

NO. 34493-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MILES D. PARKISON, APPELLANT

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY JK DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 05-1-00074-2

BRIEF OF RESPONDENT

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

1. Did the trial court violate defendant's right to self-representation where, although defendant filed a written motion making such a request, he never requested the trial court to proceed pro se, even after the trial court raised the issue?
2. Did the prosecutor engage in misconduct in closing argument where his remarks were not improper and there was no objection?
3. Was defendant denied effective assistance of counsel where neither prong of Strickland is met and where there was overwhelming evidence of guilt?

B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2005, the State charged MILES D. PARKISON, defendant, with six counts of first degree robbery. CP 421-24. On November 3, 2005, the State filed an amended information adding firearm sentencing enhancements to counts I-IV. CP 461-64. There were two trials. The first trial resulted in a hung jury, the jury voting 11 to 1 in

favor of conviction. CP 468-69; RP 11¹. The second trial resulted in verdicts of guilty as charged in counts I-IV and VI, guilty of the lesser offense of second degree robbery in count V, and firearm sentencing enhancements on counts II-IV. CP 656-63.

The court sentenced defendant to 129 months on counts I-IV and VI, and to 63 months on count V, all to run concurrently. CP 405. For the firearm sentencing enhancements (60 months each on counts II-IV) defendant received an additional 180 months flat time to run consecutively to the 129 months. Id. Defendant's actual number of months of total confinement was 309 months. Id.

2. Facts

a. Wright Park Shell Gas Station.

On December 19, 2004, Brandon McCarty was working at the Shell gas station located near Wright Park in Tacoma. RP 96. Defendant entered the store and asked for cigarettes. RP 98. When McCarty went behind the counter to get the cigarettes, defendant followed him. Id. Defendant was so close behind McCarty, that McCarty said it was almost as if he were giving defendant "a piggy-back ride." RP 121. Defendant said it was a hold up and to give him the money. RP 99. Defendant was

¹ Respondent follows citations as done by appellant and set forth in Appendix A in Brief of Appellant.

reaching in his coat by his stomach, fidgeting with something. Id.
McCarty's first impression was that he had a weapon, possibly a gun. RP 99, 131. McCarty gave defendant the money, about \$300.00. RP 101. Defendant casually stuffed the money in his pocket and walked out. Id. McCarty saw him get into a car. RP 102. Although pretty shaken, McCarty wrote down the license number of the car. Id. He gave the number to the 9-1-1 operator when he called police. RP 128. The car, a rental, was leased by defendant's girlfriend, Jennifer Lonborg. RP 544-45; 847; 854. The surveillance system was not functional at the gas station that night. RP 104.

Officer Hannity responded to the call of the robbery at the Shell station. RP 51. He observed that McCarty was terrified and physically shaking. RP 53. McCarty was terrified the whole time he spoke to officers. RP 57.

After his arrest, defendant told detectives in a taped statement that he robbed the Shell gas station on December 19, 2004. RP 883-83. He told the detectives that he wanted McCarty to think he had a gun. RP 885. He said left Shell with \$80.00 to \$100.00, driving away in Lonborg's car. RP 883.

b. Subway.

William Turbyfill was working at the Subway sandwich shop near Wright Park in Tacoma on December 20, 2004. RP 149. Defendant

entered the store and went straight to the cash register. RP 149.

Defendant was holding a silver revolver. RP 154. Defendant said, "Open the fucking cash register. Don't fuck around." RP 158. As defendant pointed a gun at him, Turbyfill took out the tray of the cash register and grabbed the bills. RP 157. According to the Director of Operations for Subway, defendant stole \$220.00 belonging to Subway. RP 230.

Still photographs from a surveillance video captured defendant pointing a gun at Turbyfill during the robbery. RP 166. Defendant later admitted to detectives that he robbed the Subway and acknowledged that he was the individual in the surveillance photographs. RP 885-89. Defendant said he used a toy gun that looked like a revolver. RP 885. He said that he believed that Turbyfill thought the gun was real. RP 887. Defendant also said that he altered his appearance by using a make-up pencil of his girlfriend, Lonborg, to blacken his face. RP 889-90. Defendant said that he left Subway with \$100.00 to \$150.00. RP 887.

c. Taco del Mar.

At 10:16 p.m. on December 20, 2004, just 20 minutes after the robbery at Subway was called in, defendant robbed the Taco del Mar at 26th and Pearl. RP 239, 909-10. Twenty-year-old Emmi Jensen was working at Taco del Mar that night along with Regan Bradwell. RP 239, 278. When defendant first entered the store, Jensen told him that the store was closed. RP 244. He told Jensen, "Come here," and pulled a

gun. RP 244. Defendant used the gun as a pointer; pointing it at the register and then at her. RP 284. Defendant stated, "I don't want to hurt you, so just give me the money." RP 285. Jensen explained that the till money was already put away, so defendant grabbed the money from the tips jar, about \$30.00 to \$40.00, and fled. RP 245. Bradwell, who had witnessed the robbery, yelled at Jensen to lock the door after defendant fled. RP 244-47. Jensen was frozen and could not move her body immediately. RP 247. She eventually made it to the door, nearly crawling, and was able to lock it. RP 287. She was crying. RP 247. Both employees were in shock. RP 247. The security camera was not recording that night. RP 309.

Defendant also confessed to this robbery. RP 890. He told detectives that he displayed a toy gun on this occasion. RP 890. He also explained that the clerk offered to take him into the back to where the till was, but that he elected to just take the \$30.00 to \$40.00 on the counter. RP 890-91. Defendant told police he used Lonborg's vehicle for this robbery as well. RP 890.

d. Walgreen's.

Minutes after the Taco del Mar robbery was called in to police, defendant robbed the nearby Walgreen's store at 35th and Pearl. RP 911, 346. Pamela Dias was working as cashier at Walgreen's that night. RP 346. Defendant came in and pretended he was going to buy a cookie with

pink frosting on it. RP 349. Defendant had a gun in his hand that was partially covered by a handkerchief. RP 349. Defendant pointed to the gun and said, "Look, look," wanting to be sure Dias saw it. RP 352, 385. The barrel of the gun was pointed in Dias' direction. RP 386. Defendant said, "Open the drawer. I'm serious. Open the drawer." RP 385. She got the drawer open and he leaned over and took the bills. RP 354. Defendant stole over \$200.00. RP 354.

Video surveillance equipment captured the robbery on tape. RP 358. However, the quality of the video was poor. RP 374. Tacoma police forensics tested the pink-frosted cookie wrapper for fingerprints. RP 776. The only prints located matched those of Dias. Id. Dias was afraid even after the incident was over because of defendant's use of the gun. RP 375.

During his taped statement, defendant admitted going to Walgreen's after he left Taco del Mar, which he said was not far. RP 892-93. Defendant said he walked up to the counter, picked up a cookie, and told Dias to give him the money out of the till. RP 893. She complied and he then left with the money. RP 893. Defendant thought that he had his hand in his pocket. RP 893. He said he did not remember putting a bandana over the gun. RP 893.

e. Payless Shoe Store.

On December 29, 2004, Emily Ratekin was working at the Payless Shoe Store on 6th Avenue and Pearl. RP 313. Defendant came into the

store and approached Ratekin. He asked her, "Are you going to cooperate with me and make this easy and give me all the money in the till?" RP 316. Ratekin noticed as defendant said this he lifted his hand up from his side. RP 337. Ratekin indicated she would cooperate and she walked to the cash register. RP 316. Defendant followed Ratekin to the register. RP 317. His right hand was in his belt area as if he were reaching for something. RP 317. Ratekin thought it was a gun. RP 317. She gave defendant the money out of the till, about \$50.00. RP 318, 321. When defendant left, she hit the panic button in the cash register and then ran to the back of the store to hit the other silent alarm button. RP 319. Ratekin was so scared during the incident she was unable to work during closing hours for two weeks. RP 328.

Tacoma Police responded to Payless shoes. RP 795. A Puyallup Police Department K-9 unit also responded. RP 798. The dog began tracking from the corner of the building. RP 800. The dog continued tracking between the Subway and Payless Shoe Store over to a dumpster and recycle bin where police found a pile of clothes. RP 801. The track ended where blackberry bushes come up against the parking lot at the end of the "H" Building of the Mark Twain Apartments. RP 801. The distance from Payless Shoe Store to the end of the dog track is about a 30 second walk. RP 512. Defendant lived in the Mark Twain Apartments. RP 896.

In his taped statement defendant told police how he walked into the Payless Shoe Store to find Ratekin putting shoes on the rack. RP 895. Defendant said he indicated with his hand, but that he did not display anything. RP 895. He described how Ratekin opened the till and gave him the money. RP 895. Defendant then told police that he ran back to his house at the Mark Twain Apartments, going down Pearl Street and approaching the apartment from the back. RP 896. Defendant said he was aware of the police out in that area and he was very nervous thinking that his arrest was imminent. RP 876.

f. Dollar Tree Store.

Later that same night, the 29th of December, defendant robbed the Dollar Tree Store located on 6th Avenue between Mildred and Pearl. RP 393-95. Leigh Eddy and Lesa Bentley were both working at Dollar Tree that night. RP 395, 452. Defendant was waiting in Bentley's check out line. RP 398. Eddy offered to take defendant to another checkout line to expedite checkout because it was near closing time. RP 398. Defendant declined to change lines. RP 399. Eddy went to tend another task and then saw defendant go behind Bentley at the cash register. RP 399. She saw as defendant pointed a gun at Bentley's side, and heard defendant tell her to "Hurry up." RP 400. Bentley grabbed the till out and put her hands up. RP 453. Defendant said, "The 20's, the 10's and the 5's. Give them

to me. Give them to me.” RP 453. Defendant left with \$400.00 belonging to the Dollar Tree Store. RP 403.

Defendant told detectives that after getting home from robbing Payless Shoe Store, he went back out later that night and went to the Dollar Store. RP 897. He said he went in like he was going to buy a candle. RP 897. When Bentley opened the till, he asked for the money. RP 897. Defendant said he showed the clerk a plastic gun. RP 899.

g. Background and investigation.

Defendant knew a woman, Jennifer Lonborg, since childhood. RP 528. During the second week of November 2004, Lonborg was staying with defendant at the Mark Twain Apartments. RP 533-34. In the second week of December, Lonborg gave defendant a Colt .45 revolver that came from an antique gun collection her father had. RP 535-38. Defendant asked her for the gun after he thought his apartment had been broken into. RP 537. Defendant later admitted to Lonborg that he had used the Colt .45 in the robberies. RP 546.

During the time period of the robberies, defendant did not own a car. RP 539. Lonborg would allow defendant to drive her car. Id. Defendant admitted to her that he had used her car in the robberies. Id. In December of 2004, both defendant and Lonborg were using crack. RP 541. They were running out of money and began to pawn items. RP 542.

On December 22, 2004, defendant showed Lonborg a Crime Stopper's bulletin that was in the newspaper. RP 540-44. He said, "There, that's me." RP 540. Although it was a blurry photo, Lonborg recognized defendant. RP 540. Lonborg was upset and freaked out about the robberies, which contributed to the break-up with defendant on Christmas Day. RP 551, 569. Lonborg could not turn defendant in because of her feelings for him, so she showed the Crime Stopper's bulletin to John Lagerquist, who she knew would do the right thing. RP 546.

Tacoma Police Detectives received a tip through Crime Stopper's. RP 841. John Lagerquist had provided the name of defendant. RP 841. Detectives got more leads and defendant was under investigation. RP 859. A warrant was secured for his arrest for the robberies. RP 782.

On January 3, 2005, police officers arrested defendant for the robberies. RP 782. Pursuant to a search warrant, officers searched his apartment. RP 784. Among other things, officers located a plastic gun in the desk drawer in defendant's apartment. RP 788.

Defendant was advised of his *Miranda* rights. He initially told detectives that he was home watching TV on the 20th of December. RP 871. When denying the robberies, defendant got more and more nervous as he was confronted with the details of the crimes. RP 874. He kept his head down, made no eye contact with the detectives, and picked at his

fingernails. RP 874. When he was confronted about the facts of the robberies and how his life was out of control, defendant broke down and stated it was him. RP 872. He stated that owed money to drug dealers for crack cocaine and that he was in over his head with the drug dealers. RP 872; 876. With his eyes tearing up, defendant stated, "You're right. I have got to face this. I did it." RP 875. Defendant provided a taped statement outlining the course of each robbery. RP 883-99.

h. Defendant's testimony.

Defendant testified at trial. RP 1006-92. On direct examination, defendant essentially claimed that his confession was coerced. He testified that police violated his rights continuing to question him after he requested an attorney. RP 1039. He described his contact with detectives as "a torture interrogation" where he "just made a statement in anger." RP 1042.

However, on cross-examination, defendant denied that he confessed: "I never stated anything about me being at any robberies." RP 1086. He then testified that he guessed that he described the robberies, but said he did not recall. RP 1087. He admitted, however, that it was his voice on the tape containing the confession. RP 1089.

On redirect, defendant again changed his testimony. His attorney asked him if he made a confession to detectives. Defendant testified:

“Yes. You know, kind of. It’s kind of a little bit blurry, but yes, I still know what went on, kind of.” RP 1090.

The jury found defendant guilty of first degree robbery on counts I-IV and VI, and guilty of second degree robbery on count V. CP 656-63.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE DEFENDANT’S RIGHT TO SELF-REPRESENTATION WHERE, ALTHOUGH DEFENDANT FILED A WRITTEN MOTION MAKING SUCH A REQUEST, HE NEVER REQUESTED THE TRIAL COURT TO PROCEED PRO SE, EVEN AFTER THE TRIAL COURT RAISED THE ISSUE.

The Sixth and Fourteenth Amendments of the United States Constitution allow a criminal defendant to waive his or her right to assistance of counsel. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The Washington Constitution similarly provides that the accused in criminal prosecutions shall have the right to appear and defend in person. Const. art. 1, § 22 (amend. 10). State v. Barker, 75 Wn. App 236, 881 P.2d 1051, 1053 (1994). However, the assertion of the right to proceed pro se must be unequivocal. State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995) [citations omitted].

However a defendant who chooses to waive this right must do so knowingly and intelligently. State v. DeWeese, 117 Wn.2d 369, 377, 816

P.2d 1 (1991). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.” Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S. Ct. 236, 143, 87 L. Ed. 268 A.L.R. 435 (1942).

In interpreting Faretta, our State Supreme court held that a colloquy between the defendant and the court must at a minimum consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist which will bind defendant in the presentation of his case. Bellevue v. Acrey, 103 Wn.2d 203, 233, 691 P.2d 957 (1984).

Since its decision in Faretta, the United States Supreme Court has remained silent on the what specific procedures the trial court must engage in before a defendant can knowingly, intelligently, and voluntarily waive his right to counsel. See e.g., McDowell v. United States, 484 U.S. 980, 108 S. Ct. 478 (1987).

A defendant’s desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation. State v. Garcia, 92 Wn.2d 647, 655,

600 P.2d 1010 (1979). A defendant's request to represent himself must be unequivocal. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

In State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995), the Supreme Court held that the defendant did not make an unequivocal assertion of his right to self representation. The case involved an aggravated homicide in which the attorney for the defendant was seeking a continuance to interview necessary witnesses. Defendant was opposed to the continuance motion. The following statements by defendant ensued:

MR. LUVENE: I've been here since July. . . You know, I don't wanna sit here any longer. It's me that has to deal with this. If I'm prepared to go for myself, then that's me. You know, can't nobody tell me what I wanna do. They say I did this, so why not -- if I wanna go to trial, why can't I go to trial on the date they have set for my life? I'm prepared. I'm not even prepared about that. I wanna go to trial, sir. . .

I don't wanna extend my time. This is out of my league for doing that. I do not want to go. If he's not ready to represent me, then forget that. But I want to go to trial on this date.

Luvene, 127 Wn.2d at 690.

Mr. Luvene argued that his statements represented an unequivocal request to proceed pro se and that by granting the continuance, the trial court denied him his state and federal constitutional rights to self-representation. Luvene at 698. The court held that while Mr. Luvene stated that he was "prepared to go for myself," he also stated, "I'm not

even prepared about that,” and “this is out of my league for doing that.”

The Supreme Court held that taken in the context of the record as a whole, these statements could be seen only as an expression of frustration by Mr. Luvane with the delay in going to trial and not as an unequivocal assertion of his right to self-representation. Id.

In the present case, the record also shows that defendant was very frustrated with his attorneys. Defendant himself filed many, many motions with the court. On December 29, 2005, defendant filed a “Motion for Docket”. CP 146. The motion stated:

Reason For Motion For Docket, is to dismiss Bono-Attorney [sic] From my case for reasons, of Conflict-of-Interest. Ineffective Counsel. Motion to Fire Pro-Bono Attorney: Ephraim Benjamen [sic].

CP 147.

Defendant also filed an unequivocal request to proceed pro se, on January 9, 2006, just 2 days before trial. CP 188-89 (Motion to be Filed: For Right to Pro-Se [sic] Representation). However, at no time did he bring that motion to the attention of the trial court when the court asked him what motions he wanted heard. RP 4-5.

During the three weeks prior to the second trial, defendant filed numerous other handwritten motions on his own, including, but not limited to: bill of particulars (CP 148-49), mental evaluation (CP 177-78), order and demand not to seal file (CP 171-72), order and demand for

evidence hearing (CP 173-74), motion to dismiss (CP 165-66); motions practice pretrial (CP 152-55), order and demand all medical records to be used as evidence (CP 150-151), suppress confessed statement (CP 119-127), personal recognizance (CP 182), suppression of evidence (CP 186).

The morning of trial, the State and defense advised the court that they were ready to proceed with trial. RP 3-4. Defense counsel told the court:

MR. BENJAMIN: ... from my perspective, we're ready to proceed. My client apparently has filed numerous motions on his own, and he does not believe we are ready to proceed. I'm just making a record of that for my client's benefit.

THE COURT: Okay, Mr. Parkison, I saw some motions in the file. I don't have bench copies of any of these motions, and I don't know which, if any, have been heard.

THE DEFENDANT: None of them, Your Honor.

THE COURT: Okay. So what are your motions? Tell me what your motions are.

RP 4. Defendant responded by alleging that Mr. Benjamin had a conflict of interest and that he was ineffective counsel. RP 4. Defendant told the court that counsel was "not basically going with what I want to do on this trial..." RP 4. Defendant continued on, discussing evidence presented at the first trial and issues he had with it. RP 4-5. Defendant concluded by

again saying the counsel was ineffective.² RP 5. Defendant did not state, directly or indirectly, that he wanted to represent himself. RP 4-5. This supports the notion, that like Luvene, defendant was merely frustrated with his counsel and was not unequivocally requesting self-representation.

Additionally, although defendant filed a written motion to proceed pro se, it was his obligation to get that motion heard by the trial court.

State v. Knowles, 79 Wn.2d 835, 841, 490 P.2d 113 (1971). The Washington Supreme Court in Knowles stated:

The burden of having a pretrial motion heard and presented for disposition before trial falls upon the moving party. Unless the movant takes the procedural steps essential to bring the matter on for timely argument and disposition, the pretrial motion has little vitality of its own for most any paper can be lawfully filed with the clerk of court. If the movant does not note the motion for hearing or proceed otherwise to have it heard, neither the opposing party nor the court will know whether it has been filed in earnest, is merely perfunctory, is frivolous or dilatory, or has been abandoned or withdrawn. Accordingly, when the movant does not take timely steps to bring his pretrial motion before the court for hearing and disposition prior to trial, it is not error for the court to ignore it.

Knowles at 841. Here, defendant did not raise his pretrial motion to proceed pro se and did not seek a ruling from the court on that issue when asked what his motions were. Rather, defendant raised other issues.

² The trial court found there was no evidence of a conflict of interest, nor was there a basis to find trial counsel ineffective. RP 6-7

After some discussion, the trial court took a recess to give defendant and his attorney a chance to talk. RP 15. The court first pointed out concerns it had regarding (1) defendant's own motion requesting a 15 day evaluation at Western State Hospital³, and (2) defendant's right to proceed pro se. RP 16. The court advised defendant that preliminarily, it did not think defendant could make an informed decision to waive right to counsel, but that it may inquire further at a later time⁴. RP 16. Defendant's response to the court's concerns was simply that Mike Kawamura, his first appointed counsel, had not made motions that defendant thought should have been done. RP 17. The recess was then taken. RP 17.

When court reconvened, the issue of self-representation was not brought to the court's attention by either defendant or his counsel, nor was it ever mentioned again throughout the course of the rest of the trial. Defendant's failure to raise the issue with the court illustrates that he had

³ On March 9, 2005, the court signed an order appointing an expert to evaluate defendant's competency to stand trial, among other things. CP 424-25. On September 28, 2005, the parties signed the Status Conference document stating that the competency evaluation had been completed and that a competency evaluation was not needed. *Id.* The trial court denied defense counsel's request for a second competency evaluation. RP 21. Defendant has not assigned error to this ruling. BOA at 1.

⁴ Prior to making a decision on a self-representation, it was reasonable for the trial court to preliminarily question defendant's ability to make a knowing waiver of counsel when defendant had filed a written motion requesting a 15 day evaluation at Western State Hospital. CP 167-68.

abandoned or withdrawn the motion. See Knowles. He did not request to proceed pro se, even after the trial court raised the issue.

Defendant claims that the trial court erred in denying his request to proceed pro se. BOA at 21. However, the trial court did not rule on this issue. The court merely noted that it had concerns about defendant making a knowing waiver of his right to counsel. RP 16. The court allowed a recess for defendant and counsel to confer regarding these issues. RP 16. It appears from the record that after the recess, there was no request to proceed pro se or get another evaluation. RP 17. Therefore, the trial court never ruled on the abandoned written motion.

Defendant next claims that his trial counsel was ineffective for failing to correct prosecutor's "misstatements" about defendant's conduct during the first trial before Judge Culpepper. BOA at 28. Specifically, defendant claims the prosecutor (1) inaccurately characterized defendant's behavior as "outbursts" when he spoke directly to the jury while being admonished by Judge Culpepper to remain quiet; and (2) incorrectly advised the trial court that defendant used stall and delay tactics. BOA at 28-29.

First, defendant claims trial counsel's performance was deficient for failure to object to the prosecutor's remarks or to correct them. BOA at 28-29. This claim is without merit both factually and legally. First, the prosecutor accurately stated the facts of the case to the court. Judge

Culpepper himself used the word “outburst” to describe defendant’s behavior during the first trial. 3RP 297. Judge Culpepper admonished defendant for “yelling and screaming at the jury” while the State was putting on witnesses. 3RP 311. Judge Culpepper denied defendant’s motion for a mistrial that was based on defendant’s outbursts in front of the jury finding that defendant’s misbehavior was a tactic to get a mistrial because he (defendant) had previously stated that he did not like where the case was going once the State began to put on witnesses. 3RP 326-27. Legally, defendant fails to show how this discussion bears any relation to the issue of self-representation and how appointed counsel’s performance is relevant to defendant’s request to proceed pro se.

Despite his written motion, defendant made no request, equivocal or otherwise asking to proceed pro se as required by Knowles. The trial court did not err by allowing defendant to be represented by counsel. Defendant fails to cite any authority for the proposition that he is entitled to effective assistance of counsel on a motion to proceed pro se. Defendant’s claim fails.

2. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT IN CLOSING ARGUMENT WHERE HIS REMARKS WERE NOT IMPROPER, WERE MADE IN GOOD FAITH, AND WHERE DEFENDANT DID NOT OBJECT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). Improper comments are not deemed prejudicial unless “there is a *substantial likelihood* the misconduct affected the jury’s verdict.” State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815,

820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925, 846 P.2d 1358 (1993). It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. See State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). As an advocate, the prosecuting attorney is entitled to make a fair response to the argument of defense counsel. State v. Brown, 132 Wn.2d 529, 567, 940 P.2d 546 (1997) (quoting State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)).

The prosecutor began his rebuttal argument by arguing inferences from the evidence at trial, rebutting some of defense counsel's closing remarks. RP 1161-63. He then discussed the burden of proof of "beyond a reasonable doubt" and referred the jury to the court's instruction. RP 1163-65. The prosecutor then argued the meaning of "abiding belief." RP 1165-66. He told the jury:

Abiding belief: Abiding, lasting, strong, withstanding the test of time; **something that's not to be taken lightly**. You know, I would submit to you that you make decisions every day and you have an abiding belief in the province of making that decision. Think about deciding to have major surgery, you know, you explore the issues; you explore all the options and you take that leap of faith and let the doctor do the surgery. Buying a house, is this the right house for us? You do everything you possibly can to check it out, and at a certain point, you just have to let go and just do it. It may be as simple as – you know, you're driving down crowded I-5 and you decide to change lanes. You look and it's clear. You look again and it's clear, and you start to go.

You have an abiding belief in making that decision. **And no, being a juror is not like driving down I-5** and changing lanes in heavy traffic, but these are terms – the law that given you are terms that you are familiar with; **you’re just not familiar with them in that specific context.** And once you are convinced the State has proved every element beyond a reasonable doubt, you will then get a chance to return your verdict.

RP 1166 (emphasis added).

This argument, objected to by defendant for the first time on appeal, comprised one page of the prosecutor’s seven page rebuttal argument. RP 1166. This argument did not “pervade[] the entire rebuttal” as claimed by defendant. BOA at 37.

When viewed in the context of the entire closing argument, these remarks are not improper, do not convey to the jury that it should do other than follow the court’s instructions, and does not trivialize the burden of proof, which is proof beyond a reasonable doubt. The prosecutor’s remarks were designed to help the jury to understand the terms used to define the burden of proof. He provided some examples of the use of the word abiding, pointing out that it is not something to be taken lightly. He acknowledged that serving on a jury is not like driving in heavy traffic on I-5.

Defendant is unable to cite any Washington authority for his claim that this argument is improper. Not only does the defendant have the burden of showing the conduct was improper, but where, as here, defendant does not object below, he must also show that the remarks were

ill-intentioned and flagrant. Binkin, 79 Wn. App. at 293-94. Defendant does not attempt to explain how the remarks arise to this level. The record actually reveals that the prosecutor painstakingly went through the wording of the court's instruction to the jury. RP 1163. Similarly, he made no effort to minimize or downplay the seriousness of the standard.

Similarly, the jigsaw puzzle analogy was merely an effort demonstrate that a person could obtain a fairly high level of certainty regarding an issue even when every single piece of information is not available. In other words, if the jury is satisfied beyond a reasonable doubt that defendant is guilty based on the evidence presented at trial, the fact that there could be additional evidence that was not presented should not change their verdict because it is possible to be certain about an issue even when some details are missing. The puzzle analogy merely illustrates this point and does not mitigate the burden of proof or fly in the face of the court's instructions to the jury.

The fact that defense counsel did not object to this argument indicates a perceived lack of prejudice, and the trial court's written jury instructions minimized the risk of any prejudice.

The prosecutor's remarks were not improper, nor were they ill-intentioned and flagrant. Even if they were improper, defendant cannot show that resulted in enduring prejudice that would deprive defendant of a fair trial. This claim must fail.

3. DEFENDANT CANNOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT SATISFY EITHER PRONG OF STRICKLAND: DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in Strickland. See also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. Id. To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), review denied, 123 Wn.2d 1004,

868 P.2d 872 (1994)). “[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing Strickland, 466 U.S. at 689). If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

To satisfy the second prong, prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further.” Hendrickson, 129 Wn.2d at 78.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When

the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. United States v. Kimmelman, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

a. No Deficient Performance.

Defendant first complains that his counsel was deficient for failure to move pretrial for suppression of dog track evidence. BOA at 41-43. However, this is a tactical decision made by trial counsel to which this Court should defer. See State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

In the present case, Officer Gamble (not the dog handler) testified that he did not see the dog track, but was told by his partner, Officer Bundy, that the police dog tracked from the Payless Shoe Store to the "H" building of the Mark Twain Apartment complex where defendant resided. RP 512. Defense counsel properly, but unsuccessfully, objected to this evidence on the grounds of hearsay. RP 512. Before further witnesses were called, defense counsel moved the court to instruct the jury to disregard the dog track evidence because it was inadmissible on the grounds of hearsay and for lack of foundation. RP 520-522. Officer

Bundy (not the dog handler) later testified as to the route of the police dog track, which he personally observed, but the K-9 officer who actually handled the dog did not testify to lay the required foundation. RP 795-808.

Here, defense counsel made the proper objections. The fact that the trial court did not sustain them does not meet the burden to show deficient performance. See Early 70 Wn. App. at 461. Defendant complains that the objection should have been made pretrial rather than when the testimony was offered. BOA at 42. As the trial court considered the issue several times, always rejecting defense counsel's objections, it is unlikely a pretrial motion would have produced a different ruling. RP 512, 520-25, 595, 1003-04. Because counsel objected in a timely fashion and offered the correct bases for his objections, defendant has failed to show deficient performance.

Nor can defendant meet his burden in showing that trial counsel's performance prejudiced him to the extent that it effected the verdict, the second prong under Strickland. See Strickland at 687. First, defendant cannot show that the trial court would have made a different ruling had counsel made an objection pretrial.

Second, the dog track evidence was weak, and therefore minimally prejudicial, if prejudicial at all. Because the dog handler did not testify, there was no evidence as to who, if anyone, the dog may have been

tracking, nor was there any testimony as to the dog's reliability. For all the jury knew, the dog could have been tracking an innocent customer. Also, the dog did not track to any specific apartment, only to Building "H" of the complex. Defendant lived in Building "C". RP 1050. The connection made between the robber of Payless Shoe Store and defendant was tenuous at best. This evidence was in no way central to the State's case.

Third, the dog track evidence was merely cumulative of other evidence admitted at trial. Detective Andren testified that defendant told detectives that after he robbed the Payless Shoe Store, he ran back to his house at the Mark Twain Apartments. RP 896. He told police how he went down Pearl and approached his apartment from the back. *Id.* This is the same route the police dog took. RP 512. Because the evidence was properly admitted from another source, the testimony of the dog track could not have prejudiced defendant.

Lastly, there was overwhelming evidence of guilt presented at trial. Defendant confessed to each and every crime, in detail, and on tape. RP 868-99. He also confessed to Lonborg that he was the robber referred to in the Crime Stopper's bulletin. RP 540. Defendant was using drugs heavily at the time. RP 541; 872. He owed the drug dealers "a good thousand dollars" who were aggressively trying to collect from him. RP 872; 901. This provided a strong motive for the robberies. The strength

of this evidence is so compelling that defendant cannot show that his trial would have had a different outcome but for the claimed errors of his counsel.

Next, defendant claims that trial counsel was deficient for (1) failure to suppress evidence that police used a prior booking photo of defendant for use in a photo montage to be shown to victims of the robbers and (2) draft a curative instruction once the ‘prior booking’ evidence was part of testimony. BOA at 43-47. The trial court’s sua sponte curative instruction referred to ‘some *conviction* information’ rather than *booking* information. RP 675.

The decision 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). “Only in egregious circumstances, on testimony central to the State’s case will the failure to object constitute incompetence of counsel justifying reversal.” Id. Here, counsel may have strategized that it would call less attention to defendant’s 1995 booking by not objecting than by having the jury sent out.

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996), provides analysis of whether a lone improper statement causes reversible prejudice. During cross-examination of a defense witness in Copeland, the prosecutor asked the witness, a fellow inmate of Copeland, about his prior conviction for assault: “You beat her [the victim] black and blue and

you burned her abdomen with a cigar, didn't you?" Id. at 284. The court found this question improper under ER 609 which limits the evidence to the fact of the conviction. Id. The court noted that the giving of a curative instruction does not end the inquiry if the misconduct is so flagrant that no instruction can cure it. Id. While the Copeland court noted that "[t]he prosecutor's question was a deliberate attempt to influence the jury's perception of [the witness] and his testimony," and constitutes prosecutorial misconduct the court did not find that it required reversal. Id. at 285. The court evaluated the testimony and the circumstances and concluded:

Further, the single question occurred during a lengthy trial; the trial court immediately sustained the defense objection to it and instructed the jury to disregard it. **The jury is presumed to follow instructions to disregard improper evidence.** State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), *cert. denied*, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). [The witness] never answered the question. In light of all the circumstances, the error resulting from the improper question was cured by the court's instruction. See id [sic] 125 Wn.2d 24, at 84-85.

State v. Copeland, 130 Wn.2d at 285.

The instant case is similar to Copeland. Although Copeland dealt with prosecutorial misconduct, the analysis regarding the prejudicial effect of improper evidence is on point. In the present case, the evidence was a single reference to a prior booking asked during a lengthy trial. The prosecutor did not repeat the question and did not again raise the subject

matter with any other witness or during closing argument. The trial court, after briefly excusing the jury, ordered the witness not to discuss defendant's criminal history. RP 674. Similar to Copeland, the jury was instructed to disregard the evidence. The jury here is presumed to follow the court's instructions. State v. Russell at 84.

Additionally, the booking testified to was in 1995, over ten years prior. In a trial that spanned 20 days, with 26 witnesses, and a taped confession, this evidence would not have had much, if any, impact on the jury verdict. Without prejudicial error, defendant cannot meet his burden of showing ineffective assistance of counsel.

Finally a review of the record shows that defense counsel made objections, presented evidence on behalf of defendant and argued to the jury that his client should be acquitted. Defendant has failed to demonstrate that his attorney was so woeful that he was effectively left without counsel.

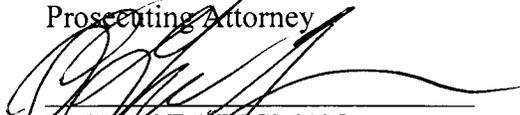
As defendant cannot show deficient performance or resulting prejudice on any of the claims he makes regarding the actions of his attorney or from the record as a whole, his claim of ineffective assistance is without merit.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court of affirm defendant's convictions.

DATED: February 7, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



E. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

Certificate of Service:

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

2/7/07 
Date Signature

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