

No. 44325-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS ROMAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it refused to instruct the jury on the lesser-degree offense of Assault in the Fourth Degree?
- B. Can Roman raise for the first time on appeal the alleged error that the deputy prosecutor elicited testimony that commented on Roman's right to silence?
- C. Did Roman receive ineffective assistance from his trial counsel?

II. STATEMENT OF THE CASE

Thomas Roman and Angela Roman were married on November 15, 2008. RP 107.¹ Roman and Angela lived together before and after they were married and had one child, a son, who was born on December 3, 2008. RP 108. Angela moved out of the family home after July 2010 and the couple started going through divorce proceedings. RP 109, 163. Angela and her son moved back into the family home in August 2012. RP 109-10. Initially the purpose of Angela moving back in was to ease some of the mediation issues currently pending in the divorce. RP 111. There was talk of reconciliation, but that was abandoned. RP 111.

Angela rented a car in the beginning of September 2012. RP 112. The car was rented in Angela's name but Roman paid for the

¹ The State will hereafter refer to Thomas Roman as Roman and Angela Roman as Angela for clarity purposes, no disrespect intended.

car on his credit card. RP 112. On September 30, 2012, Angela, Roman and their son came down to Chehalis from their home in Lynwood to take a ride on the steam train. RP 110-112. Angela drove the family down in her rented car. RP 113. Roman had a beer prior to leaving their home and drank beer in the car on the way down. RP 114.² Everyone was getting along when the family road the steam train at 3:00 p.m. RP 115. Angela consumed two small single serve bottles of wine on the train. RP 116. Roman continued to consume beer while on the train. RP 115.

After the train ride Roman wanted to stop at Great Wolf Lodge to check it out when the family headed north to go back home. RP 117-18. Angela drove and the family stopped at AM/PM and then at Dairy Queen before attempting to go to Great Wolf Lodge. RP 118, 169. The family did not make it to Great Wolf Lodge because Angela got turned around, got back on the freeway, and began heading south on I-5. RP 119, 171-72. Roman was not concerned about Angela's ability to drive at this point in time. RP 172. Roman got upset with Angela for going the wrong way and began to yell at her in the car. RP 119. Angela told Roman it was

² Roman disputes that he drank alcohol in the car on the way down to Chehalis. RP 194.

not a big deal and they would make a U-turn, and head north again.
RP 119.

Angela exited the freeway and made a U-Turn. RP 120. Roman was upset and Angela made a snide comment to him. RP 120. Roman attempted to take the keys out the ignition while Angela was driving the car. RP 120. Angela put the car in park while the car was still in the lane of travel waiting at a light, got out of the car, removed her son from the car, and walked over to a restaurant parking lot. RP 120, 173-74. Angela eventually saw that the car was now parked across the street. RP 120. Roman saw Angela and yelled at her, "Get over here you fat bitch!" RP 126. Angela goes over to the car and can see stuff from the car scattered all over the ground, including her cell phone which was broken apart. RP 126.

Angela attempted to take the car keys from Roman because she was concerned that Roman was going to drive off and leave her. RP 126. Roman bit Angela's arm and then punched her in the chest, knocking her to the ground. RP 127. Angela got up from the ground. RP 127. Roman put her in a headlock and squeezed hard enough that Angela saw stars and had difficulty breathing. RP 85. Angela was also kicked and kneed by Roman. RP 40, 84. Angela

did not lose consciousness. RP 84. Angela began screaming for help. RP 127.

Centralia Police Officer Makein heard Angela's screams for help. RP 53-54. Officer Makein investigated and saw Angela frantically moving back and forth and screaming, "Help me!" RP 58. Roman was holding his son. RP 58. Angela appeared terrified and scared. RP 59. Angela told Officer Makein that her husband had assaulted her and pointed to Roman. RP 60. Officer Makein could smell a slight odor of intoxicants on Angela but smelled a strong odor of intoxicants on Roman. RP 68. Officer Makein observed a fresh bite mark on Angela. RP 68.

Roman became defiant and angry when Officer Makein approached him. RP 74. Roman accused Officer Makein of profiling him because Roman was a guy. RP 71, 74. Ultimately, after receiving assistance from Sergeant Warren, Makein placed Roman under arrest for domestic violence. RP 72-74. Roman exercised his right to silence. RP 73.

Angela was treated at the emergency room of Centralia Providence Hospital. RP 36-39. Gary Biodeau, a physician's assistant (PA), examined and cared for Angela. RP 38-50. Angela explained that her husband had assaulted her. RP 39. Angela told

Mr. Biodeau that Roman had bit and hit her. RP 39. Angela also said Roman threw her to the ground, choked and kicked her, and she had seen stars but did not believe she had lost consciousness. RP 39-40. Mr. Biodeau observed petechia in Angela's cheeks, swelling on her throat, bruises, and a bite mark on her left wrist. RP 40. A CAT scan was ordered because Angela was complaining of difficulty swallowing and the condition was getting worse as time progressed. RP 43-44. The CAT scan showed that Angela had a thyroid cartilage fracture and soft tissue edema in the neck. RP 46.

The State charged Roman with Assault in the Second Degree. CP 4-6. The State alleged that on September 30, 2012 Roman assaulted Angela by strangulation. CP 4. The State also included two special allegations, one, that Roman and Angela were family or household members, and two, that the offense involved domestic violence and occurred within the sight or sound of Roman and Angela's minor child. CP 5.

Roman elected to have his case tried to a jury. See RP. Roman testified at the trial. RP 163-225. Roman denied assaulting Angela but admitted he was not treating Angela well during the incident. RP 172, 177, 210, 221. Roman believed Angela had consumed too much alcohol to safely drive and explained he was

attempting to prevent Angela from driving when the incident occurred. RP 173-74, 179-86. Roman's attorney requested a lesser included instruction for Assault in the Fourth Degree which the trial court denied. RP 236-45. Roman was convicted as charged. CP 65-67. Roman was sentenced to six months in jail. CP 83. Roman timely appeals his conviction. CP 91-101.

The State will supplement the facts as needed throughout its argument.

III. ARGUMENT

A. ROMAN WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE INFERIOR DEGREE OFFENSE OF ASSAULT IN THE FOURTH DEGREE.

Roman asserts that the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of Assault in the Second Degree. Brief of Appellant 7-13. Roman argues that the trial court erred when it concluded factually there was no evidence that only an Assault in the Fourth Degree had occurred. Brief of Appellant 10-13. The State respectfully disagrees with Roman's analysis and argues to this Court that the trial court did not err because the evidence does not support the inference that Roman only committed Assault in the Fourth Degree to the exclusion of the charged crime of Assault in the Second Degree.

1. Standard Of Review.

This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

2. Roman Was Not Entitled To Have The Trial Court Give A Lesser Included Instruction For Assault In The Fourth Degree.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case but it is not absolute. *Gamble*, 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d

448, 454, 6 P.3d 1150 (2000). The analysis whether an offense is an inferior charged offense as applied to the law is:

(1) The statutes for both the charged offense and proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense...

Fernandez-Medina, 141 Wn.2d at 454 (citations and internal quotations omitted). When dealing with a crime such as Assault in the Second Degree, it is clear that Assault in the Fourth Degree meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. RCW 9A.36.021; RCW 9A.36.041; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The factual prong of the analysis for an inferior degree offense requires, “there is evidence that the defendant committed **only** the inferior offense.” *Id.* at 454 (emphasis added). This necessitates that the inference must be that inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.*

The reviewing court evaluates the sufficiency of the evidence in support of the lesser included or inferior degree offense in the light most favorable to the party that requested the jury instruction. *Id.* at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State's evidence that points towards guilty. *Id.* at 456. "The evidence must firmly establish the defendant's theory of the case." *Id.* If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The State alleged Roman committed Assault in the Second Degree using the strangulation prong of the statute. RCW 9A.36.021(1)(g); CP 4-6. The trial court instructed the jury on Assault in the Second Degree by strangulation. CP 52-53. The State was required to prove, "[t]hat on or about the 30th day of September, 2012, the defendant assaulted Angela Roman by strangulation." CP 53, *citing* WPIC 35.19.01. As with all assault allegations, the State was required to prove that Roman intentionally touched or struck Angela in a manner that was harmful or offensive. WPIC 35.50; CP 54. The allegation was that the intentional touching was Roman strangling Angela. CP 4. For an

act to be intentional a person must act “with the objective or purpose to accomplish a result that constitutes a crime.” WPIC 10.01.

Roman sought the trial court to give a jury instruction on the inferior degree offense of Assault in the Fourth Degree. RP 238-42; CP 38-39, 41. In order to commit Assault in the Fourth Degree a person must assault another not amounting to Assault in the First, Second or Third degree or Custodial Assault. RCW 9A.36.041. The trial court refused to give the jury instruction for Assault in the Fourth Degree. RP 244-45; CP 45-64.

For Roman to be entitled to a lesser included instruction for Assault in the Fourth Degree there must be an inference from the evidence that only the Assault in the Fourth Degree was committed. *Fernandez-Medina*, 141 Wn.2d at 454. Roman must be able to show that the evidence inferred, in the light most favorable to him, that Roman only intentionally touched Angela in a harmful or offensive way, to the exclusion of strangulation as alleged by the State. See RCW 9A.36.021(1)(g) ; RCW 9A.36.041; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The testimony in this case does not infer that only an Assault in the Fourth Degree was committed. The testimony from Angela

was she was punched and fell to the ground, got up and then the next thing she remembered was getting up for a second time. RP 127. Angela testified that the second time she got up from the ground she was having more difficulty, she was seeing stars and felt like she was going to black out. RP 127. Angela was clear she could not remember what happened between the first time she got up and the second time she got up from the ground. RP 135, 142. Angela also stated, "I realized that I can't turn my neck and it hurts to swallow and it hurts to make any sort of motion with my neck turning, swallowing, opening my mouth, anything like that." RP 135-36.

Mr. Biodeau, the PAC, testified that Angela told him that Roman had choked her. RP 39. Upon examination of Angela, Mr. Biodeau observed petechia, broken blood vessels, in both of her cheeks. RP 40-41. A CAT scan was ordered for Angela because she was complaining of having difficulty swallowing and the condition was getting progressively worse. RP 43-44. The CAT scan revealed Angela had a thyroid cartilage fracture and a lot of swelling, edema, in her neck. RP 45-46. Mr. Biodeau testified that cutting off a person's air supply or if the blood supply was cut off to a person's brain it could cause a person to see stars. RP 47. Mr.

Biodeau also testified that Angela's injuries were consistent with her explanation of what had happened to her. RP 48.

Officer Makein testified that while speaking to Angela she began coughing more throughout her conversation with him. RP 84. Angela began holding her throat area more and stated, "[m]y throat hurts, I'm having difficulty breathing." RP 84. Officer Makein testified that Angela told him that she remembered Roman coming up behind her with his arm around her neck and squeezing her neck and that is when she remembered seeing stars and having difficulty breathing. RP 85.

Roman testified that he used Angela to stop himself from falling on their son and this was a reflex that he did not do it on purpose. RP 185. Roman stated:

When she came at me I wasn't looking at her, so I put my arm up like this, I had her shoulder, and I came down and I almost fell. I guess you could consider it at one point kind of a headlock, but I wasn't - - you know I was - - I was told I had choked her out, and I thought it was like a big time wrestler using two hands to choke someone.

RP 213. Roman further testified, "No, I never choked her, punched her, kicked her or kneed her. I didn't do any of those things. I was an ass, but I didn't do those things." RP 221.

Roman argues that he had a right to have the jury instructed on the lesser included of Assault in the Fourth Degree because there was testimony that Roman bit Angela, kicked her and punched her in the chest and the jury would have likely reached a compromise verdict of Assault in the Fourth Degree if given the option. Brief of Appellant 11.³ But the State had not charged Roman with Assault in the Second Degree for his actions in kicking, biting or punching Angela. RP 237-38, 244; CP 4-6. The trial court recognized this and commented upon it while hearing Roman's attorney's argument for the lesser included instruction. RP 239. There must be evidence Roman intentionally put his arm or hands around Angela's neck but did not choke or strangle her for the lesser included instruction to be given. *Fernandez-Medina*, 141 Wn.2d at 454. Even with all inferences drawn in the light most favorable to Roman, there is no such evidence in the trial record. *Id.* at 455-56; See RP. Roman testified he did not intentionally grab onto Angela and put her into a headlock. RP 185, 213. Roman denied choking Angela. RP 213, 221. Angela's failure to recall what had happened does not infer that she was only intentionally

³ The State would note that if this instruction had been given as proposed by Roman's attorney it is likely that the State now would be answering an argument that the State did not elect which conduct constituted the Assault in the Fourth Degree and there was therefore, not a unanimous verdict.

touched in a manner that was harmful or offensive and not strangled; it simply means she cannot remember. RP 141-42.

The trial court did not abuse its discretion when it ruled Roman was not entitled to the lesser included instruction of Assault in the Fourth Degree. RP 239-43. The trial court articulated the correct analysis regarding why it would not give the inferior included offense instruction. See RP 239-43. Further, although the trial court did not use the magic words and state it was considering the evidence in the light most favorable to the defendant, the omission does not make the ruling incorrect. *Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979) (citations omitted).⁴ This Court should affirm the trial court's ruling and Roman's conviction because he was not entitled to the lesser included instruction.

B. ROMAN CANNOT RAISE FOR THE FIRST TIME ON APPEAL THAT THE DEPUTY PROSECUTOR ALLEGEDLY COMMENTED ON HIS RIGHT TO REMAIN SILENT BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.

Roman argues, for the first time on appeal, that the deputy prosecutor repeatedly elicited testimony regarding Roman's exercise of his right to silence. Brief of Appellant 13-17. Roman

⁴ When the ruling by the trial court is correct "it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition." *Pannell v. Thompson*, 91 Wn.2d at 603.

does not argue to this Court how he is able to raise this alleged error for the first time on appeal. See Brief of Appellant 13-17. The alleged error, while of constitutional magnitude, is not manifest. Therefore, Roman is precluded from raising this issue for the first time on appeal.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Roman Did Not Object To The Questions Or The Testimony He Alleges Commented On Exercise Of His Right To Silence And Fails To Show This Court That The Alleged Error Is A Manifest Constitutional Error.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned

error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

An alleged error regarding a defendant’s exercise of his or her right to remain silent, as guaranteed by the United States and

Washington Constitutions, is a constitutional error.⁵ Therefore, the only inquiry here is whether the alleged error was manifest. *O'Hara*, 167 Wn.2d at 98. An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a "plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case." *O'Hara*, 167 Wn.2d at 99 (internal citations and quotations omitted). Roman has not satisfied this requirement.

Any comment in regards to Roman's exercise of his right to silence was brief. RP 73-75. There was no objection to any of the questions or the testimony of Officer Makein. RP 73-75. The deputy prosecutor made no reference to Roman's exercise of his right to silence during the deputy prosecutor's closing argument. RP 261-78, 286-91. There was zero argument made on behalf of the State that Roman's silence inferred he was guilty of Assault in the Second Degree or that Roman had something to hide. RP 261-78, 286-91.

⁵ The State is not agreeing that there was an error, or that the State improperly elicited testimony regarding Roman's exercise of his right to silence. The State will fully argue below, in subsection 3, the analysis regarding commenting on a defendant's exercise of his or her right to silence.

The overwhelming evidence in this case proved beyond a reasonable doubt that Roman had committed the crime of Assault in the Second Degree by means of strangling his wife. Angela could not remember the act of being strangled but could recall that she had to get up from the ground a second time and that time she was seeing stars and felt as if she was going to black out. RP 127, 135, 141-42. Angela did recall that she could not turn her neck, it hurt to swallow or make any sort of motion with her neck. RP 135-36. Angela did not have these injuries prior to the incident with Roman. RP 137-38.

Angela told Officer Makein that Roman had come up behind her and put his arm around her neck and squeezed hard enough that she saw stars and had trouble breathing. RP 85. As Officer Makein spoke to Angela she started to complain about her throat hurting and she coughed more and more throughout the conversation. RP 84.

Angela told Mr. Biodeau that her husband had assaulted her. RP 39. Angela also told Mr. Biodeau that Roman had thrown her to the ground and choked her. RP 39. Mr. Biodeau testified that Angela had swelling in her neck and a thyroid cartilage fracture, all

which was consistent with Angela's version of what had occurred. RP 45-46.

While Roman denied choking, punching, kicking or kneeling Angela, the physical evidence presented would suggest otherwise. RP 40-50, 221. Roman's testimony minimized what had happened and painted Angela as the aggressor. See RP 172-221. The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The jury obviously did not find Roman's version of events credible and, considering the evidence presented in this case, it is clear why the jury would make such a determination.

The overwhelming evidence proved Roman was guilty of Assault in the Second Degree by means of strangulation. Roman cannot show he was prejudiced by any alleged error the State may have committed when it allegedly commented on Roman's exercise

of his right to silence. This Court should not consider this claimed error for the first time on appeal.

3. If This Court Permits Roman To Raise The Alleged Error Regarding Improper Eliciting Of Testimony Regarding Roman's Right To Silence, Any Comment On Roman's Right To Silence Was Harmless Beyond A Reasonable Doubt.

Roman argues that the deputy prosecutor repeatedly elicited testimony from Officer Makein regarding his exercise of his right to silence. Brief of Appellant 13-17. Roman asserts that this occurred on three separate occasions during Officer Makein's testimony. Brief of Appellant 14-15. Yet, Roman does not acknowledge that the deputy prosecutor was asking open ended questions not formulated to elicit a direct response regarding Roman's right to silence. Brief of Appellant 13-17; See RP 73-75. Roman also does not acknowledge that the deputy prosecutor does not even reference Roman's silence during his closing argument. Brief of Appellant 13-17; See RP 261-78, 286-91. Even if Officer Makein's statements are considered a direct comment on Roman's right to remain silent, any error would be harmless.

A person cannot be compelled in a criminal case to provide evidence against him or herself. U.S. Const. amend. X; Const. art. I, § 9. A person who invokes his or her right to silence may not

have that silence used as substantive evidence of guilt in a criminal trial. *State v. Sloan*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006), citing *State v. Easter*, 130 Wn.2d 228, 238, 992 P.2d 1285 (1996) (additional citations omitted). It is a violation of a defendant's due process rights for the State to exploit or comment on the defendant's choice to exercise his or her right to remain silent. *State v. Romero*, 114 Wn. App. 779, 786-87, 54 P.3d 1255 (2002), citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979). The State, therefore, "cannot elicit comments from a witness that are related to a defendant's silence or make such comments during closing arguments in order to infer guilt. *Sloan*, 133 Wn. App. at 127 (citations omitted).

When the defendant's exercise of his or her right to remain silent is raised, the reviewing Court "must consider whether the prosecutor manifestly intended the remarks to be a comment on [the right to remain silent]." *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 204 (2008) (internal quotations and citations omitted). A mere reference to a defendant's silence does not amount to a comment on his or her right to silence. *Burke*, 163 Wn.2d at 216.

A comment on a defendant's right to silence can be harmless error. *State v. Pottorff*, 138 Wn. App. 343, 346-48, 156 P.3d 955 (2007). In *Pottorff* the court differentiated the review standards of the harmless error analysis based upon what type of comment was made by the State. *Pottorff*, 138 Wn. App. at 347. The court explained that the prejudice incurred as the result of a direct comment about a person's right to remain silent would require the State to show the error was harmless beyond a reasonable doubt. *Id.* "A direct comment occurs when a witness or state agent makes a reference to the defendant's invocation of his or her right to remain silent." *Id.* at 346.⁶ A constitutional error is deemed harmless if the reviewing court is certain beyond a reasonable doubt that the verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The Supreme Court has held, "[t]his 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." *Anderson*, 171 Wn. 2d at 770.

⁶ The court gave the following as examples of direct comment on the evidence: An officer testifying that he read a defendant his *Miranda* warnings and the defendant chose not to waive his right to remain silent and would not speak to the officer. An officer testifies that a defendant would not speak to the officer and requested an attorney. See *Pottorff*, 138 Wn. App. at 347. (referring to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)).

Whereas, the prejudice incurred when the State makes an indirect comment on a person's right to silence is reviewed under the lower standard, which determines whether no reasonable probability exists that error affected the outcome. *Pottorff*, 138 Wn. App. at 347. The State makes an indirect comment on the a person's right to silence when it, through a witness or the deputy prosecutor, references an action or comment made by the defendant which could be inferred as an attempt by the defendant to exercise his or her right to silence. *Id.*, citing *State v. Lewis*, 130 Wn.2d 700, 706, 927, P.2d 235 (1996).⁷

Roman takes issues with the following exchange, characterizing it as the deputy prosecutor repeatedly eliciting testimony regarding Roman's exercise of his right to remain silent:

Q: Now, you didn't have him do any of those [field sobriety tests], did you?

A: Once he was - - I advised him he's under arrest for domestic violence assault, I read him Miranda. He clammed up, said I want my attorney. I don't want to talk to you, so for me once he says anything like that after Miranda I don't ask him anything else.

Q: Describe for me when you first made contact with him how is his demeanor?

⁷ "[O]fficer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent ...[O]fficer's testimony that the defendant would take polygraph test after discussing the matter with his attorney was an indirect reference to silence."

A: I would have to say defiant, probably the best word because after he made the statement, are you profiling me because I'm a guy? I tried to explain to him, no. I'm just making sure everybody is safe, but for him once he made that statement it was clear he wasn't going to cooperate. He wasn't going to really assist with the investigation or provide information that we need. His demeanor was basically I was pissing him off, because I determined it was a crime that occurred against his wife and put him in custody.

...

Q: After the defendant is taken into custody, what did you do?

A: Of course pat him down for weapons, put him in the backseat of my car, read him his Miranda. He doesn't want to talk, so I left him in the car continued my investigation to make sure that the victim gets medical treatment, have her evaluated and that's what I did.

RP 73-75. None of the deputy prosecutor's questions were formulated to require Officer Makein to testify regarding Roman's exercise of his right to silence. RP 73-75. Therefore it is a complete mischaracterization of the deputy prosecutor's questioning for Roman to state the deputy prosecutor repeatedly elicited testimony regarding Roman's exercise of his right to silence.

In *State v. Keene*, this Court held that the deputy prosecutor and the detective who testified impermissibly commented on Keene's right to silence. *State v. Keene*, 86 Wn. App. 589, 594, 938

P.2d 839 (1997). The detective “testified that she never heard from Keene after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again.” *Keene*, 86 Wn. App. at 594. The deputy prosecutor used Keene’s failure to contact the detective as substantive evidence to infer guilt by telling the jury “it could decide if Keene’s failure to contact the detective was the act of an innocent man.” *Id.*

In contrast, nothing in Officer Makein’s testimony is presented as substantive evidence of Roman’s guilt for the crime of Assault in the Second Degree. Further, the deputy prosecutor does not attempt to use the testimony of Officer Makein to infer Roman is guilty. *Burke*, 163 Wn.2d at 216; RP 261-78, 286-91. The testimony (and lack of argument) does not amount to a comment on Roman’s right to silence.

If this Court were to find that Officer Makein’s testimony was a direct comment on Roman’s exercise of his right to silence, any such comment is harmless. See *Pottorff*, 138 Wn. App. at 346-48. The verdict was unattributed to the brief testimony offered by Officer Makein stating that Roman had invoked his right to silence. As outlined above, there was overwhelming evidence that Roman committed the crime of Assault in the Second Degree by means of

strangling Angela. There was no argument from the deputy prosecutor that Roman's silence inferred that he had in fact strangled Angela. RP 261-78, 286-91. This Court should find that the resulting prejudice from the comment was harmless beyond a reasonable doubt and affirm Roman's conviction.

C. ROMAN RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Roman's attorney provided competent and effective legal counsel throughout the course of his representation. Roman asserts his attorney was ineffective for failing to object to Officer Makein's comment on Roman's post-*Miranda* silence. Brief of Appellant 17-19.

Roman's assertion that his attorney was ineffective is false. If this Court were to find Roman's attorney's performance was deficient, Roman cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *McFarland*, 127 Wn.2d at 335 (citations omitted).

2. Roman's Attorney Was Not Ineffective During His Representation Of Roman Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Roman must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. An attorney's "failure to request a limiting instruction for evidence under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence." *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). A "defendant can rebut the presumption of reasonableness by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (internal quotations and citations omitted).

As argued above, Officer Makein's testimony was not a comment on Roman's right to silence because there was no inference that Roman was guilty of Assault in the Second Degree from Officer Makein's testimony. Therefore, it was not necessary to object and any such objection would not have been sustained by

the trial court. Also, Roman's attorney could have been using a legitimate trial tactic not to call further attention to Roman's invocation of his right to silence. Because there was no inference of guilt, the testimony was not offered for substantive evidence of Roman's guilt, and most if not all jurors necessarily understand a defendant has the right to remain silent, an objection could have drawn the jury's attention to the silence in such a way that it would appear that Roman had something to hide. Roman's counsel was not deficient for failing to object. Roman received effective assistance from his attorney and his conviction should be affirmed.

3. If Roman's Attorney Is Found To Be Deficient, Roman Has Not Met His Burden To Show That He Was Prejudiced By The Deficient Performance Of His Attorney.

The State maintains that Roman's attorney's performance was not deficient, *arguendo*, if this Court were to find Roman's attorney's performance deficient; Roman has not met his burden to show he was prejudiced. Roman must show that, but for his attorney's error for failing to object to Officer Makein's testimony regarding his post-*Miranda* silence, the jury would not have found Roman not guilty. *See Horton*, 116 Wn. App. at 921-22.

As argued above, due to the overwhelming evidence of Roman's guilt for the crime of Assault in the Second Degree,

Roman was not prejudiced by the testimony from Officer Makein regarding Roman's exercise of his right to silence. Roman has not met his burden to show prejudice and this Court should affirm his conviction.

IV. CONCLUSION

For the foregoing reasons, this court should affirm Roman's conviction for Assault in the Second Degree – Domestic Violence.

RESPECTFULLY submitted this 19th day of July, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

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