

65009-2

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No. 65009-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

ANDREW STEAN, Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION ONE
CLERK OF COURT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the right to public trial precludes the trial court from conferencing legal issues, specifically jury instructions, in chambers.
2. Whether Stean has demonstrated his attorney was deficient or that he suffered the requisite prejudice as a result of his attorney failing to object to specific instances of testimony when the record reflects Stean's attorney acted strategically, the testimony at issue was not central and could not, in the face of overwhelming evidence presented resulted in sufficient prejudice to warrant a new trial.

C. FACTS

1. Procedural Facts

Andrew Stean was charged with three counts of felony harassment and one count of bail jumping. CP 84-85. After failing to appear for trial, the State amended the information adding an additional charge of bail jumping. CP 63-64, RP 65-71.

During trial, Stean acknowledged he was guilty of both bail jumping charges. 2 RP 172-173. At the close of the trial, counsel for Stean and the State met in chambers with the trial judge to discuss jury instructions. RP 174. Upon returning to the courtroom, the trial judge advised the public that the parties had met in chambers to discuss

instructions and then had the State and defense confirm on the record that they were not taking any exceptions to the proposed instructions or making any request for additional instructions. RP 174. Following the jury trial Stean was convicted of two out of three of the felony harassment charges and both counts of bail jump. CP 24-25. The trial court imposed standard range concurrent sentence of 17 months. CP 3-11. Stean timely appeals. CP 14-23.

2. Substantive Facts

In July of 2007 Mathew West, Travis Hansen (herein after referred to as T.J. Hansen) and Whitney Bartlett attended a gathering at Amanda Olson's home at 1107 37th Street in the Lake Samish area. RP 47. Andrew Stean was Olson's former live-in boyfriend. 2 RP 46-49. Stean was not at Olson's July gathering having recently moved out, but had left a 1984 station wagon, worth approximately \$300.00, he was in the process of purchasing from a friend, at Olson's house. 2RP 48, 86, 142-44.

During the gathering Olson made it clear to T.J. Hansen she was glad Stean was gone and didn't care if anything happened to Stean's belongings. 2 RP 68. At some point during the evening Bartlett observed West jumping on the hood of Stean's car. 2 RP 49, 57. Bartlett also saw T.J. Hansen standing on the car roof and that the roof had "popped" in. 2 RP 57. Stean subsequently found out about this incident, drove over to

Olson's and asked who was responsible for damaging the vehicle. 2 RP 50-51. Eventually, Stean determined West and T.J. Hansen were responsible. 2 RP 69-71.

West and T.J. Hansen lived at 712 East Maple with a friend, Kris Elling. 2 RP 64, 104. Stean called West or T.J. Hansen and asked for money, a couple hundred dollars, for damage to the car. 2 RP 69, 71. T.J. Hansen told Stean if he wanted money he needed to go get the damage appraised. RP 70. Sometime during the evening of July 31st Stean and a friend, known as "Sono" showed up at Elling, T.J.Hansen's and West's house at 712 East Maple. 2 RP 107. Stean asked to speak to West. 2 RP 109. Elling stepped back onto the porch to be with West after he noticed Stean's voice was agitated and it sounded like there might be a fight. 2 RP 110, RP 120. Stean displayed a gun and told West he needed \$200.00 by midnight or he would come back over to the house and shoot everyone. 2 RP 109, 112. Elling took Stean's threat seriously. 2 RP 112-13. West acted scared too, according to Elling and then called his friends to warn them. 2 RP 117. Bartlett was with T.J. Hansen when Hansen received a call from West saying something had happened. 2 RP 59. Bartlett noticed T.J. Hansen appeared scared and nervous as a result of what was relayed by West over the phone. 2 RP 60.

Later that evening evening, Stean's friend "Sono" showed up at 712 East Maple and told T.J. Hansen they needed to pay for the damage to the car. 2 RP 77, 93. When T.J. Hansen told him he didn't have the money, "Sono" called Stean on a cell phone and then passed the cell phone to T.J. Hansen. 2 RP 93, 77. Stean told T.J. Hansen he wanted his money by midnight and if they didn't get him the money, he was going to come to T.J.Hansen's house and collect, one way or another. 2 RP 77-79. T.J. tried to reason with Stean asking for appraisal and telling him he didn't have any money but Stean just wanted the money. Id. Twenty minutes later Stean and a friend showed up at 712 East Maple Street and one of the Maple Street occupants informed Stean that the police had been called. 2 RP 80, 97. Stean left the premises. 2 RP 169.

When Officer Harper arrived at 712 East Maple in response to an emergency call, he noted that the witnesses were "frantic" and very concerned about the threats conveyed. 2 RP 138. After the police were called and left, T. J. Hansen didn't want to be alone in the house. 2 RP 75. His roommate Elling stayed at the house but loaded a borrowed shotgun, locked all the windows and turned off all the lights in the house for their security reasons. 2 RP 116. West left the house and stayed with Bartlett at her parent's home. 2 RP 61-62.

D. ARGUMENT

1. **Stean's right to a public trial was not violated by the trial court conferencing jury instructions in chambers and then confirming on the record in an open court room that neither party was objecting or taking exception to the proposed instructions.**

Stean first asserts the trial court denied him of his right to a public trial by conferencing jury instructions in chambers. Br. of App. at 8.

Stean's right to a public trial was not violated when the trial court reviewed purely legal matters, jury instructions, in chambers. Stean's request to extend the right to public trial to situations where the court is addressing purely ministerial and legal matters is impractical, unprecedented and should be rejected as without merit.

The Sixth Amendment of the United States Constitution and article I, §22 of the Washington State constitution guarantee criminal defendant's the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Questions regarding whether a trial court has violated a defendant's right to a public trial are reviewed de novo. State v. Brightman, 155 Wn.2d at 506.

In State v. Sadler, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008) the court recognized that the right to a public trial applies to all evidentiary phases of the trial as well as other "adversarial proceedings" which

includes, suppression hearings, jury selection and Batson hearings. *See, State v. Brightman*, 155 Wn.2d at 515 (right to public trial extends to jury selection) and *State v. Boneclub*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (extends to pre-trial suppression hearings). The court recognized however, that a defendant does not have the right to a public hearing on purely ministerial or legal issues that do not require resolution of disputed facts. *State v. Sadler*, 147 Wn.App. at 114; *see also, In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). Consistent with this precedent, the court held in *State v. Sublett*, 156 Wn. App. 160, 231 P.3d 231 (2010), a trial court's in chambers conference regarding a jury question that arose during deliberations did not violate a defendant's right to a public trial.

The right to public trial correlates to the defendant's constitutional right to be present during the critical phases of the trial. *State v. Rivera*, 108 Wn.App. 645, 652, 32 P.3d 292 (2001). In *In re Pirtle*, 136 Wn.2d at 484, the court determined defendants do not have the right to attend in chamber conferences on ministerial or purely legal matters such as the wording of legal instructions. Similarly, the right to a public trial does not encompass situations where the trial court and parties are determining what jury instructions will be provided to the jury. *See, State v. Bremer*, 98 Wn.App. 832, 835, 991 P.2d 118 (2000).

The trial court in this case was conferencing purely legal and ministerial issues pertaining to the composition and wording of proposed jury instructions and not engaged in adversarial proceedings while in chambers. Therefore, Stean's right to public trial was not implicated. Particularly where the trial court confirmed on the record following the conference that neither party was objecting or taking exception to the court's proposed jury instructions. 2 RP 174. Under these circumstances, Stean has not sufficiently demonstrated how the court's actions on legal issues violate his right to a public trial. Stean's argument should be rejected.

2. The record reflects Stean's trial attorney made reasonable strategic decisions throughout his trial and such decisions could not, based on this record, have resulted in sufficient prejudice to Stean to warrant a new trial.

Stean asserts that defense counsel was ineffective for failing to object to alleged hearsay evidence from witnesses Whitney Bartlett, T.J. Hansen and Bellingham Police Officer Harper. Br. of App. at 17. Deciding when and how to object, however, is a classic example of trial tactics, typically within the discretion of counsel. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). Only in egregious circumstances, on testimony central to the state's case, will the failure to object constitute incompetence of counsel justifying reversal. Strickland

v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The alleged instances Stean asserts his trial attorney should have objected were not egregious. The testimony was limited, cumulative to other testimony and not central to the disputed issues before the jury. Reversal of Stean's conviction for alleged ineffective assistance of counsel is not warranted.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) trial counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003).

To establish his trial attorney's representation was deficient, Stean must show that his trial counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. State v. Thomas, 109 Wn.2d 222, 229-230, 743 P.2d 816 (1987). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127

Wn.2d 322, 326, 899 P.2d 1251 (1995). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. den.*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992)d.

To establish prejudice under the second prong of the Strickland test, Stean must demonstrate that his trial counsel's deficient performance deprived him of a fair trial. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). That is, Stean must show there is a reasonable probability, but for his counsel's errors, the result of the proceeding would have been different had the error not occurred.

Strickland, 466 U.S. at 694, State v. McFarland, 127 Wn.2d at 334-35. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." State v. West, 139 Wn.2d 37, 46, 983 P.2d 617 (1999) (*citing Strickland*, 466 U.S. at 693).

It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or the claim of

ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). The court need not address both prongs of the Strickland test if a defendant fails to make a showing under either one prong. State v. Thomas, 109 Wn.2d at 226.

Appellate review of counsel's performance is highly deferential and it is Stean's burden to overcome this strong presumption based on the record below. In re Personal Restraint of Stenson, 142 Wn.2d 710, 742, 16 P.3d 1 (2001). Appellate review of a challenge to effective assistance of counsel is de novo. State v. White, 80 Wn.App. 406, 907 P.2d 1310, *rev. den.*, 129 Wn.2d 1012, 917 P.2d 130 (1995).

Stean contends his trial attorney was deficient because he failed to object to alleged hearsay evidence from three witnesses. Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). Where the alleged hearsay statements are admissible, defense counsel's failure to object will not constitute deficient performance. State v. Alvarado, 89 Wn.App. 543, 553, 949 P.2d 831 (1998). Additionally, because the "decision of when or whether to object is a classic example of trial tactics," only in "egregious circumstances, where the testimony is central to the state's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn.App.at 763.

First, Stean claims his trial attorney failed to object to witness Whitney Bartlett's testimony wherein she recounted that she had "heard" from T.J. that Stean had been at the house. Br. of App. at 20. Bartlett's testimony, taken in context was directed at her describing the demeanor of her and her friends to the events that were unfolding and were not offered for the truth of the matter asserted. Moreover, this evidence was cumulative to both Stean and Elling's testimony. Both witnesses testified Stean came to Elling's house on July 31st, 2007. Therefore Bartlett's testimony that she'd "heard" Stean was at the house, even if objectionable, was neither central nor sufficiently prejudicial to constitute incompetence of counsel to warrant a new trial.

Next, Stean contends his trial attorney should have objected to Officer Harper's testimony that T.J. Hanson, West and Elling said they were "in fear for their lives." Br. of App. at 20. Contrary to Stean's assertion, this evidence was not offered to prove Stean threatened West and Elling. The record demonstrates that the State's question was, in context, asking Harper to describe the demeanor of witnesses T.J. Hanson, West and Elling when he contacted them and was not designed to elicit improper hearsay evidence. The State's question itself was not therefore objectionable. The State specifically asked:

Q: Did they show by demeanor any concern for the threats that had been made? Could you tell when talking to them they were afraid? Did they appear to be scared?

A: Yes. I read from their behavior and they were anxious in getting information to me, stating they called 911 in fear for their lives and I believe one individual stated they were going to stay up all night to ensure their safety.

RP 138. To the extent Officer Harper relayed hearsay in his response, this statement was isolated and not offered for the truth of the matter asserted, but was offered to provide context to Stean's threat; evidence the State must provide in order for the jury to determine whether the victims were placed in reasonable fear that the alleged threat would be carried out.

RCW 9A.46.020(1) states: A defendant is guilty of felony harassment if he threatens to cause bodily injury to a person and the person is placed in "reasonable fear that the threat will be carried out." These elements require the jury in this case to consider Stean's threat in context and determine whether West, Elling and T.J. Hansen reasonably feared Stean was going to harm them. Officer Hansen's response to the prosecutor's question was arguably admissible under the state of mind or excited utterance hearsay exceptions pursuant to ER 803(a)(2), (a)(3). Under these circumstances it is reasonable to presume Stean's attorney strategically chose not to move to strike Officer Harper's response.

Stean asserts however, that pursuant to State v. Parr, 93 Wn.2d 95, 99,606 P.2d 263 (1980), Harper's limited testimony would not be admissible under the state of mind exception to the hearsay rule, ER 803(a)(3). In Parr, the issue before the court was the admissibility of the decedent's statements that she feared Parr and that Parr had once threatened her. The court held that ER 803(a)(3) permits statements reporting the declarant's state of mind but does not permit statements reporting the conduct of another which may have induced that state of mind. Contrary to Parr, Officer Harper's testimony referred only to West, Elling and T.J.Hansen's state of mind and did not include out of court declarations detailing the precipitating threat from Stean. Additionally, it is clear from the context of the testimony that Officer Harper was asked to describe the demeanor of the witnesses, not provide hearsay statements. *See, State v. Ragin*, 94 Wn.App. 407, 408, 972 P.2d 519 (1999) (felony harassment victim permitted to testify to other violent acts defendant committed because this information gave context to determining whether the victim's fear of the defendant's threat was reasonable).

Finally, Stean asserts his trial attorney was ineffective because he failed to object to alleged hearsay testimony from T.J. Hansen. Br. of App. at 21. The record reflects however, that Stean's attorney did object to T.J. Hansen's testimony when the State asked him to relate the content

of the phone call West made to him warning him of Stean's threat. RP 73.

The court then appropriately gave the jury the following limiting instruction:

I will overrule the objection. Ladies and Gentlemen, I'm going to let the witness answer the question about what he was told over the phone. You may not consider for the truth of the matter what was said over the phone to the witness, but you may consider it only for purposes of any reaction that with witness had to what was told him.

RP 73. Stean contends that even though his attorney objected and the court gave this appropriate limiting instruction, his attorney was nonetheless ineffective for failing to object when T.J. Hansen subsequently related that West and Elling reiterated what West said on the phone when they arrived home. Stean's argument is unreasonable. The trial court previously acknowledged Stean's hearsay objection and informed the jury it was limiting jury's use of the hearsay evidence. The jury is presumed to follow the court's instruction. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Repeatedly objecting to T.J. Hansen's testimony, particularly when the court already determined and advised the jury that such testimony was not being offered for the truth of the matter asserted, would only serve to further highlight the testimony. It is therefore reasonable that Stean's attorney chose not to draw further

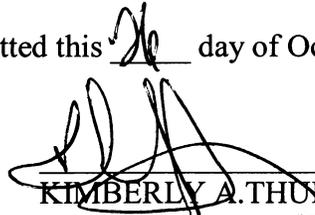
attention to this testimony and instead focus on undermining the reliability of testimony of the various witnesses through cross examination.

None of the limited testimony Stean complains of was central to the State's case and therefore his attorney's alleged failure to object cannot be construed as egregious enough to warrant reversal. The "threat" Stean contends the State was indirectly alluding to was presented directly to the jury through Elling's testimony. Moreover, given the overwhelming evidence presented against Stean from Elling, and the trial court's limiting instruction, there is no reasonable probability that the outcome of the trial would have been any different without these limited instances of testimony. Stean's argument should be rejected.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests that Stean's convictions be affirmed.

Respectfully submitted this 20 day of October, 2010

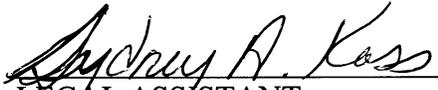


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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Andrew Zinner, addressed as follows:

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LEGAL ASSISTANT



DATE