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NO. 61481-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

JOHN CHARLES FRANKLIN,
Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Mr. Franklin was convicted of assault in the third degree (count I); unlawful possession of a firearm in the first degree (count II); possession of cocaine with intent to deliver (count III); felony harassment (count IV); assault in the second degree (counts V and VI); and tampering with a witness (counts VII and VIII). In this appeal, he contends that (1) the convictions in counts I and V violated the prohibition against double jeopardy; (2) the search of his person was conducted without authority of law; (3) the State failed to prove a valid waiver of his Miranda rights; and (4) he was denied the effective assistance of counsel where his attorney failed to argue the issue of same criminal conduct, failed to move for severance of charges, and failed to object to inadmissible hearsay.

B. ASSIGNMENTS OF ERROR.

1. The convictions in counts I and V violated the prohibition against double jeopardy.

2. The trial court erred in admitting evidence obtained in violation of Mr. Franklin's constitutional rights under article 1, section 7 of the Washington Constitution.

3. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 5.¹

4. The trial court erred in entering Conclusion of Law 10.

5. The trial court erred in entering Conclusion of Law 11.

6. The trial court erred in entering Conclusion of Law 12.

7. The trial court erred in entering Conclusion of Law 13.

8. The trial court erred in entering Conclusion of Law 14.

9. The trial court erred in admitting Mr. Franklin's statements made during custodial interrogation.

10. Mr. Franklin was denied the effective assistance of counsel.

11. The trial court erred in giving Court's Instruction #8 to the jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The 5th and 14th Amendments to the United States Constitution protect criminal defendants against double jeopardy. Multiple acts that constitute a continuing course of conduct encompass only one offense. Where the assaults in counts I and V were committed against the same victim, at the same place, and within moments of each other, do the two

¹ A copy of the trial court's Findings of Fact and Conclusions of Law from the CrR 3.5/3.6 hearing (CP 102-05) is attached as Appendix A.

convictions violate the prohibition against double jeopardy? (Assignment of Error 1).

2. The Washington Constitution, article 1, section 7, prohibits searches without authority of law. Where a search is performed incident to an arrest, the fact of the lawful arrest provides the requisite authority of law for the resulting search. In this case, police arrested Mr. Franklin on a warrant, but the court found that the existence of the warrant was not proven. Even if there was probable cause to arrest Mr. Franklin for possession of drugs, where the police did not do so, was the resulting search of his person without authority of law? (Assignments of Error 2-7).

3. Prior to undergoing custodial interrogation by the police, a suspect must be advised of and waive his 5th and 6th Amendment rights to silence and counsel pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Subsequent statements are admissible at trial only where the State proves that the suspect knowingly, intelligently, and voluntarily waived his Miranda rights. Did the trial court err in finding the State had carried its burden of proving Mr. Franklin waived his rights? (Assignments of Error 8, 9).

4. The 6th Amendment guarantees criminal defendants the right to effective assistance of counsel. RCW 9.94A.589 requires that current

offenses encompassing the same criminal conduct shall be counted as one offense when computing a defendant's offender score and standard sentence range. Did defense counsel provide ineffective assistance of counsel by failing to raise the issue of same criminal conduct at sentencing regarding counts IV and VI, and counts I and V? (Assignment of Error 10).

5. Where counsel was deficient in failing to move for severance, and where the failure to sever charges prejudiced Mr. Franklin, was he provided ineffective assistance of counsel? (Assignments of Error 10 and 11).

6. Counsel's duty to effectively represent a client includes objecting to the admission of inadmissible evidence. Was defense counsel's performance deficient in failing to object to hearsay statements by Kelly Benchero to Charlene Nicholson and Sara Shorr, and was Mr. Franklin prejudiced by this error? (Assignment of Error 10).

D. STATEMENT OF THE CASE.

On the evening of January 31, 2007, Seattle Police Officers arrested a man named Milo Burshaine on a warrant. 10/15/07RP 183-84. The police entered into an agreement with him. In return for Mr. Burshaine arranging an "order-up" (setting up a drug deal with another

individual that resulted in that person's arrest), the police agreed not to book him into jail that night. 10/15/07RP 174, 176.

To arrange the "order-up," Mr. Burshaine made a telephone call to an individual asking "could he hook him up?" 10/17/07RP 52. The call was made to Mr. Franklin's phone. 10/15/07RP 193; 10/17/07RP 118-20. There was a series of telephone calls between the two people. 10/15/07RP 194-99. Police sat close by and listened in on the conversations. 10/15/07RP 194-99. Other officers were staked out in front of the residence Mr. Burshaine had identified as Mr. Franklin's, located at 5040 – 35th Avenue South in Seattle. 10/15/07RP 187-88; 10/16/07RP 130-31. A few moments after the last call concluded, Mr. Franklin left the residence, and he was arrested. 10/15/07RP 199-200. This occurred at approximately 3:15 a.m. on February 1, 2007. 10/16/07RP 132.

A search incident to Mr. Franklin's arrest revealed approximately 40 grams of chunky off-white material found to contain cocaine, two cell phones, and over \$1400 in cash. 10/16/07RP 57-63; 10/22/07RP 44-50.

Mr. Franklin was questioned by officers and told them that if they searched the residence they would find more drugs and also guns. 10/17/07RP 47; 10/22/07RP 84-85. He signed a form consenting to a

search of the residence, and police also secured a search warrant for the home. 10/22/07RP 81.

A search of the residence revealed numerous items, including additional suspected drugs (which were not tested), drug paraphernalia, two firearms (a handgun and a rifle), ammunition, and an energy bill addressed to Mr. Franklin at that address. 10/11/07RP 71; 10/16/07RP 135-38; 10/17/07RP 30, 101-03, 112.

Once inside the residence, officers also came into contact with two women who resided there, Sara Shorr and Charlene Nicholson.

10/17/07RP 49. Ms. Shorr appeared to be injured. 10/17/07RP 49, 74.

Ms. Shorr was photographed and interviewed, and later taken to the hospital. 10/15/07RP 67. The emergency room physician who treated Ms. Shorr testified regarding her injuries, which included fractures to her nose and a rib, as well as notable bruises on her left thigh. 10/16/07RP 90, 101.

According to the doctor, both of the fractures occurred within the previous week. 10/16/07RP 104, 124. Officer Conine observed and photographed what appeared to be blood on the ground in front of the home, and also observed what appeared to be blood on some boards near the front porch. 10/17/07RP 74-75. A board was taken into evidence.

Ms. Shorr is an admitted cocaine and heroin addict who had been in an on-and-off again relationship with Mr. Franklin for the past couple of years. 10/15/07RP 16-17, 24-25. According to Ms. Shorr, there were two separate assault incidents that led to charges against Mr. Franklin. The first incident took place when Ms. Shorr was “high” on heroin, and her memory was somewhat hazy, but she believed it occurred around January 25, 2007. 10/15/07RP 46, 48, 87. The incident took place at the residence on 35th Avenue South and began in the kitchen. 10/15/07RP 45-46. Mr. Franklin was angry that she was using heroin again, and he assaulted her. 10/15/07RP 45-46. The incident continued in the basement, where Mr. Franklin continued to assault her: punching and kicking her, as well as strangling her with a bed sheet. 10/15/07RP 45-47. She suffered a fractured rib in the assault. 10/15/07RP 45-46.² During the assault Mr. Franklin stated to her, “Don’t think I won’t kill you.” 10/15/07RP 45, 153. Ms. Shorr took the threat seriously and feared for her life. 10/15/07RP 47-48, 153.

According to Ms. Shorr, she left the next morning, intending not to

² Ms. Shorr testified that Mr. Franklin also fractured her collar bone. 10/15/07RP 45-46. Dr. Cooper, who treated Ms. Shorr on February 1, 2007, testified that Ms. Shorr had at some point suffered a fractured collar bone, but could not say that the injury was recent. 10/16/07RP 106, 128-29.

return. 10/15/07RP 49-50. She went to downtown Seattle where she bought her heroin and met a woman named Star. 10/15/07RP 49-50. Through Star, Ms. Shorr met Jared Carter, and Mr. Carter invited Ms. Shorr to stay with him at his home on Capitol Hill. 10/15/07RP 50.

The second assault incident took place on approximately January 30, 2007. 10/15/07RP 65. Mr. Franklin found Ms. Shorr at Mr. Carter's residence and drove her back to the residence on 35th Avenue South. 10/15/07RP 55-57. Mr. Franklin was mad because he thought she owed him money. 10/15/07RP 57. While parked in the driveway of the residence, Mr. Franklin punched Ms. Shorr, fracturing her nose. 10/15/07RP 60. He then pulled her out of the car into the front yard, where he picked up a wooden board and hit her in the leg three or four times. 10/15/07RP 60-61. Both acts occurred in front of the residence within minutes of each other. 10/15/07RP 88.

The original information alleged four charges against Mr. Franklin. CP 1-3. Count I charged assault in the third degree for hitting Ms. Shorr in the leg with the board. CP 1-3; 10/4/07RP 10; 10/23/07RP 17. Count II charged unlawful possession of a firearm based on the two guns found in the search of the home. CP 1-3. Count III charged possession of cocaine with the intent to deliver based on the drugs found on Mr. Franklin's

person when he was arrested. CP 1-3. Count IV charged felony harassment for threatening to kill Ms. Shorr in the basement. CP 1-3; 10/23/07RP 44.

An amended information added counts V and VI. CP 11-13. Count V charged assault in the second degree for fracturing Ms. Shorr's nose during the same January 30, 2007 incident where Mr. Franklin was charged in count I with hitting Ms. Shorr with the board. CP 11-13; 10/4/07RP 11; 10/23/07RP 17. Count VI charged assault in the second degree for assaulting Ms. Shorr and fracturing a rib. CP 11-13; 10/4/07RP 12-13. This crime was allegedly committed in the basement on approximately January 25, 2007 at the same time as the felony harassment charge in count IV. 10/4/07RP 12-13.

A second amended information added a charge of witness tampering (count VII) for attempting to induce Ms. Shorr to testify falsely regarding the assault incident in counts I and V. CP 26-29. Suppl. CP ____ (Sub. No. 62D at pages 1-3). The basis for the charge was an allegation by Ms. Shorr that a friend of Mr. Franklin's named Kelly Benchero contacted her at Mr. Franklin's request and asked her to testify falsely that Star was the one who hit her with a board and also broke her nose. 10/15/07RP 68-69.

A third amended information added another witness tampering charge (count VIII) for attempting to induce Ms. Nicholson to testify falsely regarding the unlawful possession of a firearm charge in count II. CP 48-51; 10/10/07RP 2. This charge was based on Ms. Nicholson's allegation that Mr. Benchero asked her (on Mr. Franklin's behalf) to lie and testify that the guns found inside the residence belonged to her. 10/11/07RP 64, 68.

After a jury trial, Mr. Franklin was found guilty on all charges. CP 106-07; 10/24/07RP 2-3. This appeal timely follows. CP 227-38.

E. ARGUMENT.

1. THE CONVICTIONS IN COUNTS I AND V VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

a. The prohibition against double jeopardy prohibits multiple convictions for the same offense. The double jeopardy clauses of the Fifth Amendment to the United States Constitution³ and Article I, section 9 of the Washington Constitution protect a criminal defendant from multiple convictions and punishments for the same offense. Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985);

³ The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).

State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). The Washington State double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. Bobic, 140 Wn.2d at 260.

A double jeopardy violation is reviewed de novo. State v. Knutson, 88 Wn.App. 677, 680, 946 P.2d 789 (1997). The reviewing court must determine whether, in light of legislative intent, the charged crimes constitute a single offense. Blockburger v. United States, 284 U.S. 299, 303, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

b. Mr. Franklin's convictions for assault in the third degree in count I and assault in the second degree in count V violated double jeopardy. Before trial began, defense counsel expressed confusion regarding the basis for the multiple assault charges. 10/4/07RP 8. The deputy prosecuting attorney clarified that count I, charging assault in the third degree, was based on Ms. Shorr being struck in the leg with the wooden board, and that count V, charging assault in the second degree, was based on Ms. Shorr's fractured nose. 10/4/07RP 10-11. The

prosecutor admitted that these two acts took place “at the exact same time.” 10/4/07RP 11. Defense counsel argued that together this constituted only one occurrence, and should only form the basis for one count of assault. 10/4/07RP 11-12. Nevertheless, both charges proceeded to trial.

After the conclusion of the testimony, the defense moved to dismiss one of the assaults, arguing that counts I and V together constituted only one assault. 10/23/07RP 11-12. The trial court denied the motion. 10/23/07RP 12-14. In closing argument, the prosecuting attorney discussed counts I and V together as one incident of assault. 10/23/07RP 92-93. This is an accurate depiction, since Ms. Shorr testified that both acts occurred in front of the residence within minutes of each other. 10/15/07RP 88.

Whether multiple convictions for violating a single criminal statute violates double jeopardy depends on what the “unit of prosecution” is under the statute. State v. Graham, 153 Wn.2d 400, 405, 103 P.3d 1328 (1328). The "unit of prosecution" test requires a determination of what act or course of conduct the legislature intended as the punishable act under the statute. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Where the legislature has not clearly indicated the unit of prosecution in a

criminal statute, the lack of statutory clarity requires that any “doubt must be resolved in favor of lenity.” Whalen, 445 U.S. at 694.

In Graham, the Washington Supreme Court held that the unit of prosecution under the reckless endangerment statute (RCW 9A.36.050) is each person endangered, rather than each endangering act. In reaching this decision, the court focused on the nature of reckless endangerment as a crime against persons, and the language of the statute, which prohibits certain acts creating a risk of death or serious physical injury to “another person.” 153 Wn.2d at 406-08. Similarly, the crimes of assault are found in RCW 9A.36, and an assault is a crime against a person. RCW 9A.36.021(1)(a) defines assault in the second degree as intentionally assaulting “another,” and RCW 9A.36.031(1)(d) provides that assault in the third degree involves bodily harm to “another person.” As in reckless endangerment, the unit of prosecution in an assault is each victim, not each act. For this reason, the prohibition against double jeopardy did not prohibit three assault convictions where the defendant fired a single bullet into a vehicle occupied by three people. State v. Smith, 124 Wn.App. 417, 432, 102 P.3d 158 (2004), aff’d on other grounds, 159 Wn.2d 778 (2005).

Multiple acts can constitute a single violation of the law. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) is illustrative on this point. Under Petrich, when there is evidence of several acts presented at trial, any of which could form the basis for a single charge, the need for jury unanimity requires that the jury agree on a specific criminal act. Id. at 572; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). However, where the several acts constitute but one “continuous act,” there is only one alleged law violation, and a Petrich instruction is not necessary. Petrich, 101 Wn.2d at 571. To determine whether multiple acts constitute a continuing offense, the facts must be evaluated in a commonsense manner. Id.

The “continuing course of conduct” exception has been applied to multiple acts of assault over a two-hour period, resulting in a fatal injury (State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10, cert. denied, 501 U.S. 1237, 115 L.Ed.2d 1033, 111 S.Ct. 2867 (1991)), two acts of assault occurring during a short period of time against a single victim in an attempt to commit sexual assault (State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)), and the repeated rape of a victim over an hour-long period (People v. Mota, 115 Cal.App.3d 227, 233, 171 Cal.Rptr. 212 (1981)).

In the case at hand, counts I and V constituted one “continuous act,” and therefore encompass only one offense. Both acts took place in front of the residence on 35th Avenue South, and both took place within just moments of each other. It is illogical to argue that each blow to the same victim of a beating could form the basis for a separate assault charge.

c. The proper remedy is vacation of the conviction in Count

I. Where, as here, two convictions violate the prohibition against double jeopardy, the remedy is to vacate the conviction for the offense that carries the lesser sentence. State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. denied, 127 S.Ct. 2986, 168 L.Ed.2d 714, 2007 U.S. LEXIS 7828 (2007). Accordingly, the conviction for assault in the third degree in count I must be vacated.

2. THE SEARCH OF MR. FRANKLIN’S PERSON
WAS CONDUCTED WITHOUT AUTHORITY OF
LAW IN VIOLATION OF THE WASHINGTON
CONSTITUTION.

a. Article 1, section 7 of the Washington Constitution
prohibits searches without authority of law. Article I, section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Unlike the Fourth Amendment to the United States Constitution, article I, section 7

“clearly recognizes an individual’s right to privacy with no express limitations.” State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Article I, section 7 provides greater protection against search and seizure than does the Fourth Amendment. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998).

Warrantless searches are per se unreasonable. State v. Williams, 102 Wn.2d 733, 736, 698 P.2d 1065 (1984). Exceptions to the warrant requirement are limited and narrowly drawn. State v. White, 135 Wn.2d at 769. The State bears the heavy burden of proving that a warrantless search falls within an exception to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

The Washington Supreme Court has interpreted the “authority of law” requirement to prohibit searches that would be allowable in other jurisdictions. See Ladson, 138 Wn.2d at 358 (a pretextual traffic stop is a seizure “absent the ‘authority of law’ which a warrant would bring”).

Under article 1, section 7, the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment. State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). A lawful arrest

is a prerequisite to a lawful search. State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008). In the context of a search incident to arrest, it is the fact of the lawful arrest that provides the requisite “authority of law” for the resulting search. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); O’Neill, 148 Wn.2d at 585. In the absence of an actual arrest, even where there is probable cause for the arrest, a search is without “authority of law.” Id. at 585-86.

b. Mr. Franklin was searched without authority of law.

Police arrested Mr. Franklin based on their belief that there was an outstanding warrant for his arrest. 10/8/07RP 63-64, 71; Pretrial Ex. 7 (affidavit for search warrant at page 2). But the existence of the warrant was never proven. The trial court specifically found at the CrR 3.6 hearing that “the State has failed to prove to this Court that the defendant had an outstanding warrant on February 1, 2007.” CP 104 (Conclusion of Law 9).

The trial court went on to find that the police had probable cause to arrest Mr. Franklin for possession of cocaine with intent to distribute, and that both his arrest and the resulting search of his person were therefore “proper.” CP 104 (Conclusions of Law 10 and 11). However, while the trial found that probable cause to arrest existed, the court did not make a finding that Mr. Franklin was actually arrested based on the probable

cause. “In the absence of a finding on a factual issue”, the party with the burden of proof is presumed to have “failed to sustain their burden on this issue.” State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). It is presumed, then, that the State failed to prove that Mr. Franklin was actually arrested based on probable cause to believe he had committed a crime.

Other jurisdictions may allow a search incident to arrest so long as probable cause for the arrest existed. However, under Washington law, even if probable cause existed, the resulting search was “without authority of law” since Mr. Franklin was not actually arrested for possession of drugs. O’Neill, 148 Wn.2d at 585-86.

c. The Constitutional violation requires suppression of all illegally seized evidence. Under our state constitution, evidence obtained in violation of the Fourth Amendment or article I, section 7 must be suppressed. State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982); Young, 123 Wn.2d at 196; State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). Because the exclusionary rule of Article 1, section 7 is not concerned solely with deterring police misconduct and is not a judicially created remedy, “*whenever* the right is unreasonably violated, the remedy *must* follow.” White, 97 Wn.2d at 111-12 (emphasis in original).

Conclusion of Law 12 pursuant to the CrR 3.5/3.6 hearing states that Mr. Franklin provided a knowing, intelligent, and voluntary consent to search the residence of 5040 – 35th Ave. South. Finding of Fact 5 and Conclusion of Law 13 pursuant to the CrR 3.5/3.6 hearing state that the search warrant for the home was valid. Defense counsel correctly argued at the CrR 3.6 hearing that the search of the home was tainted by the earlier invalid arrest and search of Mr. Franklin. CP 22; 10/9/07RP 104. The consent to search was tainted by the unlawful search of Mr. Franklin. Similarly, the search warrant for the residence was tainted because it was predicated in part on the items seized from Mr. Franklin and the statements he made after his invalid arrest. Pretrial Ex. 7.

Findings entered in a CrR 3.6 hearing are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). In the absence of sufficient evidence, CrR 3.6 Finding of Fact 5 must be stricken. Truck Ins. Exchange v. Merrell, 23 Wn.App. 181, 184, 596 P.2d 1334 (1979). Conclusions of Law 10, 11, 12, and 13 cannot stand.

This Court should reverse the convictions and remand with direction that the unconstitutionally-obtained evidence be suppressed.

This would include all items located on Mr. Franklin's person at the time of his arrest, all post-arrest statements made by Mr. Franklin, and all evidence obtained from the search of the house.

3. THE STATE FAILED TO PROVE MR. FRANKLIN ENTERED A VALID WAIVER OF HIS MIRANDA RIGHTS.

a. Facts relevant to the CrR 3.5 motion. Officer Bauer testified that after arresting Mr. Franklin, he advised him of his Miranda rights both at the scene and again at the precinct. 10/8/07RP 65. Mr. Franklin stated that he understood his rights, and Officer Ellithorpe testified Mr. Franklin seemed to understand his rights when read to him by Officer Bauer. 10/8/07RP 66-67, 78-79. Officer Bauer then relayed to the other officers both that Mr. Franklin had been advised of his rights and that he felt Mr. Franklin understood his rights. 10/8/07RP 68.⁴ The trial court questioned Officer Bauer regarding whether there was a subsequent waiver of those rights:

Q: What did he say about his willingness to speak to you bearing those rights in mind, if anything?

⁴ Mr. Franklin testified that he was not Mirandized at the scene, and only partially Mirandized at the police precinct. 10/9/07RP 30. He also testified that he asked to speak with an attorney multiple times. 10/9/07RP 37-38, 44. However, the trial court did not find Mr. Franklin's testimony to be credible to the extent that it differed from the testimony of the officers. CP 103 (Finding of Fact 8); 10/9/07 108-09.

A: Actually I don't have anything written down on my statement about that.

Q: Do you remember what he said?

A: I didn't ask him any questions, I just Mirandized him.

10/8/07RP 69.

At the precinct, Officer Conine did not readvise Mr. Franklin of his rights and there was no indication that he discussed with Mr. Franklin whether he wished to waive those rights. 10/8/07RP 36. Rather, based on his belief that Mr. Franklin had been advised of and waived his Miranda rights, Officer Conine testified that he "went and had a conversation with" Mr. Franklin regarding what items the officers might find pursuant to a search of the residence. 10/8/07RP 35.

Officer Branham accompanied Mr. Franklin back to the residence. 18/8/07RP 54. She was aware that Mr. Franklin had been advised of his rights and that he had signed a consent to search the home. 10/8/07RP 54. Officer Branham readvise Mr. Franklin of his Miranda rights. 10/8/07RP 56. Before police began searching the home, she questioned Mr. Franklin. 10/8/07RP 54. She felt that Mr. Franklin answered her questions voluntarily. 10/8/07RP 60. She did not testify that Mr. Franklin agreed to waive his Miranda rights. 10/8/07RP 53-60.

The trial court concluded that Mr. Franklin's statements were made while subject to custodial interrogation, but that Mr. Franklin made a

knowing, intelligent, and voluntary waiver of his Miranda rights. CP 104 (Conclusion of Law 14); 10/9/07RP 113, 116.

b. A defendant must be advised of his *Miranda* rights and must waive those rights prior to the admission of statements made during any custodial interrogation. The prosecution may not use statements obtained from custodial interrogation unless procedural safeguards guarantee that the accused has been informed of and freely waived the constitutional privileges of the Fifth and Sixth Amendments to the United States Constitution. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The State bears the “heavy burden” of proving by a preponderance of the evidence that a defendant knowingly, voluntarily, and intelligently waived his Miranda rights. Id. at 475; *State v. Robtoy*, 98 Wn.2d 30, 35-36, 653 P.2d 284 (1982); *State v. Coles*, 28 Wn.App. 563, 567, 625 P.2d 713, rev. denied, 95 Wn.2d 1024 (1981). A waiver of a Miranda right need not be explicit. Rather, the question of waiver must be determined on the particular facts surrounding the case. *North Carolina v. Butler*, 441 U.S. 369, 373-74, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979).

However, a waiver cannot be implied merely because an individual makes a statement after receiving Miranda warnings:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

Miranda, 384 U.S. at 475. The Washington Supreme Court has reiterated the rule that a Miranda waiver cannot be presumed simply from the fact that the police obtained a statement from the defendant after he was warned of his rights:

The Supreme Court has not required an express statement by the accused for an effective waiver, but rather has forbidden the presumption that an intelligent waiver was made simply from the fact that a statement was eventually extricated from the accused after he was warned of his rights. Some additional showing is required that the inherently coercive atmosphere of custodial interrogation has not disabled the accused from making a free and rational choice.

State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971).

In finding the statements admissible, the trial court did precisely what the Miranda court clearly stated it could not do: presume a valid waiver of Miranda based solely upon Mr. Franklin's statements following Miranda warnings. This court should suppress the statements to police as a violation of Miranda. Miranda, 384 U.S. at 475. The trial court

incorrectly entered Conclusion of Law 14 pursuant to the CrR 3.5/3.6 hearing, because the State did not prove that Mr. Franklin made a knowing, intelligent, and voluntary waiver of his Miranda rights.

c. The trial court's error in finding Mr. Franklin's statements admissible was not harmless. Admission of an involuntary confession obtained in violation of Miranda is subject to a harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); State v. Rueben, 62 Wn.App. 620, 626, 814 P.2d 1177, rev. denied, 118 Wn.2d 1006 (1991). To find an error affecting a constitutional right harmless, the reviewing court must find it harmless beyond a reasonable doubt. Fulminante, 499 U.S. at 295-96. In Fulminante, the Court noted that a confession has a profound impact on the jury, and that the "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Id. at 296 (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

Mr. Franklin made several statements to police after his arrest where he discussed items that police might find when they searched the residence. Based on the trial court's ruling that Mr. Franklin waived his Miranda rights, officers were allowed to testify concerning these

statements at trial. Officer Branham testified she asked Mr. Franklin for the location of the guns they would find inside the house. At first, Mr. Franklin denied there were any guns in the house, but the officer told him this was not what he had told the other officers. Mr. Franklin then told the officer his roommate had a gun that he had seen a couple of days before and that it might be in the couch. 10/17/07RP 47. Officer Ellithorpe testified that Mr. Franklin told him they would find a firearm and more narcotics inside the house. 10/22/07RP 84-85.

These statements were offered into evidence regarding both counts II and III. With regard to count II (unlawful possession of a firearm), these statements tended to show Mr. Franklin's knowledge and possession of the firearms found inside the residence. With regard to count III (possession of cocaine with intent to deliver), Mr. Franklin's statements tended to show Mr. Franklin's involvement in selling drugs and assisted the State in proving the charge of possession of cocaine with the intent to deliver.

4. MR. FRANKLIN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS COUNSEL FAILED TO ARGUE THE ISSUE OF SAME CRIMINAL CONDUCT, FAILED TO MOVE FOR SEVERANCE OF COUNTS, AND FAILED TO OBJECT TO INADMISSIBLE HEARSAY.

a. A criminal defendant is entitled to receive effective assistance of counsel. The state and federal constitutions guarantee

criminal defendants effective representation by counsel at all critical stages of trial. United States Constitution, Sixth Amendment; Washington Constitution, art. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 685-87, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984). To obtain relief based on ineffective assistance of counsel, a criminal defendant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 390-91, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

To establish the first prong of the Strickland test, the defendant must first show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d at 226. Reasonable-attorney conduct includes a duty to investigate the relevant law in a given case. State v. Jury, 19 Wn.App. 256, 263, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978).

If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Thomas, 109 Wn.2d at 229-30. However, "tactical" or "strategic" decisions by defense counsel

must still be reasonable decisions. Wiggins v. Smith, 539 U.S. 510, 526, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (in capital case, counsel's failure to investigate mitigation evidence suggested "inattention, not reasoned, strategic judgment").

b. Defense counsel's failure to raise the issue of same criminal conduct constitutes ineffective assistance of counsel. An individual can waive his right to appeal the issue of whether multiple crimes constitute the same criminal conduct where he (1) did not raise the issue at sentencing and (2) affirmatively agreed with the State's representation of the offender score. State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030, 11 P.3d 827 (2000). However, review is not precluded where the decision not to argue same criminal conduct is the result of ineffective assistance of counsel. State v. Saunders, 120 Wn.App. 800, 825, 86 P.3d 232 (2004). In this case, defense counsel agreed with the prosecutor at sentencing that Mr. Franklin had an offender score of nine for all counts. 2/22/07RP 17. Defense counsel's failure to raise the issue of same criminal conduct constituted deficient performance and prejudiced Mr. Franklin.⁵

⁵ Mr. Franklin's counsel at sentencing was not the same counsel that represented him at trial.

When an offender is being sentenced for more than one felony offense, each current offense is normally included in the offender score. RCW 9.94A.589(1)(a). Based on this provision, with one prior felony conviction, Mr. Franklin was given an offender score of 9 for all eight counts (one point for each of the other seven counts, one point for an attempting to elude conviction under 07-1-01595-3, and one point for a prior conviction from California). CP 214-24. However, the statute also provides that if “some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

“Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). To determine whether the two crimes share the same criminal intent, the question is whether, viewed objectively, the defendant’s intent remained the same from one crime to the next. State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Whether two crimes share the same objective intent can be measured by determining whether one crime furthered another. State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996 (1992).

The “same time” element does not require that the two crimes be committed simultaneously. Porter, 133 Wn.2d at 183. Rather, the “same time” element is satisfied where the two crimes are part of a “continuous, uninterrupted sequence of conduct over a very short period of time.” Id.; see also State v. Dolen, 83 Wn.App. 361, 365, 921 P.2d 590 (1996), rev. denied, 131 Wn.2d 1006 (1997) (convictions for child rape and child molestation encompassed same criminal conduct because both offenses evidenced continuous sexual behavior over a short period of time).

Applying the test to the facts of this case, it is clear that Mr. Franklin’s offender score was incorrectly calculated because counts IV and VI constitute the same criminal conduct under RCW 9.94A.589, as do Counts I and V. Because there was a reasonable probability that the trial court would have found his current offenses to be the same criminal conduct, defense counsel’s performance was deficient when he failed to raise the issue at sentencing.

i. Counts IV and VI constitute the same criminal conduct. With regard to the basement incident, both Count IV (felony harassment) and Count VI (assault in the second degree) took place in the same location at the same time and involved the same victim. In addition, there was no discernable change in intent between the two crimes. The

criminal intent for the assault was to cause harm, and the threat merely announced the intent. Inflicting harm on Ms. Shorr furthered the crime of felony harassment by creating apprehension of more harm. In this way, one crime furthered another. Lessley, 118 Wn.2d at 777-78.

ii. Counts I and V constitute the same criminal conduct. The repeated commission of the same crime against the same victim over a short period of time falls within the “clear category of cases where two crimes will encompass the same criminal conduct.” Porter, 133 Wn.2d at 181. For this reason, delivery of methamphetamine followed by a delivery of marijuana to the same undercover officer constitutes same criminal conduct. Id. at 181. Similarly, multiple acts of rape against the same victim occurring very close in time constituted same criminal conduct. State v. Tili, 139 Wn.2d 107, 124-25, 985 P.2d 365 (1999).

During pretrial motions, the prosecutor admitted that counts I and V took place “at the exact same time.” 10/4/07RP 11. In closing argument, the prosecutor discussed counts I and V together as one incident of assault. 10/23/07RP 92-93. Both Counts I and V involve assaults against Ms. Shorr in front of the residence within moments of each other. Under Porter, the two assaults encompass the same criminal conduct.

iii. Defense counsel's deficient performance prejudiced Mr. Franklin. The prejudice prong of the Strickland test requires that the defendant show there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694. A finding of same criminal conduct by the trial court would have reduced Mr. Franklin's offender score, and a lower offender score could potentially lower his standard sentence range. A finding of same criminal conduct will also affect Mr. Franklin's offender score should he ever face another felony charge in the future. The appropriate remedy is to reverse the calculation of Mr. Franklin's offender score and remand for resentencing.

c. Defense counsel's failure to move for severance of the charges constituted ineffective assistance of counsel. Trial counsel never made a motion for severance prior to or during the course of trial. After the trial was concluded, new counsel was appointed to represent Mr. Franklin, and a motion for a new trial was made, based in part on trial counsel's failure to seek severance. CP 139-82; 2/22/07RP 6. This motion was denied by the trial court. 2/22/07RP 17.

Although CrR 4.4(a) provides that severance is waived if a motion is not timely made, a defendant may assert on appeal that counsel's

performance was deficient for failing to make (or renew) a motion to sever. State v. Standifer, 48 Wn.App. 121, 125-26, 737 P.2d 1308, rev. denied, 108 Wn.2d 1035 (1987). Showing prejudice entails demonstrating that the motion should have been granted, and that but for the deficient performance, the outcome of the proceeding would have been different. Id. at 126.

CrR 4.3(a) authorizes joinder of counts where the offenses are based on the same conduct or on a series of acts connected together. However, joinder of charges should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him a substantial right. State v. Smith, 74 Wn.2d 744, 754, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934, 33 L.Ed.2d 747, 92 S.Ct. 2852 (1972). Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. Smith, 74 Wn.2d at 755 (citing Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

Under CrR 4.4(b), severance of offenses shall be granted when “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” The rules for joinder

and severance are based on “the same underlying principle, that the defendant receive a fair trial untainted by prejudice.” State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999).

In determining whether the potential for prejudice requires severance, a trial court should consider the following prejudice-mitigating factors: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 13 L.Ed.2d 1005 (1995).

i. A timely motion for severance should have been granted because evidence of the multiple charges was not cross-admissible. If evidence of each of the crimes would be admissible in a separate trial for the other, the possibility of “criminal propensity” prejudice is not increased by the fact of joinder. Drew, 331 F.2d at 90.

In State v. Harris, 36 Wn.App. 746, 677 P.2d 202 (1984), the defendant was charged with two counts of rape against two different women for similar incidents separated by a two-week gap in time. His

defense on both counts was consent. Under ER 404(b), evidence of one crime was not admissible in a trial on the other charge. In the absence of cross-admissibility, there was “inherent prejudice” from the joinder of the two charges, and it was an abuse of discretion for the trial court to deny severance. Id. at 752.

In State v. Ramirez, 46 Wn.App. 223, 730 P.2d 98 (1986), the defendant was charged with two counts of indecent liberties against two little girls. He denied inappropriately touching either child. On appeal, the court found that evidence of the two counts was not cross-admissible, and that the joint trial of the separate offenses created an improper and “strong impression of general propensity” toward the offense. Id. at 227. The court reiterated that “joinder is inherently prejudicial.” Id. at 226. In reversing the conviction, the court concluded that “the jury may well have cumulated the evidence of the crimes charged and found guilt, when if the evidence had been considered separately, it may not have so found.” Id. at 228. In addition, the court was concerned that the jury may have used the evidence to infer a criminal disposition on the part of the defendant. Id.

Finally, in State v. Hernandez, 58 Wn.App. 793, 794 P.2d 1327 (1990), rev. denied, 117 Wn.2d 1011 (1991), the defendant was charged with robbing three businesses. He claimed mistaken identity. Where the

method in committing the crimes was not so unique as to make evidence of the three crimes cross-admissible under ER 404(b), the trial court's denial of a motion to sever amounted to a manifest abuse of discretion, and two of the three robbery convictions were reversed. Id. at 800.

In the case at hand, Mr. Franklin was required to defend against all eight charges in one trial. In denying the motion for new trial, the trial court concluded that had a severance motion been timely made, it likely would have been denied. 2/22/07RP 16-17. The court reasoned this was so because the charges were all in some way connected: the witness tampering charges showed consciousness of guilt regarding the underlying charges; the weapons charge was related to both the assaults and the harassment charge, since Ms. Shorr and Ms. Nicholson testified that they were menaced with and afraid of the guns in the home; and the drug charge was connected to the other charges because the drug investigation was what led to the other crimes being discovered. 2/22/07RP 15-17. However, the witness tampering charges (counts VII and VII) related only to the charges in counts I, II, and V. None of the charged assaults were allegedly committed with a firearm. CP 1-3, 11-13. The fact that all charges were in some way loosely connected merely demonstrates that the State could permissibly file them under the same cause number, not that a

timely motion for severance should not have been granted. Trial counsel's performance was deficient in not timely moving for severance.

ii. A timely motion for severance should have been granted because of the extensive ER 404(b) evidence concerning uncharged assaults that was admitted at trial regarding the felony harassment charge. ER 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Since the likelihood that juries will make such an improper inference is high, courts are to exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose.

In denying the motion for a new trial, the court ignored the vast amount of ER 404(b) evidence concerning uncharged assaults that was admitted at trial against Mr. Franklin. This evidence was only admissible regarding the felony harassment charge in count IV. One element of harassment is that the person threatened be placed "in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). The State offered evidence of prior uncharged assaults committed by Mr. Franklin to prove that Ms. Shorr was in reasonable fear that Mr. Franklin would carry out his

threat to kill her. Suppl. CP ___ (Sub. no. 62D at 6-9); 10/4/07RP 21.

The court agreed and allowed this evidence at trial. 10/4/07RP 22.

At trial, Ms. Shorr testified that Mr. Franklin was a violent individual. 10/15/07RP 30. She described an incident that took place a few months before Mr. Franklin's arrest where he assaulted Ms. Nicholson and pointed a gun at her head. 10/15/07RP 32-33. When Ms. Shorr tried to intervene, he assaulted her as well. 10/15/07RP 34. Afterwards, Mr. Franklin threatened to take Ms. Nicholson "to the track" to "pimp her out." 10/15/07RP 36. Ms. Nicholson testified to this incident as well.

10/11/07RP 18-21. She explained how she was "was scared to fight back," how "blood was all over the house because he kept kicking and hitting me," and how when Mr. Franklin held the gun to her head she "cried and prayed and said good-bye to my little girl." 10/11/07RP 19.

Ms. Shorr testified that she was afraid of Mr. Franklin in part because she had "heard stories" about his violence. 10/15/07RP 164. Mr. Franklin told her about violence he had inflicted on other women: one time "he slapped [Bonnie] so hard that she went into a seizure," and another time he "used cords to tie up [Trish] and whipped her with electric cords," sending her to "the hospital for a period of time." 10/15/07RP 39.

Ms. Shorr also testified regarding several different uncharged assaults that Mr. Franklin committed against her: making her bend over with her pants down and threatening to whip her with electrical cords; hitting her with a gun, causing a “huge bruise” on her arm; chasing her down the street with his gun out; and assaulting her and causing her to twist and injure her ankle, requiring surgery. 10/15/07RP 40 – 41, 97, 149-50. There was also an incident where Mr. Franklin beat her up at Craig’s house on Beacon Hill. 10/15/07RP 42-43. During this incident, Ms. Shorr testified that Mr. Franklin “charged me, and he started hitting me in the head and kicking me and threw me on the floor and was kicking me some more.” 10/15/07RP 43. When asked how long the assault lasted, she answered “If I had been beaten like that for more than five minutes I would have massive brain damage, probably.” 10/15/07RP 44. She said, “my face was out to here and black and blue, and my arm had lumps all over it. My ribs hurt. I was pretty messed up.” 10/15/07RP 43.

Finally, Ms. Shorr testified that on approximately January 30, 2007, when Mr. Franklin picked her up at Mr. Carter’s home, he was mad about her owing him money. 10/15/07RP 58. He threatened to “[guerilla] pimp” her in order to pay him back. Ms. Shorr explained what that meant: “Pretty much let anybody come up and have sex with me and pay him and

keep me there until I do what he says for these men until I broke even with him.” 10/15/07RP 58.

All of the ER 404(b) evidence was admissible only to prove Ms. Shorr’s reasonable fear in count IV. Count IV was based on the threat in the basement, and together with count VI, these charges were removed in time from all other charges, occurring several days prior to the second assault incident, the drug investigation, and the search of the home.

10/23/07RP 44. If those two counts were tried separately from the remaining six counts, none of the ER 404(b) evidence would have been admissible in a trial on counts I, II, III, V, VII, and VIII. As explained above, this evidence was extremely graphic and highly prejudicial. Under CrR 4.4(b), a “fair determination” of Mr. Franklin’s guilt or innocence on the remaining six charges demanded that they be severed from counts IV and VI.

CP 59 (Court’s Instruction #4) instructed the jury to decide each count separately. CP 63 (Court’s Instruction #8) attempted to instruct the jury that evidence of uncharged misconduct by Mr. Franklin should be considered only for the purpose of explaining Ms. Shorr’s fear when she

was allegedly threatened by Mr. Franklin.⁶ However, a limiting instruction could not cure the problem. The jury faced a difficult task of compartmentalizing the evidence. The multiple accusations bolstered each allegation. During deliberations it would be impossible to evaluate one claim without considering and comparing all of the other accusations. Such decision-making is improper, and severance should be granted when evidence of one crime taints the decision-making as to guilt for another crime. See Ramirez, 46 Wn. App. at 226.

iii. Mr. Franklin was prejudiced by the failure to sever charges. If the motion for severance had been granted, the outcome at trial would likely have been different. At a minimum, there should have been three separate trials: one trial for counts II, III, and VIII (the drug charge, the weapons charge, and the witness tampering charge related to the weapons charge); a second trial for counts IV and VI (the assault and felony harassment charges regarding the first assault incident in the basement); and a third trial for counts I, V, and VII (the two assault

⁶ Court's Instruction #8 also informed the jury that evidence of the assault on Ms. Nicholson was admitted to establish possession of a firearm. CP 63. This instruction was given in error, because neither Ms. Nicholson nor Ms. Shorr identified the gun used in the assault as one of the guns found in the house. 10/11/07RP 18-21; 10/15/07RP 122. In addition, the weapons charge (count II) was alleged to have taken place between January 29, 2007 and February 1, 2007. CP 48-51. The assault on Ms. Nicholson was said to have taken place months earlier. 10/15/07RP 33.

charges forming the second incident of assault plus the count of witness tampering related to those charges). Three trials would minimize the inherent prejudice of having all counts joined together in the absence of cross-admissibility. Ramirez, 46 Wn.App. at 226; Harris, 36 Wn.App. at 752. In addition, all of the ER 404(b) evidence was highly prejudicial, and would not have been admissible on the remaining charges if Mr. Franklin went to trial on counts IV and VI separately.

Here, prejudice of a joint trial was extreme. The jury could cumulate the evidence to find guilt when it would not have done so had it considered the charges separately. Smith, 74 Wn.2d at 755. No reasonable jury could help but be swayed by the cumulation of evidence regarding the eight charged offenses plus the uncharged evidence of additional assaults. The sheer number of charges and accusations may have resulted in feelings of hostility by the jury toward Mr. Franklin, and a single trial invited the jury to infer a criminal disposition on the part of Mr. Franklin. Smith, 74 Wn.2d at 755.

The justification for a liberal joinder rule is the economy of a single trial. Drew v. United States, 331 F.2d at 88. In assessing whether joinder is appropriate, courts must weigh the prejudice to the defendant of

the joinder against considerations of economy and expedition in judicial administration. Id.; Russell, 125 Wn.2d at 63.

While interests of judicial economy are respected in Washington, they do not trump an accused person's due process rights or society's interest in seeing an accused person receive a fair trial with a just outcome. Bryant, 89 Wn.App. at 865. The prejudice to Mr. Franklin of having to defend against all charges in a single trial deprived him of a fair trial and requires reversal of his convictions. Harris, 36 Wn.App. at 752; Ramirez, 46 Wn.App. at 226.

d. Defense counsel's failure to object to inadmissible hearsay testimony constitutes ineffective assistance of counsel. Whether evidence was properly admitted at trial is reviewed under an abuse of discretion standard. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). The issue is not generally preserved for appeal without an objection that states the specific grounds for the objection. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). However, failure to object to hearsay testimony can constitute ineffective assistance of counsel. State v. Hendrickson, 138 Wn.App. 827, 832-33, 158 P.3d 1257 (2007), rev. granted, 163 Wn.2d 1045 (2008).

i. Facts relevant to this issue. During trial, Ms. Nicholson was asked about statements made to her by Kelly Benchero. Defense counsel objected, but did not articulate a basis for the objection on the record. 10/11/07RP 68. The court called a sidebar conference, after which the objection was overruled. 10/11/07RP 68. The substance of the sidebar was later put on the record. The trial court indicated why it allowed the testimony:

Mr. B[e]nchero allegedly spoke for Mr. Franklin just as an attorney might speak for him. Allegedly, Mr. B[e]nchero was representing Mr. Franklin in this discussion with Ms. Nicholson. Whatever he said would be a party admission.

10/11/07SupplementalRP 2-3.⁷ The court further indicated that during the sidebar defense counsel agreed with her reasoning and did not pursue the objection. 10/11/07SupplementalRP 3.

Ms. Nicholson then testified that Mr. Benchero contacted her a couple of months prior to trial, and that he requested her (on Mr. Franklin's behalf) to testify that the guns found in the house belonged to her. 10/11/07RP 64, 68. This evidence formed the basis for the conviction in count VIII regarding witness tampering.

⁷ The supplemental transcript for 10/11/07, which is 8 pages in length, contains discussion among the trial court and counsel after the testimony had concluded for the day.

Later in the trial, Ms. Shorr testified that sometime in the Spring of 2007, Mr. Benchero "called me and he asked me to change my testimony on Chuck's behalf" by saying that Star, not Mr. Franklin, was the one who had assaulted her on or about January 30, 2007. 10/15/07RP 68-69. There was no objection by defense counsel to Ms. Shorr's testimony regarding what Mr. Benchero told her. 10/15/07RP 68-69. This evidence formed the basis for the conviction in count VII regarding witness tampering.

The only other evidence offered to prove the witness tampering charges consisted of recorded telephone conversations between Mr. Franklin (in the King County Jail) and Mr. Benchero, as well as the testimony of Mr. Benchero himself.

The telephone calls suggested that Mr. Franklin asked Mr. Benchero to contact two individuals and ask them something. Ex. 96-98. During one call, Mr. Benchero said, "I did get a hold of your second person on your list," and went on to say he was meeting her for coffee the next day. Ex. 96 at 2. During another call, Mr. Benchero said, "number one called me back" and says she has "got to think about it." Ex. 97 at 2. At a later call, he tells Mr. Franklin that he talked with person number one and that "she said you're out of your fuckin' tree." Ex. 98.

The State's theory was that "person one" referred to Ms. Nicholson, and "person two" referred to Ms. Shorr. However, the transcripts of the recordings do not establish who they were, what it was that Mr. Franklin wanted Mr. Benchero to ask the two people, or what Mr. Benchero discussed with them. Ex. 96-98.

Mr. Benchero, called as a State witness, testified that neither "person one" nor "person two" referred to Ms. Nicholson or Ms. Shorr. 10/18/07RP 49, 52. He denied attempting to induce either woman to testify falsely. According to Mr. Benchero, Mr. Franklin never asked him to contact Ms. Shorr or Ms. Nicholson. 10/22/07RP 12. Mr. Benchero testified he never contacted Ms. Nicholson. 10/22/07RP 22. He did speak with Ms. Shorr, but only to find out what she was going to say at trial. 10/18/07RP 74. He did not contact her on Mr. Franklin's behalf, and he did not attempt to induce her to testify falsely. 10/18/07RP 74.

ii. The testimony of Ms. Nicholson and Ms. Shorr concerning what Mr. Benchero told them is inadmissible hearsay. ER 801(c) provides that hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of Ms. Nicholson and Ms. Shorr (concerning what they were told by Mr. Benchero) was hearsay. The statements were offered for the truth of the matter asserted in order to

prove a material fact: that Mr. Franklin (through Mr. Benchero) attempted to induce the two women to testify falsely. Hearsay is not generally admissible in court. ER 802. Counsel's performance was deficient in not adequately objecting to this testimony. Hendrickson, 138 Wn.App. at 832-33.

The trial court appears to have allowed the testimony of Ms. Nicholson and Ms. Shorr based on ER 801(d)(2), which provides that admissions by a party-opponent are not hearsay if:

The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 801(d)(2) requires that the "agent" be authorized to make the statement on behalf of the principal. Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980); Crest Inc. v. Costco Wholesale Corp., 128 Wn.App. 760, 771, 115 P.3d 349 (2005). Such authorization must appear in the record. Barrie, 94 Wn.2d at 645. In addition, the requisite authority can only be established from the conduct of the principal, not by the conduct of the agent. DBM Contractors, Inc. v. State,

40 Wn.App. 98, 110, 696 P.2d 1270, rev. denied, 103 Wn.2d 1039 (1985). “Independent proof” must establish the speaker’s status as an agent and the nature and extent of his authority; in other words, there must be evidence independent of the hearsay statement itself. Passovoy v. Nordstrom, Inc., 52 Wn.App. 166, 171-72, 758 P.2d 524 (1988), rev. denied, 112 Wn.2d 1001 (1989).

Here, there was no independent proof in the record to establish that the statements allegedly made by Mr. Benchero were in any way authorized by Mr. Franklin. Mr. Benchero himself testified (as a State witness) that he was not acting at Mr. Franklin’s request. 10/22/07RP 12. The telephone recordings did not establish who the unnamed individuals were or what it was that Mr. Franklin wanted Mr. Benchero to ask them. There was thus no evidence independent from the hearsay to prove that anything Mr. Benchero said to Ms. Nicholson or Ms. Shorr was authorized by Mr. Franklin.

Under the coconspirator exception (ER 801(d)(2)(v)), the trial court must first find, by a preponderance of the evidence, the existence of a conspiracy, and that both the defendant and the speaker are members of the conspiracy. State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321

(1986); State v. Dictado, 102 Wn.2d 277, 283-84, 687 P.2d 172 (1984).

This finding must be based on evidence independent from the hearsay statements themselves. State v. Pierre, 111 Wn.2d 105, 118, 759 P.2d 383 (1988). In other words, the statements sought to be admitted cannot be considered in making this preliminary determination. Id. A conspiracy is defined as “an agreement ... made by two or more persons confederating to do an unlawful act.” State v. Halley, 77 Wn.App. 149, 154, 890 P.2d 511 (1995) (citing Webster’s Third New International Dictionary 485 (1969)).

Here, neither the recorded telephone conversations nor the testimony of Mr. Benchero established by a preponderance of the evidence that Mr. Franklin and Mr. Benchero had an agreement to perform an unlawful act. In the absence of independent evidence proving the existence of a conspiracy, Mr. Benchero’s statements to Ms. Nicholson and Ms. Shorr were inadmissible under ER 801(d)(2)(v).

iii. The failure of defense counsel to properly object to the hearsay evidence constitutes ineffective assistance of counsel. The statements of Ms. Nicholson and Ms. Shorr about what Mr. Benchero told them constituted inadmissible hearsay. The crime of witness tampering requires an attempt to induce a witness to testify falsely. RCW 9A.72.120.

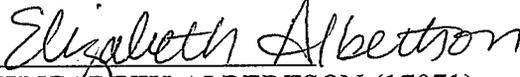
Since these statements were “key” to proving the witness tampering charges, there was no conceivable tactical reason for defense counsel’s failure to object, and “competent counsel would have objected.” See Hendrickson, 138 Wn.App. at 831-33. Counsel’s performance was therefore deficient. Moreover, the deficient performance was certainly prejudicial to Mr. Franklin. Without this evidence, there was a reasonable probability Mr. Franklin would not have been convicted on the witness tampering charges in counts VII and VIII.

F. CONCLUSION.

Numerous errors were committed in the court below: (1) the convictions in counts I and V violated the prohibition against double jeopardy; (2) the search of Mr. Franklin’s person was conducted without authority of law; (3) the State failed to prove a valid waiver of Mr. Franklin’s Miranda rights; and (4) Mr. Franklin was denied the effective assistance of counsel where his attorney failed to argue the issue of same criminal conduct, failed to move for severance of charges, and failed to object to inadmissible hearsay. These errors require reversal of all Mr. Franklin’s convictions.

DATED this 30th day of December, 2008.

Respectfully submitted,


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Washington Appellate Project (91052)
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Appendix A

OCT 24 2007

SUPERIOR COURT CLERK
EILEEN L. MCLEOD
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON;

Plaintiff,

vs.

JOHN CHARLES FRANKLIN,

Defendant.

)
)
) No. 07-1-00365-3 SEA
)
)
)

) [~~Proposed~~] WRITTEN FINDINGS OF
) FACTS AND CONCLUSIONS OF
) LAW IN ACCORDANCE WITH CrR
) 3.5 AND 3.6
)
)
)
)
)

In accordance with CrR 3.5 and 3.6, hearings were held before the Honorable Catherine Shaffer. After considering the evidence submitted by the parties, including the testimony of Seattle Police Department Officers Danial Conine, Amy Branham, David Bauer, and David Ellithorpe, as well as defense witnesses Kelly Banchemo, Milo Burshaine, and the defendant, John Charles Franklin, and hearing argument, the Court DENIES the defendant's 3.6 motion to suppress the evidence. The Court further finds the defendant's constitutional rights were not violated when he provided statements to Officers Branham, Ellithorpe, Kaffer, and Bauer. In support of these findings, the Court makes the following findings of facts and conclusions of law:

Findings of Facts

1. In the early morning of January 31, 2007, a Milo Burshaine was arrested by Officer Steve Kaffer and Danial Conine of the Seattle Police Department. In exchange for being allowed to go home that day (and not be booked on the warrant), Mr. Burshaine agreed to provide information a drug dealer he knew as John Charles Franklin, the defendant. Mr. Burshaine then told the officers where the defendant lived, and pointed out his house at 5040 35th Ave. South in Seattle, Washington. A conversation then occurred between Milo Burshaine and John Franklin, where Mr. Burshaine ordered

drugs from the defendant. This deal was closely monitored by Officer Kaffer. Specifically, Mr. Burshaine called the defendant, and the defendant said that he would call him back from another phone. At 2:10 a.m., Mr. Franklin called back Milo Burshaine from a different number and asked if the defendant could "hook him up." This was a clear reference to buying drugs. Mr. Franklin responded that he was in the kitchen, and that he would call Mr. Burshaine back in 15 minutes. Mr. Franklin then, at a later conversation, said that he was almost done and that he would call Mr. Burshaine again. Then Mr. Burshaine called and suggested a meeting at BJ's, and said that he had \$750.00. Mr. Franklin then said, "yeah, I got it." At the final conversation, the defendant then said that he would "be right there."

2. At roughly 3:15 in the morning on February 1, 2007, the defendant left the residence of 5040 35th Ave. South and started to drive from the residence. One minute later, officers pulled the defendant over, and arrested him.

3. In a search incident to arrest, the defendant was found to have roughly 40 grams of crack cocaine in his pocket. Further, the defendant was found to have two cell phones in his pocket, as well as over a thousand dollars in currency.

4. At the scene of the arrest, the officers provided the defendant with a partial version of his Miranda rights. The officers then transported the defendant to the precinct; at the precinct, the officers then provided the defendant with a fuller version of his Miranda warnings. The defendant indicated that he understood his Miranda rights.

5. The officers were then able to obtain consent from Mr. Franklin to search the residence of 5040 35th Ave. South. The officers then transported the defendant back to the home to do the search. In the meantime, the officers obtained a valid search warrant to search the residence of 5040 35th Ave. South. The officers started to search the residence based on his consent, and later searched the residence pursuant to the valid search warrant. The officers used a key to enter his residence.

6. During the search of the residence, the officers located several incriminating items, including two guns, narcotics, and a utility bill in the defendant's name dated roughly three months prior.

7. The defendant was clearly residing at least a portion of the time at this residence of 5040 35th Ave. South.

8. That the State's witnesses were credible; that the defense witnesses in this case were not credible to this Court.

Conclusions of Law

Based on the aforementioned findings of facts, the Court makes the following findings of facts and conclusions of law:

9. That the State has failed to prove to this Court that the defendant had an outstanding warrant on February 1, 2007.

10. That the officers had probable cause to arrest the defendant, John Charles Franklin, on suspicion of possession of cocaine with intent to distribute. This Court specifically finds that the officers had probable cause to believe that criminal activity was occurring with Mr. Franklin, and that his arrest on February 1, 2007 was proper and did not violate his constitutional rights.

11. That the search of the defendant was a proper search incident to arrest and did not violate the defendant's constitutional rights.

12. That the defendant had authority to grant a search of 5040 35th Ave. South, and that the defendant provided a knowingly, intelligently, and voluntary consent to search 5040 35th Ave. South.

13. That the officers also received a valid search warrant to search 5040 35th Ave. South, and did not act negligently, intentionally, or with recklessness when receiving either the consent to search or the search warrant of the residence. That the defendant's constitutional rights were not violated when officers searched 5040 35th Ave. South and when the officers seized evidence from that home.

14. That the defendant made a knowing, intelligent, and voluntary waiver of his Miranda rights, and that the defendant's constitutional rights were not violated when he made statements to the officers. The statements made by the defendant to the officers on February 1, 2007 are, thus, admissible.

15. In addition to the above written findings and conclusions, the Court incorporates by reference its oral findings and conclusions.

Signed this ²⁴~~23~~ day of October, 2007.



THE HONORABLE CATHERINE SHAFFER

Presented by:

Deputy Prosecuting Attorney

Attorney for Defendant

