

61777-0

61777-0

NO. 61777-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AMERJEET SOHAL,

Appellant.

FILED
2009 AUG 19 11 47 22
STATE OF WASHINGTON
COURT OF APPEALS

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLY PROCHNEAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

- 1. SOHAL'S COUNSEL'S WAS NOT INEFFECTIVE BY NOT OBJECTING TO WITNESS TESTIMONY THAT THE WITNESS' INTINTAL STORY WAS NOT BELIEVABLE**

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Following a jury trial in King County Superior Court Amerjeet Sohal was found not guilty of Assault in the First Degree but was found guilty of the lesser included offense of Assault in the Second Degree. CP 74-75, 80-86. Additionally by special verdict Sohal was found not to have been armed with a deadly weapon at the time of the assault. CP 73. This case is now before the court on appeal the sole issue being whether trial counsel's performance was ineffective based on his failure to object to certain testimony.

2. SUBSTANTIVE FACTS FROM TRIAL

On January 23, 2008, Amerjeet Sohal (Sohal) was at his residence with the victim Harjap Singh (victim). At some point in the evening they were joined by Munish Raj (Raj) and Ajay Kumar (Kumar). Raj and Kumar were longtime friends of Sohal's and had met the victim through Shoal. Later in the evening an argument broke out between Sohal and Singh inside the residence. The

argument moved outside where the Sohal stabbed the victim. He later fled the scene and was apprehended the next day staying at a friend's motel in Fife.

a. Testimony of Munish Raj

Munish Raj testified that he drove himself and Kumar to the Sohal's rental property in Federal Way. 4RP 11-12. He testified that when he arrived at the house Sohal and the victim had been drinking alcohol and continued to drink. 4RP 13-14. He further testified that he and Kumar were not drinking that evening. 4 RP 13. Sometime after they arrived Sohal and the victim got into an argument that escalated to the point that Kumar and Raj decided to split the two up to prevent any harm. 4RP 14-15.

Raj took the victim out to the driveway, leaving Sohal inside with Kumar. 4RP 15-16. After a few minutes Sohal came outside and began arguing again with the victim. 4RP 17-18. During the argument with Sohal he victim was pushed or fell to the ground. 4RP 19. Kumar and Raj again physically separated the two men. 4RP 19. Raj took Sohal back into the house through the open garage door, leaving the victim and Kumar outside. 4RP 20. Once inside the garage Raj closed the garage door. He and Sohal then left the house via the front door, to which Sohal had the keys. Raj

believed that the house was locked by Sohal after they came out through the front door. 4RP 20-21, 38-40. Raj testified that he did not have keys to the residence. RP 21.

Raj testified that Sohal asked him to drive him away from the residence. RP 21, 38. When Raj turned on his vehicle's headlights he noticed that the victim was bleeding. 4RP 22-23. At Sohal's request he drove the defendant to an area with a motel nearby and Sohal got out of the vehicle. 4RP 22. While enroute to that location Kumar called to ask what to do because the victim was bleeding heavily and appeared to have fainted. 4RP 23. After dropping Sohal near the motel, Raj returned to the residence to find the victim bleeding profusely. 4RP 24. He called 911 to get assistance for the victim. Police and medics arrived at the scene a short time later. Raj was later transported to the Federal Way Police Department where he gave a statement to Detectives Calhoun and Howell.

The initial story that he told the detectives was not consistent with what he testified to on the stand. 4RP 25. When asked if he told the police the same story that he testified to Raj stated "not the first time because we were scared; we didn't want to get involved in this. So we just made up a story to tell them that we weren't there

when this happened.” 4RP 25. On cross he elaborated that they had made up the story about going to get dinner and returning to the residence to find the victim alone and bleeding in the driveway. 4RP 42-43.

He went on to testify referring to Sohal “I did, but you know, we thought, you know, we didn’t want to get involved. We didn’t want to say his name or anything, that he was there. We just said that we didn’t actually see anything” 4RP 26. When asked on direct why he told the police that he had not seen anything he stated “Because he [Sohal] is like my brother. So I didn’t want anything to happen to him. So is Harjap, both good friends.” 4RP 34.

When asked on direct why he changed his mind and decided to tell the police the truth about what had happened Raj Responded “Because they told use if we told the truth they would not lock us up. Ajay went before me; so they knew what happened. Maybe he told them. So they were telling us the neighbors told us what they saw, and if you don’t tell us, then we are going to put you in jail. So we got scared. So that is why we told them what happened.” 4RP 28.

On cross defense counsel questioned Raj at length about his changing stories and why he made up the story about having gone to get pizza. 4RP 42-44. His line of questioning inferred that Raj and Kumar had changed their stories because out of fear that they would be arrested.

Q: Okay. You indicated that the police scared you, that if you did not tell them something different, that you would go to jail?

A: Yes

Q: Were the officers angry with out because of what you were saying?

A: At one point when he told them about the pizza, he got, one more time I'm going to ask you, you had better tell me the truth or I am going to put you in jail.

Q: Were they angry with you?

A: Not angry. He was just asking, just tell the truth, you know your friend is almost dying, you know, we need to know what is going on.

Raj also testified that it was the victim who encouraged he and Kumar to make up the story. "He told us that, don't tell we got into a fight, just say whatever you want. Don't tell anything happened here. So that is why we made up the story, telling them that we were not there at the time." 4RP 46.

b. Testimony of Ajay Kumar

Ajay Kumar testified at trial that he had known Sohal for 7 or 8 years and that he had known the victim for just a few months. 4RP 54-55. On direct he testified that he and Raj had gone to Sohal's house. 4RP 57. When they arrived Sohal and the victim were there drinking. 4RP 58. He testified that at some point in the evening he had stepped outside to talk on the phone, when he came back inside "they were like fighting and yelling at each other. They we tried to stop them, everything so I was holding onto Amarjeet, and Munish was holding onto Harjap." 4RP 62. He also testified that he was worried that someone would get hurt. 4RP 63.

Kumar testified further on direct that Raj took the victim outside and that he remained inside with Sohal. 4RP 63. He stated that when he went into the bathroom Sohal. 4RP 63. Kumar initially testified that he was inside when the victim was stabbed. 4RP 64. Upon further questioning he was able to describe where in the front yard the stabbing took place. 4RP 65. He also testified that he heard the victim state that he had been stabbed, 4RP 71, and that he and Raj had to physically separate the Sohal from the victim. 4RP 81-82. He pulled Amerjeet [Sohal] back and Muinsh grabbed Harjap [victim]. 4RP 82.

Raj and Sohal left in Raj's vehicle leaving Kumar and the victim alone at the residence. On direct examination Kumar testified that he did not have keys to the residence. 4RP 73. He further testified that he had tried to open the front door and even went around to the back of the house to see if he could get inside but he was unable to get into the house. He testified that he did this because it was cold and raining. 4RP 73-74. Kumar testified that while he waited for Raj to return he took off his shirt and pressed it to the victim's wounds in an attempt to stop the bleeding. 4RP 74. Kumar called Raj and asked what he should do. He testified that he waited for Raj to return to call 911 for help. He further testified that he expected that Raj would have brought Sohal back with him when he returned, but that Raj returned alone. 4RP 74-75.

When the police arrived he initially told them the story about having gone for pizza and that he was not there when the assault occurred. 4RP 77. When asked why he told the story about going to pick up the pizza he responded "Because he is my friend, and Harjap is my friend. Then we just made it up because we did not want both of them to get into trouble and we don't know who did it.

And even if he did it, he stabbed him, it was a mistake, like a misunderstanding.” 4RP 77.

On cross defense counsel went after Kumar and his reasons for changing his story.

Q: Did the police get angry at you?

A: yes

Q: Did you feel threatened by the police?

A: He told me that I, the police inspector, he said if you don't tell us everything I will put you in lock up right now.

5RP 12. On redirect when asked if he had been being truthful to the police when he told them that he and Raj had gone out for pizza and that they were not present when the stabbing occurred he responded “That's wasn't true.” 5RP 13.

c. Testimony of Detective Adam Howell

Detective Howell testified after both Raj and Kumar. 5RP 53-71. He testified regarding his interviews of both Munish Raj and Ajay Kumar. 5RP 58. He first interviewed Kumar. 5RP 58.

When Detective Howell testified regarding Mr. Kumar's demeanor during the initial portion of the interview he did not say that Kumar was lying as stated in the appellant's brief. Instead he described the witnesses behavior while giving his statement.

- Q: What was Mr. Kumar's demeanor when you first met with him?
- A: Initially it was real vague, somewhat evasive.
- Q: What do you mean by evasive?
- A: Wasn't very responsive to pointed direct questioning. He seemed to really stick to what I interpreted to be a prepared statement and then when he was asked questions that did not appear that he was ready for he would attempt to stall or concoct in the process.
- Q: Was that the story about having gone to get the pizza?
- A: That was one of them.
- Q: You said that he attempted to stall. What did he do when he was stalling?
- A: He would – it was kind of like he would look at the floor, look at the ceiling, look anywhere else but at me. You could see his eyes kind of roll back in his head and when I would press him for a direct answer at one point he said hang on a second I'm trying to think. And it was pretty apparent that he was attempting to formulate a response as opposed to just recalling something from memory.
- Q: And at some point did that change?
- A: It did.
- Q: In the course of the interview?
- A: Do you know what caused it to change?
- Q: Frankly I challenged him on it. I called him out and said, "Look I know that you are lying to me. I understand that you may have your own motive for

doing so.” But I explained to him, it’s very important that we find out what was going on that night and at that point his posture changed considerably. His shoulders slumped. He just started speaking directly to me.

5RP 58-59.

Detective Howell’s testimony continued to focus on Kumar’s physical demeanor during the rest of the interview.

Q: Was he able when he was relaying what happened to you, to maintain eye contact with you at this point?

A: Yes.

Q: Did he seem to be taking as many pauses to think things through before he spoke?

A: No. And frankly the cadence of our conversation changed considerably also. Prior to that, you know, he would make a statement and then I would say something to clarify. And more often than not he would say something to the effect of, well, I just told you, you know, A, B, C, or whatever then that line of questioning stopped. I started getting direct answers to my direct questions after that?

5RP 60.

On cross examination defense counsel employed a similar line of questioning with Detective Howell as he had with Kumar and Raj. In what was likely a tactical maneuver to demonstrate that the witnesses had been threatened into changing their stories, counsel inquired as to specific statements and questions posed by the

detective to witness Kumar from a transcript of that recorded interview, such as:

Q: And did you tell him you did not have time for his bullshit?

Q: That he was blowing smoke up your ass?

Q: Did you tell him that things were about to get ugly for him if he didn't start being upfront?

5RP 67-69.

The State objected to defense counsel's line of questioning and the objections were overruled. 5RP 67-68. On redirect Howell explained that the language used with a witness is an "interview tactic" and that they "gauge the verbiage and tone base don the perceived resistance or apprehension, I would interview and speak to them all kind of different ways." 5RP 69-70.

It was not until after defense counsel questioned the detective regarding the firm language that was used with the witness implying that the officer had somehow coerced the statement from the witness that the prosecuting attorney asked directly about the truthfulness of the initial statements made by Kumar. Prior to that the officer simply testified to his observations of the witnesses demeanor.

With respect to Detective Howell's testimony regarding his interview with Munish Raj. Again the detective described Raj's physical demeanor while giving his statement.

Q: How did the interview begin?

A: Initially Mr. Raj was visibly nervous, visibly shaking, making you know furtive glances around the room, fidgeting. He clearly didn't want to be there. He initially told the same story that he and Kumar left the house to get pizza, leaving the victim alone there and when they came they found him stabbed, immediately propped him up and said, "What happened?" and he immediately started telling the complete story corroborating most of what Kumar told us.

One question later the prosecutor asked the following question:

Q: All right. And once he started talking about the events as though he had been present during them, did his demeanor change while he was speaking with you.

A: He actually seemed kind of dejected by the whole thing. Again, his posture changed, you know. There is a point at which someone eventually becomes truthful with you where, you know the posturing kind of goes away, where they physically submit and sit up in their chair where the stress is you know, kind of all in their shoulders, he actually seemed kind of depressed by the whole thing.

5RP 62-63. Defense counsel objected to the remainder of the officer's statement and it was stricken from the record. The fact that counsel objected demonstrates that when the officer testified about something that he did not believe was proper or did not lend

itself to the defense theory that the witnesses were bullied into making their statements that he did object.

During trial Detective Howell testified that in addition to interviewing Raj and Kumar he also went to the nearby Century Motel where he obtained hotel registration information for Sohal and a set of keys left behind in the room. 5RP 54-55.

d. Testimony of Detective Debra Calhoun

Detective Calhoun testified that she was among other things involved with the evidence collection at the residence where this assault took place. 3RP 73-91. She testified that she recovered the bloody knife from inside the previously locked garage. 3RP 93. She also submitted the knife to the Washington State Patrol Laboratory for DNA testing which came back positive for the victim's blood. 5 RP 77.

Detective Calhoun testified that that she was present during the interviews of Raj and Kumar and her testimony regarding their demeanor during the interviews was similar to that of Detective Howell's. 5RP 72

e. Corroborating testimony

i. Testimony of Anil Kotayia

This testimony was corroborated by witness Anil Kotayia, who testified to the hotel registration documents and that a room had been rented to Amarjeet Singh Sohal. 5RP 37-45. She further testified that when she checked the room she found a set of keys inside which she turned over to the police. Further she testified that the defendant checked in and out quickly, within an hour. 5RP 37-45.

ii. Testimony of Parjamit Singh

Mr. Singh testified that his family owns the Sunshine Motel where the defendant was taken into custody the day after the victim was stabbed. 6 RP. He testified that contrary to usual procedure at the motel he did not fill out the usual paperwork for the check in. 6RP 63. This witness gave a statement to the police that:

Today at 11:00 Amarjeet called me to say that he was in trouble, but he said that he was in a fight with Harjap Singh and he is in the hospital. Amarjeet told me that Harjap got stabbed, but he didn't say who did it. Amarjeet told me someone was looking for him. I don't know. I met him at 272nd and Pacific Highway at 11:00 12:00. I gave him a ride in my Acura, WA license number 056OBX to my house then we came to our hotel at – I don't know the time there. I check him in at 2:18, and he was alone. I realize that I may have been helping him with the assault of Harjap.

6RP 66-67. The defendant all but confessed to this witness and this witness testified that he knew he may be helping conceal him after having committed the assault.

iii. Testimony of Janet Welch

Janet Welch testified that she was at home in her room when she heard an argument in a driveway across the cul de sac from her house. 7RP 59. She testified that she saw two people arguing, and that there were one or two other people with them. 7RP 59. She stated "They were just kind of huddled around there; and once it started to become physical the other two, or whoever else, was trying to hold one man back." 7RP 59. She gave the same answer when questioned on cross examination 7 RP 67.

She further testified that some of the individuals, she could not say how many, went back into the house through the garage. They turned off the lights and exited through the front of the house. 7RP 60. This statement corroborates the testimony of Raj and Kumar and directly contradicts the testimony of the victim that he was stabbed by an unknown assailant while he was smoking outside by himself.

f. Testimony of Harjap Singh

The victim testified that he was at Sohal's rental property alone outside in the driveway smoking a cigarette when a black car drove up to the end of the driveway, two men got out and approached him. One of the men stabbed him. He could not give descriptions of his alleged assailants. 7 RP 36-39. According to his testimony the assailant said nothing to him did not ask for anything, simply ran up stabbed him and ran away. 7RP 39. This testimony is contradicted by both Raj and Kumar as well as by Janet Welch. It is also contrary to the physical evidence that the bloody knife was located locked inside the garage.

The victim testified that both the front door and the garage door were open when he went outside to smoke. 7RP 28, 38. He was able to offer no explanation for how the house came to be completely locked up. The defendant testified that on the night that he was stabbed he was drunk. 7RP 36-37. He also testified that he had difficulty remembering things that happened after the police and paramedics arrived and after he was transported to the hospital. 7RP 40-43.

The victim testified that he and the Sohal were very good friends. 7 RP 32. They had grown up together and that he worked

for the Sohal. 7RP 56. He further testified that he is not only friends with Sohal he was also family friends with him both here and in India and that they had known each other for over 25 years. 7RP 46-47.

g. Defense counsel's closing

In closing argument defense counsel continued with the theme that Raj and Kumar were coerced by police into changing their stories and that were liars and could not be trusted and. He stated "So they are clearly liars. Well, you have to decide whether they lied the first time or the second time or whether they lied here in court. But they both told you the same thing. They were pressured by the police." 7RP 107-108.

At another point in closing he stated "the question is whether you can take people who are – witnesses who are admitted liars, and whether you can take their testimony and say 'Hey this is enough to overcome that presumption of innocence beyond a reasonable doubt.'" 7RP 99. Defense counsel didn't object to the detectives' testimony because his argument depended on being able to call Raj and Kumar liars.

C. **ARGUMENT**

THE APPELLANT HAS NOT MET ITS BURDEN TO ESTABLISH THAT COUNSEL'S LACK OF OBJECTION TO CERTAIN TESTIMONY WAS DEFICIENT, NOR HAS HE SHOWN THAT IF COUNSEL WAS DEFICIENT THAT HE WAS PREJUDICED IN ANY WAY.

Here, the appellant asks this court to reverse the trial court's rulings and grant him a new trial based on ineffective assistance of counsel at trial. As the Supreme Court noted in Strickland, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984). To sustain a claim of ineffective assistance of counsel, the appellant must prove (1) that counsel's representation was deficient, and (2) that the deficient representation prejudiced the defense. State v. Hendrickson, 129 Wash.2d 61, 77-79, 917 P.2d 563 (1996) (citations omitted); See also, State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987) (citations omitted).

1. THE APPELLANT HAS FAILED TO ESTABLISH THAT THAT COUNSEL'S DECISION AT TRIAL NOT TO OBJECT TO CERTAIN QUESTIONS AND OR RESPONSES WAS NOT DEFICIENT

To satisfy the first prong, appellant must show that counsel made errors so serious they were not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Thomas, 109 Wash.2d at 225, 743 P.2d 816. An attorney's representation is considered deficient when it falls, "below an objective standard of reasonableness based on consideration of all of the circumstances." Id. at 226 (citing Strickland, 466 U.S. at 689, 104 S.Ct. 2052). In this assessment, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. Matters that go to trial strategy or tactics do not show deficient performance. Hendrickson, 129 Wash.2d at 77-78, 917 P.2d 563. Decisions regarding when and whether to object to testimony or certain pieces of evidence are the types of decisions that are classically strategic or tactical. As appellate courts have held, "Only under egregious circumstances, on testimony central to the State's case, will the failure to object constitute ineffective assistance of counsel justifying reversal." State v. Madison, 53 Wash.App. 754, 763, 770 P.2d 662 (1989).

The decision not to object to the testimony of the detective in this case had strategic advantages for the defense. Both of the witnesses testified prior to any testimony from the officers that they had initially lied to the police about what they had witnessed that evening. The testimony of Detective Calhoun and Detective Howell regarding their demeanor during the course of the interview served to reinforce that the witnesses had previously changed their story.

From a tactical position it gave the defense the opportunity to argue that the witnesses could not be trusted as they had previously been untruthful with the police. Additionally, through both direct and cross examination of the detectives defense counsel sought to bolster the theory that the witnesses had been bullied into changing their testimony.

2. THE APPELLANT HAS FAILED TO ESTABLISH THAT IF TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT, THAT ANY ERRORS WERE SO SERIOUS AS TO DEPRIVE THE APPELLANT OF A FAIR TRIAL

To satisfy the second prong, the appellant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. In order to establish prejudice, the appellant

must show that, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Hendrickson, 129 Wash.2d at 78, 917 P.2d 563 (citing Thomas, 109 Wash.2d at 226, 743 P.2d 816).

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse, and we explicitly are not referring to counsel in this case, it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

Madison, 53 Wash.App at 763.

“Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim.” State v. Kirkman, 159 Wash.2d 918, 928, 155 P.3d 125 (2007), citing State v. Madison, 53 Wash.App. 754, 770 P.2d 662 (1989) and State v. Heatly, 70 Wash.App. 573, 854 P.2d 658 (1993). The fact that an opinion encompassing the ultimate factual issue supports the conclusion that the defendant is guilty does not necessarily make the testimony improper. State v. Heatly 70 Wash. App. At 579., 854 P. 2d 658.

To determine if statements are to be considered impermissible opinion testimony the court should consider the following factors: “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” State v. Kirkman, 159 Wash.2d 918, 928, 155 P.3d 125 (2007), citing State v. Demery, 144 Wash.2d at 759, 30 P.3d 1278 (2001), quoting City of Seattle v. Heatly, 70 Wash.App. 573, 579, 854 P.2d 658 (1993).

In this case the witnesses in question are police officers offering testimony to provide context for the witnesses prior inconsistent statements after defense called into question the witnesses veracity and through questioning implied that Raj and Kumar had some how threatened into changing their stories. In State v. Demery, 114, Wash.2d 753, 30P.3d 1278 (2001) the court held that statements made by an officer during a taped interview accusing the defendant of lying do not carry the same aura of reliability as statements made during testimony. Citing Dubria v. Smith, 224 F.3d 995, 1001 n.2, 9th (Cir 2000) the court explained that a jury would not give the officer's statements in a pretrial interview any more weight than the fact that the prosecutor brings charges against the defendant. Here while the actual taped statement was not admitted it was clear from the Detective's testimony that they were describing the circumstances at the time the witness' statements were taken.

The Demery court determined that the officer's statements during the interview were not testimony and are admissible to provide context relevant to the responses of the defendant and do not constitute improper opinion testimony. State v. Demery, 114 Wash. 2d at 765. In this case Detective Howell's statements were not testimonial, they were statements made to provide context for his descriptions of the witnesses behavior and on redirect to address specific questions asked during cross about why the officer asked certain questions of the witnesses during the recorded interview.

The defendant was charged with assault in the first degree and the defense was general denial. The defense proposed a lesser included offense instruction for assault in the second degree and argued in closing that if the jury believed that the defendant perpetrated the assault that he did not have the requisite intent for assault in the first degree.

As described in more detail below there was ample evidence to corroborate Kumar and Raj's testimony regarding the Sohal's participation in the assault of the victim.

3. IF THE COURT FINDS THAT THE ADMISSION OF CERTAIN STATEMENTS CONSTITUTE A MANIFEST CONSTITUTIONAL ERROR, ALLOWING THE ARGUMENT TO BE REAISED ON APPEAL FOR THE FIRST TIME, THE APPELLANT CANNOT SHOW ACTUAL PREJUDICE THEREFORE THE ERROR WAS HARMLESS

Even if the court were to find that the admission of the statements referenced in the appellant's brief constitute a manifest constitutional error allowing the argument to be raised for the first time on appeal, the appellant cannot show actual prejudice and the error was harmless.

Even assuming error, reversal is still not required if the error is harmless. State v. Powell, 126 Wash.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). The State bears the burden of showing that the error is harmless beyond a reasonable doubt. Id., *citing Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431 (1986) (citations omitted). An error is harmless when there is no reasonable probability that the outcome would have been different had the error not occurred. State v. Powell, 475 126 Wash.2d 244, at 267 (citations omitted).

This case is distinguishable from those relied upon by the defense. In this case prior to the Detective's testimony regarding their interviews with Kumar and Raj, both of the witnesses took the

stand and testified under oath to the jury that they had initially lied to police when asked to describe what had happened that evening.

There was a tactical reason for defense counsel not to object to the officer's testimony, quite simply put it highlighted their prior inconsistent statements and reiterated that they had previously been untruthful. In this case the jury had an opportunity to hear from Raj and Kumar and determine for themselves whether they were telling the truth during trial.

In State v. Wilber, 55 Wash. App. 294, 303, 777 P.2d 36 (1989), the court of appeals upheld the conviction of the defendant despite officer testimony that a witness was afraid of the defendant and reluctant to identify him, after the witness' version of events had changed. This opinion was based in large part on the officers observations of the witness' demeanor. The court found that the admission of this testimony was harmless error because the initial statement given by the witness was consistent with the testimony of other witnesses. In this case the testimony of Raj and Kumar was not only consistent with each other it was consistent with the independent witness in the case Janet Welch as recited above. Additionally the defendant all but confessed to Parjamet Singh.

Furthermore the physical evidence corroborates the defendant's guilt. The knife with the victim's blood was found inside the garage, after the defendant had gone in through the garage and locked up the house. This is completely inconsistent with the victim's improbable version of events that some unknown assailant drove up stabbed him and then drove off. Neither the victim nor the witnesses had keys to the residence and the responding officers had to force entry into the residence to confirm that there were not additional victims or a suspect inside the residence.

The portions of the State's closing argument that the appellant claims were objectionable were not. The State is allowed to argue reasonable inferences from the evidence, which is precisely what was done in closing.

The Record in this case also establishes that the jury was properly instructed that they were the sole triers of fact and that they had the ultimate determination as to the credibility of the witnesses. The opening jury instruction given in this case states that jurors "are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each." Clerk's Papers (CP) 51-72. The jurors were further instructed that jurors "are not bound" by expert witness opinions, but "determin[e] the

credibility and weight to be given such opinion evidence." CP 51-72. Jurors are presumed to follow the court's instructions. See State v. Kirkman, 159 Wash. 2d at 938, 155 P.3d 125 (2007).

D. CONCLUSION

For the reasons stated above the court should uphold Amarjeet Sohal's conviction for the crime of Assault in the Second Degree.

DATED this 10th day of August, 2009.

RESPECTFULLY submitted,

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