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SUPREME COURT NO. 98658-4

NO. 79381-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LAURENCE LEWIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Kevin Laurence Lewis, the appellant below, seeks review of the appended Court of Appeals decision in State v. Lewis, noted at ___ Wn. App. 2d ___, 2020 WL 1918155, No. 76837-9-I (Apr. 20, 2020), following denial of his motion for reconsideration on May 15, 2020.

B. ISSUES PRESENTED FOR REVIEW

1. The sister of Amanda Lewis (for clarity, hereinafter “Amanda”), the alleged victim, was shot and killed before Kevin Lewis’s trial began. While evidence of or testimony regarding Amanda’s sister’s death was ruled inadmissible by the trial court before trial began, a state witness and distant relative of Amanda’s referenced a murder on his side of the family during his testimony. In holding that the trial court did not err in denying Lewis’s motion for a mistrial, the Court of Appeals misapplied two of the three Weber¹ factors. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals’ decision misapplies and is therefore in conflict with the Weber decision?

2. The Court of Appeals held that Lewis failed to demonstrate that his counsel’s performance was deficient when counsel failed to object to the admission at trial of highly prejudicial testimony that the trial court had previously ruled was inadmissible and failed to request a limiting

¹ State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

instruction regarding evidence admitted only for a narrow, limited purpose because counsel's performance "may well have been strategic." Appendix at 8. The Court of Appeals did not consider the reasonableness of counsel's performance. The Court of Appeals reasoned that defense's theory of the case benefited from both emphasizing Ruggles's testimony by not objecting to it and from deemphasizing Ruggles's testimony by not requesting a limiting instruction. Appendix at 8-9. Is review appropriate under RAP 13.4(b)(1) and (3) where the Court of Appeals finds that strategic but contradictory choices made by counsel, without regard to reasonableness, overcome a claim of deficient performance?

C. STATEMENT OF THE CASE

The state charged Lewis with one count of assault in the second degree, one count of telephone harassment, and one count of violation of a court order; all counts included domestic violence allegations. CP 119-120. The state later filed an amended information adding an additional count of assault in the second degree and an additional count of violation of a court order, both with domestic violence allegations, as well as an additional count of assault in the fourth degree against Abigail Ruggles. CP 103-05.

Charges I through IV arose from allegations that Lewis punched Amanda in the face and head multiple times on November 18, 2016 (Count I), that Lewis called Amanda and threatened to kill her on June 18, 2017

(Count II), that Lewis hit Amanda in the head multiple times on June 21, 2017 (Count III), and that after Amanda obtained a protection order against Lewis, Lewis violated that order when he saw Amanda in court on July 12, 2017 and called her a “fucking bitch” (Count IV). 2RP² 212, 239, 247, 273. Charges V and VI arose from allegations on July 25, 2017, Lewis told Abigail Ruggles to give Amanda information about belongings at their home in violation of the court order and that Lewis backed Ruggles into a corner and pretended to punch the sides of her head. 2RP 454. On counts I through III, the state alleged that the crime was committed as part of an ongoing pattern of psychological abuse. CP 103; RCW 9.94A.535(3)(h).

Lewis moved to sever counts V and VI (involving Ruggles) from counts I through IV (involving Amanda) and moved to sever count I from counts II through IV. CP 97-102; CP 106-11; 1RP 5-7. Finding that “the prejudice resulting from joining for trial charges where a different witness will testify to similar behavior outweighs the interest in judicial economy,” the trial court entered an order severing counts V and VI from counts I through IV. CP 95. The court further specified:

That is not to say, however, that evidence that the court order was violated on July 25, 2017 would not, by

² This petition refers to the verbatim reports of proceedings as follows: 1RP—consecutively paginated transcript of September 21, 2018; 2RP consecutively paginated transcript of October 29, 30, and 31, 2018, November 5, and 6, 2018, and December 18, 2018; 3RP consecutively paginated transcript of October 31, 2018.

itself, be admissible to show the aggravating factors set forth in counts I through 3. But, such evidence would likely be limited to the actual statement intended to be relayed to Ms. Lewis, and would not necessarily include the surrounding behavior and assault.

CP 95. The trial court declined to sever count I from counts II through IV.

CP 96.

Trial on counts I through IV began on October 29, 2018. 2RP 3. The state voiced its intent to introduce evidence of the incident with Ruggles under ER 404. 2RP 18-20. The trial court noted its concern that the evidence was “probably more prejudicial than probative.” 2RP 23. The state reiterated the court’s language from the severance order: that “Judge Larsen indicated that [the incident with Ruggles] may be admissible on the pattern of abuse but she had reservations with regards to the assault” 2RP 24.

The trial court ruled that the assault of Ruggles was “for sure” not admissible at trial but that testimony in relation to the violation of the court order protecting Amanda that occurred through Ruggles would be allowed. 2RP 26; 28-29. The court also indicated its willingness to give a limiting instruction that evidence related to the July 25 incident with Ruggles could only be considered for the purposes of determining whether the state had proven the aggravating factor. 2RP 29. Lewis’s lawyer never requested such an instruction and did not attempt to clarify what if any testimony regarding

Lewis's behavior with Ruggles would be permitted at trial. CP 70-77; 2RP 331.

Per Lewis's trial memorandum, Amanda's sister Michelle Canales-McGuire was murdered on September 20, 2018. CP 80. During motions in limine, Lewis moved to exclude any mention of the murder as irrelevant and highly prejudicial. CP 80; 2RP 14. The state agreed that the information "shouldn't come in." 2RP 14. The court granted Lewis's motion to exclude. 2RP 14.

At trial the state presented the testimony of Amanda, Dr. Andrew Young, Dr. Andrew Tran, Sergeant John Zeka, Deputy James Hand, Detective Tedd Betts, Dr. Todd Denkinger, Sherri Weyker, Deputy Daryl Hansmann, Deputy Jay Ravenscraft, Deputy Curt Carlson, Jesus Rosales, Marshal Kathleen Marino, Abigail Ruggles, Brian Mattax, and Deputy William Binkley. 2RP 200-477. The defense presented testimony of Kimberly Phelps and Lewis also testified. 2RP 493-543.

Amanda testified that she and Lewis were married in July 2009 and had three children. 2RP 201. She testified that during their relationship, Lewis demonstrated controlling and psychologically abusive behaviors regarding her clothing, her appearance, and her friends. 2RP 203-07. She and Lewis eventually moved to a home in Lynnwood, Washington. 2RP 206. In 2016, the couple was still living together in Lynnwood, but Amanda had

moved into the office downstairs. 2RP 207. In November of 2016, the Lewis family was staying in a hotel for a few days while water damage at the home was repaired. 2RP 208. Amanda testified that she would “stay where Lewis wasn’t,” meaning when he was at the hotel she would stay at their Lynnwood home, and vice versa. 2RP 208-09.

On the night of November 17, 2016, Amanda was staying at the Lynnwood home and Lewis slept at the hotel. 2RP 208. Early the following morning, Amanda testified that Lewis woke her up at the Lynnwood home between 5:00 and 6:00 a.m. 2RP 209. Lewis asked to look at Amanda’s phone. 2RP 211. Amanda testified that when she refused to let him look at her phone, Lewis punched her in the nose, causing her to fall. 2RP 211-12. At that point she allowed Lewis to look at her phone. 2RP 212. Amanda testified that she believed Lewis then hit her in the eye and jaw areas. 2RP 212. Amanda sought medical treatment for broken teeth and vision problems. 2RP 214-17.

On the night of June 21, 2017, Amanda testified that she had returned to her York Road duplex around midnight after her dance practice and was sitting in her car, which was parked in the driveway. 2RP 244-45. Amanda looked at her phone for five to 10 minutes while in the car. 2RP 245. When she opened her car door to exit the vehicle, she was hit on the head. 2RP 247. She was hit repeatedly after that. 2RP 248.

Amanda was able to eventually shut her car door and call 911 from inside. 2RP 249. While she was not able to identify the attacker, she suspected it was Lewis, and gave police his name and address. 2RP 249. Amanda had a laceration on her eyebrow which required sutures and sustained injuries to her arms and wrists. 2RP 248. She testified that she suffers from neuropathy as a result of the attack. 2RP 248.

Rosales testified that on the night of June 22, 2017, he came into contact with Lewis in the parking lot outside the Royal Casino. 2RP 418-19. Rosales knew Amanda, and therefore knew Lewis, because Amanda was a relative of his father-in-law. 2RP 417. Rosales testified that two days after seeing Lewis in the parking lot, he saw on social media that “there was a murder on our side of the family”— apparently referring to the murder of Michelle Canales-McGuire, Amanda’s sister, which had been addressed during motions in limine. 2RP 421. Lewis objected as to the statement’s relevance, the objection was sustained, and the trial court instructed the jury to disregard the statement. 2RP 421. The jury was excused. 2RP 421.

Lewis moved for a mistrial: “Obviously, this was excluded evidence. This is highly prejudicial. He made this comment about the murder. The jury’s now heard that. You can’t unring the bell. So I would ask the Court to declare a mistrial.” 2RP 422. The state argued that the witness had made a mistake, as the murder had not yet occurred two days after the witness saw

Lewis in the casino parking lot. 2RP 423. “When he said he had learned two days later,” the state argued, “he was supposed to say an assault, and I think he slipped and said murder. . . . And if he comes back and says on the stand that what happened two days later, and he says he meant to say an assault, I think that will rectify the problem.” 2RP 423. Lewis argued that “somebody’s going to know the difference between assault and murder.” 2RP 423.

The court clarified for the record that the alleged assault occurred on June 22, 2017 and that Amanda’s sister, Michelle, was murdered in September of 2017. 2RP 424. Considering the dates and finding the witness misspoke, the court made the following ruling:

I think that so long as it’s clarified when he testifies that the statement that he made earlier was he’s not sure why he said it, he said something inadvertently and incorrectly and it was related to the assault, I think that takes care of the issue. So as long as his testimony is clear is that that’s what he meant, the jurors are not going to know anything in relation to a murder. So I will deny the motion for mistrial.

2RP 424. The court also stated its intention to reinstruct jurors not to seek outside information or discuss the case with anybody, and in fact did so reinstruct. 2RP 424, 430-31.

Rosales retook the witness stand. 2RP 425. The state asked him about his previous testimony:

STATE: All right. So you said that you had seen something on social media. Did you misspeak about what you saw on social media?

ROSALES: Yes, I did. I misspoke. I apologize for that.

STATE: What did you see on social media; was it an assault?

ROSALES: Social media, I saw there was an assault [of Amanda], yes. I'm sorry, yes, I misspoke.

2RP 425-26.

Rosales then testified that when he saw Lewis, Lewis was wearing dark clothing, had dark gloves on, and was riding a black bicycle. 2RP 427. Rosales approached Lewis and Lewis asked Rosales for a ride to Aurora Avenue. 2RP 427. Rosales declined to give him a ride and went inside the casino. 2RP 428.

Deputy Curt Carlson testified that he responded to a 911 hang-up call on York Road on June 22, 2017. 2RP 397. Dep. Carlson made contact with Amanda, who was still in her vehicle, took photographs of her injuries, and then proceeded to Lewis's Lynnwood home to investigate any involvement. 2RP 399, 402, 408. It took Dep. Carlson about 10 to 15 minutes to drive to Lewis's home from Amanda's duplex. 2RP 409. He arrived at 1:07 a.m. 2RP 409. As Dep. Carlson was looking at the vehicle in the driveway, Lewis arrived by bicycle and entered the driveway. 2RP 409-10. Lewis was wearing dark clothing. 2RP 412. Dep. Carlson asked if Lewis had been in

the vicinity of Amanda's duplex that evening, and Lewis answered that he had not. 2RP 412. Lewis said he had been gone about 30 minutes. 2RP 413.

Amanda testified that the Lynnwood home where Lewis lived was about a 10-minute drive from her Everett duplex, or approximately a 30-minute bike ride. 2RP 258. She testified that the casino where Rosales claimed to have seen Lewis was between a half mile and a mile from Amanda's Everett duplex. 2RP 257-58.

At the close of the state's case, Lewis successfully moved to dismiss count II, telephone harassment pursuant to State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). 2RP 489.

Lewis testified that the injuries Amanda suffered on November 18, 2016 were the result of Lewis lawfully defending himself against her. 2RP 537-39.

During closing argument, defense counsel argued that on November 18, 2016, Lewis defended himself against Amanda. 2RP 563. Regarding the June 22, 2017 attack, defense counsel argued that, based on witness testimony, Lewis could not have been the attacker. 2RP 567.

The jury convicted Lewis of both counts of assault in the second degree and found Lewis not guilty of violation of a court order. CP 35-41. The jury found that Lewis and Amanda were family or household members

as to both counts of assault and also found that the assaults were aggravated domestic violence offenses. CP 36-37, 39, 40.

Lewis appealed. CP 7-8. He argued that the trial court erred when it denied his mistrial motion following the introduction of excluded evidence of his sister-in-law's killing. Br. of Appellant at 13-18; Reply Br. of Appellant at 1-4. Lewis also argued that he was denied effective representation when his attorney failed to object to the admission of highly prejudicial evidence of his alleged assault of Ruggles and failed to request a limiting instruction regarding the jury's consideration of Lewis's interaction with Ruggles only for the purposes of proving the alleged aggravator. Br. of Appellant at 18-22; Reply Br. of Appellant at 4-8.

The Court of Appeals held that the trial court did not err in denying Lewis's motion for a mistrial because, while the irregularity was serious and significant and the problematic testimony was not cumulative of other evidence, Rosales's later corrective testimony was consistent with other evidence presented and the court provided a curative instruction. Appendix at 6-7. The Court of Appeals also seemed to reason that because the inflammatory testimony was irrelevant, nonresponsive, and inaccurate, the fact that it was *not* cumulative weighed in favor of the trial court's denial of Lewis's motion for a mistrial. Appendix at 6.

The Court of Appeals also held that Lewis failed to demonstrate that his counsel's performance was deficient when counsel failed to object to the admission at trial of highly prejudicial testimony that the trial court had previously ruled was inadmissible and failed to request a limiting instruction regarding evidence admitted only for a narrow, limited purpose because counsel's performance "may well have been strategic." Appendix at 8. Specifically, the Court noted that the "portion of testimony identified by defense . . . of Kevin cursing at [Ruggles], pointing his finger at her like a gun, and trying to get her to tell Amanda something[.]" "was not at odds with the defense theory of the case, which focused on the theme of a failing marriage where every party involved was acting badly and with high emotions." Appendix at 8. Somewhat contradictorily, the court also found that defense counsel's failure to request a limiting instruction may be explained by a desire to deemphasize Ruggles's testimony. Appendix at 9.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION MISAPPLIED THE FACTORS SET OUT IN *STATE V. WEBER*

While the Court of Appeals found the trial error at issue to be significant, serious, and not cumulative of other properly admitted evidence, it held that the trial court did not err in denying Lewis's motion for a mistrial

because the trial court gave the jury a curative instruction. Appendix at 5-7. The Court of Appeals seemed to find that the non-cumulative, irrelevant, nonresponsive, and inaccurate nature of the testimony at issue weighed against Lewis's motion for a mistrial. And it simply found that Rosales's testimony could be cured through an instruction because the trial court provided one. Appendix at 6-7. The Court of Appeals both misapplied and failed to fully consider the factors set out in Weber, necessitating RAP 13.4(b)(1) review.

In Weber, the Washington State Supreme Court set out a three-factor test to use when considering whether a trial irregularity rendered a trial unfair. 99 Wn.2d at 165. Courts consider (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether admission of the illegitimate evidence could be cured by an instruction to disregard. Id. at 165-66.

In considering whether Rosales's testimony was cumulative under Weber, the Court of Appeals emphasized the non-cumulative and inaccurate nature of Rosales's testimony in holding that the trial court did not err in denying a mistrial. Id. at 165; Appendix at 6. In analyzing a trial irregularity to determine whether it may have influenced the jury, a court considers whether the irregularity in question was cumulative of properly admitted evidence; the idea is that the more cumulative a trial irregularity is of other

properly admitted evidence, the less likely it is to have influenced the jury. Weber, 99 Wn.2d at 165; State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). In contrast, the Court of Appeals appeared to hold that the admittedly “serious” and “significant” error did not influence the jury in part because of its non-cumulative nature: the Court of Appeals noted that Rosales’s improper testimony was irrelevant, non-responsive, and inaccurate in holding that the trial court did not err in denying Lewis’s motion for a mistrial. Appendix at 6.

This analysis is without precedent and appears to directly contradict the purpose of the consideration of a trial irregularity’s cumulative nature. Weber, 99 Wn.2d at 165-66. The question is not whether Rosales’s non-cumulative testimony was factually accurate or relevant; the question is whether the testimony regarding a murder presented to the jury influenced the jury, considering its non-cumulative nature. Id.

The Court of Appeals also misinterpreted or failed to consider the third Weber factor. It reasoned that Rosales’s testimony could be cured through an instruction because the court provided one. Id. at 166; Appendix at 6-7. Under Weber, the court should consider whether the admission of the particular illegitimate evidence is capable of being cured by an instruction, not whether an instruction was given. Id. The Court of Appeals either misinterpreted or failed to consider this factor.

The Court of Appeals' failure to properly consider the implications of noncumulative inflammatory testimony and potential ineffectiveness of the trial court's curative instruction is in conflict with Weber and review under RAP 13.4(b)(1) is warranted.

2. RULING THAT COUNSEL'S PERFORMANCE WAS NOT DEFICIENT BECAUSE IT "MAY WELL HAVE BEEN STRATEGIC" WITHOUT REGARD TO THE REASONABLENESS OF SUCH A CHOICE AND WITHOUT A BASIS IN THE RECORD WARRANTS REVIEW UNDER RAP 13.4(b)(1) AND RAP 13.4(b)(3)

The Court of Appeals held that Lewis could not demonstrate that his counsel's performance was deficient when counsel failed to object to the admission and limit the use of highly prejudicial and excluded evidence because counsel's failure may have been strategic. Appendix at 8. The Court of Appeals did not consider the reasonableness of any legal tactic and in fact, on the face of the record, such a choice would appear to have been unreasonable. Lewis was charged with and denied assaulting Amanda, and his attorney failed to object to the admission of Ruggles's testimony that Lewis assaulted and threatened Ruggles. No reasonable trial strategy explains defense counsel's failure to object to or request to limit the jury's consideration of this testimony, especially when such testimony was specifically excluded pretrial. CP 94-95; 1RP 26. Review is appropriate under RAP 13.4(b)(1) and (3) as the Court of Appeals'

troubling view of what constitutes effective assistance of counsel is in conflict with established case law and presents a significant question of law under both the federal and state constitutions.

In finding defense counsel's performance not deficient, the Court of Appeals reasoned that Ruggles's testimony claiming to have been assaulted by Lewis "was not at odds with the defense theory of the case, which focused on the theme of a failing marriage where every party involved was acting badly and with high emotions." Appendix at 8. But Ruggles did not describe anyone behaving badly except for Lewis, whom she claimed pointed his finger at her like a gun, pretended to punch her on the sides of her head, and physically backed her against a wall. 2RP 453-54.

The Court of Appeals further suggested that part of the defense theory could have been that "Ms. Ruggles may have fueled the increasing tension between Kevin and Amanda by telling Amanda about this hostile interaction," as "insinuated" by defense counsel in closing. Appendix at 8-9. In fact, defense counsel's only mention of the incident in closing included an argument that the incident with Ruggles was not evidence of a pattern of abuse of Amanda Lewis, an aggravating factor alleged in conjunction with counts one, two, and three. 2RP 569-70; CP 103. To find that Ruggles's unfairly prejudicial testimony was helpful to Lewis or was

consistent with defense's trial theory has no basis in the record. There was no conceivable legitimate tactic explaining counsel's failure to object to it.

From the supposition that counsel did not object to Ruggles's testimony because her testimony was consistent with the "defense theory of the case," the Court of Appeals next concluded that defense counsel's failure to request a limiting instruction as to Ruggles's testimony was not deficient given the strategic value of avoiding calling the jury's attention to the Ruggles incident. Appendix at 9. The Court of Appeals position, therefore, is that defense's theory of the case benefited from both emphasizing Ruggles's testimony by not objecting to it and deemphasizing Ruggles's testimony by not requesting a limiting instruction. Appendix at 8-9. These two strategies cannot reasonably be reconciled.

Indeed, at no point does the Court of Appeals consider the reasonableness of any supposed strategy on behalf of defense counsel. Appendix at 8. Effective assistance of counsel requires the defense attorney's performance to be reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 99, 351 P.3d 138 (2015). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe

v. Flore-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Review is appropriate under RAP 14.3(b)(1) and (3) where the Court's determination that counsel may have failed to object to or limit highly prejudicial testimony for strategic but inconsistent reasons appears to be in conflict with Strickland v. Washington (and all Washington cases applying it) and run contrary to both the United States and Washington Constitutions.

E. CONCLUSION

The trial court erred in denying the motion for a mistrial following a serious trial irregularity. Lewis received ineffective assistance of counsel when his attorney unreasonably failed to request a limiting instruction and failed to object to the admission of inadmissible evidence. Because RAP 13.4(b)(1) and (3) are satisfied, Lewis asks this court to grant review and reverse the Court of Appeals.

DATED this 15th day of June, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 79381-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
KEVIN LAURENCE LEWIS,)	
)	
Respondent.)	
_____)	

HAZELRIGG, J. — Kevin L. Lewis was convicted at trial of domestic violence related offenses: two counts of assault in the second degree, both subject to an aggravating factor that the offenses were part of an ongoing pattern of abuse of the victim. Lewis argues that the court erred in not granting his motion for a mistrial after a witness violated a pretrial order and that his counsel was ineffective. He also raises double jeopardy and ineffective assistance of counsel claims in a Statement of Additional Grounds. We disagree and affirm.

FACTS

Kevin L. Lewis was charged with six counts of domestic violence related offenses—which include two counts of assault in the second degree, telephone harassment, two counts of gross misdemeanor violation of a no contact order, and assault in the fourth degree. The three felony counts, assault in the second degree

and telephone harassment, included a domestic violence aggravating factor alleging that the offenses were part of an ongoing pattern of abuse of the victim.

The charges arose out of several incidents between Kevin and Amanda Lewis.¹ The couple was in the process of separation and later, a dissolution. In November 2016, Amanda was sleeping at home when Kevin, who had been staying elsewhere, woke her up early in the morning. Kevin asked to look at Amanda's phone, but she refused. Kevin then punched Amanda in the nose, and she let him look at her phone. Amanda also testified that she believed Kevin hit her in the eye and jaw areas which caused her to seek treatment for her injuries. Amanda moved out of the family home after this incident.

On June 18, 2017, Kevin called Amanda to discuss their children and try to convince her to return home. Kevin told her that if she did not return, he would get a divorce, seek custody of the children, and if he was not successful in obtaining custody, would kill her. Amanda reported the threat to the police.

Just before midnight on June 21, 2017, Amanda arrived at her new residence. She was parked in the driveway looking at her phone for a few minutes. As she started to exit the vehicle, she was hit on the head and was hit many more times before the assault suddenly stopped. Amanda eventually shut her car door and called 911. She was unable to identify the assailant, but suspected Kevin and gave police his contact information. An officer went to Kevin's residence and while the officer was looking the vehicle in his driveway, Kevin arrived on a bicycle. The officer asked if he had been in the vicinity of Amanda's home that night, to which

¹ For clarity, Kevin Lewis and Amanda Lewis will be referred to individually by their first names. No disrespect is intended.

he replied that he had not and had only been gone about thirty minutes. A few days after the attack Amanda posted about her injuries and the incident on Facebook. Amanda also sought a protection order against Kevin.

Amanda filed a petition for a no contact order in Snohomish County Superior Court on June 28, 2017 and was granted a temporary order. Kevin and Amanda were present in court on July 12, 2017 when a permanent order was entered after a hearing was held on Amanda's petition. One of the misdemeanor violation of no contact order charges stemmed from an interaction in the courthouse, prior to the issuance of the final order, while the temporary order was still in effect. Kevin filed for divorce later that summer. The criminal case at issue here was formally filed in Snohomish County Superior Court on April 2, 2018.

Abigail Ruggles had been a live-in nanny for the couple. Ruggles testified at trial that she moved out of the couple's home in June 2017 and into Amanda's new residence. She further testified that she returned to the old home, where Kevin was still living, to retrieve some of her things. Ruggles stated that she and Kevin got into a verbal altercation, and Kevin pointed his fingers like a gun at her. Ruggles also testified that Kevin tried to communicate with Amanda through her.

Jesus Rosales, a distant relative of Amanda, knew Kevin based on their marriage. Rosales testified that he ran into Kevin the night of June 20, 2017, in the parking lot outside of a casino. This was the same night Amanda had been assaulted outside of her car. He further testified that he learned through social media that "there was a murder on our side of the family." This reference likely

was to Amanda's sister who had been killed on September 20, 2017.² There had been a ruling to exclude any reference to the murder based on an unopposed pretrial motion. Kevin objected to Rosales' statement based on relevance and the jury was excused. Kevin then moved for a mistrial, but the motion was denied. Rosales again took the stand and continued his testimony, explaining that he misspoke earlier and meant an assault. He specifically clarified that he was referring to the attack on Amanda while exiting her vehicle.

At the close of the State's case, the defense successfully moved to dismiss the charge of telephonic harassment. The jury convicted Kevin on both counts of assault in the second degree and the jury found that both assaults were aggravated domestic violence offenses. The jury acquitted him of the gross misdemeanor violation of a no contact order charge in Count IV. Kevin was sentenced to 38 months total confinement, including mandatory consecutive time on enhancements based on the aggravators. The remaining charges of gross misdemeanor violation of a no contact order and assault in the fourth degree had previously been severed from the other four counts and were dismissed after the trial at issue here. Kevin timely appealed.

ANALYSIS

I. Denial of Defense Motion for Mistrial

Kevin first challenges the court's denial of his motion for a mistrial after a witness violated a pretrial ruling excluding any reference to the murder of the

² One document in the record references the year as being 2018, however all other references within the record indicate 2017, which appears to be the proper date. This discrepancy does not affect our analysis.

victim's sister. Rosales' testimony included a statement about learning of "a murder on our side of the family" on social media, which directly violated the court's pretrial ruling on the matter. Defense counsel objected, which was sustained. The judge then sua sponte issued an instruction to the jury to disregard the statements as irrelevant and nonresponsive to questioning. The State requested a recess, during which the parties took up the issue outside the presence of the jury and defense formally moved for a mistrial. The court denied the motion, but offered to reiterate the instruction to the jury to avoid conducting any research or otherwise seeking out information related to the case. The judge reminded the jury of this instruction at the conclusion of Rosales' testimony.

We review a trial court's denial of a motion for a mistrial for abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). We find abuse of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "[T]he court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). "The trial judge is best suited to judge the prejudice of a statement." Id.

In reviewing a trial court's ruling on a motion for a mistrial, we utilize a three-part test to determine whether the petitioner was so prejudiced as to require a new trial. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). We consider 1) the seriousness of the irregularity, 2) whether the statement at issue was cumulative of other properly admitted evidence, and 3) whether the irregularity was

able to be cured by an instruction to disregard the improper testimony, which the jury is presumed to follow. Id.

The seriousness of Rosales' remark that he had become aware of a murder on the victim's side of the family was significant since it directly violated the agreed pretrial order to exclude any testimony on this subject. Beyond the violation of the motion in limine, this testimony regarding a murder was factually inaccurate and unrelated to the case at hand.

The second factor, whether the statement in question was cumulative of other proper evidence, is informative. This statement by Rosales was not cumulative as the jury did not hear about the murder of Amanda's sister at any other point during the trial. The court characterized the statement as irrelevant and non-responsive to questioning, but the record suggests it was also inaccurate. The trial transcript demonstrates that Rosales was expected to, and eventually did, testify that he learned of the assault on Amanda from her social media post. After the motion for a mistrial was addressed, Rosales returned to the stand and corrected his earlier testimony, explaining that he misspoke and meant to say assault. This corrective testimony was in line with what the jury previously heard in opening argument from the State about a Facebook post by Amanda. The jury was later provided more testimony from Amanda regarding that post. Here, the improper statement was not cumulative.

The final step in our analysis is to determine if the testimony by Rosales about the murder could be properly cured through instruction. We believe it was. The court immediately provided a curative instruction, striking the testimony and

explaining to the jury that it was irrelevant and non-responsive. At the conclusion of Rosales' testimony, the court reiterated the standard instruction prohibiting jurors from seeking out independent information about matters discussed at trial. Kevin offers no reason that we should overcome the presumption that jurors follow the court's instructions. See State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). We find here that the court's instruction was sufficient to cure the irregularity, particularly in light of Rosales' correction as to the testimony.

Though any violation of a pretrial order on motions in limine is serious, here the violation was promptly and properly cured. The trial court did not abuse its discretion in denying Kevin's motion for a mistrial.

II. Ineffective Assistance of Counsel

Kevin argues he was denied effective representation on two grounds. First, based on his attorney's failure to object to testimony by Ruggles about prior assaults, in violation of a ruling on a motion in limine. Second, because his attorney failed to request a limiting instruction that Kevin's interactions with Ruggles were only to be considered to establish the aggravating factor that the jury was to decide.

The accused has a right to assistance of counsel under both the federal and state constitutions. U.S. Const. amend. VI; Wash. Constitution art. 1, § 22. "A claim that counsel was ineffective is a mixed question of law and fact that we review de novo." State v. Jones, 183 Wn.2d 327, 338, 352 P.3d 776 (2015). To prevail on a claim for ineffective assistance, counsel's performance must have been deficient, and the deficient performance must have resulted in prejudice.

State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); Strickland v. Wash., 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.” Grier, 171 Wn.2d at 33. Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We engage in a strong presumption that counsel was effective. Id. at 335.

As to Kevin’s first ground for his ineffective assistance claim, he argues the testimony by Ruggles was “extensive” and described an “assault.” Our review of the record demonstrates that her testimony described a charged interaction between former roommates in the context of a relationship ending. We do not find counsel’s failure to object to be deficient as it may well have been strategic. The portion of testimony identified by defense is Ruggles’ description of Kevin cursing at her, pointing his finger at her like a gun, and trying to get her to tell Amanda something. “The decision of when or whether to object is a classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Here, Ruggles’ testimony was not at odds with the defense theory of the case, which focused on the theme of a failing marriage where every party involved was acting badly and with high emotions. It is noteworthy that defense declined to cross-examine Ruggles, which further suggests that there was a strategic reason behind the decision not to object. During closing, defense counsel insinuated that Ruggles may have fueled the increasing tension between Kevin and Amanda by

telling Amanda about this hostile interaction. We do not find deficient performance and our ineffective assistance inquiry ends there.

The second ground upon which Kevin relies is counsel's failure to request a limiting instruction seeking to restrict consideration of Ruggles' testimony only as to the domestic violence aggravating factor. "But prior cases have established that failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence." State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

Given the defense theory of the case and the strategic value of avoiding calling the jury's attention to the Ruggles incident, we are unable to overcome the presumption of effectiveness of trial counsel to find that this was not a tactical decision. The decision not to seek a limiting instruction could serve two valid defense purposes deemphasize Ruggles' testimony that Kevin sought to use her for prohibited third-party communication with Amanda in violation of the no contact order and allow for argument as to Ruggles' role in the escalating divorce conflict. Kevin has failed to overcome the presumption of effective representation under State v. McFarland, 127 Wn.2d 322.

III. Statement of Additional Grounds

Kevin submits a Statement of Additional Grounds that identifies four other issues for review. Three of them, Additional Grounds 1, 3 and 4, center on the argument that the civil protection order proceeding in which Amanda sought a no contact order and the criminal case underlying this appeal constitute double

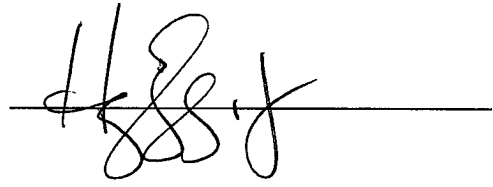
jeopardy. We construe Additional Ground 2 as a claim of ineffective assistance of counsel for failing to seek a jury instruction on self-defense.

Kevin identifies his claims and offers argument and legal authority, but does not cite to the record on appeal. While citations are not required for review, “the appellate court is not obligated to search the record in support of claims made in a defendant’s statement of additional grounds for review.” RAP 10.10(c). Further, as to the double jeopardy assertion, the record of the civil no contact order proceedings is not before us for review, so we decline to reach those issues.

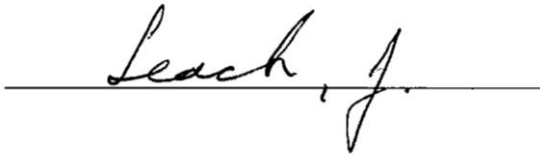
The test for examining claims of ineffective assistance of counsel is discussed at length in Section II of this opinion. As to this specific challenge to counsel’s performance, case law is well settled that the decision to pursue a particular trial strategy is one left squarely within the discretion of trial counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001); See State v. Thompson, 169 Wn. App. 436, 459-60, 290 P.3d 996 (2012); See also State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). In order to show “ineffective assistance of counsel based on the failure of trial counsel to request a jury instruction, this court must find that [the defendant] was entitled to the instruction.” State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). “Generally, a defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense.” State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). The record here does not demonstrate self-defense. As such, Kevin fails to establish that counsel’s performance was deficient and his claim of ineffective assistance on this basis fails.

No. 79381-1-I/11

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, appearing to be "Leach, J.", written over a solid horizontal line.A handwritten signature in cursive script, appearing to be "Tappelwick, J.", written over a solid horizontal line.

NIELSEN KOCH P.L.L.C.

June 15, 2020 - 2:50 PM

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