IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS RAY MOORE, Appellant.	No. 39586-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Thomas Ray Moore guilty of one count of first degree assault of a child and eight counts of witness tampering. On appeal, Moore challenges his witness tampering convictions on double jeopardy and evidentiary grounds. He seeks reversal of his assault conviction because of ineffective assistance of counsel. Finally, he raises additional claims of error applicable to all of his convictions in a pro se statement of additional grounds (SAG).[1] We reverse seven of Moore's witness tampering convictions and remand for resentencing on his remaining convictions.

FACTS

On March 11, 2008, Washington Child Protection Services (CPS) received a report

[1] RAP 10.10.

raising concerns about the welfare of T.M., a four-year-old boy, and an allegation of possible abuse by Moore, his father. When a case worker was unable to reach T.M.'s residence by telephone, he called 911 and Lakewood Police Officer Austin Lee went to the Moore apartment to do a welfare check.

Officer Lee found Tammara Moore and her three children in the living room. At the time, Tammara[2] was Moore's wife and T.M.'s stepmother. Tammara told Lee that T.M. was asleep in his bedroom and gave the officer permission to check on him.

Officer Lee found T.M. lying on the floor next to a mattress. He was in a fetal position and covered by a thin blanket. Lee could see numerous lacerations, scratches, marks, and bruises all over T.M.'s body. One arm was significantly swollen. Some of the cuts and bruises appeared to be old and some were fresh. Lee called an ambulance.

CPS social worker Manuel Martinez met T.M. at Mary Bridge Children's Hospital and observed that he was bruised from head to toe. T.M. was released from the hospital that night into foster care. (Tammara's other children also were placed in foster care.)

Two days later, police detectives interviewed both Moore and Tammara. When shown photographs of T.M.'s injuries, Moore initially denied causing any of them. The detectives then interviewed Tammara. She described instances where Moore hit, slapped, spanked, and kicked T.M., and she also said he scrubbed T.M. with an abrasive sponge. In a follow-up interview, Moore admitted causing T.M.'s injuries: "All of this is me. All of this is because of me." Report of Proceedings (RP) (June 16, 2009) at 88. He explained that he had hit T.M. with a belt,

[2] We use Tammara's first name for clarity and mean no disrespect.

scoured him with the sponge, and fed him Tabasco sauce and hot peppers.

The police arrested Moore following that interview. Moore and Tammara maintained telephone and mail contact while he was in jail. The State ultimately charged Moore with one count of first degree assault of a child as well as eight counts of witness tampering based on his post-arrest contact with Tammara. The State also alleged aggravating factors of particular vulnerability and abuse of trust on the assault charge.

The trial court denied Moore's pretrial motions to suppress the statements he made during his police interviews as well as his letters and phone calls to Tammara from jail. At trial, the CPS social worker described T.M.'s injuries and added that he had investigated T.M.'s welfare in 2007, when he saw the child at Madigan Army Medical Center with bruises and a small cut. At that time, he found no evidence of abuse. During Officer Lee's subsequent testimony about his welfare check on T.M., the trial court admitted several photographs of T.M.'s injuries.

A.P., Tammara's 10-year-old daughter, then testified that Moore had spanked T.M. with a belt and banged T.M.'s head against a wall when the family lived in New York and after they moved to Washington. Moore also made T.M. eat hot peppers and do "PT," which required T.M. to crouch in a sitting position with arms extended. 3 RP at 65. If T.M. did not hold the position correctly, Moore would hit him with the belt. A.P. said that bruises on T.M.'s forehead were caused when Moore banged T.M.'s head against a wall; that scratches on his face were from Tammara; and that after T.M. fell and hurt his arm while roller skating, Moore would not take him to the hospital. A.P. could not remember what she told an earlier interviewer.

Tammara testified that her divorce from Moore was final six months before his trial. She

denied inflicting any of T.M.'s injuries and said the only physical discipline she witnessed from Moore was with the abrasive sponge, though she often heard T.M. scream when he was in his bedroom with Moore. She described a series of calls and letters from Moore after his arrest in which he asked her to flee to Arkansas, to blame her son, and to stop the divorce so that she could assert the marital privilege and avoid testifying against him. She read excerpts from five of those letters, which were admitted as exhibits, and the trial court played partial recordings of several phone calls. The trial court overruled defense counsel's objection to the admission of two phone calls in which Moore urged Tammara to assert her Fifth Amendment right not to testify.

Dr. Edward Walkley, who examined T.M. in the emergency room, reviewed photographs taken at the time and testified that T.M.'s pattern of bruising showed multiple injuries occurring on multiple dates. Some of the injuries were up to a month old and several were nonaccidental. Walkley concluded that T.M. had a series of injuries that had been inflicted over a considerable period of time.

Valerie Pancoast, T.M.'s maternal grandmother and current guardian, testified that Moore had called her several times for advice when he became frustrated with T.M. Moore called her on March 11, 2008, and said she had 48 hours to pick up T.M. or he would be abandoned. When Pancoast and her husband were unable to make travel arrangements from their home in Missouri, they called CPS. Pancoast testified that T.M. was not clumsy, that he did not fall a lot, and that he had received no significant injuries since she had obtained custody.

Michelle Breland, a nurse practitioner with Mary Bridge Children's Hospital's Child Abuse Intervention Department, evaluated T.M. in June 2008. She testified that T.M. had

collarbone, elbow, and pelvic fractures and that his lacerations and bruises in 2008 were similar to those shown in the Madigan records from 2007. She did not find any motor skill issues with T.M. and thought that many of his injuries were the result of nonaccidental trauma.

Kimberley Brune, an interviewer with the prosecutor's office, testified that she interviewed T.M. and Tammara's children shortly after their placement in foster care. A.P. told her that her parents had never hurt T.M. and that they did not discipline him any differently than the other children.

After Detective Chris Westby testified about the interviews with Moore and Tammara that led to Moore's arrest, Moore testified on his own behalf. He admitted using "PT" as punishment and to spanking T.M. with a belt, giving him Tabasco, and scrubbing him with an abrasive sponge, but he said that Tammara inflicted most of T.M.'s wounds and that he did not implicate her earlier because he was afraid she would kill T.M. He explained that he told the detectives "[a]ll this . . . is because of me" because he should have done more to protect T.M. from Tammara. RP (June 24, 2009) at 62. He admitted calling Tammara more than 400 times and writing her more than 100 letters from jail. He also admitted that he tried to get her not to testify and to say something helpful if she did testify.

The jury returned guilty verdicts on all counts and also found that both aggravating factors had been proved. The trial court declined to impose an exceptional sentence on the assault conviction and instead sentenced Moore to 318 months, the high end of the standard range. The trial court imposed concurrent 60-month sentences on the tampering convictions.

ANALYSIS

Witness Tampering Convictions

A. Unit of Prosecution

We first address whether Moore's multiple witness tampering convictions violate double jeopardy because they were based on a single course of conduct comprising a single unit of prosecution. This issue presents a question of law that we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010). Whether or not a defendant faces multiple convictions for the same crime depends on the unit of prosecution. *Hall*, 168 Wn.2d at 730. In *Hall*, the Supreme Court held that the unit of prosecution for witness tampering is the ongoing attempt to persuade a witness not to testify in a single proceeding and that the defendant's multiple phone calls to a prospective witness supported only a single conviction of witness tampering. 168 Wn.2d at 734-37.

The parties agree that *Hall* controls the resolution of this issue but with slightly different results. Moore argues that seven of his eight convictions must be reversed because his phone calls and letters were part of a single course of conduct that supported a single unit of prosecution. The State points to additional language in *Hall* that supports separate convictions based on Moore's telephone calls and his letters:

> 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.

168 Wn.2d at 737.

The State also argues that because Moore attempted to induce Tammara not to testify in addition to testifying falsely, two or more convictions are permissible. *See* RCW 9A.72.120(1) (person is guilty of witness tampering if he attempts to induce a witness to testify falsely, to withhold testimony, or to absent himself from the proceedings).

We agree with Moore that under *Hall*, the evidence here supports a single unit of prosecution based on his ongoing effort to interfere with Tammara's testimony at a single proceeding, and we remand for reversal of seven of his eight witness tampering convictions. Given this result, we need not examine whether the trial court's instructions adequately informed the jury that it had to find a separate and distinct act for each count of witness tampering.

B. Admission of Evidence

Moore next argues that the trial court abused its discretion in admitting two phone calls in which he told Tammara that she could not be forced to testify if she pleaded the Fifth Amendment. Moore maintains that these statements did not constitute witness tampering and should not have been admitted.

We review a decision to admit or exclude evidence for abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). The improper admission of evidence is harmless error if that evidence is of minor significance in reference to the "overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

RCW 9A.72.120(1)(a) provides that a person is guilty of tampering with a witness if he

attempts to induce a witness to testify falsely "or, without right or privilege to do so, to withhold any testimony." Division Three of this court cited this definition in noting that a defense attorney's advice to witnesses to assert the Fifth Amendment when called to testify would not amount to tampering under RCW 9A.72.120. *State v. Ahern*, 64 Wn. App. 731, 734 n.2, 826 P.2d 1086 (1992).

The trial court denied Moore's motion to exclude the two conversations in which he mentioned the Fifth Amendment, stating that defense counsel could argue that they did not constitute witness tampering during closing argument. Moore argues that admitting this irrelevant evidence was prejudicial because there is a reasonable probability that it supported one or more of his convictions.

Under *Hall*, however, Moore's phone calls constituted a single course of conduct and a single unit of prosecution. In several of those calls, Moore made no reference to the Fifth Amendment as he tried to prevent Tammara from testifying or urged her to testify falsely. Thus, even if the trial court abused its discretion in admitting irrelevant conversations, the other conversations were more than sufficient to support a single conviction of witness tampering. Moore's claim of prejudicial error fails.

Assault Conviction

A. Ineffective Assistance of Counsel

1. Failure To Request a Limiting Instruction

Moore argues that his counsel's failure to request a limiting instruction regarding Tammara's prior inconsistent statements demonstrated ineffective assistance of counsel. We

review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782, *review denied*, 155 Wn.2d 1005 (2005). To prevail on such a claim, a defendant must show both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Our scrutiny of counsel's performance is highly deferential; it presumes that counsel provided reasonable assistance. *Thomas*, 109 Wn.2d at 226. A defendant shows prejudice if he demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant can also establish prejudice by showing that if counsel had made the objections or arguments at issue, they likely would have succeeded. *McFarland*, 127 Wn.2d at 337 n.4. If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988).

A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with her testimony in court, even if such a statement would otherwise be inadmissible as hearsay. *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005). Where prior inconsistent statements are admitted as impeachment evidence, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is necessary and proper. *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). But where no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence. *See State v. Myers*, 133 Wn.2d

26, 36, 941 P.2d 1102 (1997).

At trial, Tammara testified that Moore never abused T.M. Detective Westby testified that, during her interview with him, however, she implicated Moore in several acts of physical abuse. Moore argues here that by failing to request an instruction cautioning the jury to consider Tammara's prior inconsistent statements as impeachment evidence only, the jury was free to consider those statements as substantive evidence that supported his assault conviction.

A court may presume that trial counsel decided not to request a limiting instruction as a trial tactic so as not to reemphasize damaging evidence. *State v. Barragon*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Moore insists that counsel's decision not to request a limiting instruction could not have been strategic. Even if this decision constituted deficient performance, however, it cannot be considered prejudicial. Detective Westby followed his description of Tammara's statements with Moore's own admissions of abuse, and A.P. had already testified about such abuse as well. Moreover, Moore himself confirmed some of the abuse allegations. There is no reasonable probability that the result of the trial would have differed had defense counsel obtained an instruction limiting the use of Tammara's prior inconsistent statements as impeachment evidence only.

2. Failure To Object To Special Verdict Instruction

The trial court's instruction on the special verdict forms stated in pertinent part,

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer "no."

Clerk's Papers at 157. Moore argues that his attorney was deficient in failing to object to the instruction's requirement that a "no" answer be unanimous because that requirement was error under *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), and *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

In *Goldberg*, an aggravated murder prosecution, the jury initially returned a guilty verdict and answered "no" on the special form for the aggravating factor alleged. 149 Wn.2d at 891. When the jury was polled, it was determined that only some of the jurors had voted "no" on the special verdict instruction. The judge proceeded as if the jury was deadlocked and instructed it to continue deliberating to see whether unanimity could be reached. The next day, after more deliberations, the jury returned a unanimous finding that the State had proved the aggravating factor. *Goldberg*, 149 Wn.2d at 891-92. The Supreme Court held that the jury's nonunanimous judgment should have been accepted and that it was error to order continued deliberations. *Goldberg*, 149 Wn.2d at 894.

When an appellant argued that a special verdict instruction requiring unanimity was erroneous under *Goldberg*, Division One disagreed. *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008), *rev'd*, 169 Wn.2d 133. In *Bashaw*, the trial court instructed the jury that "[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict." 144 Wn. App. at 201. Division One rejected any finding of error, observing that because the jury was polled and found to unanimously uphold the aggravating factor, there was no basis for believing that telling the jurors they had to be unanimous to return a negative finding could have harmed the appellant. *Bashaw*, 144 Wn. App. at 203.

The Supreme Court reversed, concluding that under *Goldberg*, the rule is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. "A nonunanimous jury

decision is a final determination that the State has not proved the special finding beyond a reasonable doubt." *Bashaw*, 169 Wn.2d at 146. Because it was impossible to determine what might have occurred had the jury been properly instructed, the court vacated the sentence enhancements. *Bashaw*, 169 Wn.2d at 148.

As the State argues, the facts here do not resemble those in *Goldberg* because the polling of the jury indicated that it was unanimous in finding both aggravating factors proved beyond a reasonable doubt. And, under Division One's opinion in *Bashaw*, the special verdict instruction requiring unanimity for either a "yes" or "no" verdict was not error. This case law was in effect during Moore's trial; the instruction's unanimity language mirrored the pattern instruction. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 630 (3d ed. 2008). It was not until the Supreme Court issued its opinion in *Bashaw* a year later that the special verdict instruction used in Moore's trial amounted to reversible error. We do not find defense counsel deficient for failing to predict the majority holding in *Bashaw.* *See State v. Slighte*, 157 Wn. App. 618, 625, 238 P.2d 83 (2010) (attorneys are not required to predict changes in the law to provide effective assistance of counsel). We note, however, that our ruling in no way constitutes an endorsement of the instruction at issue.

Statement of Additional Grounds

A. *Miranda*[3] Rights

Moore argues here that his Fifth Amendment rights were violated when he was not properly advised of his *Miranda* rights before his second interview with the detectives. In

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

unchallenged findings of fact entered after the suppression hearing, the trial court found that Moore was read his *Miranda* rights during the initial interview, that he acknowledged those rights, and that he indicated he wanted to answer the detectives' questions both verbally and by initialing the form. When Moore returned for the second interview approximately two hours later, Detective Westby explained that Moore's *Miranda* rights were still in effect and asked if he remembered those rights. Moore indicated that he did and agreed to answer additional questions. These unchallenged findings are verities on appeal and support the trial court's conclusion that Moore waived his *Miranda* rights before each interview.

B. Prosecutorial Misconduct

Where a claim of prosecutorial misconduct is based on comments or argument made during trial, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Absent a proper objection and a request for a curative instruction, the issue of misconduct is waived unless the comment was so flagrant or ill intentioned that the prejudice could not have been cured by an instruction. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). To support the claim that the prosecuting attorney has wrongfully suppressed evidence favorable to the accused, a defendant must show that the evidence at issue is favorable to him, that it was suppressed by the State either willfully or inadvertently, and that it is material. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Moore argues that misconduct occurred when the prosecuting attorney referred to the "previous investigation" without mentioning that it was unfounded and showed the jury photographs of T.M.'s injuries during opening argument. He complains that additional misconduct occurred when the prosecuting attorney referred to the fact that Moore was in jail and argued that the skating incident in which T.M. allegedly injured his elbow was an intentional violent act. We do not review these claims of error because the State's opening argument was not transcribed. *See McFarland*, 127 Wn.2d at 335 (where ineffective assistance claim is brought on direct appeal, reviewing court will not consider matters outside the record). Even if these statements were made, however, subsequent witnesses testified to the earlier investigation that did not result in a finding of abuse, and the trial court overruled defense objections to the photographs. The fact that Moore was in jail was an integral part of his witness tampering charges, and the State was entitled to argue its theory of the case regarding T.M.'s injuries. These allegations do not support a claim of misconduct.

Moore also argues that the prosecuting attorney suppressed evidence that the children physically fought and harmed each other, claiming that this evidence was brought before the judge but not the jury. If it was brought before the judge, it was not suppressed, and this claim of misconduct fails. Moore also asserts that the prosecuting attorney erred by not supplying the jury with the recordings of the interviews between Brune and the Moore children. He argues that one recording reveals A.P.'s statement that he was not the aggressive parent. But Brune so testified and the recording was unnecessary to establish that A.P.'s trial testimony differed from her interview statements. Brune testified that these interviews were recorded and there is no support

for the allegation that the State suppressed them.

Moore also contends that misconduct occurred when the State introduced a photograph of T.M. taken three months after his placement in foster care. He notes that the trial court overruled the defense objection to this photograph; there is no support for a claim of prosecutorial misconduct.

C. Additional Instances Of Ineffective Assistance Of Counsel

Moore makes several general assertions of inadequate assistance. He contends that his attorney did not spend enough time with him before trial, failed to investigate his alibis, failed to introduce a neighbor as a witness, failed to interview any prospective witnesses, and failed to secure copies of the interviews between the children and Brune.

The record shows, however, that there were no day care or medical records to support Moore's innocence, and he provides no support for the allegation that military or medical staff might have testified on his behalf. His claim that a neighbor's testimony could have been helpful does not establish that his attorney was deficient in failing to call him as a witness. *See State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (decision to call witnesses is generally a matter of legitimate trial tactics). As for the interviews between the children and Brune, Brune testified that T.M.'s interview was not helpful because the child could not speak clearly, and she testified that A.P.'s interview statements contradicted her claims of abuse at trial. Moore does not explain why further information about these interviews would have assisted his defense, and it is unlikely that admission of the interviews would have affected the trial's outcome, given the considerable evidence of abuse.

D. Perjured Testimony

Moore next argues that the discrepancies between the two detectives' testimony during the suppression hearing show that they committed perjury. The fact that the detectives described Moore's advisement of rights slightly differently does not show that they offered perjured testimony. *See Nessman v. Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522 (contradictory statements are not direct evidence of the falsity that perjury requires), *review denied*, 94 Wn.2d 1021 (1980).

E. Improper Opinion Evidence

Finally, Moore argues that Breland's testimony should have been stricken as improper opinion evidence. Breland, a nurse practitioner in Mary Bridge Children's Hospital's Child Abuse Intervention Department, testified that many of T.M.'s injuries were the result of nonaccidental trauma.

A trial court may allow opinion testimony by an expert witness if the testimony will be helpful to the trier of fact and the witness is qualified as an expert by knowledge, skill, experience, training, or education. ER 702. The trial court has wide discretion in ruling on the admissibility of expert testimony. *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001).

Breland has 18 years of nursing experience, with 17 of those years spent in connection with the Child Abuse Intervention Department, and she has seen thousands of children with abuse allegations. The trial court did not abuse its discretion in allowing her to offer an opinion about the origins of T.M.'s injuries.

We remand for reversal of seven of the eight witness tampering convictions and for resentencing on Moore's remaining convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.