NO. 47326-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN ALBERT RIVERA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman, Judge

No. 14-1-03750-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant has met his burden to show prosecutorial error that was flagrant, ill-intentioned, and could not have been cured by an instruction to the jury?

2. Whether defendant has met his burden of showing defense counsel's performance was deficient and that he was prejudiced by any deficiency?

3. Whether, where defendant has provided no evidence of any seized property, has claimed no possessory interest in such property, and has not shown the property was not contraband, the record is insufficient to review whether the sentencing court had statutory authority to order forfeiture of any items seized?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2014, the Pierce County Prosecutor's Office (State) charged Kevin Albert Rivera (defendant) with one count of assault in the third degree, one count of felony harassment, and one count of malicious mischief in the third degree. CP 1-2. On February 10, 2015, the State amended the information, changing count one to assault in the second degree. CP 9-10.

Following trial, a jury found defendant guilty of assault in the second degree and malicious mischief, and not guilty of felony harassment. CP 66-68. Defendant was sentenced to a standard range sentence for the assault in the second degree. CP 69-81. He was given a 364 day sentence, which was suspended for two years, for the malicious mischief. CP 82-86. Defendant filed a timely notice of appeal. CP 87.

2. Substantive Facts

On September 20, 2014, Alicia Clements was working as a process server; she was assigned to post a notice of default and a notice of foreclosure at defendant's home. 2/12/15RP 11. While Ms. Clements was posting the notices on a post just outside of defendant's property, defendant and his wife came out of their house and started screaming at Ms. Clements. 2/12/15RP 16-17. Defendant yelled at Ms. Clements to "get the fuck out of here. If you don't get the fuck out of here, we are going to kill you." 2/12/15RP 16. Ms. Clements heard something metal thrown in her direction and she hurried back to her car. 2/12/15RP 21. Her car window was open roughly one or two inches, which she rolled up when she got to her car. 2/12/15RP 22. Defendant was walking to her car as she rolled up her window and locked her door, then he turned around to get the papers she had just posted. 2/12/15RP 22. When Ms. Clements went to put her car in gear, defendant came through her car window with both of his fists and the papers in his hand. 2/12/15RP 23. Her car window shattered and defendant struck Ms. Clements on the left side of her face in

the forehead with his fist twice. 2/12/15RP 24-25. As this happened, defendant was screaming at Ms. Clements telling her he was going to find her, kill her, and for her to "get the fuck out of here." 2/12/15RP 29. Ms. Clements got her car in drive and started moving, which was what got defendant out of her window. 2/12/15 RP 29. Ms. Clements drove until she could get a signal to call 911. 2/12/15RP 29-30.

As a result of defendant assaulting Ms. Clements through her window, Ms. Clements suffered injuries from the glass and from defendant's fist. 2/12/15RP 25-27. She had a bump on the left side of her forehead, glass in her eye, elbow, and ear, and cuts and gashes in her forehead. 2/12/15RP 25.

Officer Minion responded to the 911 dispatch and arrived to speak with Ms. Clements after she had been treated by medical aid. 2/12/15RP 111. Officer Minion, in speaking with Ms. Clements, observed that she was "visibly upset, shaken and seemed a little bit stressed out." 3RP 120. Ms. Clements indicated to Officer Minion that she was concerned about her ability to drive because she still had glass in her eye. 3RP 120. Officer Minion inferred from her tone of voice and speech, which became more excited and sped up while she was talking about what had occurred, that she was a little angry about what had happened to her. 3RP 121.

After getting Ms. Clements' statement, Officer Minion drove to defendant's house. 3RP 126. Defendant told Officer Minion there had been a trespasser at his house. 3RP 129. Defendant acknowledged that there had been paperwork posted, that he grabbed the paperwork off of the post, and that he put the documents back into Ms. Clements' car. 3RP 130. Defendant also acknowledged that Ms. Clements' car window was broken and he was the cause. 3RP 130. Based on these acknowledgements and statements made by defendant, Officer Minion placed defendant under arrest. 3RP 131.

After being advised of his rights and waiving his right to silence, defendant told Officer Minion that anyone who came on to his property would be met with force and that Ms. Clements needed to leave instead of running her mouth. 3RP 131-132.

Officer Minion testified that it is challenging to break a car window and that flashlights, batons, or special tools are used to do so when needed in an emergency situation. 3RP 133.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW ANY IMPROPER ARGUMENT OR ONE SO PREJUDICIAL THAT IT COULD NOT BE CURED BY AN INSTRUCTION.

To prevail on a claim of prosecutorial error[1], a defendant must show the prosecutor's conduct was both improper and had a prejudicial effect. ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

a. Officer Minion's statements regarding what he observed and what was stated to him were not improper opinion testimony.

"[O]pinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," are allowed

[1] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorney's Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

under Evidence Rule (ER) 701. ***State v. Blake***, 172 Wn. App. 515, 523, 298 P.3d 769 (2012). Generally, when a witness testifies in the form of an opinion regarding the guilt of the defendant, the testimony is improper. ***State v. Demery***, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, testimony based on inferences from the evidence is not improper. ***Blake***, 172 Wn. App. at 523. "The fact that an opinion supports a finding of guilt . . . does not make the opinion improper." *Id.* (*citing* ***State v. Collins***, 152 Wn. App. 429, 436, 216 P.3d 463 (2009)).

In determining whether statements are impermissible opinion testimony, courts consider the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before jury. ***Demery***, 144 Wn.2d at 759.

Officers' comments on the defendant's demeanor based on a proper foundation of factual observations which directly and logically support the officers' conclusion are admissible. ***State v. Rafay***, 168 Wn. App. 734, 808, 285, P.3d 83 (2012). In ***Rafay***, officers testified that a defendant's grin "kind of shocked" an officer and that a defendant appeared "robotic" and "very concerned." The court in that case held that the comments were primarily an attempt to describe the defendants' demeanor and thus proper.

Here, the prosecutor questioned Officer Minion about his observations of the victim. 3RP 110-111, 119-121.

> [Prosecutor]: [C]an you give me an idea as to what you recall in terms of how she appeared?
> [Officer Minion]: She had been treated by medical aid . . . she was shaken, scared.
> [Prosecutor]: What gave you the impression she was scared?
> [Officer Minion]: Just her demeanor was . . . you could tell that she had been upset and . . . she was just kind of a little down.

3RP 110-111.

> [Prosecutor]: [H]ow would you describe her demeanor?
> [Officer Minion]: She was visibly upset, shaken, and seemed a little bit stressed out by what had just happened to her.

3RP 120

> [Prosecutor]: What made you . . . think she was angry?
> [Officer Minion]: Well, just the tone of her voice and the fact that she would speed up, and her explanation was a little bit louder.

3RP 121.

Officer Minion's opinions regarding the victim were rationally based on his factual observations of her injuries, her speech patterns, and her statements. As in ***Rafay***, where officers commented on the expressions and appearance for the purpose of describing the defendants' demeanor, Officer Minion's comments were primarily an attempt to describe the victim's demeanor, they were not comments on the defendant's guilt. Officer Minion's opinion was helpful to the jury in understanding his testimony regarding how the victim appeared and the victim's demeanor.

Officer Minion testified to facts pertaining to his decision to arrest defendant. The facts consisted of statements made by both Ms. Clements and defendant. Defendant acknowledged that Ms. Clement's driver's side

window was broken and admitted he was the cause of that. 3RP 130. Ms. Clements identified defendant as the person who had assaulted her. 3RP 125. Officer Minion knew the nature of the call he was responding to was an assault. 3RP 109. Based on these facts, Officer Minion made a rational inference that defendant was involved in an altercation with Ms. Clements and struck her with his fist. 3RP 131. The fact that defendant broke her window needed not be inferred, defendant did not deny this. 3RP 130. These facts and the inferences therefrom provided the jury a clear understanding simply regarding Officer Minions decision to place defendant under arrest.

The defense in this case was that the window of Ms. Clement's car broke accidentally. 2/12/15RP 71. The testimony of Officer Minion merely identified the defendant as the person who was involved in the incident causing damage and harm to Ms. Clements. Additionally, other evidence presented to the jury included Ms. Clements statements that defendant broke through her window with both fists and struck her in the head with his right fist after yelling expletives at her. 2/12/15RP 23-24, 16.

Statements which plainly indicate a witness's opinion regarding whether a defendant is guilty are improper opinion testimony. *See* ***State v. Jones***, 71 Wn. App. 798, 813, 863, P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994) (Witness's statement she believed the defendant molested A. was improper opinion on the guilt of the

defendant). Unlike in ***Jones***, Officer Minion did not make statements regarding whether he believed defendant was guilty, he simply commented on what he observed and the facts presented to him.

Officer Minion's opinions and inferences drawn from facts were rationally based on his observations of Ms. Clements and from statements made by both Ms. Clements and defendant. His testimony was helpful to the jury in that it could assist them in determining the facts at issue in this case.

b. Ms. Clements' statements during testimony were proper.

Ms. Clements' opinion that the defendant's actions appeared to be intentional was rationally based on her perception of defendant's demeanor, statements, and behavior. Defendant yelled at Ms. Clements to "get the fuck out of here. If you don't get the fuck out of here, we are going to kill you." 2/12/15RP 16. Ms. Clements heard something thrown in her direction. 2/12/15RP 21. She saw defendant rip the documents she had posted off of the post. 2/12/15RP 23. While Ms. Clements was in the driver's seat of her car, defendant came through the side window with both of his fists, one of which had the documents she had posted, and shattered the window. 2/12/15RP 23. Defendant's right fist struck the left side of Ms. Clements' face. 2/12/15RP 24-25. From all of these factual observations, Ms. Clements' inferred the actions were done on purpose. Additionally, the prosecutor's question, "*Based upon what you observed*

of the defendant's conduct directed toward you, did you consider, and did his behavior and actions *appear* to be intentional from what you could see?" (emphasis added) is clearly phrased to elicit only an opinion rationally based on Ms. Clements' perceptions which was helpful to the jury in assessing Ms. Clements' frame of mind at the time of the incident. 2/12/15RP 31.

It was Ms. Clements' perception that because her window was all the way up and based on the defendant's threatening statements and actions leading up to and when he shattered the window, that defendant did not burst through the glass and strike her accidentally.

c. The prosecutor's reference to the law and jury instructions in closing was proper.

It is improper for a prosecutor to misstate the law to the jury. ***State v. Swanson***, 181 Wn. App. 953, 959, 327 P.3d 67 (2014). The State had to prove that defendant intentionally assaulted another and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a); CP 53. Intent is statutorily defined as "[A] person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a); CP 55. The jury was instructed on the definition of assault as follows:

> An assault is an intentional touching or striking of another person with unlawful force, that is harmful or offensive. A touching or striking would offend an ordinary person who is not unduly sensitive.

> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 51.

The prosecutor referenced the jury instruction on the definition of assault in her closing argument. 2/12/15RP 117. The prosecutor's statement, "it is offensive touching," tracked the language of the jury instruction. The prosecutor gave examples of offensive touching when she stated "[b]eing hit, slugged, touched or anything of that nature as described in this particular case is offensive and amounts to the assault as defined in your instruction..." 2/12/15RP 117.

The prosecutor correctly stated the law in her closing argument when she tracked the language of the statutory definition of assault and referred jurors to the jury instructions.

d. The prosecutor's arguments during closing were proper.

Although prosecutors may not give a personal opinion on the credibility of witnesses during closing arguments, they may argue inferences from the evidence. ***State v. Copeland***, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996). That includes inferences as to why the jury should believe one witness over another, including the defendant. *Id.* A prosecutor arguing credibility only commits misconduct when it is clear

that they are expressing a personal opinion rather than arguing an inference from the evidence. *Id.* at 290. "'[T]here is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.'" ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (*quoting* ***State v. Armstrong***, 37 Wash. 51, 54-55, 79 P.490 (1905)).

Asking the jury to decide whom they believe does not rise to the level of misstating the law or misrepresenting the role of the jury. ***State v. Lewis***, 156 Wn. App. 230, 241, 233 P.3d 891 (2010). In ***Lewis***, the prosecutor asked the jury, "[D]o you believe that Mr. Crocker isn't telling you the whole story or do you believe that the defendant is fudging on the story?" *Id.* The court in that case held that argument was neither misconduct nor flagrant and ill-intentioned. *Id.* at 242.

Similarly to ***Lewis***, the prosecutor in this case asked the jury to decide if they "believe the fact this was an accident, or do you believe that window shattered into a million pieces because he touched it with his fingertips?" 2/12/15RP 113. The prosecutor was simply asking the jury who they believe, which witness they find credible. This is the role of the jury. Further, the jury is reminded by the court in the jury instructions of this very fact. CP 44.

e. Even if the court were to find the prosecutor erred in any of the instances where defense counsel failed to object, defendant is still unable to show prejudice given the number of times the jury was reminded and instructed on the law.

Where defendant fails to object at trial, defendant on appeal must establish the prosecutor's conduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" that cannot be cured by a jury instruction. ***State v. Sakellis***, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011). "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." ***State v. Emery***, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). The focus should be placed more on whether the alleged error resulted in prejudice that cannot be cured by an instruction, and less on whether the error was flagrant or ill-intentioned. *Id.* at 762. To show prejudice, the defendant must show a substantial likelihood that the alleged improper statements affected the jury's verdict. ***Dhaliwal***, 150 Wn.2d at 578 (*quoting* ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

Defendant did not object to statements made by the prosecutor and testimony from the State's witnesses that defendant now, on appeal, argues are improper. 3RP 131; 2/12/15RP 31-32, 108, 113, 116-17, 123, 139, 141-42; Brief of App. 12-15, 18-20. Instead, defense counsel chose to

address the State's argument and witness testimony in his own closing. (*See* argument in section two.)

> The jury in this case was correctly instructed as follows:
>
> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of the witness's memory while testifying; . . . the reasonableness of the witness's statements in the context of all of the other evidence.

CP 44. The jury was also correctly instructed to disregard any remark, statement, or argument that is not supported by the evidence or the law in the court's instructions. *Id.* A jury is presumed to follow the court's instructions. ***State v. Lamar***, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Any prejudice resulting from the prosecutor's statements or witness testimony would be minimized by these instructions. *See* ***State v. Perkins***, 97 Wn. App. 453, 460, 983 P.2d 1177 (1999) (holding any prejudice from prosecutor's argument that the amount of drugs found on the defendant is an amount unlikely to be left unattended was minimized by jury instructions to disregard remarks unsupported by evidence).

An instruction could have been given to the jury reminding them, as previously instructed, that they are the sole judges of the credibility of the witnesses and to only rely on the evidence and law as instructed by the court, thereby curing any error.

2. DEFENDANT HAS FAILED TO SHOW DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT DEFENDANT WAS PREJUDICED BY DEFICIENCY.

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution. *See* ***Strickland v. Washington***, 466 U.S. 668, 685-87, 80 L.Ed.2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.* at 684. To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by the deficient performance. ***In re Crace***, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (*citing* ***Strickland***, 466 U.S. at 668).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). "The defendant alleging ineffective assistance of counsel 'must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" ***In re Personal Restraint of Elmore***, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007) (*quoting* ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

There is a strong presumption that counsel provided adequate assistance and "made all significant decisions in the exercise of reasonably professional judgment." ***State v. Strange***, 188 Wn. App. 679, 688, 354 P.3d 917 (2015) (*quoting* ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991)). The presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. ***Ciskie***, 110 Wn.2d at 284. Failure to object to the State's comments during closing arguments generally does not constitute deficient performance because it is uncommon to object during closing arguments "absent egregious misstatements." ***In re Cross***, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (quoting ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 717, 101 P.3d 1 (2004)).

Deficient performance prejudices a defendant when there is a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. ***McFarland***, 127 Wn.2d at 335.

When the record is viewed as a whole, counsel's performance was far from deficient. During the State's case in chief, defense counsel thoroughly cross examined all of the State's witnesses, pointing out any inconsistencies in testimony. 3RP 134-39, 159-65; 2/12/15RP 32-45. During cross examination of Officer Minion, defense counsel specifically asked how Officer Minion would characterize defendant's demeanor and

called into question Ms. Clements' account of events given to Officer Minion. 3RP 138-39. After the State rested, defense counsel called two witnesses to testify on defendant's behalf, defendant and his wife. 2/12/15RP 53-60, 80-85. Additionally, defense counsel objected numerous times to testimony produced by the State's witnesses and at one point even indicated he purposely waited to object to one of Officer Minion's statements to see what the next statement would be. 3RP 112-13, 126, 133, 141, 158; 2/12/15RP 24, 27, 31.

Furthermore, defense counsel's decision not to object during the State's case in chief beyond the objections defense counsel did make or during the State's closing argument was likely part of a larger trial strategy. Defense counsel probably recognized the State's argument was proper and the statements made during Officer Minion's and Ms. Clements' testimony were proper. Also, he may have chosen not to object in order to challenge the State's argument in his own closing. He said:

> This case is about the State proving, beyond a reasonable doubt in Jury Instruction 11, "a person acts with intent or intentionally when acting with the objective or purpose to accomplish the result that constitutes *the* [sic] crime." . . . His intent was not to assault that woman. He did something incredibly stupid. He might have been reckless in doing it. He might have been negligent in doing it.

2/12/15RP 127. (emphasis added). It is likely defense counsel, in misstating the jury instruction on intent from "constitutes *a* crime" to "constitutes *the* crime" was strategically shifting the focus from defendant

intending to assault Ms. Clements to recklessly or negligently breaking the car window. Additionally, defense counsel in closing argument called into question the credibility of the State's witnesses. He stated:

> Now the State's theory is that he (defendant) became suddenly enraged when he learned this notice was posted. I would submit to you there is just no evidence of that at all. It is not supported by what we know.
>
> He (Officer Minion) assumed. That's not what she (Ms. Clements) told him. . . . (Ms. Clements') version now months and months later is that A, he me with the right fist. . . . I would submit to you her injuries do not corroborate that statement.

2/12/15RP 125, 126. Defense counsel's decision not to object was part of a larger strategy to challenge the State's argument and the testimony of the State's witnesses in his own closing.

Even if defense counsel's performance was deficient for failing to object during the State's closing or to specific testimony from the State's witnesses, defendant is unable to show he was prejudiced by such inaction as required under the second prong of ***Strickland***. The jury was repeatedly reminded to consider only the testimony and evidence that was presented during the trial and the law as instructed by the court and that they are the sole judges of the credibility of each witness.

All of this reflects that even if the failure to object was deficient, defendant cannot show how he was prejudiced by it. He is unable to satisfy either the first or second prong of the ***Strickland*** test.

3. THIS COURT SHOULD DECLINE REVIEW OF DEFENDANT'S FORFEITURE CONDITION BECAUSE THE RECORD IS INSUFFICIENT FOR REVIEW.

An illegal or erroneous sentence may be challenged for the first time on appeal. ***State v. McWilliams***, 177 Wn. App. 139, 150, 311 P.3d 585 (2013) *review denied*, 179 Wn.2d 1020, 318 P.3d 279 (2014) (*citing* ***State v. Ford***, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). The court reviews de novo whether the sentencing court had the statutory authority to impose a sentencing condition. ***State v. Armendariz***, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, if the record is insufficient for review, the court may decline to review a particular issue. ***Washington Pub. Trust Advocates v. City of Spokane***, 120 Wn. App. 892, 898, 86 P.3d 835 (2004) (*citing* ***Bulzomi v. Dep't of Labor & Indus.***, 72 Wn. App. 522, 525, 864 P.2d 996 (1994)).

There are three reasons a court may refuse to return seized property no longer needed for evidence: (1) the defendant is not the rightful owner, (2) the property is contraband, or (3) the property is subject to forfeiture pursuant to statute. ***McWilliams***, 177 Wn. App. at 150 (*citing* ***City of Walla Walla v. $401,333.44***, 164 Wn. App. 236, 244, 262 P.3d 1239 (2011)). A defendant may file a motion pursuant to CrR 2.3(e) for the return of unlawfully seized property. ***McWilliams***, 177 Wn. App. 150-151; CrR 2.3(e). CrR 2.3(e) requires an evidentiary hearing to determine

the right to possession between the defendant and the State. ***State v. Marks***, 114 Wn.2d 724, 734–735, 790 P.2d 138 (1990).

In the present case, defendant on appeal makes no claim of ownership to any seized property. In fact, defendant does not identify any property seized. Defendant also failed to object to the imposition of the condition at sentencing. Therefore, it is not evident from the record that defendant is the rightful owner, that the alleged property is not contraband, or that the alleged property is not subject to forfeiture pursuant to statute. Defendant has also not made a CrR 2.3(e) motion, which would have been accompanied by a full evidentiary hearing. With these deficiencies in the record, this court should decline to review defendant's challenge.

D. CONCLUSION.

For the foregoing, reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: May 12, 2016.

MARK LINDQUIST
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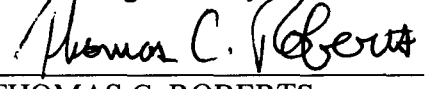

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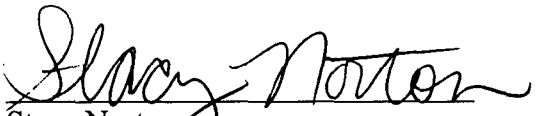

Stacy Norton
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ C. 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.

5.13.16 Theresa Kay
Date Signature