NO. 44268-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROY E. MILLER,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not err when Miller's attorney did not introduce evidence that the court previously held to be admissible; because Miller did not argue or cite any legal authority to support his assignment of error to court's decision to sustain a hearsay objection, he has failed to preserve this issue for review; the prosecutor did not commit misconduct by asking a question on redirect that was within the scope of the defense attorney's cross examination; and Miller's attorney was not ineffective when he chose not object to answers to his own cross examination questions.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

A. Did the trial court err by not *sua sponte* introducing evidence on Miller's behalf that Miller's attorney chose not to introduce?

B. Has Miller preserved review of the trial court's decision to sustain a hearsay objection, when he assigned error to this ruling but failed to provide any argument or legal authority in support of this position?

C. Has Miller waived his claim of prosecutor misconduct when he did not object at trial and the question asked by the prosecutor was within the scope of the defense attorney's cross examination?

D. Did Miller suffer ineffective assistance of counsel, when during his cross examination of the victim his attorney chose not to object to her answers after they were already heard by the jury, when there was a legitimate trial strategy for choosing not to object after the fact?

III. STATEMENT OF THE CASE

Roy Miller and Rachel Robinson were in a dating relationship and lived together at Miller's house for roughly seven years. RP at 49. They had a six-year-old son together named Matthew. RP at 49. Miller and Robinson's dating relationship ended about a year prior to November of 2012. RP at 49-50. Miller kicked Robinson out of the house at this time. RP at 50. Because there was no place for Robinson to go, Matthew stayed at Miller's house. RP at 50. There was no parenting plan between Miller and Robinson. RP at 50. Although Robinson no longer lived at the house, Miller would permit Robinson to come visit Matthew on a daily basis. RP at 50-51. Robinson would go over to Miller's house and wake Matthew up to go to school. RP at 50. If Miller and Robinson did not argue after Matthew went to school, then Robinson would stay at the house and see Matthew after he got out of school. RP at 51.

While Robinson had been living at Miller's house, she planted strawberry, raspberry, and blueberry bushes. RP at 51. After she moved out, she continued to take care of these plants. RP at 51. Whenever Robinson came to the house, she would use the back gate. RP at 51.

In the evening of July 13, 2012, Robinson was at Miller's house getting Matthew ready for bed. RP at 52. Robinson made plans with Miller to take Matthew to the Kalama Marina the next day. RP at 52. At

the time, Miller agreed to let Robinson take Matthew. RP at 52. On the morning of July 14, 2012, Miller sent Robinson a text message telling her not to come over or she would leave in an ambulance. RP at 53. It was not uncommon for Miller to text Robinson telling her not to come over, but then, if she came over anyway, for Miller not to discuss the text with her. RP at 53-54.

In the late afternoon of July 14, 2012, Robinson went to Miller's house. RP at 53. Although she knew Miller was angry with her, Robinson was undeterred from going to the house because she wanted to follow through on her plans to take Matthew to the marina. RP at 54. Robinson arrived at Miller's house and, because the gate was locked, entered the backyard by crawling under the fence. RP at 54-55. It was not unusual for this gate to be locked, or for Robinson to crawl underneath it to enter the backyard. RP at 55. In her hands, Robinson carried a knife and a cellular phone. RP at 55. Robinson brought the knife for her protection. RP at 56.

Once she was in the backyard, Robinson began picking blueberries off the blueberry bush. RP at 57. Robinson had her phone in one hand and her knife in the other. RP at 58. It was normal for Robinson to come over and pick blueberries while she waited for Matthew to come out of the house. RP at 58. Normally, Matthew would come out and the two of

them would pick blueberries together. RP at 58. Robinson hoped Matthew would come out on his own so that she would not have to engage in a conversation with Miller. RP at 58-59.

Miller had security cameras on his property, which allowed him to see the back gate. RP at 58. Miller came out of the house holding a metal pipe. RP at 59, 185. Miller ran toward the strawberry and raspberry bushes nearby and asked Robinson, "[Are you] ready to die today, bitch?" RP at 59. Miller jumped down in front of Robinson holding the pipe as if he was about to hit Robinson. RP at 59.

Robinson told Miller she was just there to see Matthew and asked Miller why he was so angry with her. RP at 59. Miller told Robinson to leave. RP at 59. Robinson told Miller, "Well, I'm here to get Matthew, because we made arrangements for me to come pick him up." RP at 59. Miller then acted as if he was about to swing the pipe. RP at 59. Robinson opened the knife and cut Miller's arm. RP at 59. Miller hit Robinson in the hand with the pipe, shattering Robinson's phone. RP at 60. Miller hit Robinson again with the pipe, this time in the left hip. RP at 60. Robinson dropped the knife. RP at 61. Robinson backed away from Miller. RP at 61. Miller then struck her for the third time with the pipe—this time, across the shoulder blade—knocking her to the ground. RP at 61.

Miller stood over Robinson, pulled out a handgun, pointed it at her, and told her, "I should just finish you off now." RP at 62. Miller then told Robinson, "No, I'm gonna make you deal with what you did." RP at 62. After saying this, Miller then put the gun back into his pants. RP at 62. Miller then stomped on Robinson's rib cage. RP at 62.

Andrew Elliot lived on the property bordering Miller's. RP at 41. Elliot had lived on this property for a little over seven years. RP at 42. Elliot was aware that Miller and Robinson had lived at Miller's house. RP at 42. He would often see Robinson in the backyard playing with her son. RP at 43.

On the afternoon of July 14, 2012, Elliot was replacing a pump to a pond in his front yard. RP at 43. Elliot was checking on his pond, when he heard yelling coming from Miller's yard. RP at 45. Although it was not uncommon to hear yelling coming from Miller's residence, this argument was more heated and intense than usual. RP at 45. Elliot could hear Miller and Robinson arguing.[1] RP at 46. Elliot heard Miller order Robinson to get off his lot, and Robinson respond by asking, "Why can't I see Matthew?" RP at 46. Elliot heard what sounded like a "hitting noise"

[1] Although Elliot identified the voices as being male and female, rather than Miller and Robinson, the timing of the argument and the fact that he heard the female asking about "Matthew" made it obvious at trial that this argument was between Miller and Robinson. RP at 45.

three times. RP at 46. Then immediately after heard Miller say, "Die, bitch." RP at 46. At this point, Elliot called 911. RP at 46.

The Kalama police responded to this call. RP at 128-29. When Officer Jeff Skeie of the Kalama Police Department arrived at Miller's house, he was directed by an occupant of the house to the backyard. RP at 130-31. After Officer Skeie entered the backyard he observed Robinson laying on the ground with Miller standing "[r]ight on top of her" and "looking down at her." RP at 131. Officer Skeie observed Robinson crying with blood on her face. RP at 132. Officer Skeie asked Robinson why she was laying on the ground. RP at 132. Miller told Officer Skeie, "Because I put her there." RP at 133.

Officer Skeie observed that Miller was "very angry, very agitated, [and] just really worked up." RP at 133. Miller told Officer Skeie that Robinson had been trespassing on his property. RP at 133. Officer Skeie asked Miller if he had any guns or knives on him. RP at 133. Miller then reached for a knife. RP at 133. Officer Skeie removed this knife, as well as two other knives fond on Miller. RP at 134. The third knife Officer Skeie removed was a switchblade.[2] RP at 134, 135. While Officer Skeie was removing the knives, Miller turned his body. RP at 134. Officer Skeie observed that Miller had a gun in the waistband of his pants. RP at

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[2] Officer Skeie referred to this knife both as a switchblade and a spring blade knife. RP at 135.

134. Officer Skeie removed the gun from Miller. RP at 138. The gun was a .9 millimeter, semi-automatic pistol that was fully loaded. RP at 138.

Officer Skeie handcuffed Miller. RP at 142. Miller showed Officer Skeie a cut he had on his left arm. RP at 142. Officer Skeie observed Robinson on the ground in pain. RP at 145. He immediately noticed that Robinson had blood on her face and right knee. RP at 146. Robinson's knee had scrape marks and rough areas consistent with falling on rocks. RP at 159. Officer Skeie observed that the ground in this area was "rocky dirt" or gravel. RP at 159-160. Robinson stood up, however due to pain she had difficulty walking and sat back down on the ground. RP at 148. In the area of the blueberry bush, Officer Skeie recovered the metal pipe. RP at 149. Officer Skeie observed that Robinson had a long thin cut, elongated redness, and "puffiness" on her left thigh. RP at 157. Officer Skeie observed that Robinson's cell phone was shattered. RP at 157-58. Officer Skeie observed that Robinson's hand was swollen and cut. RP at 158. On Robinson's shoulder Officer Skeie observed a "big long, red pattern" with a "deeper white injury" in the center that looked like it was beginning to "welt up." RP at 160.

Sergeant ("Sgt") Parker of the Kalama Police Department also responded to the 911 call. RP at 177-78. When Sgt Parker arrived,

Officer Skeie had already placed Miller in handcuffs. RP at 180. Miller told Sgt Parker that normally Robinson had permission to come to the house to visit her child, however, today he had specifically told her not to come over. RP at 182. Miller told Parker that because Robinson had a knife, he used the metal pipe to defend himself. RP at 187. When asked about saying, "Die, Bitch," Miller told Sgt Parker he might have said that. RP at 188.

Miller was charged with assaulting Robinson and with possessing a dangerous weapon. The case proceeded to trial. During motions in limine, the State moved to exclude as irrelevant an email from Robinson to Miller that indicated Robinson was a drug user. RP at 15-16. Miller's attorney argued that the reason Miller had told Robinson not to come to his property was because Miller had heard Robinson was selling drugs for Scott Tuitt. RP at 16. Miller's attorney indicated that this evidence would come in both during his cross examination of Robinson and through Miller's testimony. RP at 22. After a lengthy discussion of the issue, the court ruled that testimony regarding Robinson's potential involvement with drugs was admissible so long as it was limited to the issue of Miller's belief. RP at 27. If the evidence was introduced for a reason beyond this purpose, then the court would rule on objections as they were raised. RP at 30.

During his cross examination of Robinson, Miller's attorney asked her if she had been with Scott Tuitt that morning. RP at 96. However, he did not ask her any questions related to the email, drug use, or a drug deal with Tuitt. RP at 77-105, 110-11. On direct examination, Miller testified that he had a gun on his person because Tuitt had come to his house. RP at 253-54. Miller's attorney chose not to ask Miller any questions regarding Robinson's involvement with drugs or a drug deal with Scott Tuitt. RP at 230-263, 274.

When Miller's attorney cross examined Robinson, he also never asked her about whether or not she told the police that Miller had pulled the gun on her. RP at 77-105, 110-11. After Robinson testified, Officer Skeie was called to testify. RP at 125. During his cross examination of Officer Skeie, Miller's attorney asked him: "Okay. Did – on July 14th, when you talked to Ms. Robinson, did she ever make a statement that my client had pointed a gun at her?" RP at 175. The State objected that the question called for hearsay. RP at 175. The objection was sustained. RP at 175. At the court's request counsel approached and conducted a sidebar. RP at 175. Afterwards, Miller's attorney withdrew his question. RP at 175.

Miller's attorney also cross examined Officer Skeie regarding "no trespassing" signs on the property, and the fact that Miller told Officer

Skeie that Robinson was trespassing. RP at 176. During his cross examination of Sgt Parker, Miller's attorney elicited the fact that Robinson had said she brought a knife expecting trouble, that Miller told police Robinson attacked him with a knife, and that Miller had a cut to his arm. RP at 191. Miller's attorney then pointed out to the jury that Sgt Parker had not been there during the incident, and that Miller was equivocal about whether or not he had made the statement "Die, Bitch." RP at 191. Miller's attorney then asked Sgt Parker, "Okay. You didn't arrest Ms. Robinson?" RP at 191.

Sgt Parker responded by saying, "No." RP at 192.

On redirect examination, immediately after this cross examination of Sgt Parker, the prosecutor asked Sgt Parker, "Why didn't you arrest Rachel Robinson?" RP at 193.

Sgt Parker responded, "Well, as far as the assault, we didn't believe that she was the primary physical aggressor." RP at 193. Miller's attorney did not object to the prosecutor's question or to Sgt Parker's response. RP at 193.

Miller's attorney cross-examined Robinson about bringing a knife to the property, trespassing, and then thinking she could "cry self-defense." RP at 85. After Robinson told Miller's attorney that he had never had any trouble in the past with her coming to visit her son, Miller's

attorney asked: "So, if he's never had an issue with you before, why bring the knife?" RP at 85. Robinson explained that she meant no issue with coming to the property, not with physical confrontations. RP at 86. After Robinson told Miller's attorney that Miller would often text her that he was angry, but then when she went to the property he would not say anything about the text, Miller's attorney asked her why she needed a knife on the date of the incident. RP at 86.

At this point Robinson responded by stating:

> Because me and him got in fights. I know how he is. I've put up with him hitting me upside the head and my ear bleeding. I mean, he's pulled his gun on me in front of our son. This is just him, I mean, he's – and yeah, I've fought back previous times too. An this time I felt a little bit better and he also was telling me that he was getting – giving my stuff away. Giving my car key away, my spare car key, and the X-Box, the Wii, he said he was, you know, giving – getting rid of all my stuff. Giving it away to someone who despises me. And I have no idea who that was.

RP at 86.

Miller's attorney then immediately asked Robinson: "And so you took the knife there to stab him?" RP at 86.

Miller's attorney also asked Robinson about her claim that while Miller was pointing the gun at her, he had told her, "I should just finish you off now." RP at 88. Miller's attorney then suggested to Robinson that in actuality it was Robinson who asked, "Why don't you just finish

me off?" RP at 88. After Robinson denied saying this, Miller's attorney asked, "You said you hadn't really paid attention to that gun before?" RP at 88.

Robinson responded: "Oh, I got it pulled on me so many times, it's not that I don't pay attention to it. I kind of got used to him pulling a gun on me." RP at 88. Miller's attorney then asked Robinson if Miller had bought the gun for her. RP at 88. Robinson admitted that Miller had purchased the gun for her. RP at 88. Then, after Robinson expressed regret for not taking the gun with her when she moved out, Miller's attorney seized on the opportunity to ask, "But then you could have brought the knife and the gun?" RP at 88.

Miller's attorney asked Robinson about Miller's physical limitations during the following exchange:

Q: Are you aware that he has some physical limitations?

A: What do you mean by that? Physical limitations?

Q: Bad back, a bad left arm?

A: Yeah, that's never stopped him before from beating me.

Q: Okay, that wasn't really my question. My question was you're aware that he has the bad back?

A: Yeah, his back. So he says, yeah.

Q: Pardon me?

A: I said, "So he says," yeah.

Q: And you're aware that he's disabled?

A: Yeah, be he's able to do – work on cars, do whatever, you know, run at me with a pipe. That doesn't look disabled to me.

Q: I'm sorry?

A: I said that doesn't look disabled to me. Him running at me with a pipe.

Q: Okay. But you're aware that he is disabled?

A: Yeah. And I have a bad ankle, too. So –

Q: And you're aware that his disability affects his back?

A: Yeah.

RP at 93-94.

Miller's attorney also asked Robinson if she was trying to set Miller up. Robinson responded:

> No, I wasn't. I've never done that. If that was the case, I would have done it a long time ago. All the twenty, thirty other times he's beat on me. That was not my intention – I did not. The neighbors called that I don't talk to, I don't talk to his neighbors. I wanted to get arrested because I was afraid of Mr. Miller, the way he would react, I mean, and I asked Officer Skeie, who – you know, called the cops? And he said the neighbor.

RP at 95.

Immediately after this response, Miller's attorney elicited from Robinson that she had seen Miller show her his phone, indicating he had dialed 911. RP at 95. He also elicited that at this point Robinson mocked Miller, calling him a "cop caller." RP at 95. During his closing argument, Miller's attorney argued that Miller had acted in self-defense, Robinson was the aggressor, and Robinson's testimony was not credible. RP at 328-339. After hearing the evidence, the jury found Miller guilty as charged. RP at 358-59.

IV. <u>ARGUMENT</u>

A. The trial court did not abuse its discretion when it permitted Miller to introduce evidence that he chose not to introduce.

The trial court did not abuse its discretion, when it held evidence was admissible but Miller's attorney chose not to introduce this evidence. "The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse." *State v. Stubsjoen*, 48 Wn.App. 139, 147, 738 P.2d 306 (1987) (citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984)). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). However, for a court to err in deciding an issue, the issue must necessarily be before that court. For example, when evidence

is admitted under ER 404(b), the trial court is not required to *sua sponte* provide a limiting instruction when neither party requests such an instruction. *See State v. Russell,* 171 Wn.2d 118, 124, 249 P.3d 604 (2011).

Here, the trial court did not prohibit Miller from eliciting evidence of Robinson's alleged involvement in a drug deal. Miller's attorney argued that the evidence—an email indicating Robinson used drugs[3]—was relevant to show that Miller excluded Robinson from the property because he believed that Robinson had been involved in a drug deal. RP at 16. The court ruled that this evidence was admissible to show Miller's belief. RP at 27, 30. This was exactly what Miller's attorney had argued the evidence was admissible to show. RP at 16. After holding the evidence was admissible to show his belief, the court explained that if the evidence was used for a different purpose, it would rule on objections as they were made. RP at 30. Thus, at the time of the court's ruling, no evidence had been excluded. In spite of the court's favorable ruling, Miller's attorney elected not to introduce evidence regarding the alleged drug deal. For these reasons, Miller's argument that the court refused to admit the evidence is contrary to the record. Miller simply chose not to introduce

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[3] The email contained the following admission from Robinson: "I honestly don't think I would get clean now but that I am I'm realizing all the stupid stuff that come along with dope. Can't really believe that you would think I set you up." RP at 16.

evidence that the trial court had held admissible. The trial court did not abuse its discretion when it did not *sua sponte* introduce evidence on Miller's behalf that Miller chose not to introduce.

B. Because Miller fails to provide any argument or legal authority in support of his assignment of error regarding the court's decision to sustain an objection to hearsay, this issue has been waived.

Because Miller fails to argue or cite any legal authority in support of his assignment of error to the trial court's decision to sustain a hearsay objection, he has waived this issue on appeal. "Without argument or authority to support it, an assignment of error is waived." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). In his brief, Miller assigns error to the court's decision to sustain the State's hearsay objection to Officer Skeie being asked to testify as to what Robinson told him about being threatened with the gun. *Brief of Appellant* at 1; RP at 175. However, Miller fails to argue or provide any legal authority in support of this assignment of error. For this reason, he has waived this issue on appeal.[4]

[4] At trial, Miller's attorney did not question Robinson about what she told the police with regard to being threatened with the gun. RP at 77-105, 110-11. He then attempted to elicit from Officer Skeie what she had said regarding the threat. RP at 175. ER 613(b) states: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same[.]" Because Robinson was not given the opportunity to admit or deny this statement, its admission through Officer Skeie would have been hearsay. Therefore, the trial court's decision to sustain the objection was correct under the rules of evidence. It should also be noted that after a sidebar on this issue, Miller's attorney chose to withdraw this question. RP at 175.

C. Miller did not preserve his claim of prosecutor misconduct for review when he did not object at trial, and the prosecutor did not err because the question asked on redirect was within the scope of cross examination.

Because Miller did not object to the prosecutor's question regarding the decision not to arrest Robinson, and Miller's attorney opened the door to this question during his cross examination of Sgt Parker, Miller's claim of prosecutor misconduct fails. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). At trial Miller did not object to the prosecutor's question, therefore his claim of misconduct fails unless he can meet this heightened standard of review. He fails to do so. First, he has not shown the prosecutor's question was improper, much less flagrant and ill-intentioned. Second, the question did not evince an enduring prejudice that could not have been neutralized by an admonition to the jury.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and

prejudicial." *Id.* at 718 (citing *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene,* 127 Wash.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing State v. *Brett,* 126 Wash.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill[-]intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the

verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. 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.").

Here, Miller waived his claim of misconduct by failing to object because he has not shown the question was improper, much less flagrant and ill-intentioned. It is well-established that "when a party opens up the subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (citations omitted). Yet the harm Miller claims occurred—Sgt Parker's given reason for not arresting Rachel Robinson—was subject matter that Miller's attorney put at issue during his cross examination of Sgt Parker.

During his cross examination of Officer Skeie, Miller's attorney elicited that "no trespassing" signs were posted on the property and Miller had told Officer Skeie that Robinson was trespassing. RP at 176. Then,

during his cross examination of Sgt Parker, Miller's attorney elicited that Robinson had brought a knife, that she had said she brought it expecting trouble, that Miller had told police Robinson attacked him, and that he had a cut on his arm. RP at 191. Miller's attorney then asked, "Okay. You didn't arrest Ms. Robinson?" RP at 191. As can be seen from the record, Miller's attorney was obviously implying that Robinson was the wrongdoer, and that she should have been arrested. By putting Sgt Parker's decision not to arrest Robinson at issue, Miller's attorney opened the door to the prosecutor asking him why he had not made the decision to arrest her. For this reason, Miller has not shown that the prosecutor's question was improper, and therefore he has not shown that it was flagrant and ill-intentioned.

Additionally, to overcome his failure to object Miller must also show that the alleged misconduct evinced enduring prejudice that could not have been neutralized by an admonition to the jury. While the State does not concede that misconduct occurred, even if the question was objectionable there is not a substantial likelihood that Sgt Parker's answer caused enduring and uncorrectable prejudice. Sgt Parker's response to the question was, "Well, as far as the assault, we didn't believe that she was

the primary physical aggressor."[5] RP at 193. The jury heard evidence that Miller had beaten Robinson with a metal pipe while armed with several weapons, Miller was observed standing over Robinson saying she was on the ground because he "put her there," and Andrew Elliot heard him exclaim "Die, Bitch." RP at 46, 59-61, 131-34. Under these circumstances, Sgt Parker's response was unlikely to have had any effect on the jury's verdict. Further, because Miller did not raise this issue at trial, the trial court was deprived of the opportunity to instruct the jury in an effort to neutralize any concern. Had Miller done so, the court could simply have instructed the jury not to consider any opinion evidence as to Miller's guilt. Because Miller has not shown that the prosecutor's question was improper, let alone flagrant and ill-intentioned or that it resulted in enduring prejudice that could not have been neutralized by an instruction, he waived this issue when he failed to object.

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[5] Miller argues that this was opinion evidence as to his guilt or innocence. Although it can be deduced that if Robinson was not believed to be the primary aggressor Miller must have been, Sgt Parker never testified that he believed Miller to be the primary aggressor or that it was his opinion that Miller was guilty. Further, the State never argued that this statement was evidence of Miller's guilt. RP at 304-326, 339-350.

D. Miller did not suffer ineffective assistance of counsel when his attorney chose not to object to answers given in response to his own questions on cross examination.

Miller did not suffer ineffective assistance of counsel when his attorney chose not to object to answers given by the victim during his own cross examination of her, but rather elected to use these answers to discredit her. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State*

v. Jury, 19 Wn.App. 256, 262, 576 P.2d 1302 (*citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (*citing State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986)). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* at 173.

"If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). Trial counsel has "wide latitude in making tactical decisions." *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). "Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* (citing

Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)).

Here, during cross examination, Robinson referenced prior acts of violence against her by Miller. To support his claim of ineffective assistance Miller argues these references were inadmissible, propensity evidence, therefore his attorney should have objected after these answers were given. While in domestic violence cases there are a variety of ways that such evidence has been found admissible under ER 404(b),[6] the admissibility of these statements is not the issue on appeal. Rather, the issue on appeal is whether or not Miller's attorney was ineffective when he chose not to object to Robinson's answers to his questions after they had already been heard by the jury. On each occasion, after the potentially objectionable testimony was given, Miller's attorney had a choice, object to information that the jury had already heard, or simply proceed with questioning and use this information to discredit Robinson.[7] On each occasion, Miller's attorney chose the latter course of action. This was part of a legitimate trial strategy to portray Robinson as both the aggressor and as one who was making unbelievable, exaggerated claims.

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[6] For example, evidence of prior acts of domestic violence could be admissible to show the defendant's motive, intent, a common scheme or plan, *modus operandi*, or to rebut a material assertion of the defendant. *See, e.g., State v. Baker*, 162 Wn.App. 468, 472-75, 259 P.3d 270 (2011).

[7] The value of objecting to testimony that the jury has already heard is obviously highly questionable.

In the first instance, Miller's attorney attempted to show that Robinson had been the aggressor because she had brought the knife with her. After getting Robinson to admit that Miller had not barred her from visiting her son in the past, Miller's attorney asked her why she brought the knife. RP at 85. She responded by telling Miller's attorney that he had hit her and pulled a gun on her before. RP at 86. At this point the jury had heard her response. Rather than sidestep this answer, Miller's attorney seized the opportunity and used Robinson's answer to establish her motive by asking, "So you took a knife there to stab him?" RP at 86.

In the second instance, Miller's attorney questioned Robinson on her claim that Miller had stated he should just "finish her off" when he pointed the gun at her. RP at 88. Miller's attorney asked Robinson if it actually had been her who asked Miller, "Why don't you just finish me off?" RP at 88. After Robinson denied this, Miller's attorney asked her about an earlier claim where she said she had not really paid attention to the gun before. RP at 88. Robinson then claimed Miller had pulled the gun on her many times before and that she had regretted not taking the gun with her when she moved out of the home. RP at 88. Again, Miller's attorney had a choice, object to information the jury had already heard or proceed. This time Miller used Robinson's statements to discredit her claim that she had brought the knife for self-defense by asking her, "But

then you could have brought a knife and a gun?" RP at 88. By doing so Miller's attorney furthered his portrayal of Robinson as the aggressor.

In the third instance, while questioning Robinson about Miller's disability, Miller's attorney asked Robinson if she was aware of his physical limitations, bad back, and bad arm. RP at 93. She responded by saying his bad arm had not stopped him from beating her before. RP at 93. At this point, rather than object, Miller's attorney remained undeterred in his effort to get Robinson to admit Miller's physical limitations. Shortly after this, Robinson admitted that Miller had a bad back and was disabled. RP at 93-94. This was an important admission because it corroborated Miller's later claim of being disabled. RP at 231-38. Further, by refusing to allow the witness to change the subject matter from the questions he wanted answered, Miller's attorney made Robinson appear uncooperative. As a seasoned cross-examiner, Miller's attorney refused to cede control of the questioning to the witness by continuing to ask pointed questions. This resulted in obtaining answers that were favorable to Miller's defense. Had Miller's attorney stopped the questioning and objected, he may not have achieved this desired result.

Finally, while asking Robinson if she had attempted to set Miller up, Robinson responded by telling Miller's attorney that she had not called the police 20-30 other times when he had beat her and that she did not call

the police on this occasion. RP at 95. Again, rather than objecting to information the jury had already heard, Miller's attorney used her own testimony against her by eliciting from Robinson that Miller had dialed 911 and that she had mocked him by call him a "cop caller." RP at 95. Thus, Miller's attorney established that Robinson was the one who opposed cooperating with the police, to make it appear more likely that she was the one who was in the wrong. Further, when considering the entirety of the cross examination, by not drawing special attention to her claim of 20-30 prior incidents, Miller's attorney attempted to create the impression that Robinson was exaggerating. Accordingly, on all four occasions Miller complains of, his attorney used Robinson's testimony to discredit her, while bolstering Miller's claim of self-defense.

It is important to consider the decisions made by Miller's attorney in their proper context. Cross examination is a fluid exercise, the examiner must listen to the witness, then use answers elicited to serve the interests of the examiner's client. Robinson's testimony was that Miller had asked her if she was ready to die, beaten her with a metal pipe, pulled a gun on her, and threatened to finish her off. RP at 59-62. Obviously, if believed, such conduct would offend any juror. More importantly, if believed by the jury, Miller would almost certainly be found guilty. For this reason, it was critically important for Miller's attorney to discredit

Robinson.[8] Thus, rather than object to Robinson's statements after they had already been heard by the jury, Miller's attorney elected to use them to support his argument that she was the aggressor, that she went to the property intending to attack Miller with the knife, and that she was exaggerating what had happened and was therefore not credible.

Miller's attorney's closing argument demonstrates his strategy. He argued repeatedly that Robinson was the aggressor:

> We have a woman who is bound and determined to go where she's told not to go, where she doesn't have a right to go. And to go there with a knife, because she knows she can't go there, and she's going there armed for trouble.

RP at 328.

> She struck at him with the knife that she brought because she was going to have it her way, she didn't care what he said. And she was going there.

RP at 329.

> And she knew she wasn't supposed to be there. She admitted that on the stand, but she went anyway, with the knife, she was bound and determined to get in there and she knew she was going to have to fight

RP at 330.

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[8] This was realistically the only strategy available to Miller's attorney as the evidence that he had used force against Robinson was independently corroborated. In addition to Robinson's testimony, Robinson was observed with recent injuries consistent with being hit with a pipe, Miller admitted to the police that Robinson was on the ground because he "put her there," and Andrew Elliot had heard him exclaim, "Die, Bitch." RP at 46, RP at 157-160.

Miller's attorney also attacked Robinson's credibility, arguing that she exaggerated about the amount of force Miller had used against her, and that her claims about what occurred were not believable:

> If Mr. Miller was out there trying to beat her up with this pipe, she wouldn't have little skin abrasions, she would have serious injuries. If he swung it to hurt her, she would probably have a broken arm, or a broken shoulder, not just some skin bruising. ...She doesn't have the injuries that would come from somebody who was really trying to attack her.

RP at 334.

> And then he comes out, "Oh my God, he's a wild man, he's gonna attack me with the pipe," so I – I open the knife up when the guy[']s going to attack me? To stand my ground? Doesn't make any sense, that's stupid....You'd get rid of that phone and get the knife open, unless, you already had it opened and had already swung it at him and gotten blood on your face when you struck him.

RP at 338.

> Which makes the most sense? Did he come running after her to try and get her with the pipe? And then she opened the knife on the fly with the hand full of phone? Or did she already have it open? It makes more sense that she already had it open and did exactly what happened.

RP at 338-39.

While it is possible that Miller's attorney could have employed different strategy, by objecting after the fact to the answers to his own questions, his strategy of using Robinson's responses during cross examination to bolster his argument was not an unreasonable one.

Because Miller's attorney employed what can be characterized as legitimate trial strategy, his decision not to object in response to answers already given cannot serve as a basis for a claim of ineffective assistance of counsel. *See McNeal*, 145 Wn.App. at 362. Thus, Miller has not overcome the strong presumption in favor of effective representation.

Miller also did not suffer any prejudice. In addition to overcoming the strong presumption of effective assistance, Miller must also show that he was prejudiced. "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, it is important to consider that the evidence of the assault was not based on Robinson's claims alone. When the police arrived, they found the metal pipe Robinson claimed to have been struck with. RP at 149. Police observed that she had bruising consistent with having been struck with the pipe. RP at 157-160. The phone she claimed Miller had struck was found shattered. RP at 157-58. Her claim that Miller had threatened her with the gun was corroborated by the fact that Miller had a loaded gun on his person when the police arrived. RP at 138. Police observed that Miller was highly agitated, and his immediate statement to

the police was that Robinson was on the ground because he "put her there." RP at 133. Finally, Andrew Elliot heard Robinson and Miller arguing, heard three "hitting" noises—consistent with Robinson being struck three times with the pipe, and heard the Defendant exclaim, "Die, Bitch." RP at 46. In short, the evidence that Miller was the aggressor was overwhelming. Accordingly, there is not a reasonable probability that had Miller's attorney objected to Robinson's statements the outcome of the trial would have been different. For this reason, Miller suffered no prejudice.

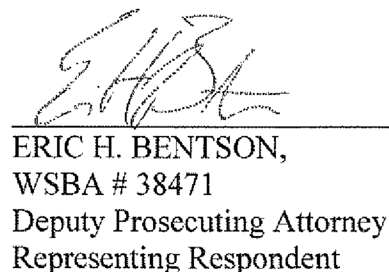
V. **CONCLUSION**

For the above stated reasons, Roy Miller's convictions should be affirmed.

Respectfully submitted this 17th day of September, 2013.

SUSAN I. BAUR
Prosecuting Attorney

By:



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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 17th, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 17, 2013 - 1:23 PM

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