

61481-9

61481-9

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NO. 61481-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN FRANKLIN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES

1. Generally, when the elements of two offenses are not the same, proof of one offense does not provide proof of the other, or the offenses do not arise from the same act, convictions for those offenses do not violate double jeopardy. Here, the elements of second and third-degree assault are not the same, and, under the facts of this case, the State could have proved the second-degree assault without proving the third-degree assault, and vice-versa. Was the defendant properly convicted of both second-degree assault and third-degree assault?

2. Probable cause provides officers with lawful authority to arrest and then search a suspect. In this case, the officer arrested and searched the defendant based on probable cause that the defendant possessed drugs. Has the defendant failed to show that the officer acted without “lawful authority?”

3. In order for custodial statements to be admissible, those statements must be made after the defendant is fully advised of his rights and knowingly, voluntarily, and intelligently waives them. A defendant may make an implied waiver of his rights. Here, the defendant said that he understood his rights and then spoke freely with the officers. Further, there was no evidence that the defendant was threatened or given any promises for talking with the officers. Has the defendant failed to show

that the trial court abused its discretion by concluding that the defendant waived his rights?

4. To succeed on an ineffective assistance of counsel claim, the defendant must show deficient performance and prejudice. A reasonable tactical decision cannot form the basis of an ineffective assistance of counsel claim. In this case, the defendant maintains that his counsel was ineffective for failing to (1) argue same criminal conduct, (2) move to sever the counts, and (3) object to alleged hearsay. As to each claim, however, either the trial attorney made a tactical decision, the court would not have granted the defense motion, or any deficient performance did not prejudice the defendant. Has the defendant failed to show ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant John Franklin was charged in King County Superior Court with eight crimes:

(Count 1) Assault in the Third Degree — Domestic Violence (for assaulting Sara Shorr with a board);

(Count 2) Unlawful Possession of a Firearm in the First Degree (“UPFA 1”);

(Count 3) Violation of the Uniform Controlled Substances Act — Possession with Intent to Deliver Cocaine (“VUCSA”);

(Count 4) Felony Harassment — Domestic Violence (against Sara Shorr);

(Count 5) Assault in the Second Degree — Domestic Violence (for assaulting Sara Shorr and recklessly inflicting substantial bodily harm — a broken nose);

(Count 6) Assault in the Second Degree — Domestic Violence (for assaulting Sara Shorr and recklessly inflicting substantial bodily harm — a broken collarbone and rib);

(Count 7) Tampering with a Witness — Domestic Violence (for tampering with Sara Shorr);

(Count 8) Tampering with a Witness — Domestic Violence (for tampering with Charlene Nicholson).

CP 48-51.

The jury found Franklin guilty on all counts. CP 106-07. At sentencing, the trial court imposed high-end, concurrent standard-range sentences totaling 120 months, based on an offender score of “9.”

CP 214-24. Franklin appealed. CP 227-38.

2. SUBSTANTIVE FACTS

a. Assaults And Felony Harassment.

When Sara Shorr first met the defendant, John "Chuck" Franklin, she was a homeless cocaine and heroin addict. 8RP 23.¹ Shorr and Franklin developed a relationship, and she soon moved into his residence at 5040 35th Avenue South. 8RP 24. Along with Franklin's roommate, Robin Jaycox, and Shorr, another of Franklin's girlfriends, Charlene Nicholson, would also stay at his place. 8RP 27-28. Franklin also had a separate residence that he shared with another girlfriend, Trish. 6RP 21-22.

Shorr dated Franklin off and on for roughly two years before his arrest on February 1, 2007, and she depended on him during this time for clothes, shelter, and money. 8RP 24, 29. Although Franklin sometimes

¹ The verbatim report of proceedings is cited as follows:

- 1RP (Oct. 4, 2007)
- 2RP (Dec. 7, 2007) (hearing to continue sentencing date)
- 3RP (Oct. 8, 2007)
- 4RP (Oct. 9, 2007)
- 5RP (Oct. 10, 2007)
- 6RP (Oct. 11, 2007)
- 7RP (Oct. 11, 2007, supplement)
- 8RP (Oct. 15, 2007)
- 9RP (Oct. 16, 2007)
- 10RP (Oct. 17, 2007)
- 11RP (Oct. 18, 2007)
- 12RP (Oct. 22, 2007)
- 13RP (Oct. 23, 2007)
- 14RP (Oct. 24, 2007)
- 15RP (Feb. 22, 2008).

treated Shorr well, he had a violent side. During trial, Shorr described how Franklin would assault her, threaten her, and brag about his violent behavior. 8RP 32-39. Shorr further saw Franklin put a gun to Nicholson's head and threaten to kill her. 8RP 32-39, 149-50.²

In one charged incident, around January 26, 2007, Franklin assaulted Shorr in the basement of his house, strangled her with a bed sheet, and threatened her life. 8RP 147. She suffered a broken rib and collarbone due to this assault. 8RP 147.

The following morning, Shorr left Franklin's home with the intent never to return. 8RP 48-50. She went to downtown Seattle, where she bought heroin and met a woman named Star. 8RP 49. Star introduced her to Jared Carter, and Shorr stayed at Carter's residence on Capitol Hill in an effort to avoid Franklin. 8RP 49.

While Shorr was at Carter's apartment, Carter received phone calls from someone claiming that he was Shorr's ex-boyfriend from Texas who was looking for her. 8RP 53; 9RP 156. Shorr suspected that the person calling was Franklin, and that Star had informed Franklin that Shorr was staying at Carter's apartment. 8RP 53.

² Several of these instances were not charged conduct, but were admitted under ER 404(b) to show Shorr's reasonable fear in order to prove the felony harassment charge, count 4.

On January 31, 2007 — less than a week after the basement assault — Franklin found Shorr. 8RP 84. On this day, Star came to Carter's apartment, and he agreed to give her a ride to her friend's house. 9RP 159-60. When Carter got into his car, Franklin and his friend, Vincent Washington, drove into the parking lot, blocking Carter in. 9RP 160. Carter exited his car to talk to Franklin, at which point Star grabbed Carter's keys and left with Carter's vehicle. 9RP 160.

Franklin demanded that Carter take him to Shorr, telling Carter that this could be done the "the hard way" or "the easy way." 9RP 162. Franklin further indicated that he would get Carter's car back and that his "plan" did not include Star taking the car. 9RP 163.

Carter reluctantly led Franklin to the apartment. Standing outside his apartment, Carter yelled "Chuck is here, Chuck is here." 8RP 55. Shorr responded that she did not want to see Franklin. 9RP 164. When Franklin commanded that she open the door, Shorr finally complied. 8RP 56; 9RP 164. Franklin, angry and carrying a gun, grabbed Shorr, led her outside, and forced her into his car. 8RP 54, 56; 9RP 164. Franklin, Washington, and Shorr then returned to Franklin's residence on 35th Avenue. 8RP 57. A few hours later, Star returned Carter's car. 9RP 168.

Upon returning home, and while they were still in the car, Franklin turned and punched Shorr, breaking her nose. 8RP 60. Franklin then led

Shorr to the base of stairs leading to the house, where he grabbed a board and struck Shorr in the leg several times. 8RP 61.

Franklin then went inside and told Nicholson that he “broke the bitch’s nose” and commanded Nicholson to put Shorr in the shower and clean her up. 6RP 34, 37. Franklin further told Nicholson that they had three options: they could return Shorr to Carter’s house, they could take her to treatment, or they could deal with her at home. 6RP 37. They decided not to take her anywhere. 6RP 38. Nicholson then put ice on Shorr’s nose and provided her a bucket in which to vomit. 6RP 37. Nicholson also went outside and cleaned up the blood. 6RP 40. Shorr then went to Jaycox’s bed and lay down. 8RP 63.

b. VUCSA, Tampering, And UPFA 1.

On the same day, January 31, 2007, in a separate part of Seattle, Seattle Police Department (“SPD”) officers arrested Milo Burshaine on a warrant for driving with a suspended license. 8RP 184. After the arrest, the officers told Burshaine that if he were willing to assist the officers in apprehending other drug dealers, they would not take him to jail that evening. 8RP 184. Burshaine agreed, and told the officers that he could buy drugs from Franklin. 8RP 186.³

³ Burshaine also told the officers that he saw Franklin assault Shorr with a board and thought that she had suffered a broken nose. 4RP 123-24.

In cooperation with the police, Burshaine called Franklin and ordered several drugs from him. 8RP 189-92; 3RP 127-32 (pretrial testimony). On the early morning of February 1, 2007, the officers arrested Franklin when he left his house to deliver those drugs to Burshaine. 8RP 186-200. At the time of arrest, Franklin had roughly 1.5 ounces of crack cocaine on him. CP 103; 3RP 64.

After the arrest, the officers received Franklin's consent to search his residence. 10RP 72. When they entered the home, they found both Shorr and Nicholson. 9RP 9. Once they found both women, they stopped the search to wait for a search warrant, which they received shortly after. 8RP 65; 12RP 82-83. In a search of the home, the officers found two guns, papers belonging to Franklin, baking soda in the kitchen, and several scales. 9RP 134-35; 10RP 29-36, 100-01.

Shorr was transported to Harborview Hospital, where she was admitted to the Intensive Care Unit and then spent roughly four days at the hospital. 8RP 67; 9RP 100-01. The doctors diagnosed her with a broken rib, collarbone, and nose, substantial bruises on her thigh, and brain contusions. 9RP 102. Her doctor specifically described her broken rib and nose as "acute," meaning they were incurred within the previous week. 9RP 103-05. Shorr told the doctors that her boyfriend had caused her injuries. 9RP 108.

Franklin was held in King County Jail pending trial. While in jail, he told his friend, Kelly Banchemo, to contact Shorr and ask her to say that Star assaulted her and caused her injuries, and to contact Nicholson and ask her to say that the guns belonged to her. Exs. 95-98 (transcripts of jail phone conversations between Franklin and Banchemo); 6RP 68; 8RP 69.

c. Trial.

During pretrial, Criminal Rule ("CrR") 3.5 and 3.6 hearings were held. Franklin argued that his arrest and the search of his person and home were improper. The trial court denied Franklin's CrR 3.6 motion, and found that his statements to the officers were admissible. CP 102-05.

During trial, the State called several witnesses, including Nicholson, Shorr, Carter, Banchemo, Dr. Cooper (Shorr's treating physician), several officers, and a representative from AT&T to introduce Franklin's cell phone records showing that he and Milo Burshaine communicated several times on February 1, 2007. Franklin called one witness, Vincent Washington, who testified that Franklin had moved out of the residence at 5040 35th Avenue several months prior to his arrest, that the guns did not belong to Franklin, and that Franklin never asked him to get electrical cords to use to beat Shorr, an allegation Shorr made during her testimony. 11RP 24-45. Although Burshaine and Franklin testified pretrial, neither testified at trial.

The State will provide additional facts as they relate to each argument.

C. ARGUMENT

1. FRANKLIN'S CONVICTIONS FOR SECOND-DEGREE ASSAULT AND THIRD-DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

Franklin argues that his convictions for second-degree assault (count 5) and third-degree assault (count 1) violate his double jeopardy rights because both convictions are based on the same act. Franklin's argument fails. The second-degree and third-degree assault charges are not the same in law or in fact and, thus, the convictions for these offenses do not violate double jeopardy.

a. Relevant Facts

On January 31, 2007, after Franklin took Shorr away from Carter's house, Franklin and Washington placed Shorr in the backseat of his car and then returned to the residence on 35th Avenue. 8RP 55. Franklin drove while Washington sat in the passenger seat. 8RP 57. During the drive, Franklin screamed at Shorr, claiming she owed him money. 8RP 57-58.

Upon arriving at the residence, Washington exited the car while Franklin and Shorr remained. 8RP 60. Shorr told Franklin that they were

“even” because of Shorr’s medical bills for treatment of her broken ankle caused by Franklin in a previous assault. 8RP 60, 152. After hearing this, Franklin, while still in the front seat, turned around and punched Shorr, breaking her nose. 8RP 60; 9RP 101.

Franklin then forcibly removed Shorr from the car. 8RP 60. He dragged her to the front of the house and commanded her to sit down at the base of the front stairs until she stopped bleeding; Shorr complied. 8RP 60-61. Franklin then grabbed a two-by-four board and hit Shorr three times on her leg and hip. 8RP 61.

The State charged Franklin with Assault in the Second Degree — Domestic Violence (substantial injury prong) based on Franklin punching Shorr while in the car and breaking her nose. RCW 9A.36.021(1)(a). The State charged Franklin with Assault in the Third Degree — Domestic Violence (instrument prong) for hitting Shorr with the board while she sat on the cement in front of the house. RCW 9A.36.031(d).

After the presentation of evidence, Franklin moved to dismiss one of these assault charges, arguing that the nose incident and the board incident constituted the same assault. 13RP 11-12. The trial court denied the motion, stating that “it is fair to say the Assault in the Second Degree that involved the fractured nose was finished before the Assault in the Third Degree involving the two-by-four began.” 13RP 14.

b. Franklin's Convictions On Counts 1 And 5 Do Not Infringe On His Double Jeopardy Rights Because The Offenses Are Not The Same In Law Or Fact.

To determine whether convictions of multiple crimes violate double jeopardy, the courts will initially look to the language of the statutes to determine whether the Legislature expressly permits or disallows multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If this step does not result in a definitive answer, the court turns to the two-part "same evidence" test, which asks whether the offenses are the same "in law" and "in fact." Id. at 777. If each offense includes elements not included in the other, the offenses are not the same "in law." Id. Offenses are the same "in fact" only when proof of one offense would also necessarily prove the other offense. Id. The failure under either prong of the same evidence test creates a strong presumption in favor of multiple punishments, which can be overcome only when clear evidence exists that the Legislature did not want the crimes to be punished separately. Id. at 778. This Court reviews a trial court's decision on double jeopardy de novo. State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).

The statutes for Assault in the Second Degree and Assault in the Third Degree do not expressly allow or disallow multiple punishments for

a single act. RCW 9A.36.021(1)(a); RCW 9A.36.031(d). Further, these offenses are not the same “in law” because each offense includes elements not included in the other. To commit Assault in the Second, Franklin had to “[i]ntentionally assault[] another and thereby recklessly inflict[] substantial bodily harm.” RCW 9A.36.021(1)(a); CP 49-50. To commit Assault in the Third Degree, Franklin had to “[w]ith criminal negligence, cause[] bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” RCW 9A.36.031(d); CP 48. Second-degree assault requires substantial bodily harm, an element that is not required to prove assault in the third degree. Third-degree assault requires an assault with an instrument, an element not found in second-degree assault. These two charges differ in law and, thus, convictions for both cannot constitute violate double jeopardy.

These two assaults are also not the same “in fact.” Although the prosecutor mentioned *pretrial* that these two crimes occurred at the “exact same time,” 1RP 11, the evidence *during trial* showed that Franklin initially punched Shorr while she was in the back of the vehicle; he then removed her from the car, sat her down in front of the house, grabbed a board, and struck her several times with the board. 8RP 60-61. The two assaults, thus, took place at different places, different times, with different means (fist vs. board), and the State could have proved second-degree

assault without proving third-degree assault, and vice-versa. Accordingly, the two convictions punish separate and distinct conduct and, thus, are separate “in fact.”

Because the offenses are not the same “in law” or “in fact,” this Court must find that Franklin’s two convictions can be punished separately unless “there is a clear indication of contrary legislative intent.” Calle, 125 Wn.2d at 780. Franklin fails to provide any legislative history, statutory analysis, or other argument suggesting that the legislature sought to provide a single punishment for violating both assault statutes.

Franklin asserts that because the assault statutes refer to an assault of a “person,” this means that multiple assaults against the same person cannot constitute separate punishments. Br. of App. at 13. This is incorrect. The cases relied on by Franklin merely hold that if one act of assault or reckless endangerment has multiple victims, the defendant can be charged with multiple acts of those statutes. See, e.g., State v. Graham, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005) (holding that unit of prosecution of reckless endangerment statute is each person endangered); State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004) (allowing three assault convictions where defendant fired single bullet into car occupied by three individuals), aff’d on other grounds, 159 Wn.2d 778 (2007). This case, however, involves multiple acts of assault against the

same victim, and Franklin has failed to cite any authority holding that the situation here cannot support multiple punishments.

Franklin then relies on State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), to argue that the two assaults here constituted a continuing course of conduct. Petrich merely holds that if two assaults constitute a continuing course of conduct, the State does not need to provide a *unanimity instruction*. Id. at 571. This is not the legal test for double jeopardy. The double jeopardy clause does not bar Franklin's convictions on counts 1 and 5.

2. THE OFFICERS HAD "LAWFUL AUTHORITY" TO ARREST AND SEARCH FRANKLIN.

Franklin argues that the officers did not have "authority of law" to arrest him. Franklin, however, does not contest the trial court's specific finding that the officers had probable cause to arrest him for drug possession. Instead, Franklin submits that there is no evidence that the search was valid because the trial court never specifically stated in its findings of fact and conclusions of law that the officers arrested Franklin *based on the probable cause* that the court found the officers had to arrest him.

For several reasons, this argument fails. First, although not stated explicitly, the court found that the officers arrested Franklin based on

probable cause that he possessed drugs. Second, even if the court did not make this finding, the record supports this conclusion. And finally, as long as probable cause exists to effectuate an arrest, the law does not require an officer or a court to specify the precise basis for the arrest.

a. Relevant Facts

In accordance with CrR 3.6, Franklin moved to suppress the evidence found on him, arguing that the officers did not have a valid reason to arrest him. A pretrial hearing occurred, which showed the following:

On January 31, 2007, Milo Burshaine and SPD officers agreed that Burshaine would order drugs from Franklin and then suggest an exchange of the money and drugs at the home of a mutual friend, BJ Seesay.

3RP 18. When Franklin would leave his home to meet Burshaine, the officers would arrest Franklin for possession of drugs with the intent to deliver and for his outstanding warrant. 3RP 18, 33, 62-63.

Burshaine contacted Franklin and ordered \$750 worth of drugs from him while officers waited outside Franklin's house. CP 102-03; Pre-trial Exhibit 3 (Statement of Officer Kaffer); 3RP 127-32. SPD Officer Kaffer closely monitored the conversation between Burshaine and Franklin. CP 103; 3RP 124-25. Franklin agreed to provide the drugs and meet Burshaine at BJ's. CP 103; 3RP 122, 132.

At around 3:15 a.m. on February 1st, Franklin left his residence and started to drive away. CP 103; 3RP 17. Officers Bauer and Ellithorpe stopped Franklin and arrested him based on (1) probable cause that Franklin possessed drugs and (2) an outstanding warrant. 3RP 63-64. SPD Officer Bauer indicated that he had authority to arrest Franklin because he was “in route to deliver the narcotics that we ordered up.” 3RP 64. Officer Ellithorpe also testified that they arrested Franklin based on his outstanding warrant “and the delivery of cocaine.” 3RP 78. During a search of Franklin incident to arrest, the officers discovered two cell phones and roughly 1.5 ounces of moist crack cocaine. CP 103; 3RP 64.

The court found that the State failed to show that a valid outstanding warrant existed to arrest Franklin, but held that the officers had sufficient probable cause to arrest him. CP 104; 4RP 112. In its findings of fact and conclusions of law, however, the court never explicitly stated that the officers arrested Franklin based on probable cause. CP 102-05.

b. The Search Incident To Arrest Was Valid Because The Officers Had Probable Cause To Arrest Franklin.

Probable cause for an arrest exists when facts and circumstances within the arresting officer’s knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. State v.

Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). Here, the court found that probable cause existed, and stated, although not explicitly, that the officer arrested Franklin based on this probable cause. The court concluded 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.” CP 102 (emphasis added). In its oral ruling, the court said that “I do think there was plenty of probable cause to arrest [Franklin] . . . [a]nd, of course upon arrest the officers were entitled to search him.” 4RP 112. The trial court was clear: that Franklin’s arrest was proper because *the arrest was based on probable cause*. Franklin’s argument that the trial court did not make this finding should be rejected.

Further, *even if* the trial court did not specifically state that the officers arrested Franklin based on probable cause, rather than the outstanding warrant, the record supports this conclusion. State v. Byrd, 25 Wn. App. 282, 289, 607 P.2d 321 (1980) (“A trial court’s correct ruling will not be disturbed on appeal merely because it was based on an incorrect or insufficient reason.”). Officer Bauer testified that the plan was to have Burshaine order drugs from Franklin and then arrest Franklin when he attempted to deliver those drugs, and that Bauer felt that he had probable cause to arrest Franklin for possession and attempted delivery of

drugs. 3RP 64. Officer Ellithorpe specifically stated that the officers arrested Franklin “for the outstanding warrant *and the delivery of cocaine.*” 3RP 78 (emphasis added). Officer Conine testified that when he was at the precinct, he told Franklin that he was under arrest, not for the warrant, but for possession of drugs with the intent to distribute. 3RP 37. The evidence shows that Franklin was arrested based on the officers’ belief that they had probable cause to arrest him for drug possession.⁴

And finally, even if the officers arrested Franklin for his outstanding warrant, and not on probable cause, his arrest, and subsequent search, would still have been valid. As long as probable cause to arrest exists, the subjective basis of the arrest is irrelevant. State v. Huff, 64 Wn. App. 641, 645, 826 P.2d 698 (1992) (“The validity of an arrest is determined by objective facts and circumstances.”). In Huff, this Court held that an arrest supported by probable cause is still lawful even when officers arrest a suspect for an offense for which probable cause did not exist. Id. at 648. In reaching this conclusion, this Court noted that the “law cannot expect a patrolman, unschooled in the technicalities of

⁴ This is confirmed by the testimony of Officer Bauer at trial.

Q: And why did you place [Franklin] under arrest?

A: He had an outstanding warrant for his arrest. And, because also – also because of the order-up that we had just done.

12RP 42.

criminal and constitutional law . . . to always be able to immediately state with particularity *the exact grounds on which he is exercising his authority.*” Id. at 646 (quoting McNeely v. United States, 353 F.2d 913, 918 (8th Cir. 1965)) (emphasis added).

This Court should reach the same conclusion here. It is uncontested that the officers had probable cause to arrest Franklin for possessing drugs; accordingly, it is irrelevant whether the officers’ subjective reason for arresting Franklin was his warrant or probable cause.

Franklin’s argument on this point relies primarily on a misinterpretation of State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). O’Neill holds that an officer who has probable cause cannot search a suspect incident to arrest until the officer actually *arrests* the defendant. Id. at 585-86 (holding that a search prior to a formal arrest was invalid, even though the officers had probable cause at the time of the search). The O’Neill decision does *not* say that if an arrest is supported by probable cause, the arrest is unconstitutional because the officer incorrectly thought he was arresting the defendant on a valid warrant. Here, the officer searched Franklin *after Franklin was arrested* and, thus, O’Neill is inapplicable. For all these reasons, Franklin’s argument fails.

3. FRANKLIN MADE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS.

Franklin contends that this Court should overturn his convictions for VUCSA (count 3) and UPFA 1 (count 2) because the trial court erred when it concluded after a CrR 3.5 hearing that Franklin waived his Miranda rights.⁵ Again, this argument fails. Substantial evidence supports the trial court's conclusion that Franklin made an implied waiver of his Miranda rights. Further, any statement admitted in violation of Franklin's Miranda rights was harmless error.

a. Relevant Facts

When Franklin was arrested on February 1, 2007, Officer Bauer read him a partial list of his Miranda warnings at the scene. 3RP 65-66. Officer Bauer then transported Franklin to the precinct, where he read Franklin his Miranda rights from a pre-printed card. 3RP 65-67. Franklin acknowledged his rights and indicated that he understood them. 3RP 66-68, 78-79.

Soon after Franklin was informed of his rights at the precinct, Officers Conine and Ellithorpe interviewed Franklin and attempted to get his consent to search his residence at 5040 35th Avenue South. 3RP 19, 80-81. Franklin apparently freely talked to both officers and answered

their questions. 3RP 18, 80-81. There is no credible evidence that, during this conversation, Franklin requested an attorney, asked to remain silent, or refused to answer any of the officers' questions. 3RP 87.

Franklin ultimately provided consent to search the house, and was transported to the house for the search. 3RP 33, 81. When Franklin arrived at his residence, Officer Branham again advised Franklin of his Miranda rights and asked him a few more questions, which Franklin answered voluntarily. 3RP 54, 60. Again, during his conversation with Officer Branham, Franklin did not ask for an attorney, did not invoke his right to remain silent, and did not say that he did not understand his rights. 3RP 54, 60. None of the State witnesses, however, testified that Franklin specifically stated that he agreed to waive his rights.

During the CrR 3.5 hearing, Franklin testified that he understood his rights, indicated that he knew what Miranda rights were, and that he had been arrested just a few days prior to this incident. 4RP 30-31. Further, Franklin said that he invoked his rights by asking for an attorney and telling the officers that he did not want to speak with them. 4RP 37-38, 41, 44. Franklin also denied making the comments that the officers attributed to him. 4RP 73-74.

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1620, 20 L. Ed. 2d 694 (1966).

The trial court did not find Franklin credible. CP 103. The court concluded that Franklin was given his Miranda warnings, that he understood his rights and voluntarily waived them, and that his comments were admissible in trial. CP 104; 4RP 113. As the court said: “[I]t’s clear to me that knowing about his rights and having those rights in mind that he chose to speak voluntarily to officers. I find no threats, no coercion, no promises.” 4RP 113.

During trial, Officer Branham testified that Franklin initially denied that any guns were in the house, but then later said that his roommate owned a gun and that it might be in the couch. 10RP 47. Officer Ellithorpe testified that Franklin said that the officers would find a firearm and more narcotics inside the house. 12RP 84-85. These were the only post-Miranda statements of Franklin admitted by the State.

b. Franklin Has Failed To Show That The Trial Court Abused Its Discretion In Finding An Implied Waiver Of His Miranda Rights.

In order for custodial statements to be admissible, those statements must be made after the defendant is fully advised of his rights and knowingly, voluntarily, and intelligently waives them. State v. Wheeler, 108 Wn.2d 230, 237-38, 737 P.2d 1005 (1987). A trial court’s determination of the validity of the waiver will not be disturbed on appeal where there is substantial evidence in the record from which the trial court

could have found by a preponderance of the evidence that the statements were voluntary. State v. Cushing, 68 Wn. App. 388, 393, 842 P.2d 1035 (1993). An explicit waiver is not required. State v. Rupe, 101 Wn.2d 664, 678, 683 P.2d 571 (1984). Implied waivers have been found where the record shows that a defendant understood his rights and thereafter volunteered information, or where answers were freely and voluntarily made without duress, promise, or threat and with a full understanding of constitutional rights. State v. Terrovona, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986). If statements were admitted in violation of a defendant's constitutional rights, reversal is not required if the error is harmless beyond a reasonable doubt. State v. Cervantes, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991).

Here, sufficient facts in the record exist to support the trial court's finding that Franklin waived his Miranda rights. Officer Bauer testified that Franklin said that he clearly understood his rights, and other officers testified that Franklin answered questions voluntarily. 3RP 55, 66-68, 78-79. Indeed, Franklin conceded that he understood his rights. 4RP 112 (court noting that "Franklin has admitted that he understood his rights."). Further, Franklin stated that he invoked his rights by asking for an attorney (a contention, however, that the court did not find credible). The fact that he understood his rights is further supported by the fact that

Franklin was just arrested a few days prior to this incident and presumably was given his rights then. 4RP 49. Finally, there was no credible evidence that any of Franklin's statements were made under duress or a threat from the officers, with false promises, or that Franklin asked for an attorney or invoked his right to remain silent.

c. Any Violation Of Franklin's Miranda Rights Was Harmless Error.

Further, any violation of Franklin's Miranda warnings was harmless beyond a reasonable doubt. The sole statement attributed to Franklin regarding drugs was his statement to Officer Ellithorpe that the officers could expect to find more narcotics in the house. Franklin's VUCSA conviction, however, was not based on the drugs in the house, but on the 1.5 ounces of cocaine found on Franklin when he was caught driving to meet Burshaine. The only items the State proved were cocaine were those found in Franklin's pocket when he was arrested. 9RP 48-68; Ex. 73 (crime laboratory report). Further, in closing argument, the prosecutor focused solely on the drugs found on Franklin as a basis to convict him for the drug offense, and did not even mention Franklin's statement to Ellithorpe, or any drugs found in the house, when discussing the VUCSA. 13RP 83-86.

And excluding Franklin's single comment about drugs, the evidence of his guilt on the VUCSA conviction was overwhelming. This evidence includes the fact that Franklin was found with 1.5 ounces of moist cocaine, that Burshaine had just ordered drugs from Franklin and Franklin was arrested when he was driving to meet Burshaine at BJ's, that Nicholson saw Franklin cooking crack cocaine immediately before he was arrested, and that officers found baking soda, an item used to make cocaine, inside the house. 6RP 45; 8RP 184-200; 12RP 43-45, 66. Based on this evidence, any improper testimony about Franklin's statement that more narcotics were at the house, a fact not related to his VUCSA conviction, was harmless.

Nor did the statements by Franklin that the State admitted at trial affect his conviction for UPFA 1. The statements were that the officers would find a gun in the house, and that the gun belonged to his roommate, not him. Those statements, however, were exculpatory and consistent with the defense — that the guns in the house did not belong to Franklin. 13RP 117-19 (defense counsel arguing this point in closing).

Further, excluding the statements regarding the guns, the jury would still have convicted Franklin of UPFA 1. The evidence at trial showed that Franklin lived at the residence where the guns were discovered, that the pistol was found in the nightstand of his room, and,

according to Nicholson and Shorr, the pistol and rifle belonged to Franklin. 6RP 25-28, 33; 8RP 74, 137. The fact that Franklin tried to get Nicholson to say the guns were hers — the basis of the tampering charge of count 8 — provides further damning evidence of his guilt on this charge.

4. FRANKLIN HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Franklin contends that his attorney acted ineffectively for failing to (1) argue same criminal conduct, (2) move to sever the charges, and (3) object to alleged hearsay. As explained below, Franklin's arguments fail.

In order to demonstrate ineffective assistance of counsel, the defendant bears the burden to show (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If the challenged action can be characterized as legitimate trial strategy, then it cannot serve as a basis for a claim of ineffective assistance of counsel. Id. at 77-78.

a. Franklin's Counsel Was Not Ineffective For Not Raising A Same Criminal Conduct Argument.

Franklin contends that his counsel was ineffective for failing to argue that his convictions in counts 4 (felony harassment) and 6 (second-degree assault), and counts 1 (third-degree assault) and 5 (second-degree assault), constituted the same criminal conduct. This argument fails. When Franklin committed the crimes alleged in counts 4 and 6, he did not have the same objective intent; when Franklin committed the crimes alleged in counts 1 and 5, he did not have the same objective intent and the crimes did not occur at the same time. Accordingly, none of his convictions constituted same criminal conduct and Franklin cannot show any prejudice from his counsel not raising this issue.

i. Relevant facts on felony harassment and assault.

Around January 26, 2007, Shorr and Franklin were at his residence when Franklin became angry that Shorr had been using heroin. 8RP 45. Upstairs, Franklin struck her several times. 8RP 45. Shorr then went to the basement, with Franklin following closely. 8RP 47. While in the basement, he kicked her while she lay on the ground. 8R 45-48. As a result of this assault, she suffered a broken rib and collarbone. 8RP 46. He also said, "don't think I won't kill you, bitch," causing her to fear for her life. 8RP 73, 153. After assaulting her, Franklin told her to get up, at

which point he strangled her with a bed sheet. 8RP 45-46. Based on this incident, the State charged Franklin with Felony Harassment — Domestic Violence (count 4) and Assault in the Second Degree — Domestic Violence (count 6).⁶

ii. Summary of the law.

Multiple offenses will count separately unless the trial court finds that the offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Two crimes constitute the “same criminal conduct” only if the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); RCW 9.94A.589(1)(a). Failure to meet any one element precludes a finding of same criminal conduct, and the offenses must be counted separately in calculating the offender score. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

In determining whether crimes shared the same criminal intent, the courts evaluate two things: (1) whether a defendant’s intent, viewed objectively, changed from one crime to the next; and (2) whether one crime furthered the other. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). As part of this analysis, courts consider whether the

⁶ For the relevant facts regarding the crimes alleged in counts 1 and 5, see supra pp. 10-11.

crimes are “merely sequential, or part of a continuous, uninterrupted sequence of conduct.” State v. Price, 103 Wn. App. 845, 858, 14 P.3d 841 (2000). The intent need not be a different *type* of intent. Different criminal conduct can be found when an intent is renewed or re-formed, creating a distinction from one act to the other; thus, unless the crimes are continuous, they are not the same criminal conduct. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

- iii. Franklin’s assault and felony harassment convictions were not same criminal conduct.

Although Franklin’s convictions for assault in the second degree and felony harassment clearly involved the same victim, and occurred essentially at the same time and place, they had different objective criminal intents to physically victimize and psychologically terrorize Shorr. In other words, the threats Franklin made did not somehow *further* the assault — that is, the threats did not make the commission of the assault more possible or in some way easier. Franklin might have a more viable or persuasive argument if the crime accompanying the harassment charge had been kidnapping or rape, where the threats might have assisted Franklin in subduing, gaining control over, or abducting Shorr. In this case, however, nothing in the record suggests that the threats Franklin made somehow assisted him or furthered his intent of trying to cause

physical harm to Shorr. Moreover, there is no evidence that the assault furthered Franklin's decision to threaten Shorr's life.

In contrast, the objective purpose of Franklin's assault was to cause her *physical*, as opposed to *psychological*, harm. Had Franklin merely wanted to physically harm Shorr, he could have simply beat her and kicked her without saying a word. But Franklin chose not to stop at that. Instead, he threatened her life while beating her. Similarly, had Franklin simply wanted to place Shorr in fear, he clearly could have done so without raising a hand to her. Thus, the events as they played out in this case clearly evidenced separate and distinct intents on the part of Franklin to harm Shorr both psychologically *and* physically. See State v. Wilson, 136 Wn. App. 596, 614-16, 150 P.3d 144 (2007) (holding under the facts of that case that crimes of assault and harassment were not same criminal conduct); cf. State v. Worl, 129 Wn.2d 416, 427, 918 P.2d 905 (1996) (noting that the defendant evidenced distinct intents in committing malicious harassment and attempted second degree murder).

- iv. Franklin's assault convictions were not same criminal conduct.

Although the two assaults (counts 1 and 5) were committed against Sara Shorr, they did not involve the same objective criminal intent. In Tili, the court determined that the three counts of rape constituted the

same criminal conduct where Tili's three penetrations of the victim were nearly simultaneous, all occurring within two minutes. Tili, 139 Wn.2d at 124. The court focused on the "extremely short time frame, coupled with Tili's unchanging pattern of conduct" and found it unlikely that Tili formed "an independent criminal intent between each separate penetration." Id.

In reaching its conclusion, the Tili court distinguished Grantham, 84 Wn. App. at 859, where the defendant twice raped the same victim, at the same place, within minutes of each other. Grantham forced anal intercourse on the victim, and then withdrew. Id. at 856. The victim crouched in a corner, while Grantham kicked her and called her names. Id. The victim begged him to stop and take her home. Id. At that point, Grantham forced her to perform oral sex on him. Id.

Although the rapes occurred close in time, the Grantham court held that they constituted different criminal conduct. First, the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Grantham, 84 Wn. App. at 859. Although the second rape had the same general objective intent as the first rape — sexual intercourse — the pause supported a finding that the second rape "was accompanied by a *new* 'objective intent.'" Id. (emphasis added). The "crimes were sequential, not

simultaneous or continuous.” Id. Second, each sexual act “was complete in itself; one did not depend upon the other or further the other.” Id.

Here, the facts are more similar to Grantham than Tili. Franklin hit Sara Shorr in the face, breaking her nose. After Franklin did this, he had time to reflect and cease his activity. Instead, he formed a new intent to commit a different assault. Franklin exited the vehicle. He went around the car and grabbed Shorr. He dragged Shorr to the bottom of the stairs. He told Shorr that she could not go inside until she stopped bleeding. He grabbed the board. Only after all of these acts did Franklin take the board, lift it, and put it to Shorr’s legs and hips. Because of the time to reflect between assaults, the two assaults were sequential, and were not simultaneous or continuous. Moreover, each assault was complete in itself. The two assaults were committed by different means, resulted in different injuries, did not occur in the same transaction, and one assault did not depend upon or further the other.

Moreover, the two assaults occurred at different times because the assaults did not constitute a continuing, uninterrupted sequence of conduct. In Price, 103 Wn. App. at 849, the defendant shot the victim while he was standing by her car. When the victim drove away, Price followed her onto the freeway and shot at her again. Id. at 849-50. This Court (Division 2) concluded that because the defendant had enough time

after the first shooting to return to his truck, pursue the victims up an on-ramp, and pull up next to them on the freeway, there was no continuing, uninterrupted sequence of conduct and, thus, the two shootings did not constitute same criminal conduct. Id. at 856. This Court should reach the same conclusion here.

The trial court would not have granted any motion that any of Franklin's convictions constituted same criminal conduct; accordingly, his ineffective assistance of counsel claim fails.

b. Franklin's Counsel Was Not Ineffective For Not Moving To Sever The Charged Counts.

Franklin argues that his attorney was ineffective for not moving to sever the charges into the following three trials:

Trial 1: counts 2, 3, and 8 (the drug charge, weapons charge, and witness tampering of Nicholson);

Trial 2: counts 4 and 6 (the basement incident — assault and the felony harassment charge); and

Trial 3: counts 1, 5, and 7 (the broken nose assault, the board assault, and the witness tampering of Shorr).

This argument is unpersuasive, as Franklin has not shown that his attorney acted deficiently or that the failure to move to sever the counts prejudiced Franklin at trial.

- i. Franklin has failed to show his attorney acted deficiently as his attorney had a legitimate trial strategy not to sever the counts.

Except for the VUCSA, all the counts relied, at least partly, on the credibility of Sara Shorr. If the defense could show that she was not credible on *any* of the charged allegations, this would increase the chance that the jury would find her not credible on the other charged allegations. In this sense, by joining the charges in one trial, the defense received more opportunities to impeach Shorr's testimony and attack her credibility. Put simply, the more allegations in a single trial the more impeachment opportunities. If the counts, however, were severed, Franklin would lose several chances to challenge Shorr's credibility in each trial.

This strategy is especially compelling when dealing with the ER 404(b) evidence, *none* of which was corroborated by physical evidence.⁷ If defense counsel could put doubt into the jurors' minds that Shorr either exaggerated or fabricated *any* of the ER 404(b) evidence, then

⁷ The ER 404(b) evidence included testimony from Shorr that Franklin had pointed a gun at Charlene Nicholson, that Shorr had heard stories about his violence, and that Franklin had admitted to whipping his girlfriend, Trish, with electrical cords and slapping another ex-girlfriend. 8RP 18-21, 32-36, 39, 164. Shorr also described several uncharged assaults against her, including a time when Franklin hit her with a gun, chased her down the street with his gun out, assaulted her (resulting in her breaking her ankle), beat her up at "Craig's" house on Beacon Hill, and threatened to whip her with electrical cords. 8RP 40-44, 97. This evidence was admitted to show Shorr's reasonable fear when Franklin threatened to kill her. CP 63.

it was more likely that the jury would doubt her credibility on her other allegations, including the charged assaults and harassment. In other words, by having all the allegations presented in one trial, defense counsel tactically hoped that the jury would find her not credible on just one of the allegations, and the State's case would then crumble.

This was not an unreasonable trial strategy, as Franklin's counsel tried to cast doubt on several of the charged and uncharged allegations by Shorr. 8RP 98-99, 121, 126, 139-47; 13RP 120, 123. For example, Franklin's only substantive witness, Vincent Washington, unequivocally denied that Franklin had ever asked for electrical cords to use against Shorr, an allegation made by Shorr in her testimony. 8RP 126; 11RP 37. Further, Franklin tried to cast doubt on Shorr's ER 404(b) allegations by showing that even though Shorr claimed several witnesses saw her get assaulted, she did not know the names, addresses, or phone numbers for any of them. 8RP 129-32.

Other possible tactical reasons existed not to sever the charges. By allowing the jury to hear all the allegations in one trial, Franklin's counsel could more effectively argue that Shorr's allegations were false because there was no way that "for a three year period, free to come and go, that [Shorr] came back there with all this turmoil, violence and hatred towards her[.]" 13RP 119. Further, by hearing all the charges at once, the jury

might have felt that the State was overly aggressive in its charging, or it might have reached a compromise verdict to Franklin's benefit. Also, it is possible that Franklin did not want to pay his private counsel for three separate trials, certainly a reasonable choice under these circumstances.

- ii. Franklin has failed to show prejudice from his attorney failing to move to sever the counts.

To establish prejudice based on his attorney's failure to seek severance, Franklin must show that (1) had the motion been made it likely would have been granted, and (2) if the charges had been tried separately there was a reasonable probability the outcome would have been different.

State v. Warren, 55 Wn. App. 645, 653-54, 779 P.2d 1159 (1989).

Franklin does not meet either of these requirements.

First, the motion to sever would not have been granted. In a motion to sever, the defendant has "the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). When deciding a motion to sever, the court considers four factors: (1) the strength of the State's evidence on each count, (2) the clarity of defenses raised for each count, (3) the court's instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other crimes even if they had not been

joined. Warren, 55 Wn. App. at 655. No one factor is controlling and each must be considered in determining whether potential prejudice requires severance. Id.

The trial court would not have severed the charges in the way Franklin now proposes.⁸ First, the State's case on every single count was extremely strong. Second, none of the defenses conflicted with one another. Third, the court instructed the jury to consider each crime separately. CP 59.

In his brief, Franklin does not even attempt to argue that the first three factors support severance into three trials. Instead, Franklin focuses solely on the fourth factor, and argues that the trial court would have granted the motion for a new trial because the evidence in the three trials would not have been cross-admissible.

This is incorrect. In Franklin's proposed first trial (VUCSA, UPFA 1, tampering of Nicholson) and third trial (broken nose assault, board assault, and tampering of Shorr), the State would have been able to introduce evidence of the other tampering charge, either as *res gestae* or

⁸ The trial court denied Franklin's motion for a new trial based on his attorney acting ineffectively for failing to move to sever the assault and drug charges, and for not severing the tampering charges. CP 139-82; 15RP 6, 17. In his appeal, Franklin argues that his counsel should have moved to sever different counts, resulting in the three trials described above. Since the trial court did not specifically rule on the severance of these specific charges, the State will address them under the framework of ineffective assistance of counsel.

common scheme or plan. ER 404(b). Further, in the first (VUCSA, UPFA 1, tampering with Shorr) and second (basement incident) proposed trials, the State would have been able to show evidence that Franklin possessed guns, to prove UPFA 1 (count 2, trial 1) and show Shorr's reasonable fear for the felony harassment charge (count 4, trial 2).⁹

Further, if the court had provided three separate trials, as Franklin now suggests, many of the same witnesses would have had to appear for multiple trials and present the same evidence. Sara Shorr, Charlene Nicholson, and several of the officers would have had to testify in all three trials. Jared Carter testified about Shorr's condition after the basement incident as well as the events that led to the nose and board incident and, thus, would have had to testify in the second and third trials. Sergeant Pierson would have had to provide almost identical evidence in the first and third trials regarding the jail phone recordings. Vincent Washington testified for the defense on the weapons charge, the felony harassment, and the assault charges and, thus, would have had to come to all three trials. Kelly Banchemo also would have had to testify at the first and third

⁹ In a footnote, Franklin asserts that jury instruction #8 was error. This instruction told the jury that it could consider the assault of Nicholson, which occurred in 2006, to establish that Franklin possessed a firearm on January 29th to February 1, 2007. CP 63. This instruction was proper. The evidence of the assault against Nicholson was not used to show that Franklin had a propensity to carry firearms, but to show that the firearm he used to assault Nicholson was the firearm he possessed on January 29th to February 1st.

trials. Considering all the factors, Franklin has failed to show that a single trial was so manifestly prejudicial that it outweighed the significant resources that would have been wasted had multiple trials occurred.

Relying on State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990), State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), and State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984), Franklin contends that the multiple charges tried together caused substantial prejudice. Those cases, where the courts held the trial court erred by not severing the charges, are inapposite for several reasons. In those cases, the trial court refused to sever charges involving completely separate incidents against *multiple victims*, where none of the evidence on those separate counts was cross-admissible. The fear was that the jury would conclude it was too coincidental that several victims would accuse the defendant of similar acts on different days. See, e.g., Harris, 36 Wn. App. at 749 (prosecutor in closing emphasizing the “coincidence” that defendant had been “accused of two rapes within two-and-a-half weeks of each other”).

Moreover, in those cases, trying those counts together would not have saved substantial judicial resources because those incidents were entirely separate, and involved different witnesses (victims and officers) and testimony.

And finally, Harris and Hernandez involved separate allegations of sexual assault. In Bythrow, 114 Wn.2d at 718-23, the court held that the trial court did not abuse its discretion by denying the motion to sever two robbery counts, even though the second robbery would not have been admissible in a trial for the first robbery. The court specifically distinguished Harris and Hernandez, noting that those cases “involved sexual offenses” and that there is “great potential for prejudice inherent in evidence of prior sexual offenses.” Bythrow, 114 Wn.2d at 718 (quoting Harris, 36 Wn. App. at 752).

This is not the situation here. In this case, which did not involve sexual assault allegations, much of the evidence was cross-admissible (see above). Further, the assault and harassment charges are all against the same victim, Sara Shorr, meaning that the testimony of one victim would not influence the jury’s perception of the testimony of another victim — the situation in Harris, Ramirez, and Hernandez. Further, unlike the situation in the cases cited by Franklin, not severing the cases here would unnecessarily waste substantial judicial resources. Franklin, in fact, has failed to provide one case where the court severed counts involving assaults and tampering of the *same victim* over a short period of time.

Finally, there is not a reasonable probability that the trial’s result would have been any different if some of the charges had been severed.

This case did not involve some strong counts and some weak counts — a situation where overwhelming guilt of one charge might influence the outcome of the other charge.¹⁰ No evidence exists that Franklin wanted to testify as to some of the counts, but not others. And finally, the court instructed the jury to: (1) consider the ER 404(b) evidence only to show Shorr's reasonable fear on the felony harassment charge and (2) consider each count separately. CP 59, 63. There is no reason to believe the jury did not follow these instructions. Indeed, Franklin's counsel emphasized to the jury that a guilty finding on one count did *not* mean that Franklin was guilty of a separate count. 13RP 112-13.

c. Franklin's Counsel Was Not Ineffective For Failing To Object To Alleged Hearsay Evidence.

Franklin argues that his counsel was ineffective for failing to object to testimony from Shorr and Nicholson about what Franklin's friend, Kelly Banchemo, told them. This is wrong. The defense attorney had a potential strategic reason to allow any alleged hearsay. Further, these statements were admissible as admissions by a party-opponent. Finally, even if the court would have excluded some of the statements, the jury still would have convicted Franklin of the tampering charges.

¹⁰ In Hernandez, 58 Wn. App. at 800, the court held that severance should have occurred because the evidence of one of the robberies was strong whereas the evidence of the other two robberies was weak. In this case, however, the evidence against Franklin was strong on all counts.

i. Relevant facts

On May 19, 2007, Franklin told Banchero that they could not talk on the phone about a certain subject because their conversations were being recorded, and requested that Banchero visit him at the jail. 9RP 73-74; Ex. 95.¹¹ The following day, Banchero visited Franklin in the King County Jail, and Franklin asked Banchero to talk to two individuals for him. 11RP 48. Franklin and Banchero then agreed that when talking about these two individuals on the telephone, they would refer to them as “person #1” and “person #2,” so that anyone listening to their conversation would not know to whom they were referring or why Franklin wanted Banchero to contact them. 11RP 48-51.

During subsequent jail phone conversations, Banchero told Franklin that he spoke with person #1 and that “she’s just like fuck you. You’re out of your fuckin’ tree.” Ex. 98. As to person #2, Banchero said he contacted her and that he would meet her for coffee at 10:00 a.m. the following day. Ex. 96. Person #2 did not show up for the coffee, and Banchero apparently did not talk to “person # 2” again. Ex. 98.

Banchero testified that person #1 referred to Trish, Franklin’s girlfriend, and person #2 referred to Angie Banchero, Banchero’s niece.

¹¹ The State recorded and admitted several jail phone conversations between Franklin and Banchero. Exs. 95-98.

11RP 48-50. Banchemo asserted that he intended to talk to them, on Franklin's behalf, about money. 11RP 50. The State showed that this was false.¹²

To the contrary, the State proved that person #1 referred to Nicholson. Nicholson testified:

Q: What did Kelly Banchemo say to you?

A: Kelly Banchemo told me he was asking a big favor from Chuck, to say the guns were mine.

6RP 68. The State showed that Banchemo's statement to Franklin about the response of person # 1 was consistent with Nicholson's testimony:

Q: And how did you respond?

A: Excuse me. I can't remember if I said hell no, or excuse me, I might have said, fuck no. One of the two I said.

6RP 68.

¹² Banchemo insisted that, for some reason, Franklin and Banchemo wanted to keep Trish's and Angie Banchemo's name out of their telephone conversations, but the State showed that Franklin and Banchemo frequently used the name "Trish" and "Angie" throughout their conversations. 11RP 64; Ex. 96. Further, in one jail phone conversation, Banchemo said that he *contacted* person #2; in the same conversation, however, Banchemo tells Franklin that he could not reach "Angie Banchemo." 11RP 68-69. During testimony, Banchemo's response was that he "may have been confused." 11RP 69. Further, it makes little sense why Franklin and Banchemo would want to keep a conversation about money (as opposed to witness tampering) confidential, why Franklin's girlfriend, Trish, would say "hell no" to a simple money request, and why Franklin would have Banchemo contact his girlfriend for money rather than just ask her himself.

The State further showed that person #2 was Sara Shorr. Shorr

testified:

Q: Can you describe to me the conversation that you had with Mr. Banchemo?

A: He called me and he asked me to change my testimony on [Franklin's] behalf?

Q: What exactly did he request you to do?

A: That I change my testimony and say that Star is in fact the one who hit me.

Q: Was Star the one that hit you?

A: No, she wasn't even there.

Q: And did he say that this was on a request from Mr. Franklin?

A: Yes.

8RP 68-69. Again, Banchemo's comment to Franklin about the response of person #2 was identical to what Shorr said occurred.

Q: And how did you respond to that?

A: I said I would think about it, and we'd have coffee in the morning. I had no intention of complying with that request.

Q: And, [Banchemo] didn't want to meet you at a particular place?

A: He did, he wanted to have coffee the next day and talk about it. And I didn't want to talk about anything.

Q: Did he say you would meet him for coffee?

A: I did.

Q: Did you meet with him?

A: No, I didn't. I had no intention of meeting him.

Q: You stood him up, essentially?

A: Yes.

8RP 69-70.

When Nicholson first testified about what Kelly Banchero had asked of her, defense counsel objected and the court held a sidebar conference. 6RP 68. The court then overruled the objection. 6RP 68. Later, the court memorialized the sidebar, indicating that the court told the parties that Banchero was speaking as Franklin's agent. 7RP 3. The court noted that defense counsel then withdrew the objection. 7RP 3. Franklin's attorney did not object to Shorr's testimony about Banchero's statements.

- ii. Franklin has failed to show that his attorney acted deficiently.

Franklin's counsel had a legitimate tactical reason to withdraw his objection and allow Shorr and Nicholson to testify about what Banchero had told them. The defense knew that Banchero would deny talking to Shorr and Nicholson on Franklin's behalf, pitting Banchero's credibility against theirs. By allowing Nicholson and Shorr to testify about Banchero's comments, the defense had an opportunity to try to show that they were not credible. And if defense could show the jury that these witnesses were fabricating on the tampering charges, it is likely that the

jury would have found that Nicholson and Shorr lacked credibility on the other, more serious charges.

iii. Franklin has failed to show prejudice.

Further, Franklin cannot show prejudice as the trial court would not have granted a motion to exclude these comments. Indeed, the trial court denied defense counsel's objection, asserting that Banchemo's statements to Nicholson and Shorr were admissions by Franklin's authorized agent. ER 801(d)(2)(iii),(iv); 6RP 68; 7RP 2-3. This ruling was not an abuse of discretion. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (hearsay rulings reviewed for abuse of discretion).¹³

A statement is not hearsay if "the statement is offered against a party and is . . . (ii) 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." ER 801(d)(2)(iii), (iv). This rule requires that the agent have authorization to speak on behalf of the principal.

Barrie v. Hosts of America, 94 Wn.2d 640, 644, 618 P.2d 96 (1980).

When determining whether the agency relationship exists, the trial court

¹³ Although defense counsel withdrew his objection, the trial court had already ruled on his objection to the alleged hearsay. Accordingly, the State will analyze the trial court's decision under the abuse of discretion standard.

applies a preponderance of the evidence standard, and the court can consider the alleged hearsay statement. Condon Bros., Inc. v. Simpson Timber Co., 92 Wn. App. 275, 285-86, 289, 966 P.2d 355 (1998). The court, however, cannot find an agency relationship *only* from the alleged hearsay statement; the State must provide some evidence, apart from the alleged hearsay, to show the agency relationship. Id. at 286; Passavoy v. Nordstrom, Inc., 52 Wn. App. 166, 171-72, 758 P.2d 524 (1988) (holding hearsay statements *alone* insufficient to show agency relationship).

Here, both Nicholson and Shorr testified that Banchero told them that Franklin had asked Banchero to request them to change their testimony. 6RP 68; 8RP 69. The State, however, provided additional proof, *apart from the alleged hearsay statements*, to show that Banchero acted as an agent of, and on behalf of, Franklin. Banchero testified that he was authorized by Franklin to provide a request to person #1 and person #2. 11RP 48-51. And the evidence showed that these people were Nicholson and Shorr. Banchero's explanations to Franklin about the responses of person #1 and person #2 mirror what Nicholson and Shorr testified about how they responded to Banchero's requests. Further, Franklin and Banchero referred to everyone else by name except

“person #1” and “person #2,” indicating that these individuals were likely witnesses in a pending trial. And finally, proof that Franklin intended to speak to Nicholson and Shorr was corroborated by Banchemo’s insistence — shown to be false — that he was talking about Trish and Angie Banchemo. Considering all the evidence, the trial court properly exercised its discretion by concluding that Banchemo was Franklin’s speaking agent.

By the same reasoning, Banchemo’s statements are also admissible as statements of co-conspirators. Under ER 801(d)(2)(v), out-of-court statements are admissible if the statements were made by a co-conspirator of the defendant in furtherance of the conspiracy. ER 801(d)(2)(v); State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). The State must present evidence apart from the alleged hearsay showing the conspiracy. State v. St. Pierre, 111 Wn.2d 105, 116, 759 P.2d 383 (1988).

As explained above, see supra pp. 48-49, sufficient evidence existed, apart from the alleged hearsay, to show that Franklin and Banchemo conspired to tamper with Nicholson and Shorr. Accordingly, Banchemo’s statements are admissible as statements of a co-conspirator.

Further, even if Franklin did object, and even if the trial court would have ruled some of the questions and answers inadmissible, the jury still would have returned a guilty verdict on the two tampering charges. Even without the alleged hearsay, the State would have been able to show:

(1) that Franklin asked Banchemo to talk to person #1 and person #2, 11RP 48-51; (2) that, around the same time, Kelly Banchemo called Charlene Nicholson and *asked* her to say that the guns belonged to her, and that Banchemo called Sara Shorr and *asked* her to say that Star, not Franklin, assaulted her, State v. Collins, 76 Wn. App. 496, 498, 886 P.2d 243 (1995) (inquiries are not hearsay); and (3) that the responses of Nicholson and Shorr to Banchemo's requests mirrored what Banchemo told Franklin about how person #1 and person #2 responded.¹⁴

This evidence would have been more than sufficient to show that person #1 was Nicholson and person #2 was Shorr, and that Franklin, with Banchemo's assistance, tampered with both witnesses. Accordingly, Franklin fails to show prejudice from his attorney's failure to object, and his ineffective claim fails.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm.

DATED this 26 day of March, 2009.

Respectfully submitted,

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Deputy Prosecuting Attorney

Attorneys for Respondent

¹⁴ The only possible hearsay is the testimony by Shorr and Nicholson that Banchemo told them that *Franklin* wanted them to change their testimony.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elizabeth Albertson, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in State v. John Franklin, Cause No. 61481-9-I, in the Court of Appeals, Division I. of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

3/26/09
Date

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