No. 44461-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JENNIFER MARKWITH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 12-1-00174-0

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because in the instant case each conviction is distinct in law and fact, conviction for both assault and reckless endangerment on the fact of this case does not violate double jeopardy.

2. Although the court's instructions to the jury in this case erroneously varied from the standard WPIC instructions by inadvertently omitting a sentence to instruct the jury that "[t]he defendant has no burden of proving that a reasonable doubt exists", the error was harmless beyond a reasonable doubt on the facts of this case.

3. Markwith contends that certain trial testimony constituted improper propensity evidence, but Markwith did not preserve this issue with an objection in the trial court. Additionally, the State contends that the evidence was not propensity evidence and that it was admissible as *res gestae* evidence relevant to the crimes of conviction.

4. Markwith contends that the trial court erred by admitting evidence in violation of ER 404, but Markwith failed to object on this basis in the trial court. Because Markwith's only objection was a generalized objection without specifying a basis, the error is not properly preserved for appeal. Additionally, the State contends that the evidence was not character evidence and that it was admissible as *res gestae* of the crimes of conviction.

5. Because trial counsel's failure to object to admission of evidence can be explained as legitimate trial tactics

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or strategy, and because Markwith cannot show that the result of the trial would probably be different but for trial counsel's alleged error, counsel was not ineffective for not objecting to admission of evidence

6. During a post-*Miranda* discussion with the arresting officer in this case, Markwith became irrational and belligerent and began accusing the deputy of lying and of using drugs with the victim. The deputy testified that when this occurred, he gave up asking any more questions. This testimony did not constitute a comment on Markwith's right to remain silent.

B. FACTS AND STATEMENT OF THE CASE

Early in 2012, Jennifer Markwith and Yvonne Bell were together in a grocery store when they ran across Angela Tecpile,[1] who was an old friend of Bell's. RP 91. At the time, Markwith and Bell were romantically involved, and had been dating for about ten years. RP 78, 114-15, 128. Angela had a room for rent, which was in a loft in a barn behind her house at 911 Arcadia Road in Shelton. RP 154. Another tenant, Dan Irwin, lived below the loft in the barn. RP 70, 100. Angela offered to rent the loft to Bell, who accepted the offer. RP 70, 78, 91.

[1] To distinguish Angela Tecpile and her husband, Julio Tecpile, they are occasionally referred to by their first names.

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Markwith lived with Bell in the loft. RP 70, 78, 115. There was no running water and no kitchen in the loft, so Markwith and Bell were allowed to use the bathroom and kitchen in the main house, where Angela lived with her husband, Julio Tecpile. RP 64-65, 70-71, 129. Bell and Markwith kept some soap and other toiletries in the house, and they went in whenever they wanted to take a bath or to use the kitchen. RP 70-71.

On the evening of April 23, Markwith became upset because she thought Bell and Angela were sleeping together. RP 115, 129, 158, 169, 172. There was a confrontation, and at some point Markwith used a bat to break out the back glass on Bell's car. RP 135, 169, 171-72. The sequence of events is uncertain, but at some point, either before or after Markwith broke out the glass on Bell's car, sometime between midnight and 2:00 a.m., Bell went to Angela's house to sleep for the night. RP 115, 158, 169. There was a confrontation between Markwith and Angela, and in the process, Angela told Markwith that she was no longer welcome on the property and that she'd have to pack her things and leave. RP 79, 158-59.

But Markwith stayed in the loft until morning. RP 159, 169. At around 7:00 in the morning, Markwith went to the house to contact Bell.

RP 76, 116, 159, 169. Another confrontation broke out between Markwith and Angela. RP 76, 159, 171. The police were called, and when the police arrived, they saw signs that Markwith had been assaulted. RP 76, 119, 160. Bell would later say that she saw Markwith self-inflict those injuries. RP 119, 129-30. But, she did not say this while the police were there investigating; so, the police arrested Angela and took her to jail. RP 64-65, 71, 76, 160.

About an hour after she was arrested, Angela was released from jail. RP 65, 71. Her husband, Julio, drove to the jail and picked her up at about 8:00 a.m. RP 65, 71, 77. Julio told Angela that he had learned that Markwith had taken Angela's Wii gaming system from inside the house. RP 65, 77. Upon learning this, Angela called 911 and then went home to find that the Wii and other things were missing. RP 77-78, 80.

Sometime later in the morning, Angela, Julio, and Irwin left the house to go the Chevron station and buy cigarettes. RP 67, 80, 101. While they were there, they thought they saw Markwith and Bell go driving past, and it looked like they were on their way to the house. RP 68, 80. So, they jumped in their car and began to try to follow them. RP 80. When they arrived back home, they drove around to the rear of the

house, and there they saw Markwith and Bell with the car backed up to the barn, where they were loading their things. RP 68. Angela told Julio to park across the roadway so as to block Markwith's escape, and as Julio did so, Angela called the police. RP 68, 81.

When Bell saw Julio and Angela, she got out of the car and approached Angela because she wanted to give her a hug goodbye. RP 81, 121. Angela yelled at Markwith to stay put because the cops were on the way. RP 81. When she did so, Markwith got in the car and revved the engine. RP 81. She stomped on the gas and drove the car straight toward Angela's car, where Angela, Bell, Irwin, and Julio were all standing. RP 82, 102, 123. Markwith drove toward Angela's car but then changed course and drove toward Angela. RP 81-82. Angela was standing by the car as Markwith approached it, so she moved away, but when she moved, Markwith changed direction and continued to drive toward Angela, who had to jump out of the way. RP 81-82, 87, 124. Angela thought that Markwith intended to run her over and possibly kill her. RP 82. But before striking Angela with the car, Markwith turned the car toward a barbed wire fence. RP 69, 82.

Irwin used a walker to help him get around, and because he sensed trouble when the confrontation began, he tried to flee from the scene and go into the house. RP 102. Irwin was hobbling toward the house when Markwith turned the car and drove through the barbed wire fence. RP 103, 125. Several fence post were broken off, and the fence became trapped by the car. RP 103, 125. As the car dragged a part of the barbed wire fence, the fence snagged Irwin's walker, tipped it over, and caused Irwin to fall to the ground and receive minor injuries. RP 103, 125.

Markwith stopped momentarily and told Angela that she'd be back to burn the house down and to shoot her and her family. RP 82. She then drove through the garden and got back on the driveway and drove away. RP 125.

The State charged Markwith with residential burglary, assault in the second degree, and reckless endangerment. CP 19-20. Count II of the information, alleging assault in the second degree, specified that Markwith had assaulted Angela Tecpile with an automobile. CP 20. Count III, which alleged reckless endangerment, specified that Markwith had recklessly engaged in conduct that created "a substantial risk of death or

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serious physical injury to another person...." CP 20. The jury returned guilty verdicts for each of the three charges. RP 243.

C. ARGUMENT

1. Because in the instant case each conviction is distinct in law and fact, conviction for both assault and reckless endangerment on the fact of this case does not violate double jeopardy.

A claim of double jeopardy raises a question of law that is reviewed de novo and may be raised for the first time on appeal. *State v. Strine*, 176 Wn.2d 742, 751, 293 P.3d 1177 (2013).

Markwith contends that her duel convictions in the instant case for reckless endangerment and for assault in the second degree violate state and federal constitutional protections against double jeopardy. Appellant's Opening Brief at 6. '"Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause.'" *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007), quoting *In re Pers. Restraint of Percer,* 150 Wn.2d 41, 49, 75 P.3d 488 (2003). Both the federal and state constitutions prohibit: "(1) a second

prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding." *Womac* at 650-51, citing *Percer* at 48–49 (further citations omitted).

Markwith's arguments do not involve prohibitions (1) and (2); instead, Markwith relies on prohibition (3) and contends that her crime of assault and her crime of reckless endangerment are "based upon the same act of allegedly driving toward Ms. Tecpile and Bell." Appellant's Opening Brief at 8. Contrary to Markwith's assertions on appeal, however, the evidence at trial shows that, before committing the crime of reckless endangerment, Markwith first drove a car toward Angela Tecpile, and the evidence shows that Markwith did so with the intent to scare her into believing that she was about to be run over by the car and that she was, therefore, in imminent danger of death or serious bodily harm. RP 69, 81-82, 87, 102, 124. The evidence shows that after scaring Angela, Markwith then turned the car and drove through a barbed wire fence. RP 82, 125, 163, 178. After driving through the fence, Markwith continued to drive away despite the fact that she was dragging the fence along with her and despite the fact that her conduct endangered another person, Irwin,

who was put in danger of grave harm when the fence ripped his walker away from him. RP 82, 103, 125. Thus, Markwith committed two distinct acts: the first was an assault committed against Angela Tecpile; and the second, which followed the first and did not begin until after the assault had ended, was the act of recklessly endangering Irwin. RP 82, 103, 125.

If there were, in fact, other people who were standing near Angela when Markwith drove a car toward her, then a separate count of assault for each of those victims may give rise to an additional conviction of assault without violating double jeopardy. *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994); *State v. Smith*, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007). Likewise, if more than one person was put in danger when Markwith drove her car through the barbed wire fence, then, without violating double jeopardy, each additional victim may give rise to a separate count and conviction for reckless endangerment. *State v. Graham*, 153 Wn.2d 400, 407-08, 103 P.3d 1238 (2005). It follows, then, that when each crime involves separate victims, duel convictions for both assault and for reckless endangerment do not offend double jeopardy. *State v. Rivera*, 85 Wn. App. 296, 300-01, 932 P.2d 701 (1997).

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At trial of the instant case, the prosecutor argued during closing argument that Markwith committed the crime of assault in the second degree because, with the intent to cause Angela to fear imminent bodily injury (which resulted in Angela actually fearing imminent bodily injury), Markwith drove a car toward Angela. RP 216, 223-24, 237. The prosecutor then separately argued that Markwith committed the crime of reckless endangerment because she "drove the car right toward a group of people, which included Bell, Irwin, and Angela." RP 224. The prosecutor argued that Markwith's conduct was reckless because it caused "[t]he barbed wire fence [to] hit Irwin's walker, ripping it away from him." RP 225.

An assault occurs when one intentionally places another person in reasonable apprehension or fear of an imminent offensive touching. *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012); *State v. Jarvis*, 160 Wn. App. 111, 117-18, 246 P.3d 1280 *review denied*, 171 Wn.2d 1029, 257 P.3d 663 (2011). The crime of assault in the second degree occurs when one assaults another person with a deadly weapon. RCW 9A.36.021(1)(c). "A person is guilty of reckless endangerment when he or she recklessly engages in conduct... that creates a substantial risk of death

or serious physical injury to another person." RCW 9A.36.050; *State v. Graham*, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005).

"Washington follows the 'same evidence' rule which this court adopted in 1896." *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007), quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). "'[T]he defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.'" *Womac* at 652, quoting *Calle* at 777.

But in the instant case, the offense of reckless endangerment and the offense of assault in the second degree are distinct in both law and fact because each crime involved different victims, and each crime required proof of an element not required by the other. Count II of the information and RCW 9A.36.021(1)(c) required proof that Markwith assaulted Angela Tecpile and that she did so intentionally and with an automobile that was used as a deadly weapon. CP 20. Count III of the information and RCW 9A.36.050(1) required proof that recklessly engaged in conduct that created a "substantial risk of death or serious physical injury to another person...." CP 20.

The instant convictions are not the same in law in fact. In fact, one involves an apprehension of harm against Angela, and the other involves reckless conduct that endangered Irwin. In law, one involves intent to assault, and the other involves reckless conduct that endangers another. Thus, neither offense is identical in either law or fact, and conviction of both offense does not violate double jeopardy. *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

2. Although the court's instructions to the jury in this case erroneously varied from the standard WPIC instructions by inadvertently omitting a sentence to instruct the jury that "[t]he defendant has no burden of proving that a reasonable doubt exists", the error was harmless beyond a reasonable doubt on the facts of this case.

The trial court, apparently inadvertently, provided a "reasonable doubt" jury instruction that differed from WPIC 4.01 because it erroneously omitted the sentence that "[t]he defendant has no burden of proving that a reasonable doubt exists." CP 27 (Jury Instruction No. 3). The State contends that this error was harmless beyond a reasonable doubt.

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The trial court in the instant case instructed the jury in Instruction No. 3, as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State of Washington is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

RP 204-05; CP 27. The instruction provided to the jury differed from the pattern WPIC instruction because it, apparently inadvertently, omitted the following sentence, which appears at the end of the first paragraph of the pattern instruction, as follows: "The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed) (brackets and italics appear in original). Markwith contends that omission of this sentence is error that entitles her to a new trial. Appellant's Opening Brief at 9-13.

A challenged jury instruction is reviewed de novo, in the context

of the instructions as a whole. *State v. Castillo,* 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett,* 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury about the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Id.* It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. *Id.*

But an erroneous jury instruction is "generally subject to a constitutional harmless error analysis." *State v. Lundy,* 162 Wn. App. 865, 871, 256 P.3d 466 (2011). The reviewing court on appeal may hold the error harmless if it is satisfied "'beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *Lundy,* 162 Wn. App. at 872 (quoting *State v. Bashaw,* 169 Wn.2d 133, 147, 234 P.3d 195 (2010), overruled on other grounds by, *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *Lundy,* 162 Wn. App. 872.

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Markwith contends that the reasonable doubt jury instruction provided in this case was reversible error under our Supreme Court's *Bennett* decision. *Bennett* "instructed" trial courts "to use the WPIC 4.01 instruction ... until a better instruction is approved." *Bennett*, 61 Wn.2d at 318. The *Bennett* court, however, did not decide whether the failure to give the entire WPIC 4.01 was automatically reversible or instead subject to harmless error analysis.

Division One of the Court of Appeals, in *State v. Castillo,* 150 Wn. App. 466, 469, 208 P.3d 1201 (2009), has concluded that such failure is grounds for automatic reversal. *See* 150 Wn. App. at 472. Division Two of the Court of Appeals, however, reached the opposite conclusion in *State v. Lundy,* 162 Wn. App. 865, 871, 256 P.3d 466 (2011), and held that failure to give WPIC 4.01 verbatim was subject to harmless error analysis. *Lundy,* 162 Wn. App. at 872–73.

Neither party in the instant case highlighted the State's burden of proof, and neither party suggested that Markwith had any burden of proving or disproving anything at trial. Here, contrary to the facts of *Castillo*, the State never tried to shift its burden of proof. *Castillo* at 473. Additionally, *Castillo* involved a potentially confusing jury instruction,

but the instruction in the instant case did not contain any such misleading or confusing alterations. *Id.* at 470-71; CP 27.

Finally, the State's instruction to the jury in the instant case contained the following language: "The State of Washington is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." CP 27. This language clearly states that the State bore the burden of proof beyond a reasonable doubt.

In light of the instructions as a whole and the arguments of the attorneys, Markwith has failed to demonstrate that omission of the "defendant has no burden" sentence from the instruction caused him prejudice, especially in light of the fact that the State never attempted to shift the burden of proof to him, the fact that the jury was aware that the State bore the burden, and the fact that the evidence supporting his conviction was overwhelming. The circumstances show beyond a reasonable doubt that the jury verdict would not have differed had the trial court included the additional "defendant has no burden" sentence in its reasonable doubt instruction. Accordingly, the State contends that omission of this sentence was harmless error.

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3. Markwith contends that certain trial testimony constituted improper propensity evidence, but Markwith did not preserve this issue with an objection in the trial court. Additionally, the State contends that the evidence was not propensity evidence and that it was admissible as *res gestae* evidence relevant to the crimes of conviction.

Markwith contends that the jury received improper propensity evidence when it received evidence that she broke the rear window of the victim's car the night before she committed the crimes charged in the instant case. Br. of Appellant at 15-16. Markwith did not preserve this issue with an objection in the trial court, but she contends that the issue may be raised for the first time on appeal because, she contends, "[t]he use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment." Br. of Appellant at 14.

To support this contention, Markwith cites *Garceau v. Woodford,* 275 F.3d 769 (9th Cir.2001), *reversed on other grounds by Woodford v. Garceau,* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). Br. of Appellant at 14. However, this Court is bound only by decisions of our state Supreme Court and nonsupervisory decisions of the United States Supreme Court. *In re Pers. Restraint of Crace,* 157 Wn. App. 81, 98 n. 7,

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236 P.3d 914 (2010), *reversed on other grounds,* 174 Wn.2d 835, 280 P.3d 1102 (2012).

Under RAP 2.5(a)(3) an issue cannot be raised for the first time on appeal unless it is a manifest error that effects a constitutional right. *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). During trial, there were several brief references to the fact that Markwith had busted out the back glass of Bell's car. RP 134, 135, 153, 169, 170, 171, 172. But there are no citations to an objection to this testimony in the trial court. "A trial court does not err in considering evidence that a defendant has not moved to suppress." *State v. Jones*, 163 Wn. App. 354, 364, 266 P.3d 886 (2011) *review denied*, 173 Wn.2d 1009, 268 P.3d 941 (2012), citing *State v. Mierz,* 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Generally, an objection to propensity evidence should be made under ER 404. *See, e.g., State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002). Evidentiary errors are not of constitutional magnitude. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009); *State v. Smith,* 106 Wn.2d 772, 780, 725 P.2d 951 (1986); *State v. Jackson,* 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Because Markwith did not object to the evidence's admission at trial, the court should not review it on appeal. *Id.*

Additionally, even if evidence of the breaking of the window was constitutional error, which it is not, it would nevertheless not be error that is "manifest" on the facts of the instant case. To establish manifest constitutional error, Markwith must both identify a constitutional error and make a showing that the error negatively affected her rights at trial. *State v. Kirkman,* 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007). "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *Id.* at 927. Thus, Markwith bears the burden of showing that the alleged error had "practical and identifiable consequences in the trial...." *State v. O'Hara,* 167 Wn.2d 91, 99, 217 P.3d 756 (2009), quoting *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotation marks omitted). Markwith has not shown actual error.

Markwith argues that the trial court erred by not giving a limiting instruction regarding this evidence. Br. of Appellant at 15. But Markwith did not request a limiting instruction, and the court is not required to *sua sponte* give such an instruction. *State v. Russell,* 171 Wn.2d 118, 124, 249 P.3d 604 (2011). There is no reversible error for failure to give a limiting

instruction where none was requested. *State v. Hess,* 86 Wn.2d 51, 52, 541 P.2d 1222 (1975).

The evidence was not propensity evidence. Evidence of Markwith breaking out the window of the car was relevant and admissible because it showed a continuing course of action by Markwith. *State v. Grier*, 168 Wn. App. 635, 648-49, 278 P.3d 225 (2012). Evidence of Markwith's actions and behavior in the hours leading up to her crimes of conviction explained her jealousy, her anger, and her intent, and thereby helped to "'set the stage'" for the assault against Angela Tecpile. *Id.* at 648, quoting *State v. Schaffer,* 63 Wn. App. 761, 770, 822 P.2d 292 (1991), *aff'd,* 120 Wn.2d 616, 845 P.2d 281 (1993). Thus, evidence of the broken window '"explained parts of the whole story which otherwise would have remained unexplained."' *Grier* at 649, quoting *State v. Mutchler,* 53 Wn. App. 898, 902, 771 P.2d 1168 (1989). As such, this evidence showed nothing about Markwith's character or propensity to commit crime; instead, it showed a series of events that explained her intent.

Finally, although the State contends that no error occurred, even if admission of this evidence was error, the error was harmless. Such error would be harmless if there is no reasonable probability that the outcome of

the trial would have been different had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The jury heard ample evidence to support each of the crimes of conviction; thus, admission of this testimony would not affect the outcome of the trial within any reasonable probability. *State v. Grier*, 168 Wn. App. 635, 651-52, 278 P.3d 225 (2012).

4. Markwith contends that the trial court erred by admitting evidence in violation of ER 404, but Markwith failed to object on this basis in the trial court. Because Markwith's only objection was a generalized objection without specifying a basis, the error is not properly preserved for appeal. Additionally, the State contends that the evidence was not character evidence and that it was admissible as *res gestae* of the crimes of conviction.

During trial, Markwith asked the court to exclude evidence that the night before she committed the crimes charged in this case, Markwith had been intimidating Bell, which caused Bell to sleep in Angela Tecpile's house rather than sleep out in the barn with Markwith. RP 110. Without specifying any evidence rule or other basis for the motion, Markwith simply addressed the court as follows: "So I would ask that there – any testimony about that be excluded." RP 110.

The court asked the prosecutor for a response, and the prosecutor began his response by stating, "Well, Your Honor, I think that it is relevant." RP 111. The prosecutor then went on to explain that this testimony was invited by Markwith when she insisted on introducing evidence that there had been an assault between Markwith and Angela the night before the charged crimes occurred in this case. RP 45, 111. The prosecutor explained as follows:

> And it goes directly to her state of mind, i.e. she wasn't afraid because she had - there had been no assault and she had basically fabricated a story to make it up because she was angry at Ms. Tecpile, so I think I think [sic] it certainly should come in.

RP 111.

The trial court then sought clarification, as follows:

> THE COURT: Okay. I want to make sure that I'm not being – that I'm not confused here. So, Ms. - the issue that Mr. Sergi [Markwith's attorney] wants excluded, the evidence is Ms. Bell's fear of and the reason for that fear of Ms. Markwith?
> MR. SERGI: Right, the night before, April 23.

RP 111. There was still no reference to ER 404 or to any other evidence rule by Markwith, by the court, or by the prosecutor.

Without reference to any evidence rule or other authority, the court then ruled, with the following exchange:

> The Court: I am going to allow that testimony to come in. Anything else?
>
> MR. SERGI: I would take exception to that, for purposes of the record.
>
> THE COURT: Exception noted. I think it goes to – it goes, actually, one, to Ms. Bell's state of mind and also as to why she was in the home. Alright, anything further before we bring in the jury?

RP 113. There was never any mention of any rule of evidence, and particularly no mention of ER 404, related to this defense motion. The only hint at the basis of Markwith's motion was the prosecutor's reference to "relevance," which was not disputed or corrected by the defense. RP 111.

On appeal, Markwith now contends that introduction of this evidence at trial violated ER 404(b). Br. of Appellant at 17-20. But Markwith failed to object on this basis at trial. RP 110-13. Therefore, this issue is not preserved for appeal. *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007).

Additionally, contrary to Markwith's assertion on appeal, at trial the evidence was not offered to prove Markwith's character. RP 110-13. Instead, the evidence was offered and was admissible because it described a continuing course of action by Markwith. *State v. Grier*, 168 Wn. App. 635, 648-49, 278 P.3d 225 (2012). As in the State's argument in section

three, above, this evidence was admissible because it was part of the *res gestae* of the offense. *Id.*

Finally, although the State contends that no error occurred here, even if there was error, the error was harmless. Any error in the admission of prior misconduct is harmless unless the reviewing court finds that the outcome of the trial court would have been different had the error not occurred. *State v. Jackson,* 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Error is harmless when the court "cannot say that 'within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Grier*, 168 Wn. App. 635, 651, 278 P.3d 225 (2012), quoting *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981). As in the corresponding discussion of this topic in section three, above, the jury in this case heard ample evidence to support each of the crimes of conviction; thus, admission of this testimony would not affect the outcome of the trial within any reasonable probability. *State v. Grier*, 168 Wn. App. 635, 651-52, 278 P.3d 225 (2012).

5. Because trial counsel's failure to object to admission of evidence can be explained as legitimate trial tactics or strategy, and because Markwith cannot show that the result of the trial would probably be different but for trial counsel's alleged error, counsel was not ineffective for not objecting to admission of evidence.

Markwith contends that evidence of the fact that she intentionally busted out the window of Bell's car (during the night before the morning on which she committed the crimes of conviction in the instant case) was so substantially prejudicial that it denied her a fair trial. Br. of Appellant at 20-22. Markwith further contends that her trial counsel was ineffective for soliciting testimony about the broken car window. *Id.* Markwith supports her contention with citations to the verbatim report at pages 129 and 134-135. *Id.* at 22.

But, it is not apparent that trial counsel actually solicited this testimony. The first reference to it occurred as follows:

Q. Were you intending on leaving with Jennifer or were you going to stay there?
A. I was going to stay because of the violence our relationship had taken a turn towards the night before.

RP 129. This question and answer does not indicate that counsel solicited testimony about the car window. The next reference to the car window occurred as follows:

> Q. And you said that you went to a friend's house after Jennifer was arrested.
> A. Yes.
> Q. Who was that?
> A. Kelly Burdette.
> Q. Okay. And why did you go there?
> A. Um, I was feeling really lost because of the situation that happened. I didn't really know or have anywhere else to go or anyone really to talk to about what happened, and I really just wanted somewhere safe to go, given the situation that happened the night before with the window being bashed out with a bat, by my ex and everything.

RP 134. Again, it does not appear that counsel actually solicited testimony about the car window; instead, it appears that the witness blurted it out.

The final reference to the car window occurred as follows:

> Q. Do you recall telling Ms. Burdette that you had taken the computer and the game controller?
> A. No. What I told her was that Jennifer had taken my friend's property out of her house and that I wanted her, if she could, give me a ride back up there to return the property.
> Q. Why couldn't you drive yourself?
> A. Because the back window was bashed out of my car the night before by Jennifer with a bat.

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RP 134-35.

To prove ineffective assistance of counsel, Markwith must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced her. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009). On review, the court presumes that counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A deficient performance claim cannot be based on matters of trial strategy or tactics. *State v. Weber,* 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing *State v. Cienfuegos,* 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). "The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct." *State v. Alvarado,* 89 Wn. App. 543, 548, 949 P.2d 831 (1998).

As argued elsewhere in the State's brief, evidence that Markwith had broken out Bell's car window described a continuing course of action by Markwith and was admissible as *res gestae* of the crimes of conviction. *State v. Grier*, 168 Wn. App. 635, 278 P.3d 225 (2012). There was no order suppressing or excluding the evidence, and the court had already

ruled to allow evidence that showed Bell's fear of Markwith and the reason for that fear. RP 111.

Thus, trial counsel had nothing to gain from voicing an objection (or a motion to strike as non-responsive) when Bell initially volunteered testimony that Markwith had broken out her car window. Voicing the objection would have highlighted the testimony and risk that the jury would perceive it as something that the defense regarded as particularly damaging. Still more, regardless whether counsel initially intended to elicit the testimony, accepting the testimony and moving past it had the tactical effect of deemphasizing it and diminishing its effect. Choosing not to object in these circumstances constituted a valid trial strategy. *In re Pers. Restraint of* Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Finally, Markwith must also show that she was prejudiced by her counsel's deficient performance. *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)). The jury in this case heard ample evidence in support of each of the crimes of conviction, and Markwith has not shown that but for her counsel's failure to object to

evidence of the broken car window the result of the trial would probably have been different. On these facts, Markwith has not shown prejudice.

6. During a post-*Miranda* discussion with the arresting officer in this case, Markwith became irrational and belligerent and began accusing the deputy of lying and of using drugs with the victim. The deputy testified that when this occurred, he gave up asking any more questions. This testimony did not constitute a comment on Markwith's right to remain silent.

Markwith contends that Deputy "McGill testified that he attempted to conduct post-arrest questioning and that Ms. Markwith exercised her constitutional right not to answer." Br. of Appellant at 26. Markwith's right to remain silent is not in dispute. It is axiomatic that it is impermissible for the State to ask the jury to draw an inference of guilt based upon a defendant's exercise of his or her right to remain silent. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

But in the instant case, Markwith did not assert her right to remain silent, and neither Deputy McGill nor the State made any comment or suggestion in regard to Markwith's constitutional rights. RP 141-42. Markwith voluntarily conversed with Deputy McGill, up to a certain point.

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RP 141-42. Then, rather than choosing to remain silent, she then chose to speak out belligerently, calling Deputy McGill a liar and accusing him of using drugs with the victim. RP 141-42.

The State contends that speaking out belligerently without mentioning the right to remain silent is not an assertion of the right to remain silent, and that the State in this case did not comment upon Markwith's right to remain silent; instead, the State commented upon her choice to speak out belligerently. RP 141-42. Although the prosecutor's question did not elicit the response, the only comment by Deputy McGill was as follows: "Right, and at that time I could not get anything out of her, so I just stopped any questioning." RP 142. But this comment was not a comment on Markwith's right to remain silent, nor did it suggest that she had exercised a right to remain silent or that she simply had chosen not to give a statement. The only thing suggested by Deputy McGill is that when Markwith belligerently began calling him a liar and accusing him of using drugs with the victim, *he chose to stop questioning her.*

A "comment" occurs when the State uses the silence "to suggest to the jury that the silence was an admission of guilt." *State v. Lewis,* 130

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Wn.2d 700, 707, 927 P.2d 235 (1996). There is no citation to the record where this can plausibly be argued to have occurred in this case.

No reference to or comment upon Markwith's right to remain silent occurred in this case, but even if Deputy McGill's testimony could be characterized as a reference to the right to remain silent, the comment would be an indirect reference as opposed to a direct reference. *State v. Pottorff*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007). Review of an indirect reference requires use of a nonconstitutional harmless error standard to determine whether the error probably affected the outcome of the trial. *Id.*

Neither the deputy nor the prosecutor invited the jury to infer guilt based upon Markwith's belligerent response. Therefore, prejudice, if any, was limited. *See, e.g., State v. Lewis*, 130 Wn.2d 700, 706, 927 P.2d 235 (1996) ("Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence.").

Because the untainted evidence in this case was overwhelming and Markwith's conduct was not used as substantive evidence of guilt, reference to Markwith's conduct, even if it were a comment on the right to

remain silent, was harmless beyond a reasonable doubt. *Lewis,* 130 Wn.2d at 706–07; *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). But the lesser standard of nonconstitutional error applies in this case, and where the error is harmless beyond a reasonable doubt, it is more so improbable that the alleged error affected the outcome of the trial. *State v. Pottorff*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007). As such, Markwith has failed to meet her burden on appeal on this issue. *Id.*

Finally, Markwith asserts that her attorney was ineffective for failing to object to testimony about Markwith's comments to Deputy McGill. Br. of Appellant at 27. However, as argued elsewhere in the State's brief, to show ineffective assistance of counsel, Markwith must show both that her attorney was deficient and that his deficient performance prejudiced her. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009). And, a deficient performance claim cannot be based on matters of trial strategy or tactics. *State v. Weber,* 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing *State v. Cienfuegos,* 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)).

First, as argued elsewhere, the testimony now challenged on appeal in this case did not constitute a comment on Markwith's right to remain

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silent. Therefore, counsel did not err by not objecting on that basis. But even if it were an indirect comment on Markwith's right to remain silent, or even if the testimony were objectionable for some other purpose, such as relevance, counsel would have a legitimate tactical or strategic reason not to raise the objection.

The testimony, limited as it was, was hardly prejudicial. But voicing an objection to it might have raised the jury's awareness and might have imparted a suspicion that the testimony was somehow more important than it was. "[D]efense counsel's decision not to object can be characterized as legitimate trial strategy or tactics. Counsel may not have wanted to risk emphasizing the testimony with an objection." *In re Pers. Restraint of* Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

In addition to it being a legitimate trial strategy or tactic for her attorney to refrain from objecting on these facts, Markwith's ineffective assistance of counsel claim on this issue should also fail because she cannot show prejudice. As argued elsewhere in the State's brief (where the same claim was raised in regard to other issues), the jury received ample, overwhelming evidence of Markwith's guilt; thus, Markwith's claim on this point should fail because she has not shown, and cannot

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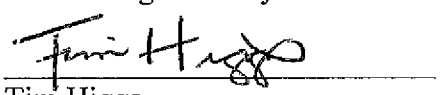
show, that she was prejudiced by her counsel's allegedly deficient performance. *State v. Thomas,* 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

D. CONCLUSION

For the reasons stated above, the State asks the court to deny Markwith's appeal and confirm the convictions.

DATED: December 2, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
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MASON COUNTY PROSECUTOR

December 02, 2013 - 3:49 PM

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