

NO. 39586-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS RAY MOORE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck

No. 08-1-01328-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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3. Whether the court properly admitted the evidence of witness tampering in a phone conversation where the defendant told the witness they could not make her testify against the defendant if she also pleaded the fifth, but also encouraged her not to get divorced from him so that she would not have to testify under the spousal privilege?
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B. STATEMENT OF THE CASE.

1. Procedure

On March 14, 2008 based on an incident that occurred on March 11, 2008 the State charged the defendant Thomas Moore with two counts: Count I, assault of a child in the first degree; Count II, criminal mistreatment in the fourth degree. CP 1-2.

On November 18, 2008 the State filed an amended information that dismissed Count II and added Counts III through X, tampering with a witness. CP 9-13. Each count of tampering with a witness alleged different acts of tampering as to the same witness. CP 9-13.

On April 21, 2009 the case was assigned to the Honorable Judge Kitty-Ann van Doorninck, although a jury was not empaneled until June 11, 2009. CP 214, 215-18, 219.

On May 22, 2009 a second amended information was filed that added an allegation of aggravating circumstances as to Count I only. CP 14-19.

The jury returned verdicts of guilty as to every count and also found that the aggravating circumstances had been proved. CP 162-174.

The defendant was sentenced on July 17, 2009 to 318 months on Count I based on an offender score of 9. CP 199, 202. All other counts involved a lower sentence that ran concurrent to Count I so that the total sentence was 318 months. CP 202. The defendant's offender score on

Count I was based on another current conviction for assault of a child in the third degree under Cause No. 08-1-05410-3, as well as the eight counts of tampering with a witness. CP 197-99. The defendant had no other prior convictions. CP 197-99.

The appeal was timely filed on July 17, 2009. CP 191-92.

2. Facts

On March 11 of 2008 Washington Child Protective Services (CPS) received a report or notice of concerns regarding the welfare of T.M., a minor, and an allegation of possible abuse of T.M. by T.M.'s father, the defendant Thomas Moore. 3 RP 5, ln. 5 to p. 6, ln. 2; p. 8, ln. 4-17. T.M. was four years old on the date of the incident. *See* 3 RP 5. There was already an open case on T.M. at that time. 3 RP 5, ln. 9-12. It was necessary for CPS to determine if the report involved a new allegation or was a continuation of the existing case. 3 RP 5, ln. 17-23.

CPS case officer Martinez concluded that the new report raised enough of a concern that it was necessary to go out and investigate the allegation. 3 RP 7, ln. 14-22. Officer Martinez was twice unable to make contact at the residence [apparently by telephone], so the matter was reported to police via the 911 call system. 3 RP 7, ln. 23 to p. 8, ln. 3; p. 9, ln. 5 to p. 10, ln. 9.

Lakewood Police Officer Lee responded to T.M.'s residence to conduct a check on T.M. 3 RP 34, ln. 3-8. Present, and also residing at

the apartment was Tamara Moore [hereinafter Tamara], the defendant's wife who was T.M.'s stepmother, and had three other children of her own who were not Moore's biological children. 3 RP 34, ln. 25 to p. 35, ln. 7. Those three children were in the living room watching TV when Officer Lee arrived. 3 RP 35, ln. 8 to 21. Tamara advised Officer Lee that T.M. was sleeping in his room and gave Officer Lee permission to check on T.M. 3 RP 35, ln. 24 to p. 36, ln. 16.

Officer Lee initially observed T.M. to be laying in a fetal position on the floor next to but not on a mattress, covered with a thin blanket. 3 RP 37, ln. 1-14. Upon contacting T.M. Officer Lee could see numerous injuries all over his face and all parts of his body. 3 RP 37, ln. 18-21; p. 42, ln. 13 to p. 45, ln. 3; p. 47, ln. 22 to p. 48, ln. 4-10; Exs. 19, 20, 27, 28. There were numerous lacerations or cuts and obvious scratches and marks all over face and especially on his forehead. 3 RP 38, ln. 3-6; p. 46, ln. 9-24; Ex. 22. There was dried blood behind his ears and at the top of his head and a lot of bruises around the forehead and his face. 3 RP 38, ln. 6-9; p. 46, ln. 9-23; Ex. 18. There was also a laceration to T.M.'s head. 3 RP 41, ln. 6-25; Ex 29. T.M. had severe bruising on his right arm which was also swollen significantly. 3 RP 45, ln. 11-15; p. 47, ln. 2-15; Ex. 12. Some of the bruises and cuts appeared to be old and some appeared to be fresh. 3 RP 41, ln. 2-3.

Because T.M. had an immediate medical issue that was not being dealt with, Officer Lee called an ambulance for T.M. and followed it to the

hospital in his patrol vehicle. 3 RP 49, ln. 10-18. Thus, about an hour and a half to two hours after CPS had called 911 the local police department contacted CPS and advised them that the police were on the way to Mary Bridge Children's Hospital. 3 RP 10, ln. 10 to p. 11, ln. 22. CPS officers reported to the hospital as well and found T.M. was being treated. 3 RP 10, ln. 10 to p. 11, ln. 22. CPS Officer Martinez observed that T.M. was bruised from head to toe, on his face and neck, on his chest, back, legs, arms, and feet. 3 RP 12, ln. 16 to p. 13, ln. 3.

T.M. was released from the hospital that night and was immediately taken into foster care before being released. 3 RP 13, ln. 24 to p. 14, ln. 5.

T.M.'s step-sister A.P. testified that her siblings and her mother (who at the time of this incident was name Tamara Moore) all lived together with Thomas Moore and T.M. 3 RP 57, ln. 7 to p. 58, ln. 24. Initially they lived in New York for a short while before moving to Lakewood. 3 RP 58, ln. 6-7; p. 81, ln. 14-16.

A.P. testified that in New York she observed the defendant use a leather belt to spank T.M. and also take T.M.'s head and bang it against the wall, probably more than once. 3 RP 60, ln. 11 to p. 62, ln. 22. A.P. also testified that she once saw Moore bang T.M.'s head against the wall in Washington. 3 RP 62, ln. 23. She also said she saw Moore hit T.M. with the belt more than once a week in Washington. 3 RP 63, ln. 12 to p. 64, ln. 2.

T.M. was not allowed to eat with the other children and if T.M. didn't follow the rules he would get spanked and have to do "PT." 3 RP 64, ln. 17 to p. 65, ln. 4. T.M. was small and skinny when he was brought into the emergency department. 4 RP 9, ln. 25. "PT" meant having to pretend as if one was sitting on a chair while putting arms out. 3 RP 66, ln. 16 to p. 67, ln. 4. If T.M. couldn't hold the position, Moore would smack T.M. on the hands with a belt while T.M. was still in that position, which would cause T.M. to start crying. 3 RP 67, ln. 5-19.

When he did not behave as Moore desired T.M. was also forced to eat little orange hot peppers that made T.M. cry because they were really hot and Moore similarly had T.M. eat Tobasco sauce a few times a month as a punishment. 3 RP 65, ln. 7-17; 3 RP 102, ln. 15 to p. 103-16. About two weeks before officer Lee arrived at the apartment T.M. failed to scrub with soap or shampoo in the shower, so Moore got a kitchen sponge with a scrubber side and scrubbed him until he screamed. 3 RP 98, l n. 8 to p. 99, ln. 18. Tamara also testified that on one occasion she heard T.M. screaming as if in pain from the back bedroom and went in to find T.M. with his pants down, Moore on top of him with his hand back as if to strike T.M., Tamara told Moore to stop and get off T.M., which Moore did. 3 RP 99, ln. 19 to p. 100, ln. 15.

A.P. testified that the bruises on T.M.'s forehead in Exhibit 25 were from Moore banging T.M.'s head against the wall. 3 RP 67, ln. 25 to p. 68, ln. 16. A.P. testified that most of the scratches on T.M.'s face were

from a ring Tamara Moore was wearing when she smacked T.M. 3 RP 69, ln. 18 to p. 70, ln. 11. A.P. also testified that Tamara Moore would also hit T.M. with the belt, make him assume the PT position and make him eat hot peppers. 3 RP 70, ln. 12 to p. 71, ln. 14. Tamara claimed she did none of this. 3 RP 93, ln. 8-10; p. 124, ln. 8-16; p. 129, ln. 12-21; 135, ln. 22-23.

Dr. Wakley of Mary Bridge Children's Hospital testified that T.M. had a large number of bruises that were in various stages of healing, suggesting that they were of different ages over a long period of time. 4 RP 12, ln. 1-8. Swelling, however, was something you would see right at the time of injury. 4 RP 13, ln. 8-9. T.M. had an older laceration on the back of his scalp that was partially healed. 4 RP 13, ln. 18-19. It was the kind of wound that would have been sutured [stitches] in the emergency department, but there was no sign the wound had been repaired. 4 RP 14, ln. 15 to p. 15, ln. 7.

T.M. also had a number of spots that were round red 25-cent sized or 50-cent sized marks made recently, within the last week. 4 RP 15, ln. 24 to p. 16, ln. 6. These marks were not consistent with natural injuries and were 100 percent inflicted on multiple occasions. 4 RP 16, ln. 7-13. The injuries could have been either burns or bruises. 4 RP 16, ln. 1-2.

Dr. Wakely also testified that T.M. had lacerations on his legs that were in the process of healing and that were consistent with being hit by a looped object such as a cord or coat hanger and that would have required a

significant amount of force and injury to inflict. 4 RP 20, ln. 5-20. T.M. had a number of other injuries that were consistent with non-accidental trauma, i.e. child abuse. 4 RP 9, ln. 18; pp. 22-39. In addition to the bruising and abrasions, T.M. had several bone fractures that were in different stages of healing. 4 RP 40-42.

A week or two after the incident and T.M. was removed to foster care, Moore and Tamara were interviewed by the police at the Lakewood Police Department. 3 RP 90, ln. 19 to p. 91, ln. 7. After interviewing Moore and Tamara, in a follow-up interview with Moore after Tamara's interview, regarding T.M.'s injuries Moore admitted, "All of this is me. All of this is because of me." He then went on to explain how he had inflicted the injuries on T.M. RP 06-16-09, p. 88, ln. 5-13.

Moore was ultimately arrested that day. 3 RP 104, ln. 19-20. Tamara continued to maintain phone and mail contact with Moore after he was arrested. 3 RP 104, ln. 21 to p. 105, ln. 5; Exs. 38, 39, 40, 41, 42, 43.

In a number of their telephone conversations while Moore was in the jail, he asked Tamara not to proceed with the divorce against him because then she couldn't testify against him. 3 RP 118, ln. 2-11. Moore also asked Tamara to take her kids and hide out in Arkansas. 3 RP 118, ln. 12-16. He also asked Tamara if it would be o.k. to blame T.M.'s injuries on someone else and wanted her to blame them on her son (first initial C.). 3 RP 118, ln. 17-22.

In a letter dated March 31, [2008], Moore first indicates that he believes that it is Moore who will get him out of jail, although he doesn't know how, and he asks her to figure it out because he is completely stumped. 3 RP 122, ln. 20-24. In a subsequent letter Moore suggests that there were a number of things Tamara could do or say to "save his ass." 3 RP 122, ln. 6-15.

In a letter dated April 13, 2008 Moore wrote Tamara that they couldn't make her testify against him in court because they were married and that all she had to do was tell the judge that her lawyer was trying to get her to lie on the stand. 3 RP 123, ln. 3-18. In that same letter he went on to say that he could have her statement to the cops suppressed because they were married, so that should make her feel better about things. 3 RP 123, ln. 11-17.

Finally, in one of the letters Moore wrote that she is going to be what gets him out of the mess because as long as the two are married they can't force her to testify against him. 3 RP 124, ln. 7-11. He went on to say that he understands why she was the one to get him out and all his dreams so they have to be married right now because they "think they have me by the balls but you can put one hell of a damper on their plans by stopping the divorce." 3 RP 124, ln. 13-15. "I mean, wouldn't it do your heart good to know you fucked them over after they completely life –

they – life – why would you want to help them out when they took your babies away.” 3 RP 124, ln. 15-18.¹

Tamara was separately charged with a crime and pleaded guilty in relation to what happened to T.M., although, that crime was not for inflicting injuries on T.M. 3 RP 126, ln. 9-20. After she pleaded guilty Moore asked her to also take responsibility for charges against Moore and for the injuries to T.M. because they couldn’t charge her with those crimes under double jeopardy so that they would have to be dropped and Moore would be released. 3 RP 126, ln. 21 to p. 127, ln. 7.

C. ARGUMENT.

1. MOORE’S CONVICTIONS DID NOT
CONSTITUTE A SINGLE UNIT OF
PROSECUTION.

Claims of double jeopardy are questions of law that are reviewed de novo. *State v. Kelley*, Slip. Op. 82111-9, --- Wn.2d ---, 3, --- P.3d --- (2010) (citing *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009, --- Wn (citing *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)). The double jeopardy clauses of the Fifth Amendment to the United States Constitution and the double jeopardy clause of Article I, section 9 of the Washington Constitution provide the same protection.

¹ Tamara’s three children had also been removed from her custody by CPS. See 3 RP 79, ln. 7-22.

Kelley, Slip. Op. 82111-9 at 3 (citing *In Re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006)).

The double jeopardy clause bars multiple punishments for the same offense. *Kelley*, Slip. Op. 82111-9 at 3 (citing *Borrereo*, 161 Wn.2d at 536; *N. Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)).

“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”

Kelley, Slip. Op. 82111-9 at 3 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). The legislature has authority to enact statutes that in a single proceeding impose cumulative punishments for the same conduct. *Kelley*, Slip. Op. 82111-9 at 3.

Thus, when a defendant’s act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Calle*, 125 Wn.2d at 776. “If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended.” *Calle*, 125 Wn.2d at 776. (Citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. “The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.” *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)(emphasis in the original)(citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

If the legislature clearly intended to impose multiple punishments for the same act or conduct, there is no double jeopardy violation and the inquiry ends there. *Kelley*, Slip. Op. 82111-9 at 3. However, if the legislative intent is unclear, the court applies the *Blockburger* test to determine whether the legislature intended one or multiple offenses, and if the legislature intended only one offense, imposing multiple punishments violates double jeopardy. *Kelley*, Slip. Op. 82111-9 at 3 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)).

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. *State v. Hescoek*, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). To determine whether a

defendant has received multiple punishments for the same offense, the court must determine the unit of prosecution that the legislature intended to constitute the prohibited act. *State v. Green*, Slip. Op. 38893-6-II, p. 1, --- Wn. App. ---, --- P.3d --- (2010) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). “The ‘unit of prosecution’ refers to the scope of the criminal act.” *Green*, Slip. Op. 38893-6-II, p. 1. When the legislature’s intent is unclear any ambiguities must be construed in the defendant’s favor pursuant to the rule of lenity. *Green*, Slip. Op. 38893-6-II, p. 1 (citing *State v. Bobic*, 140 Wn.2d 250, 261-62, 996 P.2d 610 (2000)).

Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). “Among other things, double jeopardy principles bar multiple punishments for the same offense.” *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). When a defendant’s acts support charges under two statutes, “the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question.” *Borrero*, 161 Wn.2d at 536; *State v. Gaworski*, 138 Wn. App. 141, 156 P.3d 288, 291 (2007) (citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed.

2d 275 (1981)). If the legislature did intend to impose cumulative punishments for the crime, double jeopardy is not offended. *Borrero*, 161 at 536 (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)). Washington courts primarily rely on the test announced in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932), to determine legislative intent in these cases. *Borrero*, 161 Wn.2d at 536-537. Under the *Blockburger* test, “two offenses are not the same if each contains an element not contained in the other.” *State v. Corrado*, 81 Wn. App. 640, 649, 915 P.2d 1121 (1996)(citing *Blockburger*, 284 U.S. at 304). If the crimes meet this test, the court presumes that the legislature intended separate punishment. *Gaworski*, 138 Wn. App. at paragraph 8 (citing *Freeman*, 153 Wn.2d at 772). The *Blockburger* presumption may also be rebutted by evidence of contrary legislative intent. *Freeman*, 153 Wn.2d at 772.

The *Blockburger* test is a tool used to discern legislative intent, however, where the legislature has made its intent clear the *Blockburger* test is irrelevant.

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in

Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct.673, 74 L. Ed. 2d 535 (1983).

Here, the Supreme Court's recent opinion in *State v. Hall* is controlling, at least in part. *State v. Hall*, Slip. Op. 82558-1, --- Wn.2d ---, --- P.3d --- (2010). In *Hall*, the court conducted a three part legal analysis to determine the unit of prosecution: first, the court analyzed the statute in question; second the court analyzed the statute's history; and third, the court conducted a factual analysis of the unit of prosecution. *Hall*, Slip. Op. 82558-1 at 2-6. Ultimately, the court held that the plain language of the statute revealed that the legislature intended to criminalize inducing a witness not to testify or to testify falsely. *Hall*, Slip. Op. 82558-1 at 6. Said otherwise, for the charge of witness tampering the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding. *Hall*, Slip. Op. 82558-1 at 4.

In *Hall*, the defendant attempted to call the witness over 1,200 times and during those calls attempted to persuade the witness not to testify or to testify falsely. *Hall*, Slip. Op. 82558-1 at 1. Based on this,

Hall was charged with four separate counts of witness tampering. *Hall*, Slip. Op. 82558-1 at 1.

The court determined that Hall's conduct was continuous and ongoing, aimed at the same person in an attempt to tamper with her testimony in a single proceeding. *Hall*, Slip. Op. 82558-1 at 5. However, as the court noted in its holding, their determination might have been different if Hall had sent letters in addition to phone calls. *Hall*, Slip. Op. 82558-1 at 6.

That is precisely the case here. Moore communicated with Tamara by both telephone and letter. In doing so he sought to have her testify falsely, or not at all. Moore also sought to have Tamara absent herself from the proceedings by hiding out in Arkansas.

The witness tampering statute provides as follows:

- (1) 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 ... 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.

Hall, Slip. Op. 82558-1 at 2 (citing RCW 9A.72.120(1)).

The plain language of the statute makes it clear that inducing a person to absent herself from the proceedings is a separate basis for committing the crime, independent of inducing a person to testify falsely

or withhold any testimony. The court in *Hall* did not reach this disjunction in the statutory language.

Thus, under the facts of this case, Moore is still guilty of two separate counts of witness tampering. This is because the phone conversations in which he sought to induce Tamara not to testify or to testify falsely constitute one unit of prosecution, the letters constitute a second unit of prosecution. *Compare* 3 RP 118, ln. 2-11 *with* 3 RP 122-24 and Exs. 36, 37, 38, 39, 40, 41, 42.

The court should remand this matter for re-sentencing based on two counts of witness tampering for a total offender score of three rather than nine.

2. THE COURT PROPERLY INSTRUCTED THE JURY WHERE NO UNANIMITY INSTRUCTION WAS REQUIRED BECAUSE THE COUNTS CONSTITUTED A CONTINUING COURSE OF CONDUCT.

It is well established that in Washington, jury verdicts in criminal cases must be unanimous. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963). Washington courts have repeatedly affirmed that the right to a unanimous jury verdict in criminal cases is of constitutional magnitude and may be raised for the

first time on appeal.² See *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1977) (citing *State v. Holland*, 77 Wn. App. 420, 424, 891 p.2d 49 (1995)); *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980)(citing Wash. Const. art. 1, § 21).

The court has divided cases involving jury unanimity issues into two types: cases involving multiple acts and cases involving alternative means. See *State v. Kitchen*, 110 Wn.2d 403, 409-410, 756 P.2d 105 (1988). Multiple acts cases are where the State presents evidence of several acts that could form the basis of one count charged. See *Kitchen*, 110 Wn.2d at 409. In multiple acts cases, the State must either tell the jury which acts to rely upon, or the court must instruct the jury that they must unanimously agree as to which act has been proved. *Kitchen*, 110 Wn.2d at 409 (citing *Petrich*, 101 Wn.2d at 570). See also WPIC 4.25; 4.26; and *State v. Moultrie*, 143 Wn. App. 387, 392-94, 177 P.3d 776 (2008) (approving the current version of WPIC 4.25).

In alternative means cases, a single offense may be committed in more than one way. *Kitchen*, 110 Wn.2d at 410. There must be jury unanimity as to guilt, but the jury need not be unanimous as to the means

² The right to a unanimous jury verdict is a matter of constitutional magnitude, and therefore a matter that may be raised for the first time on appeal, only under the Washington Constitution. The United States Constitution does not require a unanimous jury verdict. See *Burch v. Louisiana*, 441 U.S. 130, 136, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), (citing *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)); *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)).

by which the crime was committed so long as substantial evidence supports each alternative means. *Kitchen*, 110 Wn.2d at 410.

Because the State has conceded in section 1 above that witness tampering is an ongoing offense and that there are only two units of prosecution in this case, the defense argument that there were multiple counts in the same charging period is now moot. Moreover, a unanimity instruction was given in jury instruction 37. CP 152.

It is a well established principle, both in Washington and under federal law that a jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 235, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007); *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Here, the jury received several instructions that gave it proper guidance as to this issue. Jury instruction number 5 [CP 120] stated 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.

Jury Instruction 38 advises the jurors that they have a duty to deliberate with one another in an effort to reach a unanimous verdict. CP 153.

Jury Instruction 39 advises the jurors that because this is a criminal case, each of them must agree for them to return a verdict. CP 156.

Because the State has conceded that all but two counts constitute the same course of conduct, the defendant's argument as to this issue is without merit because it is rendered moot.

3. THE COURT PROPERLY ADMITTED THE EVIDENCE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *Thomas*, 150 Wn.2d at 856; *Guloy*, 104 Wn.2d at 421.

Even when an objection was made at trial, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94,

97, 935 P.2d 1353 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Relevant evidence is:

[E]vidence 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.

State v. Wilson, 144 Wn. App. 166, 176, 181 P.3d 887 (2008) (quoting ER 401). Under that definition, to be relevant evidence must: (1) have a tendency to prove or disprove a fact; and (2) the fact must be of consequence in the context of other facts and the applicable substantive law. *State v. Sargent*, 40 Wn. App. 340, 349, 698 P.2d 598 (1985) (citing 5 K. Tegland, Wash. Prac., Evidence § 82 at 168 (2d ed. 1982) [now published as 5 K. Tegland, Wash. Prac., Evidence § 401.2 at 258, (5th ed. 2007)]). It is also the case that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Sergeant*, 40 Wn. App. at 349, ln. 4 (citing ER 403).

Here, defense counsel objected to the admission of the April 20th phone conversation on the defense position that it was not witness tampering for Moore to tell Tamara, “They cannot make you testify

against me if you plead the fifth.” Because it was a discussion of legal rights. 3 RP 151, ln. 23 to p. 152, ln. 1.

This argument on appeal is without merit for two reasons. First, in that conversation Moore also encouraged Tamara to not get divorced from him so he could exploit the spousal privilege. 3 RP 152, ln. 2-4. Second, and more importantly, that count becomes irrelevant as a separate count where there were multiple phone calls where Moore encouraged Tamara not to testify or to testify falsely, which calls the State has already conceded constitute a single course of conduct. Where the multiple calls constitute a single course of conduct, any error is harmless.

4. TRIAL COUNSEL WAS NOT INEFFECTIVE.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *McFarland*, 127 Wn.2d at 333-34; *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)(emphasis added in original)). Deliberate tactical choices may only constitute ineffective

assistance if they fall outside the wide range of professionally competent assistance, so that “exceptional deference must be given when evaluating counsel’s strategic decisions.” *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *McNeal*, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel’s representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

a. The Failure To Request A Limiting Instruction As To Tamara’s Prior Inconsistent Statement Was Harmless.

At trial Tamara claimed she never observed Moore hit T.M. strike him with a belt, etc. 3 RP 93-103. Tamara’s testimony was impeached with her prior inconsistent statements made during her interview at the Lakewood Police Department where she stated she did see Moore engage in such conduct. RP 06-16-09, p. 80-82. Moore now claims on appeal that trial counsel was ineffective because he failed to request a limiting instruction as to that impeachment testimony. Br. App. 17. However, the failure to request such an instruction was harmless error because there was

already substantive evidence that Moore had hit and abused T.M. in those ways. That testimony came from Tamara's daughter A.P. who directly testified to observing Moore engaged in that abusive conduct. 3 RP 60-68. Where those facts were already before the jury as substantive evidence, the lack of a limiting instruction was moot, which is presumably why defense counsel didn't ask for it.

b. Defense Counsel Was Not Ineffective For Not Asking For A Unanimity Instruction As To The Special Verdict.

There was a unanimity instruction as to the special verdict. Jury Instruction 40 directed the jury regarding the special verdict and specifically told the jury that, "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]." CP 157. Additionally, Jury Instruction 39 generally directed the jury that for them to return a verdict each of them must agree for them to return a verdict. CP 156.

The defense finds fault with the jury instruction in this case because it also directs the jury that in order to answer the special verdict form "no" the jury must be unanimous. In support of this the defense relies on *State v. Goldberg*. Br. App. 46ff (citing *State v. Goldberg* 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003)). However, that reliance is

misplaced. As a preliminary matter, the court in *Goldberg* did not hold that a jury need not be unanimous in order to enter a special verdict of “no.” Rather, the court on *Goldberg* merely held that the jury must be unanimous to reach a verdict of “yes.” The court in *Goldberg* did not reach the issue the defense claims the case stands for. Rather, the court’s ruling was limited to a consideration under the particular instruction that was given to the jury. *Goldberg*, 149 Wn.2d at 893. While that instruction was not held to be error, the court in *Goldberg* did not go on to establish a standard that the jury must enter “no” if not unanimous. The instruction in this case was not incorrect and because of the difference in the two instructions, *Goldberg* is inapplicable to this case. *See Goldberg*, 149 Wn.2d at 893. The trial court’s error in *Goldberg* was that when the jury returned a special verdict of “no,” the trial court treated it as if the jury was deadlocked as to the special verdict and then sent the matter back for further consideration. *Goldberg*, 149 Wn.2d at 894.

The instruction used by the court here is in fact more correct than that used in *Goldberg*. If the jury is unable to reach a unanimous verdict of “no” the issue remains unresolved, and the verdict form should properly reflect the difference between a verdict of “no” as opposed to the inability to reach a verdict. Such a distinction is important and more correct because it directly impacts the State’s ability to pursue the aggravating

circumstances in the event of any retrial because of double jeopardy limitations.

Moreover, even if the instruction here was error, any error was harmless under the facts of this case where the jury here was instructed that it must be unanimous to answer “yes” and it in fact answered “yes,” so that an answer of “no” was never at issue.

Because the instruction was not erroneous, or at the least was harmless even if it was error, trial counsel was not ineffective for failing to request a different instruction.

Trial counsel was not ineffective where his actions were not unreasonable and in any case they did not prejudice the defendant.

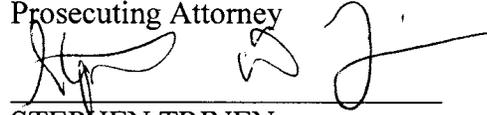
D. CONCLUSION.

For the foregoing reasons, the State asks the court to hold that the defendant should have been convicted of two counts of witness tampering and reverse and remand for resentencing with a corrected

offender score. But as to the remaining issues the State asks the court to deny the appeal as without merit.

DATED: June 8, 2010.

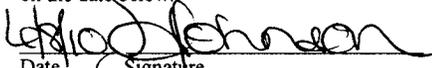
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

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