

FILED
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 41544-5-II

STATE OF WASHINGTON,

Respondent,

vs.

LEEANNA RAE WHITE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 10-1-00363-0

BRIEF OF RESPONDENT

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| SERVICE | Jordan B. McCabe Law Office of Jordan McCabe PO Box 6324 Bellevue, WA 98008-0324 | This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: April 15, 2011, at Port Angeles, WA <p style="text-align: right;"><i>[Signature]</i></p> |
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I. STATEMENT OF THE ISSUES:

1. Did the defendant receive notice of the alleged crime that the State intended to prove when (1) the criminal information alleged every element of the charged offense, (2) the criminal information alleged the particular facts supporting each element, (3) the motion for probable cause appraised the defense of the charge and facts the defendant must defend against, and (4) the defense never requested a bill of particulars or challenged the sufficiency of the information?
2. Did the trial court's decision that permitted two witnesses to testify telephonically during a bench trial violate the defendant's right to confrontation when the live testimony was taken under oath and subject to cross-examination?
3. If the trial court erred when it permitted a State witness to testify telephonically, was the error harmless when a defense witness corroborated the same testimony that an assault actually occurred?
4. Did the defendant invite error when trial counsel (1) moved the court to permit a defense witness to testify telephonically, (2) informed the State prior to trial that it would not object to a prosecution witness testifying via the telephone, and (3) agreed in open court to the prosecution's request to permit a State witness to testify telephonically?
5. Did the defendant waive her right to confront the witnesses at trial when her attorney (1) moved the trial court to permit a defense witness to testify telephonically, and (2) agreed in open court with the prosecution's request to permit a State witness to testify telephonically?
6. Did the defendant receive effective assistance of counsel?

II. STATEMENT OF THE CASE:¹

Factual History

Ms. Leeanna White (White) is the granddaughter of Ms. Edna Lingle (Lingle). RP (10/12/2010) at 45. The two shared a tumultuous relationship, which forced Lingle to obtain a protection order protecting her from White.² See CP 22. White was aware that a court order was in effect and prohibited her from having any contact with her grandmother. See CP 22; RP (10/12/2010) at 39-40.

On August 17, 2010, White went to Lingle's apartment. RP (10/12/2010) at 7-8, 19, 28, 45. For reasons not clear in the record, White was able/permitted to enter the apartment. A fight quickly ensued between White and Lingle. See RP (10/12/2010) at 7-8, 45-46. According to Lingle, White "was pulling my hair and flung my head on the floor." RP (10/12/2010) at 47. The altercation caused Lingle to suffer several injuries to her head. RP (10/12/2010) at 45.

A neighbor, Ms. Jacquelyn Howard (Howard), was outside the apartment watching her children. RP (10/12/2010) at 7-8. Howard overheard the fighting. RP (10/12/2010) at 7-8. When the fighting moved

¹ Ms. White does not assign error to the trial court's factual findings (CP 19-20). As such, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

² The protection order prohibited White from coming within 100 feet of Lingle.

to the outside of the apartment, Howard witnessed White punch Lingle, knocking her to the ground. RP (10/12/2010) at 8. Howard ran to call 911. RP (10/12/2010) at 8.

Officer Mike Rowley of the Forks Police Department responded to the scene. RP (10/12/2010) at 16. Officer Rowley found White within 100 feet of the Lingle residence, crying and distraught. RP (10/12/2010) at 19. After speaking with both Lingle and Howard, Officer Rowley placed White under arrest. RP (10/12/2010) at 19-20.

Procedural History

On August 19, 2010, the State filed a motion for determination of probable cause. CP To Be Determined (T.B.D.). On August 23, 2010, the State charged White with assault in violation of a protection order contrary to RCW 26.50.110(4). CP 22. The State personally served its witnesses with subpoenas, compelling their attendance at trial between October 11-13, 2010. CP To Be Determined (T.B.D.).

On October 10, 2010, the State phoned the defense and advised counsel that Lingle was denying that an assault actually occurred. RP (10/11/2010) at 2. The State informed the defense that it would not call Lingle to testify because (1) she intended to protect her granddaughter by

denying the assault, and (2) her extremely poor health would not permit her to travel to court. RP (10/11/2010) at 2.

On October 11, 2010, during a status hearing, the defense moved the trial court to (1) continue the trial one day, and (2) permit Lingle to testify by phone as a defense witness. RP (10/11/2010) at 2-4. The State did not oppose the motions. RP (10/11/2010) at 3. Additionally, White waived her right to a jury trial. RP (10/11/2010) at 5-6. The trial judge granted the motions and scheduled a bench trial for the next day. RP (10/11/2010) at 4-6.

Later that afternoon, the State learned Howard was having difficulty arranging childcare for her children. *See* RP (10/12/2010) at 2. The State asked the defense if it would permit Howard to testify by phone. *See* RP (10/12/2010) at 2. The defense was willing to accommodate the request. *See* RP (10/12/2010) at 2.

On October 12, 2010, prior to the commencement of the bench trial, the defense informed the trial judge that Howard would also be testifying by phone. RP (10/12/2010) at 2. The State informed the judge that its witness had “childcare issues,” but that the parties had agreed to the telephonic testimony. RP (10/12/2010) at 2. The trial judge verified whether that was the agreement of the parties. RP (10/12/2010) at 2. Both the State and the Defense answered affirmatively. RP (10/12/2010) at 2.

The trial judge then ruled, “[w]e will allow [Howard’s telephonic testimony] under that stipulation.” RP (10/12/2010) at 2.

The State’s witnesses testified to the events described above, as expected. This testimony was live, under oath, and subject to cross-examination. RP (10/12/2010) at 5, 9-13, 15, 21, 26. After Howard and Officer Rowley testified, the State rested its case. RP (10/12/2010) at 26.

White testified in her own defense. RP (10/12/2010) at 27. She admitted she knew a court order prohibited her from having any contact with Lingle, RP (10/12/2010) at 39-40, but she denied assaulting her grandmother. RP (10/12/2010) at 28-29, 32-33. The defense then introduced Lingle’s telephonic testimony, which was live and provided under oath. RP (10/12/2010) at 43-44. However, Lingle testified that her granddaughter did in fact assault her. RP (10/12/2010) at 45-47. Lingle provided a blunt description of the beating she received from White. RP (10/12/2010) at 45-47. Lingle explained that she had intended to protect White, but ultimately decided her granddaughter needed to take responsibility for her actions. RP (10/12/2010) at 45-47. The State declined to cross-examine the witness. RP (10/12/2010) at 47.

The trial judge found the defendant guilty of assault in violation of a protection order. CP 19-20; RP (10/12/2010) at 54. The judge sentenced

White to a nine (9) month confinement term. CP 10; RP (11/04/2010) at 4.
White appeals. CP 6.

III. ARGUMENT:

A. THE INFORMATION WAS SUFFICIENT AND INFORMED THE DEFENSE OF THE CRIME CHARGED.

Ms. White challenges her conviction on the basis that the information was insufficient. *See* Brief of Appellant at 14-16. According to White, the information was defective because it did not “specify the manner of committing the offense.” *See* Brief of Appellant at 15. White appears to claim that she did not know which “specific assault” she was required to defend against, or when and where said assault occurred. *See* Brief of Appellant at 15. The argument is not persuasive.

The accused in a criminal case enjoys a constitutional right to notice of the alleged crime that the State intends to prove. U.S. Const. amend VI; Wash. Const. art. I, § 22. This notice is formally given in the information. CrR 2.1(a)(1) (“[T]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”)

The information must allege every element of the charged offense. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). The law

imposes this requirement so “that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.” *Id.* (quoting *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). Failure to allege each element means the information is insufficient to charge a crime and must be dismissed. *Id.* The defendant is entitled to bring a constitutional challenge to the information at any time before final judgment. *Id.*

The elements need not be alleged in the exact words of the statute so long as the information alleges the elements of the crime in terms equivalent to or more specific than those of the statute. *Nonog*, 169 Wn.2d at 226. “More than merely listing the elements, the information must allege the particular facts supporting them.” *Id.* (citing *Leach*, 113 Wn.2d at 688). *See also State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). The requirement is to charge in language that will “apprise an accused person with reasonable certainty of the nature of the accusation.” *Id.* (quoting *Leach*, 113 Wn.2d at 686). Failure to provide the facts “necessary to a plain, concise and definite statement” of the offense renders the information deficient.” *Id.* (citing *Leach*, 113 Wn.2d at 690).

This Court applies a liberal construction rule when considering challenges to the information raised for the first time on appeal. *Nonog*, 169 Wn.2d at 226-27. This rule prevents “sandbagging” on the part of the

defense. *Id.* When a defendant challenges the information for the first time on appeal, this Court employs a two-part test. First, whether the elements “appear in any form, or by fair construction can they be found, in the charging document.” *Id.* (quoting *Kjorsvik*, 117 Wn.2d at 105). This Court reads the information as a whole, according to common sense and including facts that are implied, to see if it “reasonably apprise[s] an accused of the elements of the crime charged.” *Id.* (quoting *Kjorsvik*, 117 Wn.2d at 109). Second, whether the defendant can show that the unartful language resulted in actual prejudice. *Id.* (citing *Kjorsvik*, 117 Wn.2d at 106).

Under the first prong of the test – the essential elements prong – this Court looks to the face of the charging document itself. *Kjorsvik*, 117 Wn.2d at 105-6. Here, the information stated:

On or about the 17th day of August, 2010, in the County of Clallam, State of Washington, the above named Defendant, with knowledge that District Court II of Clallam County, had previously issued a protection order, restraining order, or no contact order pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or RCW 74.34 RCW in *City of Forks v. Leeane R. White*, Cause No. CR23416, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and furthermore did intentionally assault another in a manner that does not amount to assault in the first or

second degree to another, to-wit: Edna Lingle, contrary to Revised Code of Washington RCW 26.50.110, a Class C felony[.]

CP 22. The information pleads the essential elements and supporting facts of the crime charged – assault in violation of a protection order. *See* RCW 26.50.110; RCW 9A.36.041.

The second prong of the analysis may look beyond the face of the charging document to determine if the accused actually received notice of the charges that he must prepare to defend against. *Kjorsvik*, 117 Wn.2d at 106. “It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.” *Id.*

Ms. White claims the information does not survive appellate review because “the State did not include sufficient facts in the information.” *See* Brief of Appellant at 15. White argues that she could not prepare a meaningful defense because she did not know which assault the State was relying on to establish the crime: (1) the assault that occurred in the victim’s kitchen, or (2) the assault that occurred immediately outside the victim’s apartment and in view of other witnesses. *See* Brief of Appellant at 15-16. This argument is disingenuous.

White was aware of the facts the State would use to establish the crime. In addition to the information, the motion for determination of probable cause provided the following:

On 08/17/10 at approximately 1545 hours I responded to 411 Terra Eden #6 for a disturbance. When I arrived I [saw] Leeanna WHITE sitting in front of the apartment building in the driveway less than 100 feet from the #6 apartment. Edna LINGLE resides in the #6 apartment. There is a no contact order in place with WHITE as the respondent and LINGLE as the petitioner.

I made contact with LINGLE who told me she was involved in a physical confrontation with WHITE as her son [Larry] BOLTEN attempted to remove her from the residence. LINGLE told me WHITE had struck her closed fist in the head and in the back.

A nearby resident Jacqui HOWARD gave a statement, explaining she heard screaming from the apartment and then observed WHITE striking LINGLE until the parties separated.

CP T.B.D at 2. This document, in addition to the criminal information, apprised White of the date, time, place, victim, and facts of the alleged crime. At trial, the State's case corresponded with the synopsis provided above. The assault, which began inside the apartment and moved outside, was a single continuous event and there was no need to plead two separate assaults. *See State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984) (appellate courts review multiple acts using a commonsense approach,

considering factors such as time, place, and victim, to determine if one continuous offence may be charged). There was no surprise.

Finally, White could have sought a bill of particulars if there was any genuine confusion regarding the State's case. The remedy for a lack of any specificity was to request a bill of particulars. CrR 2.1(c); *Leach*, 113 Wn.2d at 687 (“[A] charging document which states the statutory elements of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. A defendant may not challenge a charging document for “vagueness” on appeal if no bill of particulars was requested at trial.”).

The argument proffered by the defense invites “sandbagging”. This Court should reject White's claim that a new trial is warranted based upon the information, a document that she did not contest until this appeal. The information properly advised the defense of the essential elements of assault in violation of a protection order; and the defense cannot establish prejudice because (1) it was aware of the facts the State would rely upon to prove the defendant committed an assault in violation of a protection order, and (2) it never requested a bill of particulars. This Court should affirm.

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**B. THERE IS NO VIOLATION OF THE
CONFRONTATION CLAUSE.³**

Ms. White argues the trial court erred when it allowed two witnesses, Howard and Lingle, to testify by telephone. *See* Brief of Appellant at 7-11, 13-14. According to White, the trial court's failure to compel the physical attendance of Howard and Lingle violated her Sixth Amendment and art. I, section 22 right to confrontation. *See* Brief of Appellant at 7-11, 13-14. White cites *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) for the proposition that the "irreducible literal meaning" of these constitutional provisions is the right to confront the witnesses against her face-to-face. *See* Brief of Appellant at 8-9. However, the U.S. Supreme Court has retreated from its decision in *Coy*, and the majority of state courts have declined to follow this opinion. *See e.g. State v. Foster*, 135 Wn.2d 441, 457, 957 P.2d 712 (1998) (citing *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666

³ At trial, Ms. White failed to object to the telephonic testimony of either Howard or Lingle. This Court generally does not consider issues raised for the first time on appeal unless the claimed error is a "manifest error affecting a constitutional right." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)). This exception "is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *Id.* The defendant must demonstrate that the alleged error was "manifest" and that, in the context of the trial, the alleged error actually affected the defendant's rights. *Id. See also State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (for a constitutional error to be "manifest" there must be a "plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.") The State respectfully submits that Ms. White has not satisfied this burden.

(1990)). This Court should hold there is no confrontation violation because the challenged witnesses presented live testimony, under oath, and subject to cross examination, satisfying the primary concerns of the Sixth Amendment and art. I, section 22.

The Sixth Amendment to the United States Constitution provides “[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” The confrontation clause applies to state courts through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), and guarantees a criminal defendant the opportunity to cross-examine adverse witnesses. *State v. Clark*, 139 Wn.2d 152, 158, 985 P.2d 377 (1999) (citing *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)).

Article I, section 22 of the Washington Constitution provides, in pertinent part: “In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face.” Although this language is not word-for-word identical to its federal counterpart, the meaning of the provision is substantially the same and given the same effect.⁴ *State v. Foster*, 135 Wn.2d 441, 459, 957 P.2d 712 (1998).

⁴ The Washington constitution does not afford criminal defendants greater protection with respect to the right to confront adverse witnesses than the Sixth Amendment. *Foster*, 135 Wn.2d at 465.

At the core of the confrontation clause is a “preference for live testimony.” *Foster*, 135 Wn.2d at 464 (quoting *State v. Rohrich*, 131 Wn.2d 472, 477, 939 P.2d 697 (1997)). Generally, the constitutional provision is satisfied by the “traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness’ demeanor.” *U.S. v. Owens*, 484 U.S. 554, 560, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). See also *Maryland v. Craig*, 497 U.S. 836, 847, 849-50, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *California v. Green*, 399 U.S. 149, 158, 164, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Clark*, 139 Wn.2d 152, 158, 985 P.2d 377 (1999); *Foster*, 135 Wn.2d at 464; *Rohrich*, 132 Wn.2d at 477.

The present case involved “live testimony,” which secured the primary concerns of the confrontation clause. First, Howard and Lingle testified under oath. RP (10/12/2010) at 5, 43-44. Second, Howard and Lingle were subject to or available for cross-examination. RP (10/12/2010) at 9-13, 47. Finally, while the two witnesses were not physically present in the courtroom, the trial judge had an opportunity to assess their credibility. See *T.W.M. Custom Framing v. Indus. Comm’n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000) (“[T]he telephonic

medium preserves the paralinguistic features such as pitch, intonation, and pauses that may assist [the fact-finder] in making determinations of credibility.”). This Court should hold that neither Howard’s, nor Lingle’s testimony violated the confrontation clause.

Additionally, it is extremely difficult to characterize Lingle as an adverse witness to whom the confrontation clause even applies.⁵ The State never called Lingle to testify. RP (10/11/2010) at 3. It presented its case-in-chief against the defendant without the benefit of the victim’s testimony. RP (10/12/2010) at 4-26. Only after the State rested its case did White call Lingle to the witness stand. RP (10/12/2010) at 43. The State never cross-examined the victim. RP (10/12/2010) at 47. While the victim provided testimony that supported the State’s case, the State has found no legal authority that supports the claim that a defense witness is subject to the requirements of the confrontation clause. This Court should hold that Lingle’s telephonic testimony did not violate the Sixth Amendment or art. I, Section 22.

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⁵ Ms. White claims Lingle became an adverse witness in the “eleventh hour” because she “rearranged the scenery for the State.” See Brief of Appellant at 13-14. However, she fails to cite any legal authority to support her claim that the confrontation clause applies to witnesses called by the defense. See Brief of Appellant at 13-14. As such, this Court need not consider the argument. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).

C. IF THERE WAS AN ERROR, THE ERROR WAS HARMLESS.

Assuming, without conceding, the trial court erred when it permitted Howard (a State witness) to testify by phone, the resulting error was harmless. This Court should affirm.

A violation of the confrontation clause is subject to harmless error analysis. *State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), *review denied*, 159 Wn.2d 1017, 157 P.3d 403 (2007). “When an error is of constitutional magnitude, the court must apply the ‘... beyond a reasonable doubt’ standard and query whether any reasonable [trier of fact] would have reached the same result in the absence of the tainted evidence.” *State v. Benn*, 161 Wn.2d 256, 266, 165 P.3d 1232 (2007) (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)), *cert denied sub nom. Benn v. Washington*, 553 U.S. 1080, 128 S.Ct. 2871, 171 L.Ed.2d 813 (2008)).

When determining whether the error was harmless, appellate courts look to factors such as “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the

prosecution's case." *Saunders*, 132 Wn. App. at 604 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

Here, the State concedes that Howard's testimony was important to the prosecution. Howard was the only state witness who heard fighting inside the victim's apartment and actually observed White assault Lingle.⁶ RP (10/12/2010) at 7-14. However, Lingle, a defense witness, corroborated Howard's testimony during her direct examination. Lingle testified that on August 17, 2010, White assaulted her inside her apartment. RP (10/12/2010) at 45-47. Lingle explained "she (the defendant) was pulling my hair and flung my head on the floor." RP (10/12/2010) at 47. According to Lingle, the assault caused her to suffer "some big ouwies on [her] head." RP (10/12/2010) at 45. Lingle explained the fight continued outside the apartment where it was witnessed by the neighbors. RP (10/12/2010) at 46. If the trial court erroneously permitted Howard to testify telephonically, the error was harmless in light of Lingle's testimony that corroborated the assault. This Court should affirm.

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⁶ The State called Officer Mike Rowley of the Forks Police Department to establish/introduce (1) the existence of a valid court order that prohibits the defendant from having contact with the victim, and (2) the fact that he located the defendant within a distance of the victim's apartment proscribed by the court order. RP (10/12/2010) at 18-19. The defendant also testified that she knew a court order was in effect prohibiting her from having any contact with the victim, and that she knowingly violated said order. RP (10/12/2010) at 28, 39-40.

D. THE DEFENSE INVITED ERROR WHEN IT ASKED/AGREED TO HAVE THE WITNESSES TESTIFY TELEPHONICALLY.

Ms. White argues the trial court violated her Sixth Amendment and article I, section 22 right to confront the witnesses against her face-to-face by allowing Howard and Lingle to testify by phone. *See* Brief of Appellant at 7-11, 13-14. However, the defense (1) moved the trial court to permit Lingle to testify by phone, and (2) agreed to the State's request that Howard be able to testify by phone. Thus, this Court should hold that the defense invited the error, if any, in the present case.

The invited error doctrine bars claims that impact a constitutional right, including claims arising under the confrontation clause. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). *See also United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir.) (nontestifying codefendant's statements elicited by defendant cannot be basis for claim on appeal), *cert. denied*, 506 U.S. 890, 113 S.Ct. 258, 121 L.Ed.2d 189 (2002). Invited error bars review because a party cannot set up an error at trial and then complain on appeal. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). Washington's appellate courts have "held that the invited error doctrine was a 'strict rule' to be applied in every situation where the defendant's actions at least in part cause the

error.” *State v. Summers*, 107 Wn. App. 373, 381-82, 28 P.3d 780 (2001) (citing *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

Here, the actions of the defense contributed to any error. It was the defense that sought leave from the court for Lingle, the victim, to testify by phone. RP (10/11/2010) at 2-3. Additionally, prior to trial, the defense agreed to the State’s request that Howard be able to testify by phone in order to accommodate her “childcare issues.” RP (10/12/2010) at 2. The State had already personally served Howard a subpoena, compelling her attendance at court. CP T.B.D. If the defense had refused the State’s request, the prosecution would have ensured Howard’s presence at trial. Thus, any error that followed the live telephonic testimony, which was taken under oath and subject to cross-examination, was invited and agreed to by the defense. White cannot now allege error. This Court should affirm.

**E. THE DEFENSE WAIVED ANY CHALLENGE
WHEN IT FAILED TO OBJECT TO THE
TELEPHONIC TESTIMONY.**

Ms. White argues she did not waive any objection because the record does not contain a personal expression of waiver. *See* Brief of Appellant at 9-10. The State responds that the record clearly demonstrates an agreement between the parties to permit the telephonic testimony, and

said agreement permitted the trial court to assume White waived her right to confront the witnesses face-to-face. This Court should affirm.

The waiver of a fundamental right must be made knowingly, voluntarily, and intelligently. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). In *State v. Thomas*, the defendant did not testify. 128 Wn.2d at 555. On appeal, the Supreme Court considered what constitutes a valid waiver of the defendant's constitutional right to testify. *Id.* at 557. The defendant argued that the trial court was obliged to advise him of his fundamental right to testify on his own behalf. *Id.* at 556. The Supreme Court rejected the argument, holding that it is the duty of defense counsel to advise the defendant of the right to testify, not the duty of the court. *Id.* at 560. The Supreme Court reasoned trial judges should not be required to intervene in the attorney-client relationship, independently advising a defendant of rights his/her attorney might direct them to waive for tactical reasons. *Id.* The high court believed "the right to testify belongs in the category of rights for which no on-the-record waiver is required[.]" likening the right to the right to confront witnesses. *Id.* at 559 (citing *U.S. v. Martinez*, 883 F.2d 750, 756-59 (9th Cir.), *vacated on other grounds*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249, 111 S.Ct. 2886, 115 L.Ed.2d 1052 (1991)). Thus, a trial judge "may assume a knowing waiver of the right from the defendant's conduct." *Id.* at 559.

Thomas controls here. The duty fell on defense counsel to instruct White of her right to confront all witnesses against her face-to-face. The defense requested that Lingle testify by phone because it believed the victim would deny an assault occurred. RP (10/11/2010) at 2-3. This was a tactical decision. The State informed the defense it would not introduce Lingle's testimony because she had previously expressed her intent not to testify against her granddaughter. RP (10/11/2010) at 2. White believed Lingle's testimony would support her defense, thus, she asked the court to allow Lingle's telephonic testimony. RP (10/11/2010) at 2-3. The trial court was entitled to assume defense counsel had discussed the matter with his client, and that White knowingly waived her right to compel Lingle's attendance.

Likewise, the trial court could assume White knowingly waived her right to confront Howard, when the defense, in open court, agreed to permit the witness to testify by phone. The defense was the party that first informed the trial court the State's witness would need to testify telephonically. RP (10/12/2010) at 2. The trial court expressly asked if it was "agreeable to both parties [] to allow [Howard's] telephonic testimony?" RP (10/12/2010) at 2. Both the defense and the State answered affirmatively. RP (10/12/2010) at 2. The trial court only allowed Howard to testify by phone pursuant to this agreed stipulation. RP

(10/12/2010) at 2. The trial court was not obliged to obtain an express waiver from White herself, because such an act would interject the court into the attorney-client relationship when there was a tactical advantage to proceeding with telephonic testimony.⁷

Finally, White has provided no evidence to show her attorney failed to advise her of her right to confrontation, or that she actually desired to physically confront the witnesses face-to-face. This Court should hold White waived any objection to the challenged telephonic testimony and affirm.

F. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Ms. White claims she received ineffective assistance of counsel. *See* Brief of Appellant at 11-13, 16. White argues she is entitled to a new trial because her attorney did not (1) move to dismiss the case when the State's witness did not physically attend trial; (2) request a mistrial after a defense witness refused to corroborate the defendant's testimony; and (3) request a more detailed information despite being aware of the specific facts the State would rely upon to support its case against the defendant. This argument is without merit.

⁷ The defense may have agreed to Howard's telephonic testimony in order to expedite its desired resolution – a presumed acquittal. At the time of the stipulation, the defense believed the victim would corroborate the defense theory that no assault occurred.

A criminal defendant is guaranteed effective assistance of counsel under the federal and state constitutions. *See* U.S. const. amend. VI; Wash. Const. art. I, section 22. To prove ineffective assistance of counsel, White must show that (1) trial counsel's performance was deficient, and (2) that the deficient performance prejudiced her. *State v. Woods*, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A defense attorney's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). This Court gives great deference to trial counsel's performance and begins its analysis with a strong presumption that counsel was effective. *Woods*, 138 Wn. App. at 197 (citing *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999)).

Here, White cannot satisfy the first prong of an ineffective assistance claim. First, the defense could not dismiss the case. Prior to trial, the defense met with the State and agreed that Howard could testify by phone. RP (10/12/2010) at 2. Relying upon this stipulation, the State informed Howard that she could testify by phone so as not to disrupt her childcare. If the trial court had rejected the stipulation, the State would still have been able to proceed because (1) it had personally served its witnesses with subpoenas prior to the commencement of the trial, (2) it

had arranged Officer Rowley presence and he was ready to testify, and (3) it could have requested a brief recess/continuance to arrange for Howard to testify in person if necessary. *See State v. Adamski*, 111 Wn.2d 574, 577-78, 761 P.2d 621 (1988). Additionally, as stated above, counsel may have agreed to the telephonic testimony in order to expedite the desired resolution – a presumed acquittal. Thus, White’s attorney was not deficient when he did not move to dismiss the present case.

Second, the defense could not have request a mistrial simply because its witness failed to testify as anticipated.⁸ The defense made a strategic and tactical decision to call the alleged victim. The defense planned to negate the prosecutions efforts to establish that an assault actually occurred. This strategy was reasonable in light of the fact that the victim had recently denied the assault occurred.⁹ RP (10/11/2010) at 2-3; RP (10/12/2010) at 46-47. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1 (2001) (appellate courts should not second-guess the trial attorney’s tactics where they are not manifestly unreasonable). While the testimony that counsel elicited from Lingle damaged the defense, it

⁸ Ms. White cites no authority to support her claim that a mistrial is appropriate when the defense elicits testimony that was unexpected and damaging. *See* Brief of Appellant at 16. As such, this Court need not consider the argument. *Dennison*, 115 Wn.2d at 629; *Young*, 89 Wn.2d at 625.

⁹ The reason Lingle denied the assault occurred until the date of trial was that she wanted to protect her granddaughter. RP (10/12/2010) at 46-47.

does not rise to the level of ineffective assistance of counsel. *See In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998) (holding that “there is no absolute requirement that defense counsel interview witnesses before trial” and ruled that trial counsel was not ineffective for failing to conduct pretrial interviews of the witnesses).

Finally, trial counsel was not deficient when he did not request a more specific information, or additional time to prepare the defense. As argued above, the information and the probable cause statement sufficiently appraised the defense of the charges and the facts the State would seek to establish at trial. CP 22; CP T.B.D. at 2. *See Kjorsvik*, 117 Wn.2d at 105-6. The State never alleged multiple means of committing the offense. Instead, the State alleged a single assault, against one victim, occurring at the victim’s residence, on a specific date, in violation of a protection order. *See Petrich*, 101 Wn.2d at 571. There is nothing in the record to suggest counsel required additional time to defend against this single charge.¹⁰ Trial counsel’s performance did not fall below an objective, reasonable level.

Because White cannot satisfy the first prong of her ineffective assistance of counsel claim, the inquiry need go no further. *State v.*

¹⁰ The defense had fifty (50) days to prepare a defense: the date between the filing of the information and the bench trial. *See* CP 22; RP (10/12/2010) at 1.

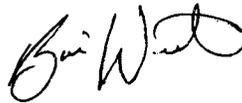
Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). White received effective assistance of counsel. This Court should affirm.

IV. CONCLUSION:

Based upon the arguments above, the State respectfully requests that this Court affirm Ms. White's conviction for assault in violation of a protection order.

DATED this April 15, 2011.

DEBORAH KELLY
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian Wendt", written in a cursive style.

BRIAN PATRICK WENDT
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