

60538-1

60538-1

NO. 60538-1-I

82558-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISIAH THOMAS HALL,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. When a defendant is convicted of violating one statute a number of times, a double jeopardy challenge must focus on the "unit of prosecution" the legislature intended to punish when enacting the statute. The witness tampering statute criminalizes each "attempt" to influence a witness's testimony. The defendant called a key witness on three different days and urged her to change her testimony or to absent herself from trial. Was the defendant properly convicted of three counts of witness tampering?

2. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate deficient performance and prejudice, and legitimate trial strategy cannot support an ineffective assistance claim. Trial strategy explained some of the defendant's attorney's actions, some errors were corrected sua sponte by the court, and other errors were minor and had little significance in the trial. Has the defendant failed to demonstrate deficient performance or prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Isiah Thomas Hall, was originally charged in King County Superior Court with Burglary in the First Degree with a firearm enhancement, and Assault in the Second Degree. CP 1-2. The charges arose from Hall's actions on January 14, 2007, when he forcefully entered Mellissa Salazar's apartment and held a gun to her head. CP 3-7.

Prior to trial, the State amended the information to charge a total of eight counts, as follows:

Count I, Burglary in the First Degree, with firearm enhancement;

Count II, Assault in the Second Degree for assaulting Melissa Salazar with a firearm;

Count III, Assault in the Second Degree for assaulting Lamont McKinney (a guest in Salazar's apartment at the time of the burglary) with a firearm;

Count IV, Unlawful Possession of a Firearm, for illegally possessing a firearm during a period between January 14 through 17, 2007;

Count V, Tampering with a Witness (Desirae Aquiningoc, Hall's live-in girlfriend) on March 22, 2007;

Count VI, Tampering with a Witness (Aquiningoc) on March 22, 2007;

Count VII, Tampering with a Witness (Aquiningoc) on March 30, 2007; and

Count VIII, Tampering with a Witness (Aquiningoc) on April 4, 2007.

CP 11-14. The tampering charges resulted from Hall's repeated jail phone calls to Aquiningoc regarding her trial testimony.

At the conclusion of the State's evidence, the parties submitted two stipulations to the court. One stipulation involved the foundational requirements for the admission of the jail recordings the State admitted (essentially providing the dates and times of the calls). 4RP 575;¹ CP 25-26. The second stipulation involved Hall's prior conviction for purposes of the Unlawful Possession of a Firearm charge. CP 24. That stipulation provided that:

The State and the Defendant hereby stipulate for purposes of trial in this matter that the Defendant was convicted, after 1993 and before January 14, 2007, of a crime against a family or household member.

CP 24.

¹ The Verbatim Report of Proceedings for this case contains five volumes of transcripts, which will be referenced using the same designations used by the appellant, as follows:

- 1RP = May 16 and 17, 2007 (pretrial)
- 2RP = May 21 and 22, 2007 (trial)
- 3RP = May 23, 2007 (trial)
- 4RP = May 24, 2007 (trial)
- 5RP = May 29 (trial) and July 30, 2007 (sentencing).

A jury convicted Hall of six of the eight charges, acquitting him of the assault against McKinney, and of Count V's tampering charge (one of the two March 22 offenses). CP 63-70. The jury also returned the special verdict form convicting Hall with the firearm enhancement for the burglary charge. CP 71.

The trial court imposed a mid-range sentence. CP 75-84. This appeal followed.

2. SUBSTANTIVE FACTS.

During the later part of 2006, Mellissa Salazar met the defendant, Isiah Hall, while out at a dance club in Seattle. 2RP 177. They dated for a short time, spending nights together frequently at Salazar's apartment, but broke up shortly before Christmas. 2RP 178-80. Although they were not dating, Hall called Salazar every day. 2RP 181.

The two reconciled for one night on New Year's Eve, but did not date after that night. 2RP 181. Hall, however, continued to call Salazar daily. 2RP 181. Salazar would mostly ignore the calls, but occasionally did answer them. 2RP 180-81.

On January 14, 2007, Hall again called Salazar. 2RP 182. Salazar was busy looking for a new apartment, so she told Hall she

would call him back. 2RP 182. Because she had plans for a date with a new friend, Lamont McKinney, Salazar did not intend to return Hall's call. 2RP 187.

Later that day, Salazar was with McKinney in her apartment watching a movie when Hall again called her. Hall heard McKinney's voice in the background and became enraged, asking her "who the fuck is over at your house?" Salazar told Hall it was none of his business and ended the call. 2RP 187.

Undeterred, Hall called Salazar's phone 18 more times. Salazar did not answer the phone and turned off her ringer so that she and McKinney would not be disturbed. 2RP 189. Later, Salazar discovered that during one of the calls, Hall left her a voice mail message in which he accused her of "fucking" other men, and told her he was going to "show up and fuck [Salazar] up." 2RP 225-27.

A short time later, Salazar heard someone banging on her front door. Suspecting that it was Hall, Salazar told McKinney she would step out for a minute. 2RP 191; 3RP 285. Salazar slipped out her front door and closed it behind her to tell Hall to leave. 2RP 191-92.

Hall was very angry and asked Salazar why she had not been answering her phone. Salazar told him that she was busy and that he needed to leave, but Hall pressed her to tell him who was in her house. 2RP 192. During this conversation, Hall was pacing back and forth, acting "real crazy." He pulled a gun out of his pocket and said "bitch, you want to fuck with my life?" 2RP 193.

Hall held the gun at the center of Salazar's forehead and threatened to kill her. 2RP 193. Salazar recognized the gun as one she had previously seen Hall carrying, and she described it as a black revolver. 2RP 195-96. Trying to remain calm, Salazar told Hall that he needed to leave. Hall then pushed Salazar out of the way and burst in to the apartment through the front door. 2RP 193.

Apparently expecting McKinney to be in the bedroom, Hall ran directly toward the back of the apartment. 2RP 193. Having heard Hall and Salazar arguing outside, McKinney fled the apartment when Hall ran past him toward the back of the apartment. 2RP 193; 3RP 286-94. Hall followed him, trying to chase him down the exterior stairs of Salazar's apartment building and attempting to take aim with his gun. 2RP 193; 3RP 292-94. Salazar immediately called 911 for help. 2RP 197. Hall fled the apartment complex in a red Kia. 2RP 197; 3RP 296.

When police arrived, they spoke to Salazar outside her building. She was "hysterical" and crying as she recounted what had happened. 2RP 126, 203. As she spoke to police, McKinney returned to the area. Mistaking McKinney for the suspect, police placed him under arrest. 2RP 130-32, 204. Salazar drove with police to several locations in an attempt to locate Hall, with no success. 2RP 207-210.

A few days later, a detective assigned to the case discovered a possible address for Hall in the Beacon Hill area of Seattle. The address was the home of Desirae Aquiningoc, who was apparently Hall's live-in girlfriend. 4RP 493. The detective verified the description of the Kia he saw outside the residence with Salazar, and decided to place the car and building under surveillance. 4RP 495.

A short time later, Aquiningoc left the house and drove off in the Kia. 4RP 496. Police followed her and pulled her over a short distance away. 4RP 438-39, 496. She confirmed that Hall was currently in her home. 4RP 499.

After assembling a SWAT team for backup, Det. Pavlovich called Hall's phone with a number provided by Aquiningoc. 4RP 500. Det. Pavlovich told Hall he would be arrested, and Hall

agreed to come out of the house voluntarily. 4RP 501. Hall did not exit for several minutes, so Det. Pavlovich again called him. 4RP 501. Finally, Hall came out of the house and was arrested. 4RP 502.

After being advised of his rights, Hall admitted to police that he knew Salazar and had been at her apartment on January 14. 4RP 503. He said that he went there because he was upset, because he believed he contracted Chlamydia (a sexually transmitted disease) from her. 4RP 503-04. Once he arrived, he saw McKinney inside and admitted to arguing with Salazar over their relationship. However, Hall denied being armed or threatening anyone with a gun. He also denied owning or possessing a firearm at any time. 4RP 504.

Officers obtained a warrant and searched Aquiningoc's home. They found a revolver hidden in a pink basket containing Aquiningoc's belts, in the closet in a main bedroom. 4RP 507-08. They also found ammunition hidden in a dental/retainer case inside a dresser drawer in another part of the bedroom. 4RP 508.

Aquiningoc testified at trial. She and Hall had been dating and essentially living together in her apartment in Seattle for almost

a year. 3RP 340-43. She frequently loaned Hall her red Kia car.
3RP 344.

On the day of the incident giving rise to these charges, Aquiningoc had heard Hall talking on the phone while in her home. Hall became upset, and told Aquiningoc that his mother's boyfriend was "beating up on her" and that he needed to go take care of it. 3RP 349. Hall left the home while Aquiningoc was showering, claiming that he would return shortly. 3RP 349.

An hour or so later, Hall came running back into the home, asking Aquiningoc to take him to a friend's house. He seemed nervous and said that he had shot at someone at his mom's house and that they had called the police. Aquiningoc took him to a friend's house, and Hall asked her to return a few hours later. 3RP 350-51. When she returned, Hall told her he had left the gun at his friend's house. 3RP 351. A few days later, Hall asked Aquiningoc for a ride to his friend's house so that he could retrieve his gun. 3RP 353.

After his arrest, Hall called Aquiningoc several times a day from the jail, and she periodically visited with him. 3RP 382-84. During several of these calls and visits, Hall repeatedly asked Aquiningoc not to testify in the case against him. He blamed her for

his trouble, and got mad at her for giving a statement to the police. 3RP 390. He told her to put the subpoena for this case back into the mailbox, and urged her to "go on a vacation" or to stay at his mother's house during the trial, so that the prosecutor could not find her to testify. 3RP 399-400. He also asked her to make up a story about the gun, to tell police that it belonged to one of her friends and that Hall had told her to get rid of it. 3RP 392. Many of the conversations from the jail were recorded, and the State played excerpts of the calls to the jury in court. 3RP 395.

Hall did not testify at trial.

Additional procedural and substantive facts will be discussed in the argument section to which they pertain.

C. ARGUMENT

1. HALL'S THREE CONVICTIONS FOR TAMPERING WITH A WITNESS ON THREE DIFFERENT DAYS DO NOT VIOLATE DOUBLE JEOPARDY.

For the first time on appeal, Hall contends that three separate convictions for witness tampering violate double jeopardy because they constitute a single course of conduct. This claim should be rejected. The unit of prosecution for witness tampering is

each *attempt* to tamper with a witness. Hall's three convictions were proper.

The Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Similarly, the Washington constitution provides that “No person shall . . . be twice put in jeopardy for the same offense.” Wash. Const. art. 1, § 9. The state and federal prohibitions against double jeopardy are coextensive; the state provision does not provide broader double jeopardy protection than the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Whether a defendant's double jeopardy rights have been violated is a question of law and should be reviewed de novo. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996), review denied, 131 Wn.2d 1017 (1997). When a defendant is charged with violating the same criminal statute multiple times, the proper inquiry is what “unit of prosecution” the Legislature intended as the punishable act under the statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). Where a defendant has two separate and distinct intents to violate the same statute more than once, that defendant may be convicted of two counts of the same

crime without violating principles of double jeopardy. See In re Personal Restraint of Davis, 142 Wn.2d 165, 174, 12 P.3d 603 (2000) (multiple intents to manufacture drugs, present where defendant had two separate marijuana grow operations in different locations, supported two separate convictions). The first step in this inquiry is to analyze the criminal statute at issue. Adel, 136 Wn.2d at 635.

Washington's witness tampering statute provides, in pertinent part, that a person is guilty of the crime of tampering with a witness if he:

attempts to induce a witness or person he . . . has reason to believe is about to be called as a witness in any official proceeding or a person whom he . . . has reason to believe may have information relevant to a criminal investigation. . . to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent . . . herself from such proceedings .

...

RCW 9A.72.120(1) (emphasis added). Washington law further defines criminal attempt as "any act which is a substantial step toward the commission" of the crime, committed with intent to commit that crime. RCW 9A.28.020(1) (emphasis added).

Thus, plain language of these statutes demonstrates that the proper unit of prosecution for witness tampering is each separate

attempt to induce a witness to testify falsely or absent herself from proceedings, regardless of whether each attempt relates to the same witness or to the same proceeding. Because "attempt" is defined as *any act* which constitutes a substantial step, each of Hall's individual phone calls to Aquiningoc constituted a separate act subjecting him to a new charge of witness tampering. See RCW 9A.28.020(1).

Ignoring the plain language of this statute, Hall argues that the "statute proscribes a *course of conduct* and the unit of prosecution is per person per official proceeding." Br. App. at 12 (emphasis added). Thus, he contends that since all three of his convictions were for a single "course of conduct" aimed at influencing one witness's testimony in this criminal proceeding, he should only be guilty of one crime.

Hall's position is untenable. His interpretation clearly conflicts with the legislative intent of the witness tampering statute, and would lead to absurd results.

When enacting recent amendments to the witness intimidation and tampering statutes, the Legislature made specific findings that "tampering with and/or intimidating witnesses or other persons with information relevant to a present or future criminal . . .

proceeding are grave offenses which adversely impact the state's ability to promote public safety and prosecute criminal behavior." Laws of 1994, ch. 271, § 201. Changes enacted after these findings have been designed to broaden the witness intimidation and tampering statutes to cover a wider range of behavior. For example, a 1994 amendment made the statute applicable to child abuse or neglect investigations as well as to criminal investigations. Laws of 1994, ch. 271, § 205. And 1997 legislation broadened the intimidation statute to cover "former" witnesses as well as current or prospective witnesses. Laws of 1997, ch. 29, §1.

The issue of the proper unit of prosecution for witness tampering appears to be an issue of first impression in Washington. But at least one Washington court has upheld separate convictions for witness tampering based on separate phone conversations with the same witness on different days, relating to the same proceeding. State v. Whitfield, 132 Wn. App. 878, 134 P.3d 1203 (2006). Although Whitfield did not involve a double jeopardy challenge to the convictions, the court found sufficient evidence to support two separate charges because he "completed a substantial step when he urged" the witness to testify consistent with his consent defense on one day, then called her a week or so later and

gave her an example of what she should say in court. Whitfield, 132 Wn. App. at 897-98.

The Wisconsin Supreme Court has specifically addressed a double jeopardy claim in a factually similar case, interpreting a similarly-worded witness intimidation statute. State v. Moore, 713 N.W.2d 131 (Wis. 2006). Moore had been charged with fourteen counts of witness intimidation under a statute that criminalized "attempts to . . . prevent or dissuade any witness from attending or giving testimony at trial." Moore, 713 N.W.2d at 134 (citing Wis. Stat. § 940.42 (2003-04)). The charges arose from statements made by Moore in seven discrete letters to one victim, in which he tried to persuade that victim and her daughter from coming to court to testify. Moore was charged with seven counts related to each witness. Moore, 713 N.W.2d 134.

Rejecting Moore's double jeopardy claim, the Wisconsin Supreme Court noted:

Attempts by anyone to intimidate any witness, or to prevent any witness from testifying, are a direct assault on the integrity of our judicial system. . . . [T]he legislature obviously recognized the importance of maintaining this systemic integrity by treating each attempt as seriously as a completed act.

* * * *

Under Moore's reasoning, there would be no incentive to stop attempting to intimidate a witness once the

process had begun. Whether a person sent one letter or one hundred letters attempting to intimidate the witness, there would be only one act, regardless of the number of letters and regardless of whether the witness decided to testify. Moore's interpretation would hardly serve to eliminate witness intimidation; indeed, it might well encourage it.

Moore, 713 N.W.2d at 138. This Court should adopt the reasoning in Moore to find that Washington's witness tampering statute makes every discrete act of attempting to induce a witness not to testify or to testify falsely a separate crime.

The second step in a unit of prosecution analysis involves analysis of the factual situation each case presents. State v. Varnell, 162 Wn.2d 165, 170 P.3d 24 (2007). The factual analysis is necessary "because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present." Varnell, 162 Wn.2d at 168.

The facts in this case clearly support Hall's three separate convictions for witness tampering. Hall called Aquiningoc on three separate occasions. Each call was separated by several days (eight days between Counts VI and VII, five days between Counts VII and VIII). CP 11-14. In each conversation, Hall committed

discrete acts aimed at preventing Aquiningoc from testifying or persuading her to change her testimony.

For example, in the March 22 call, he referenced the fact that "you might have to do something for me to . . . get me out of here. . . . What you said on tape . . . and to the police . . . incriminated me." Ex. 24 at 5. Later in the call, he told her he would "let you know what to do and what to say" and asked her if she remembered "that story I told you". Ex. 24 at 5. At trial, Aquiningoc explained that in this call Hall was referring to a conversation they had had at the jail, in which he tried to get her to change her testimony regarding the gun. 3RP 392, 397.

During the March 30 call, Hall repeatedly tried to get Aquiningoc to evade or ignore her trial subpoena. He told her "go on a vacation for a minute" and he referenced a previous jail conversation about how he would need to give her a "heads up" to know when to become unavailable. Ex. 24 at 14. Aquiningoc explained at trial that Hall wanted her to go somewhere where the prosecutor could not find her when it came time for her to testify at trial. 3RP 400. This call was obviously directed at urging Aquiningoc to absent herself from the proceedings.

Finally, in the April 4 phone call, Hall told Aquiningoc to put the subpoena she had received "back in the mailbox and just act like you didn't get it" and specifically told her "don't come to court." Ex. 24 at 15.

Thus, the facts of this case clearly demonstrate separate units of prosecution and that Hall committed the crime of witness tampering on three separate occasions. Hall used different means to influence her testimony (change her testimony, hide from police, "don't come to court"). He made the calls on separate days, separated by substantial amounts of time. Hall clearly formed a new intent to commit the crime of witness tampering each time he attempted to persuade Aquiningoc to change her testimony or absent herself from trial. This Court should therefore affirm Hall's three separate convictions for witness tampering.

2. HALL RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Hall contends that he received ineffective assistance of counsel, because of his attorney's failure to object to several alleged errors, or to move for a mistrial based on those claimed errors. This claim should be rejected. Strategic reasons explained

some of the attorney's actions, other errors were corrected, sua sponte, by the prosecutor or the court, and the trial court stated that it would not grant a mistrial even if one were requested. Thus, Hall cannot demonstrate deficient performance or prejudice.

In order to demonstrate ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The reviewing court should begin with the "strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment." State v. Glenn, 86 Wn. App. 40, 45, 935 P.2d 679 (1997). Washington courts consistently hold that where a claimed error was part of a legitimate trial strategy or tactical decision, it does not constitute ineffective assistance of counsel. See, e.g., State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The

competency of counsel is determined based upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 125 (1995).

If the defendant fails to carry his burden on either part of the test, the inquiry need not go further. Hendrickson, 129 Wn.2d at 78. Thus, if a defendant fails to show prejudice from the claimed error, the reviewing court need not consider whether counsel's performance was deficient. State v. Lord, 117 Wn.2d 829, 884, 822 P.2d 177 (1991).

a. Relevant Facts.

Hall contends that a variety of alleged failures by his trial counsel denied him effective assistance of counsel. The facts surrounding each of these alleged errors are summarized here.

During Lamont McKinney's testimony about the events, he testified that when he and Salazar heard knocking on the door, Salazar told him that it was "the guy [she] had a restraining order on." 3RP 285. McKinney volunteered that he thought it strange that Salazar would "open the door to somebody that she has a

restraining order on them." 3RP 285. Defense counsel did not object. No evidence of a restraining order was ever introduced at trial.

Detective David Keller worked with the lead detective, Detective Pavlovich, on the surveillance and arrest of Hall, and on the subsequent search. 4RP 433. On direct examination, the State elicited testimony from Detective Keller that during the search of the back bedroom floor, the police found papers containing Hall's name on them. He further testified that the presence of these papers tended to show that Hall either lived at the apartment or frequented there. 4RP 464.

On cross examination, Hall's attorney asked Detective Keller follow-up questions about these papers. He offered a photograph of one of the documents into evidence. 4RP 472-73. The document was described as a "legal document" and Hall's attorney pointed out that the address listed as Hall's address on the document was not the same address as the apartment they were searching. 4RP 473-74.

Detective Pavlovich also testified at trial as the lead detective on the case. He first described the procedure for case

assignments to detectives, and then recounted how he came to be assigned this case:

A [Pavlovich] Once I am assigned to the case, I will review it and determine if it appears that a natural [sic] crime did occur. I will then contact the victim and obtain a more detailed statement from them, try to gain as many facts as possible that leads me to either a suspect or any evidence that is associated with the case.

I will speak with them about their desire to assist in the prosecution. Do they want to move forward with the case or not. And then from there will start to move forward.

Q. [prosecutor] And did you move forward with this case?

A. I did. After talking to Mellissa, I determined that several crimes occurred. She was desirous in prosecuting, so I moved forward.

Q. What did you do to move forward?

A. Attempted to work up some background information on the suspect in this case, to locate and arrest him.

4RP 488-90.

Detective Pavlovich went on to describe the method he used to identify Hall as the suspect. He described using the "information provided by Ms. Salazar," working up "background information" to help determine an address where Hall might be located. 4RP 490.

After describing his follow up and how he came to contact Aquiningoc, he recounted his initial contact with her:

A. I told her who I was, and told her I was investigating a serious crime, a crime that involved a firearm involving a gentleman by the name of Isiah Hall. And I basically told her that I had reason to believe that Mr. Hall may be living where she was at or she may know him, and then I showed her a booking photo that obtained earlier that day from my office, and asked her if she recognized this person.

Q. Did she respond?

A. She did. She identified him from the photograph as being Isiah Hall.

4RP 498.

Later, Detective Pavlovich described the course of Hall's arrest. When detailing his second call to Hall to try to get him to come out of the home voluntarily, Detective Pavlovich stated that Hall asked him if he was under arrest. Detective Pavlovich responded that he planned to arrest him once he was outside, and "I also told him that he had some warrants as well, and that I wanted him to step outside." 4RP 502. The prosecutor immediately interrupted Detective Pavlovich and asked the court to strike his last comment. The trial court granted that request:

THE COURT: Yes, the comment with respect to warrants is stricken from the record. You are

instructed to disregard that comment. The detective is instructed not to mention anything like that again.

4RP 502.

After describing Hall's arrest and the statements Hall made to police, Detective Pavlovich described the search of Aquiningoc's home. 4RP 507-15. Specifically, he described finding the revolver in the closet, and also the bullets in the dental retainer/container.

4RP 509. During this testimony and after the detective had identified photographs of the bullets, the prosecutor asked him to elaborate what he meant when he described the evidence as ".38 caliber rounds." 4RP 514. Detective Keller testified:

A. Layman's term for a bullet or a cartridge. A cartridge is actually after the bullet is fired, you have the cartridge is left over. When it's still intact, we will typically call it one round. This is one round of ammunition.

Q. For the record, you are holding in your hand a small, metal bullet; is that correct?

A. This is a .40 caliber round from a firearm.

4RP 514. He then went on to describe the nine .38 caliber rounds found in the retainer container that matched the caliber of the revolver found nearby. 4RP 514-15.

Shortly after this testimony, the trial court requested a side bar. 4RP 516. The court expressed concerns about Detective

Pavlovich's testimony, mentioning the booking photo, the warrant, and pulling out the bullet without following proper procedures. 4RP 516-17. The court admonished the detective to follow proper procedures and to avoid mentioning inadmissible facts or evidence. 4RP 519-20.

After the side bar discussion, the trial court noted that a mistrial was not warranted under the circumstances. 4RP 520. Rather, the court seemed to be taking precautionary measures to avoid any further misunderstandings or the admission of possibly prejudicial material.² 4RP 520.

b. Legitimate Strategic Considerations Explain Some Of Hall's Attorney's Actions.

Hall contends that his attorney was deficient for admitting the photocopy of the legal document found in Aquiningoc's home, and for failing to object to testimony from McKinney referencing a "restraining order." These actions constituted legitimate trial

² Hall claims that his attorney "failed to request relief, either in the form of a motion for a mistrial or in the form of a curative instruction." Br. App. at 16. The record is not clear as to whether Hall's attorney requested a mistrial. The court's comments that a mistrial was not warranted strongly suggest that Hall's attorney requested such an action during the sidebar conference that preceded the court's remarks. At most, the record is ambiguous on this point, because Hall's attorney did not contribute to the on-the-record discussion of the side-bar conference. 4RP 517-21.

strategy and thus cannot serve as the basis for an ineffective assistance of counsel claim.

In order to prove that Hall committed the crime of Unlawful Possession of a Firearm, the State needed to prove that Hall possessed a firearm and that he had previously been convicted of an offense that involved a family or household member. CP 47. Presumably to avoid undue focus on the fact of the prior conviction, Hall agreed to stipulate to that element of the crime. 4RP 575; CP 24.

The hotly contested issue with respect to the firearm charge in this case was whether the firearm found in Aquiningoc's apartment was actually possessed by Hall. As part of this defense strategy, Hall's attorney vigorously questioned the detectives about the location where the firearm was found (i.e., in the "pink" basket, among items obviously belonging to Aquiningoc). 4RP 478-80, 552-54. Hall's attorney also pointed out the discrepancy between Salazar's initial description of the gun as "black" and the actual appearance of the gun found in Aquiningoc's closet as having a brown wooden handle. 4RP 566.

Admitting the document containing Hall's name and listing a different address was consistent with this strategy. It tended to

downplay Hall's connection to the home where the firearm was found, making it more likely that the firearm belonged to Aquiningoc and not Hall.

Moreover, any prejudice from the admission of the document was slight. The document was clearly related to a district court matter, thus was not likely related to a very serious charge. The document stated that Hall had been "released from jail," on "personal recognizance," demonstrating that the court signing the document did not believe Hall to be a danger to the community. And the overall appearance of the document was blurry, making it very unlikely that the jury would focus on the nature of the document in any event. Ex. 33. Knowing that the jury would ultimately hear testimony about Hall's prior conviction, Hall's attorney likely felt that the benefits to admitting this document far outweighed the potential minimal prejudice from the jury hearing cumulative evidence about a prior court case. Thus, admission of this evidence cannot serve as a basis for an ineffective counsel claim.

Moreover, the failure to object to McKinney's reference to a "restraining order" was plainly part of Hall's trial strategy. During closing argument, Hall's attorney used this testimony to: (1)

comment on the State's failure to present any evidence that such an order existed, calling into question McKinney's credibility; and (2) argue that Salazar was not credible because she voluntarily opened the door to a man who she claimed was the subject of a restraining order. 5RP 634-35. Because this testimony tended to question the credibility of two of the State's essential witnesses, the failure to object to this evidence was a legitimate strategy.

Moreover, it appears that this strategy was at least partially successful. The jury acquitted Hall of two of the eight charges, including the assault of McKinney. Thus, Hall cannot demonstrate prejudice from these claimed errors.

c. Detective Pavlovich's Testimony Regarding His Investigation Was Vague And Not Prejudicial.

Hall challenges Detective Pavlovich's testimony that he "determined that several crimes were committed" on the basis that this comment constituted an improper opinion on Hall's guilt. This claim should be rejected. Taken in context, this comment did not constitute improper opinion testimony.

No witness may testify to his opinion about the guilt of the defendant, or opine on the credibility of a witness, because such

testimony "invades the exclusive province of the jury." State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Washington courts have expressly declined to take an expansive view of what constitutes opinion testimony. Demery, 144 Wn.2d at 760; City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

The challenged comment in this case was not a direct comment on Hall's guilt. The remark did not directly reference or name Hall (even as a suspect), and was made during the context of explaining how the detective *began* his investigation. Taken in context, the import of the comment was simply that the detective's first responsibility is to determine whether the facts alleged by the complaining witness would constitute a crime, if the allegations prove to be true. The detective explained that he must then investigate the crime alleged, including locating and contacting a suspect and interviewing other witnesses, if any. 4RP 490. Viewed in this context, Detective Pavlovich's brief comment that crimes had been committed did not constitute opinion testimony on Hall's guilt.

d. Detective Pavlovich's References To A Booking Photo And Warrants Did Not Prejudice Hall.

Hall also challenges two unsolicited remarks by Detective Pavlovich. One remark related to the use of a "booking photo" and the other remark referenced Hall's "warrants." These claims should be rejected. Hall cannot demonstrate that these comments, even if improper, had any effect on the outcome.

Washington courts have previously held that "referring to booking photos *may* raise a prejudicial inference of criminal propensity" and therefore such references should be avoided. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005) (emphasis added). However, the mere reference to a booking photo may be proper in some instances, for example, if identity of the defendant is at issue. State v. Rivers, 129 Wn.2d 697, 711-12, 921 P.2d 495 (1996) (booking photograph relevant to victim's identification of defendant because it tended to match victim's description of robber's hairstyle; defendant's hairstyle had changed prior to trial). Moreover, even if error, a reference to the defendant's booking photo or prior jail stay may well be harmless if the jury eventually hears of the defendant's prior arrest or

convictions through other, legitimate means. State v. Condon, 72 Wn. App. 638, 647-48, 865 P.2d 521 (1994).

The brief remark by Detective Pavlovich that he showed a witness a "booking photo" of Hall cannot serve as the basis for a claim of ineffective assistance of counsel. Knowing that the jury would inevitably hear testimony of Hall's prior conviction, Hall's attorney likely made a strategic decision not to object to this comment. It was a brief remark, made in passing, in the context of determining whether Hall was currently at Aquiningoc's home after he had already been identified as a suspect in this case.

Moreover, the mere fact that someone has been in jail or has been arrested does not indicate a propensity to commit a serious crime. The jury could just as easily have concluded that the defendant was in jail for a minor offense such as the district court matter referenced in the document admitted by defense counsel. See Condon, 72 Wn. App. at 649-50.

The remark related to warrants was equally ambiguous. A failure to appear for a court hearing can occur for any number of innocent reasons, such as the failure to receive notice regarding the hearing. Moreover, the comment was immediately stricken from the record and the jury was explicitly told to disregard that

comment. 4RP 502. And the jurors had previously been instructed to disregard any evidence that was not admitted or was stricken from the record. 2RP 115-16. The jurors were instructed at the conclusion of trial, in writing, with the same admonition. CP 30. Jurors are presumed to follow a court's instructions. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Hall cannot demonstrate prejudice from this marginally improper testimony, which was immediately stricken from the record.

e. The Demonstration Involving The Bullet Was Not Prejudicial.

Detective Pavlovich's use of an actual bullet to illustrate his testimony regarding evidence found in Aquiningoc's apartment likewise did not prejudice Hall. Hall's characterization of this action as displaying "inadmissible" evidence to the jury dramatically overstates Detective Pavlovich's conduct. The record demonstrates that his actions were improper because the appropriate *procedures* were not followed, not because the evidence shown to the jury was *inadmissible*.

Washington courts have long recognized the benefit of using illustrative exhibits at trial. See, e.g., In re Personal Restraint of Woods, 154 Wn.2d 400, 426-27, 114 P.3d 607 (2005); State v. Lord, 117 Wn.2d 829, 855, 822 P.2d 177 (1991). The trial court has wide latitude to determine whether to admit such evidence at trial, and such exhibits are normally used only during the initial presentation of testimony and/or in final argument by counsel. Lord, 117 Wn.2d at 856-57. The foundation requirement for illustrative material is less onerous than the foundation requirement for other exhibits. 5 Karl B. Tegland, Evidence Law and Practice, § 402.36 (4th ed. 1999).

In this case, Detective Pavlovich apparently used the bullet held in his hand to help him illustrate his answer to the question of what a "round" of ammunition is, i.e., the difference between a "cartridge" and a "bullet." 4RP 514. Detective Pavlovich had just testified that during the search of Aquiningoc's apartment he found a container with "nine rounds in it" and the prosecutor asked him to clarify what he meant by the word "round." 4RP 514.

The use of such an exhibit is not improper. The impropriety in this case lies in the fact that Detective Pavlovich referenced this exhibit and showed it to the jury without following the proper

procedures for admitting evidence. 4RP 519. The trial court rightfully expressed annoyance with Detective Pavlovich, an experienced officer, for ignoring this proper procedure. But nothing in the record suggests that if the proper procedures were followed, the evidence would not have been admitted as an illustrative exhibit.

Moreover, this testimony related to a minor point. The exact nature of the rounds was not disputed issue at trial. Rather, the primary dispute was whether Hall had actually possessed the firearm and whether he used it to assault Salazar. A photograph of the rounds of ammunition and the container in which they were found were admitted at trial without objection. 4RP 508-09. And the rounds and container themselves were also admitted into evidence without objection, and published to the jury during trial. 4RP 538-42. Given this evidence, the brief demonstration involving the bullet held by Detective Pavlovich during his testimony could not possibly have caused Hall any prejudice.

In any event, the trial court's repeated comments that a mistrial was not warranted unequivocally defeat Hall's claim of prejudice. Immediately after the objectionable behavior, the trial court expressed its primary goal of trying to ensure a fair trial,

admonished the detective for his lapse, and warned that any further errors might lead to a mistrial. 4RP 519-20.

Additionally, at the sentencing hearing, the court reiterated that the detective acted improperly, but emphasized . . .

it was not grounds for a mistrial. We directed the jury at that time, and appropriate steps were taken. And that was not a matter that rendered your trial unfair. It was appropriately addressed.

It was an issue that was not critical to the charges that were brought. . . . [I]t was the Court's call, and it would not have resulted in a mistrial.

5RP 673. Furthermore, the trial court also commented that Hall's attorney "is known to the court to be a very able lawyer, . . . and appeared in court in a very able manner during this trial. And you did get a fair trial." 5RP 672.

Obviously the trial court was in the best position to view the possible prejudicial effect of any trial errors, and to view counsel's performance. The trial court's comments defeat any claim by Hall on appeal that his attorney's performance was deficient or that he was prejudiced by any mistakes at trial. This Court should reject Hall's ineffective assistance of counsel claim.

D. CONCLUSION

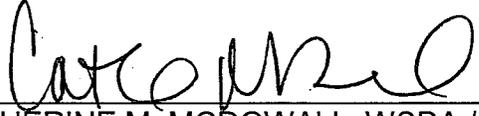
The Washington Legislature has criminalized every attempt to influence a witness's testimony. The evidence supports the conclusion that Hall formed three separate and distinct intents to commit the crime of witness tampering in this case when he called a key witness on three different days and tried to persuade her to change her testimony or absent herself from the trial. This Court should affirm Hall's three witness tampering convictions.

Furthermore, the record demonstrates that Hall's attorney was not deficient and that Hall was not prejudiced by any of the claimed errors at trial. This Court should reject Hall's ineffective assistance of counsel claim and affirm his convictions.

DATED this 22 day of May, 2008.

Respectfully submitted,

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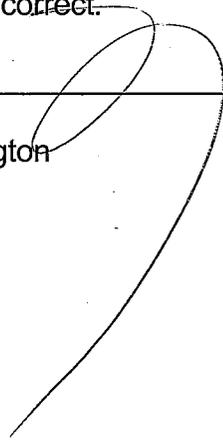
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jonathan M. Palmer and Dana M. Lind, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ISIAH HALL, Cause No. 60538-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date

05/22/2008

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