conference in chambers to decide how the jury would be instructed. 2RP 174. The public had no opportunity to view the process for selecting those instructions. This violated the constitutional provisions mandating open trials.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide the accused with the right to a public trial. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, ___, __ L. Ed. 2d. __ (2010); State v. Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The purposes behind the constitutional public trial guarantee are to ensure a fair trial, foster public understanding and trust in the process, and give judges the check of public scrutiny. State v. Duckett, 141 Wn. App. 79, 803 (2007). Public trials embody a “view of human nature, true as a

general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citations omitted). The public trial right extends beyond the taking of witness testimony at trial. Presley, 130 S. Ct. at 724 (Sixth Amendment right to public trial applies to voir dire); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (qualified First Amendment right to open access to preliminary hearings); In re Personal Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (voir dire); Bone-Club, 128 Wn.2d at 257 (suppression hearing); Ishikawa, 97 Wm.2d at 36 (motion to dismiss).

The purposes behind the open trial provisions are just as applicable to factual hearings as to purely legal ones. There is thus no reason why those provisions should not apply to instructions conferences.

Whether a trial court procedure violates the right to a public trial is a question of law courts review de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right is considered to be of such constitutional magnitude that it may be raised for the first time on appeal. Strode, 167 Wn.2d at 229. The Washington Supreme Court has set forth the specific factors a trial court must consider on the record

before ordering a courtroom closure, unless the defendant affirmatively agrees to and benefits from the closure.⁴ State v. Momah, 167 Wn.2d 140, 151, 217 P.3d 321 (2009); Bone-Club, 128 Wn.2d at 258-59.

The circumstances in this case constitute a closure. Instructive is State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008). The Court held that questioning four prospective jurors in the jury room was a “closure” that mandated Bone-Club analysis even though the trial court did not explicitly announce it was closing the proceedings. Erickson, 146

⁴ Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling state 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.

Wn. App. at 211. Observing that "[m]ost courts have jury rooms and chambers adjacent to, but separate from, the courtroom[,]" the court found that "it is improbable that a member of the public would feel free and welcome to enter a jury room of his or her own accord." Erickson, 146 Wn. App. at 209-10. The Court also held that "[b]ecause the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact on the proceedings, . . . it acts as a closure for purposes of Bone-Club." Id. at 209. See also State v. Heath, 150 Wn. App. 121, 128, 206 P.3d 712 (2009) (trial court's sua sponte decision to hear pretrial motions and to examine one prospective juror in chambers was closure calling for Bone-Club analysis); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (conducting part of voir dire in chambers without Bone-Club analysis violated right to public trial); but see State v. Wise, 148 Wn. App. 425, 436, 200 P.3d 266 (2009) (questioning 10 jurors individually in chambers was at most "temporary and partial, below the 'temporary, full closure' threshold of Bone-Club."), petition for review granted, No. 82802-4 (7/9/2010).

In Stean's case, the trial court's decision not to discuss jury instruction in open court had more than a trivial effect on the proceedings. Jury instructions – even when wrong – that are not objected to become the

law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). "Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel." State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). At the risk of stating the obvious, "words that a judge says, particularly to a jury, are very important." U.S. v. Wisecarver, 598 F.3d 982, 989 (8th Cir. 2010). See U.S. v. Medina-Martinez, 396 F.3d 1, 8 (1st Cir. 2005) ("Although our review is for plain error, we are cognizant of the fundamental importance of adequate jury instructions."), cert. denied, 544 U.S. 1007 (2005). In any event, our Supreme Court has never found a public trial right violation to be trivial. Strode, 167 Wn.2d at 230. The trial court improperly closed an important part of the trial by conducting the instructions conference in chambers without first applying the Bone-Club factors.

The trial court's error was structural under the Sixth Amendment. See Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (violation of right to public trial is structural) (citing Waller v. Georgia, 467 U.S. at 49 n.9); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006); State v. Paumier, 155 Wn. App. 673, 685, 230 P.3d 212 (2010) (remedy for closing part of jury selection is reversal of conviction under Presley and Sixth Amendment).

The choice of remedy under article I, section 22 is not as clear. In Strode, the Court held "denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Strode, 167 Wn.2d at 231. This is consistent with Bone-Club, where the Court declared that "[t]he Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment." Bone-Club, 128 Wn.2d at 260. The Strode Court consequently reversed the convictions and remanded for a new trial because part of voir dire occurred in chambers. Strode, 167 Wn.2d at 231.

Yet in Momah, the Court held the closure of part of voir dire was not structural error. Momah, 167 Wn.2d at 156. The Court relied on Waller, which held the remedy for unjustified closure of a hearing on a motion to suppress evidence was a new suppression hearing, not a new trial. Momah, 167 Wn.2d. at 150. Waller held:

Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50.

The Momah Court acknowledged that in the four closure cases immediately preceding its decision, it found structural error and granted automatic reversal. The Court asserted that in those cases, "we have held

that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." Momah, 167 Wn.2d. at 150-51. Careful review of those cases calls this claim into question; in three of the four cases, the Court found the structural error remedy necessarily followed because of unjustified closure.

In Easterling, the Court did not first consider whether reversal and remand were appropriate where the trial court improperly closed a hearing on a co-defendant's motion to sever his case from the defendant's. Instead, the remedy was automatic:

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. See Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.

State v. Easterling, 157 Wn.2d 167, 181, 127 P.2d 825 (2006).

The Brightman court held similarly, finding the structural error remedy of a new trial necessarily followed where the trial court failed to

apply the Bone-Club factors before closing voir to the accused's friends and family:

Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted. Id. at 261, 906 P.2d 325. Accordingly, we remand for a new trial. See id.

Brightman, 155 Wn.2d at 518.

In Orange, the trial court also excluded family and friends from part of voir dire without weighing the Bone-Club factors. Orange, 152 Wn.2d at 808-09. The Court did not hesitate in finding the remedy for the improper closure was reversal and remand for a new trial:

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that “[p]rejudice is presumed where a violation of the public trial right occurs.” 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n. 9, 104 S. Ct. 2210). Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.

Orange, 152 Wn.2d at 814.

Finally, only in Bone-Club did the Court did consider – and reject - the Waller remedy where the trial court closed a portion of a pretrial suppression hearing. Bone-Club, 128 Wn.2d at 261-62. The Court rejected the state's request. It found persuasive the defendant's argument

the undercover officer could testify differently in an open suppression hearing. It held, "Even if the new suppression hearing again results in the admission of [the defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262.

This review of the cases shows reversal and remand for a new trial -- contrary to the suggestion in Momah -- is the "default" remedy for improper closure. This structural error remedy will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

Momah presented those circumstances:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Momah, 167 Wn.2d at 151-52.

Stean's case, like every other closure case except Momah, has no comparable extraordinary facts. Defense counsel did not affirmatively assent to the closure, argue for its expansion, or forgo the opportunity to object. Unlike Momah's counsel, Stean's attorney did not "make a deliberate choice to pursue" an in-chambers conference. Momah, 167 Wn. 2d at 155. The judge sought no input from counsel and did not close the proceedings to protect Stean's constitutional right to a fair trial. Counsel presumably participated in the instructions conference, since he proposed instructions the trial judge did not use. Cf., e.g. CP 56 (defendant's proposed "to-convict" instruction for bail jumping) with CP 40 (court's corresponding instruction). But the private instructions conference did not "benefit" Stean any more than an open one would have. For all the reasons the Momah Court found against a reversal of the convictions, this Court should find for such a result. The error here was structural, and a new trial is required.

2. TRIAL COUNSEL DEPRIVED STEAN OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO DAMAGING HEARSAY EVIDENCE.

Defense counsel permitted the prosecutor to elicit damaging hearsay testimony from Bartlett, Hansen, and Officer Harper, by failing to object. Counsel's failure constituted deficient performance. It was not

part of a legitimate strategy because it undermined Stean's assertion that he did not threaten West or Elling and did not have a gun. Because the testimony bolstered Elling's version of events, counsel's failure was prejudicial. This Court should reverse the harassment convictions.

Failing to object to inadmissible evidence generally waives a challenge on appeal. State v. Roberts, 73 Wn. App. 141, 146, 867 P.2d 697, review denied, 124 Wn.2d 1022, 881 P.2d 255 (1994). Because an ineffective assistance claim raises an issue of constitutional magnitude, however, Stean may raise this issue for the first time on appeal. State v. Gerds, 136 Wn. App. 720, 726, 150 P.3d 627 (2007).

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Stean meets both requirements here.

An ineffective assistance of counsel claim is reviewed de novo. State v. Thach, 126 Wn. App. 297, 319, 106 P.3d 782, review denied, 155 Wn. 2d 1005 (2005). Deficient performance may be shown where counsel fails to object to inadmissible prejudicial evidence. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failing to object to evidence of prior convictions); State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257, 1261 (2007) (trial counsel ineffective for failing to object to inadmissible hearsay testimony), affd., 165 Wn. 2d 474, 198 P.3d 1029 (2009), cert. denied, 129 S. Ct. 2873 (2009); State v. Dawkins, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (failing to object to evidence of uncharged crimes).

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hendrickson, 138 Wn. App. at 832.

Hearsay evidence is inadmissible unless it falls within an exception. State v. Powell, 126 Wn. 2d 244, 265, 893 P.2d 615 (1995).

Bartlett testified she heard through Hansen that West told him Stean had come to the house. 2RP 59. Bartlett was in the basement of the house when Stean came back to the house but neither saw nor her him. 2RP 60-61. Although Bartlett said nothing about a "threat," the prosecutor asked a series of questions assuming a threat had occurred. In this manner the prosecutor elicited hearsay testimony that West and Elling appeared to take "the threat" seriously and were nervous and that they took precautions because of "the threat."

Furthermore, Officer Harper testified Hansen, West and Elling said they were "in fear for their lives." 2RP 138. And one of the three said "they were going to be staying up all night to ensure their safety." 2RP 138.

Trial counsel did not object or request an instruction limiting the use of this hearsay testimony. The trial court would have granted the objection because the evidence was offered to prove Stean threatened West and Elling. See State v. Parr, 93 Wn. 2d 95, 99, 606 P.2d 263 (1980) (testimony that victim told witness she feared accused was admissible under state-of-mind exception to hearsay rule, ER 803(a)(3), but "the

testimony concerning a threat and other conduct of the [accused] was not properly admissible under that rule and was highly prejudicial."); United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980) (state-of-mind exception to rule against hearsay, ER 803(a)(3), does not allow witness to relate declarant's statements as to why he held the particular state of mind; witnesses could testify declarant said, "I'm scared," but not "I'm scared because X threatened me.").

The prosecutor also sought to elicit Hansen's testimony that during a phone call, West told him Stean came to their house and threatened them with a gun. This time defense counsel made a hearsay objection. The court permitted the testimony, but instructed jurors they were to consider what West said "over the phone" only for the purpose of determining whether Hansen's reaction to what he heard was reasonable. 2RP 73. Stean has no quarrel with the trial court's ruling as far as it goes. See State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999) (trial court did not abuse its discretion by permitting alleged felony harassment victim to testify that accused told him about other violent acts he committed because it went to element that victim's fear caused by accused's threat was reasonable and trial court limited use of the evidence to determination of reasonableness).

But the court's limiting instruction did not go far enough. Hansen also testified – without defense objection – that when he got home, West reiterated what he said on the phone and Elling also told him Stean threatened them with a gun. 2RP 75-76. Because the court's limiting instruction applied only to "what was said over the phone" to Hansen, the jury was permitted to use essentially the same hearsay evidence for any purpose it wanted – including to prove the truth of what West said. For the same reason counsel erred by failing to object to Bartlett's testimony, his failure to object to this portion of Hansen's testimony was also deficient performance.

Counsel's failure to object was not part of a reasonable strategy. West did not testify. Elling testified Stean threatened them with a gun. Stean testified he did not have a gun and did not threaten anyone. The only issue for the jury was thus whether Stean uttered the threat. This made the credibility of Elling and Stean crucial to the verdicts. The hearsay testimony of Bartlett, Hansen, and Officer Harper bolstered Elling's credibility and undermined Stean's defense. Under these circumstances, failing to object was not a reasonable strategic decision. And whether strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in criminal law may

constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). The failures here were the product of incompetence.

Finally, counsel's deficient performance was prejudicial. An evidentiary error is prejudicial if it is reasonably probable that the error materially affected the jury's verdict. State v. Viney, 52 Wn. App. 507, 511, 761 P.2d 75 (1988). Because of its bolstering effect, it is reasonably probable the hearsay materially affected the outcome of Stean's trial. State v. McSorley, 128 Wn. App. 598, 609-10, 116 P.3d 431 (2005) (counsel's failure to object to detective's hearsay statement related to disputed point constituted ineffective assistance because it allowed prosecutor to pit accused's credibility against detective's at trial where credibility was crucial).

This Court should conclude counsel-deprived Stean of his constitutional right to effective representation by failing to object to inadmissible hearsay testimony. Reversal is the proper remedy.

D. CONCLUSION

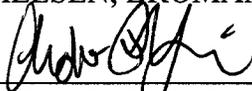
The trial court violated Stean's constitutional right to a public trial by conducting the jury instructions conference in chambers without justification. And defense counsel deprived Stean of his constitutional right to effective representation by failing to object to inadmissible hearsay

testimony that bolstered the credibility of the state's most important witness and undermined the defense. Standing alone or in combination, these errors require reversal of Stean's harassment convictions and remand for a new trial.

DATED this 3 day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65009-2-1
)	
ANDREW M. STEAN,)	
)	
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 3RD DAY OF AUGUST, 2010, 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] WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
SUITE 201
BELLINGHAM, WA 98227

- [X] ANDREW STEAN
DOC NO. 339566
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF AUGUST, 2010.

x *Patrick Mayovsky*

2010 AUG -3 PM 4:00