NO. 46657-1-II

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

STATE OF WASHINGTON, Respondent

v.

LAWRENCE ROLAND ROUSSEL, Appellant

FROM THE SUPERIOR COURT FOR COWLITZ COUNTY
COWLITZ COUNTY SUPERIOR COURT CAUSE NO.14-1-00670-2

BRIEF OF RESPONDENT AND RESPONSE TO PERSONAL RESTRAINT PETITION

Attorneys for Respondent:

ANNE M. CRUSER, WSBA #27944
Special Deputy Prosecuting Attorney
For Cowlitz County Prosecutor's Office
OID# 91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

I. **The trial court did not err in denying Roussel's proposed lesser included instruction on assault in the fourth degree.**

II. **The trial court did not infringe on Roussel's right to present a defense or confront witnesses.**

III. **Roussel cannot raise a privacy act violation for the first time on appeal and his counsel was not ineffective for failing to raise the issue.**

IV. **The State did not commit prosecutorial misconduct.**

V. **Roussel received effective assistance of counsel.**

VI. **Roussel waived his right to challenge his legal financial obligations by failing to object to their imposition at the time of sentencing.**

STATEMENT OF THE CASE

On May 27, 2014, Laura Fadden received a phone call from her daughter Rebecca Roussel. RP 55. Rebecca was upset and asked her mother to come pick her up. RP 55-56. Laura contacted Rebecca on a curb off of Westside Highway. RP 56. Rebecca told Laura she had walked from 42nd and Ocean Beach Highway, which was several miles in distance. RP 56-57. Rebecca was very sad, and her feet hurt. RP 57. Rebecca told Laura she had been in a dispute with her husband, Lawrence Roussel (hereafter 'Roussel'). RP 57. Laura drove Rebecca toward Laura's house, however

while in route, Rebecca directed Laura to take her to the trailer that she and Roussel lived in at Cedars RV Park. RP 57. So, Laura drove her daughter to the trailer. RP 57.

The women entered the trailer and observed Roussel passed out on the bed. RP 57. Clothes were strewn about the trailer and beer cans were "spewed around the floor." RP 58. Rebecca woke Roussel up and got "in his face" about dropping her off and making her walk. RP 58. Roussel was drunk, stumbling around, slurring his words, and his eyes were "very scary looking." RP 58. Roussel threw Rebecca across the trailer twice. RP 303. The first time he threw her, Rebecca landed on a dog crate which "busted apart," and she hit her arm on the wall. RP 303. Subsequently, Rebecca complained of pain to her arm. RP 303.

Laura called her husband, Rebecca's father, Gary Fadden, for help. RP 58, 103. In response, Roussel told Laura that if Gary came, he would "choke him out." RP 59. Laura then called Gary again and instructed him not to come to the trailer. RP 59. Roussel took $172 that Laura had previously given to him and Rebecca for moving expenses and threw it at Laura. RP 59. He also removed his wedding ring and threw it at Laura and said she could sell it and get some of the money back. RP 59.

Roussel gathered clothes, intending to leave the trailer. RP 59-60. Rebecca then began begging him not to leave. RP 60. Rebecca and

Roussel made up, and Rebecca was hugging and kissing Roussel. RP 60. Laura gave Roussel back his wedding ring. RP 61. Laura took Rebecca's phone, which she had purchased, and a "big wad of keys," and left. RP 61. Laura took the keys in an attempt to prevent Roussel and Rebecca from driving. RP 61. Laura then returned to her house at 135 Dusty Drive in Kelso. RP 61.

Within an hour, Rebecca drove Roussel to the Fadden's house in Rebecca's Honda Accord. RP 62. Rebecca entered the house demanding her phone and keys back. RP 63, 107. Laura told her the keys were on the counter. RP 63. Rebecca began yelling at her parents. RP 63. Rebecca also wanted her parents to sign over the title of the trailer her parents had purchased. RP 107. Gary explained to her that because the trailer was being financed he did not have the title. RP 107. Due to Rebecca's "foul and vulgar language" to her mother, Gary told Rebecca to "get out of the house." RP 107, 122. Rebecca exited the house and went to the car. RP 63. Laura exited the house and told Gary to remain inside. RP 108. As Gary attempted to watch from the house, Laura followed Rebecca and tried to calm her down. RP 63, 108. Rebecca entered the car and sat in the driver's seat. RP 64. Laura stepped into the space behind the open driver's door. RP 64. Rebecca put the car in reverse and the door bumped into Laura. RP 64. Rebecca put the car in park. RP 64.

Roussel said he was going to "choke Gary out." RP 64. Laura reached across Rebecca and grabbed Roussel by the sweatshirt. RP 64. Roussel got away from Laura and exited the car. RP 65. Laura intercepted Roussel and stepped in front of him, blocking his path, in an effort to keep him where he was. RP 65, 109. By this time, Gary, who Laura had told to remain in the house, was looking out the door. RP 65. Roussel picked Laura up and threw her to the ground backwards, causing her to hit the back of her head on the asphalt and bleed. RP 65, 110. Rebecca knelt down beside her mother and placed her hand under Laura's head. RP 66.

Not wanting his wife to be assaulted further, Gary grabbed his walking stick and headed to Roussel. RP 110. Roussel took the walking stick from Gary. RP 125. Both men ended up on the ground, with Roussel on top of Gary. RP 66, 125. Roussel pushed the walking stick across Gary's throat.[1] RP 110. Due to the pressure from Roussel pushing the walking stick against his throat, Gary had difficulty breathing. RP 110-11. As Roussel continued to push the walking stick down on his throat, Gary

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[1] It was clear at trial that Roussel, who was 43, physically dominated Gary. RP 295. Gary was a 66-year-old retired captain with the Longview Fire Department. RP 104. As a result of injuries sustained as a firefighter, Gary had knee-replacement surgery on both knees. RP 104-05. Gary also had multiple rotator cuff surgeries and suffered a heart attack. RP 105. For these reasons, Gary was physically slow, immobile, and weak. RP 105, 123.

believed that he was going to be "choked to death."[2] RP 111, 119. Suddenly, Roussel relented and relaxed. RP 111. During this time, Rebecca came to the side of Roussel. RP 112. Roussel took the stick from Gary. RP 112.

When Laura came to, she observed that Roussel was on top of her husband with his knees on Gary's chest. RP 66. Roussel and Gary both had hold of the walking stick. RP 68. Gary was pushing the walking stick up above his chest. RP 68. Roussel was holding the stick that Gary had pushed up over the area of his chest and throat. RP 94. Gary yelled to Laura to call 911. RP 68, 112. Laura went into the house and obtained a phone. RP 68. After Laura did this, Roussel and Rebecca returned to Rebecca's car and drove away. RP 68. Gary then used a phone to dial 911, however, not wanting to get her daughter in trouble and cause greater conflict, Laura told Gary to hang up. RP 69, 82. Gary then hung up the phone. RP 69.

Sergeant ("Sgt.") Cory Huffine of the Cowlitz County Sheriff's Office responded to the Fadden's house. RP 69, 145. Laura had a bump on her head that was bleeding. RP 77, 146. Sgt. Huffine located the walking

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[2] During testimony to these events Gary became extremely emotional, as the verbatim report of proceedings reflects. RP 111.

stick in the front yard. RP 148. The walking stick was about four feet long and using it to compress a person's neck carried the potential for "deadly force." RP 150-51.

Sgt. Huffine called Rebecca and left a message on voice mail. RP 154. Sgt. Huffine called Roussel and spoke with him. RP 154. Roussel claimed he had reported the incident and been seen by a doctor in Portland. RP 154. Sgt. Huffine asked Roussel for a medical release, copy of his medical records, and written statement. RP 154. Roussel told Sgt. Huffine he would fax this information to him. RP 155. However, Roussel did not ask for a fax number. RP 155. Roussel told Sgt. Huffine he would fill out a statement at the Clark County Courthouse and have it forwarded to him. RP 155. However, Roussel did not provide Sgt. Huffine with either medical reports or a written statement. RP 154-55.

Two days later, on May 29, 2014, Deputy Brady Spaulding of the Cowlitz County Sheriff's Office contacted a police officer in Clark County who had arrested both Roussel and Rebecca. RP 167. Deputy Spaulding transported both of them to the Cowlitz County Jail. RP 176, 243. At the jail, both Roussel and Rebecca provided written statements. RP 177. In his statement, Roussel claimed Gary was beating up Rebecca and that they wanted to press charges against Gary for a "violent assault with a weapon." RP 178. Roussel described the weapon as a "five-foot stick."

RP 179. In their statements, neither Rebecca nor Roussel made any mention of Laura falling or hurting her head. RP 240, 298.

Roussel was charged with assault in the second degree for assaulting Gary with a deadly weapon and strangling him and assault in the fourth degree for assaulting Laura. CP at 1-2. As discussed in motions, after the assault of Gary occurred, Rebecca sent numerous texts and voice mails threatening to tell people that she was molested by Gary as a child unless her parents dropped the charges and gave the trailer to her and Roussel. RP 22, 23. As result, Rebecca was prosecuted and pled guilty to attempted theft in the first degree and attempted extortion in the second degree. RP 22. The State moved in limine to exclude any reference by Rebecca that she was raped or molested by her father. RP 23. Roussel's attorney acknowledged the threats were made after the assault, but also argued that for 15 years Rebecca had claimed her father molested her. RP 23. Roussel's attorney said that about a month prior the assault, the Faddens offered to buy Rebecca and Roussel the trailer if she stopped making these allegations. RP 24. Roussel's attorney argued that the allegation of molestation in conjunction with Rebecca's extortion conviction was admissible to show Gary's motive as the aggressor. RP 25.

The court questioned the relevancy of the claim of molestation to the assault charge. RP 26-27. The court found that even if the claim of molestation was relevant, the danger of unfair prejudice outweighed the probative value of the evidence under ER 403. RP 27. In its ruling, the court only ruled on the State's motion regarding the claim of molestation; the court did not prohibit testimony regarding the fact that Rebecca had been extorting her parents. RP 27. After the court ruled that attempted extortion could be admitted as a crime of dishonesty to impeach Rebecca under ER 609, Roussel's attorney asked that the underlying facts and names of the victims—the Faddens—not be admitted under the rule. RP 29-30. The State agreed not to elicit this information. RP 30.

At trial, the State called Laura Fadden, Gary Fadden, Sgt. Huffine, and Deputy Spaulding as witnesses. RP 51, 102, 140, 165. Several photos were admitted into evidence, as well as the walking stick itself. RP 67-78, 93, 116-18, 169-177. One of these showed Laura's head bleeding. RP 77. The defense called Rebecca to testify that she arrived at the house and was handed the keys and phone by her mother out the back door. RP 203. Rebecca denied having a conversation about her parents signing over the trailer. RP 215. Rebecca claimed that her father brushed past her mother, grabbed the walking stick, and began hitting her all over, swinging the walking stick at her like a baseball bat. RP 203, 206. Rebecca estimated

that her father struck her 20 times, "as fast as he could, as hard as he could." RP 208, 232. However, Rebecca also stated that she never fell to the ground. RP 208. She also testified that while Gary was beating her with the walking stick he never said anything. RP 232. Rebecca said that Gary had never hit her before, therefore she was not expecting him to hit her. RP 233.

Rebecca testified that Roussel exited her vehicle and came to her aid by attempting to remove the walking stick from Gary. RP 208. She testified that Gary hit Roussel in numerous places. RP 208. However, she also testified that she never saw Roussel hit her father with the walking stick. RP 211. Rebecca testified that Roussel got the stick away from Gary and threw it as far as he could. RP 211. Rebecca claimed that Roussel did not knock Laura to the ground. RP 212, 219. Rather, she claimed that Laura fell while trying to help Gary, but then also testified that she did not see Laura's injury at all. RP 219, 236. She stated that after Roussel threw the walking stick, she and Roussel returned to her car and left. RP 213.

Rebecca testified to having suffered injuries, but denied that these were the result of being assaulted by Roussel in her trailer. RP 242. Rebecca claimed she and Roussel went to visit a mental health doctor in Vancouver. RP 214. She said after visiting the mental health doctor they went to Emmanuel hospital. RP 214.

Rebecca testified that afterward she spoke with Laura on the phone. RP 236. When asked if they had discussed Rebecca's injuries, Rebeca did not recall. RP 236. When asked whether Laura had told her that she had observed Rebecca injure her arms when Roussel knocked her down in the trailer, Rebecca said she did not remember and did not think so. RP 237. When asked if she screamed at her mother that she had better not bring that up, Rebecca she did not recall saying that. RP 237.

Roussel also testified at trial. RP 256. Roussel testified that the trailer he and Rebecca lived in was provided to them by Gary, between two to two-and-a-half weeks before the events of May 27, 2014. RP 260. Roussel claimed that he and Rebécca had not argued at the trailer, and that he had not assaulted her in the trailer. RP 288. Roussel agreed that Rebecca had driven the two of them to her parents' house to retrieve her phone. RP 268-69. Roussel testified that while sitting in the car, he observed Rebecca exit the house with her phone. RP 269. Roussel testified that Gary came "out of nowhere" with the walking stick and "bashed" Rebecca as many times as he could. RP 269-270. Roussel claimed that as he approached, Gary was striking Rebecca as she lay in a fetal position. RP 271-72. Roussel testified that upon arrival Gary saw him and backed up. RP 272. Roussel testified that he asked, "What the hell is going on?"

RP at 272. Roussel said he leaned over in an attempt to get Rebecca out of the situation, but then felt a jab to his back. RP 272.

Roussel testified that he turned to face Gary. RP 273. Roussel claimed that Gary took two steps backward and fell onto his back, then struck him in the knee. RP 273. Roussel claimed he took the stick from Gary and threw it into the yard. RP 273. Roussel explained that while Gary was on the ground he managed to jerk the stick out of Gary's hand. RP 275. Roussel denied ever choking Gary with the stick. RP 275. Roussel denied kneeling on Gary. RP 297.

Roussel claimed that Laura had not been thrown the ground and that he never saw her get injured. RP 273-74. Roussel also claimed that he never saw Laura become involved in the conflict at all. RP 292. Roussel testified that after they left, he and Rebecca visited a psychiatrist in Vancouver and then went to the emergency department at Emmanuel hospital in Portland. RP 279. Roussel also testified that the walking stick was a deadly weapon. RP 298-99.

After the defense rested, the State recalled Sgt. Huffine. RP 308. Sgt. Huffine testified that after the incident, while at Laura's house, there was a phone call between Rebecca and Laura. RP 308. Sgt. Huffine listened to the conversation through another phone extension. RP 308. During this conversation Rebecca claimed that she sustained injuries to

her arms from Gary hitting her with the walking stick. RP 308. Laura Fadden responded by saying the injuries were from being thrown around in the trailer by Roussel. RP 309. Rebecca then responded by screaming at her mother, "You better not bring that up or you're going down." RP 310. During this exchange the only objection raised by the defense was to Laura's statement as hearsay. RP 309. The Court overruled this objection and allowed the statement to be admitted for the purpose of bringing in Rebecca's response, which—although not objected to—was admissible as a prior inconsistent statement. RP 311.

Roussel proposed a lesser included jury instruction of assault in the fourth degree. RP 323-24. The court stated the rule for giving a lesser included instruction required (1) each of the elements of the lesser offense to be a necessary element of the offense charged, and (2) that the evidence supported an inference that the lesser crime was committed. RP 333. The court further explained that as to the second prong, the evidence must affirmatively establish a defendant's theory of the lesser crime. RP 333. The court found that the first prong was satisfied. RP 334. However, the court noted that both defense witnesses denied the assault had occurred, and the Faddens testified to evidence sufficient to support assault in the second degree. RP 334. Because no affirmative evidence had been presented that the lesser crime of assault in the fourth degree was

committed to the exclusion of the crime of assault in the second degree, the court declined to instruct the jury on the lesser offense. RP 334-35. The jury found Roussel guilty as charged. RP 427-28. At sentencing, Roussel did not object to the court's imposition of legal financial obligations. RP 470-71.

ARGUMENT

I. The trial court did not err in denying Roussel's proposed lesser included instruction on assault in the fourth degree.

Roussel claims the trial court erred in failing to grant his request to instruct the jury on Assault in the Fourth Degree as a lesser included. The trial court properly based its decision on the law, made a sound and reasoned decision that was correct based on the evidence presented at trial. The trial court did not abuse its discretion in denying Roussel's proposed lesser included instruction.

It may be appropriate for a trial court to instruct the jury on inferior degree offenses pursuant to RCW 10.61.003. RCW 10.61.003 allows a defendant charged with an offense that is divided into degrees to be found not guilty of the charged degree and guilty of any inferior degree instead. An inferior degree offense instruction is appropriate if "1) the statues for both the charged offense and the proposed inferior 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; and 3) there is evidence that the defendant committed only the inferior offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979))).

It may also be appropriate for a trial court to instruct the jury on a lesser included offense. A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are elements of the offense charged; and (2) the evidence must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If it is possible to commit the greater offense without committing the lesser offense, then the latter is not a lesser included crime. *State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978) (citing *State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)).

Under both the inferior degree method and the lesser included method, the trial court must be satisfied that factually, the evidence affirmatively supports that the lesser or inferior crime was committed. To satisfy the second prong of the lesser included *Workman* rule, "the evidence must affirmatively establish the defendant's theory of the case—

it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). While the legal prong of the *Workman* rule is reviewed *de novo*, an appellate court will "review a trial court's decision regarding the second prong of the *Workman* rule for abuse of discretion." *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1992)).

"[I]f there is no testimony tending to prove the commission of any of the lesser crimes charged, the court is not required to submit such lesser crimes to the jury, and commits no error in its refusal so to do." *McPhail*, 39 Wn. at 206. Of course, "[i]t would be error to give an instruction not supported by the evidence." *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) (citing *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993)). Moreover, to instruct the jury on a lesser included offense requires a "factual showing that is more particularized than that required for other jury instructions. Specifically … the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.* at 455 (citing as examples, *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (lesser included

offense instruction); *State v. Peterson* 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (inferior offense instruction)). "[T]here must be some rational basis for the lesser charge; otherwise it is merely a device for [a] defendant to invoke the mercy-dispensing prerogative of the jury, and that is not by itself a permissible basis to require a lesser included instruction." *State v. Condon*, 182 Wn.2d 307, 367, 343 P.3d 357 (2015) (Gonzalez, J., dissenting) (quoting *United States v. Sinclair*, 144 U.S.App.D.C. 13, 444 F.2d 888, 890 (1971)).

Here, the evidence did not support giving the lesser or inferior instructions. The evidence only supported either an acquittal or an Assault in the Second Degree and thus giving an instruction on Assault in the Fourth Degree would have been improper.

This Court reviews a trial court's decision to give an instruction that rests on a factual determination for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). When determining whether the evidence was sufficient to support giving an instruction, this court views the evidence in the light most favorable to the party requesting the instruction, here, Boswell. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing *State v. Cole*,

74 Wn. App. 571, 579, 874 P.2d 878 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)). Only when a trial court's decision is manifestly unreasonable or based upon untenable grounds will this court find it abused its discretion. *State v. Jensen*, 149 Wn. App. 393, 399, 203 P.3d 393 (2009) (citing *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997)).

At trial, there was no evidence that Roussel committed the lesser offense of Assault in the Fourth Degree. The only evidence presented by the State was that Roussel strangled the victim by using a walking stick as a deadly weapon. The defense claimed that the victim struck Roussel and fell and Roussel took the walking stick and threw it. No evidence was presented to support a finding that Roussel assaulted the victim, but did not strangle him or use a deadly weapon. The evidence presented at trial failed to establish the second prong required for giving a lesser included or inferior degree instruction. The trial court did not abuse its discretion and properly denied Roussel's request.

Both Roussel and Rebecca testified that Gary attacked Roussel, and that upon being attacked Roussel removed the walking stick from Gary's hands and threw it. Nothing in their testimony supported an inference that Roussel assaulted Gary, but only that to protect himself Roussel removed the weapon that he was being assaulted with from Gary.

Gary's testimony at trial was that Roussel pushed the walking stick across his neck, restricting his ability to breath. This testimony supported both assault in the second degree by strangulation and assault with a deadly weapon. Laura testified that Roussel threatened to "choke Gary out," broke free of her grasp; then, when she attempted to block his path, knocked her to the ground. Due to being knocked to the ground, Laura was temporarily out of commission. RP at 67. Her first observation was of Gary effectively bench pressing the walking stick upward with Roussel on top of him still holding the walking stick across his chest and throat area. RP at 68, 94. Laura's testimony was not to the entirety of the strangulation, but to immediately after Roussel had strangled Gary with the walking stick. This is an important distinction; had Laura testified that she observed the entire event and merely observed an assault by Roussel that did not involve strangulation—this would provide affirmative evidence that an assault not involving strangulation had occurred. Yet no such testimony existed here.

Roussel maintains that Laura's testimony supported the inference that Roussel assaulted Gary by pressing the walking stick down over his chest.[3] However, Laura's observation of a portion of an event that had

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[3] Roussel's brief states Laura's testimony was that Roussel was pressing the stick "over her husband's chest, not his neck." Br. Of Appellant at 11. However, clarification in

already occurred did not tend to prove a lesser crime, but rather was corroborative of the greater crime. Should Roussel's reasoning be carried to its logical conclusion, then a lesser included instruction of assault in the second degree would be warranted on a murder charge, if, after a shooting, a witness testified to seeing the shooter still pointing a gun toward the victim. Further, even if what Laura observed had been an assault that did not involve strangulation, it still would have involved an assault with a deadly weapon. Roussel has not argued that the walking stick failed to qualify as a deadly weapon. In fact, Roussel wrote in his statement that he wanted to press charges against Gary for a "violent assault with a weapon," and he also testified that the walking stick was a deadly weapon. RP 178, 298-99.Therefore, no affirmative evidence supported an inference that an assault in the fourth degree had occurred instead of the charged offense of assault in the second degree.

Roussel maintains that there was affirmative evidence showing Roussel committed an assault without using the walking stick. Roussel argues that his testimony to "squaring off" prior to wrestling the stick away from Gary and throwing it, coupled with testimony from Gary that Roussel knocked Gary to the ground provided evidence of an inference

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Laura's testimony indicates that the walking stick was above the chest and throat area. RP 94.

that he attacked Gary without using the walking stick. However, "squaring off" would be an indication that Roussel faced Gary, nothing more. And if all Roussel did was remove the walking stick from Gary after Gary assaulted him with it, this would not constitute an assault. In addition, Gary never testified to exactly how he ended up on the ground, but simply that he ended up on the ground with the walking stick being pressed against his throat. RP at 110. Roussel testified that Gary fell on his own, that after he fell Gary struck Roussel in the knee, and then Roussel grabbed the walking stick. RP at 273. Thus, there was no evidence that any assault occurred that did not involve the deadly weapon. Additionally, even if Roussel knocked Gary down in the course of obtaining the walking stick to assault him with it, this was *res gestae* of the assault with the deadly weapon and did not support the giving of an instruction for a lesser assault.

The trial court did not abuse its discretion in applying the factual prong of the *Workman* rule to the facts presented at the trial. The trial court was best positioned to evaluate the intricacies of the facts presented at trial. After making this evaluation, the trial court found that no affirmative evidence had been presented that would support a lesser offense having been committed to the exclusion of the charged offense. As

there was no such evidence, the trial court did not abuse its discretion in reaching this conclusion.

II. The trial court did not abuse its discretion by failing to admit allegations of the victim molesting a child in an unrelated case over fifteen years prior.

Roussel argues the trial court abused its discretion when it denied Roussel's attempt to admit evidence that the victim had been accused by his daughter, Roussel's wife, of molesting her as a child. The trial court properly excluded this irrelevant evidence and did not abuse its discretion in so doing.

This Court reviews decisions to admit evidence under an abuse of discretion standard. *State v. Demery,* 144 Wash.2d 753, 758, 30 P.3d 1278 (2001). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." *Id.* However, the trial court has abused its discretion on an evidentiary ruling if it is contrary to law. *State v. Neal,* 144 Wash.2d 600, 609, 30 P.3d 1255 (1996). "An abuse of discretion exists '[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.' " *Id.* (alteration in original) (quoting *State v. Stenson,* 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)). Here, the trial court properly applied the law, considered the

arguments of the parties and came to a reasoned and reasonable decision. The trial court did not abuse its discretion.

Although a defendant has "the constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (citing *State v. Otis*, 151 Wn.App. 572, 578, 213 P.3d 613 (2009)). There is no constitutional right to present irrelevant evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006)). If the defense seeks to present relevant evidence, "the burden is on the State to show that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)). "The exercise of discretion in balancing the danger of prejudice against the probative value of evidence is also a matter within the trial court's discretion, and should be overturned only if no reasonable person could take the view adopted by the trial court." *State v. Hudlow*, 99 Wn.2d 1, 18, 659 P.2d 514 (1983) (citing *State v. Kalamarski*, 27 Wn.App. 787, 789, 620 P.2d 1017 (1980) and *State v. Blum*, 17 Wn.App. 37, 56, 561 P.2d 226 (1977))). A danger for unfair prejudice exists when evidence is more likely to stimulate an emotional response from the jury,

rather than a rational decision. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

At trial, the State moved to exclude reference to allegations by Rebecca Roussel that her father, the victim, had molested her, because such allegations were irrelevant under ER 401. Roussel's offer of proof showed that Rebecca had been making this claim for 15 years, there were text messages sent after the incident and that she threatened to exaggerate the claim. RP 23-34. Roussel also showed that a month prior to the incident the victim and his wife bought Rebecca a trailer to stop making these allegations. RP 24. Roussel argued to the trial court that these claims motivated the victim to assault Rebecca. RP 25. The trial court questioned the relevancy of the child molestation to whether or not the assault occurred, but determined that even if such evidence were relevant, its prejudicial impact outweighed any probative value. RP 27. The trial court did not prevent Roussel from presenting evidence that Rebecca threatened her father or extorted him to support Roussel's claim that the victim had a motive to assault Rebecca, however Roussel chose not to elicit this evidence as part of the defense. RP 30. Had the defense chosen, they could have admitted evidence of the extortion or threats without specifically stating that the nature of the threats was for a claim of child molestation. This would have provided Roussel with evidence from which he could

have argued Gary had a motive to assault Rebecca. Thus, it is clear, the probative value of these claims was low.

The trial court based its decision on sound reasoning and the law. This was not an abuse of discretion. It was reasonable for the court to question the relevancy of the accusations. Furthermore, the unfair prejudice that would have resulted carried an extreme risk of the jury improperly considering such evidence. Allegations of child molestation create potential that a jury may improperly consider such evidence and would have judged the victim based on his character. *Cf., State v. Baker*, 89 Wn.App. 726, 736, 950 P.2d 486 (1998) (stating there is a likelihood the jury will convict based on character when it hears about prior similar acts of child molestation). The trial court here found an undue risk of prejudice if the jury heard that Rebecca had accused the victim of molesting her. This finding was warranted and appropriate and based on the proper balancing test the court was required to perform. The trial court made a sound decision that was legally appropriate and did not abuse its discretion or deny the defendant the right to present his defense. Roussel's claim fails.

III. Roussel is prohibited from raising a privacy act violation for the first time on appeal.

Roussel alleges violation of his rights under the Privacy Act for the first time on appeal. At trial, Roussel did not raise objection under the Privacy Act to the testimony of the contents of a telephone call Sgt. Huffine testified to. This means the record below was insufficiently developed for the State to adequately respond to an actual allegation of a Privacy Right violation.

A violation of a defendant's rights under the Privacy Act does not constitute a manifest constitutional issue which may be raised for the first time on appeal. *See State v. Corliss*, 123 Wn.2d 656, 662-664, 870 P.2d 317 (1994). Under RAP 2.5 and *Corliss*, this court should decline to hear this matter as it was raised for the first time on appeal as Roussel did not object on a Privacy Act basis below, and the State did not have the opportunity to develop the record to adequately respond to such an objection. Developing the record below is especially important in this situation as it was not testified to whether the police officer listened to the conversation with the permission of one or both of the parties or without any permission. This fact significantly changes the legal analysis of a Privacy Act issue and thus development of the record below was of utmost importance.

A. IN THE ALTERNATIVE, COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT UNDER THE PRIVACY ACT.

Roussel alleges that alternatively, his attorney was ineffective for failing to object to the admission of the phone call under the Privacy Act.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011)

(stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*,

153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91. Therefore, in order for Roussel to prevail on his claim, he must show that but for his attorney's failure to object to authentication, hearsay or Confrontation issues, the outcome of the trial would have been different.

In order to be effective, an attorney need not make every possible objection. Here, an objection on the basis of the Privacy Act would have been moot as the same information would have gotten before the jury anyhow. Witness Laura Fadden, Rebecca's mother and the victim's wife, testified at trial and could have been called as rebuttal witness to testify to Rebecca's inconsistent statement. As Laura was not an employee of the State and was a party to the phone call, it would not have been a violation of the Privacy Act in any way for her to disclose the contents of a telephone call of which she was a witness. The statements Rebecca made in the phone call were admissible as prior inconsistent statements, admitted to impeach her credibility. It was not ineffective for defense counsel to not object; the statements would have been admitted anyhow.

Roussel has shown no prejudice as a result of his counsel's failure to object based on the Privacy Act as the statements were otherwise admissible. Roussel's claim of ineffective assistance of counsel fails.

IV. There was no prosecutorial misconduct.

Roussel argues prosecutorial misconduct for allegedly commenting on his pre-arrest silence and by misstating the burden of proof. Roussel cannot show any prosecutorial misconduct, let alone misconduct that was so flagrant and ill-intentioned that it denied him a fair trial. Roussel's claim of prosecutorial misconduct fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant

must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the 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). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

A. THE STATE DID NOT COMMENT ON ROUSSEL'S PRE-ARREST SILENCE.

Roussel argues the prosecutor committed misconduct by commenting on Roussel's pre-arrest silence during a witness' testimony and his closing argument. Roussel did not remain silent and chose to speak to police; the prosecutor properly commented on the evidence and what it showed in his closing argument. The witness properly testified. There was no misconduct.

Roussel never objected to any of the conduct he now claims was prosecutorial misconduct. He has therefore waived the error unless it was "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." *Russell*, 125 Wn.2d at 86. 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 a new trial or appeal." *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986). Roussel bears the burden here of establishing the impropriety of the prosecuting attorney's comments and questions and their prejudicial effect. *See Russell*, 125 Wn.2d at 85. If he shows that misconduct occurred, he also must show that no curative instruction would have obviated any prejudicial effect on the jury and that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citing *State v.* Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)); *In re Pers. Restraint of Glasman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The question becomes then, whether a curative instruction would have cured any potential prejudice.

In looking at the closing argument complained of here, it is clear it was not an improper argument. The State did not improperly comment on Roussel's right to silence. The State may use a defendant's pre-arrest silence to impeach a testifying defendant at trial. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). "A comment on an accused's silence

occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Further, not every comment that touches upon a defendant's constitutional rights are "impermissible comments on the exercise of those rights" *State v. Gregory*, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). If the prosecutor's focus is not on the right itself, the remark does not violate the right at issue. *Id.* at 807.

In *State v. Hamilton*, 47 Wn.App. 15, 20, 733 P.2d 580 (1987), the Court of Appeals dealt with the issue of pre-arrest silence by citing to *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.E.2d 86 (1980), where the defendant was cross-examined about his claim that he did not claim self-defense until he turned himself in two weeks after a stabbing. *Id.* During closing argument in *Anderson*, the prosecutor referred to Anderson's failure to earlier tell officers about his self-defense claim. *Id.* The Supreme Court found no violation of the Fifth Amendment stating:

> Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.

Id. (quoting *Anderson*, 447 U.S. at 238). Relying on *Anderson's* holding the *Hamilton* Court found no violation of the Fifth Amendment. *See id.* at 21.

Roussel testified at trial and had a story about what happened and it is perfectly acceptable for the State to comment on the cohesiveness of the story and whether actions were suspicious or not given the defendant's choice not to remain silent. Furthermore, Sgt. Huffine's testimony that Roussel told him he would send him medical records and that he did not was not a comment on his pre-arrest silence, but rather was testimony regarding Roussel's failure to follow through with something he stated he would do. *See* RP 154-55. Again, Roussel did not remain silent and comments and testimony surrounding his statements to police are admissible and doing so does not violate his constitutional rights. The State was within bounds to comment on Roussel and his wife's claims of having been assaulted and the evidence that they were victims. Roussel cannot make such a claim and then prevent the State from commenting on the claim by couching it as comment on a constitutional right to pre-arrest silence. That is not what occurred here. The prosecutor properly argued the facts of the case and the evidence presented at trial. Roussel's claim fails.

B. THE MISSING WITNESS DOCTRINE IS NOT AT ISSUE.

Roussel claims the State argued that Roussel failed to call a witness, however the State never suggested any witness who was under his control was missing. Roussel's claim fails.

"When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). When the State does not suggest a witness is under a defendant's control and does not request a missing witness instruction, the test of justifying the instruction is not pertinent. *See State v. Berube*, 171 Wn.App. 103, 118, 286 P.3d 402 (2012). Roussel contends the prosecutor argued that he failed to call a witness who was under his control, and on this basis should have requested a missing witness instruction. However, the prosecutor never made this express assertion. RP 376. Rather, the prosecutor's argument challenged the credibility of Roussel and Rebecca's claim to have gone to the hospital.

In *Berube*, the defendant was on trial for shooting the victim in in the leg. *Id.* at 107. When interviewed by detectives, the defendant denied shooting the victim, but also said he observed the shooting and knew who the shooter was. *Id.* at 109. The defendant also indicated to detectives that

he would not disclose whom the person he claimed to be the shooter was. *Id.* At trial, the defendant testified that he heard the shooting and knew who was present at the time of the shooting, but refused to provide the names of those he claimed were present. *Id.* at 110. On appeal, relying on *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), where the court ruled the trial court had erred in giving a missing witness instruction, the defendant argued that the prosecutor shifted the burden to him to produce a missing witness by arguing:

> And why wouldn't [Berube] provide you with the names of any of the people he was with who could corroborate his version of these events, the people who could help him out and say that he did what he told you he did?...And when there are others who can help you out, you provide the names of those others. And you need to ask yourself: Is Ivory Berube so self-sacrificing and is he protecting others with this code or is it because there is no one who can corroborate his version of events?

Id. at 117.

The Court of Appeals explained that Berube's reliance on *Montgomery* was misplaced because in *Montgomery*, the prosecutor made numerous references to the absence from trial of the defendant's grandson and landlord, and questioned the defendant extensively on where they were and why they did not testify to corroborate his explanation. *Id.* at 117-18. By giving a missing witness instruction, the *Montgomery* Court permitted the jury to infer that the missing witnesses' testimony would

have been unfavorable to Montgomery. *Id.* at 118. Unlike *Montgomery*, the prosecutor in *Berube* did not suggest any witness was particularly under Berube's control and did not request a missing witness instruction, so the test for justifying the instruction did not apply. *Id.* "Rather the argument was another challenge to Berube's credibility. The State emphasized that despite conceding he knew some of those present at the shooting, and that he could identify the shooter, Berube refused to do so[.]" *Id.* The court stated: "The State was entitled to comment on these facts." Further, the court explained that to any extent the prosecutor's argument implied Berube had a burden to produce witnesses, any error was easily curable by instruction; therefore Berube waived his claim by failing to object. *Id.*

Here, as in *Berube*, the prosecutor's argument did not suggest any particular witness was under Roussel's control who he had failed to produce, but rather challenged the credibility of Roussel and Rebecca's claim to have gone to the hospital. After reminding the jury that Roussel and Rebecca fled the scene after the Faddens called 911, the prosecutor argued:

> The only thing they did was go to the doctor, or they claim they went to the doctor. We don't have a doctor, but they claim they went to the doctor, and said they had all these injuries. Obviously, they got some pictures of the injuries. But those weren't reported immediately.

RP 374-75. Of course, the jury heard this claim after having already heard that Roussel did not send the medical reports of his claimed hospital visit to Sgt. Huffine after telling him he would do so. RP 154-55. Thus, as in *Berube*, the argument was permissible to attack Roussel's credibility on an uncorroborated claim about going to the hospital and did not suggest that Roussel had a doctor under his control. Unlike *Montgomery*, the prosecutor did not make repeated claims about the absence of particular witnesses or repeatedly question why the absent witness did not testify on his behalf. Accordingly the prosecutor did not make an improper missing witness argument.

Further, because Roussel did not object, even if the prosecutor's brief statement was considered a comment on a failure to produce a witness, then it was easily curable with an instruction. However, because no objection was raised, the court did not have the opportunity to provide such an instruction. As it was, the jury heard testimony about three different assaults involving Roussel, and evidence that he had suffered some injury was not in dispute, therefore there was not a substantial likelihood that this statement had an impact on the outcome of the trial. Thus, as in *Berube*, when Roussel did not object or propose such an instruction his claim was waived.

C. THE PROSECUTOR DID NOT MISSTATE THE BURDEN OF PROOF.

Roussel claims the prosecutor misstated the burden of proof by suggesting to the jury its task was to determine which version of events to believe. The State never told the jury that in order to acquit it had to find the Faddens were lying. Instead, the State spoke to the jury about its job in determining credibility of witnesses, which is absolutely accurate, and then argued the credibility of some witnesses over others. "[T]here is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts it must necessarily reject the other." *State v. Vassar*, 188 Wn.App. 251, 261, 352 P.3d 856 (2015) (quoting *State v Wright*, 76 Wn.App. 811, 825, 888 P.2d 1214 (1995)). In its quest to find whether evidence has been proved beyond a reasonable doubt it is appropriate for jurors to evaluate the credibility of the witnesses who were presented at trial.

During closing arguments, the State is permitted to comment on the quality and quantity of the evidence presented by defense, and by so doing it does not improperly suggest the burden rests with the defense. *Gregory*, 158 Wn.2d at 860 (citing as an example, *People v. Boyette*, 29 Cal. 4th 381, 127 Cal.Rptr.2d 544, 58 P.3d 391, 425 (2002).

As discussed above, any statements made during closing argument should be viewed within the context of the entire closing argument. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). And "while a defendant is not obligated to provide any evidence, a prosecutor is allowed to comment on a defendant's failure to support her own factual theories[.]" *Vassar*, 188 Wn.App. at 260.

Here, the prosecutor did not mischaracterize the burden of proof, but rather properly argued the evidence supported the credibility of the State's witnesses and created reasons to doubt the credibility of defense witnesses. The prosecutor never argued that disbelief of one witness or belief of another required a finding of guilt, but rather continued to argue its proper burden of proof and what the evidence showed and did not show, making proper arguments based on the evidence presented at trial.

Even if there were some inappropriate statements by the prosecutor, they fell to no objection at trial. Thus here, Roussel would have to show that the statements made were so flagrant and ill-intentioned that a curative instruction would not have fixed the issue. This simply is not so. As juries are presumed to follow instructions, and the statements by the prosecution were not flagrant or ill-intentioned, the trial court could easily have restated the burden of proof and told the jury that the court is

the one who instructs the jury on the law. But Roussel did not object and therefore there was no chance for this to occur. Roussel cannot show misconduct or prejudice here. His claim fails.

V. Roussel received effective assistance of counsel.

Roussel claims ineffective assistance of counsel for his attorney failing to object to the admission of certain evidence and for failing to object to prosecutorial misconduct. Roussel's claims fail.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said

> that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902,

909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted

arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91. Therefore, in order for Roussel to prevail on his claim, he must show that but for his attorney's failure to object to authentication, hearsay or Confrontation issues, the outcome of the trial would have been different.

To show that a failure to object caused counsel to be ineffective, the defendant must show that "not objecting fell below prevailing professional normal, that the proposed objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 714, 101 P.3d 1 (2004). When a claim of ineffective assistance of counsel is based on a failure to object, "[o]nly in egregious circumstances on testimony central to the State's case" will the failure to object

constitute incompetence of counsel that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). This Court presumes that the failure to object was legitimate trial strategy or tactics, and Roussel has the duty to rebut this presumption. *See State v. Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007).

If one party opens up a subject, he inherently contemplates that the evidence rules permit cross or redirect within the scope of the examination. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (citing *State v. Stevens*, 69 Wn.2d 906, 421 P.2d 360 (1966), *State v. Hunter*, 183 Wn. 143, 48 P.2d 262 (1935), *State v. Ward*, 144 Wn. 337, 258 P. 22 (1927), *State v. Hempke*, 121 Wn. 226, 209 P. 10 (1922), and *State v. Anderson*, 20 Wn. 193, 55 P. 39 (1898)). Under ER 801(d)(1)(ii), an out of court statement is not hearsay when "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is...consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" ER 801(d)(1)(ii).

Sgt. Huffine was called as a witness after both Laura and Gary Fadden had testified. RP 140-55. When Laura and Gary Fadden testified, they both described having been assaulted by Roussel. On cross-examination, Roussel asked Laura Fadden about whether she had initially

told police that everything was fine and she did testify that she had initially told police that "nothing happened. RP 81-82. Because of this testimony elicited by Roussel, the jury was aware that Laura Fadden had minimized what had occurred when first contacted by police and the jury was given the impression that she had simply said "it got physical with [Roussel]." Therefore, when the State elicited from Sgt. Huffine that Laura had initially minimized what had happened, the issue had been brought out by Roussel. Sgt. Huffine's testimony that Gary and Laura Fadden's testimony was the same as their statements to him was admissible as prior consistent statements under ER 801 to show their testimony was not a result of recent fabrication, to rebut the impression Roussel gave that Laura Fadden had told police only that "it got physical." Any objection to this rebuttal to what Roussel brought out in cross-examination would not have been sustained. Roussel cannot show that his counsel was ineffective for failing to object to this evidence. His claim fails.

Roussel also claims his attorney was ineffective for failing to object to times of prosecutorial misconduct. As discussed above, in order to sustain a claim of ineffective assistance of counsel Roussel must show that his attorney's objections, had they been made, would have been sustained. Also as discussed in the section above, there was no

prosecutorial misconduct. The questions asked of witnesses and the statements made during closing arguments were appropriate and not misconduct. Roussel's objections would not have been sustained and Roussel cannot make a showing of ineffective assistance of counsel.

VI. Roussel waived his right to challenge his legal financial obligations by failing to object to their imposition at the time of sentencing.

At the time of sentencing, Roussel did not object to the imposition of his legal financial obligations ("LFOs"), therefore he has not preserved this issue for review. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Kuster*, 175 Wn.App. 420, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez,* 160 Wn.App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd,* 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue *sua sponte*. *State v. Kirkpatrick,* 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper,* 174 Wn.2d 96, 271 P.3d 876 (2012). RAP 2.5(a) permits a party to raise issues for the first time on

appeal for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. While Roussel cites RAP 2.5(a) generally, he fails to explain which of these exceptions apply. Because Roussel did not object to the imposition of his LFOs at sentencing, this issue was waived.

CONCLUSION

Roussel's judgment and sentence should be affirmed.

DATED this 21st day of January, 2016.

Respectfully submitted:

By: Anne M. Cruser

ANNE M. CRUSER, WSBA #27944
Special Deputy Prosecuting Attorney
For Cowlitz County
OID# 91127

CLARK COUNTY PROSECUTOR

January 21, 2016 - 3:57 PM

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Court of Appeals Case Number: 46657-1

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

STATE OF WASHINGTON, Respondent, v. LAWRENCE ROLAND ROUSSEL, Appellant.	No. 46657-1-II (Consolidated) Cowlitz Co. No. 14-1-00670-2 DECLARATION OF TRANSMISSION BY MAILING

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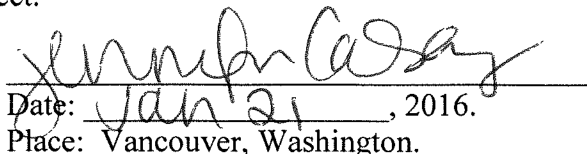

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