

No. 42227-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KIMLIS TEK,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 10-1-00807-5, 10-1-00911-0, 10-1-01957-3

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 1

D. CONCLUSION..... 35

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

| | |
|--|------------|
| <u>Powell v. Alabama</u> , 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)..... | 32 |
| <u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).... | 31, 32, 33 |
| <u>United States v. Garsson</u> , 291 F. 646, 649 (D.N.Y. 1923)..... | 21 |

Washington Supreme Court Decisions

| | |
|--|----------------|
| <u>In re Personal Restraint Petition of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1996) | 32 |
| <u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978) | 32 |
| <u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999) | 3, 5, 6 |
| <u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987) | 17-18 |
| <u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990) | 3 |
| <u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980) | 3 |
| <u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001) | 18 |
| <u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) | 2 |
| <u>State v. Hall</u> , 168 Wn.2d 726, 230 P.3d 1048 (2010) | 23, 24, 26, 27 |

| | |
|---|----------------|
| <u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996) | 30 |
| <u>State v. Jackson</u> , 112 Wn.2d 867, 774 P.2d 1211 (1989) | 6 |
| <u>State v. Jacobsen</u> , 78 Wn.2d 491, 477 P.2d 1 (1970) | 9 |
| <u>State v. King</u> , 167 Wn.2d 324, 219 P.3d 642 (2009) | 21 |
| <u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007) | 18, 20, 21, 22 |
| <u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006) | 8, 9, 10 |
| <u>State v. McFarland</u> , 127 Wn.2d 332, 899 P.2d 1251 (1995) | 31 |
| <u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008) | 19, 22 |
| <u>State v. Piche</u> , 71 Wn.2d 583, 430 P.2d 522, 527 (1967) | 34 |
| <u>State v. Renfro</u> , 96 Wn.2d 902, 639 P.2d 737 (1982) | 31 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) | 2, 3 |
| <u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998) | 30 |
| <u>State v. Thomas</u> , 71 Wn.2d 470, 429 P.2d 231 (1967) | 32 |

| | |
|---|----|
| <u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987) | 30 |
| <u>State v. White,</u> 72 Wn.2d 524, 433 P.2d 692 (1967) | 22 |
| <u>State v. White,</u> 81 Wn.2d 223, 500 P.2d 1242 (1972) | 32 |

Decisions Of The Court Of Appeals

| | |
|--|------------|
| <u>Jankelson v. Cisel,</u> 3 Wn. App. 139, 473 P.2d 202 (1970)..... | 9 |
| <u>Safeco Ins. Co. v. Jmg Rests.,</u> 37 Wn. App. 1, 680 P.2d 409 (1984)..... | 9 |
| <u>Seattle v. Heatley,</u> 70 Wn. App. 573, 854 P.2d 658 (1993)..... | 17, 19, 20 |
| <u>State v. Baker,</u> 136 Wn. App. 878, 151 P.3d 237 (2007)..... | 5 |
| <u>State v. Bradbury,</u> 38 Wn. App. 367, 685 P.2d 623 (1984)..... | 32 |
| <u>State v. Brown,</u> 159 Wn. App. 1, 248 P.3d 518 (2010)..... | 28 |
| <u>State v. Fredrick,</u> 45 Wn. App. 916, 729 P.2d 56 (1989)..... | 33 |
| <u>State v. Madison,</u> 53 Wn. App. 754, 770 P.2d 662 (1989)..... | 20, 21 |
| <u>State v. Neidigh,</u> 78 Wn. App. 71, 895 P.2d 423 (1995)..... | 22, 31 |
| <u>State v. Sutherby,</u> 138 Wn. App. 609, 158 P.3d 91 (2007), <i>affirmed in part and reversed in part</i> 165 Wn.2d 870, 204 P.3d 916 (2009) | 18-19 |

| | |
|---|------------|
| <u>State v. Thomas,</u> 158 Wn. App. 797, 243 P.3d 941 (2010)..... | 23, 24, 27 |
| <u>State v. Walton,</u> 64 Wn. App. 410, 824 P.2d 533 (1992)..... | 3 |

Statutes and Rules

| | |
|-----------------------|----|
| RCW 26.50.110..... | 28 |
| RCW 26.50.110(1)..... | 29 |

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence that a rational trier of fact could find that Tek intended to inflict great bodily harm when he slashed the victim with a knife with a 7.5-inch blade.

2. Whether the trial court made an impermissible comment on the evidence when it cautioned the jurors that a photograph admitted into evidence was graphic and they might want to look at it quickly or not at all.

3. Whether the testimony of two police officers constituted improper opinions regarding Tek's guilt, such as to violate his right to a jury trial.

4. Whether Tek's two convictions for witness tampering, and 36 convictions for violating a no-contact order, violate double jeopardy.

5. Whether Tek received ineffective assistance of counsel.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case, with any additions or clarifications included in the argument below.

C. ARGUMENT.

1. There was more than sufficient evidence at trial that Tek intended to inflict great bodily harm to the victim when he slashed her with a knife with a blade seven and a half inches long.

Tek maintains that there was insufficient evidence from which a jury could find that Tek intended to inflict great bodily harm

when he slashed his wife's arm open with a knife. He claims that the evidence of intent is entirely circumstantial and proves only that he did in fact inflict a serious wound. Appellant's Opening Brief at 9.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

therefrom.” Salinas, supra, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court 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 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

At trial, Andrea Tek claimed not to remember the actual infliction of the knife wound. However, she told Brandon Sivonen from the Thurston County Fire Department, one of the first responders to the Tek residence, that she and Tek had been arguing, she told him she didn’t want to be with him anymore, he

went to a closet, took out a knife, and slashed her with it. RP 50.¹ Lisa Skinner, the emergency room doctor, testified that Andrea Tek said her husband cut her with a bowie knife after Ms. Tek told him she wanted to leave him. RP 60. Andrea Tek told Officer Jeff Jordan of the Olympia Police Department that when she told Tek to leave their residence, he went to the closet, pulled out a bowie knife, and slashed her with it. RP 119.

On the witness stand, Andrea Tek testified that on the night of the assault, Tek was angry with her because she had inadvertently disabled the computer which he was using to communicate with his family in Cambodia. RP 532. She began drinking and went into another room where she had a telephone conversation with her ex-husband and the father of her son. Tek became upset because he thought she wanted to reunite with her former husband. She told Tek she wanted him to leave. He said he would show her, and took a knife from a closet, a knife she did not know was there. She said she did not remember the actual cutting. She was sitting on the bed at the time. RP 533-34. While not remembering the event, she testified that it was quick. She looked down and her arm was cut open. RP 565.

¹ Unless otherwise noted, all references to the verbatim report of proceedings are from the sequentially numbered transcripts of the trial.

Andrea Tek testified that the knife was a military or hunting knife. The police recovered the knife from the residence. One officer described it as a large, military-style knife and estimated its length as 12 inches. RP 104. The knife was admitted into evidence and was measured on the witness stand. The blade was approximately 7.5 inches long. RP 178.

In addition to this evidence the jury heard about an earlier incident in which Tek had pointed a gun through the window of the residence, frightening Andrea Tek so much she took refuge in a locked bathroom. RP 520.

The jury was instructed that to convict Tek of first degree assault it must find that he intended to inflict great bodily harm. CP 113. The facts set forth above are more than sufficient to permit a rational jury to infer that his intent was to inflict such harm. The trier of fact may draw logical inferences from proven facts. State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999); see also State v. Baker, 136 Wn. App. 878, 151 P.3d 237 (2007). Intent, while in the mind of the criminal, can be proved by facts and circumstances that are perceived by others. Id. at 710.

[F]or the fact finder to draw inferences from proven circumstances, the inferences must be rationally related to the proven fact. 'The jury is permitted to

infer from one fact the existence of another essential to guilt, if reason and experience support the inference.”

...
[I]f the finder of fact concludes an alternative *reasonable* explanation exists for the defendant's actions, then the State has failed to meet its burden of establishing guilt beyond a reasonable doubt.

Id. at 707-08 (emphasis in original, citing to State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). The Bencivenga court went on to explain that it was up to the trier of fact, not the appellate court, to decide what is reasonable. Id. at 708.

Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not barred against discarding one possible inference when it concludes such an inference is unreasonable under the circumstances. Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt. . . . An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of the witnesses.

Id. at 708-09. The appellate court decides only whether any rational trier of fact, considering the evidence most favorably to the State, could have found intent beyond a reasonable doubt.

Here the evidence was that Tek, an emotionally volatile man, was angry with Andrea Tek because he could not use the computer

and because she spoke to her ex-husband on the phone. She asked him to leave. He said he would show her, grabbed a large knife, and cut her arm open. No other explanation was offered—he did not trip and accidentally cut her as he fell, he did not display the knife and threaten her with it, he did not slowly and deliberately inflict a small cut. He very quickly grabbed the knife and slashed her arm open. The clear inference was that he intended to inflict great bodily harm to “show her” who was in charge. The jury’s verdict is supported by the facts.

2. The court’s remark that the photograph admitted into evidence was graphic and the jurors might want to look quickly or not at all was not the kind of comment on the evidence prohibited by art. 4, § 16 of the Washington Constitution.

The State wanted to admit two photographs of the knife wound to the victim’s arm, one a close-up and one taken from farther away. RP 13. The defense objected to both being admitted. RP 15. The court ruled that only one would be permitted, and gave the State the choice of the two offered exhibits. RP 16. The State chose the one marked Exhibit 27. RP 17. The photograph was offered and admitted during the testimony of Lisa Skinner, the emergency room physician. RP 57. The State requested and received permission to publish; publication was

obviously done by projecting the photograph onto a screen. RP 57-58. Before the photograph of the wound was shown to the jury the court said:

. . . I do want to caution the jury. These photographs are somewhat graphic—actually, Exhibit Number 27 is. You may want to look at it quickly or not at all.

RP 57. No objection was made.

Tek now argues that this remark by the judge is an unconstitutional comment on the evidence that can be reviewed for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006). The State does not dispute that a manifest constitutional error may be raised on appeal even if no objection was made in the trial court. The State does dispute that the court's remark was an unconstitutional comment on the evidence.

Article 4, section 16 of the Washington Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A "comment on the evidence" is defined as follows:

To fall within the ban of article 4, section 16, the jury must be able to infer from the trial judge's comments that he personally believes or disbelieves evidence relative to a disputed issue. The action of the judge must be such that it will fairly import to the jury an expression of judicial opinion relative to the credibility of some significant evidence.

Safeco Ins. Co. v. Jmg Rests., 37 Wn. App. 1, 17, 680 P.2d 409 (1984) (citing to Jankelson v. Cisel, 3 Wn. App. 139, 145-46, 473 P.2d 202 (1970)).

The purpose of this provision is to avoid influencing the jury with the judge's opinion of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

In keeping with this purpose, we have consistently held that this constitutional prohibition forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial.

Id. This includes remarks that convey to the jury the court's personal opinion of the merits of the case or instructing it that some matter of fact has been established as law. Levy, 156 Wn.2d at 721. "[A]ny remark that has the potential effect of suggesting that the jury need not consider *an element* of the offense could qualify as a judicial comment." Id., emphasis added.

To determine whether the judge's words constitute a comment on the evidence, a reviewing court looks to the facts and circumstances of the case. Jacobsen, 78 Wn.2d at 495. Here the court conveyed its opinion that the photograph was gruesome, which was not contested, but not its opinion regarding the weight,

credibility, or sufficiency of the evidence. Further, a fair reading of the judge's remark indicates that the judge was concerned about the reaction of the jurors seeing the photograph magnified on a screen while in open court. Nothing about the remark indicates that the judge was instructing the jurors not to ever look at the photograph, and particularly not that they should ignore it during deliberations.

If a reviewing court determines that a remark does amount to a comment on the evidence, it then undertakes a two-step analysis to determine if reversal is required. "Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 723. Here, the defense had successfully limited the State to one photograph of the injury; it would obviously be to his advantage to keep the jury from seeing it at all. No one disputed that it was a gory picture; while Tek contested that the injury constituted great bodily harm, he did not claim that the photograph was inaccurate. His argument was that the injury did not result in lasting impairment. RP 715-18. Tek argues that the photograph was relevant to his mental state at the time he cut his wife—and he

did not deny inflicting the injury—but it is not apparent, and he does not explain, how that would be. Thus, even if the remark was a comment on the evidence, it did not go to any contested matter. Nor did it relieve the jury of the duty to determine that all of the elements of the offense had been proven by the State. The jury was properly instructed that if it appeared to it that the court had indicated its personal opinion, the jury was to disregard it entirely, CP 92, and that it was to consider the exhibits admitted during trial. CP 91. Where no prejudice results from the court's comment, reversal is not appropriate. Id. at 727.

The court's remark was not a comment on the evidence, but even if it were, it was not reversible error because there was no prejudice to the defendant.

3. The challenged testimony did not constitute improper opinion testimony. Even if it were improper, however, Tek did not object in the court below, and has not established that it was a manifest error affecting a constitutional right such that it may be raised for the first time on appeal.

a. The testimony.

Tek assigns error to several portions of testimony by Detectives Russell Gies and Brenda Anderson.²

² Although Tek refers in his brief to Detective Anderson as "he", Appellant's Opening Brief at 16, Brenda Anderson is female.

Detective Gies testified about the telephone calls Tek made from the jail to Andrea Tek. The prosecutor asked a series of questions to establish that those were the two parties speaking during the recorded calls. RP 220-21. One of the reasons that Gies could say that the calls were between Tek and his wife was the content of the conversations. This exchange occurred:

Q. Were there other specifics unique to the defendant and Ms. Tek and those calls that helped you identify the caller?

A. Well, as far as some of the things he was asking her to do, if that perhaps is what you mean. He was very specific in asking her to do some covering up for him.

RP 221. Tek did not object. There were no further questions on the topic. It is obvious from the context of this remark that the detective was explaining how he knew that the defendant was the person speaking. He was not testifying to Tek's guilt.

The next challenged testimony occurred when Gies was asked why he had originally identified the charge as second degree assault but later changed it to first degree assault. The question and answer were as follows:

Q. There was some—earlier, it was mentioned that this was originally charged as an assault two but later charged (sic) to assault one. Can you explain that?

A. Yes, sir. When I was done that evening, as I was driving from the scene and after I had a full vision of what had occurred, I contacted the Thurston County Jail and advised that the charges were to be upgraded for assault first degree.

Q. What did you base that on?

A. Due to the severity of the injury that I had become aware of during the investigation.

RP 247-48. Again there was no objection, and the subject was dropped. The next question concerned what happened when the detective arrived at the Teks' residence. RP 248. The substance of the testimony was not that Tek was guilty of any particular degree of assault, but that the nature of the injury was greater than Geis had at first believed, and the investigation had led to that conclusion.

Tek next challenges Gies' testimony that the phone calls Tek made from the jail to Andrea Tek contained evidence that Tek was attempting to persuade her to change her testimony.

Q. Why were those phone calls important to your investigation?

A. Because it was evident to me that, when Mr. Tek called Andrea Tek, he was attempting to both have her change her testimony and/or not show up for a trial and be out of town or not be available during trial.

Q. And were you able to identify—I know we went through the calls yesterday, and these are all portions of those same calls. Were you able to identify the defendant's voice in those calls?

A. Yes, I was.

RP 322-23. Tek did not object, and the subject was changed. It was apparent that the State was laying the foundation for the calls. RP 307-08. The portions of the calls to which Gies referred were later played to the jury. RP 325-354.

Next, Tek challenges the testimony of Gies about the letters Tek sent to Andrea Tek from the jail. After identifying the sender and addressee, Gies responded to the following question:

Q. And why were these letters significant to your investigation, Detective?

A. Well, I was aware of the no-contact order being out, so there was to be no contact, and it was evident that there was some—an attempt to influence the testimony of Andrea in the letters, or not even show up.

RP 355-56. There was no objection. The letters had previously been admitted into evidence without objection, RP 226, and portions of them were published to the jury by having the detective read them. RP 357-59. The detective was explaining his investigation and talking about the contents of the letter.

Detective Anderson had been listening to jail phone calls made by the defendant after his arrest at the end of May, 2010. From those conversations, Anderson became aware that there had been a face-to-face visit between Tek and Andrea Tek and so she obtained and listened to the recording of that visit. RP 564-65. That recording was played to the jury. RP 470-74. Immediately thereafter, this exchange occurred:

Q. Detective Anderson, when you were listening to these phone calls, or these portions of the visitation, what did you find pertinent to your investigation?

A. I believe that there was evidence . . .

MR. FRIX: Your Honor, objection as to opinion.

THE COURT: Sustained.

MS. LORD: Regarding your investigation, what specifically were you looking for in this visitation?

A. Evidence to suggest tampering with the witness, of Andrea.

Q. And after listening to this telephone call—or excuse me. After listening to this visitation, what did you do next?

A. I downloaded the information, but I actually charged Kimlis Tek with tampering with a witness. Since he was already in custody, it required that I down to the jail and file the additional charge.

RP 474-75. Again, there was no objection to this answer. The topic of questioning moved on to a no-contact order. RP 475-76. It appears that Anderson was describing what she did during the investigation.

Finally, Tek challenges the following testimony:

Q. In your previous testimony, Detective Anderson, you stated that you had, after listening to that jail visitation on May 30th, 2010, you booked the defendant for witness tampering, correct?

A. Yes.

Q. And what was your basis for that booking?

A. Based on the information that he had—the conversation that he had with Andrea on that visit, there was evidence to suggest he was trying to change her story.

Q. And what evidence was that?

A. That he didn't point the gun at her specifically, that he only brandished the weapon, which means that he just had it out.

Q. And was there anything else that you found in that visitation that led you to believe that those charges were warranted?

A. Well, he said stick to the story.

MR. FRIX: Your Honor, I'm going to object as to opinion evidence at this point.

THE COURT: I'll allow it.

THE WITNESS: And that in itself, I mean, the story, if he would have said stick to the truth, that's different than stick to the story. To me, it indicated that there was—

MR. FRIX: Your Honor, I'm going to object to opinion evidence again.

THE COURT: Sustained.

MS. LORD: Q: Was there anything else about the telephone call—or excuse me—about the visit that led you to believe that you were warranted in making an arrest for witness tampering against this defendant?

A. Nothing is coming to mind. There was clear evidence to me there was tampering.

MR. FRIX: Your Honor, objection, opinion evidence, move to strike.

THE COURT: Can we have a sidebar, please?

....

THE COURT: The jury will disregard the last answer of the witness. The objection is sustained, and, Ms. Lord, you may ask your next question.

RP 480-82. Tek did not object to the answer he now challenges.

b. Argument.

"The general rule is that no witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference." Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d

336, 348, 745 P.2d 12 (1987). Such testimony invades the province of the fact-finder and is unduly prejudicial. Id.

However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.

Id. at 578. Opinion testimony is defined as "testimony based on one's belief or idea rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001)

When deciding whether particular statements are impermissible opinion evidence, the court considers five factors:

(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

Id., at 759. An opinion is not automatically inadmissible just because it addresses an issue that the jury must decide. State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007). "In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense." State v. Sutherby, 138

Wn. App. 609, 617, 158 P.3d 91 (2007), *affirmed in part and reversed in part* 165 Wn.2d 870, 204 P.3d 916 (2009).

The two police officers whose testimony is challenged were explaining their investigations and the facts upon which they based certain actions, such as changing the charges on which Tek was being held in jail. Neither of them gave an explicit or “near-explicit” opinion that Tek was guilty. The Court of Appeals has not been willing to take an “expansive” view of claims that a witness has opined that the defendant is guilty. Heatley, 70 Wn. App. at 579. If the evidence supported the officer’s conclusion, it is not improper opinion testimony. Id.

Further, Tek does not claim that he was prejudiced by the testimony he now challenges. Nothing in the record suggests prejudice. The jury heard the telephone calls and the jail visit, it read the letters, it saw the photographs of Andrea Tek’s injury and heard testimony about it. The detectives did not add anything to the evidence that was before the jury. If the jury understood any of this testimony as the detectives’ opinions that Tek was guilty, it cannot have been a surprise to them.³ The officers had testified extensively about the facts of the case. There is nothing to suggest

³ This fact alone would not justify permitting explicit opinions about intent. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

that if the challenged testimony had not been allowed, the outcome of the trial would have been different.

Under these circumstances, nothing in the record suggests that the testimony was unfairly prejudicial, *i.e.*, that it persuaded the jury to abdicate its responsibility and decide the case on a basis other than the evidence and the pertinent law.

Heatley, 70 Wn. App. at 582. Here Tek simply argues that if there is error the case must be reversed. He does not identify any prejudice.

Even if any of the statements made by the two detectives were improper opinion testimony, Tek did not object to any of the statements he now challenges. He asserts that his claim may be raised for the first time on appeal, but that is not necessarily the case.

A claim of error may be raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). If a reviewing court concludes that had an objection been made it would have been sustained, then the court must decide if the admission of the testimony amounted to a manifest constitutional error. State v. Madison, 53 Wn. App. 754, 762, 770 P.2d 662 (1989). The exception for manifest constitutional errors is intended to be a narrow one. Kirkman, 159 Wn.2d at 934.

“Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to a ‘manifest constitutional error’ reviewable for the first time on appeal.” Madison, 53 Wn. App. at 762. Testimony that touches on an ultimate fact, which is not objected to, is not automatically a manifest error and thus not automatically reviewable. State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). The burden is on the defendant to show how the error actually affected his rights. “It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review. Kirkman, 159 Wn.2d at 926-27.

Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, “Juries are not leaves swayed by every breath.” *United States v. Garsson*, 291 F. 646, 649 (D.N.Y. 1923)

The court in Madison, 53 Wn. App 754, explained the correct analysis. If the reviewing court concludes that there was error, it must decide if it was of constitutional magnitude. If not, the court should deny review. If the court finds that the claim is of constitutional magnitude, then the harmless error analysis applies. Id. at 763. “Strong policy reasons support the use of harmless error analysis. ‘A judicial system which treats every error as a

basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.” State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). “A reversal should occur only when the reliability of the verdict is called into question.” State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

A factor to consider in deciding whether the defendant was prejudiced, and therefore the error not harmless, is whether the jury was properly instructed. Montgomery, 163 Wn.2d at 595. The court in Kirkman placed great weight on the jury instructions in deciding that there was no prejudice, specifically the instruction telling the jury that it was not bound by expert opinion and the instruction that it is the sole judge of credibility of witnesses and weight to be given their testimony. Kirkman, 159 Wn.2d at 938. In Tek’s case, the jury received both of those instructions. CP 91-92, 98. Juries are presumed to follow instructions. Kirkman, 159 Wn.2d at 928.

The testimony at issue here was not improper opinion testimony that Tek was guilty. Even if it had been, it was not objected to at trial and because it is not a manifest error—no

prejudice has been shown—it cannot be raised for the first time on appeal.

4. Tek's two convictions for witness tampering and 36 convictions for violation of a no-contact order do not violate the constitutional protection against double jeopardy.

A defendant may not be convicted more than once for the same offense. Whether that has occurred depends upon the unit of prosecution for that offense. State v. Hall, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010). The determination of the unit of prosecution is a question of law that is reviewed de novo. State v. Thomas, 158 Wn. App. 797, 800, 243 P.3d 941 (2010).

a. Witness Tampering.

In Hall, the defendant called a victim more than 1200 times on three different days—March 22, March 30, and April 4, 2007. During those calls he attempted to persuade the victim to either testify falsely or not at all. Hall, 168 Wn.2d at 729. He was charged with four counts of tampering with a witness and the jury convicted him on three of them. Id. Hall argued, and the Supreme Court agreed, that the statute intended to criminalize the attempt to convince the witness, not the length of the process or number of particular acts it took to do so. Id., at 731. Under the facts of that

case, the Hall court found that the 1200-plus calls comprised only one unit of prosecution and reversed two of his convictions.

In Thomas, the defendant made 29 calls from the jail between January 6 and January 9, 2007, to the victim, trying to convince her to change her testimony. Thomas, 158 Wn. App. at 798. The Thomas court also found these to be a single course of conduct, forming only one count of witness tampering. Id. at 802.

In Hall, however, on which the Thomas court relied, the court said:

Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign. But those facts are not before us.

. . . .

We do not reach whether or when additional units of prosecution, consistent with this opinion, may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct.

Hall, 168 Wn.2d at 737-38.

The court in Hall framed the question thusly: “We are asked to determine the unit of prosecution for the crime of witness tampering when the defendant makes multiple phone calls to a single witness in an attempt

to persuade that witness not to testify or to testify falsely *in a single proceeding.*" *Id.* at 728 (emphasis added). As noted, the calls in that case were all made within a two-week period.

Tek was charged with assaults resulting from two different events many months apart—a second degree assault which occurred on May 28, 2010, CP 2, and a first degree assault which occurred on December 25, 2010. Following the May 28, 2010, arrest, Detective Anderson listened to Tek's phone calls from the jail to Andrea Tek. From them she discovered that the two had had face-to-face visits at the jail and she listened to the recording of their conversations. RP 449-50. During a visit on May 30, 2010, Tek told Andrea Tek to help him "out of this mess" by telling "them" that he was just stressed out and would never harm her or himself. RP 466-67. He told her to "stick with the story," RP 470, to tell the judge he was just depressed and didn't threaten her, RP 472, to convince the judge there was no fight and no threat and that she had to get him out of this mess, RP 473, and to do whatever it takes to get him out of jail. RP 474.

Tek was charged with second degree assault on June 3, 2010, and witness tampering June 9, 2010. Supp. CP. The record does not reflect why the charges had not been tried or otherwise resolved before Christmas of that year. On December 25, 2010, the assault involving the cutting of Andrea Tek's arm occurred, for which Tek was charged with first

degree assault on December 29, 2010. Supp. CP. Between February 7, 2011 and February 21, 2011, the defendant made many phone calls to Andrea Tek. RP 250-307. In some of them he attempted to persuade her, among other things, to not show up, RP 326-27, to stay out of it, RP 331, and not to give in to "these lying son of a bitches," RP 333. He told her a wife doesn't have to testify against her husband, RP 334, and she should have kept her mouth shut. RP 335. He instructed her to read his letters, RP 340, and told her again that she did not have to testify, RP 341.

Tek also wrote three letters to Andrea Tek, using her maiden name of Blevins. RP 355. One of the letters, postmarked February 11, 2011, urged her to "just take a few days off" and ignore the prosecutors. RP 356-57. In two other letters postmarked March 24, 2011, he reminds Andrea Tek not to show up for trial and not to testify against him. RP 358-59. These letters and the phone calls made from the jail in February of 2011 resulted in the second charge of witness tampering. CP 61.

Tek now asserts, based upon Hall, that all of these phone calls, the face-to-face visit, and the letters can support only one count of witness tampering, even though one communication occurred in May of 2010, and concerned only the second degree assault charge, and all of the remaining communications occurred in February and March of 2011, and referenced the first degree assault charge. The State maintains that this

is the very kind of situation that the Hall court left undecided. The attempts to influence Andrea Tek were separated by a long period of time. In February and March of 2011 he used both phone calls and letters, while in May of 2010 there was only a face-to-face visit in the jail. The three letters and numerous phone calls in 2011 resulted in only one count of witness tampering, following the holding in Hall. But the two different events, or courses of conduct, were so separated in time that they support two units of prosecution. In addition, Tek was attempting to influence Andrea Tek about different crimes in the two separate communications.

In Thomas, Judge Quinn-Brintnall's concurrence articulated the reasons that the two counts of witness tampering should stand.

Combining temporally separate and escalating tampering actions together can distort the impact of a defendant's actions.

.....

Treating a defendant's temporally separated tampering actions as the same crime is inconsistent with (1) the long-standing charging principles that require demarcations by time and initiation, (2) the executive prosecutor's authority to determine the appropriate charges, and (3) the sentencing court's authority to determine the appropriate standard range sentence.

Thomas, 158 Wn. App. at 802-03.

b. Violation of No-Contact Order.

Tek asserts, without citation to authority, that the unit of prosecution for violation of a no-contact order is a “conversation,” even if that conversation is interrupted by a dropped telephone call or consists of several “tweets” on Twitter. Because the jail phone system limited calls to 15 minutes each, if Tek and Andrea Tek were still talking at the end of the 15 minutes, Tek would have to call her again and a new 15-minute call would begin. This occurred several times. RP 360-65.

Tek also maintains that RCW 26.50.110 does not specify a unit of prosecution, and that the legislative history sheds no light on the legislature’s intent. Washington courts, however, have been able to discern the unit of prosecution for a violation of a no-contact order.

In State v. Brown, 159 Wn. App. 1, 248 P.3d 518 (2010), Brown was charged with five counts of felony violation of a no-contact order. He had called the protected party hundreds of times on six different days. He argued that his conduct was a continuing violation and the convictions violated his right to be free of double jeopardy. The court disagreed, finding that the legislature intended that each violation of the order was a unit of prosecution. Id. at 9.

RCW 26.50.110(1) punishes “a violation” of a no-contact order. Use of the word “a” supports the State’s reading that the unit of prosecution is each single violation of a no-contact order. The Supreme Court “has consistently interpreted the legislature’s use of the word ‘a’ in a criminal statute as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously.

Id., at 10-11 (internal cite omitted). Further, the legislative history supports this interpretation. The statute was amended in 2007, and the legislative statement of intent made it clear that it intended to punish each violation of the statute, not a continuing course of conduct. Id. at 12.

Tek’s argument is essentially that each “conversation” is a continuing course of conduct. It is not clear why the unit of prosecution should be a verbal exchange that continues until the parties decide they are through talking. Every time the jail phone system disconnected a call at the end of 15 minutes, Tek had to affirmatively place another call and Andrea Tek had to take an affirmative action to accept that call. *See e.g.*, RP 250-51. Tek could have chosen to refrain from placing another call, but instead he continued to call until he decided there would be no more conversation. Each affirmative act of placing a telephone call constituted a violation, and a violation is the unit of prosecution of

RCW 26.50.110(1). It is not a continuing course of conduct. None of the convictions for violating a no-contact order should be reversed.

5. Tek did not receive ineffective assistance of counsel.

Tek claims that his counsel was ineffective for failing to object to the testimony of Detectives Gies and Anderson that was discussed above in section three.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence

of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire

record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See, Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome

undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

A reading of the record shows that defense counsel conducted a vigorous defense. He objected to those portions of the officer’s testimony that he thought were improper opinion, and, as noted, twice he was sustained. RP 474, 481. Once he was not. RP 481. The fact that he did not object in other instances indicates he did not believe those answers were inadmissible, and, as argued above, they were not.

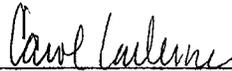
Tek argues that there is no tactical or strategic reason for his counsel not to have objected to the instruction, and that his counsel was therefore deficient. Appellant's Opening Brief at 22. Even if there was no strategic reason for defense counsel to not object to the testimony, the competency of counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

Finally, Tek has not established that had the detectives not testified as they did, the outcome of the trial would have been different. The evidence was overwhelming that he was attempting to persuade Andrea Tek to either refuse to testify or refuse to appear for trial at all. With respect to the first degree assault, Tek admitted to causing the injury. The only dispute was whether it was serious enough to support a finding that it was great bodily harm, and whether he intended to inflict an injury that serious. There was ample evidence apart from the testimony of the detectives to prove those facts beyond a reasonable doubt.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Tek's convictions.

Respectfully submitted this 9th day of March, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

JODI R. BACKLUND, ATTORNEY FOR APPELLANT
EMAIL: BACKLUNDMISTRY@GMAIL.COM

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

Dated this 9th day of March, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

March 09, 2012 - 11:03 AM

Transmittal Letter

Document Uploaded: 422271-Respondent's Brief.pdf

Case Name: STATE V. KIMLIS TEK

Court of Appeals Case Number: 42227-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Chong H McAfee - Email: mcafeec@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:
backlundmistry@gmail.com