

NO. 41753-7
Cowlitz Co. Cause NO. 10-1-00180-5

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

STATE OF WASHINGTON,

Respondent,

v.

TARA ROSE FENNEL,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

There was sufficient evidence for the jury to find Fennel guilty of malicious mischief in the first degree; Fennel did not suffer ineffective assistance of counsel when her attorney chose not to submit a cautioning jury instruction; and the trial court had the authority to prohibit Fennel from having contact with a witness to the crime who testified for the State.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. After the jury heard testimony from witnesses regarding the damage and cost of repair to the vehicle exceeded \$1,500, was there sufficient evidence for the jury to find that the cost of repair exceeded \$1,500?**
- B. Was Fennel's attorney ineffective for choosing not to submit a cautionary jury instruction about the testimony of an accomplice, when there was substantial corroboration of Lindsey Divine's testimony and this permitted Fennel's attorney to best argue the defense theory of the case?**
- C. Did the trial court have the authority to impose as a condition of her sentence that Fennel not contact one of the State's witnesses after that witness testified against Fennel at trial?**

III. STATEMENT OF THE CASE

On August 9, 2008, Kelly Rothwell began her shift as a bar manager at the Silver Star Sports Bar and Grill. RP at 58. Her shift lasted from between 5:00 and 6:00 at night to around 2:00 or 3:00 the next morning. RP at 59. She drove to work that night in a 2001 black BMW.

RP at 59. She parked her car in the first spot closest to the alley of a bank parking lot behind the Silver Star. RP at 59.

Meanwhile, Tara Fennel and Lindsey Divine were drinking at Fennel's house. RP at 130. Laura Leigh Quigley was also present, however she was not drinking because she was to be the "designated driver." RP at 130-32. Quigley drove Fennel and Divine to the Silver Star in Fennel's Mitsubishi Montero. RP at 132. Quigley and Fennel were both over 21, however Divine was only 20 years old. RP 134-35. Fennel and Quigley entered first, then Fennel delivered Quigley's identification to Divine who waited in the vehicle. RP at 135. At 11:51 p.m., Fennel and Divine entered through a back entrance, but were stopped by a security guard and asked for identification. RP at 136, 143, 145. Divine presented Quigley's identification and a discussion ensued about whether or not the identification was truly Divine's.¹ RP at 136.

The bartender Chris Moon notified Rothwell that there was a question about a female's identification. RP at 59-60. Rothwell recognized this female as Lindsey Divine. RP at 60. Because she doubted that Divine was 21 years old, Rothwell told Moon to double check her identification. RP at 61. After the identification was further scrutinized,

¹ During this conversation, Fennel placed glasses on the security guard to assist him in viewing the identification. RP at 79, 146-47.

Moon and the security guard decided that the identification did not belong to Divine and asked her to leave the Silver Star. RP at 61, 137.

At 11:56 p.m., Fennel went to the bar and told Rothwell she was kicking Fennel's friend out, that Divine had just turned 21, and accused Rothwell of trying to "start shit" with her. RP at 61, 149. Rothwell told Fennel that Divine was not 21, and that because the identification Divine presented was not hers, Divine had to leave. RP at 61-62. Fennel then threw her arms in the air and told Rothwell she was being "insecure" and accused her of sleeping with Divine's boyfriend. RP at 62. During this conversation, Fennel was cursing at Rothwell and calling her names. RP at 62. Rothwell told Fennel that she also needed to leave. RP at 62, 63. Quigley exited the Silver Star, followed by Divine, then Fennel, just seconds after midnight. RP at 63, 153.

The three females returned to Fennel's Montero. RP at 154. Quigley drove, Fennel sat in the front passenger seat, and Divine sat in the rear seat on the passenger side. RP at 137-38. While in the Montero, Fennel and Quigley discussed keying Rothwell's car. RP at 139. Divine told Fennel and Quigley that she did not want to participate in the keying, however she agreed to act as a lookout. RP at 139. Quigley drove the Montero down the alley and back around to the bank parking lot where Rothwell's car was parked. RP at 139. At 12:02:49 p.m., Fennel exited

the Montero and Divine followed. RP at 139-140, 160. Fennel went the passenger side of Rothwell's car and began keying the passenger door. RP at 140. Divine crouched down at the back of the car. RP at 140, 172. At 12:03:49 p.m., Divine became frightened that they would be seen and headed back to the Montero. RP at 141. Fennel followed Divine back to the Montero. RP at 141.

Because Quigley did not believe that Fennel and Divine had been out long enough to cause the desired damage to Rothwell's car, she drove back around and parked the Montero four or five spaces away from Rothwell's car. RP at 163. Fennel and Quigley went back to Rothwell's car, and Divine remained inside the Montero.. RP at 163-64. Two to three minutes later, Fennel and Quigley returned to the Montero laughing. RP at 164. When Rothwell and Moon got off work around 2:45 a.m. on August 10th, they observed that Rothwell's BMW had been keyed with the word "whore" across the trunk and "whore," "bitch," "fuck," and "ha-ha" along with other keying damage along the passenger side. RP at 64-72, 117-18.

The police were called and Trooper Jason Cuthbert of the Washington State Patrol responded and took photographs of the Rothwell's car. RP at 14-15. Later, Officer Michael Berndt of the Longview Police Department, also took pictures of the car. RP at 27-29.

Rothwell took her car to her insurance company for an estimate of the damages. RP at 73. She informed the insurance adjuster, Claudio Sanchez, of pre-existing damage from having backed into a chain link fence. RP at 74, 184-86, 192. Minus the cost the pre-existing damage, Sanchez estimated the cost of repair of Rothwell's car at \$1,516.56. RP at 203.

Later, Officer Berndt obtained video surveillance from the Silver Star. RP at 31. The video shows Fennel inside the bar, wearing a white jacket with a black top underneath, a pair of jeans and her blonde hair pulled up. RP at 77. It also shows Divine inside the bar wearing a black top with jeans and having short hair that was dark with highlights. RP at 78, 88. Fennel and Divine are seen speaking with the security guard at 11:51 p.m. RP at 78-79. Fennel is seen having a conversation with Rothwell at the bar. RP at 84. At 11:57 p.m., Fennel is seen leaving the bar area where Rothwell was working. RP at 84-85. A short while later, Divine is seen exiting the inside of the Silver Star followed by Fennel seconds after midnight. RP at 89. A video clip from a different camera shows the three females exiting the Silver Star, and Fennel is seen in her white jacket. RP at 37, 90, 109. They are seen getting into a Mitsubishi Montero and Fennel enters the front passenger side of the vehicle. RP at 38.

At 12:01, the Montero is seen being driven down toward Washington Way. RP at 39. At 12:02, the video shows the Montero entering the Riverview Bank parking lot directly behind the Silver Star. RP at 40. Fennel exits the front passenger door of the Montero still wearing the white jacket, black top, and jeans at 12:02 a.m. and she is followed by Divine exiting the rear passenger side of the Montero RP at 92, 159. The video shows Fennel head toward the passenger side of Rothwell's car and Divine following. RP at 93. One minute later, Divine is seen heading back toward the Montero and Fennel follows her. RP at 93. Fennel and Divine are seen getting back into the Montero, and the Montero drives off. RP at 93-94

During trial, this video footage was played for the jury. RP at 75. Officer Berndt identified Fennel on the video inside the Silver Star, then outside the Silver Star walking to and getting into the front passenger seat of a Mistubishi Montero. RP at 35, 37-38. He also identified the Montero turn onto 11th Avenue, onto Washington Way, and then into the Riverview Bank parking lot. RP at 40. Officer Berndt identified Fennel as exiting the Montero and going to the passenger side of Rothwell's car followed by another person. RP at 41-43. Officer Berndt identified Fennel as being further into the passenger side of Rothwell's car, with the second person towards the rear of the car. RP at 43. After one minute, Officer Berndt

identified the second person walk back to the Montero followed by Fennel. RP at 43.

The photographs taken by Trooper Cuthbert and Officer Berndt were admitted into evidence. RP at 15-20, 27-29. Chris Moon testified about the false identification presented by Lindsey Divine, and that Fennel was with her. RP at 115. He testified that after Divine was told to leave, Fennel went to the bar and began “bad mouthing” Rothwell. RP at 115-16. Moon also testified to observing the damage to Rothwell’s car after he and Rothwell got off work. RP at 117-18. Claudio Sanchez testified to the damage he observed to Rothwell’s car and estimated the reasonable cost of repairing the car minus the pre-existing damage. RP at 186, 188-205. A copy of this estimate was admitted into evidence. RP at 187.

Kelly Rothwell testified to what happened at the Silver Star that night. RP at 57-112. She testified to alerting Chris Moon that Divine may have been under 21. RP at 59-61. She testified that Fennel was in the Silver Star with Divine. RP at 60. She testified that after Divine was asked to leave, Fennel personally attacked her at the bar, cursing at her and accusing her of sleeping with Divine’s boyfriend. RP at 62. She testified to the damage done to her car that night. RP at 64-75.

On the video, at 11:51 p.m., Rothwell specifically identified Fennel and Divine inside the Silver Star, and noted that it showed Divine

entering through the back door, where security was not checking identification. RP at 77-78. Also on video, she identified Fennel “personally attacking” her at the bar. RP at 83-84. At 11:57 p.m. on the video, she explained how it showed her conversation with Fennel ending when Rothwell told Fennel to leave the Silver Star. RP at 84. She identified Fennel and Divine exiting the Silver Star, noting that after they had exited the time was 27 seconds after midnight. RP at 87-89. On a video clip beginning 26 seconds after midnight outside the door they exited, Rothwell identified Fennel and Divine with a third person walking toward a vehicle. RP at 90, 111. At 12:02 p.m., Rothwell identified this same vehicle as stopping near where her car was parked, and then Fennel walking over to her car followed by Divine. RP at 90-93. She identified them as kneeling down at the passenger side of her car. RP at 93. She identified Divine head back to the vehicle with Fennel following after. RP at 93-94, 112.

Lindsey Divine testified that Fennel, Laura Quigley, and herself, went to the Silver Star in Fennel’s Mitsubishi Montero. RP at 132. She testified that Fennel provided her with Quigley’s identification and that the two of them then entered through the back entrance. RP at 134-36. She testified that after she was asked to leave the Silver Star, she left with Fennel and Quigley. RP at 154. She testified that Fennel and Quigley

discussed keying Rothwell's car, and she admitted to agreeing to act as a lookout. RP at 139. She testified to following Fennel over to Rothwell's car and crouching at the back of the car while Fennel keyed the passenger door. RP at 140, 172. Divine stated that she became afraid of being seen so she headed back to the Montero and Fennel followed. RP at 141. Divine testified that after parking the Montero nearby, Fennel and Quigley went back to do additional damage to Rothwell's car, while she remained inside the Montero. RP at 163-64. She testified that two to three minutes later Fennel and Quigley returned, laughing. RP at 164.

The jury found Fennel guilty of malicious mischief in the first degree. RP at 364. Fennel was sentenced as a first time offender to 25 days in custody and required to be on community custody for 12 months. RP at 387. One of the conditions of her sentence was that she could not have contact with Rothwell or Divine. RP at 375, 388. At the time of sentencing, Fennel did not object to this condition or argue against it. RP at 371-391.

IV. ARGUMENT

- A. There was sufficient evidence for the jury to find Fennel guilty of malicious mischief in the first degree, when the evidence they heard was that the damage to the vehicle was over \$1,500.**

There was sufficient evidence for the jury to find that the reasonable cost of repair for the damage to Rothwell's car was over \$1,500. The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). For

purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-08. All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

When determining the damages, “[t]he ordinary meaning of damages includes the reasonable cost of repairs to restore injured property to its former condition.” *State v. Gilbert*, 79 Wn. 383, 385, 902 P.2d 182 (1995) (citing *State v. Ratliff*, 46 Wn.App. 325, 328-29, 730 P.2d 716 (1986)). Here, the insurance adjuster testified that minus the pre-existing damage to the car, the cost of repair to restore the car to its former condition was \$1,516.56. The jury heard this testimony, as well as Rothwell's testimony regarding the damage that existed before and after her car was damaged, and determined that the damages exceeded \$1,500. Based on the evidence presented at trial, it was reasonable for the jury to conclude that the damages exceeded \$1,500.

In her appeal, Fennel interprets certain lines of the estimate to indicate that a BMW emblem and a nameplate were to be replaced. Even if this interpretation of the estimate is correct, it is possible that repairing the car would have required that these items be replaced. Were it not for the damage done to the car, this would not have been necessary. Because

the amount of damages is based on the reasonable cost of repairs to restore the damaged property to its former condition, it is proper to include the cost of replacing undamaged items if this is necessary to restore the damaged property to its former condition.

Further, the exhibit Fennel refers to was admitted into evidence, and the jury was able to review the lines referencing the emblem and nameplate in reaching its decision. The jury had the discretion to review the evidence and determine whether or not the damage exceeded \$1,500. The jury's conclusion was that the damage did in fact exceed \$1,500. When all reasonable inferences are drawn in favor of the State and interpreted most strongly in the State's favor, it is possible that a rational trier of fact could have found the damage to the car to exceed \$1,500. For these reasons, the jury's decision should be upheld.

B. Fennel did not suffer ineffective assistance of counsel because her defense attorney chose not to submit a cautionary jury instruction about the testimony of an accomplice.

Fennel did not receive ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d

816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*,

42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

Fennel’s claim fails both prongs of the Strickland test. First, because Lindsey Divine’s testimony was corroborated by video and photographic evidence, as well as the testimony of several other witnesses, a cautionary instruction was not required. Second, there was a legitimate, tactical reason for not submitting this instruction. Third, even if the decision to give the cautionary instruction was ineffective, Fennel cannot show that “but for” the failure to give this instruction there is a reasonable probability that the result of her trial would have been different.

I. Fennel’s attorney did not fail to provide her with effective representation when he elected not to submit a cautionary accomplice instruction because there was substantial corroboration for Divine’s testimony.

Because there was substantial corroboration for Divine’s testimony, Fennel did not receive ineffective assistance of counsel based on her attorney’s decision not to request a cautionary accomplice instruction. When jury instructions are not erroneous, an attorney is not ineffective for failing to object to them. *See State v. Releford*, 148 Wn.App. 478, 497, 200 P.3d 729 (2009); *see also State v. Fortun-Cebada*,

158 Wn.App. 158, 172, 241 P.3d 800 (2010) (“Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained.”) (citing *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998)). If it there is no error when an instruction is not given, then an attorney cannot be ineffective for choosing not to request that instruction. The testimony of other witnesses, photographs, and video evidence presented at trial provided substantial corroboration for Divine’s testimony, making the cautionary accomplice instruction unnecessary. Because there was substantial corroboration for Lindsey Divine’s testimony, the cautionary accomplice instruction was not required.

A cautionary instruction is required only if the accomplice’s testimony is uncorroborated. *State v. Williams*, 29 Wn.App. 828, 630 P.2d 1387 (1981); see *State v. Jennings*, 35 Wn.App. 216, 221, 666 P.2d 381 (1983); *State v. Lee*, 13 Wn.App. 900, 910, 538 P.2d 538 (1975). On the other hand, a conviction may rest solely upon the uncorroborated testimony of an accomplice only if the jury has been sufficiently cautioned by the court to subject the accomplice’s testimony to careful examination and to regard it with great care and caution. *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974). “[T]o connect the accused to the commission of the crime charged, it is not necessary that the accomplice be

corroborated in every part of his testimony.” *State v. Gross*, 31 Wn.2d 202, 217, 196 P.2d 297 (1948) (citing 20 Am.Jur. 1091, Evidence, § 1238; 22 C.J.S., Criminal Law, § 812, p. 1394 et seq.; 2 Wharton’s Criminal Evidence, 11th Ed., 1264-1272, §§ 752, 753); see *State v. Calhoun*, 13, Wn.App. 644, 648, 536 P.2d 668 (1975). Whether the instruction is needed depends on the extent of the corroborating evidence. *State v. Harris*, 102 Wn.2d 148, 155, 685, P.2d 584 (1984) (overruled on other grounds by *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989)). “If the accomplice testimony was substantially corroborated by testimonial, documentary or other circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.” *Id.*

In *Jennings*, the Court of Appeals dealt with the question of whether a cautionary accomplice instruction was required. *Jennings*, 35 Wn.App. at 220-21. Alva Jennings was convicted of five counts of possession of stolen property in the second degree. *Id.* at 217. During his trial, juveniles who had burglarized the victim’s home testified that they had either sold the items they stole to Jennings or were present when sales were made. *Id.* at 218. Also during the trial, the victim of the burglary testified to owning items that were seized from Jennings’ home. *Id.* Jennings proposed a cautionary accomplice instruction regarding the testimony of the juveniles but the court refused to give this instruction. *Id.*

The Court of Appeals noted that a cautionary accomplice instruction is not required when testimony is corroborated by other evidence. *Id.* at 221. Because the testimony of the alleged accomplices was corroborated by the seizure of the property from Jennings' home and the identification of these items by the true owner, there was no error in not giving the requested instruction. *Id.*

Here, as in *Jennings*, Divine's testimony was substantially corroborated. The jury was not asked to convict Fennel on Divine's testimony alone, if anything, considering the other evidence that was presented, Divine's testimony merely served to corroborate Fennel's guilt. After the jury had already watched the video, seen the photographs, and heard the testimony of Trooper Cuthbert, Officer Berndt, Rothwell, and Moon, Divine testified.

Divine testified that she had entered the Silver Star through the back entrance with Fennel between 11:00 p.m. and midnight. RP at 132, 135-36. This was corroborated by video evidence and Rothwell's testimony showing Divine and Fennel enter at around 11:51 p.m. RP at 77-78. Divine testified to using Quigley's identification and being asked to leave. RP at 135, 154. This was corroborated by video evidence and Chris Moon's testimony that Divine presented another person's identification and was asked to leave. RP at 79, 115, 146-47. Divine

testified to leaving the Silver Star with Fennel and Quigley, to getting into the rear passenger seat of Fennel's Montero, to Fennel sitting in the front passenger seat, and to Quigley driving. RP at 137-38. This was corroborated by video evidence, Rothwell's testimony, and Officer Berndt's testimony identifying Fennel entering a Mitsubishi Montero just after midnight, along with two other people entering the driver's seat and the rear passenger seat. RP at 35, 37-39, 87-90, 111.

Divine testified that the Montero was driven down the alley and back around into the bank parking lot where Rothwell's car was parked. RP at 139. This route of travel was corroborated by video evidence, Officer Berndt's testimony describing the route of travel of the Montero, and Rothwell's testimony to having parked in the bank parking lot behind the Silver Star. RP at 40, 59. Divine testified to following Fennel over to Rothwell's car and crouching behind while Fennel keyed the passenger door. RP at 140, 172. This was corroborated by video evidence, Rothwell's testimony, and Officer Berndt's testimony that Fennel walked to the passenger side of Rothwell's car followed by Divine, and that Fennel knelt down on the passenger side of Rothwell's car while Divine remained at the rear of Rothwell's car. RP at 43, 90-93. Divine testified that she became afraid and headed back to the Montero, followed by Fennel. RP at 141. This was corroborated by the video, Rothwell's

testimony, and Officer Berndt's testimony that after a minute Divine head back to the Montero followed by Fennel. RP at 43, 93-94, 112.

Divine also testified that there was a second trip to do additional damage to the car by Fennel and Quigley and that two minutes later Fennel and Quigley returned laughing. RP at 163-64. There was no video of the second trip, however there was strong circumstantial evidence to support it. The laughing upon returning to the Montero was consistent with "ha-ha" being carved into the passenger side. As Fennel's attorney argued, because Fennel and Divine's trip to the car on the video lasted about a minute, another trip to the car was most likely necessary considering the extent of the damage. This is also consistent with Divine's testimony that there was a second trip.

Further, the circumstantial evidence supporting Fennel's involvement with damaging Rothwell's car was overwhelming. At 11:56 p.m. Fennel was at the bar "bad mouthing" and "personally attacking" Rothwell, accusing Rothwell of trying to "start shit" with her, sleeping with Divine's boyfriend, calling Rothwell insecure, cursing at her, and calling her names. RP at 61, 83-84, 115-16, 149. Rothwell then told Fennel to leave the Silver Star. RP at 84. At 12:02 p.m., Fennel is then seen leading the way to Rothwell's car and kneeling down on the passenger side of Rothwell's car where the majority of the damage

occurred. RP at 90-93. This damage included the carving of the words “whore,” “bitch,” and “fuck.” RP at 64-72, 117-18. These specific words are consistent with Fennel having accused Rothwell of sleeping with someone else’s boyfriend, cursing, and name-calling. In combination, the circumstantial evidence showed Fennel’s motive, state of mind, and placed her at the precise location where car was damaged just minutes after having insulted Rothwell at the bar. For these reasons, Divine’s testimony was substantially corroborated.

2. Because there was a legitimate, tactical reason for electing not to propose the cautionary accomplice instruction, Fennel’s attorney was not ineffective when he chose not to propose it.

There was a legitimate, tactical reason for not proposing the instruction, because this permitted Fennel’s attorney to most effectively argue the defense theory of the case that Fennel did not participate in the crime and therefore was not an accomplice to anyone. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to

ineffective assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)).

A defense attorney’s performance is not deficient when he or she does not request jury instructions that are unsupported by the evidence or would hinder the objective of an outright acquittal. *See State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); *State v. King*, 24 Wn.App. 495, 501, 601 P.2d 982 (1979). “Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.” *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (citing *Blaney v. Intern’l Ass’n of Machinists & Aerospace Workers*, 151 Wn.2d 203, 210-211, 87 P.3d 757 (2004)). Jury instructions should also give the jury the discretion to decide questions of fact. *State v. Koch*, 157 Wn.App. 20, 33, 237 P.3d 287 (2010) (citing *Barnes*, 153 Wn.2d at 382).

Here, there was a legitimate, tactical reason for not asking for the cautionary accomplice instruction, because it allowed Fennel’s attorney to best argue his theory of the case. In her appeal, Fennel argues that WPIC 6.05 should have been given. WPIC 6.05 states:

Testimony of an accomplice, given on behalf of the [State][City][County], should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless,

after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

During the trial sufficient evidence was presented to prove Fennel's guilt even without Divine's testimony. Thus, the trial did not involve a situation where the jury was being asked to find Fennel guilty based on Divine's testimony alone. For this reason, Fennel's attorney may have felt that the second sentence in WPIC 6.05, which addresses a situation where the jury is being asked to find a person guilty based on the testimony of an accomplice alone, would have reinforced the fact that Divine's testimony was only a part of the evidence. Additionally, because the defense theory was that Fennel was completely uninvolved, her attorney may have wanted to simply avoid suggesting to the jury that Divine and Fennel were accomplices to each other.

More importantly, because the defense theory was that Quigley and Divine were the actual culprits, the defense wanted the jury to believe part of Divine's testimony, as it implicated Quigley as the primary promoter of the crime and also suggested a motive for Divine. Considering Quigley did not testify, and Fennel chose not to testify, this defense strategy depended heavily on the cross examination of Divine. Under these circumstances, Fennel's attorney needed to attack portions of Divine's testimony but agree with others to support the defense theory.

Thus, there was a legitimate trial tactic in avoiding the blanket statement in the instruction casting doubt on all of Divine's testimony. By not having this instruction read, Fennel's attorney was better able to argue the defense theory of the case, selectively attacking and using Divine's testimony to support this argument as needed. As demonstrated in the record, Fennel's attorney was able to argue Divine's role in the crime and motive made her an unreliable as a witness against Fennel, while relying on her statements about Quigley's involvement to implicate Quigley as the one most likely was behind the damage. RP at 340-41. Thus, because there was a legitimate trial strategy for not proposing the instruction, Fennel's attorney was not ineffective.

3. Fennel did not suffer prejudice when her attorney chose not to ask for a cautionary instruction regarding the testimony of an accomplice.

Because there is not a reasonable probability that the outcome of the trial would have been different if the instruction had been given, Fennel did not suffer any prejudice. "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (citing *State v. Reichenbach*, 153 Wn.2d , 126, 130, 101 P.3d 80 (2004)). Because the evidence presented against Fennel was sufficient to

support her conviction² even without Divine's testimony, and Fennel's attorney was able to selectively attack Divine's credibility without the instruction, there is not a reasonable probability that but for her attorney's decision not to request the instruction the outcome of the trial would have been different. Therefore, Fennel did not suffer any prejudice.

In *State v. Manhalt*, 68 Wn.App. 757, 758, 845 P.2d 1023 (1993), Guenter Manhalt appealed his convictions for conspiracy, robbery, and possession of stolen property. A string of restaurant robberies led to the police arresting Manhalt and seizing stolen property from his place of business, the International House of Donuts on Pike Street in Seattle. *Id.* at 758-59. Manhalt was never present at these robberies, however the perpetrators were former associates who testified that he had provided them with guns, cars, advice, and assistance to commit these robberies. *Id.* at 759. At the conclusion of trial, the trial court refused to give a requested cautionary instruction regarding the testimony of accomplices.³ *Id.* at 760. Manhalt appealed the denial of this requested instruction. *Id.* at 767. The Court of Appeals cited several examples of evidence that corroborated the testimony of Manhalt's accomplices and found that there was substantial corroboration for the testimony of the accomplices. *Id.* at 768-770. The Court of Appeals also noted the following:

² This evidence included video of Fennel committing the crime.

³ Manhalt's first trial was reversed and was retried. *Id.* at 758-760.

The verdict would almost certainly be the same had the instruction been given, because any reasonable juror, hearing the criminal background of the witnesses would feel cautious about accepting the witness' testimony. Thus, even if we were to determine that the failure to give the cautionary instruction was error, the error would be harmless.

Id. at 770, n.3.

Here, as in *Manhalt*, there was substantial corroboration for Divine's testimony. As has been argued above, the video evidence, photographs, testimony of other witnesses, and circumstantial evidence were sufficient for the jury to find Fennel guilty even if Divine had not testified. *See supra*, B-1. And there was substantial corroboration for Divine's testimony, because virtually all of it was corroborated by other evidence. Thus, it cannot be said that there was a reasonable probability that the result of the proceeding would have been different if the jury had simply been given an additional jury instruction.

Further, Fennel's attorney attacked numerous parts of Divine's testimony even without the instruction. Similar to *Manhalt*, it is obvious that a reasonable jury would have questioned Divine's testimony even without the cautionary instruction. Evidence was presented that Divine had a motive to damage Rothwell's car, as Rothwell was accused of sleeping with Divine's boyfriend and Rothwell was primarily responsible for kicking Divine out of the Silver Star. Video evidence showed Divine

walking to Rothwell's car behind Fennel, thus as a participant Divine had an incentive to minimize her involvement and blame someone else. Divine also admitted to not being truthful in her statement about what happened to Sergeant Hallowell, to the insurance company, and to attempting to use someone else's identification to enter the Silver Star underage. For these reasons, Fennel's attorney argued that the evidence suggested Divine was someone who was "loose with the truth" cautioning the jury to scrutinize Divine's testimony. RP at 336. Thus, even though Fennel's attorney did not request the cautionary jury instruction, no reasonable jury would have simply taken Divine's testimony as the absolute truth without substantial corroboration. Because this is what occurred here, Fennel did not suffer any prejudice.

C. The trial court did not err in ordering that Fennel have no contact with one of the State's witnesses after trial.

The trial court did not err in ordering that Fennel have no contact with one of the State's witnesses after her trial. In a unanimous opinion, the Washington Supreme Court unequivocally held:

The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, authorizes trial courts to impose crime-related prohibitions as part of defendants' sentences. We conclude that, as part of any felony sentence, such crime-related prohibitions may include orders prohibiting contact with victims or witnesses for the statutory maximum term.

State v. Armendariz, 160 Wn.2d 106, 108, 156 P.3d 201 (2007). Perhaps because trial courts serve on the front lines of preserving order in our society, the legislature has granted broad powers for sentencing those who are convicted of committing felonies. Because the phrase “crime-related prohibitions” has been defined to include the authority to grant no contact orders protecting the witnesses to crimes, the trial court had the statutory authority to prohibit Fennel from having contact with the State’s witness for up to the statutory maximum term.

RCW 9.94A.030(10) defines “crime-related prohibition” as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted....” In *Armendariz*, the Washington Supreme Court dealt with the issue of whether a crime-related prohibition provided a trial court with the authority to impose a no contact order prohibiting contact with a witness under the SRA. 160 Wn.2d at 109-110. *Armendariz* was convicted of assault in the third degree for assaulting a police officer who responded to a possible domestic violence incident between *Armendariz* and Ms. Nonas-Truong. *Id.* at 109. *Armendariz* was also convicted of a misdemeanor violation of an existing no contact order with Nonas-Truong. *Id.* at 109. As part of his sentence for assault in the third degree, the trial court imposed as a condition of community custody that *Armendariz* have

no contact with Nonas-Truong for the statutory maximum of five years. *Id.* Armendariz appealed this part of the sentence, arguing that the trial court had exceeded its authority in issuing a no-contact order with Nonas-Truong as part of his sentence for assaulting the police officer. *Id.* at 109-110.

The Supreme Court noted that the statutory definition for a “crime-related prohibition” was “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.”⁴ *Id.* at 111-12. The Court then reasoned that because the SRA plainly authorizes trial courts to impose orders prohibiting conduct directly relating to the circumstances of an offender’s crime, such orders reasonably include no-contact orders regarding witnesses to a crime. *See id.* at 113.

Here, it should first be noted that at sentencing Fennel did not object to the entry of the no contact order entered to protect the State’s witness. Because she was convicted of malicious mischief in the first degree, a class B felony, Fennel was sentenced under the SRA. However, because Fennel did not have prior felony history the trial court chose to sentence her as a first time offender under RCW 9.94A.650, and placed her on community custody. As a condition of her sentence, the court also

⁴ At the time “crime-related prohibition” was defined under RCW 9.94A.030(13).

prohibited Fennel from having contact with the victim, Kelly Rothwell, and Lindsey Divine, who was present during the incident and was called as a witness by the State at trial. Consistent with *Amendariz*, this condition prohibiting contact with a witness was authorized by RCW 9.94A.703(3)(f), which gives the sentencing court the discretion to require a defendant to comply with “crime-related prohibitions.” Because contact with a witness falls within the definition of a crime-related prohibition, the trial court had authority to make no contact with Divine a condition of Fennel’s sentence.

V. CONCLUSION

For the above stated reasons Tara Rose Fennel’s conviction and sentence should be affirmed.

Respectfully submitted this 22nd day of November, 2011.

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By:



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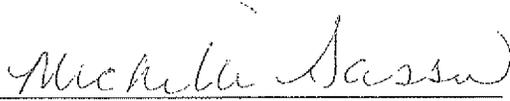
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November ^{22nd} ~~21~~, 2011.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 22, 2011 - 12:13 PM

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