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ORIGINAL

NO. 67667-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CURTIS HAMILTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the trial court abuse its discretion when it found that the Defendant, Curtis Hamilton, opened the door to his prior criminal convictions when, in violation of court orders, Hamilton repeatedly placed his character at issue and repeatedly told the jury a specific prison term he claimed to be facing if convicted?

B. STATEMENT OF THE CASE

By November 2010, Amber Hamilton (Amber) and Curtis Hamilton (Hamilton) were divorced and had three children together. 5RP 34-35.¹ At the time, Amber had an open case with Child Protective Services (CPS) involving all three children. 5RP 35. After Hamilton met certain requirements, he was allowed to see the children on supervised visits and call them on the phone. 5RP 36. However, CPS did not permit Hamilton to live in the home with the children, and if it was discovered by CPS that he was living in the home, CPS would possibly remove the children. 5RP 35-37. Additionally, there was a valid court order in place prohibiting Hamilton from having any contact with Amber. 5RP 28-29.

¹ The State adopts the citation method of Hamilton by citing to the verbatim report of the proceedings as follows: 1RP - 7/20/2011; 2RP - 7/21/2011; 3RP - 7/25/2011; 4RP - 7/26/2011; 5RP - 7/27/2011; 6RP - 9/2/2011.

In early November 2010, Amber was allowing her friend, Dena Carter, to stay with her and the children in her Woodinville home. 4RP 11, 14. On November 5, 2010, Hamilton was at Amber's Woodinville house. 4RP 16. Carter was also present. 4RP 16. Early on November 6, Carter saw Hamilton at Amber's house. Carter was awakened by Hamilton yelling derogatory names at Amber in an angry tone awakening her. 4RP 17-18. Carter saw Amber lock herself in a bathroom and she saw Hamilton hit the bathroom door at least once. 4RP 20-21. Carter tried to get Hamilton away from the door and told him to leave, but he began yelling at Carter. 4RP 21-23. At one point, Hamilton allegedly hit Carter in the mouth with his forearm and threw a glass of ice water at her, hitting her ring finger. 4RP 23-24. Hamilton left shortly after and Carter called 911. 4RP 27, 30.

The police arrived and took statements from Carter and Amber. 4RP 37-38, 69, 95-97. In her statement to police, Carter claimed that she and Amber were in the home on November 6, 2010 when Hamilton appeared out of nowhere and started yelling and screaming at Amber and Carter. 4RP 11, 42-43, 48

Following those police reports, the State initially charged Hamilton with burglary in the first degree and two felony counts of

violating a domestic violence no-contact order. CP 1-3. The burglary in the first degree charge was based on the original understanding that Hamilton did not live in the home, due to the 911 call and statements made by Amber and Carter. At the beginning of trial, the State dismissed the burglary in the first degree count and added a count of assault in the fourth degree. In doing so, the Prosecutor noted:

[A]fter further investigation it appears to the State that Mr. Hamilton was actually living in the premises, that it was not an unlawful entry, although the State believes there was a valid no contact order precluding him from being there, that his presence there was not unlawful insofar as the person that had the right to live there was not excluding him.

The original reports are different. After further investigation, the State believes that it would be inappropriate to go forward on the burglary in the first degree. I would note the assault in the fourth degree is the same assault that was the predicate assault for the burglary in the first degree.

1RP 8-9.

Subsequently, the State amended to one count of violation of a no-contact order and one count of assault in the fourth degree. Id.; CP 35-36. The defendant also stipulated to having two prior convictions for court order violations and he stipulated to knowing of the existence of a valid no-contact order prohibiting him from

having contact with Amber.² CP 24-25. As a result, the only issue at trial was whether Hamilton was at Amber's Woodinville home on November 6, 2010.

At trial, Carter testified that Hamilton was living at the home on November 6, 2011. 4RP 32-33. Carter also testified that she did not tell 911 or the police that Hamilton was living there because she feared that CPS would take Amber's children if they learned Hamilton was in the home. 4RP 32-33, 36-37.

Amber did not appear at trial.

At trial, the State played a recorded jail conversation in which Hamilton admitted that he was living at Amber's home at the time of the charged violation of a court order incident. 4RP 111-12, 118-20; 5RP 64-66.

The State played another recorded jail call at trial. In the call, Hamilton told Amber's mother to ask Amber's sister, Erin, to be an alibi witness for him by stating that he was not at Amber's home.

² The elements of Felony Violation of a Court Order are: (1) there is a valid order in place pursuant to RCW chapter 10.99 and RCW chapter 26.50, (2) the defendant or person to be restrained knows of the order, (3) the defendant willfully violates the terms of the court order, and (4) the defendant has at least two prior convictions for violating the provisions of a court order. CP 1-2; RCW 26.50.110(1), (5).

Hamilton specifically wanted Erin to claim he was with her at the time of the incident, babysitting a child named Haley. 5RP 101.

Hamilton took the stand at trial and denied being at Amber's house on November 5 and 6, 2010 and denied living in the home with Amber. 5RP 34, 70. He claimed that Carter called 911 as revenge for when he previously kicked her out of the house. 5RP 31-32, 67-69, 104.

At trial, the Judge granted the State's motion prohibiting the defendant from testifying about possible punishment he faced if convicted. 2RP 21. Additionally, the Court granted the State's motion to preclude character evidence. 1RP 27; 2RP 27-51.

During his trial testimony, Hamilton repeatedly mentioned his potential sentence regarding the burglary in the first degree count, stating he would be sentenced to: "19 years," the "equivalent to a second degree murder charge," "200 something months," "19 years," "I'd be almost 70" by the time I'd get out, "200 something months," and an "ungodly amount of time." 5RP 33, 60, 66, 67, 72, 73. He also testified that he faced 60 months for the felony violation of a no contact order charge. 5RP 71-72. The trial court judge ruled that this, in addition to Hamilton putting his character at issue while testifying, opened the door to his prior convictions.

At the close of the trial, the jury found Hamilton guilty of felony violation of a court order and not guilty of the assault in the fourth degree, for the alleged assault on Carter. CP 63-64. The trial court sentenced Hamilton to the statutory maximum of 60 months based on his offender score. CP 65-72.

C. ARGUMENT

Hamilton repeatedly informed the jury of the specific prison term he faced if convicted of burglary in the first degree and testified to the amount of time he would receive if convicted of felony violation of a court order. Hamilton also directly placed his character at issue while testifying and insinuated that the amount of time he faced was due to a vindictive prosecutor, while in truth it was a result of his substantial criminal history. Accordingly, the Court did not abuse its discretion finding that Hamilton's testimony opened the door to his prior criminal history.

1. THE APPROPRIATE STANDARD OF REVIEW.

As a general rule, if a defendant opens the door by raising an issue before the jury, the State may respond by asking additional questions about the same matter. State v. Gefeller, 76

Wn.2d 449, 454-56, 458 P.2d 17 (1969). As the Gefeller court noted:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.... To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct ..., he contemplates that the rules will permit cross-examination ..., within the scope of the examination in which the subject matter was first introduced.

Id. at 455. This rule applies to impeachment in cross-examination, particularly when it involves allegations of potential instances of misconduct by the witness. See, e.g., State v. Mak, 105 Wn.2d 692, 709-10, 718 P.2d 407 (1986) (overruled on other grounds, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)). Therefore, a defendant's testimony can open the door for the State to cross-examine the defendant about prior convictions. See State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

A trial court's decision to admit testimony is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion only when its decision is

manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

2. GIVEN THE APPROPRIATE STANDARD OF REVIEW, THE TRIAL COURT EXERCISED PROPER DISCRETION IN FINDING THAT HAMILTON HAD OPENED THE DOOR TO ADMISSION OF HIS PRIOR CONVICTIONS.

In this case, the trial court ruled that the State could inquire into Hamilton's prior felony convictions. 5RP 75-84. Hamilton made several statements in his testimony that led to this ruling.

As a pre-trial matter, the State made a motion to exclude evidence or argument concerning the penalty that the defendant is subject to if convicted and the Court granted the motion. 2RP 21. Additionally, before Hamilton took the stand, the prosecutor re-noted the "motion in limine for disclosure of any 404(b), 609, 608, any kind of character evidence which defense may be offering through the defendant." 5RP 26. Accordingly, the Court noted that the orders were still in place with the exception that defense could inquire into Dena Carter's drug history. Id.

During direct examination, Hamilton described the situation with CPS regarding his and Amber's children:

[A]nyone that's being around my kids or in the home had a clear background check, that included our parents, our siblings, me and Amber's, and any of our friends that, you know, if we would wanted to go visit someone's house and take our kids, they had to clear a background check with CPS, and family law is different than criminal law.

There's like they can go back 30 years or whatever, and if you've had a felony or something, something, you know what I mean, you're not supposed to be around them.

5RP 31. This statement put Hamilton's character at issue and framed his later testimony describing his role as a provider and protector of his children.

He went on to say that, while Carter was staying in Amber's house, she was "doing meth at the pad," and "selling drugs out of the house." 5RP 31-21. Hamilton testified he became very concerned for his children, especially after his little brother found, "a bag of needles like, I don't know, 150, 200 of them. Some of them had lids on them, some didn't, you know, and I got concerned, real concerned." Id. He also presented irrelevant testimony apparently aimed to present him as a good man when he testified that he met Amber and Dena on November 5 and loaned Amber his Suburban on November 1, because "[s]he had to walk my kids to

school in the rain." 5RP 32. In response to Dena's conduct, he said:

So I told her [Dena] to get out of the house, and she didn't. I was going to turn them into Housing Authority cuz Amber's on section 8, and no one's really supposed to be living at that house anyhow, and another thing is the CPS case was open, so I threatened them with CPS, which I probably would never turn her in any way because it was the last straw. If we lose the kids again, they were gone permanently.

Id.

Defense counsel went on and asked, "What can you tell us about the telephone call that we listened to yesterday?" Id. Despite the court order against mentioning potential penalties if convicted, Hamilton responded, "That was stupid on my part. I was desperate. I was terrified of possibly doing 19 years, which is equivalent to second degree murder charge." 5RP 33. The State objected and the Court responded:

Hold on just a second. The jury is not concerned, should not be concerned with any punishment that may follow conviction. There is an order that the length of incarceration from any crime is not to be mentioned. You will disregard it.

Id.

During cross-examination of Hamilton, Hamilton reiterated testimony in which he admitted to having contact with Amber on

two occasions in November before the incident. 5RP 41. Going into more detail, he also admitted that he spoke on the phone with Amber to arrange giving her the vehicle. 5RP 42. When she did arrive to pick it up, he did not let her take the vehicle, because "[s]he was high on methamphetamines." 5RP 43. Finally, he also stated that he did not immediately insist on her departure from that meeting, because:

She needed gas money. She comes to me. The only time she calls me is when she's struggling. She don't call me to chitchat. I feel it's my obligation, since she's got my sons, to help her out if I can. I don't go beyond. You know, I don't go over there and try to visit. I don't call her. She calls me. She -- going to her house. She comes to my house. Sometimes she shows up unannounced.

5RP 46-47. When asked if he hangs up when she calls him, he admitted "No. I didn't hang up on her." 5RP 51. Hamilton also testified that:

My obligations is [sic] to help my children as much as I can, not Amber. If I had no children with her, I wouldn't give her the time of day, if you want to know the truth, but I feel as a parent, my obligation is to protect my children and ensure they have food, clothing, birthday gifts, Christmas gifts.

5RP 52.

On cross-examination, the prosecutor also asked about the jail call:

Prosecutor: So again, when you made the phone call that the jury all listened to the other day, what had you personally read about this case? What evidence had you had an opportunity to review?

Hamilton: I researched the first degree burglary with the two counts of violation of no contact order and assault and I added up the time, which is equivalent to a second degree murder charge.

5RP 60. Defense counsel objected, and the Court responded:

Hang on. Stop. The question was what had you read. You're getting off track in your answer. Just you either read something or you didn't. If you read something, you can explain to him, and I'm not talking about anything you got from your attorney, but if you read statements, any of the transcripts, or the police reports, you may answer what you read.

5RP 61. Several questions later, the prosecutor asked what

Hamilton meant when he said, "I was living there" on the recorded

jail conversation. 5RP 64. Hamilton responded:

Hamilton: As I said before, that was a mistake on my part. I was scared to death about you trying to give me 200 something months based on all the lies, and you knew they were lies and yet you still -- you're still trying to put me in prison, and you know this woman lied five times before she even took the stand, and you still put her on the stand against me. You want me to go to prison that bad, you're going to put a girl on the stand that lied to three police officers, 911 call, an investigator in an interview; you know

she perjured herself all those times, yet you still want to put her on the stand. And the reason why she told that lie, because she didn't want my kids to get taken away. Yet she's doing meth out of the house; she's got needles in the house; they're selling drugs in the presence --

Prosecutor: And your friends are as well in the house?

Hamilton: -- when enough is enough

5RP 64-65. At that point, the Court interrupted, saying:

The Court: All right. You've answered, sir. You've answered, sir. You've answered the question. Get beyond it. Ask your next question.

Prosecutor: Okay

Hamilton: I'm sorry, your Honor. But I mean --

The Court: Just answer the questions.

Hamilton: Okay. Do you want me to answer the question?

The Court: There is not a question pending.

5RP 66. The prosecutor then asked:

Prosecutor: Okay. So why is it that you never just told your sister, I was never there, this is crazy, I was never there, I don't know where this came from? Why did you never say that?

Hamilton: Like I said before, on the phone call, I did that because I was scared to death of you convicting me of first degree burglary, that I didn't do it.

Prosecutor: But --

Hamilton: I didn't want -- hold on. You're asking me a question. Let me answer that. I did that, I said I lived there so you couldn't charge me with first degree burglary. I didn't live there. I was scared. You know what, I'm not quite sure you wouldn't have done the same thing you're trying to give me.

The Court: Hold on just a second.

Hamilton: 19 years.

The Court: Stop. You've answered the question.

Hamilton: I did that because I was scared. I said that because I was scared to death of going to prison. I'm 47 years old. By the time I got out, I'd be almost 70, based on lies. I was desperate. I've never perjured myself in life...

5RP 66-67. Hamilton went on until defense counsel objected for a non-responsive answer, which the Court overruled. 5RP 67-68.

After a few more questions, the prosecutor asked why Hamilton never said that his confrontation with Dena was on the phone. 5RP 71. Continuing to mention potential jail sentence, Hamilton responded:

Hamilton: Like I said, my main priority was the burglary charge.

Prosecutor: Okay.

Hamilton: That's why I said what I said. I'm telling you the truth, man. You've asked me I don't know how many times about the same thing. You know what, it keeps going back to why. That's why I did it. My bad on my part. I apologize. But hey, man, you guys swear by them phone calls, and I was desperate, and I know you were going to listen to that phone call. I knew you were going to listen to it. That's why I said, hey, I was living there, man. But I wasn't living there. I would rather face a charge of a no contact order violation than pertaining, you know, for 60 months, but then instead of 200 and something months. Wouldn't you honestly? I'm asking you a question now. If you were in my shoes and someone was trying to put you in prison for damn near the rest of your life based on lies --

5RP 71-72.

After Hamilton repeatedly mentioned potential prison terms for a conviction of burglary in the first degree and mentioned the amount of jail time he faced for the single count of violation of a court order, the prosecutor asked what these prison sentences were based on and why Hamilton was facing so much time.

5RP 72. Hamilton began to respond, saying:

Hamilton: If you research, I'm sure you know the law, any time first degree burglary is involved in a crime, everything is run consecutive

Defense: Your Honor, I'm going to object. This is nonresponsive.

The Court: It is nonresponsive, but he is going way beyond the court orders. And he is introducing items that he should well know are not admissible by my orders, and I told him that that can open up other things. So him having opened up a lot of things that were inadmissible, I don't think your objections are well taken.

5RP 72. The prosecutor repeated the question and Hamilton responded:

Hamilton: Well, like I was trying to say, first degree burglary, um, with it's my understanding, I'm not a lawyer, all I got is a GED but, you know, at the time, I didn't have much confidence in my attorney; I didn't -- no one was coming to see me or talking to me about my case. I did some research the best I could, and to my understanding of the law is any time a first degree burglary is tossed in with other crimes, everything is ran consecutive.

Prosecutor: Does your --

Hamilton: That's my perception. I'm telling you my perception. I don't know if I'm correct or not, but I'm not an attorney, but I mean my chance of looking at 60 months

compared to what you were trying to give me is hey, man, I made a mistake; you know, like I said, I was scared. You know, you're trying to send me to prison for a [sic] ungodly amount of time for a lady that clearly lied to not only to 911 call but to three officers, and I mean the investigator and detective.

5RP 72-73.

Defense counsel objected, claiming the questions were beyond the scope and irrelevant; the Court overruled the objections. 5RP 73-74. After the prosecutor asked how many "points" Hamilton had and how his prior convictions may affect these long jail sentences, Hamilton testified:

Okay. I don't know because I'm not an attorney. Like I said, I'm not real sharp on all the laws. All I got is a GED, but that's my understanding when I was researching the burglary charge, that's all. I didn't have no attorney helping me, you know what I mean. I couldn't get really much help, you know. I only -- you guys already know, I only get out an hour a day out of my room, you already know that, the guy that testifies about the jail calls. That don't give you too much time to use the phone, shower, and my life is on the line. Hey, I did the best I could for what I had, you know, and to my knowledge the first degree burglary, to my knowledge, I don't know if it's true, but it was good enough to scare me.

5RP 74-75. The prosecutor stated that Hamilton had not answered the question, and asked it again. 5RP 75. Hamilton responded, "Yeah. I mean --." Id. Defense counsel objected for improper

questioning and that it was argumentative. 5RP 75-76. The Court ruled that, "it would be an improper question, had your [defense counsel's] client not given improper answers, but he gave improper answers, which opens the door to otherwise improper questions."

5RP at 76. The Court then dismissed the jury to the jury room. Id.

After Hamilton had repeatedly referred to specific sentences despite numerous warnings by the Court, the prosecutor moved to introduce Hamilton's prior felonies. Id. The Court responded that Hamilton's:

[T]estimony to the jury is that the State is being unfair to him and draconian by suggesting that he could serve a lot of time unfairly. I've told him over and over again that the amount of time is not admissible and nevertheless, he keeps talking about it.

5RP 77. The Court further noted that:

His crimes would not be admissible but for the fact that he keeps telling the jury that the prosecutor is on some kind of vendetta to give him an enormous amount of time in prison.

5RP 77.

At this point in argument, defense counsel conceded that inquiring into Hamilton's prior convictions may be appropriate, but that delving into each specific crime would be improper, because most of them were not crimes of dishonesty. 5RP 76-77. The trial

court responded that Hamilton had opened the door for two reasons:

One is that he has violated the Court's motions, orders on motions in limine. He was told before he took the witness stand, don't do that; if you do it, it's going to open up a lot of avenues you don't want to get into.

So the door is open. The question is how far. He has suggested to the jury that the State is on a mission to punish him unfairly, and that perhaps even counsel himself is on some kind of personal mission to do that. The jury is entitled to know what it's based on, but beyond that, he's placed his own character into issue. He has repeatedly suggested that he was the one keeping that family together, that people tearing the family apart was his ex-wife and Dena, and that he was some type of person on the outskirts trying to be the good guy with the good character holding it together and they're the one with the bad character. I think by inference he has squarely put his character at issue.

ER 404(b) is a character rule. You don't get to introduce prior bad acts to show what kind of character you are, unless you open up your character. He has done that. He has done that over and over during his testimony. He has done it in violation of this Court's orders. He was warned.

5RP 81-82.

At this point, the Court did not abuse its discretion in finding that Hamilton had opened the door to his prior convictions. A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll

v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The Court's decision was reasonable as opening the door to Hamilton's prior convictions was the only proper means available to the State to explain why Hamilton faced such significant prison terms. Hamilton's testimony was clearly aimed at making the prosecutor appear vindictive and to suggest that he is a good man that should not be facing such harsh punishment.

Furthermore, the Court did not abuse its discretion in finding that the scope of convictions admitted should not be limited convictions relating to Hamilton's children or crimes of dishonesty. Hamilton generally put his character at issue on direct and cross-examination. Additionally, he accused the prosecutor of pursuing harsh and unfair punishments by reiterating the jail sentences. These repeated statements gave rise to the implication that it was the prosecutor's vendetta rather than Hamilton's past crimes that gave rise to the substantial sentence. Furthermore, Hamilton bolstered these statements by claiming to be a "straight-shooting truth teller," as described in defense's brief. Br. App. 13. Therefore, Hamilton unfairly took advantage of the pretrial exclusion to *show* he was a man of good moral character and that the State unfairly treated him in this case.

While the Court gave Hamilton some leeway in attacking Carter's character, Hamilton went well beyond this ruling by specially placing his character at issue by characterizing himself as a righteous and noble man. He contended that he was a source of protection for his children, that he was strongly against drug abuse, and a provider of dependable financial support. This explicitly placed his character at issue.

Additionally, Hamilton's claim that he referenced large prison sentences to explain to the jury why he said he lived with Amber during a recorded jail conversation must fail. This characterization is inaccurate in light of the totality of Hamilton's testimony. He mentioned specific prison terms repeatedly, even when not referencing the jail calls. He did so in such a quantity that he gained an unfair advantage to support his inference of prosecutorial unfairness. Hamilton took these claims further by discussing the large sentence in the present tense, even though the robbery charge had been dismissed, saying, "You know, you're trying to send me to prison for a [sic] ungodly amount of time for a lady that clearly lied." 5RP 73. Hamilton also referenced the 60 months he faced for the court order violation. 5RP 71-72.

The trial court's finding that Hamilton opened the door to his prior convictions was neither manifestly unreasonable nor based on untenable grounds as a result of Hamilton's own testimony. Accordingly, the Court did not abuse its discretion in finding that Hamilton opened the door to his prior convictions.

3. THERE WAS NO PREJUDICE.

It is clear that the jury was not swayed by the admissions of Hamilton's prior convictions, as the jury acquitted Hamilton on the assault in the fourth degree charge. There was simply no prejudice, even if admission of Hamilton's prior convictions was improper. As an initial matter, Amber did not testify at trial -- the jury heard her side of the events through the testimony of Dena Carter. As a result, the outcome of this case depended on the jury's evaluation of Dena Carter's credibility weighed against Hamilton's credibility. Both witnesses testified and were subject to cross-examination and the jury had the opportunity to observe the testimony and make its own independent judgment as to the respective veracity and credibility of the statements.

For all these reasons, the jury had to judge credibility for itself. Moreover, the jury is assumed to have followed the trial

court's instructions that it do so. As the Washington Supreme Court held in State v. Kirkman, "Even if there is uncontradicted testimony [as to] credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence to the contrary." 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citations omitted). Thus, despite Hamilton's assertion to the contrary, this Court should not presume that any testimony by Hamilton prevented the jury from making its own determination. "Only with the greatest reluctance and with the clearest cause should judges – particularly those on the appellate courts – consider second-guessing jury determinations or jury competence." Kirkman, 159 Wn.2d at 938.

In the instant case, the record affirmatively indicates that the jurors were *not* swayed by any improper testimony, but made their own independent decisions. The damage to the bathroom door and the officers' evaluations at the scene tended to show that someone else was at the house the night on November 5, 2010 and that an altercation had occurred. At trial, Hamilton claimed he was not living at Amber's house, while Carter testified that Hamilton was living at the house and present from November 5, 2010 to November 6, 2010. Importantly, Hamilton admitted on a recorded

jail conversation that he was living at the house at the time and that he was there that night. He also admitted in court that he had violated the court order on several other occasions. 5RP 39-43, 46-47, 50-52.

At the conclusion of the trial, the jury deliberated and chose to convict Hamilton of violating the no-contact order and acquitted him of the assault in the fourth degree charge. CP 63-64. This difference in verdicts demonstrates that the jury was not swayed by any improper testimony. Indeed, it indicates that the jury actually believed much of what Hamilton said – it convicted him of the crime he admitted to on the jail call and acquitted him of the crime he denied both on the jail call and at trial.

In defense's brief, Hamilton argues there was prejudice, because "[j]urors were probably more likely to have found Hamilton lacked credibility," and that he "was predisposed to commit crimes and not follow court orders." Br. App. 15. This statement lacks factual support based on the trial court record for three reasons. First, Hamilton stipulated to the court that he had at least two prior convictions for violating the provisions of an order issued under RCW Chapters 10.99, 26.50, 26.09, 26.10, 26.26 or 74.34. CP 24-25. Second, Hamilton had already admitted in his testimony that he

knowingly had contact with Amber on several occasions, but simply denied contact specifically on November 6, 2010. 5RP 39-43, 46-47, 50-52. Third, as defense acknowledges in their brief, the jury's acquittal on the assault charge shows that the jurors did not believe Carter's testimony. Br. App. 15. For the jury to render their ultimate verdict, they simply needed to find Hamilton credible when he spoke privately on the jail recording. The acquittal on the assault in the fourth degree charge demonstrates that the admission of the prior conviction was not prejudicial.

D. CONCLUSION

The Court did not abuse its discretion in finding that Hamilton opened the door to his prior convictions when he, in violation of Court orders, testified about punishment he faced and put his character at issue. Admission of Hamilton's prior felony convictions was proper to allow the State to rebut Hamilton's testimony. Additionally, the admission of Hamilton's prior convictions was not prejudicial, as demonstrated by the fact that he was acquitted of the assault in the fourth degree count. The State,

therefore, respectfully requests that this Court affirm Hamilton's conviction.

DATED this 5 day of July, 2012.

Respectfully submitted,

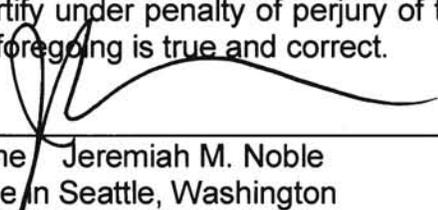
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JASON L. SIMMONS, WSBA #39278
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Andrew Peter Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CURTIS HAMILTON, Cause No. 67667-9-1, in the Court of Appeals, Division I, for 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.



Name Jeremiah M. Noble
Done in Seattle, Washington

7.6.12

Date July 6, 2012