NO. 45115-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL T. JACKSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00156-8

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# BRIEF OF RESPONDENT

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| | Jodi R. Backlund<br>Po Box 6490<br>Olympia, WA 98507-6490<br>Email: backlundmistry@gmail.com | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.<br>DATED April 24, 2014, Port Orchard, WA<br>**Original e-filed at the Court of Appeals; Copy to counsel listed at left.** |

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## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Michael T. Jackson was charged by information filed in Kitsap County Superior Court with the second-degree domestic-violence assault of AL. CP 1. After trial, the jurors found Jackson guilty of second-degree assault, but were unable to reach a verdict on the domestic violence allegation. CP 96, 97, 5RP 576.

### B. FACTS[1]

Alexandria Siefert witnessed the assault a few blocks from her house in Bremerton. 4RP 432. Her fiancé was driving her to the airport at the time. 4RP 434. She was in the passenger seat when they came to the stop sign on Chester Avenue facing Sixth Street. 4RP 434-35.

When they stopped, Jackson and AL were on the street corner on the opposite side of Chester, about six feet from Siefert's car. 4RP 436-37, 446-47. At first it looked like they were goofing around, but it quickly became apparent they were not. 4RP 436. As car approached, it looked like Jackson was trying to push AL into traffic. 4RP 436.

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[1] AL did not testify at trial.

AL broke loose from Jackson and ran in front of Siefert's car to the corner on the opposite side of Chester. 4RP 437. Jackson pursued her and then turned to Siefert and her fiancé and asked them what they were looking at and cursed them. 4RP 436. Siefert got a good look at both of them. 4RP 438.

Jackson quickly caught up to AL and grabbed her by the hair and hit her face against a telephone pole. 4RP 438. Siefert immediately opened her door and yelled for him to get away from her. 4RP 439. She just felt like she needed to make it stop. 4RP 439. Siefert immediately stopped, however. 4RP 440. Jackson turned to her and said, "Hey, if you want to do something, you know, get out of the f'ing car." 4RP 440. His tone was very aggressive and gave her pause. 4RP 440.

AL attempted to escape again, but Jackson grabbed her and began choking her. 4RP 442. They were about two feet away from Siefert's car, so Siefert's fiancé reached back and opened the rear passenger-side door of the car. 4RP 442. AL tried to get in the car. 4RP 442. She began moving toward it as soon as the door opened. 4RP 443. She had to get around the door and Jackson grabbed her hair again and tried to pull her back. 4RP 443. Siefert turned around in her seat and tried to grab AL while Jackson kept pulling on her hair. 4RP 444. Siefert's fiancé hit the gas and they drove out onto Sixth. 4RP 445. Jackson held on and was

pulled along for about five feet. 4RP 445. Jackson was yelling and cursing, but eventually let go. 4RP 445-46.

Once she was in the car, Siefert noticed that AL was crying and that there was blood everywhere. She was yelling, "Oh, my god. Oh, my god." 4RP 447. Siefert noticed that the blood was coming from AL's forehead, so she told her to put pressure on it and they would take her to the hospital. 4RP 447. Siefert did not know AL. 4RP 451. However, AL told Siefert that her name was "A[]." 4RP 452.

Emergency department physician Timothy Dahlgren treated AL for her head injury. 4RP 371, 374. AL said that her ex-boyfriend had grabbed her and pushed her to the ground and in the process she struck the back of her head on the ground. 4RP 374. She attempted to get in her car and he grabbed her again. 4RP 374. He pushed her face against the door hinge of the car, which caused a laceration. 4RP 374.

Dahlgren explained that it was important to know who assaulted someone who came into the emergency room because it helps them determine if the patient would be safe when they left. 4RP 375. Part of the hospital's duty is to make sure that victims of non-accidental trauma have safe resources on discharge. 4RP 375.

AL had hit the back of her head and had a 3-centimeter laceration on her forehead that required sutures. 4RP 375-76. Dahlgren stated that

suturing would always leave a scar. 4RP 377.

Bremerton Police Officer Jonathan Meador was dispatched to Harrison Hospital regarding the assault. 4RP 388. On arrival he was directed to a private room where he met AL. 4RP 388.

AL was emotional and crying and had obvious injuries to her head and face. 4RP 389. She winced when she spoke and touched her head. 4RP 389, 397. She had a huge Band-Aid on her forehead and a cut on the side of her face. 4RP 389. She removed the Band-Aid and showed him the large cut on her forehead, which had approximately ten stitches. 4RP 389.

Meador left the hospital and located Jackson. 4RP 402. Meador detained him and told him that he was investigating a domestic violence assault. 4RP 403. Jackson waived his rights and agreed to talk to Meador. 4RP 403.

Meador asked Jackson if he knew where AL was. 4RP 420. Jackson stated that he did not. 4RP 420. He also denied having seen her that day. 4RP 420. Meador transported Jackson to the police station for an interview. 4RP 406.

At the station Meador explained AL's complaint and that he had seen her injuries. 4RP 421. In response Jackson denied having seen her,

and then changed it to he might have seen her briefly. 4RP 406, 421. After that, he admitted having seen her and stated that everything was fine and that he had given her a kiss. 4RP 406-07, 422. Meador then told him he had witnesses, but Jackson did not change his story. 4RP 415, 422.

Then Jackson gave the written statement. 4RP 422. In his written statement, Exhibit 9, which was completely different from his oral one, Jackson claimed that they were on their way to do laundry. 4RP 408-09, 419. On the way, AL encountered an acquaintance in a car and stopped to speak with her. 4RP 410. She bumped her head slightly when she was getting into the car. 4RP 4120.

## III. ARGUMENT

### A. AL'S STATEMENTS TO THE NURSE AND SOCIAL WORKER WERE PROPERLY ADMITTED AS NONTESTIMONIAL BUSINESS RECORDS.

Jackson argues that statements she made to a nurse and social worker should not have been admitted because they violated the confrontation clause and the business records exception to the hearsay rule. It is questionable that the constitutional aspect of this claim was preserved for review. Moreover, the claim is without merit because the statements were nontestimonial and the requirements of the business records statute were met.

### *1. The admission of AL's statements made for the purpose of medical diagnosis did not violate* Crawford.

Jackson argued extensively that AL's medical records should have been excluded. 1RP 24-26, 28-31; 4RP 332-33, 336-40. However, no *Crawford* issue was really raised. Jackson mentioned the case once when he was arguing for why he should be permitted to voir dire the physician:

> But we do know that the record in this case contains input from people who aren't on the witness list, who aren't here to testify how it was done, and that the doctor doesn't know what was said to Ms. Lindsey regarding whether or not the statements would be turned over to police or could be used in court or anything of that nature. We simply just don't know.
>
> And for that reason, there's a Crawford issue, the 6th Amendment right to confront. And we also have the hearsay issue as to what went on and his lack of knowledge as to what went on.
>
> So for those reasons, I think that it's appropriate to voir dire the doctor out of the presence of the jury regarding diagnosis, treatment, and his knowledge of these facts.

4RP 339-40. The trial court permitted Dr. Dahlgren to the voir dired. Dahlgren testified that the relationship between the perpetrator and the victim of an assault was relevant to the treatment of the victim. 4RP 346. 346-47, 350. He did not know whether the social worker would have told AL that her statements could be used in court. 4RP 354. Jackson never asked the doctor whether he himself ever made such a statement to AL.

After the voir dire of the doctor, the court accepted argument. Jackson never argued that *Crawford* was in issue. He argued only that it

did not comply with RCW 5.45.020. He subsequently challenged the record under ER 1002, but conceded that it was probably admissible under ER 1003. 4RP 367. He also raised a claim of privilege under RCW 5.60.060(4) and HIPAA. 4RP 367-689.

Although the Supreme Court has held that a defendant may raise a confrontation clause claim for the first time on appeal if he meets the requirements of RAP 2.5(a)(3), *State v. Kronich*, 160 Wn.2d 893, 899-01, 161 P.3d 982 (2007), *overruled on other grounds*, *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876 (2012), Division I of this Court persuasively argues that subsequent United States Supreme Court decisions call that conclusion into question. *See State v. O'Cain*, 169 Wn. App. 228, 234-48, 279 P.3d 926 (2012). Nevertheless, because Jackson also frames the issue as one of ineffective assistance of counsel, the State will address the merits of this claim.

The Sixth Amendment's confrontation clause, made applicable to the states by the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. It bars the admission of the testimonial hearsay statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness under oath. *Crawford v.*

*Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "It is the *testimonial character* of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (emphasis supplied). This Court reviews alleged confrontation clause violations de novo. *Kronich*, 160 Wn.2d at 901.

On three occasions since the filing of the *Crawford* opinion, the United States Supreme Court has characterized statements made to medical providers for purposes of diagnosis or treatment as nontestimonial and, therefore, not subject to a confrontation clause objection. *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143, 1157 n.9, 179 L. Ed. 2d 93 (2011) (statements made for purpose of medical diagnosis are "by their nature, made for a purpose other than use in a prosecution"); *Melendez–Diaz*, Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 2533 n.2, 174 L. Ed. 2d 314 (2009) (discussing cited cases: "[o]thers are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today"); *Giles v. California*, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) ("[O]nly testimonial statements are excluded by the Confrontation Clause.... [S]tatements to physicians in the course of

receiving treatment would be excluded, if at all, only by hearsay rules.").

Likewise under Washington precedent, statements to medical personnel, including those attributing fault, are often held admissible in domestic violence and sexual abuse cases as reasonably pertinent to diagnosis and treatment. "A declarant's statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury." *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). *See also* Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 Brooklyn L. Rev. 311, 348 (Fall 2005) (finding that statements for medical diagnosis and treatment are "staples in child abuse and domestic violence cases.").

*Williams* held that a forensic nurse's testimony regarding a rape victim's answers to a questionnaire was admissible, even though the victim did not initially feel she needed treatment. *Williams*, 137 Wn. App. at 746-47. Similarly, a victim's statement to a doctor that her boyfriend kicked her, hit her with his fists, and hit her several times with a belt was admissible where the doctor said the manner in which an injury occurs, including whether it was inflicted by a stranger or a family member,

impacts diagnosis and treatment. *State v. Sandoval*, 137 Wn. App. 532, 538, 154 P.3d 271 (2007). A victim's statements to a paramedic and emergency room physician, including those identifying her assailant, were admissible "because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part of a treatment plan." *State v. Saunders*, 132 Wn. App. 592, 608, 132 P.3d 743 (2006), *review denied*, 159 Wn.2d 1017, 157 P.3d 403 (2007). *See also State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005); *State v. Moses*, 129 Wn. App. 718, 730, 119 P.3d 906 (2005).

Finally, it should be noted that the Supreme Court has given little guidance regarding the analytical framework that courts should employ in determining whether statements to non-state actors were made for purposes of creating a substitute for in-court testimony. Indeed, the Court has "explicitly reserved the question of 'whether and when statements made to someone other than law enforcement personnel are "testimonial."' *Bryant*, 131 S. Ct. at 1155 n.3 (*quoting Davis*, 547 U.S. at 823 n.2). Nevertheless, *Bryant* sheds some light. There, applying the *Davis* "primary purpose" test, *Davis*, 547 U.S. at 822, *Bryant* explained that, to ascertain the primary purpose of a police interrogation, a court must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Bryant*, 131 S. Ct. at 1156.

"[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 131 S. Ct. at 1156. This is an objective standard. "Objectively viewed, a person giving information to a medical provider is typically doing so to benefit that person's health, not to afford a substitute for later in-court testimony." *O'Cain*, 169 Wn. App. at 250. Thus the Sixth Amendment does not preclude such testimony. *Id.*

Here, Dr. Dahlgren specifically and repeatedly testified that knowing who perpetrated an assault was an essential part of the hospital's treatment of assault victims. There is no evidence whatsoever that AL was aware that the statements she made to the hospital personnel would later be used in court. Nor, under *Davis*, would a reasonable person with a gaping gash in her forehead and blood streaming down her face have told her treatment providers what occurred for the primary purpose of preserving the story for future court proceedings. As such, there was no *Crawford* violation, and the trial court would not have erred in admitting this evidence, even if Jackson had raised the constitutional claim.

Jackson acknowledges the foregoing authorities. Brief of Appellant at 13. He purports to distinguish them, *citing Jasper*, on the

grounds that once the statements were formalized in the medical records, they became testimonial. *Jasper* is not controlling. That case involved the certification of driver's records. Following *Mendez-Diaz*, the Court concluded that such certifications prepared for trial are testimonial. *Jasper*, 174 Wn.2d at 111-16. Nothing in that case suggests that the Court intended to abrogate existing case law holding that medical records routinely prepared in the ordinary course of treating patients should be considered nontestimonial. Nor does any other case Jackson cites. Because the statements were nontestimonial neither *Crawford* nor the Sixth Amendment apply and this claim should be rejected.

***2. AL's medical chart and her statements contain therein were properly admitted under ER 803.***

Jackson also argues that AL's statements to the nurse and social worker should also have been excluded because even if AL's statements were not hearsay under ER 803(4), the statements contained in the hospital record by the two hospital workers were. Jackson, however, overlooks both the trial court's review of the business records statute and ER 803(6) which provides that documents qualifying under RCW Ch. 5.45 are also not hearsay.

RCW 5.45.020 provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its

> preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Great weight is given to the trial court's decision to admit or exclude evidence under RCW 5.45.020. *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). Accordingly, its ruling will not be reversed unless there has been a manifest abuse of discretion. *Id.*

The business records statute makes evidence that would otherwise be hearsay competent testimony. It contemplates that business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify. *Ziegler*, 114 Wn.2d at 538. There are five requirements for admissibility designed to ensure reliability. To be admissible in evidence a business record must (1) be in record form, (2) be of an act, condition or event, (3) be made in the regular course of business, (4) be made at or near the time of the act, condition or event, and (5) the court must be satisfied that the sources of information, method, and time of preparation justify the admittance of the evidence.

> As applied to hospital records, compliance with the act obviates the necessity, expense, inconvenience, and sometimes impossibility of calling as witnesses the attendants, nurses, physicians, X ray technicians, laboratory and other hospital employees who collaborated to make the hospital record of the patient. It is not necessary to examine the person who actually created the record so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its

creation.

*Ziegler*, 114 Wn.2d at 538 (*quoting Cantrill v. American Mail Line, Ltd.*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953)).

Here, there is no doubt that Exhibit 12A was in record form. There is no doubt that it recorded acts, conditions, or events. There was no doubt that it was created in the regular course of the hospital's business and made at or near the time of the act, condition, or event. *See* 4RP 355-57, 360. Further, although the quoted language in *Ziegler* suggests that the that the primary record custodian must testify, subsequent case law clarifies that point. *See State v. Garrett*, 76 Wn. App. 719, 725, 887 P.2d 488 (1995) (treating physician was competent to introduce medical chart as business record, even if she did not supervise other medical personal and social workers who made some of the entries).

Because the chart was properly admitted as a business record, the entries in it by the nurses and social workers were not hearsay. Likewise, because AL's statements were made for diagnosis and treatment they, too, were not hearsay. No error occurred.

***3. Harmless error***

Finally, even if the Sixth Amendment or hearsay rules had been violated any error would be harmless. "Confrontation Clause errors [are] subject to *Chapman* harmless-error analysis." *Delaware v. Van Arsdall*,

475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

> Whether such an error is harmless in a particular case depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

*Van Arsdall*, 475 U.S. at 684. This court employs the "overwhelming untainted evidence" test and looks to the untainted evidence to determine if it so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011).

The State's statement of the facts, *supra*, deliberately omits any reference attributable to the nurses or the social worker or to the contents of Exhibit 12.[2] The State urges the Court to re-read that statement now. Moreover, at trial Jackson's primary concern in the notes was identification of Jackson as AL's boyfriend. Since the jury hung on the domestic violence issue, he was obviously not prejudiced in that regard.

[2] Jackson does not argue that the testimony of the ER doctor was improperly admitted.

Clearly if the admission of Exhibit 12 were improper, the remaining evidence is so overwhelming that any error would be harmless.

Although Jackson does not appear to challenge AL's statements to Siefert, it is plain that they were admissible as excited utterances. The excited utterance exception to the hearsay rule provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not hearsay. ER 803(a)(2). The excited utterance exception is based on the notion that "'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.'" *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (*quoting* 6 Wigmore, *Evidence* § 1747, at 195 (1976)). Thus, "[t]he crucial question is whether the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912 (1999). Courts look to the amount of time that passed between the startling event and the utterance, the declarant's emotional state at the time of the utterance, and "any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it." *Briscoeray*, 95 Wn. App. at 174.

Here, AL made the statements to Siefert immediately after having been assaulted, after having just driven away at high speed while Jackson was still trying to pull her from the car by the hair, while yelling "Oh, my god. Oh, my god" and with blood still streaming down her face. These claims must be rejected.

## B. THE COURT BELOW PROPERLY APPLIED THE TIME-FOR-TRIAL RULE.

Jackson next claims that the trial court failed to bring him to trial within the time allowed by CrR 3.3. This claim is without merit.

### *1. Standard of review*

Whether a court correctly applied CrR 3.3 is a question of law that the Court reviews de novo. *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009). "[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). An appellate court "will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Downing*, 151 Wn.2d at 272 (alteration in original) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

When any period of time is excluded from the speedy trial period

under CrR 3.3(e), the speedy trial period extends to at least "30 days after the end of that excluded period." CrR 3.3(b)(5). Excluded periods under CrR 3.3(e) include delays "granted by the court pursuant to section (f)." CrR 3.3(e)(3). A court may grant a continuance based "on motion of the court or a party" where a continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).

Here, both continuances were due to the unavailability of material State witnesses. The unavailability of a material State witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993).

***2. Original trial setting***

Jackson was arraigned on February 20, 2013, and trial was set for April 15, 2013. State's Supp. CP (Clerk's Minutes, 2/20/13). Absent a valid continuance, the time-for-trial period would thus have expired on April 22, 2013.[3] CrR 3.3(b)(1)(i) & (c)(1).

***3. First continuance***

At the trial call hearing on April 11, 2013, the State requested a

[3] April 21, 2013, the actual sixtieth day, was a Sunday.

three-week continuance because Siefert was going to be at work in Montana until May 6, 2013. RP (4/11) 2. The State further explained that she would be the only available eyewitness to the assault because Siefert's fiancé was also out of town and would be for the next six months. RP (4/11) 2.

Jackson's only objection was that there was no showing that the *victim* was unavailable, and as such Siefert, as a "passerby" was not a material witness. RP (4/11) 3. There was no claim that the State had not been diligent in procuring the witness's attendance. Nor was there any contention that the defense would be prejudiced.

The trial court noted that the defense was a general denial, and as such corroboration of the victim's story made her an essential witness. RP (4/11) 3. The court observed that if the request were based on the unavailability of the second eyewitness, then it might have considered the testimony cumulative and the witness not essential. RP (4/11) 4. The Court thus found good cause and reset the trial date for May 6, 2013.[4] RP (4/11) 4. The parties agreed that the new time for trial period would expire on June 5, 2013. RP (4/11) 4; *see* CrR 3.3(b)(5).

[4] The report of proceedings indicates May 5, but either the trial court misspoke or this is a typo. May 5, 2013, was a Sunday. The State's request was for a continuance until the Monday, May 6. The order setting the trial date also indicates May 6. State's Supp. CP (Order Setting, 4/11/13).

*4. Second continuance*

At the second trial call hearing on May 6, the State moved to continue because Meador, its chief law-enforcement witness, had been called up for out-of-state military training and would be unavailable until the end of May. RP (5/6) 3-4. The State explained that Meador was material because he was the officer who took the report, took the photos of AL, did the primary investigation, interviewed Jackson, and took his statement. RP (5/6) 4. It was also noted that Siefert would again be out of town until the beginning of June. RP (5/6) 4.

Jackson objected that the trial had been continued to accommodate Siefert once, and questioned whether Meador's training was planned ahead of time. RP (5/6) 5. The State explained that Siefert worked in Montana two weeks every month. RP (5/6) 5. It further explained that the State did not become aware of Meador's training obligation until after the trial had been rescheduled. RP (5/6) 5. It reiterated that both witnesses would be available for a June 3 trial. RP (5/6) 5.

The trial court found good cause and continued the trial to June 3, 2013. Contrary to Jackson's claim, Brief of Appellant at 19, this new trial date was within the existing time-for-trial period, which, as noted above, expired on June 5, 2013. RP (5/6) 4, 6.

Trial commenced on June 3, 2013. 1RP 3.

*5. State's diligence*

The sole issue Jackson appears to raise is that the State did not subpoena the witnesses – he does not claim that they were not material and he does not claim that the continuance prejudiced his defense.[5] *See Nguyen*, 68 Wn. App. at 914.

While Jackson objected to the continuances in the trial court, it was not on the basis of any procedural flaw relating to subpoenas. Rather, for Siefert, it was on the grounds that she was not a material witness. At the second continuance, his sole objection related to when the State knew Meador would be unavailable. This Court will generally not address the issue of diligence when it is raised for the first time on appeal. *Seattle v. Clewis*, 159 Wn. App. 842, 848, 247 P.3d 449 (2011) (*citing State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995)). Moreover, although returns were not filed, the State did in fact subpoena both these witness. State's Supp. CP (Declaration of L. Myette). Had Jackson raised this issue at trial, the State could have easily provided this evidence to the court.

Jackson relies on two cases for his contention that proof of a subpoena is required to show diligence on the State's part. In *State v. Wake*, 56 Wn. App. 472, 473, 783 P.2d 1131 (1989), the absence of a

[5] If anything, it would appear to have helped him, since the record suggests AL, who did not testify, was available at the time of the first continuance. *See* RP (4/11) 3.

subpoena was just one factor the Court considered. There, the State sought a continuance because an expert witness from the state crime lab was unavailable. The crime lab was overworked, and there was insufficient staff manage the growing number of drug cases. *Wake*, 56 Wn. App. at 474. Division III of this Court reasoned that if congestion could excuse speedy trial rights, then there would be inadequate incentive for the State to remedy the problem. *Wake*, 56 Wn. App. at 475. Further, the court noted that the prosecutor knew of the conflict before trial was scheduled, but failed to make alternative arrangements. *Wake*, 56 Wn. App. at 475-76. Ultimately, the court determined that the circumstance was not beyond the State's control. *Wake*, 56 Wn. App. at 476. Additionally, the court noted that the State did not issue a subpoena. *Wake*, 56 Wn. App. at 473. It explained that the issuance of a subpoena was a critical factor, because it would have ensured a record to show the reason for the absence and have given the opposing party an opportunity to argue the merits of unavailability. *Wake*, 56 Wn. App. at 476.

However, neither *Wake* nor any of the cases it cited require that a subpoena be issued to show due diligence. Here, the record suggests that the State contacted the witnesses, and that the witnesses were willing to testify as soon as they returned on a date certain. Jackson did not at trial and does not now challenge the merits of the witness's unavailability.

Under these circumstances, *Wake* is inapt.

Nor does *State v. Adamski*, 111 Wn.2d 574, 761 P.2d 621 (1988), control. In *State v. Bible*, 77 Wn. App. 470, 472, 892 P.2d 116, *review denied*, 127 Wn.2d 1011 (1995), this Court rejected *Adamski*'s application to CrR 3.3:

> The *Adamski* court held that a continuance was not warranted where the State failed to exercise due diligence in procuring a witness. *Adamski*, 111 Wn.2d at 580. However, *Adamski* is not applicable to this case. The Adamski court was interpreting a Juvenile Criminal Rule which required that the State exercise "due diligence" before a continuance can be granted. CrR 3.3(h)(2), which describes the circumstances under which a continuance may be granted in an adult proceeding, only requires findings that a continuance is necessary for the administration of justice and will not substantially prejudice the defense. CrR 3.3(h)(2).

Moreover, even if *Adamski* applied, unlike CR 45, which applied in that juvenile case, CrR 4.8(3) permits service of subpoenas in criminal cases by mail.[6]

Again, however, there is no evidence whatsoever that the witnesses in this case were unavailable due to the State's failure to subpoena them. The burden is on the appellant, however, to assure that the record is complete. *Nguyen*, 68 Wn. App. at 915. The record clearly indicates that the State was in contact with them and that they were willing to testify

[6] Siefert's subpoena was mailed to her at her address on 10th Street in Bremerton, where she testified she lived. 4RP 432.

once their out-of-state commitments were completed. Nothing in the record indicates otherwise. Under such circumstances a claim of a lack of diligence must fail:

> Thus, in the absence of anything in the record indicating otherwise, there is no reason to conclude that [the State] did not meet the requirement that the State make "'timely use of the legal mechanisms available to compel the witness' presence in court.'" *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988) (*quoting State v. Toliver*, 6 Wn. App. 531, 533, 494 P.2d 514 (1972)). *Accord, State v. Whisler*, 61 Wn. App. 126, 137, 810 P.2d 540 (1991) (the requirement that the prosecution make a good faith effort to obtain a witness' presence at trial generally entails *at least asking the witness to attend* and subpoenaing the witness if refused).

*Nguyen*, 68 Wn. App. at 915 (emphasis supplied). Jackson did not challenge the State's diligence below, and the record fails to reveal any lack of diligence. This claim should be rejected.

***6. Entitlement to dismissal***

Jackson argues that each of the continuances violated his rights under CrR 3.3, and that he is therefore entitled to a dismissal. Although the State believes that both continuances were proper, it must be noted that Jackson would be entitled to dismissal only if the first continuance were improper. If it was proper, then the time-for-trial period under CrR 3.3 did not expire until June 5, 2013. Since the second continuance resulted in a trial date of June 3, and trial commenced on that date, the second continuance did not result in a trial beyond the time prescribed by CrR 3.3.

As such dismissal would not be the remedy.

In *State v. Duggins*, 68 Wn. App. 396, 398, 844 P.2d 441, *aff'd*, 121 Wn.2d 524 (1993), this court explained why a continuance within the time-for-trial period did not justify dismissal

> Dismissal with prejudice of charges against a defendant convicted in a fair trial is a Draconian penalty. It frustrates the public interest in punishing those otherwise duly convicted of crimes and can only be justified by a compelling public policy.

The Court went on to observe that there was "simply no rational public policy requiring" the Court to "impose the same Draconian consequences on a continuance within the speedy trial period that are required by a continuance beyond the speedy trial period unless the Supreme Court has unequivocally so provided." *Duggins*, 68 Wn. App. at 400. The Supreme Court agreed: "We agree that because Duggins was tried within the speedy trial period defined by JuCR 7.8 there is no basis for dismissing the prosecution under that rule." *Duggins*, 121 Wn.2d at 525. Moreover, since *Duggins* was decided the Supreme Court has amended CrR 3.3 to unequivocally show that the *Duggins* holding was correct:

> **Dismissal With Prejudice**. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. ... No case shall be dismissed for time-to-trial reasons except as expressly required by this rule ...

CrR 3.3(h). Thus unless Jackson can show that the first continuance was improper, this claim must fail.

## C. THE TRIAL COURT PROPERLY DENIED JACKSON'S REQUEST FOR AN INSTRUCTION ON THE INFERIOR-DEGREE OFFENSE OF FOURTH-DEGREE ASSAULT WHERE THERE WAS NO EVIDENCE SHOWING THAT ONLY THAT OFFENSE WAS COMMITTED.

Jackson next claims that trial court improperly denied his request for an instruction on the inferior-degree offense of fourth-degree assault. This claim is without merit because the evidence did not support a finding that only fourth-degree assault was committed.

### *1. Workman*

*State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), established a two-part test for analyzing requests for instructions on lesser included offenses. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman*, 90 Wn.2d at 447-48. The Court refers to the first prong of the test as the "legal prong" and the second prong as the "factual prong." *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997). Although fourth-degree assault meets the legal prong, the evidence in this case did not satisfy the factual prong.

In order to meet the factual prong of the test, "there be a factual showing more particularized than that required for other jury instructions.

Specifically, ... the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (emphasis the Court's). It is thus not enough that the jury might disbelieve the State's evidence; instead, there must be affirmative evidence that the defendant committed the lesser included offense. *State v. Speece*, 115 Wn.2d 360, 363, 798 P.2d 294 (1990).

Jackson cannot meet this test. RCW 9A.36.021(1) defines second-degree assault as charged in this case:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm;

Jackson's theory of the case was either that no assault occurred or that AL's injuries did not amount to "substantial bodily harm." Obviously if no assault occurred, *i.e.* if Jackson's statement were believed, then the evidence would not support a finding that a fourth degree assault occurred. *See* Exh. 9.

Nor does the evidence support a finding that no substantial bodily harm occurred. That term is defined at RCW 9A.04.110(4)(b):

> "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement ...

Here, the uncontradicted evidence showed that Jackson inflicted a 3-

centimeter cut to AL's forehead that required 10 stitches. 4RP 376, 389; Exh. 1-3. The doctor testified it would leave a permanent scar. 4RP 377. This evidence is more that sufficient to establish substantial bodily harm, *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011), and thus excludes any finding that Jackson committed *only* a fourth degree assault.

Additionally, to be entitled to a fourth-degree assault instruction, the evidence would also have to exclude a third-degree assault. Fourth-degree assault is defined at RCA 9A.36.041(1):

> A person is guilty of assault in the fourth degree if, *under circumstances not amounting to assault in the first, second, or third degree*, or custodial assault, he or she assaults another.

(Emphasis supplied).

Although this point was not raised below, this Court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Guttierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

Third degree assault is defined, in pertinent part, at RCW 9A.36.031(1):

A person is guilty of assault in the third degree if he or she,

> under circumstances not amounting to assault in the first or second degree:
>
> > (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering;

"'Bodily ... harm' means physical pain or injury." RCW 9A.04.110(4)(a). Here, the evidence was uncontested that AL suffered a gash and other injuries to her head. By the time the officer arrived, she had already been stitched up, but she was still crying and winced whenever she touched her head. 4RP 389, 397. This evidence is more than sufficient to establish a third-degree assault. *State v. Fry*, 153 Wn. App. 235, 220 P.3d 1245 (2009), *review denied*, 168 Wn.2d 1025 (2010); *State v. Saunders*, 132 Wn. App. 592, 600, 132 P.3d 743 (2006), *review denied*, 159 Wn.2d 1017 (2007). As such, the evidence does not meet all the elements of fourth-degree assault.

***2. Constitutional due process***

Jackson also asserts that his Fourteenth Amendment right to due process was violated when the trial court refused to give a lesser included offense instruction. Under the Fourteenth Amendment, "due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 611, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982) (emphasis the Court's). As discussed

above, the evidence in this case did not warrant an instruction on fourth-degree assault.

Jackson further contends that he has an independent state constitutional right to a lesser included jury instruction. Even assuming that the Washington Constitution grants criminal defendants such a right, it is difficult to see how the *Workman* test violates that right. The Workman test requires little evidence in order for a defendant to be entitled to an instruction. However, it is error for a court to give an instruction not supported by the evidence. *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). As has already been stated, the evidence simply does not support an inference that Jackson committed assault in the fourth degree. Therefore, his state constitutional rights were not violated by the denial of the instruction. This claim should be denied.

### D. JACKSON FAILS TO SHOW THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS IMPROPER OR THAT IT PREJUDICED HIS RIGHT TO A FAIR TRIAL.

Jackson next claims that the State committed misconduct in its closing argument. This claim is belied by the record.

To prevail on a prosecutorial misconduct claim, a defendant must show that in the context of the record and all the trial circumstances, the prosecutor's conduct was improper and prejudicial. *State v. Thorgerson*,

172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, a defendant must show a substantial likelihood that the misconduct affected the verdict. *Thorgerson*, 172 Wn.2d at 442-43. In analyzing prejudice, the Court does not look at the comment in isolation but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008).

Jackson objected to the first two instances he cites, but not the last. If a defendant fails to object to misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *Thorgerson*, 172 Wn.2d at 443. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

***1. The prosecutor's argument that the absent victim's story could be heard through the testifying witnesses was not an improper appeal to passion or sympathy.***

Jackson first argues that the prosecutor improperly appealed to sympathy for the victim by noting that "victims of domestic violence need a voice." Brief of Appellant at 35. Jackson, however, omits the preceding argument, and in so doing, completely divorces the part he quotes from its

context. The prosecutor was not appealing to sympathy, he was explaining how the State had proved its case even without live testimony from the victim:

> I want to talk about Ms. Lindsey for a second. She's not here. Okay. You know that. She didn't testify. You hear her words though her statements to her doctor. We have a license photo of Ms. Lindsey. Okay. It puts a name with the face. That's why this information is provided. It puts a name with a face.
>
> * * *
>
> Again, she's not here. For whatever reason, she's not here. But that doesn't mean she doesn't have a voice in this case. She does. You need to read the words of this report because this is another eyewitness account of the crime. The victim is giving you an eyewitness account of the crime through the words in this report.
>
> In addition to that, you have Ms. Siefert who is an eyewitness to the crime. She saw the whole thing unfold right in front of her on her way to the airport. She and her fiancé were just going about their business, living their lives. She's going to work in Idaho. And they witnessed this assault on their way to the airport. Thank god they intervened because who knows what would have happened had they not intervened. Thankfully they did. But that's why we're here today because we have a witness, because we have the victim's words.
>
> * * *
>
> One of the jurors asked me during voir dire, you know, if the complaining witness of a crime did not testify, why would we be in court? You know, why would we be here? Okay. Well, the answer is because victims of domestic violence need a voice. They do. Even when they're not potentially strong enough to stand up on their own, they need someone to stand up for them. And that's why we're here today. You didn't hear from the victim, but you did hear her voice.

5RP 525-27. Plainly this was not an appeal to sympathy, but a call to

consider the evidence. Jackson opines that "[t]he alleged victim did not testify at trial, which created a weakness in the state's case. Rather than attempting to cure the weakness with admitted evidence, the prosecutor argued that the alleged victim's absence was a reason to convict in order to lend her a 'voice'" Brief of Appellant at 35. Contrary to this contention, examination of the record clearly shows that the prosecutor did exactly what Jackson claims he should have done. Moreover, the references to AL's voice are to her statements to Siefert and the ER doctor. The prosecutor was not talking about "giving victims a voice" he was asking the jury to consider AL's *own* voice as related by the witnesses. This Court recently rejected a virtually identical claim:

> The prosecutor did not argue that the jury was the "voice of society and the victim." He argued that, despite Deborah's inability to testify, her voice could be heard in the evidence.

*State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012), *review denied*, 176 Wn.2d 1023 (2013). As in *Thompson*, this claim thus lacks merit.

***2. The prosecutor's rebuttal to Jackson's argument that AL and Siefert were reckless did not improperly denigrate the defense.***

Jackson next asserts that the prosecutor improperly "mischaracterized and denigrated the defense theory" in a way that "discouraged the jury from considering the evidence and the logic of the defense arguments." Brief of Appellant at 36-37. Again, Jackson

selectively parses the prosecutor's argument. The full passage shows that the argument, which was made during rebuttal, was not improper:

> MR. SALAMAS: He sat here, he stood here and told you that the victim was reckless. He stood here and told you that the people that helped her were reckless, the people that potentially saved her life were reckless.
>
> MR. RAMSDELL: Your Honor, that's a mischaracterization of argument.
>
> THE COURT: Overruled.
>
> MR. SALAMAS: That's what he told you. That left me at a loss for words. I don't know what it did for you, but it left me at a loss for words.

Because this argument was rebuttal, the defense argument the prosecutor was responding to must also be considered. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Jackson specifically questioned whether Siefert's fiancé had acted appropriately:

> But Ms. Siefert then also testified to – beyond the struggle as she observed it – was that her husband, prior to Amber being all the way in the car, just takes off like a bat out of hell, pulling out into a space in traffic there, just happened to be fortunate and – okay. Well, is that safe? Do we do things like that? No. Generally we don't. Okay.

5RP 542. He followed that argument with the claim that Siefert acted recklessly as well:

> What kind of reckless behavior do you have in this case? We have somebody in a car without somebody seated, without somebody with a safety – with their seatbelt on – pulling out into traffic, presumably with the door half open, still dragging Mr. Jackson along. Okay. Is that recklessness attributable to Mr. Jackson? No.

5RP 545. The prosecutor did not disparage the defense theory, he

responded directly, if dramatically, to it. And in so doing, he did not "discourage[] the jury from considering the evidence and the logic of the defense arguments." To the contrary, he invoked the evidence, and asked them to consider the defense argument in that light:

> There is no question what happened here. There's no question about the evidence. An eyewitness saw the crime occur. The victim described the crime to her physician. There is no question here. And I hope that the defense presentation leaves you at a loss for words as well. Describing the victim or the people who helped her as reckless, should leave you at a loss for words.
>
> The evidence is there. The evidence supports the conviction. Every defendant has the right to go to trial. Every defendant has the right to make the State prove its case beyond a reasonable doubt. They do. And we'll do that, and we did in this case. The evidence is there. There is no question about what happened on January 7, 2013.

5RP 565-66. This argument was not improper.

***3. The prosecutor did not misstate or trivialize the burden of proof.***

Jackson next faults the prosecutor's argument for trivializing the burden of proof. In so doing he relies on *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), in which this Court found that the prosecutor improperly minimized the burden of proof. The comparison is inapt.

In *Johnson*, the prosecutor made several comments regarding the beyond-a-reasonable-doubt standard that collectively minimized the State's burden:

> Here, the prosecutor made the same fill in the blank

> argument as the prosecutor in *Anderson* and *Venegas*. Furthermore, as in *Anderson*, here the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so. Therefore, we hold that the prosecutor's arguments were erroneous and improper.

*Johnson*, 158 Wn. App. at 685. The prosecutor here did not make the "fill in the blank" argument. *See State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813 (2010); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Moreover, the argument in *Anderson* was improper because it deemphasized the importance of the burden of proof:

> The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. By comparing the certainty required to convict with the certainty people often require when they make everyday decisions – both important decisions and relatively minor ones – the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson. This was improper.

*Anderson*, 153 Wn. App. at 431. In *Anderson* the prosecutor had argued:

> The question of beyond a reasonable doubt is: Do you have enough? And the defendant did everything he could to try and create reasonable doubt by his testimony, but his testimony was so preposterous that you ought to reject it in its entirety.... And, so, beyond a reasonable doubt is a standard that you apply every single day.... [For example, in choosing to have] elective surgery, dental surgery, [you]

> might get a second opinion. You might be worried, do I really need it? If you go ahead and do it, you were convinced beyond a reasonable doubt.

*Anderson*, 153 Wn. App. at 425 (editing the Court's).

> The prosecutor subsequently gave other examples of situations in which the jurors might be convinced beyond a reasonable doubt to make a decision: when leaving their children with a babysitter or changing lanes on the freeway.

*Id.*

It is also instructive to consider that this Court has held that the "puzzle pieces" argument criticized in *Johnson* is not intrinsically improper. For example, in *State v. Fuller*, 169 Wn. App. 797, 827, 282 P.3d 126 (2012), the Court noted that, unlike in Johnson, the State's puzzle analogy "neither equated its burden of proof to making an everyday choice nor quantified the level of certainty necessary to satisfy the beyond a reasonable doubt standard." *See also State v. Curtis*, 161 Wn. App. 673, 700-01, 250 P.3d 496 (2011) (State's puzzle analogy did not quantify the level of certainty required to satisfy the beyond a reasonable doubt standard and did not minimize nor shift the State's burden of proof).

Neither of the arguments the prosecutor made here minimized, trivialized, or quantified the burden of proof. To the contrary, both arguments emphasized the burden, the instructions given, and the requirement that the jurors have an abiding belief based to the facts in evidence:

Your Instruction No. 3 is the next instruction I want to talk about. This is the definition of beyond a reasonable doubt. *And what that definition says is if, after fully, fairly, and carefully evaluating the evidence you have an – you have an abiding belief in the truth of the charge, you're satisfied beyond a reasonable doubt.* That's what it says.

So you might ask, What's an abiding belief? What does this mean? A lot of times that word is defined as lasting, enduring. That's what it means. That's the definition. *If you have a lasting or enduring belief in the truth of the charge, you're satisfied beyond a reasonable doubt.* That's the definition.

We talked about it a little bit, that drawing up there I made for you. What that drawing is, is a representation of having a common sense appreciation of the facts. We talked about – I used the example of giving someone $100,000 if they can prove beyond a reasonable doubt that the earth is a sphere, the earth is round. Okay. And we all agree that no one had ever been to space, no one had actually observed the earth being round. But we had a common sense appreciation of the fact. We all agreed that because of that, we were satisfied beyond a reasonable doubt that the earth is round. All right. That's how you need to think about the proof in this case, having a common sense appreciation of the facts.

5RP 514-15 (emphasis supplied).

The evidence is there. The evidence supports the conviction. Every defendant has the right to go to trial. *Every defendant has the right to make the State prove its case beyond a reasonable doubt. They do. And we'll do that, and we did in this case. The evidence is there.* There is no question about what happened on January 7, 2013.

There is no reasonable doubt. The defense attorney provided you with explanations. He parsed words for you. He told you he didn't think this injury was substantial. *All I'm asking you to do is go back there, look at those pictures. You read the medical reports, the description of how the injury occurred. You think about the eyewitness account of the attack on Ms. Lindsey.* And then you tell me that that injury isn't substantial.

> *One word he left out when he was describing the instruction for you and talking about it was "temporary."* Right? He left out the word "temporary." It could have been a temporary substantial disfigurement. Why did he leave that out? *Look at her face. Look at her face and the scar on her face.* The defendant did this to her. There is no question.
>
> In jury selection I talked a little bit about the lawyer example, and I proposed to you a scenario where I wasn't actually an attorney, where I had come in here and told the prosecutor to take the day off. And I proposed that scenario to you. Okay. And we all agreed that that couldn't have happened; because even though you hadn't seen my bar card, even though you hadn't seen me graduate from law school, even though you hadn't seen my diploma on the wall of my office, you had confidence in the fact that I'm an attorney based on the appearances and circumstances that you were presented with. Well, you can have confidence in the fact that the defendant committed this crime because of the appearances and circumstances that you are presented with. I submit to you that trying to concoct a scenario where the defendant did not commit this crime would be as unrealistic as trying to concoct a scenario where I am not an attorney.

5RP 566-67 (emphasis supplied).

Further, as discussed above, where the defendant fails to object to the argument at trial, he must show that a curative instruction could not have cured the alleged prejudice. Had Jackson objected to either of these arguments, the trial court could have instructed the jurors that they were bound by the reasonable-doubt instructions. Thus even were the argument improper, Jackson's claim would fail. *Emery*, 174 Wn.2d at 764.

***4. The prosecutor's argument focused primarily on the elements the State was required to prove and the what the evidence showed.***

Jackson finally argues that the cumulative effect of the allegedly improper argument prejudiced his right to a fair trial. As discussed above, none of the prosecutor's arguments were improper. Moreover, an analysis of his entire argument shows that it focused primarily on the elements the State was required to prove and the what the evidence showed.

The prosecutor began his argument by briefly noting that violence was not acceptable in our society. 5RP 512. He then discussed witness credibility. 5RP 513. He noted that the court's instructions were "the law of the case." 5RP 514. He cited Instruction 1 which stated that the jurors were the sole judges of witnesses and credibility. 5RP 514.

He next moved on to Instruction No. 3, which defined the burden of proof:

> And what that definition says is if, after fully, fairly, and carefully evaluating the evidence you have an – you have an abiding belief in the truth of the charge, you're satisfied beyond a reasonable doubt. That's what it says.

5RP 514-15. He then discussed Instruction 4, which addressed circumstantial evidence. 5RP 515-16.

After discussing the initial instructions, he turned to the definition of the crime of second-degree assault. 5RP 516-17. He then turned to the facts in evidence that supported a finding that Jackson assaulted AL. 5RP

517-19. He discussed the evidence that showed a domestic relationship. 5RP 519. He discussed the evidence that identified Jackson as the assailant. 5RP 519-20. He discussed the statements Jackson made to the police. 5RP 520-23.

The prosecutor then returned to the instructions again, specifically to the definitions of reckless and intentional. He again applied the evidence to these instructions. 5RP 523-24. He then discussed the instruction that defined substantial bodily injury or harm, again relating the instruction the facts in evidence. 5RP 524-25.

At that point he turned to the evidence that identified AL. 5RP 526. Then, the prosecutor discussed the fact that although she did not testify, they jury had heard her story, as discussed above. In so doing, he cited to the testimony of Siefert, the officer, and the doctor. 5RP 527-28.

The prosecutor then addressed the to-convict instruction, again directly tying it to the evidence, and the reasonable doubt standard:

> Your Instruction No. 11 is what we kind of call the to-convict instruction in the business. What this essentially is, is a roadmap for you. These are the elements that the State has to prove beyond a reasonable doubt to convict the defendant of this crime – for you to convict the defendant of this crime. I'm going to run through these real quick.
>
> I talked about the evidence, but these are the elements. This is what it boils down to, these instructions right here. On or about – these are the three elements: "On or about January 7, 2013, the defendant intentionally assaulted [AL]. We know what the date was. Several

people testified about the date, so that's a given.

"Intentionally assaulted [AL]." We have an eyewitness to the assault, Ms. Siefert, and we have the victim's words about the assault. The defendant's actions were nothing but intentional. Nothing but intentional. He wanted to slam her head into the pole. He wanted to choke her. He wanted to slam her head into the car. He caused the laceration to her forehead.

"[AL], the victim." The ID puts the name with the face. People identified her at the hospital. Officer Meador identified her. That's who the victim of this case is.

The second element, "That the defendant thereby recklessly inflicted substantial bodily harm on [AL]." Remember, reckless – intentional equals reckless. The defendant acted intentionally; therefore, he recklessly inflicted the injury upon her. Okay. Because he acted intentionally, he recklessly inflicted the injury on her.

Substantial bodily harm. She will have a scar on her forehead for the rest of her life because of the defendant's actions. You look at it. It's a nasty injury. Ms. Siefert testified there was lots of blood. You look at it. She's going to have a scar on her head for the rest of her life because of the defendant's actions. Those are the definitions.

This act occurred in the State of Washington. We know it happened in Bremerton at 6th and Chester. Ms. Siefert testified to that. Those are the elements the State has to prove beyond a reasonable doubt. The State has proved those elements beyond a reasonable doubt. Make no mistake about it, the defendant committed this assault. Okay.

5RP 528-29.

Then the prosecutor yet again emphasized the State's burden:

Well, think about it this way: Every single defendant in every single criminal case has the right to make the State prove the charges against them beyond a reasonable doubt. It is fundamental to our system. It is in our Constitution. It

> is the bedrock of our criminal justice system. The State has to prove the charges against them beyond a reasonable doubt. And we're happy to do that.

5RP 530. He then concluded his argument by again summarizing the evidence. 5RP 530.

In rebuttal, the prosecutor addressed Jackson's argument that Siefert, her fiancé and AL were reckless, as discussed above. 5RP 563. In the course of that discussion, he noted that the crime was significant, and the evidence showed it:

> We're not talking about some insignificant crime. We're talking about a domestic violence assault. We're talking about someone who beat up his girlfriend and caused a laceration to her head and permanently scarred her.
>
> You know, it's not a game. It's serious. You can parse words if you want to. Okay. You say something's not substantial, you say, if you can't see the injury from the back of the courtroom. You know, you can parse words if you want. But there is no question that the defendant left the victim permanently scarred. You look at the pictures.

5RP 564-65. He concluded by emphasizing the State's burden and the evidence that overcame it:

> Mr. Ramsdell talked a lot about the injury and whether it was substantial. He calls it a cut. You're going to see these pictures. Okay. You know what happened. You know what this man did to this woman. You know those things.
>
> You all seem like reasonable people. You know what happened here. There is no question what happened here. There's no question about the evidence. An eyewitness saw the crime occur. The victim described the crime to her physician. There is no question here. And I

> hope that the defense presentation leaves you at a loss for words as well. Describing the victim or the people who helped her as reckless, should leave you at a loss for words.
>
> The evidence is there. The evidence supports the conviction. Every defendant has the right to go to trial. Every defendant has the right to make the State prove its case beyond a reasonable doubt. They do. And we'll do that, and we did in this case. The evidence is there. There is no question about what happened on January 7, 2013.
>
> There is no reasonable doubt. The defense attorney provided you with explanations. He parsed words for you. He told you he didn't think this injury was substantial. All I'm asking you to do is go back there, look at those pictures. You read the medical reports, the description of how the injury occurred. You think about the eyewitness account of the attack on Ms. Lindsey. And then you tell me that that injury isn't substantial.
>
> One word he left out when he was describing the instruction for you and talking about it was "temporary." Right? He left out the word "temporary." It could have been a temporary substantial disfigurement. Why did he leave that out? Look at her face. Look at her face and the scar on her face. The defendant did this to her. There is no question.

5RP 565-66. Viewed in the context of the record and all the trial circumstances, Jackson fails to show that the prosecutor's conduct was improper and prejudicial. *Thorgerson*, 172 Wn.2d at 442. This claim should be rejected.

### E. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE *CRAWFORD* ISSUE WHERE THE CLAIM WOULD HAVE BEEN WITHOUT MERIT AND EXCLUSION OF THE EVIDENCE WOULD NOT HAVE AFFECTED THE VERDICT.

Jackson next claims that counsel was ineffective for failing to

preserve the *Crawford* issue discussed at Point I, *supra*. This claim is without merit because the underlying issue is without merit, as discussed above.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a

reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Jackson fails to show deficient performance or prejudice. As discussed previously, no *Crawford* violation occurred. Counsel is not deficient for not pursuing an objection lacking legal merit. Likewise, even if counsel were deemed deficient, Jackson cannot show prejudice because, as discussed, *supra*, any error would have been harmless.

### F. JACKSON'S CLAIMS WITH REGARD TO HIS ABILITY TO PAY AND THE IMPOSITION OF COSTS FOR APPOINTED COUNSEL ARE PREMATURE AND WITHOUT MERIT; THE STATE CONCEDES THAT THE IMPOSITION OF COSTS FOR THE DOMESTIC VIOLENCE ASSESSMENT, EXPERT WITNESS FUND, AND THE SPECIAL ASSAULT UNIT SHOULD BE STRICKEN.

Jackson next claims that the trial court erred in imposing various costs. His claims with regard to his ability to pay and the imposition of costs for appointed counsel are premature and without merit. The State concedes that the imposition of costs for the domestic violence assessment, expert witness fund, and the special assault unit should be

stricken.

### *1. Cost of court-appointed counsel*

This Court reviews a trial court's decision to impose LFOs on a defendant for an abuse of discretion. *See State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Neither the statute nor the constitution requires the trial court to enter formal, specific findings about a defendant's ability to pay LFOs. *Curry*, 118 Wn.2d at 916. Moreover, as the Court recently held in *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011):

> "[T]he meaningful time to examine the defendant's ability to pay is *when the government seeks to collect the obligation.*"

(Emphasis added) (*quoting State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991)) (*citing State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911); *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *review denied*, 165 Wn.2d 1044 (2009) ("Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs."). The Court further noted:

> "The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time."

*Bertrand*, 165 Wn. App. at 405 (alteration in original) (*quoting Baldwin*, 63 Wn. App. at 310-11). Because there is no evidence that the State has yet tried to collect Jackson's legal financial obligations, this issue is not ripe for review. Moreover, the costs imposed were permissible. Contrary to Jackson's claim, RCW 10.01.160 both authorizes the assessment of the cost of appointed counsel on convicted defendants and does not infringe upon the right to counsel. *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977); *Baldwin*, 63 Wn. App. 303, 311.

### *2. DV assessment, expert witness fund contribution, SAU contribution*

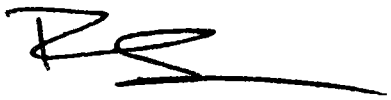
Jackson's final claims are that the trial court erred in imposing costs for the domestic violence assessment, expert witness fund, and the special assault unit. For the reasons set forth his brief, the State agrees. Jackson's conviction and sentence should be affirmed and the cause remanded to strike these provisions from the judgment.

## IV. CONCLUSION

For the foregoing reasons, Jackson's conviction and sentence should be affirmed and the cause remanded to strike the improper cost assessments.

DATED April 24, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



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# KITSAP COUNTY PROSECUTOR

## April 24, 2014 - 10:02 AM

**Transmittal Letter**

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Court of Appeals Case Number: 45115-8

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