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NO. 51959-3-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

JONATHAN JAYMES WALLIN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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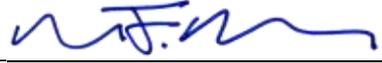
THE HONORABLE RAY KAHLER, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. The Defendant forfeited his 6<sup>th</sup> Amendment confrontation right by wrongdoing by imploring Ancy Blackburn not to attend the trial, so it was not error to introduce her statements.**
- 2. Nunez and Blackburn's alleged past gang affiliation was properly excluded as irrelevant to the case.**
- 3. The evidence was sufficient that the Defendant possessed psilocybin on the day in question because he admitted that he possessed psilocybin mushrooms and the forensic scientist testified that psilocybin degrades into psilocin.**
- 4. The unit of prosecution for Witness Tampering was defined by the legislature in 2011 as each contact with the witness, so the Defendant's convictions do not violate double jeopardy.**

## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

On January 6 of 2018 Jace Blackburn's cousin Ancy Blackburn<sup>1</sup> asked Jace to come get her and take her to her Dad's house. RP I at 107. Ancy was at the Defendant's house in Neilton. RP I at 109. Ancy had sent Jace a message on Facebook Messenger asking him to come get her and take her to her father's. RP I at 110. From the messages, Jace believed Ancy didn't want to remain at the Defendant's house. RP I at 110. Jace believed Ancy thought Jace might have a key to her car. RP I at 118. The Defendant was keeping Ancy's key away from her. RP I at 122. Ancy's car was a red Honda Civic with a black hood. RP I at 118.

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<sup>1</sup> Since Jace and Ancy share a last name, the State will refer to them by their first names.

Jace got a ride from Lloyd Nunez. RP I at 108. Mr. Nunez did not know where he was going, so Jace directed him. RP I at 69. The two drove North of Aberdeen on Highway 101. RP I at 70. While they drove, Jace continued to communicate with Ancy over Facebook Messenger. RP I at 116. However, at trial Jace said he did not believe Ancy was the person sending the messages, in retrospect. RP I at 116. The messages told Jace that the Defendant was sleeping, and that Ancy was going to put the shotgun outside. RP I at 117. The messages also indicated that Ancy was planning to take the Defendant's clothes. RP I at 119. The messages also asked repeatedly if Jace had a weapon. RP I at 121. Jace testified at trial that he did not think Ancy would repeatedly ask if he had weapons. RP I at 134.

When they pulled into the Defendant's driveway, the Defendant peeked out from the curtain, then came outside with a shotgun and shot at them. RP I at 111. Mr. Nunez hadn't even put his car in park yet. RP I at 112. When the Defendant shot, Mr. Nunez hit the gas and the car went into a ditch or some bushes. RP I at 113.

When Mr. Nunez heard the shot, he thought that he would die that day. RP I at 78. Mr. Nunez identified the weapon as a shotgun. RP I at 70. Mr. Nunez identified the Defendant as the person with the shotgun,

and said he had never seen him before. RP I at 69-70. Both Mr. Nunez and Jace testified they did not have a firearm, or any weapon at all. RP I at 72 & 113.

Mr. Nunez jumped out of the car. RP I at 73. Jace got out too. RP I at 74. Jace yelled out something to the effect that they were just there to pick up Ancy, but the Defendant shot two more times. RP I at 74. Mr. Nunez later found that those two shots hit the back of his car. RP I at 74-75.

From behind the car, through the passenger side window, Mr. Nunez saw the Defendant emerge from his house, point the shotgun, take another shot, then return inside his house. RP I at 75. Jace ran across the highway, but Mr. Nunez ran into the woods and called 911. *Id.* While Mr. Nunez was running through the woods, he heard another shot and some yelling. RP I at 76.

Jace believed he heard about four or five shots in all. RP I at 113. He fled to a mill. RP I at 114.

When officers arrived Mr. Nunez was hiding off the side of the highway in some grass. RP I at 77. Eventually, Mr. Nunez saw a person in a truck and a police officer and came out. *Id.*

The officer was Ryan Onasch of the Quinault Tribal Police, who found Mr. Nunez bent over at the waist, vomiting. RP I at 44. Mr. Nunez was panicked, out of breath, speaking quickly, and apparently frightened to the point Officer Onasch could not make sense of what he was saying. RP I at 45.

U.S. Park Ranger Joe Turgyan had heard there was a shooting and decided to respond because he knew there was limited law enforcement in the area. RP I at 51-52. He lives near Neilton and knew just where the incident occurred. RP I at 52. When he arrived, he saw Mr. Nunez' gray sedan, over an embankment, in blackberry bushes, driver's side ajar, still running. RP I at 54.

Deputy Rydman from the Grays Harbor Sheriff's Department responded from the Ocean City area, about 20 minutes away. RP I at 142. On his way from the beach side, he passed a red 1990s Honda Civic with a black hood, heading away from the scene. RP I at 148-49. When Deputy Rydman arrived, Jace was shaken up and rattled. RP I at 146. He had apparently involuntarily defecated. RP I at 146-47. After speaking with Mr. Nunez, Deputy Rydman realized that the vehicle he had passed by on the way to the scene was Ancy's car, driven by the Defendant. RP I at 148-49.

Ancy told Deputy Rydman that she had been staying at the house, which belonged to the Defendant's grandmother, with the Defendant. RP I at 153. Ancy said that the Defendant had retrieved a shotgun, went out the front door, and started shooting at a car that was in the driveway, then came back in and "did something" with the gun. RP I at 153. She said that the Defendant then left in her red Honda. RP I at 153.

Lt. Brad Johansson of the Grays Harbor Sheriff's Department also responded. RP II at 264-65. When he arrived, relatives of Ancy Blackburn had arrived to pick up Ancy. RP II at 266-67. Because the officer did not know at that point whether the suspect was still on scene, Lt. Johansson and some of the other officers on scene attempted to get Ancy's relatives away from the house. RP II at 266.

Lt. Johansson, suspecting that the Facebook messages Jace was receiving from Ancy's account were not from Ancy, and also suspecting that Ancy was under the influence at the time of the incident, sent Sgt. Wilson to obtain another statement from Ancy. RP II at 279-80.

Sgt. Wilson contacted Ancy Blackburn the next evening at her mother's house. RP II at 284. Ancy told Sgt. Wilson that she had received a message from her cousin Jace at about 1:00 AM on her cell

phone. RP II at 287. After she responded, telling Jace where she was, the Defendant took her phone away. RP II at 287-88. Ancy told Sgt. Wilson that she observed the Defendant sending messages to Jace as if he were her, trying to get Jace to come to the house. RP II at 288.

While Sgt. Wilson was talking to Ancy he became aware that the Defendant, who was still at large, was sending her messages via a messaging app on her cell phone. RP II at 289-90.

Deputy Rydman returned to the house on January 13<sup>th</sup> with an arrest warrant and another deputy, who had an apprehension dog. RP I at 157. Deputy Rydman could hear someone moving around in the house, and saw items had been moved since they had searched the house on the day of the incident. *Id.* The officers found the Defendant hiding in the attic. RP I at 159.

While Deputy Stullick of the Grays Harbor Sheriff's Department was serving subpoenas for the case, he learned that the Defendant had been contacting witnesses by phone from the jail. RP II at 227. Because Deputy Stullick had worked in the jail prior to going to the police academy, he knew how to access the jail calls. RP II at 227-28. He found that the Defendant had made two calls to Ancy Blackburn, one in late January, the other in late March. RP II at 230. Deputy Stullick knew the

calls were to Ancy Blackburn because he recognized her voice and because the calls were to the number Ancy Blackburn provided to Deputy Rydman when she made her statement to him. RP II at 229 & 232. Deputy Stullick had also responded to the scene on January 6. RP II at 197-98. Deputy Stullick had seized what he believed to be psilocybin mushrooms from the Defendant's house. RP Vol. II at 217.

In the January call, the Defendant tells Ancy Blackburn to retract her statement and asks if she is "on his side." *See* Exhibit 2. In the March call, the Defendant asks Ancy not to come to court, instructs her to "hide out," tells her she will not be arrested if she retracts her statement, and tells her the charges will be dismissed if she does not come to court, and that Mr. Nunez and Jace will not come to court. *See* Exhibit 4.

Based on these calls, pursuant to a pretrial motion, the trial court found that the Defendant had forfeited his right to confront Ancy Blackburn, and allowed the State to introduce her statements without her presence. RP Vol. I at 31-32.

On February 6, 2018 the State charged the Defendant by Information with two counts of Assault in the Second Degree with firearm enhancements, one count of Malicious Mischief in the Second Degree

with a firearm enhancement and Unlawful Possession of a Firearm in the Second Degree. CP at 1 - 3.

On April 4, the day before the trial, the State told the court that it had just learned that the Defendant had been contacting witnesses by phone from the jail. RP I at 4-5. The Information was amended to add two counts of Witness Tampering, alleged to have occurred on January 24, 2018 and March 22, 2018. *See* CP at 48 - 50. The Defendant then moved for a continuance to prepare to defend against the new charges, and the trial was continued to May 8. RP I at 12.

The Information was amended a second time on April 11, 2018 to add one count of a Violation of the Uniform Controlled Substances Act – Possession of a Controlled Substance. CP at 56 – 58.<sup>2</sup> The State identified the controlled substance as psilocybin in the Amended Information. *Id.*

At trial, the State’s witnesses testified as indicated above. The defense was initially allowed to elicit evidence of gang affiliation by Mr. Nunez and Jace Blackburn from Mr. Nunez, over the State’s objection. RP 5/8/2016 at 86-87. In response, when Jace Blackburn testified, the State allowed Jace to explain his past gang affiliation to the jury in direct.

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<sup>2</sup> The Information was amended a third time on the morning of trial to correct a scrivener’s error. *See* CP at 64; 60 – 63.

RP 5/8/2018 at 123. Jace testified that he had been affiliated with gangs when he was in high school in Vancouver. *Id.*

The forensic scientist who analyzed the mushrooms Deputy Stullick had seized, Martin McDermott, testified that psilocybin is the controlled substance psilocin with “a small chemical piece added.” *Id.* He went on to explain that psilocin is a derivative or byproduct of psilocybin, and that psilocybin breaks down into psilocin over time. RP II at 259. Mr. McDermott opined that the mushrooms contained psilocybin or psilocin or both. RP II at 257.

The Defendant took the stand. The Defendant testified that, before the day in question, he had only seen Jace Blackburn once before, in Aberdeen.

The Defendant started to testify that Jace Blackburn had assaulted him at some point in the past. RP II at 298-99. The State objected to the testimony on the basis of relevance. RP II at 298. The court excused the jury so the defense could tender an offer of proof to assess the admissibility of the prior assault. RP II at 301. Neither the court nor the State had been given prior notice of the Defendant’s self-defense claim. RP I at 174; RP II at 180 & 307.

The offer of proof was the Defendant's testimony about the prior assault. The Defendant said that Jace Blackburn had assaulted him with mace and a "Taser" in late summer of 2017 while Mr. Nunez stood by with a knife. RP II at 302. The Defendant did not explain why Jace had assaulted him. The Defendant also testified that he thought that Jace and Mr. Nunez were active members of the "Surenos" because he had seen photographs on Facebook where Jace wore blue and "gang rags" and made gang signs. RP II at 304-05. He did not explain how or what he knew about "Suerenos," how he identified the signs as "gang signs," or any special knowledge about gangs. The Defendant also said that he had heard that Jace was in a gang from Ancy. RP II at 305.

After the offer of proof, the trial court ruled that the evidence of gang membership was not relevant to the self-defense claim. RP II at 307. The court also pointed out that the claim was based only on hearsay and the color of Jace's clothes. *Id.* The court then decided to instruct the jury to disregard all prior evidence of gang affiliation. RP II at 308. However, the court did decide that evidence of the prior assault was admissible and decided to allow it. *Id.*

The defense was twice given an opportunity to object to the court's decision regarding instructions about gang affiliation, and twice affirmed that there was no objection. RP II at 308-09.

The Defendant then testified consistently with the facts as laid out in the appellant's statement of facts. On cross examination, the Defendant admitted that he was a convicted felon who had lost his right to possess a firearm, and affirmed that he had possessed a shotgun anyway. RP II at 324-25. He also admitted to possessing psilocybin mushrooms, specifically identifying them as "azureus." RP II at 325.

Because the Defendant had identified Jace's sister Lena as a witness to the prior assault upon him by Jace,<sup>3</sup> in rebuttal the State called Lena. RP II at 343-44. Ms. LeMieux contradicted the Defendant's testimony in several key ways.

The Defendant had said Mr. Nunez had driven Jace to Lena's house stood by with a ten-inch knife during the assault. RP II at 311. Ms. LeMieux stated that Jace Blackburn was alone and arrived on foot. RP II at 348-49.

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<sup>3</sup> RP II at 311.

The Defendant had testified that he was in the driver's seat<sup>4</sup> of a car and Jace sprayed him with mace and then applied a "Taser" which Jace held in his other hand. RP II at 312. While Ms. LeMieux did confirm that Jace had assaulted the Defendant with mace, she testified that Jace did not have a Taser. RP II at 349.

The Defendant had claimed that the mace attack rendered him unable to drive. RP II at 312-13. Ms. LeMieux explained to the jury that the Defendant simply wiped the mace off his face, stated he was okay, and left on foot. RP II at 350-51.

The jury, apparently unconvinced by the Defendants' testimony with the exception of the prior conviction, shotgun and mushrooms, convicted him on all counts as charged. CP at 87 – 96.

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<sup>4</sup> The Defendant identifies himself in this passage as "Jon Dreads." He also identifies himself as such on the recorded jail calls. *See* Exs. 2 & 4. Presumably, this is because sports dreadlocks. RP Vol. I at 107.

## ARGUMENT

**1. The Defendant forfeited his right to confront Ancy Blackburn, so it was not error to introduce her statements.**

Ancy Blackburn did not appear at trial but her prior out-of-court statements were introduced through other witnesses. The Defendant first complains that he was deprived of his right to confront her. However, the trial court made a pretrial ruling that the Defendant had forfeited his right to confront Ancy by wrongdoing after the State produced recordings of the Defendant imploring her not to come to court.

**The doctrine of forfeiture by wrongdoing.**

The doctrine of forfeiture by wrongdoing has been recognized in Washington courts since *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007). As of 2007, 21 States, as well as every Federal circuit, had adopted the doctrine. *Mason* at 924. The U.S. Supreme Court has accepted the doctrine as well. *See Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004). In fact, federal evidence rule 804(6) codifies the doctrine. *See Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

The basis of forfeiture by wrongdoing is that Washington courts will not allow a criminal defendant to complain that he was unable to

confront a witness when that defendant caused the witness to not appear. *Mason* at 925. The rule is grounded in equity; a party cannot complain of the natural and generally intended consequences of his actions. *Mason* at 926. Specific intent is unnecessary. *Id.*

Factual findings supporting a forfeiture are reviewed to determine whether they are supported by substantial evidence. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705, 709 (2014) Because a criminal defendant's confrontation right is constitutional, the legal conclusion that forfeiture has occurred is reviewed *de novo*. *Id.* (citing *State v. Hill*, 123 Wn.2d 641, 870 p.2d 313 (1994)) (citing *State v. Price*, 158 Wn.2d 630, 638–39, 146 P.3d 1183 (2006).)

**The trial court's findings are supported by substantive evidence.**

The trial court heard recorded jail calls from the Defendant to Ancy Blackburn, admitted as Exhibit #3. RP I at 26 – 27. Deputy Stullick from the Grays Harbor Sheriff's Department also testified that his agency had been trying to locate Ancy with a subpoena for the current trial date for almost 30 days. RP I at 23. Deputy Stullick also testified that the call was placed on March 22, 2018.

After hearing the call recording and the testimony, the trial court made factual findings on the record. The court found that Ancy indicated

to the Defendant that she had been served a subpoena to appear in court on April 3<sup>rd</sup>, 2018. RP I at 30. Upon hearing this, the Defendant immediately exhorted Ancy not to show up, and told her if she did not show up, the charges against him would be dropped. *Id.* Ancy then specifically asked the Defendant if she should not go to court, and the Defendant told her that she should not be around her house because “they” could arrest her and hold her until the trial. *Id.* He repeated the suggestion that she would be arrested and held, and told her that she needed to hide in order to prevent the arrest. *Id.* The Defendant then went on to tell Ancy that if she helped him out by not testifying, and the charges against him were dropped, then he would help her out. RP I at 30-31. The Defendant also promised to “make things right” when he got out, and again exhorted her not to testify. RP I at 31.

From the call and the testimony of Deputy Stullick, the trial court concluded that, since Ancy did not show up to court on April 3<sup>rd</sup>, 2018 when she was previously subpoenaed,<sup>5</sup> and that the sheriff had been unable to locate her for almost a month, Ancy was willfully absenting herself. RP 5/8/2018 at 31. The court went on to conclude that, based

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<sup>5</sup> See RP I at 19.

upon the Defendant's statements to Ancy on the call, her unavailability was a foreseeable consequence of his actions. *Id.*

From these factual findings, the court ruled that the Defendant had forfeited his right to confront Ancy Blackburn. RP I at 31. The court then allowed the State to introduce Ancy's statements to the police as substantive evidence. 5/8/2018 at 31-32.

Because the facts the trial court found are supported by substantial evidence, and because Ancy's scarcity at trial was clearly the Defendant's intended result, this court should find the trial court correctly applied the doctrine of forfeiture by wrongdoing, and that the Defendant's confrontation rights were not violated.

**Threats are not required to invoke forfeiture by wrongdoing.**

The Defendant claims that a threat is necessary to establish forfeiture by wrongdoing, and cites to Justice Wiggins' dissent in *Dobbs* for that proposition. The Defendant misapprehends Justice Wiggins' point. Justice Wiggins would have held that there must be specific intent to cause a witness' nonappearance,<sup>6</sup> a position specifically rejected by *Mason*. See *Mason* at 926.

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<sup>6</sup> "To conclude, a defendant's Sixth Amendment confrontation right is forfeited only upon clear, cogent, and convincing evidence that (1) the defendant acted with specific intent to procure the witness's absence and (2) the defendant's wrongful conduct is the

In fact, the trial court in this case specifically addressed the point of intent. The trial court noted that specific intent was not required, only knowledge that a witnesses' unavailability is a foreseeable consequence of a defendant's actions is required. *See* RP 5/8/2018 at 29. This is the holding of the majority of *Mason*.

In the instant case there was ample evidence that the Defendant specifically intended to prevent Ancy Blackburn from testifying, either in April or in May. When the Defendant learned Ancy had received a subpoena, he made promises to her and told her she would be held in jail. Ancy then said she would go to Oregon. The sheriff was then unable to locate her. This would appear to be precisely what the Defendant intended.

The Defendant should not be allowed to convince someone to absent themselves from the proceedings, then complain he was not allowed to confront them. This court should uphold the trial court's decision and affirm the verdict.

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actual cause of that witness's absence." *State v. Dobbs*, 180 Wn.2d 1, 27, 320 P.3d 705, 717 (2014) (Justice Wiggins, dissenting.)

**2. Lloyd Nunez and Jace Blackburn's previous gang affiliation is irrelevant.**

The Defendant next challenges the court's holding that Mr. Nunez and Jace Blackburn's alleged past gang affiliation was irrelevant. Initially, the trial court allowed evidence of Mr. Nunez and Jace Blackburn's alleged gang ties. *See* RP I at 86-87. The court later explained that, given the lack of notice of the self-defense defense, the court had assumed there would be some relevance to the gang affiliation. RP II at 307. However, after the Defendant's offer of proof it became clear that the evidence was not relevant, a ruling with which the Defendant essentially agreed.

**The Defendant agreed with the court instructing the jury to disregard the gang evidence, so this issue is not preserved for appeal.**

After the trial court ruled gang evidence irrelevant and inadmissible, it also announced the jury would be instructed to disregard the previous testimony about gang affiliation. RP Vol. II at 308. The court twice gave the parties an opportunity to be heard on this point. *Id.* Both times, the defense stated it had no objection. *Id.* at 308-09.

A party may not raise an issue on appeal that was not properly preserved for appeal by an objection at the trial court level. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321, 327 (2009) (citing *State v. Kronich*, 160 Wash.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3).

Because here the Defendant essentially agreed with the trial court's ruling, and presented no counter-argument, this court should find the issue is not preserved for appeal and decline to consider it.

**The trial court did not abuse its discretion in finding the evidence irrelevant.**

Should this court decide to reach the merits of this claim, there was no error because the trial court did not abuse its discretion in finding the gang evidence irrelevant.

Although a defendant's right to cross-examine is protected by both the federal and state constitutions, "the right to confront a witness through cross-examination is not absolute." *State v. Lee*, 188 Wn.2d 473, 487, 396 P.3d 316, 324 (2017). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986) (alteration in original).)

A limitation of the scope of cross-examination is reviewed for an abuse of discretion. *Lee* at 486 (citing *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014) and *State v. Darden*, 145 Wn.2d 612, 619, 41

P.3d 1189 (2002).) An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* (citing *Garcia* at 844.)

**The trial court did not abuse its discretion in excluding the evidence.**

“‘Relevant evidence’ means evidence having 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 401. “Evidence which is not relevant is not admissible.” ER 402.

In the instant case the Defendant was given an opportunity to show the court how the evidence was relevant before the testimony was allowed in front of the jury. The Defendant's offer of proof failed to establish that the previous violence was related to gang violence. He failed to establish that he had any reason to fear members of the “Suerenos” gang, or that he believed they had a reputation for violence. In fact, he gave no theory on the reason for the assault at all. He simply claimed that he was dating Jace's sister, and Jace, who he had never met, sprayed mace on him without saying a word.

The trial court specifically concluded that the evidence of gang affiliation was not relevant because it was offered solely for the fact of

gang membership, and not for any reputation that Jace Blackburn had for violence. RP Vol. II at 307. Further, the court noted that the Defendant's basis of knowledge for the claim of gang affiliation was based on hearsay and speculative. *Id.* Evidence of gang affiliation by Jace Blackburn and Lloyd Nunez was clearly irrelevant, as well as speculative and based upon hearsay. The trial court was correct to exclude it.

**Gang affiliation is not relevant for impeachment.**

The Defendant claims that evidence of Jace's gang affiliation was relevant for impeachment purposes, and so the court erred by not allowing him to use it in this fashion.

Evidence offered for impeachment must be (1) relevant to impeach, pursuant to ER 402; and (2) either nonhearsay or within a hearsay exemption or exception, pursuant to ER 802. *State v. Allen S.*, 98 Wn. App. 452, 466, 989 P.2d 1222, 1230 (1999). In the instant case

The Defendant fails to cite to any case that holds gang affiliation is relevant for impeachment purposes. Further, his basis of knowledge is speculation and inadmissible hearsay, given that he failed to explain how he knew what he allegedly saw on Jace's Facebook page pertains to gang affiliation.

In fact, gang affiliation, “[l]ike membership in a church, social club, or community organization... is protected by our First Amendment right of association.” *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71, 74–75 (2009) (citing *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).)

Because the evidence of gang affiliation was not relevant for impeachment purposes, and implicated Jace Blackburn and Lloyd Nunez’ right of free association, the trial court properly excluded such evidence. **There is nothing in the record to show that the jury were confused.**

The Defendant next speculates that the instruction to disregard confused the jury, because the jury was more likely to believe that Jace Blackburn was minimizing his gang ties, not abandoning them. Brief of Appellant at 22. This is pure speculation, unsupported by the record. The jury was simply instructed to disregard the prior testimony, and jurors are presumed to follow their instructions. *Tennant v. Roys*, 44 Wn. App. 305, 315, 722 P.2d 848, 854 (1986) (citing *In re Municipality of Metropolitan Seattle v. Kenmore Properties, Inc.*, 67 Wash.2d 923, 930–31, 410 P.2d 790 (1966).)

Because the Defendant's claims of juror confusion are speculative conjecture, this court, should it decide to reach the merits of this assignment of error, reject the Defendant's contention.

**The defense introduced gang evidence first, so the State did not "open the door."**

The Defendant also claims that the State "opened the door" to evidence of Jace Blackburn's gang ties. This claim is counterfactual.

Lloyd Nunez testified before Jace Blackburn. *See* RP I at 2 (Examination Index.)<sup>7</sup> On cross examination of Mr. Nunez, the defense asked if Mr. Nunez knew Jace Blackburn to be "gang affiliated." RP I at 86. The State objected on the basis of relevance, but was overruled. RP I at 87. After the objection was overruled and the question answered, the defense went on to question Mr. Nunez about his own gang affiliation. RP I at 87-88. On redirect the State allowed Mr. Nunez to explain to the jury that he had affiliated himself with the gang when he was in high school, and it was all over by the time of the incident. RP I at 99-100.

Before Jace Blackburn testified the defense made clear it intended to ask Jace about his gang affiliation. RP I at 104. The State indicated that it had made its objection to the gang evidence and understood that the

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<sup>7</sup> The Defendant has conceded that the gang evidence was first introduced during the cross-examination of Lloyd Nunez. *See* Brief of Appellant at 19.

objection was overruled. RP I at 104-05. Therefore, when Jace Blackburn testified on direct examination, the State allowed him to explain his past involvement with gangs while living in Vancouver. RP I at 122-23.

As this timeline demonstrates the State did not “open the door” as the Defendant claims. The Defendant introduced the evidence through Lloyd Nunez first. By the time the State asked Jace Blackburn about gang affiliation on direct, the Court had already ruled that such evidence would be admissible.<sup>8</sup> Certainly, the State is entitled to respond to the defense. *See State v. Calvin*, 176 Wn. App. 1, 16, 316 P.3d 496, 503 (2013), *as amended on reconsideration* (Oct. 22, 2013), *review granted in part, cause remanded*, 183 Wn.2d 1013, 353 P.3d 640 (2015).

The defense introduced gang evidence first, over the State’s objection. When the court overruled the objections, making it clear that gang evidence would be allowed, the State simply responded in a proactive manner. The State did not “open the door” by responding to the defense’s prior introduction of gang evidence. The Defendant’s claim fails.

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<sup>8</sup> A ruling the court later reversed, as noted above.

**Any error was harmless because the Defendant was able to present his self-defense claim.**

Even assuming, *arguendo*, that exclusion of gang evidence was error, it was harmless. “Nonconstitutional error is harmless if, within reasonable probability, it did not affect the verdict.” *State v. Pavlik*, 165 Wn. App. 645, 656, 268 P.3d 986, 991 (2011) (citing *State v. Zwicker*, 105 Wash.2d 228, 243, 713 P.2d 1101 (1986).)

The Defendant’s self-defense claim was based on having a reasonable fear of Jace. The Defendant was allowed to present evidence that Jace had previously assaulted him with mace and a Taser on a previous occasion. *See* RP II at 311-12. He testified that, on the date of the incident, Ancy told him Jace was there to kill him. RP II at 313. He also claimed that Jace was reaching for a firearm when he and Mr. Nunez pulled up to his house. RP II at 314. All this testimony was sufficient for the Defendant to present his self-defense claim, based upon a reasonable fear of Jace Blackburn.

The gang evidence was relatively negligible compared to the evidence the Defendant presented. Mr. Nunez and Jace testified that they were involved in gangs back in high school, but had ceased any affiliation years before the incident in question. RP I at 123.

Because the gang evidence was relatively negligible compared to the evidence the Defendant was allowed to give – of the prior assault, Ancy’s statement that Jace was there to kill him, and that he believed Jace had a firearm – exclusion of the gang evidence on nonconstitutional relevance grounds was harmless. The verdict should be affirmed.

**3. The Defendant admitted he possessed psilocybin mushrooms, and the testimony was that substance degrades into psilocin.**

The Defendant next challenges his conviction for Possession of a Controlled Substance, claiming that the evidence given by the forensic scientist was insufficient for the jury to find the Defendant possessed psilocybin on the day in question. However, the Defendant admitted that he possessed psilocybin mushrooms on the day in question. Further, he failed to object below, so this issue is not preserved for appeal.

**Standard of Review.**

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor

of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wn.App. 95, 109, 117 P.3d 1182 (2005).)

**The Defendant admitted to possessing psilocybin mushrooms.**

On cross examination the State asked the Defendant if he had psilocybin mushrooms in his house, and the Defendant replied, “I did.” RP II at 325. When the State inquired further, the Defendant identified the mushrooms as “azurescens,”<sup>9</sup> demonstrating a deeper knowledge of the contraband in his house. *Id.*

Because the Defendant admitted to having psilocybin mushrooms, the evidence was sufficient to support the conviction.

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<sup>9</sup> Presumably *Psilocybe azurescens*.

**The forensic scientist testified that psilocybin degrades into psilocin, so the jury could have found that the Defendant possessed psilocybin on the day in question.**

The Defendant's assignment of error regarding the possession of a controlled substance rests largely on the testimony of the forensic scientist who analyzed the mushrooms. That scientist, Martin McDermott, opined at trial that the mushrooms "contained psilocyn or psilocybin or both of those materials. It could be one or the other or both of the materials." RP II at 259. This, the Defendant claims, proves the evidence was insufficient to prove the mushrooms contained psilocybin.

However, Mr. McDermott also testified that psilocybin *is* psilocin with "a small chemical piece added," and that psilocybin breaks down into psilocin over time. RP Vol. II at 259.

The Defendant was charged with possessing psilocybin on January 6, 2018. CP at 62. The crime lab analyzed the material after that date, apparently some time in late March. *See* Exhibit #34. Apparently, the psilocybin had broken down into psilocin by the time the mushrooms were analyzed.

The Defendant equates the instant situation to one where a scientist cannot distinguish between methamphetamine and cocaine. This analogy is faulty because cocaine is not a component of methamphetamine, and

methamphetamine is not a component of cocaine. Neither do the two substances convert into one another when they break down.

In this case, viewing the evidence in a light most favorable to the State, the jury could have found that, consistent with Mr. McDermott's testimony and the admission of the Defendant, the psilocybin in the Defendant's mushrooms had degraded or was degrading into psilocin by March, and that the Defendant possessed psilocybin, as charged, in January.<sup>10</sup>

**The Defendant failed to object to the instruction so this issue is not preserved for appeal.**

The Defendant also asserts that the jury instructions concerning psilocybin and psilocin were flawed. However, he failed to object below, so this error is not preserved for appeal.

CrR 6.15(c) requires parties to specifically object to instructions and give a basis for the objection. The reason for the rule "is to afford the trial court an opportunity to know and clearly understand the nature of the objection to the giving or refusing of an instruction in order that the trial

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<sup>10</sup> Courts in other jurisdictions have had occasion to recognize the connection between the two substances: "'Psilocin' or 'psilocyn' is a derivative of psilocybin...." *People v. Taylor*, 732 P.2d 1172, 1175 n.2 (Supreme Court of Colorado, 1987); "Psilocin is the metabolite of psilocybin, which is the active ingredient in hallucinogenic mushrooms." *State v. Hotz*, 281 Neb. 260, 264–65, 795 N.W.2d 645, 649 (Supreme Court of Nebraska, 2011); "Psilocybin and psilocin are hallucinogenic substances that are produced by psilocybe mushrooms." *State v. Routon*, 304 Wis. 2d 480, 483, 736 N.W.2d 530, 531 (Wis. Ct. App. 2007).

court may have the opportunity to correct any error.” *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450, 453 (1976). When a defendant fails to object to a jury instruction below, the error is not preserved for appeal. RAP 2.5(a) and see *State v. Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511, 514 (2011).

RAP 2.5(a)(3) does allow review of an unpreserved issue if the error is “manifest error, affecting a constitutional right.” However, the Defendant did not argue that the alleged error is constitutional, and appellate courts should not assume that the challenge is of constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492, 495 (1988). The RAP 2.5(a)(3) exception is narrow, and only allows review of certain errors, even when they are constitutional in nature. *Id.* (citing Comment (a), RAP 2.5.)

When the court asked the parties if they had any objections or exceptions to the court’s instructions, the Defendant did not. RP Vol. II at 377. This included the instruction the Defendant now argues is faulty.

Because the Defendant failed to object at the trial court below, this issue is not preserved, and this court should not consider it.

**The jury instructions were not erroneous because they are legally correct and allowed both sides to argue their case to the jury.**

It is a long-accepted tenant of Washington law that “[j]ury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845, 852 (2002) (citing *Bodin v. City of Stanwood*, 130 Wash.2d 726, 732, 927 P.2d 240 (1996).)

In the instant case the jury instructions were correct – both psilocybin and psilocin are controlled substances. RCW 69.50.204(28) & (29). Psilocin was mentioned by the forensic scientist as a byproduct of psilocybin, so the jury was properly instructed that the chemical degradation of psilocybin is no defense to possessing a controlled substance. The verdict should be upheld.

**4. The law now provides that each instance of witness tampering is a separate offense.**

Finally, the Defendant argues that his two convictions for Witness Tampering violate the prohibition against double jeopardy, and cites to the case of *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (1048) to support his proposition.

The legislature amended RCW 9A.72.120 in 2011 specifically to address the *Hall* decision. *See* Laws of 2011, ch. 165, § 3. Since 2011 RCW 9A.72.120(3) has provided, “each instance of an attempt to tamper with a witness constitutes a separate offense.”

When a defendant is convicted of multiple counts of the same statute, the court asks what “unit of prosecution” the legislature intended. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729, 733 (2017), *as amended* (Jan. 26, 2017) (citing *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).) A unit of prosecution inquiry ultimately revolves around a question of legislative intent. *Id.* (citing *Adel* at 634.) In this case, the intent of the legislature is clear from the statute. Each call constitutes a separate criminal act.

Because the two calls to Ancy Blackburn constitute two separate units of prosecution in 2018, the two convictions do not violate the Defendant’s double jeopardy rights. The convictions should be upheld.

## CONCLUSION

The Defendant called Ancy Blackburn and exhorted her not to come to court. He made her promises and told her she would be arrested and jailed until his trial. Ancy Blackburn failed to appear at the trial she had received a subpoena for, and subsequently was nowhere to be found. Ancy Blackburn's absence was a foreseeable (and intended) consequence of the Defendant's calls. Therefore, the Defendant forfeited his right to confront her. He should not now be allowed to complain she was absent, and it was not error to allow her prior statements to be introduced.

Neither was it error to exclude evidence of Jace Blackburn and Lloyd Nunez' gang affiliation. After the Defendant's offer of proof it became clear that the evidence was irrelevant, speculative, and based on hearsay. Even the Defendant agreed that the jury should have been instructed to disregard it. But even if exclusion of the evidence was error, it was harmless given that the Defendant's testimony.

The Defendant himself admitted to possessing psilocybin mushrooms, and the evidence at trial from the crime lab was that psilocybin degrades into psilocin. The jury could certainly believe the Defendant's admission and find that he possessed psilocybin on the date charged.

Finally, the unit of prosecution for witness tampering has been defined since 2011 as each attempt. Therefore, the Defendant's double jeopardy right was not violated.

There was no error. This court should uphold the convictions.

DATED this 3<sup>rd</sup> day of May, 2019.

Respectfully Submitted,

BY: 

JASON F. WALKER  
Chief Criminal Deputy  
WSBA # 44358

JFW / lh

# GRAYS HARBOR PROSECUTING ATTORNEY

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