

No. 39130-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

TEMICA TAMEZ
Appellant.

FILED
COURT OF APPEALS
10 JUN -7 AM 10:30
STATE OF WASHINGTON
BY [Signature] [Signature]

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

The Honorable, Judge Hirsch
Cause No. 08-1-00761-1

BRIEF OF RESPONDENT

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08-1-9 WJD

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court's misstated oral instruction was harmless error?
2. Whether Ms. Tamez's counsel was ineffective and was she prejudiced by his representation.
3. Whether there was sufficient evidence to support Ms. Tamez's conviction for Tampering with a Witness?
4. Whether there was prosecutor misconduct when the deputy prosecutor asked a witness if Ms. Tamez knew what Mr. Harris did for his source of money?

B. STATEMENT OF THE CASE.

1. Factual history

The Thurston County Narcotics Taskforce (TNT) is a multi-police agency taskforce assigned to investigate narcotics crimes occurring in Thurston County and to develop criminal investigations focusing on the narcotics and the financial assets involved in these crimes. RP II, p. 29-35.

The TNT investigated Damien Harris and his associates for the sale of crack cocaine. RP II, p. 41. Mr. Harris also used the street names of "D" and "D-Loc". RP II, p.39. Temica Tamez was the living partner of Mr. Harris and they resided together. RP II, p.40. Two other associates of Mr. Harris were Michael Boyer and Adrian Morris. RP II, p. 37-38. The street names of Mr. Morris

were "C-Rag" and "C" and the street names of Mr. Boyer were "Peanut Head" and "Mikey". RP II, p.39.

After the TNT surveilled Mr. Harris make a number of "controlled" drug buy sales, the TNT arrested Mr. Harris and Mr. Boyer for delivery of crack of cocaine on April 18, 2008. RP II, p.44-57.

The TNT investigation then focused on where Mr. Harris stored his crack cocaine and the proceeds from the first controlled drug transaction and other assets from the illegal distribution of crack cocaine. RP II, p. 58. As Mr. Harris was under Department of Corrections supervision, his home that he shared with Ms. Tamez was subject to DOC home inspection and searches and that home was searched by DOC. RP II, p. 59. TNT learned through intelligence and surveillance that Mr. Harris was associated with another address at an apartment complex at 612 American, Olympia, Washington; however, he was not on any lease agreements with the management of the apartment complex. RP II, p.59-60.

TNT Detective Lundquist made contact with Ms. Cathy Kruse at apartment L-205 at the apartment complex at 612 American and explained that he had recently arrested Mr. Harris

and was interested whether Mr. Harris stored narcotics and illegal proceeds at her apartment. RP II, p. 60-61. Ms. Kruse appeared very nervous and stated, among other things, that Mr. Harris “may or may not have stuff here”; Ms. Harris refused to allow the police to search the apartment. RP II, p. 62.

Ms. Kruse later testified in the instant trial against Ms. Tamez and stated that Mr. Harris paid Ms. Kruse twenty dollars a day (later, he paid her in crack cocaine) to be allowed to store his items in one of her bedrooms. RP III, p. 221-223. Ms. Kruse stated that she remembered Detective Lundquist coming to her apartment on April 18, 2008 but she refused him entry into the apartment because she had been smoking crack cocaine. RP III, p. 224. Ms. Kruse also recalled that Mr. Harris had a three-way phone call with her from the jail directing her to not let anyone in the apartment and that all of Mr. Harris’s items should be given to Ms. Tamez. RP III, p.225.

However, Ms. Kruse also recalled that Mr. Adrian Morris had come to her apartment twice regarding the property of Mr. Harris. RP III, p.230. When Mr. Morris came to her apartment the second time, she refused to allow him in the apartment. Id.

TNT Detective Renschler investigated an attempted break-in at Ms. Kruse's apartment that allegedly occurred on April 19, 2008. RP III, p. 274-279. Detective Renschler photo-documented evidence that there were pry marks around the front door and damage around the door molding and jamb. RP III, p. 277.

Ms. Kruse testified that at the direction of Mr. Harris she went into his "rented" room and located \$2600.00 in cash, "about a hundred counts of ecstasy", and "two eight-balls" of crack cocaine". RP III, p.226-227. Ms. Kruse testified that at Mr. Harris's direction she kept the illegal drugs; she testified that Ms. Tamez came to her apartment and she gave Ms. Tamez \$2,400.00 in cash. RP III, p. 228. Ms. Kruse stated that Ms. Tamez came to her apartment on another occasion and took a large screen television, stereo and other personal items belonging to Mr. Harris, RP III, p. 229. Ms. Kruse indicated that on one occasion telling Mr. Harris that if Ms. Tamez was going to be "irate" she would not let her in the apartment. RP III, p.229-230.

After Mr. Harris was arrested and in the Thurston County Jail, Detective Lundquist monitored his phone calls in an attempt to learn where the illegal proceeds, "buy" money and illegal narcotics were being stored. RP II, p. 65-69. On phone calls placed from

any phone inside the jail, there is a warning that advises all parties to the phone call that the call is being recorded and the caller and recipient must acknowledge that the call is being recorded and agree to that condition before the call is connected. RP II, p.66. The maximum amount of time for a jail phone call is fifteen minutes; after fifteen minutes, the call is automatically terminated. RP II, p. 70.

The weekend following the arrest of Mr. Harris, Detective Lundquist began to monitor his phone calls from the jail. RP II, p. 69. There were hundreds of phone call between Mr. Harris and Ms. Tamez in the days following his arrest. RP II, p. 70. These contacts were in violation of a court order prohibiting contact. RP II, p.71.

On April 19, 2008, at 14:18, Mr. Harris initiated a three-way phone call from the jail to contact Mr. Adrian Morris, who also went by the street name "C-Rag". RP II, p.84. Mr. Harris is insistent that someone needs to go to the "spot"; "if they don't go to the spot, then I can't get me and Mike out (referring to Mr. Boyer who was also arrested on April 18, 2008)". Transcript of Taped Jail Phone calls, p. 3. Mr. Harris is informed "she (referring to Ms. Kruse) wouldn't let C-Rag in". Id., p. 5. Mr. Harris then learns in the phone

call that "C-rag" tried to kick Mr. Kruse's door open. Id. Mr. Harris asks for Ms. Kruse's phone number. Id., p. 8.

In this phone call, Mr. Harris also has a three-way conversation with Mr. Bennett and Ms. Kruse where Mr. Harris commends Ms. Kruse for doing a "good job" by keeping the police from coming into the residence. Id., p.12.

Mr. Harris then directs that the third party call Ms. Kruse to find out if the police came in the apartment. Id., p. 11. Mr. Harris then finds out that Ms. Kruse did not let the police in and he praises her repeatedly. Id., p. 12. Mr. Harris then directs that Ms. Kruse can go into his room at her apartment and look in a black coat for money and drugs; he then instructs that the drugs should be disposed of or used by Ms. Kruse and the money should go to C-Rag. Id., p. 11-19.

In another jail phone call, Ms. Tamez tells Mr. Boyer that she met C-Rag at the Olive Garden; Ms. Tamez stated, "I had to go meet him because he made me go pick-up D-Loc's money from this f***ing guy and go bring it to him and the lady where his sh-t is threw all his sh*t outside and picked it up real quick before I got there 'cause I told her I was gonna beat the sh*t out of her." Id., p.43-44. Ms. Tamez states that the money is all "wrapped up in a

f***ing piece of paper; I just gave it to C-Rag exactly how it was; I wasn't f***ing with anything --- cause I was shaking; I was mad". Id., p. 44.

Ms. Tamez then told Mr. Harris that "that lady threw all your sh*t outside". Id., p.45. Ms. Tamez tells Mr. Harris that she had to go over there to get whatever money you had over there. Id.

Ms. Tamez then states that Ms. Kruse "wants everybody to leave her alone and blah, blah, blah cause it all started this morning when Adrian called me when he went over there to get your sh*t and she was talking sh*t through the door, so he tried to kick the door off the hinges, and he called me and he was like I need you to act ignorant". Id., p.47. Subsequently, Ms. Harris went to the residence and got Mr. Harris's money from Ms. Kruse's boyfriend and then gave it to C-Rag. Id.

In another jail phone call from April 19, 2008, Mr. Harris called Ms. Tamez and Ms. Tamez tells him that she was just speaking with Mr. Adrian Morris; the topic of conversation was how much money was recovered from Ms. Kruse's apartment. Id., at 58. Ms. Tamez states, "he (referring to Mr. Morris) wishes you would have just had me get everything at once instead of doing piece by piece and - - do you have her (referring to Ms. Kruse)

giving, distributing money to people or something?” Id., p.58. Mr. Harris responds in the negative to this inquiry by Ms. Tamez. Id.

Ms. Tamez then states, “I was like I don’t know what’s going on. Please, you’re stressing me out. He (again, referring to Mr. Morris) was like Temica, I told you to beat her (again, referring to Ms. Kruse) ass. I was like she didn’t come outside (laughing)”. Id.

Detective Lundquist also monitored phone calls approximately a week after the arrest of Mr. Harris where both Mr. Harris and Ms. Tamez were concerned about the contents of a safety deposit box at the HomeStreet Bank in Olympia, Washington. RP III, p. 113. On April 25, 2008, Ms. Tamez and Mr. Harris had another jail phone conversation; on this occasion, Ms. Tamez was at the HomeStreet Bank and she was attempting to get added on the signature cards for all of Mr. Harris’s property at the bank including his account and the safety deposit box. Transcript of Tape Jail Phone calls, p. 73-75. The bank employee Josh Haia also testified at the trial; he testified that Ms. Tamez came to the bank on April 25, 2008, and discussed the forms she filled out and signed to be added to Mr. Harris’s account and safety deposit box. RP III, p. 208-213. Ultimately, Ms. Tamez was not able to access

the safety deposit box as the only keys had been seized by law enforcement. *Id.*, p. 214-215.

Detective Lundquist testified that there was \$25,000.00 in the safety deposit box. RP III, p.117. Detective Lundquist also learned that Ms. Tamez had tried to sell a GMC Suburban belonging to Mr. Harris between April 19 and April 25, 2008. RP III, p. 137. Lt. Thompson of the TNT supervised the arrest of Ms. Tamez on April 25, 2008; at the time of the arrest, Ms. Tamez was driving the white GMC Suburban belonging to Mr. Harris; this vehicle was kept parked near the stash house. RPII, p. 73-77. The vehicle was subsequently impounded. *Id.* Mr. Boyer testified that he purchased the GMC Suburban originally At Mr. Harris's request for \$3,100.00; Mr. Boyer testified that the title was placed in Boyer's name because Mr. Harris was worried it would be seized by the police if it was in Harris's name. RP III, p.158.

Mr. Harris talked about large amounts of money with Ms. Tamez and warned her, "don't be letting no nosy Cassie (referring to Mr. Boyer's girlfriend) or nobody nosy, you know what I mean?" Transcript of Taped Jail Phone Calls, p. 80. After Mr. Harris gives Ms. Tamez more instructions and directions about

people to contact; Ms. Tamez responds, “give me till the end of the week and I’ll get everything done.” *Id.*, p. 90.

Detective Hedin-Baughn of the TNT also monitored many of the phone calls between Mr. Harris and Ms. Tamez. *RP III*, p. 255. Detective Hedin-Baughn discusses how Mr. Harris and Ms. Tamez would speak in a sort of code to exchange the minimum amount of information over the recorded jail phone calls. *RP III*, p. 256-258. Detective Hedin-Baughn also describes how Mr. Harris would give Ms. Tamez a set of instructions regarding things to do and people to contact on his behalf. *Id.*

Detective Lundquist served a search warrant on May 9, 2008 on the residence of Ms. Tamez and located a letter from Mr. Harris instructing Ms. Tamez to put in a legal claim for a portion of the \$25,000.00 found in the safety deposit box at the HomeStreet Bank. *RP III*, p. 135-141. Ms. Tamez also indicated to Detective Lundquist that she had received these letters of instructions from Mr. Harris and had done some of the things; including trying to sell the GMC Suburban. *RP III*, p. 136. Detective Lundquist warned Ms. Tamez of the potential for being charged with a crime if she claimed moneys that she did not have a legitimate claim to; ultimately, Ms. Tamez did not file a legal claim in the civil forfeiture

by the TNT (she was provided notice by law enforcement as she had been added to the safety deposit box and account at HomeStreet Bank and had signed the bank documents adding herself to the account and safety deposit box). RP III, p. 202.

2. Procedural History

By Second Amended Information file February 6, 2009, Ms. Tamez was charged with Count I: Intimidating a Current or Prospective Witness, Count II: Tampering with Physical Evidence, Count III: Money Laundering, Count IV: Money Laundering, and Count V: Tampering with a Witness. The Jury returned a verdict of Not Guilty on Count I and Guilty verdicts on Counts II, III, IV, and V. Ms. Tamez was subsequently sentenced to a standard range sentence and timely appealed her conviction.

C. ARGUMENT.

1. The written jury instructions were correct and properly advised the jury of the requirements of accomplice liability and the court's misstated oral instruction was harmless error.

The appellant concedes that the Court's written jury instructions were a correct statement of law in all regards. However, the appellant raises the interesting issue on appeal that the court's oral recitation of the written jury instruction was incorrect

and in conflict with the Court's written jury instructions on Jury Instruction #11, the accomplice liability instruction. When reading the instructions, the Court substituted the word "a" for the word "the" in jury instruction #11 on two separate occasions when reading Jury Instruction #11 (the instruction on accomplice liability). RP IV, p. 335-336.

The failure to read an oral jury instruction can be manifest error. State v. Sanchez, 122 Wn.App. 579; 94 P.3d 384 (2004). In Sanchez, the court failed to read the "essential assault element of specific intent to inflict bodily injury, or to cause apprehension of bodily injury". *Id.*, at 591. Mr. Sanchez's defense to the charge of second degree assault turned on a lack of specific intent; he had asserted at trial that he was trying to harm himself and no other person. *Id.* The lack of a specific intent instruction read orally to the jury raises the possibility some jurors might have convicted without a finding of specific intent and, thus, his conviction was overturned. *Id.*

The trial court in the instant case properly provided written jury instructions but did misstate a portion of the accomplice liability instruction when the judge read the instructions to the jury. This misstatement was not objected to by the State or the defense

attorney (likely because the error was difficult to detect in the context of the lengthy instructions). It would appear that the jury relied on the written jury instructions as the jury actually found Ms. Tamez not guilty of Intimidating a Current or Prospective Witness as charged in Count I of the Second Amended Information and instead found her guilty of the lesser charge of Tampering with a Witness. RP IV, p.406-409.

Not every omission or misstatement in a jury instruction constitutes a reversible error; the Washington Supreme Court has ruled that an erroneous accomplice liability instruction may constitute harmless error. State v. Brown, 147 Wn. 2d 330; 58 P.3d 889 (2002). The United States Supreme Court has held also that an erroneous jury instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

Under *Brown*, an erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Brown*, at 332. The court explained that where evidence

shows that a defendant facing multiple charges acted as a principal in any of the crimes charged, the difference between “a crime” and “the crime” in the accomplice instruction is harmless with respect to those charges. *Id.*, at 341-342. But if the evidence pertaining to one or more of the charges shows no direct participation by the defendant as a principal and the jury may have found the defendant guilty based on her involvement in some crime other than the specific crime charged, the erroneous accomplice liability instruction is not harmless. *Id.*

When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Neder*, 527 U.S. at 18. To hold an erroneous instruction is harmless in a given case, the court must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Brown*, at 19.

In the instant case, the court’s oral misstatement was harmless under the above standard. Ms. Tamez tampered with Ms. Kruse in a misguided effort to protect Mr. Harris from further criminal prosecution difficulties regarding new crimes and his current DOC supervision (which was a DOSA sentence). Ms. Kruse’s apartment contained illegal controlled substances and

proceeds from the illegal controlled substance sales and Ms. Kruse had first-hand knowledge of the Mr. Harris's drug dealing as she was paid in crack cocaine by Mr. Harris to allow him to keep a room at her residence. Immediately after the arrest of Mr. Harris and Mr. Boyer, a large amount of attention was directed at Ms. Kruse in an effort to keep her from allowing the police to enter the property and search for the drugs and drug proceeds, to keep her from cooperating and talking with law enforcement, to get the drug money from her residence, and to dispose of the controlled substances.

Ms. Tamez was pivotal to this plan as she was not in custody on April 18, 2008. Ms. Tamez was the living partner of Mr. Harris and she acted to run his business for him while he was in the jail. Ms. Tamez was aware that Mr. Morris had tried to break in to Ms. Kruse's apartment and she, herself, admitted making threats to Ms. Kruse personally. Ms. Tamez also made at least two trips to Ms. Kruse's apartment to get the drug money and other property of Mr. Harris that was linked to drug proceeds.

The jury, however, did not find Ms. Tamez guilty of intimidating a current or prospective witness as charged in Count I but instead found her guilty of Tampering with a witness. The State

submits that the jury relied upon the written instructions of the court and carefully deliberated before reaching their verdicts. As there is overwhelming evidence that Ms. Tamez acted as a principal in the crime of tampering with a witness, the State respectfully requests that the court affirm this conviction and make the finding that the misstated oral jury instruction was harmless error as the jury clearly deliberated and relied upon the correct written jury instructions and found that there was evidence beyond a reasonable doubt that Ms. Tamez acted as a principal in the crime of Tampering with a Witness.

2. Ms. Tamez's counsel was not ineffective, nor was she prejudiced by his representation.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial

strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

The appellant first argues that defense counsel should have objected to the court's misstated oral jury instruction on accomplice. However, as stated above, the court's written jury instructions were correct and neither the state nor the defense apparently detected the slight misstatement of the one oral jury instruction. In any case,

this misstatement did not prejudice the defendant. The jury returned a verdict of not guilty on the Intimidating a current or prospective witness charge and returned a verdict of guilty of the tampering with a witness charge. The state submits that the jury reached this decision after fully and carefully considering the evidence and the jury instructions in this case and there was clearly evidence beyond a reasonable doubt to support the conviction of witness tampering.

The tampering with a witness charge dealt with the attempts of Ms. Tamez to induce Ms. Kruse not to cooperate with law enforcement and to continue to withhold information that was relevant to the criminal case against Mr. Harris.

The appellant next argues that defense counsel was ineffective when he failed to object to jail phone calls between multiple parties regarding the crimes alleged. However, these jail phone calls were properly admitted under ER 401 and were used effectively by defense counsel in presenting his arguments to the jury; in fact, the jury acquitted Ms. Tamez of the more serious count of witness intimidation.

Evidence Rule (ER) 401 defines relevant evidence as that which has “any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 403 provides that all relevant evidence is admissible unless it is limited by statutory, constitutional, or other considerations. ER 404(b) prohibits admitting evidence of a person’s character in order to prove that he or she acted in conformity with that character trait. However, ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A trial court has “wide discretion” in balancing the probative and prejudicial values of evidence. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Unfair prejudice is that which suggests a decision on an improper basis, often, though not necessarily, an emotional one. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984)

The list contained in ER 404(b) is not exclusive. Washington courts also recognize an exception for “res gestae,” or “same transaction,” where “evidence of other crimes is admissible ‘to complete the story of the crime on trial by proving its immediate

context of happenings near in time and place.” State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (internal cite omitted). “Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

The content of these jail phone calls were necessary for both sides to argue their “story” of the case. If the calls had been redacted to omit portions of the conversation, the jury would have been left to guess to the full context of the calls and could have surmised that Ms. Tamez’s role was even larger. Defense counsel employed a comprehensive strategy of wanting the jury to hear all of the criminal participants in the attempt to portray Ms. Tamez as a weak or minor participant.

The jail phone calls as admitted were used by defense counsel in part of a comprehensive defense attempting to portray Ms. Tamez as a relatively unsophisticated and ignorant pawn of Mr. Harris. The defense strategy could only work if the full content and context of those jail phone calls were played to the jury; in that manner, the jury could compare the conversation of Ms. Tamez to

Mr. Harris, Mr. Boyer, Mr. Morris and others. Defense counsel attempted to show that Ms. Tamez just did what she was told and in many ways she was simply ignorant. The phone calls were clearly used by defense counsel to make the argument that Ms. Tamez had no intent to evade the law but simply to help her boyfriend Mr. Harris. Defense counsel asked the jury to repeatedly listen to Ms. Tamez's tone and to consider that Ms. Tamez was simply a girlfriend trying to help Mr. Harris bail out of jail and hire an attorney.

The appellant next argues that there was no independent evidence corroborating Ms. Tamez's admission that she threatened to physically assault Ms. Kruse. However, this argument is misplaced as the jury acquitted Ms. Tamez of the charge related to a threat to cause physical harm to Ms. Kruse of intimidating a current or prospective witness as alleged in count I of the Second Amended Information ("In that the defendant, Temica Denise Tamez, in the State of Washington, April 18, 2008, by use of a threat directed against a current or prospective witness, attempted to influence the testimony of that person or induce a person not to report the information relevant to a criminal investigation").

Also, appellant misstates that there was no independent evidence of the attempt by Mr. Morris to break-in to Ms. Kruse's residence; testimony was heard from Detective Renschler explaining the physical evidence that supported that there had been an attempted break-in of Ms. Kruse's residence on April 19, 2008 which corroborated the statements of Ms. Tamez and Mr. Morris regarding Mr. Morris's actions. RP III, p.274-279.

As to the witness tampering conviction, there was substantial independent evidence that Ms. Tamez tampered with Ms. Kruse; please refer to argument 3 below.

The statements of Ms. Tamez contained in the jail phone calls were properly admitted by the trial court; therefore, there is no error on the part of the defense counsel.

3. There was sufficient evidence to support Ms. Tamez's conviction for Tampering with a Witness.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

• • •

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are

determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

As soon as Mr. Harris is arrested, he contacts Ms. Tamez and begins to give her instructions on what to do to maintain his drug business, gather money and get rid of the evidence. The primary concern for Mr. Harris and Ms. Tamez is Ms. Kruse. This is because Ms. Kruse has a quantity of Mr. Harris's crack cocaine and drug proceeds money. Ms. Kruse had been renting a room in her residence to Mr. Harris in exchange at first for money and then for crack cocaine. Ms. Kruse also related that Mr. Harris kept personal property including a large screen television in the "rented" room. Ms. Kruse also learned the Mr. Harris had \$2,600.00 in the "rented" room; she found the money at his request and then gave \$2,400.00 to Ms. Tamez at her request.

Mr. Harris and Ms. Tamez had concerns that the police would get into Ms. Kruse's residence and find the crack cocaine and drug proceeds which would make the case against Mr. Harris worse. Also, Mr. Harris and Ms. Tamez wanted to get the money from Ms. Kruse's residence. Ms. Tamez went to Ms. Kruse's residence, threatened her, received the approximately \$2,400.00,

and then made a couple of additional trips to remove Mr. Harris's personal property.

As recounted in the above statement of facts, using both direct and circumstantial evidence and through the use of a direct threat and subtle persuasion, Ms. Tamez attempted to convince Ms. Kruse to withhold testimony from law enforcement that pertained to the criminal investigation against Mr. Harris. Taking the evidence, along with the reasonable inferences therefrom, in the light most favorable to the State, there was ample evidence to support the conviction for tampering with a witness.

4. There was no prosecutor misconduct when the deputy prosecutor asked a witness if Ms. Tamez knew what Mr. Harris did for his source of money.

The appellant argues that the deputy prosecutor asked Mr. Boyer during direct testimony whether Ms. Tamez knew that Mr. Harris sold drugs; this is not an accurate rendition of the question nor its context.

The deputy prosecutor had finished asking Mr. Boyer about the "spot", referring to Mr. Harris's stash house and whether the location of the stash house was a closely guarded secret. Mr. Boyer agreed that this location was not known to people because

Mr. Harris and he “didn’t want to draw heat to it”. RP III, p.160-161. However, when asked, Mr. Boyer stated that Ms. Tamez knew where the “spot” was and had gone there before. The purpose of this testimony was to demonstrate that Ms. Tamez knew the secrets of Mr. Harris’s and Mr. Boyer’s drug-dealing.

Then the deputy prosecutor and Mr. Boyer engaged in the following dialogue without objection:

Q. Now, in your experience Ms. Tamez – was she involved in the actual drug sales?

A. No.

Q. All right. Did she know what Damien did for his source of money?

A. I can’t say yes or no, but I mean, his caliber of a person you can’t really not know.

Later, the deputy prosecutor asked, “*But you never had a specific conversation with Mrs. Tamez about the drug activity that Damien [Harris] was conducting*”; Mr. Boyer answered, “No”. [Emphasis added]. RP III, p.162.

In cross examination, defense counsel further explored this line of questioning and Mr. Boyer further stated that Mr. Harris would not deal drugs in front of Ms. Tamez or Mr. Boyer’s girlfriend

because “it’s putting them in jeopardy; he wouldn’t want something to happen to them”. RP III, p. 170. Defense counsel then asked Mr. Boyer, “So your understanding is that Mr. Harris purposely kept Temica (Ms. Tamez] out of the loop?”; Mr. Boyer responded, “yeah”. RP III, p. 171.

Mr. Boyer was arrested with Mr. Harris for illegal controlled substances dealing; they were business partners in the illegal distribution of crack cocaine. RP III, p. 152-164. The questions by the deputy prosecutor were intended to illustrate what role Ms. Tamez played in the illegal business of Mr. Harris and Mr. Boyer and were intended to address Mr. Boyer’s direct knowledge of Ms. Tamez’s involvement based on what he witnessed and conversations he personally had with Ms. Tamez. The deputy prosecutor committed no misconduct in this line of questioning.

A prosecutor has wide latitude in presenting his case, making arguments and drawing reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Ms. Tamez did not object to the prosecutor’s question to which she now assigns error. If a defendant does not object and request a curative instruction, his claim of prosecutorial misconduct is waived unless the misconduct was so “flagrant and ill-

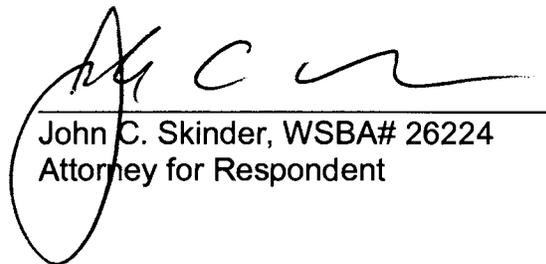
intentioned” that no instruction could have removed the prejudice. State v. Dennison, 115 Wn.2d 609, 622-23, 810 P.2d 193 (1990). Not only was there no prejudice, there was no objection. Therefore, there was no prosecutor misconduct and subsequently the convictions should be affirmed.

D. CONCLUSION.

For the reasons set forth above, the State respectfully requests that this Court affirm Ms. Tamez’s convictions for one count of Tampering with Physical Evidence, two counts of Money Laundering, and one count of Witness Tampering. While there was a misstatement of the trial court’s oral jury instruction on accomplice liability, this misstatement was harmless error in the context of the trial court’s correct written jury instructions and a close examination of the facts in this case which clearly demonstrate that Ms. Tamez acted as a principal in the crime of tampering with a witness. Defense counsel was not ineffective in his trial strategy of portraying Ms. Tamez as naïve and ignorant; in fact, the jury returned a verdict of not guilty on the more serious offense of intimidating a witness (a Level VI Class B felony). The evidence was clearly sufficient to support the conviction of tampering with a witness. And, finally, after reviewing the transcript

of the trial, the deputy prosecutor did not commit misconduct when he asked a question of a witness that was not objected to at trial by the defense counsel.

Respectfully submitted this 4th day of JUNE, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: ANNE CRUSER
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BY km
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of June, 2010, at Olympia, Washington.


Chong McAfee