NO. 46616-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESSIE D. BRITAIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 14-1-01830-6

OPENING BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

The State originally charged Jessie Britain (hereinafter "the defendant") with one count of attempting to elude a pursuing police vehicle (RCW 46.61.024(1)), one count of unlawful possession of a controlled substance (RCW 69.50.4013), and one count of driving with a suspended license in the first degree (RCW 46.20.342(1)(a)). CP 1-2. The State later filed an amended information adding an endangerment enhancement to the attempting to elude charge. CP 4-5.

The defendant pleaded guilty to the unlawful possession of a controlled substance and driving with a suspended license charges. CP 86-88. He proceeded to trial on the attempting to elude charge. RP[1] 5.

Before calling its first witness, the State informed the court outside the presence of the jury that it intended to elicit the fact that the defendant had outstanding warrants at the time he attempted to elude police to show motive. *See* ER 404(b); RP 13. The defendant objected. RP 13. The court heard argument from both parties on the issue and conducted a balancing test pursuant to ER 403. RP 65-74. The court ultimately ruled that

[1] The verbatim report of proceedings has two volumes. The first volume includes pretrial matters and the trial itself. This volume will be referred to as "RP." The second volume includes only the defendant's sentencing hearing. This volume will be referred to as "RP2."

evidence of the warrants was admissible under ER 404(b) and ER 403, as outstanding warrants can be a motive for eluding the police and the probative value of this evidence outweighed the potential for unfair prejudice. RP 74. However, the court also limited its ruling by instructing the State that it could not elicit what the warrants were for or that the defendant had a suspended license and was in possession of methamphetamine at the time of his arrest. RP 74.

The jury found the defendant guilty of attempting to elude a pursuing police vehicle and of the endangerment enhancement. RP 141. The trial court sentenced him to a prison-based DOSA sentence following a joint recommendation from the State and defense counsel. RP2 9-10. The defendant filed a notice of appeal on August 29, 2014. CP 136.

2. Facts

On May 20, 2014, Pierce County Sheriff's Deputies Chad Helligso and Chris Olson were driving westbound on 96th street in Pierce County, Washington in a marked patrol car. RP 24; RP 26. Deputy Olson was driving the patrol car while Deputy Helligso rode in the passenger seat. RP 78. At 3:59 AM, the deputies noticed a pickup truck traveling the other direction had a broken brake light. RP 26. Officer Olson conducted a U-turn and began to follow the pickup truck. RP 27. After the deputies were behind the pickup truck, it accelerated away from them. RP 31. The

deputies activated the red and blue lights attached to the top of their patrol car to signal for the driver of the pickup truck to pull over, but he continued driving. RP 33.

The truck turned left onto Patterson Street, but took the corner too fast, entered the oncoming lane, and hit a curb with the left front wheel. RP 32. After hitting the curb, the truck continued southbound down Patterson while driving on the wrong side of the road. RP 32-33. The truck again accelerated away from the deputies and at that point they activated the siren on their patrol car in another effort to have the driver of the pickup truck pull over. RP 33. At one point, the truck was traveling 55 miles per hour. RP 89. The speed limit on Patterson Street is 25 miles per hour. RP 89. The driver of the truck still would not stop the car and proceeded toward 100th street. RP 36.

As the truck decelerated to turn onto 100th street, Deputy Olson performed a "pit maneuver" by bumping the front of his patrol car against the rear quarter panel of the truck in an attempt to make the truck spin out. RP 83. Although the truck did not spin out, it did begin to wobble back and forth, also known as "fishtailing." RP 83. Officer Olson then noticed a head in the back of the truck and concluded that there was a passenger in the vehicle. RP 84. Deputy Olson then ceased the "pit maneuver" out of concern for the passenger's safety. RP 84.

After the truck turned onto 100th, it began to decelerate and eventually slowed to about 5 miles per hour. RP 36. At that point, the

defendant opened the driver's side door, got out of the vehicle, and began to run away from the deputies. RP 85. The truck was still rolling after the defendant jumped out of the driver's seat. RP 36. The truck was never shifted into park. RP 102. The truck eventually came to a stop after striking a mailbox on 100th street. RP 87. Both deputies pursued the defendant on foot. RP 85. The defendant eventually slipped on some grass and was taken into custody. RP 85.

While the deputies were arresting the defendant, they heard noises coming from the bed of the truck. RP 88. Deputy Olson approached the truck and discovered another man, later identified as Ronnie Prim, attempting to get out of the truck through a window on the truck's canopy. RP 88. Mr. Prim was also taken into custody due to an outstanding warrant for his arrest. RP 88-89.

C. ARGUMENT

1. THE DEFENDANT HAS FAILED TO SHOW DEFICIENCY OF COUNSEL AND PREJUDICE

To demonstrate a denial of the effective assistance of counsel, the defendant must satisfy a two-prong test. First, he must show that his attorney's performance was deficient. ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment.

Id. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***In re Davis,*** 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004). A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the trial. ***Strickland,*** 466 U.S. at 694.

When asserting that an attorney's performance was deficient, a criminal defendant must show that the attorney's conduct fell below an objective standard of reasonableness. ***Strickland,*** 466 U.S. at 687-88. Judicial scrutiny of an attorney's performance must be highly deferential. *Id.* at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." *Id.* In evaluating an attorney's performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. ***Davis,*** 152 Wn.2d at 673.

Regarding the second prong, the "defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'" ***State v. Crawford,*** 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting ***Strickland,*** 466 U.S. at 693). "In doing so, 'the defendant must show that there is a reasonable probability that but for

counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." ***State v. McFarland,*** 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Similarly, "[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *Id.* at 337 (citing ***State v. Thomas,*** 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

a. Deputy Helligso's did not make a direct comment on the defendant's guilt, therefore defendant's objection would have been improper.

During trial, the State elicited proper opinion testimony from Deputy Helligso. The testimony did not include any comment on the defendant's guilt. The first portion of testimony alleged to have been improper occurred when the State questioned Deputy Helligso regarding the endangerment of Mr. Prim as a passenger during the pursuit:

> [THE STATE]: And was there anything, specifically during your search, you testified to several instances where you had safety concerns, specific instances during the pursuit that possibly could have endangered Mr. Prim as a passenger?
>
> [HELLIGSO]: Yes

[THE STATE]: And what were those?

[HELLIGSO]: The high-speed turns, could have been ejected out the side windows. The quick acceleration could have caused him to roll towards the back and come out the back end.

RP 41-42.

Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." ***City of Seattle v. Heatley,*** 70 Wn. App. 573, 579, 854 P.2d 658 (1993). To determine if testimony constitutes an improper comment on a defendant's guilt, courts look to (1) the type of witness involved, (2) the nature of the testimony, (3) the nature of the charges, (4) the nature of the defense, and (5) other evidence before the trier of fact. ***State v. Demery,*** 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing ***Heatley,*** 70 Wn. App. at 579).

Any objection to the challenged testimony would have been meritless as Deputy Helligso did not make a direct comment on the defendant's guilt. It is true that Deputy Helligso is a law enforcement officer and therefore his testimony is likely perceived as reliable. But testimony is not improper, and therefore objectionable, simply because it is reliable and touches on an ultimate issue to be decided by the trier of fact. *See* ER 704.

While Deputy Helligso is a law enforcement officer, he is also one of only three eyewitnesses to the pursuit involving the defendant. Deputy Helligso's testimony that Mr. Prim was in danger during the pursuit was based on Helligso's perception of the events and circumstances surrounding the pursuit as it was happening, not his opinion. Witnesses may testify in the form of an opinion or inference if the testimony is rationally based on their perceptions and helps the jury understand the testimony. ***State v. Montgomery,*** 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing ER 701). The fact that Deputy Helligso's testimony may be viewed as particularly reliable does not automatically render it improper. The jury's reliance on Deputy Helligso's testimony is not based solely on the fact that he is a law enforcement officer. In weighing his credibility, the jury may rely on the fact that Deputy Helligso was a direct participant in the pursuit and witnessed the events and circumstances surrounding the defendant's conduct firsthand.

The second *Demery* factor is the nature of the challenged testimony. ***Demery,*** 144 Wn.2d at 759. Deputy Helligso's testimony consisted of factual assertions based on his perception of the pursuit. While this testimony suggests that the defendant is guilty, this fact does not render Deputy Helligso's testimony improper because it is the very

fact that a witness's opinion implies that the defendant is guilty that makes the testimony relevant and material. ***Heatley,*** 70 Wn. App. at 579.

Furthermore, Deputy Helligso's conclusion that the defendant endangered Mr. Prim is based entirely on observations made during the course of the pursuit. After Deputy Helligso answered affirmatively to the question of whether the defendant endangered Mr. Prim, he went on to identify specific examples of conduct that gave rise to that danger. RP 42. These examples illustrated the circumstances surrounding the pursuit for the jury to aid them in making factual determinations regarding the endangerment enhancement. Testimony that does not directly comment on the defendant's guilt, is based on inferences from the evidence, and is helpful to the jury is proper testimony. ***State v. Baird,*** 83 Wn. App. 477, 485, 922 P.2d 157 (1996).

Finally, Deputy Helligso's testimony is still subject to the jury's scrutiny and evaluation, as is the testimony of every witness. The jury are the sole judges of the credibility of witnesses, and the jury in the defendant's case was properly instructed. CP 95. Jurors are presumed to follow the court's instructions. ***Montgomery,*** 163 Wn.2d at 596.

The third *Demery* factor also weighs against a finding of an improper comment on the defendant's guilt. The defendant was charged with attempting to elude a pursuing police officer with an endangerment

enhancement. CP 4. To prove the endangerment enhancement, the State must show that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle." RCW 9.94A.834(1).

The nature of the charges against the defendant required Deputy Helligso to draw conclusions from his direct observations of the pursuit in order to provide relevant testimony. "Endangerment" is defined as "threatened with physical injury or harm." ***State v. Williams,*** 178 Wn. App. 104, 108, 313 P.3d 470 (2013). Thus, the term "endangerment" speaks only to threatened harm and not actual, realized injury. Therefore, making a determination of whether someone was endangered necessarily requires the witness to describe risks that threatened a person's welfare.

Lay witnesses may testify in the form of an opinion or inference if the testimony is (1) rationally based on the perception of the witness, (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (3) not based on any specialized knowledge. ER 701. Testimony that encompasses a lay witness' opinion or inferences is admissible when it is based on personal knowledge. ***State v. Kunze,*** 97 Wn. App. 832, 850, 988 P.2d 977 (1999). A witness has personal knowledge if a reasonable trier of fact could reasonably find that

the witness had firsthand knowledge of the facts. ***State v. Smith,*** 87 Wn. App. 345, 351, 941 P.2d 725 (1997).

In this case, Deputy Helligso was present and observed the defendant's driving, as well as the environment in which it took place. He provided his opinion, based on inferences from his own observations, that Mr. Prim was in danger during the pursuit because of the defendant's driving. Deputy Helligso also provided concrete examples of the type of driving that threatened Mr. Prim's with harm. RP 42. These examples were helpful for the jury as they illustrated the facts surrounding the pursuit. Such testimony is proper and any objection thereto would be meritless. ER 701.

At trial, defense counsel called Mr. Prim to the stand who testified that he was not afraid for his safety while riding in the back of the pickup truck. RP 108-109. While it may be true that Mr. Prim did not subjectively feel endangered, a person does not need to be aware of the risk of injury in order to have been endangered for the purposes of RCW 9.94A.834(1). *See* ***State v. Graham,*** 153 Wn.2d 400, 415, 103 P.3d 1238 (2005) (Madsen, J., dissenting). The prudence of this rule is illustrated by the facts of this case.

Mr. Prim's testimony was similar to Deputy Helligso's in the sense that both witnesses provided an opinion based on their observations during

the pursuit. Mr. Prim's testimony was based off his perception of the pursuit as he rode in the bed of the truck. He provided his own opinion that he was not endangered during the pursuit, which he is entitled to do under ER 701 as his opinion is based on his own perception and can aid the jury in making a final determination of a fact in issue. As both Deputy Helligso and Mr. Prim's testimony was proper, the task of determining which witness's testimony was more credible was properly left to the jury.

The final factor to be considered is the other evidence before the trier of fact. In this case, evidence relevant to the endangerment enhancement consisted of testimony from three witnesses: Deputy Helligso, Deputy Olson, and Mr. Prim. Deputy Olson's testimony corroborated that of Deputy Helligso. Deputy Olson also observed that the defendant was speeding, turned into the oncoming lane on Patterson Street, and hit a curb with his tires. RP 82. This testimony is consistent with the examples Deputy Helligso provided of the types of conduct that endangered Mr. Prim during the pursuit. RP 42. Mr. Prim's testimony contradicted the assertion that the defendant was driving recklessly, but his credibility was also called into question as he admitted that the defendant was his friend, that he did not enjoy seeing the defendant on trial, and that he had an interest in the outcome of the case. RP 110.

Obviously, the jury found the deputy's testimony more credible than Mr. Prim's.

The question of whether Mr. Prim was endangered was always properly in the province of the jury. Two deputies testified that the defendant did endanger Mr. Prim and their testimony was consistent on the details of the pursuit. While Mr. Prim testified that he was not endangered by the defendant's driving, the jury rejected his testimony. It is the jury's role to weigh the evidence and decide the credibility of witnesses. ***State v. King,*** 131 Wn. App. 789, 797, 130 P.3d 376 (2006). Neither deputy's testimony infringed on the jury's role as ultimate trier of fact as they only provided testimony based on their direct knowledge of the facts at issue that was helpful to the jury in making factual determinations. *See* ER 701.

As outlined above, the five factors enumerated in *Demery* favor a finding that Deputy Helligso provided proper opinion testimony based on his direct knowledge of the circumstances surrounding the pursuit. This testimony illustrated how the pursuit unfolded for the jury but allowed them to make the ultimate determination on the issue of whether Mr. Prim was endangered. Such testimony is proper under ER 701, and therefore an objection at trial would have been meritless. "An attorney has no duty to argue frivolous or groundless matters before the court." ***State v.***

Stockman, 70 Wn.2d 941, 946, 425 P.2d 898 (1967). Thus, the defendant's counsel had no duty to object to Deputy Helligso's testimony and her performance was not deficient.

b. Defense counsel's questioning regarding the initial charging recommendation was legitimate trial tactics.

When defense counsel's conduct can be characterized as legitimate trial strategy or tactics, the defendant cannot prevail on a claim of ineffective assistance of counsel. ***State v. Lord,*** 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing ***State v. Adams,*** 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). During the cross-examination of Deputy Helligso, defense counsel engaged in the following exchange:

> [DEFENSE COUNSEL]: And you often make recommendations as to what the criminal charges should be, right, correct?
>
> [HELLIGSO]: We initially charge them.
>
> [DEFENSE COUNSEL]: You initially charge them?
>
> [HELLIGSO]: Yes
>
> [DEFENSE COUNSEL]: And you initially charged Mr. Britain with reckless driving?
>
> [HELLIGSO]: No

RP 43.

To prove that the defendant is guilty of attempting to elude a pursuing police vehicle, the State must establish that the defendant drove

their vehicle recklessly while attempting to elude a marked police vehicle. RCW 46.61.024(1). Rather than mistakenly believing that the defendant was arrested for reckless driving, it appears far more likely that by asking Deputy Helligso whether he arrested the defendant for reckless driving and eliciting a negative response, defense counsel was actually attempting to negate the reckless driving element required for conviction under RCW 46.61.024(1).

After Deputy Helligso answered that he did not arrest the defendant for reckless driving, defense counsel made no attempt to clarify why the defendant was arrested, nor does she react with surprise at being told the defendant was not arrested for reckless driving. RP 43. Defense counsel responded by saying "Okay" and moving on to her next question. RP 43. This response does not indicate a lack of knowledge on the part of defense counsel, but rather that Deputy Helligso provided precisely the response she was expecting.

Defense counsel's attempt to negate an essential element of the crime her client was charged with can certainly be characterized as legitimate trial strategy. In criminal proceedings, the State bears the burden of proving every essential element of the charged crime beyond a reasonable doubt. ***State v. Johnson,*** 180 Wn.2d 295, 306, 325 P.3d 135 (2014) (citing ***State v. Pirtle,*** 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

Therefore, an attempt to negate any element of the charged crime is legitimate trial tactics and cannot be grounds for a claim of ineffective assistance of counsel.

The record contains ample evidence that the defendant's trial counsel met the objective standard of reasonableness contemplated in ***Strickland***. Defense counsel made numerous efforts to rebut the State's allegations against the defendant. Defense counsel conducted extensive cross-examination of both of the State's witnesses, much of which was dedicated to testing the deputies' recollection regarding the defendant's driving and the environment where the pursuit occurred. RP 42-55; RP 92-99. Defense counsel also called Mr. Prim as a witness and questioned him regarding the defendant's driving in an effort to show that the defendant was not driving recklessly. RP 107-109. These tactics were legitimate means of countering the State's allegations that the defendant endangered Mr. Prim while driving recklessly.

c. <u>The prosecutor accurately stated the law during closing argument, therefore defense counsel was not obligated to object.</u>

As stated previously, a defense attorney has no duty to argue frivolous or groundless matters before the court. ***State v. Stockman,*** 70 Wn.2d at 946. To prove the endangerment enhancement, the State must show that someone other than the defendant and pursuing police officers

were threatened with physical injury or harm by the actions of the defendant. RCW 9.94A.834(1). The prosecutor accurately stated this burden during closing argument. Therefore, there was no reason for defense counsel to object.

During closing argument, the prosecutor addressed the endangerment enhancement at two separate points:

> [PROSECUTOR]: **And it's not about the actual harm, because there's a definition of what physical injury is. It's about threatened harm**, but I'm talking about in a reckless manner. And I submit to you that what you heard from the deputies' mouths, of what they observed when they were pursuing Mr. Britain, is that that was driving in a reckless manner.

RP 120-121 (emphasis added). The next time the prosecutor discussed the endangerment enhancement during closing argument came during rebuttal:

> [PROSECUTOR]: As far as the special verdict form, **I submit to you that he did threaten Ronnie Prim, his physical security**. If you jump out of a car while it's rolling, you can hurt somebody. Ronnie, he was calm then, apparently, according to Deputy Olson, and he seemed pretty calm right now. You heard their testimony, but I submit to you as a general proposition, you jump out of car while it's moving, you threaten the safety of somebody. Might not have been Ronnie. It could have been somebody in the house, had that car rolled into a house. **It's a potential for harm. Jump out of a moving car, it's dangerous, you are not only possibly going to injure yourself, but it's other people in the county on the road in their car.**

RP 136-137 (emphasis added). This is a correct statement of the law. Therefore, defense counsel had no duty to object to his closing argument.

The prosecutor did not argue to the jury that they could answer "yes" on the special verdict form if they found potential endangerment. He only argued that they could answer "yes" on the special verdict form if they found potential for *injury or harm*. This argument is appropriate given that the definition of the term "endanger" is "threatened with physical injury or harm." ***Williams,*** 178 Wn. App. at 108. Thus, the prosecutor argued for the endangerment enhancement in closing using an accurate definition of the word "endangerment."

The defendant claims the prosecutor misstated the law regarding the endangerment enhancement because the State must prove "*actual* endangerment, not just the hypothetical possibility that the driving which occurred *could potentially* have caused harm under different facts." Br. of App. at 28. Driving that causes "actual endangerment" and driving that "could potentially have caused harm under different facts" are the same thing. Actual endangerment involves placing another person at risk for physical injury or harm, even if the injury or harm never actually occur. This is precisely what the State argued during closing argument in the defendant's case.

The prosecutor accurately stated the law pertaining to the endangerment enhancement charged pursuant to RCW 9.94A.834. Thus, defense counsel had no duty to object as she has no duty to argue meritless objections before the court. Defense counsel's performance during closing was not deficient and therefore cannot be the basis for reversal based on ineffective assistance of counsel.

d. Defense counsel eliciting testimony that her client did not answer questions was legitimate trial tactics and did not prejudice the defendant.

A defendant's exercise of his right to remain silent may not be used as substantive evidence of guilt. ***State v. Fuller,*** 169 Wn. App. 797, 815-16, 282 P.3d 126 (2012). A mere reference to the defendant's silence is not necessarily a violation of the rule against using silence as evidence of guilt. ***State v. Burke,*** 163 Wn.2d 204, 217, 181 P.3d 1 (2008). It is only when the State invites the jury to infer guilt from the defendant's silence that the Fifth Amendment and Article I, Section 9 of the Washington State Constitution are violated. *Id.*

In this case, the trial court ruled prior to the State's case-in-chief that evidence of outstanding warrants for the defendant's arrest was admissible for the purpose of proving motive. RP 74. The trial court stressed that the State could not elicit the underlying charge for the warrants, or that the defendant had already pleaded guilty to two other

counts. RP 74. On direct examination of Deputy Olson, the State asked questions in conformity with the trial court's ruling:

> [PROSECUTOR]: Okay. So, dust settled, you got Mr. Prim in custody. Mr. Britain in custody. Did you do a records check with regards to Mr. Britain?
>
> [OLSON]: Yes, I did.
>
> [PROSECUTOR]: And what were the results of that check?
>
> [OLSON]: He had two outstanding warrants.
>
> [PROSECUTOR]: Okay, what type of warrants were those? Not the underlying charge, but –
>
> [OLSON]: Misdemeanor warrants.
>
> [PROSECUTOR]: Were they arrest warrants?
>
> [OLSON]: Yes, they were arrest warrants, correct.

RP 91. The prosecutor concluded his direct examination of Deputy Olson immediately afterwards. RP 91. Defense counsel then attempted to counter the State's use of the warrants to prove motive by inquiring into whether the defendant was even aware of the warrants for his arrest:

> [DEFENSE COUNSEL]: And with regards, you said Mr. Britain had warrants. Do you know if Mr. Britain was aware of those warrants?
>
> [OLSON]: He did not answer any questions, so I don't know.
>
> [DEFENSE COUNSEL]: So he could have been unaware? It's possible?
>
> [OLSON]: Anything's possible, yeah.

RP 99.

Defense counsel's line of questioning was legitimate trial strategy. Evidence of the defendant's warrants was admitted pursuant to ER 404(b) in order to show motive. RP 73-74. Defense counsel was attempting to show that the defendant was not even aware of the warrants to rebut the State's evidence of motive. Although it was ultimately left undetermined whether or not the defendant knew of the warrants, defense counsel's attempt to counter the State's theory of the case can be characterized as legitimate trial tactics.

Although Deputy Olson's answer disclosed more information than defense counsel sought to elicit, the defendant was not prejudiced by Deputy Olson revealing that he did not answer questions. The State never invited the jury to infer guilt from the fact that the defendant exercised his right to remain silent. The prosecutor did not even mention the fact that the defendant refused to answer questions during redirect examination of Deputy Olson or during closing argument. RP 99-103; RP 116-126; RP 134-137. The only mention of the defendant's silence came when Deputy Olson answered defense counsel's question regarding the defendant's knowledge of the warrants. A passing reference to the defendant exercising his right to remain silent is not a violation of the Fifth

Amendment or Article I, Section 9 of the Washington State Constitution. *See* ***Burke,*** 163 Wn.2d at 217.

e. Although jury instruction #11 contained a clerical error, the defendant has failed to show prejudice when the error was corrected before the instruction was read to the jury.

Errors in jury instructions do not warrant reversal unless the complaining party can show prejudice. ***State v. Aguirre,*** 168 Wn.2d 350, 364, 229 P.3d 669 (2010). To succeed on a claim of ineffective assistance of counsel, both the deficient performance prong and the prejudice prong of the ***Strickland*** test must be satisfied. ***State v. McFarland,*** 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

It appears that the prosecutor, defense counsel, and the trial court all failed to notice an error in one of the jury instructions. The record shows that instruction number 11 referred to three verdict forms instead of one, and referred to the term "verdict form" in the plural rather than the singular. CP 106-107. However, it also appears that the trial court noticed the error prior to reading instruction number 11 as it paused between the reading of instructions number 6 and 7 to correct the error. RP 115.

The defendant cannot prove prejudice based on the incorrect instruction. Trial courts are permitted to correct clerical errors in the record at any time on its own initiative or on the motion of a party. CrR

7.8(a). Additionally, the erroneous instruction was never read to the jury. The court paused and corrected the instruction prior to reading it. The trial court corrected the erroneous instruction in conformity with court rules and there is no reasonable probability the outcome of the trial would have been different had the clerical errors been noticed earlier. Thus, the defendant was not prejudiced by defense counsel's failure to notice the error and may not claim ineffective assistance of counsel based on that oversight.

2. ASSUMING THE COURT REACHES THE ISSUE, THE DEFENDANT'S CHALLENGE TO ALLEGED IMPROPER OPINION TESTIMONY WAS NOT PRESERVED AT TRIAL.

a. The defendant waived a claim of error based on the deputies providing improper opinion testimony because the issue was not preserved in the trial court.

Washington courts have "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." ***Bellevue Sch. Dist. 405 v. Lee***, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). "Defendants fail to preserve an issue for appeal when they do not object to impermissible opinion testimony at trial." ***State v. Embry,*** 171 Wn. App. 714, 739, 287

P.3d 648 (2012) (citing ***State v. Kirkman,*** 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

The defendant argues that this court should reach the merits of his assigned error because allowing the challenged testimony was a manifest error affecting his constitutional right to a fair trial under RAP 2.5(a). Br. of App. at 24. However, the Washington Supreme Court has held that when a jury is properly instructed, improper opinion testimony does not fall into the manifest error exception outlined in RAP 2.5(a). ***State v. Montgomery,*** 163 Wn.2d 577, 596, 183 P.3d 267 (2008); *see also* ***Kirkman,*** 159 Wn.2d at 937.

On appeal, the defendant has claimed error based on improper opinion testimony in the form of comments on his guilt from the testifying deputies. Br. of App. at 12. The defendant alleges that these improper comments occurred at two points during the trial. Defense counsel did not object to either line of questioning during trial. RP 41; RP 56.

By failing to object to what is now alleged to be improper opinion testimony, the defendant waived a related claim of error on appeal. ***Embry,*** 171 Wn. App. at 741 (holding that failing to specifically object to alleged improper testimony at trial precludes claiming error on appeal). This court should decline to reach the merits of defendant's assignment of error pursuant to RAP 2.5(a).

In this case, the jury was properly instructed on the elements of attempting to elude a pursuing police vehicle. CP 102. The jurors were also instructed that they are the ultimate judges of the credibility of witnesses and what weight to give to testimony. CP 95. Jurors are presumed to follow the court's instructions absent evidence to the contrary. ***Montgomery,*** 163 Wn.2d at 596. Thus, the jury was properly instructed on its role as the ultimate trier of fact, and admission of any improper opinion testimony was not a manifest error affecting a constitutional right. As the defendant failed to preserve the issue of improper opinion testimony below, the issue is not properly before this court on appeal, and should not be considered pursuant to RAP 2.5(a).

If the court were to reach the merits of the defendant's assignment of error, it still fails. As argued above, the deputies never made a direct comment on the defendant's guilt, and instead provided proper opinion testimony based on their direct knowledge of the facts at issue in this case.

3. THE PROSECUTOR ELICITED PROPER TESTIMONY FROM THE DEPUTIES AND ACCURATELY STATED THE LAW DURING CLOSING ARGUMENT.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in the context of the record and all of the circumstances of the trial. ***In re Glasmann,*** 175 Wn.2d 696, 704, 286 P.3d

673 (2012) (citing ***State v. Thorgerson,*** 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). If a defendant fails to object to alleged prosecutorial misconduct at trial, that defendant has waived a related claim of error on appeal unless they show that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***Glasmann,*** 175 Wn.2d at 704 (citing ***Thorgerson,*** 172 Wn.2d at 443).

As mentioned above, the defendant did not object to any of the challenged testimony at trial. RP 41; RP 56. The defendant also failed to object during closing argument. RP 116-126; RP 137. Therefore, the defendant must establish the prosecutor's conduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***Glasmann,*** 175 Wn.2d at 704.

a. <u>The prosecutor elicited proper opinion testimony regarding the endangerment of Mr. Prim from Deputy Helligso as the testimony was based on inferences from the deputy's direct knowledge of the facts at issue.</u>

As outlined in section 1(a) of this brief, Deputy Helligso's testimony was proper, and thus the prosecutor did not commit misconduct by eliciting it. As the prosecutor's conduct was proper, the defendant's claim of prosecutorial misconduct must be rejected. ***Thorgerson,*** 172 Wn.2d at 442.

b. The prosecutor properly elicited testimony regarding the deputy's initial charging recommendation.

During cross-examination of Deputy Helligso, defense counsel began asking questions about the report he wrote after arresting the defendant. RP 42-43. On redirect examination, the State responded with the following exchange, which is not alleged to constitute prosecutorial misconduct:

> [THE STATE]: Okay. Top part, right beneath the header. It says "PDA, home land security, subject?"
>
> [HELLIGSO]: Oh, yes.
>
> [THE STATE]: What's the first phrase that's following "subject?"
>
> [HELLIGSO]: Eluding police
>
> [THE STATE]: Okay. So in response to counsel's question, nothing about reckless?
>
> [HELLIGSO]: Correct
>
> [THE STATE]: When you have "eluding police" in there, what crime does that refer to?
>
> [HELLIGSO]: Felony elude.

RP 56.

Deputy Helligso wrote the report being referred to. RP 25-26. Thus, he had direct knowledge that no one else can possibly have regarding what crime he was referring to in his charging recommendation.

Furthermore, the testimony is not based on Deputy Helligso's *belief* of what crime the report refers to. He stated unequivocally that it refers to "felony elude." As the author of the report, Deputy Helligso does not have to rely on his beliefs or ideas to determine the meaning of his report because he has direct knowledge of what he was trying to convey at the time he wrote it. Thus, the testimony the prosecutor elicited was not even opinion testimony. The testimony is a direct reading off of a police report written soon after the defendant was arrested. RP 25.

As the defendant did not object to the prosecutor's line of questioning, he must establish that a curative instruction would have been inadequate to counter any prejudice incurred as a result of the alleged prosecutorial misconduct. ***Glasmann,*** 175 Wn.2d at 704. The jury was instructed that a charge is only an accusation and not evidence that the accusation is true. CP 94. The jury was also instructed that the defendant had pleaded not guilty and therefore every element of the charged crime was in question and must be proved beyond a reasonable doubt. CP 97. Thus, the jury was well aware that the charge Deputy Helligso referred to was only an accusation and not evidence that the accusation was in fact true.

The prosecutor did not elicit any improper testimony from Deputy Helligso. The prosecutor simply asked the deputy what he had written in

his report. Deputy Helligso provided an answer consisting solely of what was written in the report. The prosecutor then asked for clarification regarding the phrase "eluding police" and Deputy Helligso provided that clarification based on his knowledge as the author of the report. Even if the testimony can be characterized as opinion testimony, it did not prejudice the defendant so severely that proper jury instructions could not alleviate that prejudice. The defendant's claim must be rejected as he has not met his burden to prevail on an unpreserved claim of prosecutorial misconduct.

c. The prosecutor did not engage in any improper conduct during closing argument.

As outlined in section 1(c) of this brief, the prosecutor never misstated the law during closing argument. As there was no misstatement of the law by the prosecutor, the defendant's claim fails.

Even if the court should find that the prosecutor misstated the law, "reversal is not required if the error could have been obviated by a curative instruction, which the defense did not request." ***State v. Gentry,*** 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). In this case, the defendant did not request a curative instruction following the prosecutor's closing argument or rebuttal. RP 126; RP 137. An instruction defining the term

"endangerment" would have sufficed to address the concerns the defendant now raises on appeal.

Although the defendant did not request a curative instruction specifically, the special verdict form and jury instructions adequately addressed the proper standard by which the jury was to evaluate the defendant's conduct for the purposes of an endangerment enhancement. The special verdict form informed the jury that to return a special verdict of "yes," they had to find that someone other than the defendant and pursuing police officers were threatened with harm or injury. CP 111. This instruction encompasses an accurate definition of the word "endangered." *See* ***Williams,*** 178 Wn. App. at 108.

Furthermore, the court's instructions to the jury included a definition of the term "physical injury." CP 109. The jury received instructions that accurately stated the law regarding the endangerment enhancement. The defendant was free to request a curative instruction following the prosecutor's closing argument, though it would have been redundant. The prosecutor's closing argument reiterated the instructions that had already been provided to the jury. RP 120-121; RP 136-137. The defendant proposed these same instructions at trial. CP 72; CP 76.

The prosecutor accurately stated the law pertaining to the endangerment enhancement. Therefore, the prosecutor did not engage in

any improper conduct during closing argument. Even if the prosecutor did misstate the law, the defendant was not prejudiced to the point where jury instructions could not cure the error. The prosecutor did not commit misconduct in closing, and therefore, the defendant's claim of error must fail.

d. A jury unanimity instruction was not required where the State presented evidence of a continuing course of conduct with the objective of eluding a pursuing police vehicle.

A jury unanimity instruction is not required when the State offers evidence of multiple acts indicating a "continuing course of conduct." ***State v. Crane,*** 116 Wn.2d 315, 326, 804 P.2d 10 (1991). "A continuing course of conduct requires an ongoing enterprise with a single objective." ***State v. Love,*** 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In this case, the State presented evidence of multiple acts constituting a continuing course of conduct, thus no jury unanimity instruction was required.

RCW 9.94A.834 reads in pertinent part:

> **(1)** The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, **to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with**

> **physical injury or harm** by the actions of the person committing the crime of attempting to elude a police vehicle.
>
> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime **while endangering one or more persons other than the defendant or the pursuing law enforcement officer.** . . . if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

RCW 9.94A.834 (emphasis added). The statute only requires the State to prove that one or more people other than the defendant and pursuing law enforcement were threatened with physical injury or harm while the defendant attempted to elude the police.

The record contains ample evidence for the jury to conclude that the defendant endangered Mr. Prim as part of a continuing course of conduct. Mr. Prim was riding in the bed of the defendant's pickup truck for the duration of the pursuit. RP 107-109. During the pursuit, the defendant drove down residential streets at excessive speeds, took a turn too fast, hit a curb, drove on the wrong side of the road, and ultimately jumped out the truck while it was still moving. RP 31-33; RP 85. All of these actions occurred in succession during a single pursuit with the objective of eluding a police vehicle.

The evidence contained in the record supports the conclusion that the defendant's attempt to elude Deputies Helligso and Olson constituted a continuing course of conduct with a single objective. The defendant led a pursuit that began when the deputies activated the lights on their patrol car and ended when the defendant was apprehended on foot. The defendant's driving while being pursued and attempt to escape on foot after jumping out the truck indicate that the defendant had a single objective during the pursuit: eluding the police.

As the State presented evidence of multiple acts that constitute a single course of conduct with a single objective, a jury unanimity instruction was not required. ***Crane,*** 116 Wn.2d at 326. The defendant's assignment of error based on a lack of jury unanimity must be rejected.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING ER 404(b) EVIDENCE FOR THE PURPOSES OF SHOWING MOTIVE

a. The trial court properly admitted testimony regarding warrants for the defendant's arrest because it showed a motive under ER 404(b).

Trial court rulings admitting or excluding evidence are reviewed for an abuse of discretion. ***State v. Fisher,*** 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. ***State v. Dye,*** 178 Wn.2d 541, 548, 309 P.3d

1192 (2013). Trial courts have wide discretion in determining the admissibility of evidence. ***State v. Demery,*** 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Evidence of past crimes, wrongs, or acts is admissible to show motive. ER 404(b).

At trial, the State sought to elicit testimony pertaining to warrants out for the defendant's arrest at the time Deputies Helligso and Olson attempted to pull him over in order to show a motive for running from law enforcement pursuant to ER 404(b). RP 65. The trial court heard argument from both parties on whether the evidence was admissible and conducted a balancing test of probative value and prejudicial effect pursuant to ER 403. RP 73. The trial court ruled that evidence of the warrants was admissible to show motive under ER 404(b), but that the State could not elicit testimony regarding what the warrants were for, or that the defendant had pleaded guilty to additional charges. RP 74.

The trial court's ruling constituted a proper exercise of the broad discretion granted to lower courts to rule on the admissibility of evidence. The trial court grounded the admission of the challenged testimony in ER 403 and ER 404(b), and expressed its reasoning on the record. RP 73-74. Furthermore, the trial court explicitly invited defense counsel to question the deputies about the defendant's knowledge of the warrants on cross-examination. RP 73-74. Defense counsel accepted this invitation and

asked Deputy Olson whether the defendant was aware of the warrants in order to counter the State's argument that the warrants provided a motive to run from the police. RP 99.

The trial court's admission of testimony pertaining to the defendant's warrants was a proper exercise of discretion. The decision was grounded in the Rules of Evidence and based on tenable reasons. The record does not reveal any abuse of discretion by the trial court and therefore the defendant's claim of evidentiary error must fail.

b. Deputy Olson's testimony that the defendant did not answer any questions does not warrant reversal because the jury was not invited to infer guilt from his answer.

As argued previously, a passing reference to the defendant's silence is not necessarily a violation of the Fifth Amendment or Article 1, Section 9 of the Washington State Constitution. ***Burke,*** 163 Wn.2d at 217. It is only when the State invites the jury to infer guilt from that silence that reversible error may occur. *Id.*

The prosecutor never mentioned the defendant's silence during closing argument or rebuttal. RP 99-103; RP 116-126; RP 134-137. The only mention of the defendant's silence was Deputy Olson's passing reference to the fact that the defendant did not answer any questions, and therefore the deputy did not know whether he was aware of the warrants

or not. Deputy Olson's response was not a comment on the defendant's silence as he did not mention that silence besides making the factual assertion that the defendant did not answer when asked if he was aware of the warrants. The challenged testimony is only a passing reference, without comment, to the fact that the defendant did not answer questions. The testimony did not violate the defendant's constitutional rights.

5. THE DEFENDANT HAS FAILED TO SHOW THAT CUMULATIVE ERROR DEPRIVED HIM OF A FAIR TRIAL.

Reversal under the cumulative error doctrine is limited to cases where there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. ***State v. Greiff,*** 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. ***State v. Yarbrough,*** 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). No errors occurred during the defendant's trial. Therefore, the cumulative error doctrine does not warrant reversal of the defendant's conviction. *See* ***State v. Price,*** 126 Wn. App. 617, 655, 109 P.3d 27 (2005).

The defendant has failed to meet his burden of proving an accumulation of error that is of sufficient magnitude to warrant a new trial.

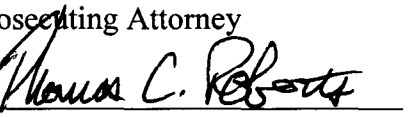
As outlined in the previous sections of this brief, the defendant's trial did not suffer from any error, let alone an accumulation of error sufficient to warrant a new trial. The defendant's trial was fair and free from error. Thus, the cumulative error doctrine cannot be grounds for reversal of his conviction. The defendant's claim of cumulative error should be rejected.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the conviction below.

DATED: September 22, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Spencer Babbit
Rule 9 Legal Intern

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-22-15 _____
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PIERCE COUNTY PROSECUTOR

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