IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27506-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
IKEIM CHACAR VASTER,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Ikeim C. Vaster appeals his second degree assault conviction. He contends the trial court erred in admitting witnesses' deposition testimony. Pro se, he argues (1) he was denied a speedy trial, (2) he received ineffective assistance of counsel, and (3) witness tampering deprived him of a fair trial. We affirm.

FACTS

During the early morning of January 12, 2008, Mr. Vaster first met Cameron Hollinger at a Spokane bar. When the bar closed, the pair drove together to a party at RickiDean Leingang's apartment. There, Mr. Vaster, who believed that Mr. Hollinger had stolen money from him, struck Mr. Hollinger in the face at least three times. As a

result of the blows, Mr. Hollinger's face was bruised and cut and he suffered a broken maxillary sinus. The State charged Mr. Vaster with first degree robbery, first degree kidnapping, and second degree assault.

On August 26, 2008, the court convened for a bench trial. Mr. Vaster filed an affidavit of prejudice against the presiding judge. The State requested a continuance due to the unavailability of any other judges on that date. The court granted a continuance until September 2, the first trial day of the following week.

Because Mr. Hollinger and his girl friend, Janice Weaver, were from Arizona, the State asked to videotape their testimony, explaining:

> We've got these witnesses sitting up here, Your Honor, at county expense . . . we can't even arrange for their transportation back until we know they're going to testify so they could be up here for some period of time if the court [doesn't] grant the State's motion to do that.

Report of Proceedings (RP) (Aug. 26, 2008) at 4-5.

Defense counsel initially objected to the State's request, noting the seriousness of the charges and the potential strike consequences. Defense counsel pointed out that Mr. Hollinger had told several different versions of the events to the police: "This guy has given numerous statements and to let him just give a video and take off before the other witnesses get to weigh in I think is hugely devastating to my client's case." *Id.* at 6. The court granted the State's request to videotape the witnesses' testimony but ruled that Mr. Vaster could recall the witnesses, if necessary. However, at the later trial, Mr. Vaster did not object to the admission of the deposition, and, as described

below, the trial judge denied his motion to recall the witnesses.

Mr. Hollinger and Ms. Weaver were deposed the next day. Mr. Hollinger related events incriminating Mr. Vaster; generally, that Mr. Vaster had punched him several times and participated in taking property from him. Ms. Weaver described her role in picking up Mr. Hollinger, his appearance after he had been allegedly assaulted, how she helped report the events, and her role in driving Mr. Hollinger to the hospital.

At trial, the emergency room physician, Dr. Michael Sicilia, described Mr. Hollinger's cut and bruised appearance on January 12. He testified a CAT scan showed a fracture of Mr. Hollinger's maxillary sinus. Dr. Sicilia related the clinical findings were consistent with Mr. Hollinger being hit in the face.

The State moved to admit the videotaped testimony of Mr. Hollinger and Ms. Weaver. Defense counsel did not object, stating:

> It is my understanding this was taken as recorded testimony prior to, in which case I would think it is already admitted or admissible.
> It was also my understanding of the prior rulings from Judge Leveque that this Court would then make a later ruling, in my case-in-chief, when I go to call – to recall them, the people down in Arizona, to have them come back to further testify in person.
> We will make that motion during my case-in-chief.
> I have no objection to the admission of this as testimony.

RP (Sept. 9, 2009) at 237. The court admitted the tape as part of the court record.

After the State rested, Mr. Vaster moved to recall Mr. Hollinger and Ms. Weaver, arguing inconsistencies in other State's witnesses' testimony called for further questioning. The court denied the request, noting Mr. Vaster's confrontation rights

were intact because he was present at the depositions and cross-examined the witnesses.

Mr. Vaster took the stand and admitted that he intentionally hit Mr. Hollinger in the face approximately three times. He explained that he was angry with Mr. Hollinger because he believed Mr. Hollinger had stolen some of his money.

Mr. Vaster was convicted of second degree assault. He appeals.

ANAYLSIS

A. Deposition Testimony

The issue is whether the trial court erred in admitting the deposition testimony of Mr. Hollinger and Ms. Weaver. Admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997). Discretion is abused if it is based on untenable grounds or is manifestly unreasonable. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under CR 32, a deposition may be used at trial if it is admissible and "may be used against any party who was present or represented at the taking of the deposition." CR 32(a); *Hammond v. Braden*, 16 Wn. App. 773, 774-75, 59 P.2d 1357 (1977). CR 32 further provides the deposition of a witness may be used if the court finds that "the witness resides out of the county and more than 20 miles from the place of trial." CR 32(a)(3)(B).

Here, the record shows Mr. Hollinger and Ms. Weaver were living in Arizona at the time of trial. The pair resided more than 20 miles from the place of trial. Thus, the trial court properly ordered the taking of the depositions.

Even so, Mr. Vaster contends the trial court erred in admitting the deposition testimony because the court made no finding, as required under ER 804(b), that the witnesses were unavailable. ER 804(b)(1) provides a hearsay exception for deposition testimony if the witness is unavailable and the party against whom the testimony is offered had an opportunity to develop the testimony through direct, cross, or redirect examination. However, Mr. Vaster did not object to the admission of the depositions at trial. Therefore, as the State correctly notes, he waived the issue. *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002).

Even if the trial court erred in admitting the deposition testimony, any error was harmless. An error in admitting evidence that does not prejudice the defendant is not grounds for reversal. *State v. Roberts*, 31 Wn. App. 375, 380, 642 P.2d 762 (1982). We "apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

To find Mr. Vaster guilty of second degree assault, the judge had to find that Mr. Vaster intentionally assaulted Mr. Hollinger and thereby recklessly inflicted substantial bodily harm. *See* RCW 9A.36.021(a). The statutory definition of "substantial bodily

harm" includes "a fracture of any bodily part." RCW 9A.04.110(4)(b).

Mr. Vaster testified that he intentionally hit Mr. Hollinger on the head three times. Mr. Vaster's defense was that the assault constituted fourth degree assault, not second degree assault. But Dr. Sicilia testified Mr. Hollinger's maxillary sinus was fractured. This testimony alone established that Mr. Hollinger suffered substantial bodily harm. Thus, any error in admitting the deposition testimony was harmless.

B. Statement of Additional Grounds (SAG)

Mr. Vaster raises three issues in his SAG. First, he argues the trial court violated his right to a speedy trial because he was not brought to trial within 60 days of his arrest and he did not sign any speedy trial waivers. He claims 137 days passed between his arrest date and the start of trial, and that he objected to the trial dates at "numerous proceedings." SAG at 2. He also questions the delay between the date of the depositions and the start of trial.

However, Mr. Vaster's arguments are too vague to identify specific error or permit fair review of this issue. He asserts violation of his right to a speedy trial but does not explain why the trial was delayed. Although continuances were granted, we know the reason for just one of them. Although a defendant is not required to cite to the record or authority in his SAG, he must still "inform the court of the nature and occurrence of [the] alleged errors." RAP 10.10(c). We are not required to search the record to find support of the defendant's claims.

Second, Mr. Vaster argues his trial counsel's representation was ineffective on several grounds. To establish ineffective assistance of counsel, he must show his defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and the deficient conduct caused actual prejudice, i.e., a reasonable probability exists, that but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If a defendant fails to establish either element, we need not address the other element. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Mr. Vaster claims his counsel was ineffective for failing to object to the trial date, failing to sign and serve a subpoena, and failing to recall a witness. Again, Mr. Vaster's claims are too vague for our review. The trial court did not rule on the basis of any failure to sign a subpoena. Moreover, even assuming his counsel was deficient he does not show prejudice flowing from the alleged errors. Without showing prejudice, an effective assistance of counsel claim cannot succeed under the second prong of the *Strickland* test. Mr. Vaster's ineffective assistance claims therefore fail.

Third, Mr. Vaster alleges witness tampering deprived him of a fair trial. He appears to contend Mr. Leingang was coerced into making a statement to law enforcement because he was granted limited immunity in exchange for a "free talk" with

law enforcement. SAG at 4.

> Under the witness tampering statute:
>
> A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
> (a) Testify falsely or, without right or privilege to do so, to withhold testimony.

RCW 9A.72.120(1)(a).

Here, no evidence shows anyone threatened Mr. Leingang or requested him to lie or withhold information. Accordingly, Mr. Vaster's argument fails.

In sum, Mr. Vaster's SAG issues have no merit.

Affirmed.

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

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.