NO. 44566-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KELVIN KEON KERVILLE MARSHALL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 11-1-03626-1

BRIEF OF RESPONDENT

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2. Has defendant failed to prove prosecutorial misconduct where the prosecutor's rebuttal closing was a fair response to defendant's argument?

3. Has defendant failed to show he received ineffective assistance of counsel where counsel's performance was neither deficient nor prejudicial?

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5. Should this court decline to consider defendant's forfeiture argument where he has not shown a manifest error of constitutional magnitude?

B. STATEMENT OF THE CASE.

1. Procedure

On September 6, 2011, the State charged KELVIN KEON KERVILLE MARSHALL, hereinafter "defendant," with one count of burglary in the first degree with sexual motivation and one count of assault in the fourth degree. CP 1-2.

On September 24, 2012 the parties held a CrR 3.5 hearing to determine whether defendant's statements to law enforcement during an in-custody interview were admissible. CP 114-19; RP 4-62. The court then made several rulings addressing redactions of the interview. *See* RP 62-84.

Jury trial commenced on January 10, 2013, before the Honorable Vicki L. Hogan. RP 115. Two of the State's witnesses[1], failed to appear despite receiving a subpoena. RP 316. One of the witnesses, Mr. Prather, was alleged to be the victim of Count II. CP 1-2. The court signed material witness warrants but the witnesses did not appear to testify. RP 319, 428. As a result of Mr. Prather's failure to testify, defendant successfully moved to dismiss Count II at the close of the State's case for insufficient evidence. RP 428.

[1] Both witnesses had outstanding warrants on unrelated matters. RP 318.

On January 17, 2013, the jury found defendant guilty of Count I and found that defendant had committed the crime with sexual motivation. CP 193, 196; RP 486-87.

On February 22, 2013, the court sentenced defendant to an indeterminate sentence of 20[2] months to life, with an additional 24 months for the sexual motivation enhancement, to run concurrent. CP 201-16; RP 499. The court also imposed conditions of release and ordered defendant to forfeit property. CP 201-16.

Defendant filed a timely notice of appeal. CP 220.

2. Facts

On September 1, 2011, sometime after 9:00 p.m., Shannon Glenn was outside her apartment, smoking. RP 287. Her apartment building is located at 1122 North 6th Street in Tacoma, Washington. RP 286. It is also a secured building, requiring a key for access to the separate apartments. RP 286. While Ms. Glenn was smoking, she saw a young black man she did not recognize walk past her. RP 288-89. Because she did not recognize him from living in the building, she asked who he was. RP 288. The man put his head down and responded that he was with maintenance before continuing to the building's basement. RP 288-89.

[2] Defendant had an offender score of zero, giving him a standard range of 15-20 months to life. CP 201-16; *see also* RCW 9.94A.507(1)(a)(ii)1, (3)(a), (3)(b).

The man came back out of the basement after a short amount of time and left. RP 289. Ms. Glenn assumed the man was with maintenance, despite knowing that Mr. Prather generally performed maintenance duties around the building. RP 289.

Eddie Sumlin and Tasha Church live together in the same apartment building as Ms. Glenn. RP 218, 221, 270. On September 2, 2011, at approximately 7:00 a.m., Mr. Sumlin was drinking his morning cup of tea in his apartment on when he saw defendant loitering near a recreational vehicle (RV) outside his building. RP 272, 283. Mr. Sumlin and defendant made eye contact a couple of times, when defendant would look up at the second-floor apartment window. RP 272, 275, 283. Mr. Sumlin did not think defendant was suspicious, as he believed he was going camping with the owner of the RV. RP 274, 276.

Mr. Sumlin went to work and received a telephone call from his live-in girlfriend, Tasha Church, approximately an hour later. RP 272. Ms. Church sounded upset during the conversation. RP 277.

After Mr. Sumlin left the apartment, Ms. Church began working on her laptop computer inside the apartment. RP 227-28. The apartment was a small studio, requiring Ms. Church to sit on her bed while she used the computer. RP 224. There had been problems with the plumbing in the

apartment the week before, but the apartment manager, Vincent Prather, had fixed the issue. RP 226-27.

Scott Kidwell owns the RV and lives across the street from Mr. Sumlin's apartment. RP 298-99. He was outside his house, smoking, when he saw a car park behind his RV. RP 300. Mr. Kidwell saw defendant get out of the car and assumed he was calling someone inside the apartments from his cellular telephone. RP 301. He saw defendant walk around to the back of the apartment building. RP 301. Defendant reappeared a few minutes later, returned to his car, and grabbed a crescent wrench. RP 301. Mr. Kidwell thought this was unusual because a defendant's appearance was too neat to be a contractor or plumber. RP 301. A few minutes later, Mr. Kidwell saw the apartment manager "huffing and puffing like he had been running." RP 301-02. When the police arrived, Mr. Kidwell directed them to defendant's car. RP 308.

Ten to twenty minutes after Mr. Sumlin left for work, defendant knocked at the apartment door. RP 228. Ms. Church opened the door approximately two inches and saw defendant, who was carrying a utility bag. RP 229. Defendant stated that he was the maintenance man and that Vincent had told him to check the pipes. RP 229. Defendant then put his hand on the door, firmly pushed it open, and walked inside. RP 229-31. Defendant went into her bathroom. RP 231.

Ms. Church thought the situation was "off" because the plumbing had already been fixed, but she went back to work on her computer. RP 231. Defendant started asking her questions while he was inside the bathroom. RP 232. He asked Ms. Church her name and asked where she was from. RP 232. Ms. Church responded, "why do you need to know?" RP 233. Defendant apologized and said that he was just making conversation. RP 233. At that point, Ms. Church felt guilty for her response and answered defendant's questions. RP 233. As the questions continued, however, she became more uncomfortable and mentioned her boyfriend. RP 233.

Defendant left the bathroom to check the pipes in the kitchen. RP 234. Ms. Church had never reported a problem with the kitchen and began to think that defendant was not a maintenance man. RP 234. She looked up and saw defendant staring at her, holding wrench, eight or nine inches long. RP 234, 236. Defendant walked toward her, sat down next to her on the bed, pushed her hair aside, and started massaging her shoulder. RP 234. Defendant stated that she "look[ed] tense." RP 235. As defendant was massaging her shoulder, he was stroking the wrench suggestively with his other hand. RP 236.

Ms. Church told defendant "[y]ou need to stop." RP 237. Defendant asked her if she was happy in her relationship with her

boyfriend. RP 237. When she said "yes," he asked if she would call him if he gave her his telephone number. RP 237. She said she would not call him. RP 237. Defendant then said that Ms. Church had nice feet and grabbed her bare foot in an attempt to massage it. RP 238. Ms. Church told him again to stop and defendant released her foot but continued to stare at her. RP 238.

Ms. Church told defendant that he had to go back to his work and defendant went back into the bathroom. RP 239. When defendant's back was turned, Ms. Church closed her laptop and gathered her shoes, purse, and the book she was working on in preparation to leave the apartment. RP 239. As she was gathering her belongings, defendant asked "if her boyfriend goes down on [her], because [defendant] would." RP 240. Ms. Churched believed this statement to be a reference to oral sex. RP 251. She made a disgusted noise and left the apartment, visibly upset. RP 240. Defendant asked if she was leaving. RP 240.

When Ms. Church saw Mr. and Ms. Prather outside her apartment. RP 241. Because she was very angry, she confronted them about the people they were hiring to perform building maintenance. RP 241. The Prathers informed her that they had not hired anyone. RP 241. Mr. Prather ran to her apartment, but Ms. Church did not see either him or

defendant leave the area. RP 241-42. While Ms. Prather called 911, Ms. Church called Mr. Sumlin. RP 242.

When Ms. Church later returned to her apartment, she found her laptop open and a compact disc (CD) inside the driver that did not belong to her. RP 243-44.

Law enforcement determined defendant's identity through a records search of his license plate. RP 333. A manila envelope seen through the car's window gave the officers the information that defendant was in the military. RP 333. Tacoma police officer Pamela Rush went to defendant's address and spoke to his wife. RP 335. After ascertaining that defendant was not present, she coordinated with Joint Base Lewis McChord (JBLM) to find defendant. RP 336.

Officer Rush picked defendant up at JBLM later that afternoon and transported him to the police station for an interview. RP 337-41. At the base, she was given a bag with defendant's belongings inside. RP 339. The bag contained keys, a watch, two unopened condoms, a wallet, and a cellular telephone. RP 339.

At the station, Tacoma police detectives Keith Miller and Brad Graham interviewed defendant. RP 360. Detective Miller complied a photomontage and showed it to Ms. Church, Mr. Prather, Mr. Sumlin, and Mr. Kidwell. RP 373. Ms. Church and Mr. Prather identified defendant

from the montage, but Mr. Sumlin and Mr. Kidwell[3] were unable to make an identification. RP 373. Detective Miller also determined that defendant's fingerprints were not on the CD or the laptop. RP 374. Only Ms. Church's fingerprints were found on the CD. RP 375.

Defendant did not testify on his own behalf, but the interview was read for the jury. RP 365. During the interview, defendant initially stated that he had been working on his car when a black man ran past him followed shortly by a white man who grabbed him. Exhibit 23 (11). Defendant claimed he was able to get away from the man and ran back to his house. Exhibit 23 (11). When he returned to his car, he saw the police nearby so he went to his cousin's house. Exhibit 23 (11). Later, defendant admitted knocking on Ms. Church's door and telling her he was a plumber. Exhibit 23 (28). Defendant gave a disjointed[4] account of a conversation with Ms. Church. Exhibit 23 (28-30). According to defendant, Ms. Church was agreeable to the conversation and, at one point, he returned to his car to fetch a CD, which they both tried to play in her laptop. Exhibit 28 (28-30). Defendant was ultimately unable to tell

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[3] While Mr. Sumlin and Mr. Kidwell were unable to identify defendant, the witnesses described the man they saw as a black male, wearing a dark t-shirt and plaid shorts. See RP 230 (Ms. Church), 275 (Mr. Sumlin), 302-03 (Mr. Kidwell). Ms. Church identified this man as defendant. RP 232.

[4] Defendant's statements are disjointed as they appear to have no relation to each other. For example, after defendant said that Ms. Church told him she was from Tacoma, he continued, "[a]nd it was like, um, it was like a pair from the, um, toilets, from the Caribbean, she was like, okay, um, she . . . she been to the Caribbean." Exhibit 23 (28).

the detectives why he knocked on Ms. Church's apartment door. Exhibit 28.

C. ARGUMENT.

1. THE DETECTIVES' STATEMENTS WERE NOT IMPERMISSIBLE OPINION TESTIMONY AS THEY NEVER STATED THAT THEY DID NOT BELIEVE DEFENDANT OR THAT DEFENDANT WAS LYING.

Generally, a witness may not offer an opinion regarding the defendant's veracity. ***State v. Demery***, 144 Wn.2d 753, 759, 30 P .3d 1278 (2001). Opinion evidence is testimony based on one's belief rather than on direct knowledge. ***Demery***, 144 Wn.2d at 760. Such opinion evidence is unfairly prejudicial because it invades the jury's exclusive province. ***City of Seattle v. Heatley***, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). Washington courts have declined to take an expansive view of claims that testimony constitutes an opinion on guilt. ***Demery***, 144 Wn.2d at 760.

Generally, testimony given by lay and expert witnesses may not directly or by inference refer to defendant's guilt. ***State v. Demery***, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing ***City of Seattle v. Heatley***, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). But, "an opinion is not improper merely because it involves ultimate factual issues." ***State v.***

Olmedo, 112 Wn. App. 525, 530, 49 P.3d 960 (2002) (citing ***Heatley***, at 578 (citing ER 704).

To determine "whether testimony constitutes an impermissible opinion on the defendant's guilt" the court looks to the circumstances of each case. ***Olmedo***, at 531. In doing this, courts should consider factors that "include the type of witness, the nature of the charges, the type of defense and the other evidence." ***Demery***, at 759, (citing ***Heatley***, at 579).

In ***Demery***, defendant stated, "I mean you guys are lookin' at me, you know. [sic] talkin' to me like I'm lying." To which the interrogating officer responded, "Cause you are." In the lead opinion of the case, four justices found the statement to be permissible, four found it impermissible, and one agreed with the dissent that it was impermissible, but harmless. ***Demery***, 144 Wn.2d at 765–66, 30 P.3d 1278 (Alexander, C.J. concurring).

In ***State v. Jones***, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003), the arresting officer testified that during his interview with the defendant, "I just didn't believe him." This court held that this was an improper comment on the defendant's credibility. ***Jones***, 117 Wn. App. 92.

In ***State v. Kirkman***, 159 Wn.2d 918, 929, 155 P.3d 125 (2007), a physician testified that a juvenile rape victim gave "a very clear history" with "lots of detail," "a clear and consistent history of sexual touching . . .

with appropriate affect" and that "the physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent." The Court of Appeals reversed, finding that these statements were a clear comment on the victim's credibility. ***Kirkman***, 159 Wn.2d 930. On review, our Supreme Court reversed the Court of Appeals, finding that the physician comment on the victim's credibility as a witness may "clearly and consistently" provide an account that is false. ***Kirkman***, 159 Wn.2d at 930. In addition to the physician's testimony, the investigating officer testified that he tested the victim's competency, determined that she knew the difference between truth and lies, and that she promised to tell him the truth. ***Kirkman***, 159 Wn.2d at 930-31. The Supreme Court also held that this was not error, as the officer did not testify that he believed the victim or that she was telling the truth, he "merely provided the necessary context that enabled the jury to assess the reasonableness of the . . . responses." ***Kirkman***, 159 Wn.2d at 931 (citing ***Demery***, 144 Wn.2d at 764).

The present case is unlike either ***Demery*** or ***Jones*** in that the statements the officers made during the interview that the defendant was lying were excised from the transcript. Exhibit 23 (54, 57, 66-67, 69, 70). Rather, the statements were more like those in ***Kirkman***, as what remained were clear attempts to have defendant tell the detectives the entire story,

put the interview into context, and never directly or indirectly asserted the detectives' opinion that the defendant was lying.

At the beginning of the interview, defendant told the detectives that he was standing on the sidewalk near his car, talking on the phone with his wife, when a black man went running by, then a white man ran up to him and grabbed him. Exhibit 23 (11, 13-14). After hearing defendant's initial story, Detective Graham told defendant that, in many instances, interviewees say things that they believe the officers want to hear, but the officers only want him to say what is true. Exhibit 23 (17). Detective Graham told defendant that one of their jobs during an interview is to sort out the lies. Exhibit 23 (17). Detective Graham finally pointed out that this interview was the last opportunity prior to trial to give his version of the event, and that if his story changed between the interview and trial, it would negatively affect his credibility. Exhibit 23 (18). None of these statements amounts to an expression of the detective's opinion that defendant was lying. Finally, Detective Graham told defendant "I don't think you're [sic] been telling us the - the complete truth, have you?" Exhibit 23 (18). This statement suggests that defendant had been telling them information that they believed, but not the whole story. This was followed by defendant giving the officers more information as to what had happened. Exhibit 23 (28).

Despite including more information during the interview, defendant avoided answering the detectives' questions as to why he went to Ms. Church's apartment. Exhibit 23 (53). Detective Graham asked defendant if he told defendant that he randomly picked an apartment, knocked on the door, happened to have a tool bag, and stated that he was a plumber, what defendant would think of that. Exhibit 23 (54). Defendant stated that there was "something crazy with that story[.]" Exhibit 23 (54). This is not a statement of the officers' belief that defendant was not telling the truth, but a statement by defendant that he knew his story was far-fetched.

Detective Miller twice thanked defendant for his honesty during the interview. "I appreciate that you told us, for the most part, I think you've told us the truth and I think you're - you're avoiding the reason why you were knocking on the door." Exhibit 23 (54). Later Detective Miller repeated his appreciation for defendant's honesty, but again stated that he believed defendant was avoiding the question of why defendant knocked on Ms. Church's door. Exhibit 23 (59). Like the statements made at the beginning of the interview, neither statement suggest that the officer believed defendant was lying, but that he did believe that defendant was not telling him everything.

Unlike the statements made in ***Demery*** and ***Jones***, at no time did the jury hear the detectives tell defendant that they did not believe him or that they believed he was lying. Rather, they heard the detectives attempting to reason with defendant to get his side of the story and defendant's attempts to avoid a direct answer.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN SHE MADE A FAIR RESPONSE TO DEFENDANT'S CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Binkin***, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***Binkin***, at 293. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Binkin***, at 293-94.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. ***State v. Bryant***, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence does not support a defense theory. ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

"[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." ***State v. Fleming***, 83 Wn. App. 209, 213, 921 P.3d 1076 (1996). Such an argument misrepresents both the role of the jury and the burden of proof by telling jurors they have to decide who is telling the

truth and who is lying in order to render a verdict. ***State v. Wright***, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

Here, defendant attempted to avoid challenging Ms. Church's credibility by arguing that the difference between her testimony and his interview was a matter of interpretation as opposed to one of them lying. RP 463. Then he argued that Ms. Church was overly sensitive or predisposed toward thinking she could be attacked, and misinterpreted defendant's behavior. RP 463. But later he noted that Ms. Church denied talking about a Caribbean cruise or music with defendant and denied seeing the CD that was in her computer. RP 465. He contrasts her testimony with his interview statements, where he stated that they were talking about music and he left the apartment to get the CD out of his car and they put it in the computer together. RP 466-67. Defendant argued that the conversation was "a little bit friendlier" than Ms. Church claimed and that her testimony was "unrealistic." RP 467.

During rebuttal closing, the State addressed defendant's claim that the case was a matter of misinterpretation of events rather than anyone lying. RP 479. The State disagreed and pointed out that one of them has to be lying. RP 479. The prosecutor also stated that it was up to the jury to decide who was telling the truth. RP 479.

The prosecutor's statement was not misconduct. Despite stating that neither party lied, defendant argued that Ms. Church was lying - not misinterpreting - about not talking about music, not talking about a cruise, and not having seen the CD before. The State was entitled to make a fair response to this argument. The prosecutor's statement did not suggest that, in order to acquit defendant the jury had to find that the State's witnesses lied. Rather, the State argued that only one version of the event was true and that it was for the jury to determine which one.

Reviewed in the context, the prosecutor's statement was not misconduct.

3. DEFENDANT HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT OR PREJUDICIAL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. ***Cronic***, 466 U.S. at 656. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so

upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

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."). 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).

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). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (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." ***Strickland***, 466 U.S. at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he

> had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

"If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). Courts can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence. ***State v. Yarbrough***, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); ***State v. Price***, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005); ***State v. Barragan***, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); ***State v. Donald***, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993).

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. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Here, defendant claims his counsel was ineffective for failing to object to improper opinion testimony and failing to object to the prosecutor's rebuttal closing argument. Defendant has failed to show either prong of the ***Strickland*** test.

First, defendant cannot show deficient performance. Counsel did object to the detectives' statements[5] contained within the interview. RP 62-77. Not only was the issue preserved for appeal, but there was a legitimate trial tactic for not objecting during the reading of the transcript itself. By not objecting, counsel did not draw additional attention to those statements. Unlike testimony where a timely objection could put a stop to improper questions, this was a reading of a transcript where counsel knew exactly what information would be given to the jury. Counsel also knew that the prosecutor could not take advantage of the statements by following up with improper questions while they were reading the transcript. Also, as argued above, neither the detectives' statements nor

[5] As part of his argument, defendant claims that counsel failed to object to the "for the most part" comment and that the prosecutor agreed to strike it. Appellant's Brief at 22. However, a review of the record shows that the State never agreed to striking that statement. The "for the most part" comment occurred on page 54 of the transcribed interview. Exhibit 23 (54). The only portion of page 54 the State agreed to striking was defendant's statement "I mean, you don't have to believe me," and Detective Graham's response, "[w]ell I - that part I don't believe you, no." RP 71. Those statements were excised from the transcript. Exhibit 23 (54). The pages cited in defendant's brief show the State having no objection to striking portions of pages 57 and 59. RP 75-76.

the prosecutor's rebuttal closing argument were improper. Failing to object to proper argument is not deficient performance.

Second, defendant has failed to show prejudice. Even if the transcript had been excised as requested by counsel and the jury instructed to disregard the prosecutor's argument, the outcome of the trial would not have been different. While defendant's theory of the case was that his entry into Ms. Church's apartment was innocent, the uncontrovered evidence showed that defendant used a ruse to enter (Exhibit 23 (28); RP 229), touched her while inside the apartment (Exhibit 23 (29); RP 234, 238), and had a crescent wrench in his hand while he was inside the apartment (Exhibit 23 (33); RP 234). Moreover, defendant admitted that when he left the apartment, he abandoned his car because he saw police around it. Exhibit 23 (45). Defendant's theory that he pretended to be a plumber to get inside an apartment just to talk to a nice girl was wholly incredible and the outcome of the case would not have changed had counsel objected.

Finally, defendant's focus on two instances within the entire trial is not the correct standard to review a claim of ineffective assistance of counsel. The appropriate standard is to review counsel's performance in light of the entire record. A review of the entire record shows that defense counsel subjected the State's case to meaningful, adversarial testing. He

challenged the admission of defendant's statements to the police. RP 56. He moved for redactions of the statements based on ER 404(b) and improper opinion testimony. RP 62-77, 97-101. He argued for redaction of a portion of the 911 call, which was ultimately not played for the jury. RP 107-08. Counsel made appropriate objections, cross-examined witnesses, and made a closing argument. He moved for directed verdict for the assault in the fourth degree charge at the close of the State's case, which was granted by the court. RP 428. He proposed jury instructions for lesser-included crimes, which would have reduced the conviction from a class A felony to a misdemeanor. RP 401-04. Defendant received constitutionally effective assistance of counsel.

4. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN PART WHEN IT IMPOSED CONDITION 21 AS CONDITIONS ON DEFENDANT'S COMMUNITY CUSTODY BECAUSE THEY WERE NOT DIRECTLY RELATED TO DEFENDANT'S CRIME.

A trial court's statutory authority to impose specific community custody conditions is subject to de novo review. ***State v. Armendariz***, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If a challenged condition is statutorily authorized, the imposition of crime-related prohibitions for abuse of discretion is reviewed for abuse of discretion. ***Armendariz***, 160 Wn.2d at 110. Conditions that do not reasonably relate to the

circumstances of the crime, to the risk of reoffense, or to public safety are unlawful unless explicitly permitted by statute. *See* ***State v. Jones***, 118 Wn. App. 199, 207–08, 76 P.3d 258 (2003). "Although the trial court's prohibition on conduct ... during community custody must be directly related to the crime, it need not be causally related to the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

a. The trial court did not exceed its authority by prohibiting defendant from unlawfully possessing controlled substances.

Under RCW 9.94A.703(2)(c), trial courts may order that offenders "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions."

Defendant challenges condition 13, arguing that "licensed physicians" are not the only lawful prescription writers. Appellant's brief at 30. While defendant is correct that other medical personnel may write valid prescriptions, Conditions 3 and 4 state:

> 3) Not consume controlled substances or alcohol, except pursuant to lawfully issued prescriptions;
>
> 4) While on community custody do not unlawfully possess controlled substances;

CP 217-19. Clearly defendant's community custody conditions provide for prescriptions written by medical professionals other than physicians. At most, Condition 13 may be stricken as it is redundant.

b. The trial court exceeded its authority in part by prohibiting defendant from patronizing establishments that promote the commercialization of sex as under condition 27.

A sentencing court has the authority to impose conditions on a defendant's community custody that require him to obey a community's laws, regardless of whether the condition relates to the circumstances of defendant's conviction. *See* ***State v. Jones***, 118 Wn. App. 199, 205–06, 76 P.3d 258 (2003) (finding that the trial court did not err when it ordered defendant to engage in "law abiding behavior"). In Washington, it is a misdemeanor to patronize a prostitute. *See* RCW 9A.88.110.[6]

Condition 21 has three, distinct requirements:

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will

[6] RCW 9A.88.110 states:

A person is guilty of patronizing a prostitute if:

(a) Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or

(b) He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefore such person will engage in sexual conduct with him or her; or

(c) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

> define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 217-19.

The first, that defendant not possess or peruse any sexually explicit material should be struck as it is not crime related. Nothing in the trial suggests that defendant showed Ms. Church any sexually explicit material or that he perused such material before committing his crime.

In the second, the trial court properly ordered the defendant to comply with the community's laws and avoid patronizing prostitutes. The trial court's order in this regard is neither manifestly unreasonable nor based on untenable grounds.

For the third section of Condition 21, the trial court did exceed its statutory authority by prohibiting the defendant from patronizing establishments that promote the commercialization of sex, insofar as those institutions comply with the law. The record does not include any evidence that defendant's activities with such establishments were directly related to his crime. The State requests that the issue be remanded with instructions to strike the first sentence of Condition 21, that defendant not "possess or peruse sexually explicit material in any medium," and the last portion, that defendant not patronize "establishments that promote the commercialization of sex."

5. THIS COURT SHOULD DECLINE TO CONSIDER DEFENDANT'S ARGUMENT REGARDING FORFIETURE OF PROPERTY AS HE FAILED TO OBJECT TO THE FORFEITURE BELOW AND HAS NOT ATTEMPTED TO RECOVER ANY OF THE PROPERTY TO WHICH HE MIGHT BE ENTITLED.

Under RAP 2.5(a) The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise for the first time on appeal a manifest error affecting a constitutional right. RAP 2.5(a)(3). A constitutional error is manifest if actual prejudice results from the error. ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The burden is on the defendant to identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights at trial. ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). "[T]here must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." ***O'Hara***, 167 Wn.2d at 99 (internal quotation marks omitted) (quoting ***State v. Kirkman***, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice focuses on "whether the error is so obvious on the record that the error warrants appellate review." ***O'Hara***, 167 Wn.2d at 99–100. "[S]peculation or possibility is insufficient to show prejudice." ***State v. Sterling***, 23 Wn. App. 171, 177, 596 P.2d 1082 (1979).

"A court may refuse to return seized property no longer needed for evidence . . . if the defendant is not the rightful owner[.]" ***State v. Alaway***, 64 Wn. App. 796, 798, 828 P.2d 591, *review denied*, 119 Wn.2d 1016, 833 P.2d 1390 (1992).

Here, defendant asserts that the court-imposed condition of forfeiting all property exceeds the statutory authority of the court. Defendant has not shown that this issue is of constitutional magnitude. Moreover, the only record of property consists of the list of exhibits. CP 235-36. The exhibit list shows nothing to which defendant is entitled. He does not have any ownership claim to the photographs, photocopies, or 911 tapes, and he abandoned the CD at Ms. Church's apartment. As the record contains no property to which defendant is entitled, defendant has failed to show that any error is manifest.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions and remand solely to strike the first and last part of Condition 21 of the conditions of community custody.

DATED: December 19, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

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.

12/19/13
Date Signature

PIERCE COUNTY PROSECUTOR

December 19, 2013 - 11:15 AM

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