

73313-3

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Court of Appeals  
Division I  
State of Washington

NO. 73313-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

RANDALL P. FOLTYNIEWICZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHAD ALLRED

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Where the trial court's ER 404(b) limiting instruction used language proposed by the defendant that evidence of prior violence could be considered only "for the purpose of showing" that the victim in a felony harassment case reasonably feared that the defendant would carry out the threat and that the threat was part of an ongoing pattern of abuse, and other instructions and argument made clear that the jury would need to determine for itself whether the victim's reasonable fear and an ongoing pattern of abuse had been proven, should this Court reject the defendant's claim that the challenged instruction constituted a judicial comment on the evidence?

2. Where defense counsel's choice to elicit the victim's allegation of a prior assault against her son appears to have been a legitimate tactical decision to establish a pattern that undercut the victim's credibility, and there is no indication that the verdict would have been different had defense counsel not elicited the allegation, has the defendant failed to establish that his counsel's choice constituted ineffective assistance of counsel?

3. Where no errors occurred that prejudiced the defendant, should this Court reject the defendant's claim that the

cumulative prejudice of multiple errors requires reversal of his conviction?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

The State charged the defendant, Randall P. Foltyniewicz, by amended Information with felony harassment and misdemeanor violation of a court order, with special allegations that both were domestic violence offenses and that the felony harassment was part of an ongoing pattern of psychological, physical, or sexual abuse. CP 256-57. A jury found Foltyniewicz guilty as charged on both counts and found that the offenses involved domestic violence, but could not reach a verdict on the pattern of abuse aggravating factor. CP 258-62. At sentencing, the trial court followed the State's recommendation to impose a first time offender waiver on the felony rather than a standard range sentence so that Foltyniewicz could be placed on community custody. CP 197; 10RP<sup>1</sup> 3-12, 27-28. Foltyniewicz timely appealed. CP 306.

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<sup>1</sup> The State adopts Foltyniewicz's convention of referring to the ten volumes of the report of proceedings in this case as 1RP (January 12, 2015), 2RP (January 29, 2015), 3RP (February 13, 2015), 4RP (February 24, 2015), 5RP (February 25, 2015), 6RP (March 2, 2015), 7RP (March 3, 2015), 8RP (March 4, 2015), 9RP (March 5, 2015), and 10RP (March 27, 2015).

## 2. SUBSTANTIVE FACTS.

Tiffany Miller<sup>2</sup> met the defendant, Randall Foltyniewicz, in 1991 when they were in the seventh grade together in Illinois. 7RP 65. After dating briefly in junior high, they remained friends until 2005, when they began dating again. 6RP 151-52. In 2006, the relationship began to deteriorate, with Foltyniewicz becoming violent toward Miller at times. 6RP 153. In the first serious incident, Foltyniewicz attacked Miller unexpectedly and without provocation, placing a cloth sack over her head and pressing her face into a mattress; Miller thought she was going to die. 6RP 153-55. When Miller talked to Foltyniewicz later about how scared she had been that he was going to kill her, Foltyniewicz agreed to go to anger management, but did not appear to regret his actions, and never followed through with seeking help. 6RP 165.

After their son was born in 2007, Miller and Foltyniewicz married in 2008, divorced in 2009, and remarried in 2012. 6RP 151. During the divorce, Foltyniewicz hid court notices from Miller, causing her to miss court dates and resulting in Foltyniewicz winning full custody of their son. 7RP 56, 175. Although

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<sup>2</sup> Although she is identified in the report of proceedings as Tiffany Foltyniewicz, she testified that she prefers to be identified by her maiden name, Tiffany Miller. 7RP 64.

Foltyniewicz's violent and controlling behavior continued, Miller remarried him so that she could attempt to protect her son. 7RP 21. Incidents of violence in 2011 and 2012 involved Foltyniewicz smashing Miller's head into floors and walls, pointing a gun at her, threatening to kill her, and pressing her head into a granite floor with his knee so hard that Miller thought her skull would be crushed. 6RP 158-66; 7RP 14-15.

In 2014, Miller, Foltyniewicz, and their son moved to Washington. 6RP 148. By late October of that year, it became clear to Miller that something was not right with Foltyniewicz. 7RP 22. He appeared very anxious, frequently paced, and appeared to be "brewing." 7RP 22. When Foltyniewicz broke into Miller's Facebook account and discovered that she had been exchanging romantic messages with a man named Matt who lived out of state, Foltyniewicz became very angry, and over the next week fluctuated back and forth between being angry and doing nice things like sending Miller songs and old photos of Foltyniewicz with their son as a baby. 7RP 22-25.

At a family dinner on Miller's birthday on November 6, 2014, Foltyniewicz seemed very "spacey" and rocked back and forth. 7RP 26-27. Later that night, he sent a request to be Facebook

friends to both Miller and Matt. 7RP 27. Foltyniewicz insisted that he wanted to give Miller a birthday present on Facebook, but Miller believed it to be a trick, and repeatedly refused to accept his friend request. 7RP 27. This made Foltyniewicz very angry, and led to confrontation in which Foltyniewicz hit Miller in the chest with his hand, causing her significant pain. 7RP 28. Miller did not call 911 because she believed from prior experience in Illinois that police would not do anything when it was merely her word against his. 7RP 29. That night, Miller lay in bed without sleeping all night as Foltyniewicz paced around the apartment and repeatedly came to stand over her while breathing heavily. 7RP 32-33.

The next day, Foltyniewicz stayed home from work and continued acting very oddly, frightening Miller. 7RP 33-35. She remained "on high alert" and wanted to take him either to a hospital or the police because she felt that she needed help dealing with him. 7RP 35. That afternoon, Foltyniewicz indicated that he wanted to go to the hospital, so Miller drove him and their son to St. Elizabeth's hospital in Enumclaw. 6RP 45; 7RP 35. At the emergency room, he became impatient, agitated, and uncooperative with staff, refusing medications they asked him to

take and communicating with staff by typing notes onto his cell phone and showing it to them. 7RP 36-38.

Because it was a Friday night, Foltyniewicz ended up waiting hours for a psychiatric evaluation, growing more and more agitated, and he eventually decided to leave the hospital around 9:00 p.m. without being evaluated. 6RP 45; 7RP 40. Hospital staff, concerned for his safety and the safety of his family, attempted to stop him, and called 911 when they were unsuccessful. 7RP 40, 190, 192. Officer Gary Horejsi of the Enumclaw Police Department responded to the hospital, and spoke to Miller and hospital staff. 6RP 46. The staff appeared nervous and edgy, and Miller more so. 6RP 46-47. When Horejsi was present, Miller stayed within approximately five feet of him at all times. 6RP 47.

At some point while Horejsi was at the hospital, Foltyniewicz contacted police dispatch and provided his phone number, and Horejsi then called him back from outside the hospital. 6RP 49. Over the phone, Foltyniewicz stated that he was having marital issues with his wife and that the hospital was taking too long. 6RP 51. Foltyniewicz stated that he wished to talk to a social worker, but refused to return to the hospital unless two conditions were met: he wanted both Miller and the Enumclaw Police Department to

accept him as a friend on Facebook, and he wanted Horejsi to bring Miller to Foltyniewicz's residence so that he could have a cigarette with her and confess to "the most outrageous crime Enumclaw's ever seen." 6RP 54-57. Foltyniewicz's voice was stern, and he did not appear to be laughing or joking. 6RP 57. Foltyniewicz continued to refuse Horejsi's requests that he come back to the hospital. 6RP 58. When Horejsi asked what crime he planned to confess to, Foltyniewicz said that he would only tell Horejsi once the police and media were at his house, and hung up. 6RP 59.

Foltyniewicz then immediately called Miller, who walked out of the hospital to where Horejsi was and put the call on speakerphone so that Horejsi could hear what was said. 6RP 59-60; 7RP 42. Foltyniewicz told Miller that Horejsi was going to bring her back to their residence so that they could have a cigarette and he could confess to a crime. 6RP 62; 7RP 43. He wanted the media to be there, and stated that when the police arrived, they needed to have their guns drawn and a sniper ready; he then hung up. 6RP 62; 7RP 43. Horejsi observed that Miller appeared very nervous when Foltyniewicz said these things. 6RP 62. When Horejsi suggested that Miller and her son stay at a hotel for the night for their safety, she agreed and asked Horejsi to escort them

there. 6RP 62-63. Over the next hour or so, Foltyniewicz continued calling and texting Miller, despite her telling him that he was scaring her. 7RP 45.

Unable to locate Foltyniewicz, Horejsi returned to his patrol duties, but called Foltyniewicz again a few hours later, around 12:30 a.m. on November 8, 2014. 6RP 63-64. Horejsi tried again to convince Foltyniewicz to return to the hospital, and asked what crime he wanted to confess to. 6RP 65. Foltyniewicz stated that the crime was attempted murder, but when Horejsi asked who he wanted to murder, Foltyniewicz said only that it would be a surprise. 6RP 65. He did not sound like he was joking. 6RP 65-66.

Approximately 45 minutes later, staff at the hospital notified police that Foltyniewicz had returned, and Horejsi contacted him in the lobby of the emergency room after waiting for backup to arrive. 6RP 67-70; 7RP 195-97. When asked who he had been referring to when he made the comment about attempted murder on the phone, Foltyniewicz stated that he was going to murder his wife. 6RP 72, 76. He said that he wanted the media, all the police, and his wife to be present when he confessed, and that the crime would get him the death penalty. 6RP 77. As they spoke, Foltyniewicz was rigid, with almost robotic movements, and was not smiling,

joking, or laughing. 6RP 70, 77. At the end of the conversation, Foltyniewicz was detained by the hospital for involuntary commitment proceedings. 6RP 77.

The next morning, Miller obtained a protection order prohibiting Foltyniewicz from contacting her. 7RP 46-47. When she was later informed by Horejsi of Foltyniewicz's comments about murdering her, Miller believed that Foltyniewicz's threat to murder her was real, and that he would carry it out. 7RP 60-61.

After Foltyniewicz was charged with felony harassment in this case, a no-contact order was entered prohibiting him from contacting Miller or her residence. 7RP 50-53. Despite that order, Foltyniewicz mailed a letter from the King County Jail to Miller's residence. 7RP 54. Although Foltyniewicz addressed the letter to himself, Miller opened it because a notation on the envelope indicated that legal documents related to the marriage were inside, and Foltyniewicz had a history of hiding such documents from her. 7RP 56.

Miller discovered that the envelope contained no marriage documents, but instead held pages of scribbled notes that appeared to be directed at her, including a list of her friends that Foltyniewicz wrote he was going to have sex with, biblical

quotations, lists of songs, and quotations from Miller's statements to the police. 7RP 57-58, 161. Next to the quotations from Miller's statement to police Foltyniewicz wrote responses such as "Go fuck yourself, save yourself, bitch." 7RP 163. In another place, Foltyniewicz had written that he had killed a man in jail, and "the guy I killed was me. But don't tell anyone because I don't want to get arrested for harassment." 7RP 162-63. Miller was frightened by the letter, and promptly reported it to both the jail and the police. 7RP 59.

At trial, the State elicited testimony to the above facts from Miller, Horejsi, an emergency room doctor, and backup officers who were present when Horejsi spoke to Foltyniewicz in the hospital lobby. Foltyniewicz did not testify or call any witnesses in his defense. 9RP 5-6.

Additional facts are presented below in the sections to which they pertain.

**C. ARGUMENT**

1. THE TRIAL COURT'S ER 404(b) LIMITING INSTRUCTION DID NOT CONSTITUTE A COMMENT ON THE EVIDENCE.

Foltyniewicz asserts that the trial court's ER 404(b) limiting instruction made an unconstitutional judicial comment on the

evidence when it stated that certain evidence could be considered only “for the purpose of showing” that Miller reasonably feared the alleged threat and that it was part of an ongoing pattern of abuse. This claim should be rejected. Any error was invited by Foltyniewicz, and the challenged language, taken in context, did not express the judge’s personal opinion of the evidence.

a. Relevant Facts.

During motions in limine, the trial court ruled that certain prior incidents of domestic violence by Foltyniewicz against Miller would be admissible under ER 404(b) to prove both that Miller reasonably feared that Foltyniewicz would carry out the alleged threat and that the alleged threat was part of an ongoing pattern of abuse. 4RP 59, 72-75. Thereafter, Foltyniewicz proposed a written limiting instruction that stated:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Tiffany Foltyniewicz’ allegations that Randall Foltyniewicz physically abused her, and may be considered by you only **for the purpose of showing** that the alleged felony harassment was a part of an ongoing pattern of physical abuse of the victim as manifested by multiple incidents over a prolonged period of time. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Supp. CP \_\_ (sub 77) (emphasis added). With the agreement of the parties, the trial court modified the instruction slightly to address allegations of psychological abuse, to specify the time frame of the prior acts, and to include the purpose of evaluating Miller's fear.

8RP 130-36. The final limiting instruction given to the jury stated:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Tiffany Foltyniewicz's allegations that Randall Foltyniewicz psychologically and physically abused her prior to November 8, 2014. This evidence may be considered by you only for the purpose of showing (1) that the words or conduct of Randall Foltyniewicz placed Tiffany Foltyniewicz in reasonable fear that the alleged threat to kill would be carried out and/or (2) that the alleged felony harassment was a part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 279.

- b. Foltyniewicz's Claim Is Barred By The Doctrine Of Invited Error.

Under the invited error doctrine, the appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). This doctrine applies even to constitutional errors such as judicial comments on the evidence

that, if manifest, would otherwise be reviewable for the first time on appeal under RAP 2.5. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999). Courts apply the invited error doctrine strictly, sometimes with harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding doctrine prohibited review of legally erroneous jury instruction even though it was standard WPIC when defendant proposed it); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (noting that defendant who participates in drafting of jury instruction may not challenge the instruction on appeal).

Foltyniewicz argues that the limiting instruction's use of the phrase "for the purpose of showing" suggested to the jury that Miller's reasonable fear and the pattern of abuse had in fact been proven. Brief of Appellant at 16. However, he proposed the very language of which he now complains. Supp. CP \_\_ (sub 77). The alleged error was therefore invited by him, and this Court should decline to review his claim. Even if this Court does reach the merits of his claim, his conviction should be affirmed for the reasons below.

c. The Trial Court's Limiting Instruction Does Not  
Constitute A Judicial Comment On The  
Evidence.

Article IV, section 16 of the Washington State Constitution prohibits a judge from making a comment that conveys to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Thus, a court may not instruct the jury that matters of fact have been established as a matter of law. State v. Hartzell, 156 Wn. App. 918, 938, 237 P.3d 928 (2010). A jury instruction challenged as a judicial comment on the evidence is reviewed de novo, in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In evaluating whether a trial court's words or actions amount to a comment on the evidence, the appellate courts look at the facts and circumstances of the particular case. Jacobsen, 78 Wn.2d at 495. A trial court must strike a balance between the obligation to give a satisfactory limiting instruction and the obligation to refrain from commenting on the evidence. Hartzell, 156 Wn. App. at 940-41. The fact that a limiting instruction could have been worded differently to more clearly avoid any issue of comment on the

evidence does not necessarily mean that the wording used was improper. Id. at 939-40.

Because Foltyniewicz did not object to the alleged judicial comment on the evidence at trial, he must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. 8RP 136; State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. Not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 342-46, 835 P.2d 251 (1992) (“[I]t is important that ‘manifest’ be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.”). A manifest error is “an error that is ‘unmistakable, evident or indisputable,’” and that has “practical and identifiable consequences in the trial of the case.” State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)).

This Court should reject Foltyniewicz’s claim because the alleged error was not actually an error, let alone a manifest error. When the limiting instruction here is viewed as a whole and in context, it is apparent that the phrase “for the purpose of showing” did not have the effect of suggesting that an element of the offense had been established. When read as a whole, the instruction would

not have given a reasonable juror the impression that the court believed that certain facts had been proven, but merely that the jury could consider Miller's testimony about the prior bad acts only as it related to the State's contention that Miller reasonably feared Foltyniewicz would carry out the threat and that the threat was part of an ongoing pattern of abuse. Because it did not communicate to the jury the judge's personal opinion of the evidence, Foltyniewicz's claim fails.

d. Any Error Was Harmless.

Where a trial court comments on the evidence, the error is presumed to be prejudicial, and reversal is required "unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted." Hartzell, 156 Wn. App. at 937. In this case, even if this Court finds that the challenged wording did constitute a judicial comment on the evidence, Foltyniewicz's convictions should be affirmed because the record affirmatively shows that he was not prejudiced by the error.

The trial court instructed the jury at the beginning and the end of the trial to disregard any potential comments on the evidence, and jurors are presumed to follow the court's instructions.

CP 266; 6RP 32; State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Furthermore, both the prosecutor and defense counsel made it clear in closing argument that whether Miller reasonably feared that Foltyniewicz would carry out the threat and whether there was an ongoing pattern of abuse was a question that the jury needed to determine for itself. 9RP 27, 33, 43.

The jury's verdicts in this case also indicate that Foltyniewicz was not prejudiced by the alleged judicial comment. By convicting Foltyniewicz of felony harassment, the jury indicated that it unanimously believed that Miller reasonably feared that the threat to kill would be carried out. CP 262. By failing to reach a verdict on the pattern of abuse aggravating factor, the jury indicated that it did not unanimously believe that the threat to kill was part of an ongoing pattern of abuse. CP 258.

There was no evidence suggesting that Miller's testimony about the prior incidents of abuse was any less credible than her testimony about her fear that Foltyniewicz would carry out the threat, which the jury clearly believed. If the jurors had been affected by the alleged judicial comment suggesting that both Miller's reasonable fear and the ongoing pattern of abuse had been established, one would expect them to have answered consistently

on both issues. The fact that the jury did not answer yes to the pattern of abuse special verdict question, despite their verdict regarding Miller's reasonable fear, affirmatively shows that the jury was not affected by the alleged judicial comment, and the defendant was therefore not prejudiced by it. See State v. Stephens, 83 Wn.2d 485, 488-89, 519 P.2d 249 (1974) (citing fact that jury convicted defendant of charges to which he confessed on the stand, but acquitted him of charge he denied, in holding that defendant was not prejudiced by comment alleged to have undermined his credibility).

Foltyniewicz contends that because the question of whether Miller reasonably feared that Foltyniewicz would carry out the threat to kill her was an "important and disputed" issue at trial, he was therefore necessarily prejudiced by the alleged comment on the evidence. Brief of Appellant at 17. However, whether the subject of a judicial comment was a disputed issue is not determinative. State v. Jackman, 156 Wn.2d 736, 744-45, 132 P.3d 136 (2006). In this case, the record affirmatively shows that the jury's verdicts were not affected by the alleged judicial comment.

2. FOLTYNIEWICZ HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL'S TACTICAL CHOICE TO ELICIT AN ADDITIONAL ALLEGATION FROM MILLER CONSTITUTED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

Foltyniewicz contends that his trial counsel was constitutionally ineffective in questioning Miller about certain allegations she had made against Foltyniewicz that had previously been excluded by the trial court for Foltyniewicz's benefit. This claim should be rejected. Foltyniewicz has failed to establish that defense counsel's tactical choice to elicit the allegations in order to provide more evidence supporting the defense theory of the case was both deficient and prejudicial.

a. Relevant Facts.

When the admissibility of prior bad acts under ER 404(b) was litigated during motions in limine, one of the prior bad acts at issue was Miller's allegation that Foltyniewicz had assaulted their son on one prior occasion. 4RP 55. Foltyniewicz moved to exclude any testimony on that topic, and the State agreed that if the prior acts of violence against Miller were admitted, the incident involving their son would be largely cumulative. CP 99; 4RP 57. The trial court subsequently ruled that only the prior acts of violence against Miller would be admitted. 4RP 73-75.

Foltyniewicz's theory of the case regarding the felony harassment charge was that Miller had fabricated the allegations of prior domestic violence by Foltyniewicz in order to exit the marriage with full custody of their son, and that she did not reasonably fear that Foltyniewicz would actually kill her. 4RP 25; 7RP 150; 9RP 43-49. To support this theory, defense counsel elicited statements from Miller on cross-examination about her desire to obtain full custody of their son and her belief that it was entirely Foltyniewicz's fault that he had been awarded custody in their prior divorce. 7RP 70, 75. The cross-examination also attempted to attack Miller's credibility by focusing on the fact that Miller had made numerous claims of prior violence yet was unable to provide corroboration for any of them. 7RP 75-90, 129.

Defense counsel went through all of the uncorroborated allegations Miller had made, and elicited her claim that photos had once existed that would corroborate a particular prior assault against her and her explanation that her failure to produce them was not her fault, because Foltyniewicz must have hacked into her email account and deleted them. 7RP 76-77, 79, 129. In addressing Miller's desire to obtain sole custody of their son, defense counsel elicited that Miller had also made an allegation

during the current case that Foltyniewicz had once assaulted their son, leaving "terrible bruises on [his] chest" and had again claimed to have photos of his bruises that later could not be found. 7RP 75-76.

On redirect, the prosecutor elicited a brief description of the assault against their son as an incident in which Foltyniewicz had pinned the boy to a bed by his chest, and had pushed and shaken him by the chest. 7RP 168. On re-cross, defense counsel elicited that Miller had testified that her son was not safe with Foltyniewicz, but had been fine with Foltyniewicz taking the boy to daycare. 7RP 172-73. He also questioned Miller about the fact that the boy was unavailable to be questioned because Miller had moved him out of state, and why she had threatened to call the police during one of the alleged assaults against her but hadn't reported the alleged assault against her son. 7RP 173-74, 176.

In closing, defense counsel argued that Miller was not credible because her actions contradicted her testimony. 9RP 43-49. He pointed to a pattern of Miller failing to provide corroboration that she claimed existed, and suggested that the jury should infer from the lack of testimony from the son that his testimony would have contradicted Miller's. 9RP 50-51, 57.

b. Foltyniewicz Has Failed To Establish That He Received Ineffective Assistance Of Counsel.

A defendant in a criminal case has a constitutional right to the effective assistance of counsel. U.S. CONST. amend. VI; Wash. CONST. art I, § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A claim of ineffective assistance of counsel fails if either prong of that test is not met. Strickland, 466 U.S. at 673.

i. Foltyniewicz has failed to establish that his counsel's performance was deficient.

In order to show that defense counsel's representation was deficient, a defendant must show that "it fell 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). There is a strong presumption that counsel's representation was reasonable, and the defendant bears the burden of showing that the representation was deficient. Grier, 171

Wn.2d at 35. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The fact that prejudicial evidence is inadmissible when offered by the prosecution does not mean that defense counsel necessarily renders deficient performance by eliciting such evidence. In re Pers. Restraint of Cross, 180 Wn.2d 664, 712-13, 327 P.3d 660 (2014) (not unreasonable for defense counsel to elicit testimony about defendant's otherwise inadmissible gun ownership to show lack of planning and to elicit defense witness's otherwise inadmissible criminal history to demonstrate stress affecting witness's father). Here, defense counsel made a reasonable tactical choice to elicit Miller's allegation of an assault against their son in order to establish that there was a pattern, rather than a single incident, of Miller claiming to have corroborating photos but being unable to produce them, and in order to use the lack of any testimony by the son to sow doubt as to Miller's credibility.

Contrary to Foltyniewicz's assertion in his brief that defense counsel was deficient in being unaware of the open door doctrine, there is no evidence in the record that defense counsel was

unaware that his questioning of Miller would allow the prosecution to elicit details of the assault. Brief of Appellant at 21; 7RP 168 (no objection when State elicited additional details on redirect). But the details of the assault were not particularly inflammatory compared to the rest of Miller's testimony, and her statements on redirect that Foltyniewicz had pinned his son down on a bed by the chest and shaken him added relatively little to the testimony elicited by defense counsel that Miller claimed Foltyniewicz had left "terrible bruises" on their son's chest. 7RP 76, 168. It appears that that defense counsel made a tactical decision that the potential benefits of opening the door to Miller's allegations of child abuse outweighed the risks.

Foltyniewicz's only reasonable hope of avoiding a conviction was to convince the jurors that Miller did not reasonably fear that he would murder her, which required convincing them that her allegations of prior violence against her were not credible. The revelation of another instance of Miller making an allegation but failing to provide corroboration that she claimed she had once possessed strengthened Foltyniewicz's attack on Miller's credibility, and, as discussed in the section below, bore little risk of negatively affecting the verdict. Thus, although defense counsel's tactic in the

end failed to persuade the jury to reject Miller's account of events, it was a reasonable choice at the time. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Because Foltyniewicz has not overcome the presumption that his counsel's conduct was reasonable, he has failed to establish that his counsel rendered deficient performance.

- ii. Foltyniewicz has failed to establish that the allegedly deficient performance prejudiced him.

In order to show that he was prejudiced by allegedly deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229.

The claim of an assault against Foltyniewicz's son was an uncorroborated assertion by Miller, just like the claims of prior violence in the marriage. Foltyniewicz's argument on appeal posits

that the jurors would have been disinclined to believe Miller's testimony regarding her fear and the prior violence in the marriage (and thus would have acquitted him) if defense counsel had not elicited the allegation of an assault against their son. However, if the jury would have been inclined to acquit Foltyniewicz under those circumstances, there is no reason that hearing about the alleged assault against the son would have swayed the jury to instead return a verdict of guilty, since there was no more reason to believe Miller's allegations of child abuse than to believe her allegations regarding the other prior incidents. Foltyniewicz has thus failed to establish a reasonable probability that the jury's verdict would have been different had his trial counsel not elicited Miller's allegation of an assault against their son.

Because Foltyniewicz has failed to show that his trial counsel's performance was both deficient and prejudicial, his claim of ineffective assistance of counsel fails.

### 3. CUMULATIVE ERROR.

Foltyniewicz contends that the cumulative effect of the trial errors alleged requires reversal, even if the errors are found to be harmless individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). In order to seek reversal pursuant to the cumulative error doctrine, however, the defendant must establish the presence of multiple trial errors *and* that the cumulative prejudice affected the verdict. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply “where the errors are few and have little or no effect on the outcome of the trial.” Id.

Instead, reversals due to cumulative error are justified only in rather extraordinary circumstances. See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (1997) (police officer’s comment on defendant’s post-arrest silence, testimony regarding prior confiscations of defendant’s guns, and trial court’s exclusion of key witness’s conviction for crime of dishonesty cumulatively warranted a new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor’s remarks regarding personal belief in defendant’s guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

Here, as explained in the sections above, no error occurred that affected the outcome of the trial, either individually or

cumulatively. Moreover, the two errors Foltyniewicz alleges could not possibly be individually harmless yet cumulatively prejudicial, because ineffective assistance of counsel, which incorporates an analysis of prejudice into the determination of whether an error occurred, is never harmless. Foltyniewicz's claim of cumulative error therefore fails.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Foltyniewicz's convictions.

DATED this 27<sup>th</sup> day of January, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

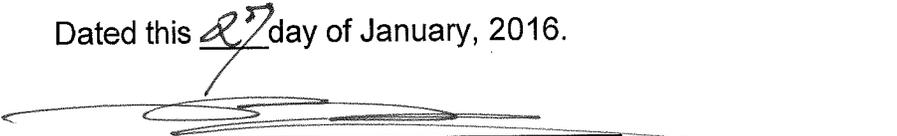
By:   
STEPHANIE FINN GUTHRIE, WSBA #43033  
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of BRIEF OF RESPONDENT, in State v. Randall P. Foltyniewicz, Cause No. 73313-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27 day of January, 2016.

  
Name:  
Done in Seattle, Washington