

No. 42227-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kimlis Tek,

Appellant.

Thurston County Superior Court Cause Nos. 10-1-00807-5,
10-1-00911-0, and 10-1-01957-3 (Consolidated)

The Honorable Judge Carol Murphy

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Tek's first-degree assault conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The prosecution failed to prove beyond a reasonable doubt that Mr. Tek acted with intent to commit great bodily harm.
3. The trial judge commented on the evidence, in violation of Wash. Const. Article IV, Section 16.
4. Mr. Tek's two convictions for Tampering with a Witness infringed his constitutional right not to be twice put in jeopardy for the same offense.
5. Mr. Tek's multiple convictions for Violation of a No Contact Order (VNCO) infringed his constitutional right not to be twice put in jeopardy for the same offense.
6. Detectives Gries and Anderson invaded the province of the jury by expressing explicit or "nearly-explicit" opinions on Mr. Tek's guilt.
7. The detectives' opinion testimony violated Mr. Tek's constitutional right to a jury trial.
8. Detective Gries should not have been permitted to provide his "nearly-explicit" opinion that Mr. Tek was guilty of first-degree assault.
9. Detectives Gries and Anderson should not have been permitted to provide their explicit and "nearly-explicit" opinions that Mr. Tek was guilty of witness tampering.
10. Mr. Tek was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel deprived Mr. Tek of the effective assistance of counsel by failing to object to inadmissible opinion testimony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for first-degree assault, the prosecution was required to prove that Mr. Tek intended to inflict great bodily harm. In this case, Mr. Tek denied such intent, and the circumstantial evidence established only that he made a long and deep cut in his wife's arm during an argument. Did the first-degree assault conviction infringe Mr. Tek's Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. A trial judge is absolutely prohibited from commenting on the evidence at trial, and any judicial comment is presumed to be prejudicial. In this case, the trial judge cautioned the jury that a photographic exhibit was "somewhat graphic," and warned jurors that they "may want to look at it quickly or not at all." Did the trial judge's comment on the evidence violate Mr. Tek's rights under Article IV, Section 16?
3. A nearly-explicit opinion on an ultimate issue violates an accused person's constitutional right to a jury trial. In this case, Detective Gries testified that he upgraded Mr. Tek's charges to first-degree assault after learning the severity of Ms. Tek's injury; he and Detective Anderson repeatedly opined that Mr. Tek was attempting to influence Ms. Tek's testimony. Did these nearly-explicit opinions on Mr. Tek's guilt invade the province of the jury and violate Mr. Tek's constitutional right to a jury trial?
4. An accused person may not receive multiple convictions for the same offense. In this case, Mr. Tek received two convictions for ongoing conduct that was (allegedly) directed at inducing his wife to withhold testimony or to testify falsely. Did the entry of two tampering convictions violate Mr. Tek's right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?

5. Multiple violations of the same statute may only be punished separately if each violation is a separate “unit of prosecution.” In this case, each of Mr. Tek’s lengthy telephone conversations with his wife was divided into contiguous 15-minute segments because of a limitation imposed by the jail’s telephone system. Did Mr. Tek’s numerous VNCO convictions—one for each 15-minute segment—infringe his right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?

6. An accused person has a constitutional right to the effective assistance of counsel. Mr. Tek’s attorney failed to object to inadmissible and highly prejudicial opinion testimony. Was Mr. Tek denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kimlis and Andrea Tek had a volatile relationship. In May of 2010, Ms. Tek called the police and told them she was concerned her husband would kill himself. RP 375-376, 405, 509.¹ The couple had been arguing, and Mr. Tek went outside with his gun. RP 375-376, 426. Ms. Tek told the dispatcher that he pointed the gun in her direction through the window. She later said that was not exactly what had happened. RP 376, 378, 519, 551, 559, 579-580. Mr. Tek admitted that he'd been considering self-harm, but denied that he had pointed the gun at his wife. RP 378. He also said that he had no wish to harm Ms. Tek. RP 480.

The next day, Ms. Tek visited Mr. Tek in custody, and the visit was recorded. RP 464-474, 528. Mr. Tek urged her to "stick with her story", told her he could get into serious trouble, and that she needed to help him. RP 470-474.

As a result of the May incident, Mr. Tek was charged with Assault in the Second Degree (with a firearm enhancement). CP 26. After charges were filed, the court entered a No Contact Order. RP 476.

¹ The trial transcript in this case is sequentially numbered and will be cited as RP. Other hearing dates will include the date in the citation.

Despite this, the family lived together when Mr. Tek was released from jail. RP 149, 531.

In the early morning of Christmas Day 2010, the Teks again argued about the future of their relationship. RP 60, 119, 533-534. During the argument, Mr. Tek opened a closet, grabbed a knife, and cut Ms. Tek on her arm. RP 159, 534, 563. She later testified that she had not seen the attack coming, and had no opportunity to try to ward off the knife. RP 565, 614. Mr. Tek was immediately remorseful, and provided first aid by holding the wound closed and wrapping it in a towel. RP 76-77, 115-116.

Police and medical aid responded and saw a deep six-inch cut to Ms. Tek's forearm. RP 49. She was taken to the hospital. RP 50, 53. Mr. Tek repeatedly acknowledged that he'd cut his wife, but said that he had not meant to hurt her, and expressed significant remorse. RP 77, 115, 147, 159, 190.

Following this incident, Mr. Tek was charged with first-degree assault (with a deadly weapon enhancement). CP 50. While in custody, Mr. Tek placed numerous calls to his wife. The jail's telephone system automatically disconnected each call after fifteen minutes. RP 360. Immediately after being disconnected, he would often call her again, so they could continue their conversation. RP 361-364, 572-573.

As a result of these calls, the in-person visits to the jail, and letters Mr. Tek wrote to his wife, he was charged with 36 counts of Violation of a No Contact Order and two counts of Tampering with a Witness. CP 2, 26, 50-61. A separate charge was filed for each time Mr. Tek called his wife, even when he made multiple calls to have a single conversation. CP 51-60, 325-353, 360.

Over defense objection, all 40 charges were joined for trial. RP (3/31/11) 8-14.

At trial, Ms. Tek testified at trial that she was “completely healed,” although she still had a scar and experienced some numbness. RP 540-542. No nerves or major arteries had been cut. RP 572. She had received only a local anesthetic receiving stitches, and had been discharged from the emergency room after a total of eight hours. RP 568. She had been able to return to her work as a dental technician within days of the incident. RP 571, 576.

Among the exhibits admitted at trial were photographs of Ms. Tek’s wounds, taken on the day she was injured. RP 56-57. Before the exhibits were published to the jury, the trial judge warned jurors about one of the photos:

Before we do that, I do want to caution the jury. These photographs are somewhat graphic – actually, Exhibit Number 27 is. You may want to look at it quickly or not at all.

RP 57.

Two officers outlined how the police had decided to file first-degree assault charges. Officer Johnson testified (on cross-examination) that he'd initially booked Mr. Tek into jail for Assault in the Second Degree. RP 194. On redirect, he explained the choice of charges further: "Through our investigation, we determine what we see as the best fit for the crime." RP 195. He added that the charge was changed to first-degree assault that night. RP 195. When Detective Gries testified, he explained (on direct examination) that he'd "upgraded" the charge based on "the severity of the injury that [he] had become aware of during the investigation." RP 247-248. Defense counsel did not object.

Two officers also explained why they'd decided to charge Mr. Tek with witness tampering. Detective Gries told the jury that he'd reviewed recordings of the couple's phone conversations, and opined that Mr. Tek was asking Ms. Tek "to do some covering up for him" and "attempting to both have her change her testimony and/or not show up for a trial and be out of town or not be available during trial." RP 321-322. He also said he'd reviewed letters written by Mr. Tek, and that "it was evident that there was some – an attempt to influence the testimony of Andrea in the letters, or not even show up." RP 356. Defense counsel did not object to this testimony.

Similarly, Detective Anderson testified that he'd listened to the recorded visits to find evidence of witness tampering, and that after reviewing the recordings he'd charged Mr. Tek with witness tampering. RP 474, 480-482. Defense counsel objected to some, but not all, of this testimony.

The jury convicted Mr. Tek of all charges, and answered "yes" to each special verdict. RP (5/25/11) 3-8. Mr. Tek was found to have no criminal history, and was sentenced to a total of 216 months in prison (including 96 months of firearm and deadly weapon enhancements). Mr. Tek timely appealed. CP 13-23, 37-47, 74-86.

ARGUMENT

I. MR. TEK'S CONVICTION FOR FIRST-DEGREE ASSAULT VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential

elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

- B. The prosecution failed to prove that Mr. Tek intended to inflict bodily injury that created a probability of death or that caused a significant permanent disfigurement or loss or impairment of function.

To obtain a conviction for first-degree assault, the prosecution was required to prove beyond a reasonable doubt that Mr. Tek intended to inflict great bodily harm, defined as “bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.” Instructions Nos. 19, 20, 22, Supp. CP; *see also* RCW 9A.04.110(4)(c); RCW 9A.36.011.

In his statement to police, Mr. Tek acknowledged that he’d “slashed” his wife’s arm with a knife, but consistently denied that he’d intended serious harm. RP 77, 115, 192. The prosecution did not present any direct evidence of Mr. Tek’s intent; instead, it relied on circumstantial evidence. The circumstantial evidence proved only that Mr. Tek cut his wife on the arm with a sharp knife, inflicting a deep wound, six inches long. RP 49, 54, 67. Ms. Tek was unable to recall the exact circumstances of the assault; she was able to testify only that it occurred very quickly, and that she did not see the knife before she was cut. RP 533-536, 563-566, 614.

She told medical personnel (and the police) that during an argument Mr. Tek went to his closet, got his knife, and slashed her arm. RP 50, 54, 69, 117, 119.

Even when considered in a light most favorable to the state, the evidence did not establish intent to inflict great bodily harm. At best, it proved that Mr. Tek wanted to hurt her, but not to the degree of harm actually inflicted. Nothing in the record suggested that he intended to inflict bodily injury that created a probability of death, that caused a significant permanent disfigurement, or that caused a loss or impairment of bodily function.

Because the evidence was insufficient to prove that Mr. Tek intended to inflict great bodily harm, his conviction for first-degree assault violated his right to due process. *Engel*, at 576. The conviction must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

II. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONS ARTICLE IV, SECTION 16.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d

818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).² An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

A comment on the evidence “invades a fundamental right” and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997).

B. The trial judge improperly commented on the facts of the case by implicitly endorsing the prosecutor’s argument that the judge had ruled that the officers did “the right thing.”

Under Article IV, Section 16 of the Washington Constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. Article IV, Section 16. A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006).

² The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

This is a higher standard than that normally applied to constitutional errors. *Id.*

In this case, the trial judge improperly commented on a photograph introduced into evidence by the prosecution. When the prosecutor sought permission to publish a photograph of Ms. Tek’s injured arm, the judge cautioned the jury that it was “somewhat graphic,” and warned jurors that they “may want to look at it quickly or not at all.” RP 57.

This suggestion—that the evidence was so disturbing that jurors would be permitted to deliberate without examining it—was an egregious comment on the evidence. Furthermore, it was relevant to the central issue in the case – Mr. Tek’s mental state when he cut his wife. Finally, it was exacerbated by the improper admission of Detective Gries’s testimony to the effect that Ms. Tek’s injuries warranted escalation of the charge from second-degree assault to first-degree assault.³

The error is presumed prejudicial, unless the record affirmatively shows that no prejudice resulted. *Levy, at 725*. The record is devoid of any affirmative indication that the error was harmless under the *Levy* test. Accordingly, Mr. Tek’s conviction for first-degree assault must be reversed and the case remanded for a new trial. *Id.*

³ This error is addressed elsewhere in the brief.

III. THE IMPROPER ADMISSION OF OPINION TESTIMONY VIOLATED MR. TEK'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND UNDER WASH. CONST. ARTICLE I, SECTIONS 21 AND 22.

A. Standard of Review

Constitutional issues are reviewed *de novo*. *E.S., at 702*. The improper admission of opinion testimony on the accused person's guilt creates may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Johnson*, 152 Wash.App. 924, 934, 219 P.3d 958 (2009).

B. An accused person's constitutional right to a jury trial prohibits a witness from providing a "nearly-explicit" opinion on the accused person's guilt.

Washington's constitution provides that "[t]he right of trial by jury shall remain inviolate," and that an accused person shall have the right "to have a speedy public trial by an impartial jury." Wash. Const. Article I, Sections 21 and 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

No witness may provide an opinion on the guilt of an accused person, whether by direct statement or inference. *State v. Black*, 109 Wash.2d 336, 349, 745 P.2d 12 (1987). Such testimony invades the

exclusive province of the jury and violates the defendant's constitutional right to a jury trial. *State v. King*, 167 Wash.2d 324, 330, 219 P.3d 642 (2009); *see also State v. Sutherby*, 138 Wash.App. 609, 617, 158 P.3d 91 (2007). Opinion testimony on an ultimate issue is forbidden if it is a “nearly-explicit” statement by the witness that the witness believes the accused is guilty. *King*, at 332.

To determine whether testimony constitutes an impermissible opinion about the accused person’s guilt, a reviewing court examines “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *Johnson*, at 931.

C. Detective Gries improperly provided his “nearly-explicit” opinion that Mr. Tek was guilty of first-degree assault.

In this case, Detective Gries provided the jury with a nearly-explicit opinion that Mr. Tek was guilty of first-degree assault rather than second-degree assault. Specifically, Gries testified that he “upgraded” the charge to first-degree assault, based on “the severity of the injury that [he] had become aware of during the investigation.” RP 247-248.

This was a clear expression of the detective’s belief that Ms. Tek’s wounds warranted a charge of first-degree assault, and was a “nearly-explicit” opinion on Mr. Tek’s guilt. This is especially true because Mr.

Tek acknowledged he was guilty of second-degree assault; the sole question for the jury was whether or not he had the intent to inflict great bodily harm. *See* RP 714-718. Furthermore, the problem was exacerbated by the trial judge's improper comment that a photograph of Ms. Tek's injury was "somewhat graphic," and her warning to jurors that they "may want to look at it quickly or not at all." RP 57.⁴

Under these circumstances, Detective Gries's improper opinion testimony invaded the province of the jury. *Sutherby, at* 617. Accordingly, its admission is a manifest error affecting Mr. Tek's constitutional right to a jury trial and may be reviewed for the first time on review.⁵ *Johnson, at* 934. Mr. Tek's conviction must be reversed and the case remanded with instructions to exclude such testimony on retrial. *Id.*

D. Detectives Gries and Anderson improperly provided explicit or nearly-explicit opinions that Mr. Tek was guilty of witness tampering.

On numerous occasions, Detective Gries testified to his opinion that Mr. Tek was guilty of witness tampering. He told the jury that Mr. Tek had asked his wife "to do some covering up for him." RP 221. He

⁴ The improper judicial comment is addressed elsewhere in this brief.

⁵ In the alternative, defense counsel's failure to object deprived Mr. Tek of the effective assistance of counsel.

testified that it was “evident to [him]” that “when Mr. Tek called Andrea Tek, he was attempting to both have her change her testimony and/or not show up for a trial and be out of town or not be available during trial.” RP 322. He said that “it was evident that there was some – an attempt to influence the testimony of Andrea in the letters, or not even show up.” RP 356.

Another detective also provided additional improper opinion testimony. Detective Anderson told the jury that he’d reviewed recordings of jail visits, looking for “[e]vidence to suggest tampering with the witness...” RP 474. He testified that after reviewing the recordings, he “charged Kimlis Tek with tampering with a witness.” RP 474-475. He reiterated this, and explained that he’d filed the charge because “there was evidence to suggest that [Mr. Tek] was trying to change her story.” RP 480-481. When he testified that “[t]here was clear evidence to me there was tampering,” a defense objection was sustained, and the jury was instructed to disregard the testimony.⁶ RP 482.

The testimony provided by Detectives Gries and Anderson included their explicit and “nearly-explicit” opinions that Mr. Tek was guilty of witness tampering. Accordingly, its admission can be challenged

⁶ This occurred after two additional defense objections, one of which had been sustained. RP 481.

for the first time on review under RAP 2.5(a)(3). *Johnson, at 934*. The tampering convictions must be reversed and the case remanded with instructions to exclude such testimony upon retrial. *Id.*

IV. THE ENTRY OF MULTIPLE VNCO AND TAMPERING CONVICTIONS VIOLATED MR. TEK'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at 702*.

Under RAP 2.5(a)(3), double jeopardy issues may be raised for the first time on review. *State v. Jackman*, 156 Wash.2d 736, 746, 132 P.3d 136 (2006).

B. The state and federal constitutions prohibit entry of multiple convictions for the same offense.

The Fifth Amendment⁷ provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9. An accused person may face multiple charges arising from the same conduct, but double jeopardy

⁷ The Fifth Amendment’s double jeopardy clause applies in state court trials through action of the Fourteenth Amendment’s due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010).

Where a person is accused of violating a single statute multiple times, the double jeopardy clause prohibits entry of multiple convictions based on a single unit of prosecution. *Id.* The unit of prosecution is the essential conduct that makes up the core of the offense. *In re Francis*, 170 Wash.2d 517, 528, 242 P.3d 866 (2010). To determine whether multiple convictions offend double jeopardy, a court must (1) analyze the statute, (2) review the statute's history, (3) perform a factual analysis to determine if multiple units of prosecution are present. *Hall*, at 730. If legislative intent is unclear, the rule of lenity requires any ambiguity to be resolved against turning a single transaction into multiple offenses. *Id.*

C. Mr. Tek committed (at most) one unit of Tampering with a Witness.

Prior to July of 2011, multiple attempts to tamper with a witness comprised a single count of tampering. *Hall, supra.* The evil addressed by the legislature in former RCW 9A.72.120 (2010)

is the attempt to "induce a witness" not to testify or to testify falsely. The *number* of attempts to "induce a witness" is secondary to that statutory aim, which centers on interference with "a witness" in "any official proceeding" (or investigation)... The offense is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days.

Id., at 731. Accordingly, prior to July of 2011, multiple attempts to induce a single witness not to testify (or to testify falsely) constituted only one offense.⁸ *Id.*, at 738.

Like the defendant in the *Hall*, Mr. Tek committed (at most) a single unit of witness tampering. As in *Hall*, his ongoing conduct was (allegedly) aimed at persuading his wife not to testify or to testify falsely. Accordingly, as in *Hall*, he committed only one offense, and should not have been convicted of two counts of tampering. *Id.* His second tampering conviction must be vacated and the charge dismissed with prejudice. *Id.*

D. Mr. Tek's multiple VNCO charges based on telephonic contact violate the prohibition against double jeopardy.

RCW 26.50.110 criminalizes violation of certain restraint provisions of specified no contact orders. The statute does not specify the unit of prosecution; nor does the statute's history reveal the legislature's intent. RCW 26.50.110. Accordingly, the rule of lenity requires that the statute be construed in such a way that one continuous communication constitutes a single unit of prosecution. *Hall*, at 730. Thus a lengthy text message would comprise a single violation, even if chopped by the carrier

⁸ The statute has since been amended, with an effective date of July 22, 2011. See Laws of 2011 Chapter 165, Section 3.

into multiple segments that arrive separately. Similarly, a direct message spanning several “tweets” on Twitter would count as a single offense. A cell phone conversation interrupted when the call is dropped by the service provider should not constitute multiple offenses if the conversation resumes when one party calls the other right back.

At least some of Mr. Tek’s 36 VNCO charges stemmed from telephone conversations he had with his wife while he was in jail. Because the jail’s telephone system terminates all calls after fifteen minutes, Mr. Tek’s conversations with his wife were cut into 15-minute segments. RP 360. Each conversation, consisting of contiguous 15 minute calls, should comprise a single violation of the order prohibiting contact.

By entering a separate conviction and imposing punishment for each time the jail system disconnected Mr. and Ms. Tek, the trial court violated Mr. Tek’s constitutional right to be free from double jeopardy. *Hall, supra*. These multiple convictions for each single unit of prosecution cannot be allowed to stand. Accordingly, Mr. Tek should only have been charged with twelve counts, and the remaining charges should be vacated and the charges dismissed. *Id.*

V. MR. TEK WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective

standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

- C. Defense counsel unreasonably allowed the prosecution to introduce inadmissible opinion testimony on Mr. Tek’s guilt.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is no legitimate strategic or tactical reasons for the failure 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 been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel erroneously failed to object to some of the opinion testimony introduced through Detectives Gries and Anderson. There was no legitimate strategic or tactical reason for the failure to object, as the evidence was inadmissible and highly prejudicial. Indeed, defense counsel did object to some of the inadmissible opinion testimony, but did not object to all of it. RP 120-132, 137, 221, 247-248. A defense objection would likely have been sustained, since a witness may not provide an opinion regarding the accused person's guilt, either directly or indirectly. *Black*, at 349.

Finally, the result of the trial would have been different had the evidence been excluded. This is especially true with regard to the assault charge: the key issue at trial was the degree of the offense, and Detective Gries's opinion (that first-degree assault was the correct charge) likely held great weight with the jury, especially when combined with the court's improper comment regarding photos of Ms. Tek's injury.

Defense counsel's failure to object to this inadmissible testimony deprived Mr. Tek of the effective assistance of counsel. *Saunders*, at 578. Accordingly, his convictions for first-degree assault and witness tampering must be reversed and the case remanded. *Id.*

CONCLUSION

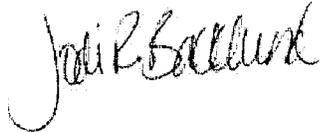
For the foregoing reasons, the first-degree assault conviction must be reversed and the charge dismissed with prejudice. In the alternative, the conviction must be reversed and the charge remanded for a new trial.

The tampering convictions must also be reversed, and the charges remanded for a new trial. If the charges are not reversed, or if Mr. Tek is convicted upon retrial, double jeopardy prohibits entry of two tampering convictions. One of the two charges must therefore be dismissed with prejudice.

Mr. Tek's VNCO convictions violate double jeopardy. Twenty four of the counts must be vacated and the charges dismissed with prejudice.

Respectfully submitted,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in cursive script.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Kimlis Tek, DOC #350238
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Thurston County Prosecutor
pao@co.thurston.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 22, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

December 22, 2011 - 1:11 PM

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