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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

V.

JONATHAN JAYMES WALLIN

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court violated Mr. Wallin's Sixth Amendment right to confrontation when it introduced Ancy Blackburn's statements from January 6 and 7, 2018.
2. The trial court erred by striking the evidence of Mr. Blackburn and Mr. Nunez' gang affiliation.
3. The evidence was insufficient to prove Mr. Wallin guilty of possession of psilocybin beyond a reasonable doubt.
4. The jury instruction defining controlled substance was erroneous.
5. Mr. Wallin two convictions for witness tampering violate double jeopardy.

Issues Pertaining to Assignments of Error

1. The trial court allowed the State to introduce two pretrial statements of Ancy Blackburn, a material witness who did not appear at trial. Did the trial court properly conclude the doctrine of forfeiture by wrongdoing had been proved by clear and convincing evidence?
2. The trial court initially admitted evidence of the gang affiliation of Mr. Blackburn and Mr. Nunez' gang affiliation.

This evidence was admissible as substantive evidence, impeachment evidence, and because the State opened the door to the evidence. Did the trial court error by suppressing the evidence during the defense case-in-chief?

3. Was the evidence was insufficient to prove Mr. Wallin guilty of possession of psilocybin beyond a reasonable doubt when the laboratory tech testified the substance could be psilocybin, or psilocin, or both?
4. Was the jury instruction defining controlled substance as psilocybin or psilocin erroneous when Mr. Wallin was charged with possessing only psilocybin?
5. Do Mr. Wallin's two convictions for witness tampering violate double jeopardy when he made two telephone calls to a single person which constitute a single unit of prosecution?

B. Statement of Facts

Jonathon Wallin was charged by third amended information with two counts of second degree assault (against Jace Blackburn and Lloyd Nunez), second degree malicious mischief (the property of Lloyd Nunez), second degree unlawful possession of a firearm, possession of a controlled substance (psilocybin), and two counts of tampering with a witness. CP, 60. The State further alleged that, at the time of the first three counts, he

was armed with a firearm. CP, 60. All of the charges were alleged to have occurred on January 6, 2018, except the witness tampering charges, which were alleged to have occurred on January 24 and March 22, 2018. CP, 62-63. The jury convicted him of all charges. RP, 467-68.

Jonathan Wallin was afraid. RP, 323. He believed Ancy Blackburn, his girlfriend for the past year and a half, who told him that her cousin, Jace Blackburn, was at his house intent on killing him. RP, 298, 323. While he was using the bathroom on January 6, 2018, Ancy Blackburn approached him and said, “Jace is here [and] I think he’s going to kill you.” RP, 313. Responding to his fear, Mr. Wallin looked out the window and, recognizing the car as Mr. Nunez’ vehicle, retrieved a shotgun from his house and went to the porch. RP, 313-14. From the porch, he saw Mr. Blackburn pull something from underneath the seat that he believed was a handgun. RP, 314. Mr. Wallin fired his shotgun firing at least two shots. RP, 314-15.

Mr. Wallin had good reason to be afraid of Mr. Blackburn. Mr. Wallin understood Mr. Blackburn was an active member of the Surenos gang. RP, 304. And this was not Mr. Wallin’s first violent encounter with him. In late July or early August of 2017, Mr. Wallin had been violently attacked by Mr. Blackburn and Mr. Nunez. RP, 311. Mr. Blackburn and Mr. Nunez pulled up in a car while he was outside Lena’s house waiting

for her. RP, 311. (Lena was later identified as Helena Lemieux, Mr. Blackburn's older sister and a former girlfriend of Mr. Wallin. RP, 343-44.) Mr. Wallin was in the driver's seat of Lena's car. RP, 311. Mr. Blackburn walked up to the driver's side door, opened it, and asked if he was "Jon Dreads," to which Mr. Wallin responded he was. RP, 312. Mr. Blackburn then pulled out a can of mace and a taser, one in each hand. RP, 312. Mr. Blackburn first maced him, then tased him, while Mr. Nunez stood behind them armed with a 10-inch blade hunting knife. RP, 312.

Ms. Lemieux corroborated the assault on Mr. Wallin by Mr. Blackburn. In August of 2017 she observed Jace Blackburn "just come out of nowhere" and assault Mr. Wallin with mace in an unprovoked assault with no apparent motive. RP, 345, 348-49, 357. Mr. Blackburn appeared to be angry. RP, 355. Mr. Wallin did not respond physically to the attack. RP, 357. Ms. Lemieux did not see Mr. Nunez present, but she admitted she was more concerned with tending to Mr. Wallin and his face, which had just been maced, than paying attention to whether someone else was there. RP, 358.

Based upon Mr. Wallin's testimony, the trial court instructed the jury on the use of lawful force. RP, 394.

In their testimony, Mr. Blackburn and Mr. Nunez tried hard to minimize their behavior and portray themselves as innocent victims of Mr.

Wallin's wild shooting. Mr. Nunez claimed to have never met Mr. Wallin, for instance, and that the first time he had ever seen Mr. Wallin was on January 6, 2018. RP, 69-70. Mr. Nunez testified the reason he went to Mr. Wallin's house on January 6 was because Mr. Blackburn asked him for a ride to pick up his cousin, Ancy Blackburn. RP, 68-69. Mr. Nunez agreed, driving his 1990 Honda Accord. RP, 69. Mr. Blackburn directed Mr. Nunez to the house. RP, 70. As Mr. Nunez and Mr. Blackburn pulled into the driveway, he saw a person approach with a shotgun and start firing. RP, 69-71. Just prior to the first shot, he heard Mr. Blackburn say, "Go, go, go." RP, 73. Mr. Nunez "hit the gas" causing the vehicle to lurch forward, coming to rest high centered in a ditch with its rear wheels spinning. RP, 72-73. Mr. Nunez and Mr. Blackburn both jumped out of the car crouched down behind the car. RP, 73-74. The shooter kept shooting at the car, hitting the back of the car. RP, 74-75. Mr. Blackburn kept yelling at the shooter to quit shooting. RP, 74. Eventually, the shooter quit shooting and went back into the house. RP, 75. Mr. Nunez estimated five total shots were fired. RP, 76. He then ran away from the scene, finding a place to hide on the side of the road until law enforcement arrived. RP, 76-77. Mr. Nunez claimed he was able to identify Mr. Wallin in court despite never having met him before and only seeing him for approximately five seconds on January 6. RP, 69-70, 71-72.

According to Jace Blackburn's testimony, on January 6, 2018, Ancy Blackburn contacted her cousin, Jace Blackburn, and asked him to come pick her up at Jon Wallin's house and take her to her father's house in Quinault. RP, 107-09. Ms. Blackburn was in a dating relationship with Mr. Wallin. RP, 126. She contacted Mr. Blackburn through Facebook messenger. RP, 110. Mr. Blackburn asked his friend Lloyd Nunez to drive him. RP, 108. En route to the house, Ancy continued to communicate with him. RP, 112. The messages did not make a lot of sense, as if someone else was using her Facebook account to send the messages. RP, 116. The messages said Mr. Wallin was asleep and she was going to put his shotgun outside. RP, 117. Several times Mr. Blackburn was asked if he had a weapon. RP, 121. Mr. Blackburn asked if Mr. Wallin had nice clothes and suggested Ms. Blackburn put them in a bag for him. RP, 133. Mr. Blackburn suggested to Ancy Blackburn that if she needed to retrieve her keys, she should stab Mr. Wallin with scissors. RP, 130.

As they pulled into the driveway, Mr. Blackburn saw Mr. Wallin peek around the curtain and come out the front door with a shotgun. RP, 111. He fired at the car, causing Mr. Nunez to accelerate into a ditch. RP, 113. Mr. Wallin fired four or five shots, yelling he was going to kill both of them. RP, 113. Mr. Blackburn and Mr. Nunez ran away in opposite directions. RP, 114.

Mr. Blackburn admitted on cross-examination that, prior to dating Ancy Blackburn, Mr. Wallin had dated his big sister (presumably Helena Lemieux) off-and-on for a couple of years. RP, 127. But despite Mr. Wallin dating first his sister and then his cousin, he claimed he did not know Mr. Wallin and had “never really come across him.” RP, 127. His explanation was that he “really [doesn’t] know my sisters.” RP, 127. Mr. Blackburn claimed he had never been in a physical altercation with Mr. Wallin. RP, 127.

Mr. Blackburn and Mr. Nunez’ gang membership was a common theme in Mr. Wallin’s impeachment of them and again we see a pattern of minimization. The issue was first raised during the cross-examination of Mr. Nunez. In response to a question, Mr. Nunez testified that Mr. Blackburn was affiliated with the Surenos gang. RP, 87. The State objected to the question, but the trial court overruled the objection and allowed the answer to stand. RP, 87. In the next question, defense counsel asked Mr. Nunez if he too was involved in gangs. There was no objection and he answered, “No, not anymore.” RP, 87. Defense counsel then asked how long he had been involved in gangs. Before the witness could answer, the State objected and the court sustained. RP, 87. The State then asked for a limiting instruction. RP, 88. Defense counsel responded, “That instruction would be too limiting, Your Honor. You allowed the

objection – or the information about the affiliation itself, but not as to the time frame.” RP, 88. The court said, “Yeah. I . . . Go ahead.” RP. 88.

The second time the issue of gang membership came up was during the direct examination of Jace Blackburn. RP, 123. In response to questions from the prosecutor, Mr. Blackburn testified he had been involved in a gang from Vancouver in high school. RP, 123. About two years earlier he got into the court system and Judge Edwards made him realize that’s not the life he wants to live. RP, 123. On cross-examination, Mr. Blackburn stated he was involved with gangs from the age of 13 until he was “around 16 or 17.” RP, 135. Defense counsel asked what gang he belonged to and the State objected, but the court overruled the objection. He stated he was involved with the “South Side.” RP, 135. Defense counsel asked if the South Side was also known as the Surenos and he said, “That’s the same thing.” RP, 136. When Mr. Blackburn restated that the gang was in Vancouver, defense counsel asked if he knew any gang members “in this area,” (presumably referencing Grays Harbor County and its environs) to which he responded, “Not really.” RP, 136. Mr. Blackburn claimed it was easy to cut off his gang ties. RP, 136.

When Mr. Wallin testified, the court wanted to hear an offer of proof outside the presence of the jury on the gang evidence. RP, 301. Mr. Wallin testified that he understood both Mr. Blackburn and Mr. Nunez

were active gang members of the Sureños. RP, 304. He had seen Facebook photos of Mr. Blackburn wearing blue, the color of the Sureños, and throwing up gang signs. RP, 304. He had also heard from his sister and from Ancy Blackburn that he was an active gang member. RP, 305. After the offer of proof, the court concluded the gang evidence was not relevant and not admissible. RP, 307. When the jury returned, the court instructed the jury, “Before we resume testimony, I am going to give you an instruction at this point. And the instruction is that you are to disregard all testimony regarding the gang membership of individuals involved in the January 6, 2018 incident and not consider it in your deliberations. So if anyone mentions that testimony during your deliberations, you should remind them that you’ve been instructed by the Court not to consider that testimony.” RP, 310.

The car had significant damage from two popped tires and buckshot in the bumper of the vehicle. RP, 80-82. The State called a mechanic at trial, who estimated the cost of repairs to be \$1450 after sales tax. RP, 188.

The first officer to respond to the shooting was Quinault Tribal Officer Ryan Onasch. RP, 41. When he arrived, he contacted Mr. Nunez. RP, 44. Mr. Nunez was bent over at the waist, panicked, out of breath, and vomiting in front of a car. RP, 44-45. Mr. Nunez reported he was

shot, then said he was not shot. RP, 45. Officer Onasch did a visual inspection of Mr. Nunez but could not see any gunshot wounds. RP, 45. Park Ranger Joseph Turgyan also responded to a location approximately half a mile south of Officer Onasch. RP, 57. When he arrived, he observed the vehicle in the ditch next to a residence. RP, 53, 60. Both officers stayed until the Grays Harbor Sheriff's Office arrived and took over the investigation.

Deputies Ryan Rydman, Jordan Stullick and Brad Johansson arrived and, after speaking briefly with Mr. Nunez and Mr. Blackburn, decided to contact the residence to find additional witnesses and, if possible, the suspect. RP, 150, 200, 266. Upon arrival, they contacted Ancy Blackburn. RP, 150-51, 201. According to Deputy Rydman, Ms. Blackburn was shaken up by the situation and "semi-cooperative," although she was initially unwilling to answer questions. RP, 151, 163. Deputy Stullick described her as having difficulty answering questions and appeared to be under the influence of some type of drug or alcohol. RP, 201. Deputy Johansson said she was "jittery," could not stay focused on the questions being asked of her and had pinpoint pupils consistent with someone under the influence of a stimulant. RP, 269.

Deputy Johansson kept asking Ms. Blackburn what happened and she repeatedly said she did not know. RP, 269. She said someone had

pulled into the driveway but she did not know who. RP, 269. “Jon” went outside with a shotgun and she heard shots, but when asked if Jon was in the house at the time, she stated she did not know. RP, 269. Deputy Johnasson tried to get more details from her but her statements were so “disjoined” he eventually gave up. RP, 269.

At some point (the record is unclear) Deputy Rydman took over the questioning of Ms. Blackburn and he wrote out a statement of the days events. RP, 151. The statement was written in Deputy Rydman’s handwriting as told to him by Ms. Blackburn. RP, 152. After the statement was completed, she signed it. RP, 151. Her written statement was:

She had been staying at Jonathan Wallin's grandma's house with Jonathan, and that this particular morning she was laying on the couch when Jon got up and he went to toward the kitchen. She said that he came out of the kitchen, he had a shotgun that he got from somewhere in the house, he went to the front door, he opened up the front door and pointed the gun out the door. She said that she heard him cock the gun and began shooting it at a car that was in the driveway. She said that he came back into the house and did something with the gun. She didn't know what he did with it. She told me that she didn't know who was in the car that was in the driveway. She said that Jon left the house in the red Honda, which she - which she - was actually Ancy's car. And that she told me she was - that when he had the gun, she was scared. She thought that he might hurt her as well. Then she started make some phone calls to try to get a ride. She called for her dad. And then she told me that Jon had received some text messages from someone before this incident occurred, but she wasn't sure who it was or who he got the text messages from.

RP, 153-54. Later, a search warrant was obtained for the residence. No suspects were located, but they did find two shotgun shell waddings. RP, 154. No shotgun was ever recovered. RP, 160.

Later that day, after obtaining a search warrant, Deputy Stullick located a purple plastic container believed to contain dried mushrooms. RP, 217. The contents were later tested by Martin McDermot of the Washington State Patrol Crime Laboratory. RP, 252. Mr. McDermot testified the mushrooms “contained psilocyn [sic] or psilocybin or both of those materials. It could be one or the other or both of the materials.” RP, 259.

The next day, January 7, 2018 at 8:30 p.m., Deputy Robert Wilson recontacted Ms. Blackburn. RP, 283. The purpose of the contact was to get a more detailed statement from her. RP, 284. During this contact, she was calm and did not exhibit signs of intoxication. RP, 285. Deputy Wilson wrote out her statement and she signed it. RP, 286. The statement read:

She advised me that they had been in a dating relationship up to two weeks prior to the 6th to the shooting. At time that this shooting occurred they had been together the last three days trying to work things, but prior to that they had been broken up for two weeks. Their relationship - their dating relationship prior to that break up had lasted approximately a year and a half. She advised that - I asked her when Jon and her had first came together prior to this incident. She advised me that Jon had picked her up on Thursday, which would have been I

believe the 4th on this here. Yes, January 4th. And at that point she picked - he picked her up at her mom's house, which is where I contacted her that night. She then drove them - or he then drove her to his house, just south of Neilton, and they remained there for the rest of Thursday, all day Friday, and into Saturday morning. At that point she advised me on Saturday morning at approximately 1:00 a.m. she observed that she had received some Facebook messages on her cell phone from her cousin, Jace Blackburn, basically asking - Jace was asking if they could hang out together. She responded back to that text message or Facebook message, stating that she was at Jon's house. It was at that point Jon observed her texting Jace on her cell phone and took her cell phone away from her. And he advised her he didn't want her talking to anybody. She stated at about 2:17 in the morning she started noticing Jon was texting Jace, acting as if - Jon was acting as if he was Ancy in his text messages trying to get Jace to come over to the house. She stated that - that he didn't want them to - he didn't want - he didn't want Jace and her to be hanging out, so he was trying to get Jace to come over to the house to beat him up is what she told me.

RP, 286-88. While Deputy Wilson was interviewing Ms. Blackburn, he noticed she was receiving a lot of text messages from someone. RP, 289. He asked her if Ms. Wallin was contacting her and she confirmed he was. RP, 289. He asked to look at her phone and she complied. RP, 289. He photographed the messages. RP, 290, Exhibit 40.

On January 13, 2018, Deputy Rydman returned to the residence with an arrest warrant. RP, 157. Mr. Wallin was located in the attic of the house and arrested. RP, 159.

The State introduced two jail phone calls initiated by Mr. Wallin to Ms. Blackburn on January 24 and March 22, 2018. RP, 231. In the phone calls Mr. Wallin encouraged Ms. Blackburn not to come to court.

Mr. Wallin timely appeals.

C. Argument

The trial court violated Mr. Wallin's Sixth Amendment right to confrontation when it introduced Ancy Blackburn's statements from January 6 and 7, 2018.

The Sixth Amendment guarantees the right of the accused to confront their accuser. There can be little question that Ancy Blackburn's statements to law enforcement on January 6 and 7, 2018 qualify as testimonial statements to which the Sixth Amendment applies. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The trial court overruled Mr. Wallin's objection to the introduction of her statements based on the doctrine of forfeiture by wrongdoing. The Court held a hearing outside the presence of the jury on this issue. Deputy Jordan Stullick was assigned the responsibility of locating Ms. Blackburn and serving her with a subpoena. RP, 22. He received the subpoena on April 11, 2018 and as of May 8, 2018 he had been unable to locate her. RP, 23. Deputy Stullick reviewed the defendant's jail phone calls and located two phone calls between him and Ms. Blackburn. RP, 24. One of

the calls was dated March 22, 2018. RP, 27. The trial court listened to a recording of the call and made the following findings by clear and convincing evidence: Ms. Blackburn received something indicating she needed to come to court of April 3, the original trial date, presumably she had been served with papers, and Mr. Wallin immediately extorted her to not show up and she did not show up. RP, 30. Specifically she asked if she should go and he suggested to her that she would not want to be around the house around that time because they could arrest her and hold her until the trial. RP, 30. He told her she needed to hide out and if she did not come he would get his charges dismissed. RP, 30. He referred to her not going in the box, which the court interpreted as a reference to testifying at trial. RP, 31. Based upon the phone call, the court concluded Mr. Wallin's statements in the March 22 phone call "it was foreseeable that the consequences of his actions would be that she would be unavailable at trial." RP, 31. Based upon these findings, the court concluded the doctrine of forfeiture by wrongdoing applied. RP, 31. The State was permitted to introduce Ms. Blackburn's pretrial statements. RP, 32.

The doctrine of forfeiture by wrongdoing was first adopted by the Washington Supreme Court in *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007). In *Mason*, the defendant was pending trial for kidnapping

when he assaulted the victim with a knife, causing her death. The victim had made multiple probative statements prior to her death about her fear of the defendant and the details of the kidnapping. The trial court admitted the out-of-court statements. On appeal, commenting that “though justice may be blind it is not stupid,” the Supreme Court concluded the defendant’s actions had forfeited his Sixth Amendment right to confront the witness. The Court held that there must be clear, cogent, and convincing evidence that the defendant’s actions were responsible for the witness’ absence.

Seven years later, in the case of *State v. Dobbs*, 180 Wn.2d 1, 320 P.3d 705 (2014), the Supreme Court readdressed the issue. In *Dobbs*, the domestic violence victim called the police to report the defendant was stalking and threatening to kill her. While she was being interviewed by the police officer, the defendant sent threatening texts and called her and the officer heard them argue about why she had called the police, with the call ending with him saying he was going to “get” her. While the defendant was in jail, he called the victim and, after first pleading with her not to appear in court, turned into him threatening, saying if she appeared she would “regret it.” There was also evidence that, the day before the trial, a police officer contacted her and reminded her of her responsibility to appear, giving her a subpoena at the same time.

Over a vigorous dissent from Justice Wiggins, the 6-3 majority ruled that the doctrine of wrongdoing applied. The majority concluded, “Taken together, these facts show that Dobbs was armed, consistently threatened C.R. if she cooperated with the police, and followed through on these threats by showing up at her house with a gun on multiple occasions, once even shooting at it. Any rational individual would fear testifying against such a person.” *Dobbs* at 12-13. Justice Wiggins disagreed, saying,

It is certainly possible that Dobbs's phone call and voice message to C.R., along with his earlier acts of intimidation and harassment, dissuaded C.R. from testifying. However, it is also quite possible that she had some other motive: if the situation with Dobbs calmed after November 10, she may have decided she did not want him to be convicted. She may also have been intimidated by the prospect of appearing in court, or may have had a personal distaste for cooperating with law enforcement once the original threat had dissipated. As early as November 17 she was not showing up for appointments at the police station, and no evidence suggested it was because she was afraid. We do not know what occurred in the months between her sworn statement to police on November 10 and her absence from trial on January 25 to change C.R.'s perspective (even assuming she ever intended to testify); we can only speculate. Where the evidence supports multiple inferences as to the cause of a witness's failure to appear, we cannot conclude that the evidence of causation is clear, cogent, and convincing.

Dobbs at 19 (Justice Wiggins, dissenting).

In *Mason*, there can be little question that the defendant's actions of murdering the victim prevented her appearance in Court. In *Dobbs*, it was a much closer call. While the defendant did make a phone call and

leave a voicemail encouraging the witness not to appear, what seems to have persuaded the majority the most is the threats and intimidation.

In Mr. Wallin's case, there is no evidence of threats or intimidation. While Mr. Wallin did encourage Ms. Blackburn not to appear, his approach was more subtle, suggesting that she "would not want to be around the house" and should "hide out." It is relevant that this phone call came nearly two months before the trial commenced. It is highly speculative why Ms. Blackburn failed to appear for trial. The State would have you believe Ms. Blackburn did not appear because of the March 22 phone call. But it is just as likely Ms. Blackburn did not want to testify in defense of her boyfriend in contradiction of her cousin. It is also likely Ms. Blackburn realized that her statement on January 6, for which she doubled down on January 7, was made when she was highly intoxicated on an unknown controlled substance, is filled with exaggerations, minimizations, and outright lies, and she was reticent to testify to the events contained in those statements under oath. This Court should conclude Mr. Wallin's alleged forfeiture by wrongdoing was not proved by clear and convincing evidence.

The trial court erred by striking the evidence of Mr. Blackburn and Mr. Nunez' gang affiliation.

As recited above in the Statement of Facts, the gang affiliations of Mr. Blackburn and Mr. Nunez came up three times in this trial. The first time was during the cross-examination of Mr. Nunez. In response to objections from the State, the Court overruled some questions and sustained others. When the State asked for a limiting instruction, the Court declined to give one. The second time it came up was during the *direct* examination of Mr. Blackburn. Mr. Blackburn answered all of the questions posed by the State about his gang affiliation without objection from the defense. During cross-examination, he answered further questions.

The third time the issue came up, the Court decided for the first time to address the issue outside the presence of the jury. Mr. Wallin testified that he understood both Mr. Blackburn and Mr. Nunez were active gang members of the Surenos. RP, 304. He had seen Facebook photos of Mr. Blackburn wearing blue, the color of the Surenos, and throwing up gang signs. RP, 304. He had also heard from Mr. Blackburn's sister (presumably Ms. Lemieux) and from Ancy Blackburn that he was an active gang member. RP, 305. After hearing the offer of proof, the trial court decided that Mr. Wallin's proffered evidence of gang

affiliation was not admissible. But the court went further. The trial court concluded all of the evidence introduced heretofore was inadmissible and instructed the jury that it was stricken and could not be considered by the jury. This was error.

Mr. Blackburn's gang affiliation was admissible for three reasons and the trial court erred by suppressing it. First, it was admissible as substantive evidence of Mr. Wallin's fear. Second, it was admissible as impeachment evidence of Mr. Blackburn. Third, it was admissible because it was introduced as substantive evidence by the State without objection from the defense.

In Washington, a jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. Given this subjective component, there need be no finding of actual imminent harm. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999). Whether Mr. Blackburn and Mr. Nunez were in fact still affiliated with the Surenos gang, if Mr. Wallin subjectively believed they were, it was admissible as substantive evidence. Mr. Wallin testified he believed they were in the Surenos because Ms. Lemieux and Ancy Blackburn told him they were and he had seen them on Facebook wearing gang colors and displaying gang signs. The trial court was correct to admit the evidence of gang affiliation initially, but in error to suppress it later.

The evidence of gang affiliation was also admissible as impeachment evidence. Mr. Wallin's attorney used Mr. Blackburn's and Mr. Nunez' minimization of their gang affiliation to make them appear unbelievable and incredible. For instance, on direct examination, the prosecutor elicited the following responses from Mr. Blackburn.

Q. And back when you were in high school, did you get in trouble?

A. Yes, sir.

Q. And what kind of people were you hanging with back then?

A. Back in high school I was hanging out with gang members from Vancouver. And I got into gangs when I was living in Vancouver. And I moved back down here and I got in the court system and me and Judge Edwards talked a lot. And he made me realize that's not the life that I want to live and that's not the life I obviously chose.

Q. How long ago was that? A. I would say about maybe two years ago.

Q. Two years ago. So have you been involved in that sort of activity since?

A. No, sir.

On cross-examination Mr. Blackburn testified as follows.

Q: So what gang were you hanging with?

A. The South Side

Q. South Side? A. Yep.

Q. Do they go by another name?

A. Nope.

Q. They're not known as the Surenos?

A. That's the same thing.

Q. Okay. Okay. So from the time that you were about 13 until you were about 17 –

A. Yeah.

Q. -- 16, 17? Okay. And then you just quit?

A. Yeah.

Q. Okay. So where were these people located?

A. What people?

Q: The people that you were hanging out with? It's what area. If they were in this area or down in I think Longview.

A. I told you, I was down in Vancouver.

Q. Down in Vancouver. Okay. So you don't know any gang members that are in this area?

A. Not really.

Q. Okay. Was it easy to quit - cut off those relationships?

A. Yeah.

RP, 135-36. (Objections omitted.)

While it is entirely possible the jury believed Mr. Blackburn had had an epiphany with Judge Edwards and easily terminated his gang ties, it is more likely the jury believed he was minimizing his gang affiliation. This was important impeachment of a material witness.

In *State v. Sua*, 115 Wn.App. 29 60 P.3d 1234 (2003), the trial court admitted evidence for purposes of impeachment, issuing a limiting instruction, then changed its mind and admitted it as substantive evidence.

The Court of Appeals ordered a new trial in part because the trial court's limiting instructions were confusing. In this case, the State's multiple objections had been overruled and the request for a limiting instruction denied. After hearing from both victims, the Court reversed course and suppressed the evidence. But the evidence had been admitted both as substantive evidence and impeachment. This left the attorneys and the jury confused as to what evidence could be considered and how. If the court was going to suppress the evidence of gang affiliation, it was incumbent for the court to do so contemporaneous with the proffer of the evidence. The suppression of this valuable impeachment evidence was error.

The evidence was also admissible because the State opened the door to the evidence of gang affiliation. A party may not bring up a matter in direct testimony and then complain when the other side cross-examines on the matter. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). This strategy is precluded by the doctrine of invited error. *Id* at 36. The Missouri Court of Appeals recently and succinctly explained the invited error doctrine as follows: "The general rule of law is that a party may not invite error and then complain on appeal that the error invited was in fact made. And a party who has introduced evidence pertaining to a particular issue may not object when the opposite party introduces related evidence

intended to rebut or explain. This is true even though the evidence introduced to rebut or explain would have been inadmissible in the first instance.” *Brown v. State*, 519 S.W.2d 848 (2017) (citations omitted).

Evidence of gang affiliation was admissible as substantive evidence, impeachment evidence, and because the State opened the door to the evidence. The trial court erred by ruling otherwise.

The evidence was insufficient to prove Mr. Wallin guilty of possession of psilocybin beyond a reasonable doubt, or, in the alternative the jury instruction defining controlled substance was erroneous.

Count 5 of the third amended information alleged Mr. Wallin was in possession of a controlled substance, psilocybin. CP, 62. The charge was based upon the contents of a purple container found in his house on January 6, 2018. Jury instruction 9 told the jury that “to convict” the defendant of Count 5 the jury needed to find that “on or about January 6, 2018 the defendant possessed a controlled substance.” CP, 78. Jury instruction 19 stated “psilocybin and psilocin are controlled substances.” CP, 80.

When charging possession of a controlled substance, the State is required to allege and prove the specific identity of the controlled substance. *State v. Goodman*, 150 Wn.2d 774, 787, 83 P.3d 410 (2004). In this case, the State alleged a specific controlled substance, psilocybin.

But the lab technician did not testify the substance was psilocybin. Instead, his testimony was the substance “contained psilocyn [sic] or psilocybin or both of those materials. It could be one or the other or both of the materials.” RP, 259. He did not do any further testing to determine if which substance was in the purple container. RP, 259.

In *State v. Siebert*, 168 Wn.2d 306, 230 P.3d 142 (2010) the Supreme Court reviewed a fact pattern where the jury instructions failed to state the controlled substance in question, methamphetamine. The jury instructions referenced the charging document, however, which specified methamphetamine, and the only controlled substance evidence produced at trial was about methamphetamine. Noting that an “instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal,” the Court held that any instructional error in omitting the identity of the controlled substance was harmless. For the same reasons, the defendant’s sufficiency of the evidence claim failed.

Mr. Wallin raises two challenges to the possession of a controlled substance charge. First, he argues the evidence was insufficient to convict him of possession of psilocybin. The appropriate test for determining the sufficiency of the evidence is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*,

94 Wn.2d 216, 616 P.2d 628 (1980). Second, in the alternative, the jury instruction defining controlled substance was flawed.

While psilocybin and psilocin are both Schedule I Controlled Substances, they are not the same substance. This is evidenced by the fact they are listed separately in the Schedule I Table. RCW 60.50.204(c)(28) and (29). In this case, Mr. Wallin was charged with possession of a single controlled substance, psilocybin. He was not charged with possessing psilocin. But the testimony was that the purple container contained “one or the other or both of the materials.” This is comparable to situation where a lab technician testified that an off-white contains either methamphetamine or cocaine or both, but did not conduct any further testing. There is no way, based upon the lab technician’s testimony, that a rational trier of fact could have concluded beyond a reasonable doubt that Mr. Wallin possessed psilocybin.

In the alternative, Mr. Wallin objects to Jury Instruction 19, which defined controlled substance as including both psilocybin and psilocin. But Mr. Wallin was not charged with possessing psilocin. Given the testimony of the lab technician, the jury could have convicted him of possessing the controlled substance psilocin despite the fact he was not charged with that offense.

Mr. Wallin two convictions for witness tampering violate double jeopardy.

Counts 6 and 7 of the third amended information alleged two counts of witness tampering charges alleged to have occurred on January 24 and March 22, 2018. CP, 62-63. The charges were based upon two telephone calls, both to Ancy Blackburn, urging her not to appear in court. Multiple telephone calls to a single person constitute a single unit of prosecution for double jeopardy purposes. *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (2010). The remedy is to dismiss one of the two counts of witness tampering.

D. Conclusion

This Court should dismiss the possession of a controlled substance offense and one of the tampering with a witness charges and order a new trial on all the remaining charges.

DATED this 3rd day of January, 2019.



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