No. 45971-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN G. COX,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 13-1-0914-9

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

The State accepts Cox's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The trial court did not err by taking challenges for cause at sidebar because (1) that procedure does not implicate the right to a public trial and (2) the courtroom was not closed.

Cox argues that his right to a public trial, guaranteed by both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court heard and decided challenges for cause and excused five

jurors at sidebar. The court made a record of that sidebar, with no objection from either party. RP 126-27.[1]

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). "Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). The initial question is whether the challenged proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State's motion, because an

[1] All references to the Verbatim Report of Proceedings, unless otherwise noted, are to the five-volume trial transcript.

undercover police officer was testifying and he feared public exposure would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Those factors are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests,
>
> 4. The court must weigh the competing interests of the proponent of the closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d. at 258-59.

That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167

Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93. Cox's argument presumes that the sidebars constituted a closure of the courtroom, but under this definition, the courtroom was never closed and there was no requirement for a Bone-Club analysis.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure, even if the public is excluded. Sublett, 176 Wn.2d at 71. To decide whether a particular process must be open to the general public, the Sublett court adopted the "experience and logic" test formulated by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). The "experience" prong requires the court to determine if "'the place and process have historically been open to the press and public.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). The "logic" prong addresses "'whether public access plays a significant positive role in the functioning of the

particular process in question.'" Id. If both questions are answered in the affirmative, the public trial right attaches and the trial court must consider the Bone-Club factors before closing the proceeding to the public. Id.

The experience and logic test was formulated to determine whether the core values of the right to a public trial are implicated. Sublett, 176 Wn.2d at 73. The right to a public trial exists to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing to federal cases). The harms associated with a closed trial have been identified as:

> [T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, ... the inability of the defendant's family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)

Applying that test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

There is no dispute that the sidebars at issue in this trial occurred in the courtroom and the courtroom was open. Cox offers no authority, nor can the State find any, to show that sidebars have not historically been conducted out of the hearing of the jurors and spectators. That is the whole purpose of the sidebar—so that the jury does not hear the discussion, and if the jurors cannot hear, neither can the spectators. The alternative would be to excuse the jury each time some issue needed to be addressed outside of its presence.

> In the case of sidebar discussions, issues arising with the jury present would always require interrupting trial to send the jury to the jury room, often located some distance from the courtroom, thereby occasioning long delays every time the court wishes to caution counsel or hear more than a simple "objection, Your Honor." This would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.

Ticeson, 159 Wn.2d at 386, n. 38. Sidebars do not violate any of the core values of the public trial right.

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), the Court of Appeals assumed, without deciding, that a sidebar conference constituted a closure. Id. at 917. In that case, challenges for cause to the jury venire had been held at a sidebar. Id. at 915. Applying the Sublett experience and logic test, the court

concluded that it was not error to handle challenges at a sidebar. Despite its earlier assumption, the court held that "[t]he sidebar conference did not close the courtroom." Id. at 920.

The court in Love further explained that the written record of the challenges to potential jurors satisfied the public interest in monitoring the integrity of trials.[2] Love, 176 Wn. App. at 919-20. This court adopted the reasoning of the Love court and held that the public trial right does not attach to challenges during jury selection. State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014).[3]

Cox argues that Dunn and Love were wrongly decided. Appellant's Opening Brief at 17. He cites to State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013); Strode, 167 Wn.2d 222; and State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), to support his argument that challenges to potential jurors in the venire must be made in such a manner that the spectators may hear them. In Strode, the court held that it was error to hold a portion of voir dire in the judge's chambers without conducting the Bone-Club analysis.

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[2] In Cox's case, a record of the sidebar challenges was made in open court. RP 126-27.

[3] A petition for review was filed in Dunn, No. 90238-1; consideration of that petition was stayed on August 5, 2014, pending a decision in State v. Smith, No. 85809-8.

It did not specifically address challenges either for cause or peremptory challenges, although challenges for cause were also made and decided in chambers. Strode, 167 Wn.2d at 224, 231. In Wise, ten potential jurors were questioned in chambers, and six were excused for cause, but the opinion does not specify whether the challenges were also heard and decided in chambers. Id. at 7-8. In Wilson, two jurors were excused by the bailiff, before voir dire began, because they were ill. Wilson, 174 Wn. App. at 332. The court distinguished between this situation and "for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344. The distinction in these cases, then, is between what happens in chambers and what happens in the courtroom that has not been closed to the public, or between pre-voir dire jury selection and voir dire.

Cox does not claim that the courtroom was closed to the public, only that the challenges to the jury venire were made at a sidebar where the public could not hear what was being said. He points to State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), where this court remarked in a footnote that "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus,

was a portion of jury selection held outside Slert's and the public's purview." Id. However, in Slert's case the challenged conduct had occurred in chambers, Id. at 775, and the footnote is dicta. Dunn was decided two years later and specifically held that it was not error to conduct challenges to the venire at sidebar. Since Cox filed his opening brief, this court has decided State v. Webb, No. 43179-3-II (August 26, 2014). In that case, the parties exercised peremptory challenges by passing back and forth a sheet of paper. The court relied on Love and Dunn to find that this procedure did not violate the defendant's right to a public trial. Webb, *slip op.* at 3.

During the evidentiary portion of Cox's trial, there were several sidebars. RP 171, 186, 343, 387, 406, 465, 585, 657, 710, and 786. Cox has not assigned error to those or argued that they violated his right to a public trial. There seems to be no reason to conclude that challenges to potential jurors at sidebar constitute a courtroom closure and other sidebars do not.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis. The cases to which Cox cites do not support an argument that the court was wrong when it decided either Love or

Dunn, and the holding of those cases should be followed in this appeal.

2. Violation of a protection order is not an alternative means offense. The prosecutor did not argue an uncharged means of committing the crime.

Cox asserts that the prosecutor argued an uncharged means of committing the crime of violation of a protection order, depriving him of a unanimous jury as to the basis of the conviction. Appellant's Opening Brief at 18-22. This is not an alternative means crime.

RCW 26.50.060(1) contains a list of behaviors which a court may order a respondent to refrain from doing. Pertinent to this case, those behaviors are:

> (1) Upon notice and after hearing, the court may provide relief as follows:
>
> (a) Restrain the respondent from committing acts of domestic violence;
>
> (b) Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the day care or the school of a child;
>
> (c) Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
>
> . . . .
>
> (f) Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected;

. . . .

> (h) Restrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;
>
> (i) Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking . . . .

The violation of some of the conditions of a protection order are punishable as such, gross misdemeanors unless there is an assault in violation of a protection order or if the offender has two or more prior convictions for violating protection orders. RCW 26.50.110 (1)(a), (4), and (5). It is a crime to violate:

> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with the protected party;
>
> (ii) A provision excluding the person from a residence, workplace, school, or day care;
>
> (iii) A provision excluding the person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
>
> (iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or
>
> (v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

RCW 26.50.110(1)(a).

There was a protection order in place at the time of the offense. It restrained Cox in six different ways, including prohibiting harassment of the petitioner or having any contact whatsoever with her. Exhibit 3 at 2.

The State charged Cox with violation of a protection order, domestic violence, using the following language:

> In that the defendant, BRIAN GLENN COX, in the State of Washington, on or about March 25, 2013, with knowledge that the Thurston County Superior Court had previously issued a protection order pursuant to Chapter 26.50 in Thurston County Superior Court on March 21, 2013, Cause No. 13-2-30027-1, did violate the order while the order was in effect by knowingly violating (1)(a)(i) the restraint provisions prohibiting contact with Lisa Marie Cox, a family or household member, pursuant to RCW 10.99.020; and/or (ii) a provision excluding the person from a residence, workplace, school, or day care of Lisa Marie Cox.

CP 21.

The jury was instructed about the elements of the crime of violation of a protection order.

> To convict the defendant of the crime of violation of a protection order, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 25, 2013, there existed a protection order applicable to the defendant;

> (2) That the defendant knew of the existence of this order;
>
> (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting contact with a protected party or a provision of the order excluding the person from a residence, school, workplace, or daycare; and
>
> (4) That the defendant's acts occurred in the State of Washington.

Instruction No. 16, CP 88.

There was no evidence presented that Cox had been in one of the places from which he was excluded, and in closing argument the prosecutor acknowledged that. RP 854-855. Then he said, "I would submit to you there's actually two parts of this order that were violated and we talked about the contact." RP 855. After some discussion about what constitutes communication, the prosecutor said:

> The other provision of the order I would submit to you that was violated is provision—and you'll see the order right above the one that says no contact, and it lists a bunch of other things that the defendant is not allowed to do. And first among those in the list is harass Lisa Cox. Again, this is a definition that we don't give you. It's up to you to determine what is harassment behavior.
>
> . . . .
>
> You have someone . . . . [who] admittedly was honking, admittedly displayed his middle finger, and admittedly was yelling at her. Is that harassing behavior? I would submit to you that it is.

RP 857.

Cox maintains that the prosecutor argued an uncharged alternative means of committing the crime of violation of a protection order because he referenced two different provisions of the order. But the alternative means doctrine applies to the statute, not an order issued pursuant to a statute. In State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007), a case involving second degree assault statute, the court said,

> In absence of legislative intent to the contrary, we limit the reach of the alternative means doctrine to those alternative means directly provided for by the assault statutes. Accordingly, we do not apply the doctrine, as Smith urges us to do, to a mere jury instruction setting forth the common law definitions of "assault" as that term is used throughout the charging statutes in chapter 9A.36 RCW.

Id. at 789-90.

The legislature has not defined alternative means crimes, nor has it labeled specific crimes as alternative means offenses. Lacking a "'bright-line rule,'" courts must decide on a case by case basis whether a statute is an alternative means crime. State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (citing to State v. Klimes, 117 Wn. App. 758, 769, 73 P.3d 416 (2003).

"[T]he use of the disjunctive 'or' in a list of methods of committing the crime does not necessarily create alternative means of committing the crime." State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). Another consideration is the variety of actions that could constitute the crime. Id. at 97.

In Owens, the court held that the statute prohibiting trafficking in stolen property[4] is an alternative means crime, but it contains only two alternatives, even though the language of the statute includes eight specific behaviors. The court found that seven of them all relate to facilitating or participating in theft of property with the intent of selling it, while the eighth relates to actually transferring property. Owens, 180 Wn.2d at 97-99. In Peterson, the court found that the failure to register as a sex offender statute was not an alternative means crime because, although there were three ways to prove failure to register, the crime was moving from his residence without notice. Peterson, 168 Wn.2d at 770.

The State maintains that the statute in this case, RCW 25.50.110, provides for one offense—violating any listed condition

[4] RCW 9A.82.050.

of the protection order.[5] There are five specific provisions of the protection order listed, and the violation of any one constitutes the crime, but the underlying crime is violating the order. When there are alternatives that may be characterized as "a means within a means," the alternative means doctrine is not applicable. Smith, 159 Wn.2d at 783.

Even if Cox were correct, however, that this is an alternative means offense statute, the prosecutor's argument did not contend that that there was any violation not involving contact. While he did assert that the contact also constituted harassment, it was still contact, and both the charging document and the jury instructions specified that Cox had had contact with the victim in violation of the order. The jury could not have been confused about what conduct the prosecutor was claiming was criminal. It was clear that he was talking about one and only one incident, during which Cox tailgated his wife's car, honked the horn, made an obscene gesture, and yelled at her. RP 855-57. Cox would not be denied a unanimous verdict, or convicted of an alternative means that was not charged and instructed, unless some or all of the jurors concluded the

[5] RCW 26.50.110(1)(a) does not specifically make harassment of the victim a violation of the statute, although "prohibiting acts or threats of violence" would likely fall into that category. RCW 26.50.110(1)(a)(i). Harassment is, of course, a separate crime under chapter 9A.46 RCW.

incident was harassment without contact, which is highly unlikely. Error, if such it was, was harmless. An error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

> 3. The prosecutor did not vouch for the credibility of a State witness. He quite properly argued circumstances which spoke to the witness's credibility. Cox's attorney did not provide deficient representation by failing to object.

a. The prosecutor's argument was proper.

Cox argues that the prosecutor, in rebuttal, improperly vouched for the credibility of Kenneth Parmley, a State witness. Appellant's Opening Brief at 22-26. In context, the prosecutor's argument, in part, was as follows.

> You look at the context of the testimony by Mr. Lopez-Ortiz and you look at it by the defendant. You saw the list that we talked about during my first closing things to consider. Please do that. The nature of their demeanor, the way they answered questions. And who answered questions directly and who answered questions directly until it was a question they didn't want to answer? And if you noticed that, that's something that I would submit for you to take into consideration.
>
> Same goes of the counts that involve Mr. Parmley. Mr. Parmley answered every question from both

sides. He was direct, he responded, he told you about this note that was on the back of what's called a kite sheet. He gave it to the defendant while he was in custody. Again, I would submit to you what do people have to gain by what they say in the testimony to you and what their testimony is?

You look at everybody. What did Lisa Cox have to gain? I would submit to you nothing. What did Ray Lopez-Ortiz have to gain? Nothing.

What did Kenneth Parmley have to gain? Well, he's already been labeled an informant, a snitch, he's already been verbally and physically assaulted on multiple occasions even outside this jail. He never said to anyone by his own testimony or anyone's testimony that, hey, you know what, I made this up, I don't want to testify. He never said you can't make me testify. He never backed out even after he knew he wasn't getting a deal.

Did he want that initially? Yes. Did he get it? No. And did he know very early on in the process he wasn't getting it? Yes. But he kept going with law enforcement, he kept cooperating and came in and testified even knowing all that.

So let's look at the other side. What does the defendant have to gain by what he said to you? That's for you to determine.

What do Mr. Borja and Mr. Pagel have to gain by their testimony? I would submit to you, you heard a lot about the jailhouse culture, right, what a snitch is, considered a snitch and all that. I asked Mr. Borja specifically, so there are ramifications to snitches, correct, and he agreed. Now, he wouldn't really say what his personal views were of them, he would kind of dance around the question and give long explanations but he wouldn't come right out and give a yes or no answer. And then he was asked, so

those ramifications, if they're not physical, they can be other ways? Well, yeah. And then I asked him, so would anyone who supports and informant that's helping law enforcement also be considered an informant and have a difficult time in jail? And he wouldn't really answer that. Why? Well, of course.

So what did Mr. Pagel and Mr. Parmley[6] (sic) have to gain? They're getting credibility in the world that they're in by trying to attack a snitch, by trying to discredit a snitch. But look at it even more. Look at the other biases they may have.

Now, this one, I would ask you to check your notes and check your memories. This one was testified to by Mr. Borja, that he really likes the defendant. He has a lot of love for him. Mr. Pagel said they had—they got along, too. And they both said they didn't have a problem personally with Mr. Parmley, right? I would ask you to remember very closely when these two individuals were talking about Mr. Cox and Mr. Parmley. Every time Mr. Cox's name came up, both of them called him Brian. Brian and I said this, Brian did that.

Every single time Mr. Parmley's name came up, they referred to him as Parmley. Not as Kenneth, not as Ken, not as Mr. Parmley. Parmley. I would submit to you that speaks volumes about what they think of these two individuals, and I would submit to you that would be something to take into consideration when you're weighing the credibility of these individuals and any bias they might have.

But you also look at the content of what they said and does it make sense in light of everything else . . . .

RP 909-13.

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6 Presumably the prosecutor meant Sonny Borja, a defense witness.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id. at 87. *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not

in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The concern is less with what was said or done than with the effect likely to result from what was said or done.

> Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?"

State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012), quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

It is apparent from the portion of rebuttal argument set forth above that the prosecutor was not expressing his personal opinion of Parmley's credibility. He specifically cited to the evidence which supported the argument that Parmley was more credible than Borja or Pagel. That is the way a prosecutor is supposed to argue.

b. Defense counsel was not ineffective.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re the Pers. Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address

both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular

case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). "The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious." Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981).

Cox argues that the record does not show any tactical or strategic reason for counsel's failure to object to the prosecutor's rebuttal argument. Appellant's Opening Brief at 28. In fact, the record shows that the prosecutor's argument was proper and an objection would have been overruled. The outcome of the trial would have been the same even if counsel had objected. Cox has shown neither deficient performance or prejudice.

4. Cox's offender score was correctly calculated, and his counsel was not ineffective.

a. Calculation of the offender score.

Cox argues that the sentencing court miscalculated his offender score by counting the gross misdemeanor conviction for violation of a protection order, domestic violence, as one point toward his score for the conviction of solicitation to commit first degree murder, domestic violence. He maintains that it was not a

prior conviction, was not repetitive, and was not a felony. Appellant's Opening Brief at 31. As the words "prior" and "repetitive" are commonly used, he is correct. However, the Sentencing Reform Act defines them differently from common usage. The offender score as calculated by the trial court is correct.

The two convictions for solicitation to commit first degree murder are both serious violent offenses. RCW 9.94A.030(45)(a)(i) and (ix). Violation of a protection order, as charged in this case, is a gross misdemeanor. CP 21.

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentencing range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero . . . All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

RCW 9.94A.589(b).

> A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. *Convictions entered or sentenced on the same date as the*

> *conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.*

RCW 9.94A.525, emphasis added.

Even though the protection of a protection order conviction is a current offense, other current offenses are considered to be prior offenses for purposes of calculating the offender score.

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using *all other current and prior convictions as if they were prior convictions* for the purpose of the offender score. . . .

RCW 9.94A.589(a), emphasis added.

Generally, misdemeanors and gross misdemeanors do not count toward the offender score. RCW 9.94A.525. There are exceptions. Pertinent to this case, RCW 9.94A.525(21) provides that if the present conviction is for a domestic violence offense, as the solicitation for first degree murder of Lisa Cox was, CP 105, the court is to count one point for "each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030 . . . " RCW 9.94A.030(44) defines a repetitive domestic violence offense as including any "domestic violence violation of a protection order under chapter 26.09, 26.10, or 26.50 RCW *that is not a felony*

offense." RCW 9.94A.030(44)(a)(iii), emphasis added. The violation of a protection order charge against Cox was filed under RCW 26.50. CP 21. One violation of a domestic violence protection order is, under this definition, "repetitive." It counts as a point in the offender score even though it is not a felony.

Under the rule of lenity, any ambiguity in the statute is construed against the State and in favor of the defendant. State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996). However, when there is no ambiguity identified in the pertinent statute, the rule of lenity does not apply. State v. Snedden, 149 Wn.2d 914, 922, 73 P.3d 995 (2003). The sentencing statutes here are not ambiguous.

The court properly counted the gross misdemeanor protection order violation as a point against the conviction for solicitation of the murder of Lisa Cox, which was a domestic violence conviction. CP 105, 107. It did not count against the conviction for solicitation for the murder of Ramon Lopez-Ortiz, because that was not a domestic violence conviction. Therefore, the calculation of the offender score was correct.

b. Defense counsel was not ineffective.

The standard of review of a claim of ineffective assistance of counsel is set forth in the preceding section. Counsel for Cox

properly agreed to his offender score because it is correct. There was no deficient performance and no prejudice.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Cox's convictions.

Respectfully submitted this 23d day of September, 2014.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

September 23, 2014 - 2:42 PM

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