IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63557-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DUSTIN SCOTT BATEMAN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 2, 2010
	)	

Lau, J. — Dustin Bateman appeals his convictions for witness intimidation, assault in the fourth degree, felony harassment, and witness tampering, arguing that the trial court erroneously admitted statements attributed to a municipal court judge, thereby depriving him of a fair trial. He also contends that the witness intimidation and witness tampering charges constitute the same criminal conduct for sentencing purposes. Finally, Batman argues, and the State concedes, that a condition of his community custody must be stricken. Because Bateman fails to demonstrate error, we affirm the convictions and the sentencing court's determination of Bateman's offender score. Accepting the State's concession, we remand for the trial court to strike the challenged community custody condition.

FACTS

Dustin Bateman and Courtney Dickmeyer began dating in 2004. After the birth of their daughter in 2005, Bateman and Dickmeyer began living together. In April 2007, Bateman was charged with a crime in Renton Municipal Court in which Dickmeyer was the victim. Dickmeyer received a subpoena directing her to appear in court on July 17, 2007. In April or May 2007, Bateman and Dickmeyer moved into a house Bateman rented.

On July 14, 2007, Dickmeyer and Bateman attended a wedding where Dickmeyer observed Bateman drinking a lot of alcohol. Although she believed Bateman was too intoxicated to drive, she left with him in order to avoid an embarrassing scene. When Bateman began speeding and driving through red lights, Dickmeyer was afraid and called her mother. When they arrived home, Bateman ran into the house and locked the door. When Dickmeyer opened the door with her key, Bateman pushed the door against her, pulled her out of the house by her hair, and then kicked and pushed her off the porch and onto the ground. Dickmeyer sustained injuries, including a split lip and various bruises.

Then Dickmeyer's mother, stepfather, and brother arrived. Bateman told Dickmeyer that she was "going to die" because she called her family. Verbatim Report of Proceedings (VRP) (Apr. 20, 2009) at 77. Bateman also told her that if she went to court, he "would choke [her] with his dick." VRP (Apr. 20, 2009) at 78. As Dickmeyer heard police sirens approaching, Bateman drove away. When police asked Dickmeyer whether Bateman had been physically violent, she denied it and claimed she had been injured the day before.

On July 17, Dickmeyer did not appear in Renton Municipal Court as directed by subpoena for the case against Bateman. On July 25, after Bateman attempted to evict her, Dickmeyer went to Renton City Hall and filed a petition for a restraining order. She spoke with domestic violence victim advocate Tina Harris and reported the incidents of July 14 to Renton Police Detective Peter Montemayor. The municipal court judge entered an order prohibiting Bateman from contacting Dickmeyer.

The State charged Bateman with witness intimidation, assault in the fourth degree, and felony harassment based on the incidents of July 14. The State also charged Bateman with witness tampering occurring on July 15 through 17. At trial, the State first called Detective Montemayor to describe Dickmeyer's demeanor and appearance on July 25 and identify pictures he took of her injuries. The State called Harris next. When the prosecutor asked Harris how she came to meet with Dickmeyer on July 25, Harris answered,

> A. I actually was at Renton River Days. It is a community festival that we have every year, a kids' day. I received a phone call from the court clerk asking that—stating that the judge requested that I come back to court to offer assistance to a petitioner, which was Courtney Dickmeyer, involving a case, because they were concerned about her safety and concerned about the order.
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> [Defense Counsel]: Objection, hearsay.
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> THE COURT: Overruled.
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> BY [Prosecutor]:
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> Q. Did you go to court?
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> A. Yes. I went back to the courthouse, which is a few blocks away, and went up to the court clerk's office and made contact with Courtney Dickmeyer.

VRP (Apr. 16, 2009) at 53. The prosecutor then asked Harris to describe Dickmeyer's demeanor during their meeting and when they both met with Detective Montemayor shortly thereafter. On cross-examination, defense counsel asked Harris whether she

remembered meetings she had with others before or after the meeting with Dickmeyer and commented that Harris seemed to "recall it fairly well today." VRP (Apr. 16, 2009) at 57.

On redirect, the following exchange occurred:

> Q. Ms. Harris, you were asked about remembering other cases the same day or same week. You told us you remember this in part because you were called away. Is there a particular thing about why you were called for this case that makes it stand out in your memory?
> A. Yes. This is the first time I was called on behalf of a judge for the severity of the case.
> [Defense Counsel]: Objection as to opinion, Your Honor.
> THE COURT: Overruled.
> BY [Prosecutor]:
> Q. What judge called you on this case?
> A. It was the court clerk who called me. And Judge Jurado was the one who requested that I be called.
> Q. What was it about being requested that makes it stand out as opposed to other cases you have?
> A. Because I've never had a judge have a court clerk call me to offer assistance to a victim.
> Q. Did you get information about what you were being called for?
> A. I had knowledge of the case prior to that because we had her as a witness and she had not shown up. So I was familiar with the case. And when the court clerk told me she was there obtaining a petition and that the judge was concerned due to—
> [Defense Counsel]: Objection, hearsay.
> THE COURT: Overruled.
> THE WITNESS: —due to witness intimidation, I likewise was very concerned.
> [Defense Counsel]: Objection, confrontation, Your Honor.
> THE COURT: Overruled.

VRP (Apr. 16, 2009) at 59–60.

The State presented several other witnesses, including Dickmeyer, her mother, and her stepfather. The jury found Bateman guilty as charged, and the trial court imposed a standard range sentence.

Bateman appeals.

ANALYSIS

Bateman argues that reversal is required here based on Harris's testimony about Judge Jurado's comments. He claims that the trial court erred by admitting hearsay, that defense counsel rendered ineffective assistance by failing to object under ER 403, and that the testimony and the trial court's ruling admitting it constituted an improper judicial comment on the evidence. We disagree.

We review a trial court's admission of evidence for abuse of discretion. State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless an exception applies. ER 802. Where a statement is not offered for the truth of its contents but for another relevant purpose, the statement is not hearsay and is admissible. State v. Iverson, 126 Wn. App. 329, 336, 108 P.3d 799 (2005) (where self-identification of woman who answered police inquiry, and who did not testify at trial, was not offered to prove her identity but to explain why officers conducted further investigation, statement was not hearsay).

Bateman cites cases holding that judicial findings from other proceedings are inadmissible hearsay. Such cases are inapposite. The State did not offer judicial findings of fact. Rather, the State elicited testimony that Harris believed that Judge Jurado was "concerned" about Dickmeyer's safety, the "severity of the case," and the allegation of witness intimidation based on the court clerk's telephone call. Harris's

testimony regarding the clerk's call was relevant to explain why she remembered meeting with Dickmeyer on July 25, such that she could describe Dickmeyer's demeanor on that day. Defense counsel specifically challenged her ability to recollect details of the meeting when she did not take any notes and could not specifically recall the details of meetings she had with other people around the same time. Under these circumstances, the trial court did not abuse its discretion by overruling defense counsel's hearsay objection.

To demonstrate ineffective assistance of counsel for failure to object to Harris's testimony under ER 403, Bateman must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to overcome the "strong presumption" of effective representation, Bateman bears the burden of establishing that no legitimate strategic or tactical reasons support counsel's choices. State v. McFarland, 127 Wn.2d 322, 336–37, 899 P.2d 1251 (1995) (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). Where a claim of deficiency rests on counsel's failure to object, a defendant must show that an objection would likely have been sustained to establish prejudice. McFarland, 127 Wn.2d at 337 n.4.

Here, defense counsel objected during Harris's testimony on three different grounds—hearsay, opinion, and confrontation. None of these specific grounds required defense counsel to make additional explanation or argument. Defense counsel could have reasonably chosen not to make a more general ER 403[1] objection

[1] ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

requiring additional explanation in order to avoid calling unnecessary attention to the testimony.

Moreover, Bateman fails to establish that an ER 403 objection would have been successful. Bateman cites cases holding that the admission of judicial findings from other proceedings or factual testimony from judges is unfairly prejudicial. Again, this authority is inapposite. General testimony that court personnel, including a judge, were "concerned" about Dickmeyer's initial allegations before the charges were filed cannot be considered unfairly prejudicial. Dickmeyer and her parents testified specifically about the incidents of July 14, and the jury was able to evaluate their credibility. And the trial court specifically instructed the jury that "a charge is only an accusation. The filing of a charge is not evidence that the charge is true." Bateman cannot establish ineffective assistance of counsel here.

Bateman also fails to demonstrate that Harris's reference to Judge Jurado or the trial court's response to defense counsel's objection constituted a comment on the evidence as contemplated under article IV, section 16 of the Washington Constitution, providing, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by the trial court constitutes a comment on the evidence only if the court's attitude toward the merits of the case or the court's evaluation of a disputed issue can be inferred from the statement. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.3d 670 (1986). As our Supreme Court has stated, "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness

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needless presentation of cumulative evidence."

has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Contrary to Bateman's claim, any statement attributed to Judge Jurado cannot constitute an unconstitutional comment on the evidence because "it was the evidence." State v. Gentry, 125 Wn.2d 570, 639, 888 P.2d 1105 (1995) (rejecting argument that admission of defendant's judgment and sentence from prior case was improper comment on the evidence); see also In re Det. of Pouncy, 144 Wn. App. 609, 621–22, 184 P.3d 651 (2008) (testimony regarding another court's factual findings was evidence, not an unconstitutional comment on evidence), aff'd on other grounds, 168 Wn.2d 382, 229 P.3d 678 (2010). And the trial court here did not comment on the evidence simply by overruling counsel's objection. Pouncy, 144 Wn. App. at 622.

Bateman next claims that his convictions for witness intimidation and witness tampering constitute the same criminal conduct for purposes of calculating his offender score. Under RCW 9.94A.589(1)(a), all current and prior convictions must be included in the offender score unless

> the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct" . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In deciding whether crimes involve the same intent, we focus on whether the defendant's intent, objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

We narrowly construe the same criminal conduct analysis. State v. Porter, 133

Wn.2d 177, 181, 942 P.2d 974 (1997). We review the trial court's determination for abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Viewed objectively, the intent of tampering with a witness is to attempt to induce a witness to withhold testimony, elude legal process, or absent the witness from court proceedings. See RCW 9A.72.120. The intent of intimidating a witness is to attempt to induce a witness to withhold testimony, elude legal process, or absent the witness from court proceedings by use of a threat of force. See RCW 9A.72.110. Thus, the objective intent for the two crimes is different.

Moreover, the incidents were separate in time. On July 14, Bateman threatened to use force against Dickmeyer if she went to court. That night, she refused to tell police the details of Bateman's actions. Beginning the next morning and through July 17, the date for which Dickmeyer had received the subpoena, Bateman repeatedly asked Dickmeyer not to go to court based on her love for him, by talking with her, and "reassuring" her. Because Bateman had time to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act" and made the decision to proceed with a different strategy, Bateman formed a new intent to commit the second crime of witness tampering. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Thus, the sentencing court was within its discretion in determining that the two counts did not involve the same criminal conduct.

Finally, relying on State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003), Bateman contends that the trial court lacked authority to order a substance abuse

evaluation as a condition of community custody. The State concedes that the evidence presented at trial supported the condition requiring an alcohol evaluation but not the condition requiring a substance evaluation. We accept the State's concession and remand for the trial court to strike the community custody condition requiring a substance abuse evaluation.

Remanded.

WE CONCUR: