

NO. 39586-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS RAY MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel's failure to request an instruction limiting the jury's use of impeachment evidence denied appellant effective representation.

2. Appellant's multiple convictions for witness tampering violate the prohibition against double jeopardy.

3. The trial court's instructions failed to inform the jury that each conviction of witness tampering had to be based on a separate and distinct act, violating appellant's right to be free from double jeopardy.

4. Improper admission of irrelevant evidence denied appellant a fair trial.

5. Trial counsel's failure to object to an improper special verdict instruction constituted ineffective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was charged with first degree assault of a child based on evidence that his son sustained multiple injuries over a period of time. Appellant's ex-wife testified that she never saw appellant assault his son, but the State presented evidence that she had previously accused appellant of inflicting the injuries. Although the prior inconsistent statements were admitted for impeachment, defense counsel failed to request an instruction limiting the jury's use of that evidence. Where there

is a reasonable probability the jury relied on the prior statements as substantive evidence, undermining confidence in the outcome of the proceedings, does counsel's error require reversal?

2. Appellant was convicted on eight counts of witness tampering based on a course of conduct attempting to persuade a single witness to withhold testimony in a single proceeding.

a. Under the circumstances, do the multiple convictions violate double jeopardy?

b. Is the unit of prosecution for witness tampering ambiguously defined, allowing more than one reasonable interpretation?

c. Does the rule of lenity require the appellate court to apply appellant's interpretation, resulting in only one conviction for his alleged course of conduct of attempting to persuade a single individual to withhold testimony in a single proceeding?

3. The court's instructions did not make it manifestly apparent to the jury that each of the eight convictions of witness tampering must be based on a separate and distinct act. Where the court's instructions exposed appellant to multiple punishments for the same offense in violation of constitutional double jeopardy protections, must seven of his convictions be vacated?

4. Under RCW 9A.72.120, a person is guilty of witness tampering if he induces a witness, without right or privilege to do so, to withhold testimony. Thus, advising a witness to assert the Fifth Amendment privilege does not amount to witness tampering. Nonetheless, the court admitted, over defense objection, statements by appellant asking his ex-wife to plead the Fifth. Did improper admission of this irrelevant evidence deny appellant a fair trial?

5. Trial counsel failed to object to an instruction improperly requiring the jury to be unanimous to answer a special verdict “no.” Where counsel’s error likely affected the outcome of the case, must the special verdicts be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On March 14, 2008, the Pierce County Prosecuting Attorney charged appellant Thomas Ray Moore with first degree assault of a child and criminal mistreatment. CP 1-2; RCW 9A.36.120(1)(b)(ii)(A); RCW 9A.42.037(1)(a). The mistreatment charge was dropped, and the State added eight counts of tampering with a witness. CP 9-13, 14-19; RCW 9A.72.120(1)(a). The State also alleged aggravating factors of particular vulnerability and abuse of trust as to the assault charge. CP 14.

The case proceeded to jury trial before the Honorable Kitty-Ann Van Doorninck. The jury returned guilty verdicts and answered the special verdict in the affirmative. CP 162, 166-74. The court imposed high end standard range sentences of 318 months on the assault and 60 months on the tampering convictions. CP 202. Moore filed this timely appeal. 191-92.

2. Substantive Facts

Thomas Moore got married shortly after high school, because his girlfriend was pregnant. 6RP¹ 10. His son TM was born in August 2003, and Moore enlisted in the Army in November 2003. 6RP 10. When his marriage broke up, Moore took custody of TM and moved with him to New York where he was stationed. 4RP 63; 6RP 10, 12. Moore met Tammara Moore online, and she moved to New York with her three children to live with Moore and TM. 3RP 80-81; 6RP 11. Moore and Tammara² were married, and the entire family moved to Washington in 2007 when Moore was transferred. 6RP 15.

While living in Washington, Moore worked full time and was generally on duty until 6:00 p.m. on week days. 6RP 20. Tammara was a full time stay at home parent. Her children were in school during the day,

¹ The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—6/9/09; 2RP—6/10/09; 3RP—6/11/09; 4RP—6/15/09; 5RP—6/16/09 (a.m.); 6RP—6/16/09 (p.m.), 6/22/09, 6/24/09; 7RP—6/25/09, 6/29/09; 8RP—7/17/09.

² Tammara Moore is referred to by her first name for clarity. No disrespect is intended.

and she had sole caretaking responsibility for TM while Moore was at work. 6RP 20-21.

In October 2007, CPS was called when TM was taken to the hospital with an injury to his chin, as well as bruises to his arms and legs. 3RP 18. Moore spoke with the CPS caseworker, explaining that TM and his stepbrother had been playing, and TM fell on a toy and bumped his chin. 3RP 18-19. After investigating, CPS found no indication of abuse or neglect, and no evidence that TM's injuries occurred other than as Moore described. 3RP 24-25. Because no further action was warranted, TM was released to Moore. 3RP 24.

In March 2008, TM injured his arm during a skating accident. He had been skating between Moore and Tammara, with each of them holding one of his arms, when his feet slipped out from under him. He fell, Tammara fell on top of him, and the children behind them skated over him. 3RP 94-95; 6RP 38. Moore checked TM's arm and felt it was probably sprained, but they drove to the emergency room to have TM checked. 3RP 95; 6RP 40-41. After waiting an hour and a half to two hours for TM to be seen, they decided to leave, intending to make an appointment with TM's regular pediatrician. 3RP 96; 6RP 42. Moore wrapped TM's arm and treated it with ice over the weekend. 6RP 42, 46.

On March 11, 2008, CPS received a phone call from TM's grandparents indicating some concern for the child. 3RP 6. The CPS caseworker called 911, and police responded to the Moore apartment to do a welfare check. 3RP 10, 34. By that time, TM's arm was severely bruised and swollen, and other injuries were visible on his head, face, back, and neck. 3RP 37-38, 47. TM was taken to the hospital where he was examined, and from there he was placed in foster care. 3RP 14.

Two days later, police detectives interviewed both Moore and Tammara. 5RP 58. Following his second interview with the police, Moore was arrested. 5RP 98.

a. The Assault Charge

At trial, the State presented evidence from the emergency room doctor who examined TM. 4RP 8. He noted multiple bruises and lacerations of varying ages on TM, consistent with injuries occurring on different dates over a period of time. 4RP 11-18, 20, 26, 27, 30-36. In addition, TM's collarbone had a healing fracture which was several weeks old, and his right elbow had been broken recently. 4RP 40-41. The doctor gave his opinion that TM suffered a series of inflicted injuries. 4RP 42. He acknowledged, however, that the fracture to TM's elbow was consistent with the skating accident, and some of TM's bruises could have been caused by falls. 4RP 45-46.

A pediatric nurse practitioner from the Child Abuse Intervention department at Mary Bridge Children's Hospital conducted an evaluation of TM in June 2008. 5RP 11-12, 18. She testified that after comparing TM's injuries in October 2007 to those seen in March 2008, she believed many of the injuries were the result of nonaccidental trauma. 5RP 31-32. She acknowledged, however, that much of the bruising could have been the result of accidental injury, and the elbow fracture was consistent with TM's skating accident. 5RP 33, 35. At the time of TM's evaluation in June 2008, he had some recent injuries which had occurred after he was removed from Moore's care. 5RP 21, 33.

Valerie Pancoast, TM's maternal grandmother, testified that TM had lived with her in Missouri while Moore was in boot camp, and she had maintained contact with Moore and TM after they moved. 4RP 62. She testified that Moore would call her for advice every couple of months when he became frustrated with TM. 4RP 62-64. After moving to Washington, Moore told her that TM was not listening to anyone and was being aggressive with Tammara. 4RP 68. Pancoast offered to have TM come live with her a couple of times, but Moore did not take her up on it. 4RP 66-67. According to Pancoast, however, Moore called her on March 11, 2008, and said she had 48 hours to pick up TM or he would be abandoned. 4RP 69. She heard Tammara screaming profanities about TM

in the background. 4RP 83. When Pancoast and her husband were unable to make travel arrangements, they called CPS. 4RP 71, 94.

TM was placed with his grandparents August 2008. 4RP 74. Both testified that TM had had trouble learning to walk and still did not run normally. 4RP 79, 90, 95, 98-99. As a result he stumbles often. 4RP 80.

AP, Tammara's oldest child, testified that TM was clumsy and fell down a lot, and she remembered him getting hurt in the skating accident. 3RP 73-75. She also testified that she had seen Moore spank TM with a leather belt, bang TM's forehead against a wall, and feed him hot peppers as a form of discipline. 3RP 60-61, 65. AP said that most of the scratches on TM's face were from Tammara smacking him while wearing a ring. 3RP 69-70. She had told a forensic interviewer, however, that TM's injuries were the result of skateboarding accidents, falling on some rock steps, and hitting himself on a table. 5RP 44-45. When asked if her mom or dad ever left any "owies" on TM, she said no. 5RP 45.

Tammara testified that, although she was home alone with TM for most of the day, she was not allowed to interact with him. 3RP 82, 128. According to Tammara, TM would spend the entire day in his bedroom, coming out only for meals. 3RP 82-83. Thus, she did not discipline TM and did not notice any injuries on him. 3RP 89-90, 129-30. Although Tammara testified that the apartment was always so dark that she could

never tell if TM had any injuries, she also testified that TM fell ten or more times a day and his falls left marks, bruises, and cuts. 3RP 133, 137.

Tammara denied inflicting any of TM's injuries. 3RP 93. She also testified that she never saw Moore hit TM with a belt and never saw him strike or kick TM, but she often heard TM scream from the other room when he was alone with Moore. 3RP 98, 139. She described an incident, about two weeks before TM was taken into custody, when Moore scrubbed TM with an abrasive sponge after he failed to wash himself properly in the shower. 3RP 98, 104. She said another time she had seen Moore standing over TM with his hand raised like he was going to strike TM. She told Moore to stop, and he did. 3RP 99-100. Tammara testified that a few times a month Moore would feed TM Tabasco Sauce or hot peppers as a punishment for mouthing off. 3RP 102-03.

The State then called the detective who interviewed Tammara to impeach her with prior inconsistent statements. 5RP 109, 111. The detective testified that Tammara was told in her interview that Moore had blamed her for TM's injuries. 5RP 79. Tammara was not happy to hear that, and she said she had seen Moore hit TM with a belt, slap him in the face, and kick him, leaving bruises and marks. 5RP 79-81. She admitted that she spanked TM every other day, but she denied inflicting any injuries. 5RP 80-83-84. Tammara told the detectives that Moore spanked

TM about every other day when TM was being stupid, and she described these episodes as “all-out spankings.” 5RP 86-87.

Detective Westby also testified that Moore said he was having trouble getting TM to understand how he was supposed to behave, and he was extremely frustrated with his lack of progress. 5RP 66, 68. When Westby asked Moore if he thought Tammara could be responsible for TM’s injuries, Moore said Tammara had a temper but was not a violent person, and he did not feel she could do something like that. 5RP 70. He then implied that it was possible Tammara was responsible for the injuries, although he did not want to think she was capable of that. 5RP 77. When the detective asked how TM broke his elbow, Moore told him about the skating accident. 5RP 72. Moore explained that TM had bruised his forehead falling on the stairs, but he did not know that TM’s collarbone was broken. 5RP 77.

Westby testified that in his second interview Moore looked at photos of TM’s injuries and said “all of this is because of me.” 5RP 88. Moore said he spanked TM with a belt a total of seven to eight times. He was not aware of leaving marks, however, because TM’s pants were always up and he did not check for injuries. 5RP 88, 96. Westby testified that Moore said that once he started spanking, it was hard to stop because he was so frustrated that he could not get through to TM. 5RP 89. Moore

admitted using Tabasco Sauce and peppers as a punishment, and he admitted scrubbing TM with an abrasive sponge when he failed to wash himself properly. 5RP 91-92.

Moore testified at trial that he got frustrated with TM during the shower incident and scrubbed him with an abrasive sponge. 6RP 51-52. He believed the scrapes visible in photographs of TM's belly and back were from that incident. 6RP 52.

As he had told the detective, Moore testified that he spanked TM with a belt a total of seven or eight times. 6RP 32-33. But Tammara's temper caused her to spank and smack the children far too often. He had seen her hit the children, including TM, with a belt and a wooden spoon. 6RP 22. She also used the Tabasco punishment more than she should have. 6RP 30. Tammara had a particularly hard time disciplining TM, because he would not listen to her, and she used a belt on him almost daily. 6RP 27, 34.

After TM was injured in October 2007, Moore started fearing for TM's safety in Tammara's care, and he considered leaving her. 6RP 55. Moore and Tammara separated for a time after a trip to California at Christmas in 2007, but Tammara returned to Washington in February 2008. 6RP 56-57. When Moore was interviewed by the detectives, he tried to tell them that he suspected Tammara could not control her temper

when she was disciplining TM. 6RP 55, 59. As the detective testified, Moore alluded to his concerns without directly accusing Tammara. 5RP 77; 6RP 60. When Moore told the detective that all the injuries were because of him, he meant he should have done more to protect his son from Tammara. 6RP 62. He testified that Tammara inflicted 90 percent of the injuries. 7RP 21.

Moore denied telling the detective that the harder he tried to get through to TM, the worse his temper got. 6RP 63. Nor did he say that he would get so frustrated with TM that he would start spanking him and did not know how to stop. 7RP 61. Moore testified that when he was at his wit's end, he would call Valerie Pancoast for advice. 7RP 60.

b. The Witness Tampering Charges

After Moore's arrest, eight charges of witness tampering were added based on letters he wrote and phone calls he made to Tammara. Defense counsel objected to statements Moore made during phone calls on April 20 and 21, 2008, in which he told Tammara that she could not be forced to testify if she pleaded the Fifth. 3RP 151-52. Counsel argued that the discussion of constitutional rights could not be the basis for a charge of witness tampering. 3RP 151-52. The court overruled the objection, telling counsel he could make that argument in closing. 3RP 152.

Tammara testified that she maintained contact with Moore through phone calls and letters after his arrest, even though she was seeking a divorce. 3RP 104-05. She said that Moore asked her not to testify and asked her to stop the divorce because he believed she could not testify against him if they were married. Moore told her to take her children to Arkansas, and he wanted her to blame TM's injuries on her son. 3RP 118. She read redacted portions of Moore's letters into evidence. 3RP 122-24. Recordings of several phone calls between Moore and Tammara were also played for the jury. 4RP 110-14.

Moore testified that he never sought to have Tammara testify falsely. 6RP 65. But he told her she had a Fifth Amendment right not to testify and she could plead the Fifth. 6RP 65. He also believed the marital privilege applied, and he told her she could not be forced to testify against him if they were married. 6RP 65. Moore testified that Tammara had talked about wanting to move to Arkansas to be with family, and he told her she should go. 6RP 65.

C. ARGUMENT

1. COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION AS TO TAMMARA'S PRIOR INCONSISTENT STATEMENTS DENIED MOORE EFFECTIVE REPRESENTATION.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is

required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. See State v. Thomas, 109 Wn.2d at 226 (counsel ineffective in failing to propose instruction that would allow counsel to argue defendant's intoxication negated mens rea). In this case, although Tammara's statements to the detectives during her interview were admissible only to impeach her credibility, defense counsel never requested that the court give a limiting instruction.

A witness may be impeached with prior out of court statements of material fact that are inconsistent with his or her testimony in court. ER 607; ER 613; State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987). But the crucial distinction is that impeachment evidence goes only to the witness's credibility; it may not be considered as proof of the substantive facts encompassed by the evidence. Clinkenbeard, 130 Wn. App. at 569; State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

Prior inconsistent statements are not admitted under the assumption that the trial testimony is false and the earlier statements are true. Rather, the theory is that if a person says one thing on the witness stand, having said something else previously, there is a doubt as to the truthfulness of both statements. State v. Williams, 79 Wn. App. 21, 26, n. 14, 902 P.2d 1258 (1995) (citing 1 McCormick on Evidence § 34, at 114 (4th ed. 1992)). "These inconsistencies are important, not because one version of the events is more believable than the other, but because they raise serious questions about [the declarant's] credibility and perceptions." State v. Newbern, 95 Wn. App. 277, 295, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999). Thus, where prior inconsistent statements are admitted to impeach a witness, "an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary." Johnson, 40 Wn. App. at 377 (citing State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)).

When evidence is admissible for one purpose but not another, the court must give a limiting instruction on request by either party. ER 105; State v. Gallgher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). A party's failure to request a limiting instruction waives that party's right to the instruction and fails to preserve the claimed error for appeal. Newbern, 95 Wn. App. at 295-96. Without a

request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others. State v. Meyers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

Here, Tammara testified at trial that she never saw Moore hit TM with a belt and never saw him strike or kick TM. 3RP 98. Detective Westby was then called to impeach her testimony. He said that in her interview, Tammara said she had seen Moore hit TM with a belt, slap him in the face, and kick him, leaving bruises and marks. 5RP 79-81. Tammara told the detectives that Moore spanked TM about every other day when TM was being stupid, and she described these episodes as “all-out spankings.” 5RP 86-87. She denied inflicting any of TM’s injuries. 5RP 80.

Even though the defense was entitled to an instruction limiting the jury’s use of Tammara’s prior statements, counsel failed to request one, creating the very real problem that the jury may have considered the statements as substantive rather than merely impeaching evidence. See State v. Hancock, 109 Wn.2d 760, 766, 748 P.2d 611 (1988). Counsel’s failure to request a limiting instruction constitutes deficient performance.

Counsel’s error cannot be excused as trial strategy. While an attorney’s decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State

v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, “tactical” or “strategic” decisions by defense counsel must still be reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”).

Although defense counsel may in some cases strategically decline to request a limiting instruction to avoid highlighting harmful evidence, the State spent a significant amount of time presenting Tammara’s statements through the detective. The jury was not going to overlook that testimony. By not ensuring that the jury knew the proper use for that evidence, counsel ensured that the jury would consider it as substantive evidence of Moore’s guilt.

To convict Moore of first degree assault of a child as charged in this case, the State had to establish not only that Moore intentionally assaulted TM, causing substantial bodily harm, but also that he engaged in a practice or pattern of assault against TM that resulted in bodily injury that is greater than transient physical pain or minor temporary marks. See RCW 9A.36.120(1)(b)(ii)(A). While Moore admitted causing the marks to his son’s back, the defense position was that his occasional use of physical discipline did not cause the bodily injury necessary to establish the offense. Limiting the use of Tammara’s statements was key to the

defense theory that Tammara, not Moore, inflicted the majority of TM's injuries. The defense depended on the jury endorsing Tammara's testimony that she never saw Moore inflict any injuries, or discounting her testimony and prior statements in their entirety due to her lack of credibility. Thus counsel's failure to seek an instruction suggests inattention rather than sound professional judgment. See Thomas, 109 Wn.2d at 227.

Counsel's deficient performance renders the trial outcome unreliable. It can be difficult for jury to grasp "the subtle distinction between impeachment and substantive evidence." Hancock, 109 Wn.2d at 764. While the jury's difficulty in making this distinction does not render the statements inadmissible, it does make a cautionary instruction "both proper and necessary." See Johnson, 40 Wn. App. at 377. Without an instruction, the jury likely relied on Tammara's prior statements as direct evidence that Moore engaged in a practice or pattern of assaulting TM. Rather than impeaching Tammara's credibility, the statements improperly bolstered the State's case. Counsel's error prejudiced the defense, and reversal is required.

2. MOORE'S MULTIPLE CONVICTIONS FOR WITNESS TAMPERING VIOLATE DOUBLE JEOPARDY BECAUSE THEY ARE BASED ON A SINGLE COURSE OF CONDUCT COMPRISING A SINGLE UNIT OF PROSECUTION.

Whether the witness tampering statute, RCW 9A.72.120, plainly denotes the unit of prosecution is currently pending before the Supreme Court in State v. Hall, 147 Wn. App. 485, 489, 196 P.3d 151 (2008), review granted, 166 Wn.2d 1005 (Jun. 3, 2009)³. Hall was convicted of multiple counts of tampering for attempting to induce a single witness in a single proceeding to change her testimony or leave town, based on a series of phone calls Hall made to the witness while in jail pending trial on other charges. Hall, 147 Wn. App at 487. Division One of this Court rejected Hall's argument that his convictions violated the prohibition on double jeopardy. Hall, 147 Wn. App at 489-90. Whereas Hall argued the statute criminalizes a course of conduct aimed at obstructing justice, the Court held the statute criminalizes each instance or attempt at witness tampering. Hall, 147 Wn. App. at 489.

Like Hall, Moore contends his convictions violate the prohibition against double jeopardy because they are based on a course of conduct aimed at a single witness in a single proceeding. The dissenting opinion by Judge Van Deren in State v. Thomas, 151 Wn. App. 837, 845-849, 214

³ Oral argument was heard on January 26, 2010.

P.3d 215 (2009), would agree. This Court should adopt the reasoning set forth in that opinion. Alternatively, Moore raises the argument herein to preserve the issue should the Supreme Court find the statute ambiguous.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)). The state constitutional provision, Article I, section 9, offers the same scope of protection as its federal counterpart. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

An appellate court engages in de novo review of the statutory unit of prosecution, a question of law. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). As the Supreme Court stated in State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007):

In a unit of prosecution case, the first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of

prosecution, the facts in a particular case may reveal more than one “unit of prosecution” is present.

a. Statutory Language

RCW 9A.72.120 is ambiguous. It does not expressly define the unit of prosecution as being either a single act, or a course of conduct. Instead, both readings are reasonable in light of the statutory language.

A statute is ambiguous if a reasonable person can interpret it in more than one way. State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002); State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001); In re Charles, 135 Wn.2d 239, 249-50, 955 P. 2d 798 (1998). Appellate courts interpret and construe statutes to give effect to all the language used, with no portion rendered meaningless or superfluous. In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007); Davis v. Dep’t of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)); see State v. Young, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). Words in a statute are given their plain and ordinary meaning, unless a contrary intent is evidenced in the statute. State v. Lilyblad, 163 Wn.2d 1, 7, 177 P.3d 686 (2008).

The witness tampering statute, RCW 9A.72.120(1), provides, in relevant part:

A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent himself or herself from such proceedings; or
- (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

The statutory language most obviously relevant to defining the unit of prosecution is that defining the punishable act: “A person is guilty . . . if he or she attempts to induce” a specifically defined class of individual to engage in specifically defined category of acts. RCW 9A.72.120. The principal issue regarding this language is whether the “attempts to induce” language criminalizes a single act, or a course of conduct. Because the language may reasonably be construed in either fashion, the statute is ambiguous and must be construed in Moore’s favor, under the rule of lenity.

This Court previously concluded that RCW 9A.72.120 unambiguously defines the unit of prosecution as a single act, rather than a course of conduct. Thomas, 151 Wn. App. at 844-45. Division One reached the same conclusion. Hall, 147 Wn. App. at 489. Contrary to the

Hall and Thomas decisions, however, the statute does not expressly define whether the unit of prosecution is a single act or a course of conduct, and the text reasonably supports either conclusion. As the dissent in Thomas recognized, the statute is ambiguous. 151 Wn. App. at 845-49.

In finding the witness tampering statute ambiguous, the Thomas dissent relied upon the Supreme Court's opinion in State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006). Thomas, 151 Wn. App. at 845-48 (Van Deren, C.J., dissenting). Leyda was convicted of four separate counts of identity theft under former RCW 9.35.020(1), after he allegedly stole a credit card and used it four times. Leyda, 157 Wn.2d at 339. The Supreme Court reversed, holding that former RCW 9.35.020 was ambiguous as to the applicable unit of prosecution. Leyda, 157 Wn.2d at 345.

The statute at issue in Leyda, former RCW 9.35.020(1), provides, in pertinent part:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

The Leyda Court focused on the enumerated verbs "obtain, possess, use, or transfer" and the disjunctive word "or:"

As indicated by the use of the word "or," the proscribed acts are disjunctive. Thus, under the statute's express language, "use" is a way to commit identity theft, but it is not the only way. An

individual also commits identity theft when he has either possessed, obtained, used or transferred a means of another's identification or information with the requisite intent.

Leyda, 157 Wn.2d at 345-46. The Court concluded:

[O]nce the accused has engaged in any one of the statutorily proscribed acts against a particular victim, and thereby committed the crime of identity theft, the unit of prosecution includes any subsequent proscribed conduct, such as using the victim's information to purchase goods after first unlawfully obtaining such information.

Leyda, 157 Wn.2d at 345.

The Leyda Court also focused on the identity theft statute's use of "a" in reference to "a means of identification:"

The identity theft statute [. . .] uses the singular "a." It is a means of identification or the financial information that is possessed, obtained, used, or transferred with the intent to commit a crime that defines the unit of prosecution. Thus, under [former RCW 9.35.020], when a person obtains, uses, or transfers a means of identifying information, there is only one crime. Again, Leyda only obtained a (singular) means of one other's identification and used it multiple times.

Leyda, 157 Wn.2d at 347 n. 9.

Thus, the Court held that multiple punishments are possible in cases involving multiple victims, but not for multiple uses of a single individual's identity:

Leyda could have been properly charged with multiple counts of identity theft if he had obtained, used, etc., the stolen credit cards of two or more persons. But, that is not the factual scenario here, the record showing that Leyda obtained, possessed, etc., a single credit card of one other individual, Ms. Austin. Thus, the State

improperly charged him with multiple thefts of Austin's identity, who, common sense suggests, has only one identity that can be unlawfully appropriated.

Leyda, 157 Wn.2d at 346-47.

The similarities between the statute at issue in Leyda and the witness tampering statute at issue here compel the conclusion that RCW 9A.72.120(1) is ambiguous and reasonably supports Moore's interpretation. Thomas, 151 Wn. App. 846-48 (Van Deren, C.J., dissenting). Under RCW 9A.72.120(1) a person is guilty of witness tampering when he or she:

[a]ttempts to induce a witness or person ... to:

... [t]estify falsely or, without right or privilege to do so, to withhold any testimony; or

... [a]bsent himself or herself from such proceedings; or

... [w]ithhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

The disjunctive "or," and the singular "a" appear in the witness tampering statute, just as in the identity theft statute at issue in Leyda. Applying Leyda's analysis to the witness tampering statute, as the Thomas dissent did, leads to the following conclusion: "Once the defendant attempts to tamper with a witness by any of these proscribed methods, the unit of prosecution includes all subsequent tampering attempts directed toward

that witness.” Thomas, 151 Wn. App. 847 (Van Deren, C.J., dissenting); see Leyda, 157 Wn.2d 345. Thus, while the legislature criminalized attempts to induce a witness to undertake the proscribed actions, it did not separately criminalize “each argument, each telephone call, each letter, or each attempt directed at the same witness.” Thomas, 151 Wn. App. 848 (Van Deren, C.J., dissenting)

Indeed, a California court concluded the unit of prosecution for that state’s witness tampering statute encompasses a continuing course of conduct, because the “gravamen” of the offense was a cumulative outcome of a series of actions over a period of time of attempting to persuade the witness to act. People v. Salvato, 285 Cal. Rptr. 837, 234 Cal. App.3d 872 (1991). Salvato was convicted of two counts of witness tampering, based on allegations that he made multiple threats to harm his estranged wife if she sought her share of community property in a dissolution proceeding. Salvato, 285 Cal. Rptr. at 839-40. Prior to trial, Salvato moved to require the state to elect the specific acts the state would rely on for the two tampering charges. Salvato, 285 Cal. Rptr. at 840. The trial court denied the motion and Salvato appealed. The appellate court held that the State was not required to elect the specific acts underlying the two tampering convictions because the two charges were for a single “continuous course of conduct,” as “the statute contemplates a

continuous course of conduct of a series of acts over a period of time.” Salvato, 285 Cal. Rptr. at 843. Accordingly, the appellate court reversed one of the convictions as multiplicitous. Salvato, 285 Cal. Rptr. at 845.

Section 136.1 of the California Penal Code is divided into three relevant subdivisions. Subdivision (a)(1) subjects to misdemeanor liability one who “[k]nowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.” Cal. Penal Code § 136.1. Subdivision (a)(2) extends liability to attempts at prevention or dissuasion. Cal. Penal Code § 136.1. Subdivision (c)(1) makes the offense a felony “[w]here the act is accompanied by force or by an express or implied threat of force or violence.” Cal. Penal Code § 136.1.

In finding the statute penalized a course of conduct, the Salvato court reasoned that the language used in the statute reflected the possibility or likelihood that the actions comprising the crime would occur over a period of time:

“Prevent” and “dissuade” denote conduct which can occur over a period of time as well as instantaneously. The gravamen of the offense is the cumulative outcome of any number of acts, any one of which alone might not be criminal. Thus it falls within the continuous conduct exception.

285 Cal. Rptr. at 843. The Salvato court further explained that crimes constitute “continuous conduct,” supporting a single conviction, when the

statute contemplates a series of acts over a period of time. 285 Cal. Rptr. at 843.

The language of Washington’s witness tampering statute supports a similar conclusion – that the legislature intended to punish a course of conduct aimed at obstructing justice, rather than each individual action taken in furtherance of that objective. Like “prevent” and “dissuade” or attempts to prevent and dissuade, the “attempts to induce” language denotes conduct occurring over a period of time. And the gravamen of the offense is the cumulative outcome of the efforts undertaken to induce a witness to behave in a certain manner—namely, the obstruction of justice. Such a reading of RCW 9A.72.120 is reasonable.

The lone case relied on by the Hall Court in holding otherwise is State v. Moore, 292 Wis.2d 101, 116, 713 N.W.2d 131 (2006). See 147 Wn. App. at 489-90. However, that case applies the law of Wisconsin, which begins with a presumption that the legislature intends multiple punishments. The Moore court expressly states:

[W]e begin with the presumption that the legislature intended multiple punishments. This presumption may only be rebutted by a clear indication to the contrary.

713 N.W. at 137.

Such a presumption does not exist under Washington law, and is contrary to the rule of lenity. Under Washington law, where the

legislature has not defined the unit of prosecution with specificity, the Court should not interpret the statutory language as permitting multiple punishments:

When choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Tvedt, 153 Wn.2d at 711. The Hall Court's analysis vitiates this State's requirement that the legislature set forth the harsher alternative clearly and definitely before the Court chooses that interpretation.

Furthermore, the Hall Court expressly based its conclusion that Hall's interpretation was not reasonable upon its own determination about which of two interpretations appeared to better "serve the legislative purpose." 147 Wn. App. at 489. In doing so, the Hall Court expressly looked beyond the language of the statute, the statute's history, and the facts of the case, and attempted to construe the statute in a manner that it deemed would accomplish the legislature's objectives. As the Supreme Court stated in Tvedt, the Court's role is to interpret the statute as it is written, and not to construe the statute in a manner that the Court determines to "best accomplish [the] evident statutory purpose:"

In determining legislative intent as to the unit of prosecution, we first look to the relevant statute. The meaning of a plain,

unambiguous statute must be derived from the statutory language. However, we are not allowed to look for an intent that reasonably could be imputed to the legislature, nor are we permitted to construe an Act in a way that we believe will best accomplish evident statutory purpose.

153 Wn.2d at 710 (internal citations, quotation marks and brackets omitted); see also, Varnell, 162 Wn.2d at 168 (In a unit of prosecution case, the Court analyzes the statutory language, the statute's history, and the facts in the case).

Because the language of RCW 9A.72.120(1) is susceptible to more than one reasonable interpretation, it is ambiguous. Watson, 146 Wn.2d at 954-55. The ambiguity must be construed in Moore's favor, as punishing a course of conduct, rather than each individual "instance" within that course of conduct. Adel, 136 Wn.2d at 634-35.

b. Legislative History

The legislative history does not denote a contrary intent on the part of the legislature. There is no dispute that under Moore's interpretation, the act of witness tampering is proscribed and made punishable by the law. Each potential witness an individual attempts to induce to thwart justice is accounted for and the harm to that person as well as the proceeding itself is recognized.

Although the State may refer to legislative history indicating the legislature considers the offense to be "grave" and contrary to the State's

interests in promoting public safety or prosecuting criminals⁴, these findings are just as consistent with Moore's interpretation.

At the same time, Moore's construction avoids the absurd result that would result from an overzealous prosecutor's charging decision. For instance, in reliance upon the Hall Court's reasoning, the State could charge an individual ad infinitum for each time he or she requests a potential witness to do one of the listed actions, even in the same sentence, meeting, letter, or phone call. After all, each such action is an "instance" of an attempt to induce a witness.

The dissent in Thomas correctly observed both the lack of clarity in the witness tampering statute, and the arbitrary charging decisions possible under the Hall court's analysis:

Oral argument amply demonstrated that the judiciary, the prosecutor, and the defense all remain uncertain about the legislature's intended unit of prosecution. There was no consensus about whether the unit of prosecution is each call, each day, or each argument used by Thomas. The State explained that the eight charges here resulted from application of prosecutorial discretion based on either (1) when each of the 36 calls were made during the three-day period, (2) whether the calls were made several hours apart, or (3) whether Thomas relied on different arguments to persuade Montgomery to change her testimony. Finally, the State admitted that it was not entirely clear how the eight charges were derived. The majority's opinion supports this deferential and imprecise approach to deciding the unit of prosecution, contrary to the rule that it is the legislature's job to define a crime's unit of prosecution.

⁴ The Hall court did not evaluate the legislative history of the witness tampering statute. See Hall, 147 Wn. App. at 489-90.

Thomas, 151 Wn. App at 849 (Van Deren, C.J., dissenting).

The Leyda Court expressed its concern that the similar ambiguity in the identity theft statute created the same potential for multiplicitous convictions based on “inconsequential” distinctions between the charges:

[U]nder the dissent's reading, an overzealous prosecutor might be tempted to divide up a defendant's single course of unlawful conduct ad infinitum, thereby resulting in hundreds of identity theft charges though the distinctions between such charges are inconsequential. Accord State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998). For example, under the dissent's reading as applied retroactively to this case, even though only one credit card from one individual was stolen, Leyda could be charged with one count of identity theft when he obtained the [credit] card, one count for possessing the card initially, one count for transferring the card to Cooley, one count for possessing the card after Cooley transferred it back to him, and, as was the situation here, four times for each instance the card was used....

Leyda, 157 Wn.2d at 344, n. 7.

The Hall court's holding that the unit of prosecution is “any one instance of attempting to induce a witness” allows breaking down a single crime into smaller temporal units. It also permits overzealous prosecution, contrary to the purpose of the unit of prosecution. See, e.g., Turner, 102 Wn. App. at 210. Nothing in the legislative history indicates that the legislature intended this absurd result.

c. Factual Record

The facts of the case show a single course of conduct directed at Tammara, a single witness in a single proceeding. All of the alleged conversations and letters had the same objective and intent—to obstruct justice in Moore’s trial. These facts demonstrate only one single course of conduct, the alleged objective of which was the obstruction of justice in a single proceeding, by a single witness.

The Supreme Court recognizes that the State cannot skirt double jeopardy protections by breaking a single crime into temporal or spatial units. Adel, 136 Wn.2d at 635 (citing Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977)). This is precisely what occurred here. The prosecutor expressly broke one charge of witness tampering into eight temporal units. All eight counts were based on letters and phone calls “between the 13th day of March, 2008, and the 31st say of October, 2008.” CP 144-51 (Instructions 29-36). The alleged facts of this case demonstrate violation of only a single unit of prosecution, arbitrarily broken down into artificial temporal divisions.

d. The Rule of Lenity Applies.

Under the rule of lenity, any ambiguity must be resolved against turning a single violation into multiple offenses Bell v. United States, 349 U.S. 81, 75 S.Ct. 620 (U.S. 1955); Universal C.I.T. Credit Corp., 344

U.S. 218, 73 S.Ct. 227 (1952); Tvedt, 153 Wn.2d at 711; Adel, 136 Wn.2d at 634-35.

The language of RCW 9A.72.120 does not unambiguously demonstrate legislative intent to punish a single act rather than a course of conduct. An interpretation of the statute as proscribing a course of conduct directed toward a single witness to a proceeding is consistent with the purpose of punishing an obstruction of justice, the statutory language, the legislative history, and the facts of this case. Because the statute is ambiguous and Moore's interpretation is reasonable, Moore's interpretation prevails.

3. EVEN IF MOORE WAS PROPERLY CHARGED WITH MULTIPLE COUNTS OF TAMPERING, THE COURT'S INSTRUCTIONS DID NOT ADEQUATELY INFORM THE JURY IT HAD TO FIND A SEPARATE AND DISTINCT ACT FOR EACH OF THE IDENTICALLY CHARGED COUNTS, AND THE RESULTING CONVICTIONS VIOLATE DOUBLE JEOPARDY.

The constitutional right to be free from double jeopardy protects a defendant against multiple punishments for the same offense. State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008); U.S. Const. amend. V; Wash. Const. art. I, § 9. To ensure that double jeopardy is not violated when a defendant faces multiple identically-charged counts, the court's instructions must make it manifestly apparent to the jury that each conviction must be based on a separate and distinct act. Berg, 147 Wn.

App. at 931-32; State v. Borsheim, 140 Wn. App. 357, 368, 165 P.3d 417 (2007); State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996). The court's instructions in this case failed to ensure that Moore was not punished multiple times for the same offense, in violation of his double jeopardy protections.

As an initial matter, while Moore did not object to the instructions below, he can challenge the instructions on appeal because his claim raises an issue of constitutional magnitude. See RAP 2.5(a); State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993) (similar double jeopardy claim was constitutional in magnitude and therefore reviewable despite defendant's failure to object to instructions at trial).

The court below instructed the jury as follows:

To convict the defendant of the crime of tampering with a witness, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 13th day of March, 2008, and the 31st day of October, 2008, the defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceeding or a person whom the defendant had reason to believe might have information relevant to a criminal investigation or the abuse or neglect of a minor child; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 144 (Instruction 29). The to-convict instructions for Counts IV, V, VI, VII, VIII, IX, and X were identical to this instruction, except for the designation of the Count number. CP 143-51 (Instructions 30-36).

The court also instructed the jury regarding the unanimity requirement:

The State alleges that the defendant committed acts of Tampering With a Witness on multiple occasions. To convict the defendant on any count of Tampering With a Witness, one particular act of Tampering With a Witness must be proved beyond a reasonable doubt, and you must unanimously agree as to which act or acts have been proved. You need not unanimously agree that the defendant committed all the acts of Tampering With a Witness.

CP 152 (Instruction 37). In addition, the court instructed the jury that “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 120 (Instruction 5).

Identical⁵ instructions were held insufficient to protect against double jeopardy in State v. Berg. As the Court of Appeals explained in that case, jury instructions ““must more than adequately convey the law. They must make the relevant legal standards manifestly apparent to the average juror.”” Berg, 147 Wn. App. at 931 (quoting Borsheim, 140 Wn.

⁵ The only difference was the crime charged: child molestation in Berg; tampering with a witness here.

App. at 366). Unless it is manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense, the defendant's right to be free from double jeopardy may be violated. Berg, 147 Wn. App. at 931. Thus, "where multiple counts ... are alleged to have occurred within the same charging period, an instruction that the jury must find 'separate and distinct' acts for convictions on each count [is] required." Berg, 147 Wn. App. at 931-32 (citing Borsheim, 140 Wn. App. at 368).

The Berg Court held that nothing in the trial court's instructions required the jury to base each conviction on a separate and distinct underlying event. Berg, 147 Wn. App. at 935. It compared the case to two previous cases.

First, in Borsheim, the defendant was charged with four counts of first degree rape of a child, and the court gave a single to-convict instruction listing each count. Borsheim, 140 Wn. App. at 364-65. Although the instruction set out the elements the State was required to prove as to each count, it did not inform the jury that it must find a separate and distinct act for each count. Borsheim, 140 Wn. App. at 367. Moreover, the court's instructions on unanimity and that a separate crime was charged in each count did not cure the defect. The instructions as a whole failed to inform the jury that each crime required proof of a

different act, and vacation of three of the four convictions was required. Borsheim, 140 Wn. App. at 370-71.

Although the trial court in Berg had given separate to-convict instructions, the Court of Appeals held that the reasoning and rule applied in Borsheim required reversal in that case as well. Because the trial court did not give a “separate and distinct” instruction and did not otherwise require the jury to base each conviction on a separate and distinct act, the defendant was potentially exposed to multiple punishments for a single act. The court remanded for vacation of one of the two convictions. Berg, 147 Wn. App. at 935.

Next, the Berg Court discussed State v. Ellis. In that case, the defendant was charged with two counts of first degree child molestation and two counts of first degree rape of a child. Ellis, 71 Wn. App. at 401. The trial court gave four separate to-convict instructions. The instructions for counts I and II, the two counts of child molestation, listed the same elements and charging period, but the instruction for count II also informed the jury that that crime had to have been committed “on a day other than Count I”. Ellis, 71 Wn. App. at 402. The instructions for the rape charges listed separate dates during which the crimes were committed. Ellis, 71 Wn. App. at 402. The court also instructed the jury

that a separate crime was charged in each count and gave the following unanimity instruction:

Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [C.R.].

Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.

Ellis, 71 Wn. App. at 402.

The defendant was convicted on all four counts, and he argued on appeal that the instructions failed to inform the jury that it had to rely on a separate and distinct act for each conviction. Ellis, 71 Wn. App. at 403. The Court of Appeals disagreed, finding the instructions marginally adequate. Ellis, 71 Wn. App. at 406-07. The court believed that the ordinary jury would understand that when two similar crimes are charged, each count requires proof of a different act. The court also noted, however, that the jury was affirmatively instructed that it had to agree that at least one particular act was proved for each count. Ellis, 71 Wn. App. at 406-07.

The Berg court distinguished Ellis, noting that the to-convict instructions in Ellis contained language distinguishing the counts. Thus, taken together with the unanimity instruction which informed the jury, "you must unanimously agree that at least one particular act has been

proved beyond a reasonable doubt for each count," the instructions as a whole conveyed to the jury the requirement that each conviction be based on a separate and distinct act. Berg, 147 Wn. App. at 936. The to-convict instructions in Berg, unlike those in Ellis, did not distinguish between the counts. Thus, the "for any count" language in the unanimity instruction did not alone adequately protect against double jeopardy. Berg, 147 Wn. App. at 936.

The reasoning applied in Berg applies equally in this case. Although the trial court gave eight separate to-convict instructions, these instructions did not distinguish between the counts in any way. CP 68-71. The same time period was described in each instruction, and unlike in Ellis, the instructions did not inform the jury that each conviction had to be based on a crime committed on an occasion separate from the other counts. See Ellis, 71 Wn. App. at 402. While the unanimity instruction informed the jury that "[t]o convict the defendant on any count ..., one particular act of Tampering With a Witness must be proved beyond a reasonable doubt"⁶, this instruction alone did not adequately protect Moore against double jeopardy. See Berg, 147 Wn. App. at 936.

In Berg, the State argued that there was no double jeopardy violation because the State presented evidence of separate acts for each

⁶ CP 152.

conviction and the prosecutor argued in closing that the jury had to agree that two particular acts occurred. Berg, 147 Wn. App. at 935. The Court of Appeals rejected this argument, pointing out that the double jeopardy violation resulted from inadequate instructions, not failure in the State's proof or argument. Berg, 147 Wn. App. at 935. As in Berg, the State's evidence and argument in this case did not cure the double jeopardy violation caused by the court's deficient instructions. It has long been recognized by Washington courts that "[t]he jury should not have to obtain its instruction on the law from arguments of counsel.' Rather, it is the judge's 'province alone to instruct the jury on relevant legal standards.'" Berg, 147 Wn. App. at 935-36 (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995), and State v. Clausing, 147 Wn.2d. 620, 628, 56 P.3d 550 (2002)).

Because the offenses in this case were identically charged, the court was required to affirmatively instruct the jury "that they are to find 'separate and distinct acts' for each count." See Hayes, 81 Wn. App. at 431. Without this instruction, Moore was potentially exposed to multiple punishments for a single act in violation of double jeopardy protections, and seven of his convictions must be vacated. See Berg, 147 Wn. App. at 935; Borsheim, 140 Wn. App. at 370-71.

4. THE COURT IMPROPERLY ADMITTED
IRRELEVANT EVIDENCE OFFERED TO SUPPORT
THE TAMPERING CHARGES

Evidence that is not relevant is not admissible in a criminal trial. ER 402. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Even if relevant, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” ER 403.

A trial court’s ruling on admissibility of evidence is reviewed for an abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

In Perrett, the defendant was arrested for second degree assault with a deadly weapon after he pointed a shotgun at a tenant. 86 Wn. App. at 314. Police arrested the defendant and, after advising him of his Miranda rights, asked him to produce the shotgun he used. Perrett refused, saying the last time the sheriffs took his guns, he did not get them back. Id. at 315. Perrett moved to exclude this statement, but the trial

court admitted it, explaining that the jury needed to understand the totality of the circumstances to judge Perrett's demeanor on arrest. Id. at 319.

On appeal, this Court held that admission of the statement was an abuse of discretion. Perrett's demeanor on arrest was not relevant to any element of the crime charged. Moreover, the statement was unfairly prejudicial, as it raised the inference that he had committed a prior crime with a gun and thus it was more likely he committed the charged offense. Id. at 319-20.

Here, as in Perrett, the defense moved to exclude some of the statements Moore made following his arrest on the grounds that they were irrelevant. In phone calls to Tammara on April 20 and 21, 2008, Moore told her that she could not be forced to testify if she pleaded the Fifth. 3RP 151-52. Counsel argued that the discussion of constitutional rights could not be the basis for a charge of witness tampering. 3RP 151-52. Like the trial court in Perrett, the court below overruled counsel's objection, saying counsel could make that argument in closing. 3RP 152. But also as in Perrett, Moore's suggestion that Tammara plead the Fifth was not relevant to the charged offenses.

Advising a witness to assert her Fifth Amendment privilege does not amount to witness tampering. State v. Ahern, 64 Wn. App. 731, 734 n.2, 826 P.2d 1086 (1992). This is self-evident from RCW 9A.72.120,

which prohibits inducing a witness to withhold testimony “without right or privilege to do so.” Moore’s statements were therefore irrelevant to the charges in this case.

Rather than excluding the irrelevant evidence, the court below reasoned that defense counsel could argue in closing that a discussion of constitutional rights does not constitute witness tampering. A defense attorney should not have to convince the jury what the law is, however. State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984).

Reversal is required if there is a reasonable probability that the erroneous admission of evidence materially affected the outcome of the case. State v. Pogue, 104 Wn. App. 981, 988, 17 P.3d 1272 (2001). In closing argument, the prosecutor went through the calls and letters admitted into evidence, arguing that each constituted evidence of tampering. He specifically referred to the two calls in which Moore suggested Tammara plead the Fifth and told the jury Moore was trying to prevent Tammara from testifying. 7RP 111-12. There was no mention of the fact that advising someone to assert a constitutional right does not, as a matter of law, constitute witness tampering. See RCW 9A.72.120; Ahern, 64 Wn. App. at 734.

As noted above, the to-convict instructions did not identify a specific instance for each charge of witness tampering. Given the court’s

improper admission of Moore's irrelevant statements and the prosecutor's argument that those statements constituted witness tampering, there is a reasonable probability the jury based one or more of the convictions on this evidence. The witness tampering convictions should be reversed and the case remanded for a new trial.

5. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO AN INSTRUCTION IMPROPERLY REQUIRING THE JURY TO BE UNANIMOUS TO ANSWER "NO" ON THE SPECIAL VERDICT.

Washington requires unanimous verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). For special verdicts on aggravating factors, jurors must be unanimous to find that the State has proven the existence of the aggravating factors beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict "no," however. Goldberg, 149 Wn.2d at 893. Where the jury is deadlocked or cannot decide, the answer to the special verdict is "no." Id.⁷

In Goldberg, the jury was given the following special verdict instruction:

⁷ Contrary to the holding in Goldberg, Division Three of the Court of Appeals concluded it was proper to tell the jury it must be unanimous in order to enter a negative finding on a special verdict. State v. Bashaw, 144 Wn. App. 196, 202-03, 182 P.3d 451 (2008). The Supreme Court has granted review of Bashaw. 165 Wn.2d 1002 (2008).

In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no”.

Goldberg, 149 Wn.2d at 893.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894.

By contrast, in this case the jury was instructed quite differently:

You will also be given special verdict forms for the crime[s] charged in Count I. ...Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer “no.”

CP 157 (Instruction 40).

This instruction incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to Goldberg. Goldberg is binding precedent, and there was no legitimate tactical reason for trial counsel’s failure to object to the improper instruction. Moreover, the defense was prejudiced by counsel’s deficient performance, even though the jury returned a unanimous “yes” verdict on the aggravating factors. Because of the erroneous instruction, the jury would have felt compelled to continue deliberating, even if genuinely deadlocked, rather than

returning a verdict of “no.” There is a reasonable likelihood counsel’s error affected the outcome of the case, and the special verdicts should be vacated.

D. CONCLUSION

Trial counsel’s failure to request a limiting instruction as to Tammara’s prior inconsistent statements and his failure to object to the special verdict instruction denied Moore effective representation. The assault of a child conviction must be reversed, and the special verdicts vacated. In addition, the multiple charges of witness tampering based on a course of conduct directed at a single witness violate double jeopardy. Even if multiple witness tampering charges are permitted, the instructions failed to ensure that each conviction was based on a separate and distinct act, again violating double jeopardy. Finally, the court’s admission of irrelevant evidence that Moore asked Tammara to plead the Fifth requires reversal.

DATED this 1st day of February, 2010.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibits and Brief of Appellant in *State v. Thomas Ray Moore*, Cause No. 39586-0-II, directed to:

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Tacoma, WA 98402-2102

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



Catherine E. Glinski
Done in Port Orchard, WA
February 1, 2010

Em