NO. 42855-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LYRIC CLINE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 11-1-02722-0

Response Brief

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B. STATEMENT OF THE CASE.

1. Procedure

On July 5, 2011, the Pierce County Prosecuting Attorney's Office charged Lyric Cline, defendant, with assault in the second degree by strangulation or in the alternative, by recklessly inflicting substantial bodily harm in a domestic violence incident. CP 1.

Trial was held before the Honorable Ronald Culpepper on October 26, 2011. RP 152. On November 1, 2011, a jury found defendant guilty as charged, and unanimously answered yes to the special verdict. CP 76-77. On November 29, 2011, the court sentenced defendant to the low end of

the standard range to 65 months in custody, with 151 days of credit for time served, 36 months of community custody, and $2,300 in legal financial obligations. CP 89-100.

Defendant timely filed a Notice of Appeal on that same day. CP 82.

2. Facts

On June 30, 2011, defendant got into an argument with Larisa Oien, his girlfriend with whom he lived. RP 163-164. He aggressively approached her in their apartment yelling so close that he was spitting on her face. RP 164. Ms. Oien momentarily escaped to the bedroom where defendant followed. RP 164.

There, defendant picked Ms. Oien up by her neck, threw her on the bed, and smothered her with a pillow. RP 167. Defendant repeatedly strangled Ms. Oien's neck using his hands, allowing her just enough time to catch her breath before repeating the strangulation. RP 164. Defendant stopped strangling Ms. Oien when she went limp. RP 165. He also punched her in the ribcage area with a closed fist sometime during the assault. RP 164-165.

Defendant ran to the parking lot and demanded that Ms. Oien drive him away from the apartment because he was afraid the neighbors heard the attack and called 911. RP 165. As Ms. Oien drove defendant away, he threatened to kill her, and that he was going to die by suicide by cop. Defendant also had a 7 inch butcher knife and made quick movements. RP

167-168. Scared, Ms. Oien pulled over and tried to get out of the car. RP 168.

Defendant pulled Ms. Oien back into the car and put her in a headlock. RP 168-169. He punched her, spit on her, and strangled her again. RP 169. Ms. Oien fought him off and fled on foot. RP 169. As she fled, defendant got into the driver's seat and followed her, threatening to run her over if she didn't get back in the car. RP 169. Defendant finally drove away after Ms. Oien called to three unidentified girls for help. RP 169.

Ms. Oien ran to Home Depot and called 911. RP 169. The police arrived, and the Tacoma Police Department forensics photographed the blue green bruises on her neck, ears, forehead, nose, and arms as well as the red marks and dots on her neck and chest area. RP 169-170. Despite her statement that her body hurt all over, Ms. Oien declined medical aid, filled out a medical release form and left with her father, Gregory Williams. RP 170.

Ms. Oien and her father went to his house where they found defendant standing in the driveway. RP 239. They told him to leave and that the police were called. RP 239. Defendant, upset that the police were contacted, demanded that Ms. Oien contact the police to cancel her report. RP 240. Defendant left after Ms. Oien called 911. RP 239. Several police officers arrived to search for defendant, but were unable to locate him. RP 181.

The next day, defendant was arrested after a police officer spotted Ms. Oien's car at an AM/PM convenience store parking lot. RP 185. Defendant, found in the passenger seat with Ms. Oien in driver's seat, identified himself and was immediately arrested. RP 186.

C. ARGUMENT.

1. WHEN THE 911 RECORDING AND MS. OIEN'S STATEMENTS TO THE POLICE WERE MADE IN THE COURSE OF AN ONGOING EMERGENCY AND THEREFORE NONTESTIMONIAL, THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE INTO COURT.

Defendant claims that the admission of Ms. Oien's 911 call and statements to the police constitute hearsay testimony, so his right to confrontation was violated when the evidence was admitted at trial. Brief of Appellant at 8. As the 911 recording and statements were made during the course of an ongoing emergency, they are nontestimonial. As the evidence was nontestimonial, defendant's confrontation rights are not implicated and his claim fails on the merits.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied,* 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER

103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***Rehak***, 67 Wn. App. at 162.

In ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. ***Crawford***, 124 S. Ct. at 1374. The decision in ***Crawford*** was restricted to the use of testimonial hearsay, but "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" ***Crawford***, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the "core class" of testimonial statements at which the Confrontation Clause was directed. These include (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an

objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford***, 124 S. Ct. at 1364.

Recently, in ***Davis v. Washington***, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and its consolidated case, ***Hammon v. Indiana***, the Supreme Court provided further guidance with regard to the parameters of statements deemed "testimonial." First, in ***Davis***, the Court held that a complainant's 911 telephone call was nontestimonial and, therefore, not subject to the Confrontation Clause of the Sixth Amendment. The court focused on several factors that made the substance of the 911 call of a different character than the testimonial statements at issue in ***Crawford***. First, the 911 caller in ***Davis*** "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" ***Davis***, 547 U.S. at 827, citing, ***Lilly v. Virginia***, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)(plurality opinion). The call in ***Davis*** was "a call for help against a bona fide physical threat" and a request for assistance in resolving a present emergency rather than a relation of past events, hours after the emergency was resolved. *Id.* The questions asked by the 911 operator in ***Davis*** to establish the identity of the assailant was to assist the officers dispatched to the scene so they might know, upon arrival "whether they were encountering a violent felon." *Id.* Lastly, there was a marked "difference in the level of formality between the two interviews." *Id.* Whereas, ***Crawford*** was at the station house responding calmly to a series of questions with both a note taker

and tape recorder documenting his responses, the 911 caller in ***Davis*** involved "frantic answers ...over the phone, in an environment that was not tranquil, or even ... safe. *Id.* In upholding the admissibility of the 911 call, the Court stated:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

The Court reached a different conclusion in the companion case, which also stemmed from a domestic dispute. At issue was Amy Hammon's statements to investigating police officers at her home after the police responded to a reported domestic disturbance. *Id.* at 819-821. The Court found the characterization of these statements was "much easier" to resolve because they "were not much different" from the statements in ***Crawford***. *Id.* at 829. The interrogation arose from "an investigation into possibly criminal past conduct," "[t]here was no emergency in progress;" Hammon told the officers when they arrived that "things were fine;" when an officer eventually questioned Hammon a second time and elicited the challenged statements he was not seeking to determine "what is happening," but rather "what happened." *Id.* at 830.

In addition to providing further guidance on what constitutes a testimonial statement, the Court explained that it must decide whether the Confrontation Clause applies only to testimonial hearsay. 547 U.S. 823-824. As noted above, this issue was raised but left undecided by the Court in ***Crawford***. In ***Davis***, the Court clarified that nontestimonial hearsay does not implicate the confrontation clause at all. Thus, any challenge to the admission of hearsay on the basis of the right to confront must assess whether the hearsay at issue is testimonial. *Id.* at 824-825.

Here, Ms. Oien's 911 call and statements to officer Bortle were nontestimonial. As such, defendant's right to confrontation are not implicated and his claim fails on the merits.

Ms. Oien was speaking about events as they were actually happening, rather than describing past events. At the time the statements were made, defendant's whereabouts were still unknown. He even had Ms. Oien's car, which he already used to follow her while threatening to run her over, so he could have quickly reappeared. Defendant did in fact reappear later at Gregory Williams' house to confront Ms. Oiens. Had defendant reappeared at Home Depot when the statements were made, it would have been very difficult for Ms. Oien to escape without her car. Also, Ms. Oien's injuries were serious and recent enough for the police to want to summon immediate medical aid.

Further, there was a bonafide physical threat at the time the statements were made. Defendant explicitly threatened to kill Ms. Oien

while they were in her car and as she fled on foot. He also implicitly threatened the police when he stated that he wanted to die by suicide by cop. The gravity of the threats was amplified and confirmed by the fact that defendant was armed with a 7 inch kitchen knife. Aside from the bonafide physical threat, these statements were clearly made to establish the identity of the assailant and assist the officers dispatched to the scene so they might know, upon arrival, whether they were encountering a violent felon.

The level of formality at the time the statements were made was very low. Ms. Oien had fled from her car and run across the road to Home Depot to get away from defendant and seek help. She was away from her familiar surroundings when she made the 911 call inside Home Depot and statements to the police in the parking lot. She was without anyone she knew and in a public place where defendant could have easily gotten to her.

Ms. Oiens' statements were necessary to resolve the present emergency, rather than learn what had happened in the past. The urgency of the matter is demonstrated by the fact that Ms. Oien was crying, wringing her hands, and having trouble, focusing, talking, and even breathing while making her statements. She not only expressed her concern that defendant was gone with her car, but also said she was afraid for her life, and was adamant that she was afraid to go home. Her statements were obviously more than a relation of past events.

As Ms. Oien's 911 call and statements to the police were made in the course of an ongoing emergency, the trial court did not abuse its discretion in finding that the statements were nontestimonal. Therefore, the trial court properly applied ***Crawford*** and ***Davis*** and defendant's confrontation rights are not implicated. This Court should reject defendant's claim and affirm his conviction.

2. WHEN LARISA OIEN'S 911 CALL CONSTITUTES AN EXCITED UTTERANCE, THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE INTO TRIAL.

Defendant argues that the trial court erred when it admitted into trial, Ms. Oien's 911 call and statements to the police because the evidence does not constitute excited utterances. Brief of Appellant at 16. Defendant's claim is without merit as the evidence is clearly admissible as an excited utterance under ER 803(a)(2) exception to hearsay, and the trial court properly admitted the evidence at trial.

a. The 911 call fell squarely within ER 802(a)(2).

A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. In ***White v. Illinois***, 112 S. Ct. 736, 742 (1992), the United States Supreme Court noted that the excited utterance exception to the

hearsay rule is a "firmly rooted" exception which satisfies the requirements of the confrontation clause. *See also* ***State v. Strauss***, 119 Wn.2d 401, 832 P.2d 78 (1992) (the excited utterance exception is a firmly rooted exception to the hearsay rule and thus the requirement of reliability is presumptively satisfied). Further, the excited utterance exception allows for a statement to be admitted without any showing that the declarant is unavailable as a witness. ***State v. Chapin***, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

"Excited utterances," for purposes of the hearsay exception, are spontaneous statements made while under the influence of external physical shock before declarant has time to calm down enough to make a calculated statement based on self interest. ***State v. Hardy,*** 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). Three requirements must be met for hearsay to qualify as excited utterance: (i) startling event or condition must have occurred; (ii) statement must have been made while declarant was still under the stress of startling event; and, (iii) statement must relate to the startling event or condition. ***Hardy***, 133 Wn.2d at 714.

i. **Startling event or condition.**

Two principles are relevant regarding the requirement that a startling event or condition must have occurred. First, the startling event or condition that must occur for purposes of the excited utterance exception need not be the "principal act" underlying the case. For example, a later

startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously. ***State v. Chapin***, 118 Wn.2d 681, 686-687, 826 P.2d 194 (1992). This is vividly illustrated in ***United States v. Napier,*** 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895, 96 S. Ct. 196 (1975). There, the victim of an assault was unexpectedly shown a picture of the alleged assailant in a newspaper eight weeks after the attack. This caused her to become excited and to exclaim, "He killed me, he killed me." The court held that the statement was admissible as an excited utterance. ***Chapin***, at 686-687, citing ***Napier***, 518 F.2d at 317-318. The court explicitly stated that the "startling event" was not the assault, but the victim being confronted with the photograph of her assailant. ***Napier***, at 318.

The second important principle regarding the requirement of a startling event or condition is that the startling nature of the event cannot be determined merely by reference to the event itself. Again, ***Napier*** is illustrative. There is nothing inherently startling about being shown a picture in a newspaper. Nonetheless, the assault victim in ***Napier*** was understandably startled when she was unexpectedly confronted with a photograph of the man who almost beat her to death. What makes an event startling is its effect upon those perceiving it, and an event might be startling to some but not to others. For purpose of the excited utterance exception, therefore, it is the event's effect on the declarant that must be focused upon. ***Chapin***, 118 Wn.2d at 687.

In the instant case, there are several ways to look at the startling event that triggered the statement. The first and most obvious event is the initial beating and strangulation that took place at the apartment. The second event is the beating and strangulation that took place in her car. Finally, the third event occurred as the defendant followed Ms. Oien threatening to run her over as she fled from her car. Ms. Oien was covered in bruises and still in pain at the time she made the statement. As the court approached the analysis, one could view the startling event as one continuous event. Certainly, being beaten and strangled in your home, then your car, and before being threatened to be killed and run over could qualify as one startling event. Whatever the analysis, it is clear that a startling event occurred and the statement was in response to this.

ii. **Ms. Oien was still under the stress of the startling event.**

The key to the second element is spontaneity. Ideally, the utterance should be made contemporaneously with or soon after the startling event giving rise to it. ***State v. Palomo***, 113 Wn.2d 789, 791, 783 P.2d 575 (1989), *cert. denied*, 111 S. Ct. 80 (1990) (statement of victim of attempted rape made immediately after a policeman pulled defendant off of her). Although the statement may be spontaneous, it need not be completely spontaneous; rather, under certain circumstances, the statement may be made in response to a question. ***State v. Bryant,*** 65 Wn. App. 428,

433, 828 P.2d 1121 (1992), citing ***Johnston v. Ohls***, 76 Wn.2d 398, 406, 457 P.2d 194 (1969). For example, in ***State v. Woods***, the court upheld the admissibility of a victim's statements made in response to paramedic's questions some 45 minutes after the startling event. 143 Wn.2d 561, 598-99, 23 P.3d 1046 (2001).

The crucial question is whether the declarant is still under the influence of the event so as to preclude any chance of fabrication, intervening influences, or the exercise of choice or judgment. ***Johnston***, 76 Wn.2d at 406. However, the fact that the victim may have spoken to other persons in between the startling event and the statements in question does not necessarily bear on admissibility. ***State v. Sunde***, 98 Wn. App. 515, 985 P.2d 413 (1999).

Here, Ms. Oien was still under the stress of the repeated strangulation, beatings, and death threats. Only about a half an hour elapsed since defendant beat and strangled Ms. Oien in her car. After escaping the beating from her car, she experienced more trauma – from the defendant following her in the car and threatening to run her over. This was her first opportunity to speak with someone about what had occurred. Ms. Oien's words and demeanor suggested that she had not had time at all to "come down" from the stress of this event and certainly had not had any time to fabricate her statements. At the time that Ms. Oien arrived to Home Depot on foot, no one knew what had transpired. She was crying and having trouble breathing, focusing, and talking.

iii. **Statement related to the startling event.**

The third element of ER 803(a)(2) is that the utterance "relate to" the startling event. For purpose of 803(a)(2), an utterance may "relate to" the startling event even though it does not explain, elucidate, or in any way characterize the event. Any utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement. ***Chapin***, 118 Wn.2d at 688.

Obviously the statements made to the 911 dispatcher relate to the startling events of that day and defendant does not attempt to suggest otherwise on appeal.

The 911 recording was properly admitted as an excited utterance. Ms. Oien's 911 call was made after the event of the beatings, strangulations, and death threats while she was still under the stress of the event, and the statements obviously related to the event. As the court properly admitted the 911 recording as an excited utterance, this Court should reject defendant's claim and affirm his conviction.

3. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

Defendant claims that his rights to effective assistance of counsel were denied because the defense declined to question Ms. Oien at the pretrial hearing when the State moved to admit the 911 recording. Brief of

Appellant at 16. Specifically, defendant claims that defense counsel was deficient because the 911 recording would not have been admitted had defense counsel questioned Ms. Oien. *Id.* Defendant's claim fails on the merits because not only is he unable to demonstrate prejudice, but also because defense counsel objected to and extensively argued about the admissibility of the 911 recording and possibly made a tactical decision to reserve questioning Ms. Oien at the pretrial hearing.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland,*** 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). A defendant must demonstrate both prongs of the ***Strickland*** test,

but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***Thomas***, 109 Wn.2d at 225-26.

There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie,*** 110 Wn.2d 263, 751 P.2d 1165 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn,*** 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for

counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489.

a. Defendant received effective assistance of counsel as defense counsel objected to and argued extensively as to the admissibility of the 911 recording.

Officer Bortle made the following statements during voir dire examination:

Q The stop at the AM/PM the next day, Ms. Oien said something about a female doing it. Did she volunteer this or were you questioning her?
A I didn't question her. It was more like she was upset that he was being arrested. She just voluntarily blurted out that this happened by a female like it was going to make me change my mind arresting him.
Q You didn't really have much conversation with her at the AM/PM.
A No. She was very uncooperative, very. She did not want to talk to me. I actually did at one point try to talk to her, and she didn't want to talk to me at all.

RP 128.

At trial, defense counsel argued at length for the opportunity to question Officer Bortle about Ms. Oien's inconsistent statements. RP 202-205. The court denied defense counsel that opportunity by responding with, "It seems to me like it is inadmissible hearsay, Mr. [defense counsel]. I'm going to sustain objections to it, if they are raised unless you can convince that there is some exception to the hearsay rule that applies here." RP 205.

Counsel also objected to the admissibility of the 911 recording and argued extensively that it did not constitute an excited utterance. RP 130-146. Although defense counsel's objections were not sustained because the statements were properly found to constitute an excited utterance, counsel's performance cannot be said to be ineffective. The failure to a defendant's counsel to obtain a successful result is not indicative of ineffective representation. ***State v. Jury***, 19 Wn. App. 256, 576 P.2d 1302 (1978).

b. Defendant fails to demonstrate prejudice.

The defendant cannot demonstrate prejudice to his case. The defendant's current argument assumes that Ms. Oien would have testified that she fabricated the statements that she made during the 911 call. There is no evidence in the record that would support the defendant's current assertion. To the contrary, Ms. Oien's statements to the police as well as

her injuries corroborated her statements to the 911 dispatcher. The defendant provided no evidence or offer of proof at trial to demonstrate that Ms. Oien fabricated her statement. On direct appeal, the appellate court is limited to evidence or facts in the record. *See*, ***McFarland***, 127 Wn. 2d at 338; ***State v. Norman***, 61 Wn. App. 16, 27, 808 P.2d 1159 (1991). If the defendant wishes to argue or imply facts not in the record, the defendant must file a Personal Restraint Petition. *Id.*

The defendant's current argument is the type of speculative hindsight warned against in ***Strickland***, 466 U.S. at 689. Both federal and state courts have a strong presumption of competence of counsel and deference to counsel's decisions at trial. It is clear from the record in this case that counsel objected to the admissibility of the 911 recording. It is equally clear that it was properly admitted.

c. Defense counsel's decision not to question Ms. Oien during the pretrial hearing may have been a tactical decision.

Defense counsel's decision not to question Ms. Oien during her pretrial hearing may have been a tactical decision. It is possible that defense counsel intended to reserve questioning Ms. Oien about her inconsistent statements until trial. Defense counsel may have done so in order to either preserve the defense's strategy at trial or simply impeach

Ms. Oien later at trial. It was unforeseen that Ms. Oien would fail to appear at trial.

Analysis of ineffective assistance of counsel begins with a strong presumption of attorney competence and deference to strategic choices made by counsel. *See* ***Strickland***, 466 U.S., at 689; ***McFarland***, 127 Wn. 2d, at 335. Counsel's strategy in this case is readily apparent from the record. His performance and strategy are not deficient. The defendant cannot show that a different strategy would likely have resulted in acquittal.

In sum, review of the entire record shows that defense counsel was an effective advocate for his client. Defense counsel properly cross-examined witnesses and made opening and closing arguments. Counsel also brought appropriate pre-trial motions and objected at appropriate times throughout the trial.

Further, even assuming that Ms. Oien fabricated her statements, the inconsistent statements would go toward her credibility, not the admissibility of the 911 call. The court's decision toward the admissibility of the evidence is independent of Ms. Oien's credibility. Defendant received constitutionally effective assistance of counsel.

As defense counsel objected to and argued extensively as to the admissibility of the 911 recording, probably made a tactical decision not to question Ms. Oien, and defendant cannot demonstrate prejudice, counsel cannot be said to be ineffective, and this Court should reject defendant's claim and affirm his conviction.

D. CONCLUSION.

The 911 recording, as well as Ms. Oien's statements to the police, were made in the course of an ongoing emergency and are therefore nontestimonial. Further, the court properly admitted the 911 recording as an excited utterance. The 911 call was made after the event of Ms. Oien's beatings, strangulations, and death threats while she was still under the stress of the event, and the statements clearly related to the event. Finally, as defense counsel objected to and argued extensively as to the admissibility of the 911 recording, possibly made a tactical decision not to

question Ms. Oien, and defendant cannot demonstrate prejudice, counsel cannot be said to be ineffective. The State respectfully requests this Court to dismiss defendant's claim and affirm his conviction.

DATED: October 30, 2012.

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Pierce County
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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-31-12 Theresa Kan
Date Signature

PIERCE COUNTY PROSECUTOR

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