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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 37920-1-II

STATE OF WASHINGTON,

Respondent,

vs.

RALPH GRAMMONT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 07-1-00285-4

BRIEF OF RESPONDENT

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SERVICE	<p>Jodi Backlund/Manek Mistry Backlund & Mistry 203 Fourth Ave. East, Suite 404 Olympia, WA 98501</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: August 10, 2009, at Port Angeles, WA <i>Debra K. Hamilton</i></p>
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I. COUNTER-STATEMENT OF THE ISSUES

- 1.) Did the trial court err in admitting a 911 recording that captured the Defendant's answers to police questions when the police did not give a *Miranda* warning prior to their questioning that sought to ascertain the nature of the underlying emergency?
- 2.) Did the trial court err in admitting the entire 911 recording when the Defendant may have been intoxicated during the initial questioning?
- 3.) Did the trial court commit reversible error in admitting the entire 911 recording when the State produced sufficient evidence, to prove beyond a reasonable doubt, that the Defendant was guilty of second degree assault?
- 4.) Did the deputy prosecutor commit reversible misconduct by expressing a personal opinion in her rebuttal argument when she stated that the evidence showed that someone was lying?
- 5.) Did the deputy prosecutor shift the burden of proof to the Defendant when she argued that the evidence showed that someone was lying?
- 6.) Did the Defendant receive effective assistance of counsel when his attorney objected only two times during the State's closing rebuttal?
- 7.) Did the trial court err when it ordered the Defendant to undergo a mental health evaluation without reviewing a pre-sentence report or finding that mental illness contributed to the crime charged?
- 8.) Did the trial court err in ordering restitution when it considered the testimony at trial, the victim's testimony at the restitution hearing, and an itemized report of services paid for by the Crime Victims Compensation Fund?

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II. STATEMENT OF THE CASE

Facts

On the late evening of May 27, 2007, Ralph Grammont (Grammont) and Selma Cole (Cole) invited Linda Carroll (Carroll) to join them for dinner. Record of Proceedings (RP) (06/09/2008) at 24. The three had dinner between 8:30 and 9:00 p.m. RP (06/09/2008) at 26. After dinner and several alcoholic beverages, Grammont and Carroll stepped into the garage to smoke a cigarette. RP (06/09/2008) at 27; RP (06/10/2008) at 50. At that point, the pleasant evening changed drastically.

According to Carroll, when the two were alone in the garage, Grammont began to masturbate in front of her. RP (06/09/2008) at 31. Shocked and embarrassed, Carroll ran from the garage to rejoin her mother inside the residence. RP (06/09/2008) at 31. Carroll was visibly upset. RP (06/09/2008) at 31-32; RP (06/10/2008) at 50. To hide the truth about what transpired in the garage, Carroll told her mother that she was troubled due to a painful memory she recalled from her childhood. RP (06/09/2008) at 31-32. Grammont soon rejoined Carroll and Cole in the living room and listened to Carroll's story. RP (06/09/2008) at 32, 45. Carroll then decided to leave, despite her mother's pleas that she sleep on the couch because she had had too much to drink. RP

(06/09/2008) at 32, 45; RP (06/10/2008) at 52, 77. When Carroll stood up to leave, Grammont suddenly struck her in the face with his fist or the back of his hand. RP (06/09/2008) at 33, 49, 65; RP (06/10/2008) at 55. The force of the blow was enough to knock Carroll to the ground and cause her to see stars. RP (06/09/2008) at 33-34, 52. Carroll pulled herself up and ran for the door. RP (06/09/2008) at 34, 52-53, 67; RP (06/10/2008) at 55-56, 78. As Carroll neared the door, Grammont tackled her from behind. RP (06/09/2008) at 34, 53, 68; RP (06/10/2008) at 55-56, 78. Grammont proceeded kick and punch Carroll in the head. RP (06/09/2008) at 34-35, 54-55, 68; RP (06/10/2008) at 55-56, 78, 82. The force of the blows nearly caused Carroll to lose consciousness. RP (06/09/2008) at 34-35. As Carroll tried to protect her face, she cried for her mother to call 911. RP (06/09/2008) at 35-36; RP (06/10/2008) at 57.

Grammont described a different end to the evening. According to Grammont, he never made obscene gestures toward Carroll. RP (06/10/2008) at 19. Instead, Carroll berated her mother the entire time the two were smoking inside the garage. RP (06/10/2008) at 21, 25. Grammont also said Carroll continued to criticize her mother inside the residence. RP (06/10/2008) at 26. Frustrated, Grammont sought to defend Cole and asked Carroll to leave. RP (06/10/2008) at 26. Grammont claimed that he tried to escort Carroll from the residence. RP

(06/10/2008) at 27. As the two approached the door, Grammont said that Carroll suddenly grabbed him and sunk her fingernails into his arm. RP (06/10/2008) at 27. Surprised, Grammont reacted and swatted Carroll away, causing her to fall to the floor. RP (06/10/2008) at 27-28. As Carroll fell, she grabbed hold of Grammont and pulled him on top of her. RP (06/10/2008) at 28. According to Grammont, the two proceeded to flail around on the ground. RP (06/10/2008) at 28.

As Carroll and Grammont fought one another in the home's front entry way, Cole called 911. Ex. 17 at 1. Cole informed 911 that Grammont was savagely beating her daughter. Ex. 17 at 1-2. During the call, 911 could hear Grammont accosting a third party. See. Ex. 17 at 1-7. Two officers responded to Cole's call. Grammont invited the two officers inside the residence. Ex 17. at 8. Because Cole left the phone of the hook, 911 recorded the questions that the officers posed to both Cole and Grammont. See Ex. 17 at 8-20.

The responding officers did not read Grammont his *Miranda*¹ rights prior to the initial questioning. See Ex. 17 at 8-20. Throughout most of the interview, Grammont claimed that an absent, unidentified male had been responsible for the attack. Ex. 17 at 9, 12,-13, 15, 18-19. After about 5 or 10 minutes, the officers exited the residence to interview

Carroll, who was waiting outside in the front yard. Ex. 17 at 13, 20; RP (03/06/2008) at 21. After speaking with Carroll, the officers re-entered the residence and arrested Grammont for assault. Ex. 17 at 23. When the officers placed Grammont under formal arrest, they read him his *Miranda* warnings. Ex. 17 at 23. As the officers applied handcuffs to Grammont, he declared that he was already familiar with his *Miranda* rights. Ex. 17 at 23.

Procedural History

The State charged Grammont with Assault in the Second Degree. CP 23. At a 3.5 hearing, Grammont moved to suppress the 911 recording that recorded his answers to the officer's initial questioning. RP (03/06/2008) at 15-17. Grammont argued that his statements were inadmissible because the officers had failed to mirandize him before they posed their questions. RP (03/06/2008) at 17. The trial court did not complete written findings of fact or conclusions of law. However, the trial court's oral ruling included the following:

In this case there was, certainly police had arrived at Mr. Grammont's home. He was inside his home. Police came into his home. Mr. Grammont says they told him to sit down. Frankly whether or not someone would believe at that point they were not free to go, reasonable in the opinion of the Court that that likely is certainly approaching that situation. ...

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Neither the tone, the demeanor, nor the questions asked nor the circumstances would give right to believe that even if Mr. Grammont did not feel [free] to leave that he was being interrogated in a manner that would render this statement involuntarily. So for purposes of 3.5 the statements are admissible.

RP (03/06/2008) at 35-37. The trial court found Grammont's statements were both voluntary and admissible. RP (03/06/2008) at 37. The State played the 911 recording in its entirety at trial. RP (06/10/2008) at 109.

At trial, Carroll testified as to her version of the events. See RP (06/09/2008) at 24-71. Cole corroborated Carroll's testimony, identifying Grammont as the one who initiated the attack and savagely beat her daughter. See RP (06/10/2008) at 46-83. The State also called Dr. Barrett and Dr. Birch to describe the extent of Carroll's injuries. Dr. Birch testified that Carroll had a cracked tooth following the incident, and that the trauma that Carroll described could cause such an injury. RP (06/10/2008) at 35. Dr. Barrett testified that following the attack Carroll began to suffer from temporomandibular joint (TMJ) difficulties: ligament stretch sprain, tendonitis, and then effusion or capsulitis or swelling of the jaw. RP (06/09/2008) at 71. According to Dr. Barrett, Carroll's resulting condition was consistent with the attack that she suffered. RP (06/09/2008) at 77. Dr. Barrett also said that following the

attack, he became aware that Carroll was also suffering from migraine headaches. RP (06/09/2008) at 80.

The defense called Mr. David Kanters, RN, and Grammont to testify at trial. Mr. Kanters testified that he treated Carroll a few days after the assault. Kanters explained that Carroll had numerous contusions on her face and a mild concussion due to the attack. 2RP (06/10/2008)² at 11, 13.

Grammont claimed self defense. RP (06/10/2008) at 27-28. When asked to explain why he told police officers that a fabricated, unidentified male was responsible for the attacks, Grammont admitted that he lied, and would lie, to avoid going to jail. RP (06/10/2008) at 35-36, 39. Grammont also admitted writing a letter to Cole, in which he apologized for the part he played in the incident. RP (06/10/2008) at 29.

Defense counsel made two objections during the State's rebuttal argument. Defense counsel opposed the inference that the State drew from the evidence presented at trial: (1) that "the evidence shows that someone is lying, but the evidence also shows that someone is telling the truth," and (2) that the defendant was "someone who will lie to avoid

² Due to the difficulty in transcribing the record of proceeding, there are two volumes that include testimony from 06/10/2008. The State refers to the volume that reproduced Mr. Kanters testimony as 2RP (06/10/2008).

trouble,” (06/11/2008) 23, 25-26, 26-27, 29. The trial court overruled both of the objections. RP (6/11/2008) at 26, 29

The jury convicted Grammont of second degree assault. CP 9. At sentencing, the trial court ordered Grammont to undergo a mental health evaluation and follow its recommendation. CP 17. RP (06/24/2008) at 6. However, the State never alleged that mental illness played a part in the crime charged, there was no pre-sentence report that highlighted an existing mental illness, and the trial court never made such a finding.

On October 23, 2008, the trial court held a restitution hearing. At the hearing the State presented an itemized report of the amounts that the Crime Victim’s Compensation Fund (CVCF) paid for Carroll’s medical treatment and recovery. RP (10/23/2008) at 17 The State provided the same report to defense counsel two months before the restitution hearing. RP (10/23/2008) at 7. In addition, the State called Carroll to testify regarding additional sums not covered by CVCF, and Grammont’s attorney cross examined her regarding the concerns he had about certain items on the CVCF report. RP (10/23/2008) at 9, 12-17. Defense counsel never presented evidence to contradict Carroll’s testimony. RP (10/23/2008) at 25. The trial court ordered Grammont to pay \$10,182.92 to CVCF and \$349.42 to Carroll. See RP (10/23/2008) at 25, 26-29.

Grammont timely appealed both his conviction and restitution order. During the pendency of this appeal, Grammont completed the confinement term of his sentence. He is presently on community custody.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED THE DEFENDANT'S RECORDED STATEMENTS.

The Fifth Amendment of the United States Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” The Washington Constitution article I, section 9 grants a similar right, and its protection is coextensive with that provided by the Fifth Amendment. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

Miranda warnings seek to protect a defendant’s from making an incriminating confession or admission to police while in the coercive environment of police custody. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). The criminal law only requires a *Miranda* advisement when a suspect endures (1) custodial (2) interrogation (3) by a State agent. *Heritage*, 152 Wn.2d at 214. *See also State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). When *Miranda* attaches, a suspect’s

unmirandized statement that is obtained via a custodial interrogation is presumed involuntary. *Heritage*, 152 Wn.2d at 214.

Because *Miranda* rights are only triggered when a suspect is both “in custody” and subject to “interrogation,” this Court must determine whether Mr. Grammont was “in custody” when police officers questioned him when they responded to a 911 emergency. Washington appellate courts review custodial determinations *de novo*. *Lorenz*, 152 Wn.2d at 36; *State v. Ustimenko*, 137 Wn. App. 109, 115, 151 P.3d 256 (2007).

1.) The Defendant was not in police custody at the time of the initial questioning.³

In *Miranda v. Arizona*, the United States Supreme Court defined a custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Heritage*, 152 Wn.2d at 217 (quoting *Miranda*, 384 U.S. at 444). In *Berkemer v. McCarty*, 468 U.S. 420, 428, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of “custody.” The high court

³ The trial court did not produce written findings of fact and conclusions of law. Mr. Grammont claims that the trial court found that he “was likely in custody.” See Appellant’s Brief at 13-14 (citing RP (03/06/2008) at 36). The State contests this characterization of the record. The trial court’s only explicit oral finding was that Mr. Grammont’s statements were voluntary. RP (03/06/2008) at 36-37.

developed an objective test – whether a reasonable person in the suspect’s position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Heritage*, 152 Wn.2d at 218 (citing *Berkemer*, 468 U.S. at 441-42); *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003). Washington applies this objective test. *Heritage*, 152 Wn.2d at 218. *See also State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1988).

In contrast, a custodial interrogation must be distinguished from an investigatory detention or *Terry*⁴ stop, which, because of its comparatively non-threatening nature, is not subject to the dictates of *Miranda*. *Cunningham*, 116 Wn. App. at 228. While a reasonable person would not feel free to leave the scene of an investigatory encounter, a seizure under such circumstances does not require a *Miranda* warning because it is brief, presumptively temporary, less police dominated, and does not lend itself to deceptive police interrogation tactics. *See Berkemer*, 468 U.S. at 436-40; *Heritage*, 152 Wn.2d at 218; *Cunningham*, 116 Wn. App. at 228. Thus, a detaining officer may ask a moderate number of questions during an investigative detention to determine the identity of the suspect and/or to confirm or dispel the officer’s suspicions without rendering the suspect “in custody” for the

purposes of *Miranda*. *Heritage*, 152 Wn.2d at 218 (citing *Berkemer*, 468 U.S. at 439-40). Washington's appellate courts agree that a brief investigatory encounter is not custodial for the purposes of *Miranda*. *Heritage*, 152 Wn.2d at 218. See e.g., *State v. Hilliard*, 89 Wn.2d 430, 432, 435-36, 573 P.2d 22 (1977) (holding that suspect was not subject to custodial interrogation despite the fact that he would not have been allowed to leave until he answered questions).

In *State v. Heritage*, the Supreme Court recognized that officers are permitted to ask a moderate number of questions to determine the identity of an individual and to confirm or dispel an officer's suspicions without having to first give a *Miranda* warning. *Heritage*, 152 Wn.2d at 219 (citing *Berkemer*, 468 U.S. at 439-40). In *Heritage*, park security guards approached a juvenile defendant and her friends while wearing their uniform, which included a t-shirt identifying them as security and a duty belt with handcuffs. 152 Wn.2d at 218-19. The guards believed the minors were smoking marijuana. *Id.* at 212-13. The guards did not physically detain or search anyone in the group, and they made it clear that they did not have the authority to arrest. *Id.* at 219. The guards did not advise the juveniles of their *Miranda* rights, before asking to whom a marijuana pipe belonged. *Id.* The defendant admitted it was her pipe. *Id.*

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)

The Supreme Court held that the statement was admissible, reasoning (1) that at the time the officers asked to whom the pipe belonged they were in the midst of a moderate number of questions related to their suspicions that the group was smoking marijuana and (2) that a reasonable person in the defendant's position would not have believed that her freedom was curtailed to a degree associated with a formal arrest. *Id.* The *Heritage* Court went on to stress that the encounter was analogous to a *Terry* stop, not a custodial interrogation, when the defendant admitted ownership of the drug paraphernalia. *Id.*

In *State v. Lorenz*, the Supreme Court held that the defendant was not in police custody to the degree associated with formal arrest at the time she provided law enforcement with a written statement admitting her criminal culpability. 152 Wn.2d at 38. In *Lorenz*, law enforcement obtained a warrant to search the defendant's property for evidence of child pornography and the sexual exploitation of minors. *Id.* at 27. When officers served the warrant on the defendant, they instructed her that she could not enter her trailer while the officers searched the premises. *Id.* at 27, 37. Police officers never required that the defendant remain on the premises. *Id.* at 27, 37. However, the defendant claimed that officers ordered her to sit on a chair. *Id.* at 27. Four officers searched the defendant's trailer for evidence, while two more officers interviewed the

defendant on the porch. *Id.* at 27, 37. Prior to the initial questioning, officers explicitly advised the defendant that she was not under arrest and that she was free to leave at any time. *Id.* at 27, 37-38. The defendant acknowledged the same in her written statement. *Id.* at 27, 38. The defendant never asked to leave the premises, she never asked the officers to stop questioning her, and she never requested an attorney. *Id.* at 38. Under these circumstances, the Supreme Court held that police questioning was not custodial and the defendant's written statements were admissible. *Id.*

In *State v. Ustimenko*, Division III of the Court of Appeals held that the defendant was not in custody when he made statements to police prior to being advised of his *Miranda* rights and that his statements constituted admissible evidence. 137 Wn. App. at 116. In *Ustimenko*, police officers investigated a report of an assault and a hit-and-run. *Id.* at 112. Law enforcement contacted the defendant at his residence after discovering his identification and his vehicle registration at the scene of the crime. *Id.* at 113. As officers walked up the defendant's driveway, they met the defendant walking toward them. *Id.* Officers noticed that the defendant smelled of alcohol, slurred his speech, swayed on his feet, and had fresh injuries on his head and hands. *Id.* The officers asked the defendant to sit down. *Id.* The defendant told the officers that his car had

been stolen and that his injuries were several days old. *Id.* When the officers sought to handcuff the defendant and advise him of his constitutional rights, the defendant yelled “[’ll] tell you what happened. I was driving.” *Id.* The trial court excluded the statements made in response to questions before the advisement of rights (*e.g.*, that that his car had been stolen), reasoning that the defendant was in custody as soon as the police approached and asked him to sit down. *Id.* at 114-15. However, Division III found that the defendant was not in custody when the officers questioned him. *Id.* at 116. The court emphasized the fact that the defendant was never told that he was under arrest and that the defendant never asked to leave. *Id.* Under these facts, Division III concluded that a reasonable person in the defendant’s position would not believe that his or her freedom was curtailed to the degree associated with a formal arrest. *Id.* Thus, Division III found that the defendant was not “in custody,” and statements obtained via the initial questioning should have been admitted into evidence. *Id.*

In contrast to the cases cited above, this Court has found that investigating officers violate a defendant’s Fifth Amendment rights when they question a defendant without advising him of his *Miranda* warnings after they have told him that he was not free to leave. *State v. France*, 121 Wn. App. 394, 399-400, 88 P.3d 1003 (2004). In *State v. France*,

police dispatch advised an officer that the defendant was a “suspect” in a specific domestic violence incident. *Id.* at 397. The officer knew the defendant from previous encounters and had seen him alongside the roadway prior to the report. *Id.* The officer located and stopped the defendant, telling him that there was an alleged dispute and that the officer “needed to clear it up” before the defendant would be free to leave. *Id.* The defendant then admitted that he had been at the victim’s trailer, that he had argued with the victim, and that he knew there was an existing order that prohibited any contact between he and the victim. *Id.* This Court held that no reasonable person in the same situation would have believed that he or she would have been allowed to leave because the officer stated that he would not let the defendant go until the matter had been cleared up. *Id.* at 400. In addition, this Court noted the officer did not ask general or open-ended questions. *Id.* Instead, he asked questions designed to obtain an admission from the Defendant. *Id.* Important to this Court’s analysis was (1) the police had told the defendant he was not free to leave, (2) the detention was potentially unlimited – until the officer determined that the matter was cleared up, and (3) the officer already had probable cause to make an arrest, but delayed doing so only to avoid a *Miranda* warning. *State v. France*, 129 Wn. App. 907, 910, 120 P.3d 654 (2005) (reconsidered in light of *State*

v. Heritage, 152 Wn.2d 210, 95 P.2d 345 (2004), and *State v. Hilliard* 89 Wn.2d 430, 573 P.2d 22 (1977)).

The present case may be distinguished from *State v. France*. First, in *France*, the officer knew the defendant, knew there was a court order prohibiting the defendant from having contact with the victim, and knew that the victim had reported an assault. 121 Wn. App. at 397. In the present case, responding officers did not know the parties involved, did not know the specifics of the 911 call, and did not know the identity of the assailant when they posed their initial questions to Mr. Grammont and Ms. Cole. *See e.g.*, Ex. 17 at 11-12, 14. Second, in *France*, the investigating officer expressly told the defendant that he was not free to leave. 121 Wn. App. at 397. In the present case, the officers gave no such order. *See* Ex. 17 at 8-20. Finally, in *France*, the police already had probable cause to initiate a formal arrest. *See* 121 Wn. App. at 397. In the present, the officers did not have probable cause to arrest Mr. Grammont.⁵ The police did not learn that Mr. Grammont was the assailant until after they discontinued questioning him and exited the residence to speak with the victim. *See* Ex. 17 at 14-15, 20, 23. Because

⁵ The State notes that whether the officer has probable cause to arrest a suspect is irrelevant to whether the officer was required to administer *Miranda* warnings so long as the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest. *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992).

State v. France is factually dissimilar, this Court should find that it does not control the instant case.

The present case is similar to *State v. Heritage*. As in *Heritage*, the facts clearly indicate that the questioning of Mr. Grammont was made in the course of an appropriate investigation that was analogous to a *Terry* stop. In *Heritage*, the officers were permitted to ask a moderate number of questions without a *Miranda* warning to confirm or dispel their suspicions. 152 Wn.2d at 219 (citing *Berkemer*, 468 U.S. at 439-40). Here, the police responded to a 911 call for help. Ex. 17 at 14. The officers asked a moderate number of questions that were reasonably related to the chaotic circumstances they encountered: signs of a struggle; two individuals with blood on them; and accusations that an absent, unidentified male was responsible for the assault. See Ex. 17 at 8-19. Additionally, in *Heritage*, the officers posed these questions to the juveniles as a group. 152 Wn.2d at 219. In the present case, the officers asked questions to both Mr. Grammont and Ms. Cole, and neither officer questioned the home's residents in isolation. Ex. 17 at 8-19. This Court should find that the officer's detention of Mr. Grammont was a brief investigative encounter that was analogous to a *Terry* stop. Thus, the police were not required to give *Miranda* warnings because Mr. Grammont was not "in custody."

The present case is also similar to *State v. Lorenz* and *State v. Ustimenko*. In both *Lorenz* and *Ustimenko*, law enforcement questioned the defendant's at their private residences. 152 Wn.2d at 27, 137 Wn. App. at 113. While officers in both cases asked the defendants to sit down, they never required that the defendants remain on the premises. *Lorenz*, 152 Wn.2d at 27, *Ustimenko*, 137 Wn. App. at 113, 116. Additionally, the defendants in *Lorenz* and *Ustimenko* never asked to leave, never asked the police to discontinue their questions, and never requested an attorney. 152 Wn.2d at 38, 137 Wn. App. at 116. The same is true in the present case. The police questioned Mr. Grammont at his residence and not the traditional (more coercive) environment of a police station. Ex. 17 at 8-19. Law enforcement never told Grammont that he was under arrest and never required that he remain on the scene.⁶ Ex. 17 at 8-19. Furthermore, Mr. Grammont never asked the officers to discontinue their questions and never requested a lawyer, despite being familiar with the protections of *Miranda*. Ex. 17 at 8-19, 23.

Finally, unlike *Lorenz*, the facts show the absence of a police dominated scene. In *Lorenz* (in which the Supreme Court still found that the defendant was not "in custody," two officers questioned the

⁶ Mr. Grammont testified that responding officers ordered him to sit down on couch, RP (03/16/2008) at 21, and he states the same in his opening brief. See Appellant Brief at

defendant on her porch while four other officers conducted a search of her residence. 152 Wn.2d at 27, 37. Here, Mr. Grammont invited two officers into his residence to speak with him. Ex. 17 at 8. The officers calmly spoke with Mr. Grammont for five to ten minutes, before they both exited the residence (without arresting the Defendant) to speak with the victim. Ex. 17 at 8-16, 16-20; RP (03/06/2008) at 21. This Court should find that the instant case is similar to *Lorenz* and *Ustimenko*. There was no curtailment of freedom that arose to the level of a formal arrest. Thus, this Court should hold that Mr. Grammont was not “in custody” at the time of his initial questioning and that his recorded statements were admissible.

Mr. Grammont argues that he was in custody pursuant to the factors identified in *United States v. Brobst*, 558 F.3d 982, 995 (C.A.9, 2009). See Appellant’s Brief at 12-13. Under these factors, Mr. Grammont’s detention still did not arise to the level of a custodial interrogation. First, the officers’ language was both polite and professional. See *e.g.* Ex. 17 at 8, 10-11. The officers sought Mr. Grammont’s and Ms. Cole’s permission to enter the residence. Ex. 17 at 8. The officers never told Mr. Grammont that he was under arrest during the initial questioning. See Ex. 17 at 8-19. The only commands the

13. A review of the 911 recording, which captured the officers’ exchange with Mr.

officers gave was that Grammont should (1) keep his voice down, and (2) speak calmly. Ex. 17 at 10-11.

Second, the officers did not confront Mr. Grammont with evidence of his guilt in order to elicit incriminating information. The officer's interference with Mr. Grammont's freedom of movement was justified because they were responding to a 911 emergency. The responding officers confronted a chaotic scene: signs of struggle, two individuals covered in blood, accusations that an unidentified male was responsible for the attack. See Ex. 17 at 8-20. The officers posed their factual questions, regarding Ms. Carroll's health, to both Mr. Grammont and Ms. Cole in order ascertain what had happened. See Ex. 17 at 9, 15, 18. Furthermore, Mr. Grammont ignores the fact that the officers questions with respect to the blood (*i.e.* evidence) on him were solely to determine whether he too needed medical attention. See Ex. 17 at 9, 20-21.

Third, the police questioning took place in Mr. Grammont's home and not the more traditional environment of the police station. See Ex. 17 at 8-20. Additionally, Mr. Grammont was never secluded, and the officers directed their questions to both Mr. Grammont and Ms. Carroll. See e.g. Ex. 17 at 9, 11, 13, 15, 18.

Grammont shows no such command. See Ex. 17 at 8-20.

Fourth, the questioning was brief. The record shows that the officers only questioned Mr. Grammont for five to ten minutes. RP (03/06/2008) at 21. *Compare Cunningham*, 116 Wn. App. at 229 (no custodial interrogation even though police handcuffed an individual for 45 minutes.)

Finally, the degree of pressure applied to detain Mr. Grammont was minimal. Again, Mr. Grammont invited officers into the residence. Ex. 17 at 8. The officers did not brandish their weapons, did not search or handcuff Mr. Grammont, did not order him to sit or remain sitting in any particular area, and did not seclude him from the other individuals in the home. See Ex. 17 at 8-20. The absence of a coercive, custodial interrogation is further illustrated by the fact that Grammont had a casual conversation about his pets with the attending medics. Ex. 17 at 22.

Under the totality of the circumstances, there is no evidence in the record to suggest that Mr. Grammont, at the time he made his statements was subjected to the sort of “coercive pressures” associated with a formal arrest. *See Berkemer*, 468 U.S. at 441-42. This Court should conclude that Grammont was not “in custody” for purposes of *Miranda*, and that his recorded statements was admissible. There is no reversible error.

2.) The Defendant's intoxication did not render his statements inadmissible.

Mr. Grammont argues that his recorded statements to law enforcement were inadmissible because his alcohol consumption made him “artificially compliant” at the time of the initial questioning. See Appellant’s Brief at 16-17. Mr. Grammont appears to claim that any level of intoxication should bar a criminal defendant’s statements from being admitted into evidence. See Appellant’s Brief at 16-17. This Court should reject this argument because Mr. Grammont was not in police custody at the time he made his statements regarding the incident. There was no requirement that he knowingly, intelligently, and voluntarily waive his constitutional rights because *Miranda* protections never attached.

The State refers this Court to *State v. Ustimenko, supra*. In *Ustimenko*, the defendant was intoxicated. 137 Wn. App. at 112. When officers contacted the defendant in the driveway of his residence, the police noted that the defendant smelled of alcohol, had slurred speech, and swayed on his feet. *Id.* at 113. Despite evidence of intoxication, the police asked the defendant where his car was located. *Id.* The defendant stated that his car had been stolen, and that his injuries were caused by a fall he suffered a few days earlier. *Id.* When the officers handcuffed the

defendant and started to advise him of his constitutional rights, the defendant blurted out “I tell you what happened. I was driving.” *Id.* The officers continued reading the defendant his *Miranda* rights and the defendant stated, without prompting, “I was in an accident.” *Id.* Division III concluded that under these circumstances, the defendant was not in custody when the officers asked him about his car and injuries. *Id.* at 116. Accordingly, the statements, although made while intoxicated, should have been admitted into evidence. *Id.*

Miranda protections only attach at the point where the defendant is (1) in custody and (2) under interrogation. *Heritage*, 152 Wn.2d at 214. When the law requires a *Miranda* warning, a defendant’s statements are admissible so long as he or she makes a voluntarily, knowingly, and intelligently waiver. *Miranda*, 384 U.S. at 444. However, this analysis should not be necessary where *Miranda* never attached. Because Mr. Grammont was not “in custody” at the time of the initial questioning, his statements are admissible regardless of his level of his intoxication. *See Ustimenko*, 137 Wn. App at 116. This Court should hold that the statements are admissible and that there is no error.

However, should this Court decide to review the “voluntariness” of Mr. Grammont’s statements, the following analysis may be helpful. *See State v. Reuben*, 62 Wn. App. 620, 624, 814 P.3d 1177 (1991).

A criminal defendant's intoxication alone does not render his or her statement inadmissible.⁷ *State v. Gardner*, 28 Wn. App. 721, 723, 626 P.2d 56 (1981). Despite the fact that Mr. Grammont testified that he was "legally intoxicated," RP (03/06/2008) at 26-27, and his recorded statements revealed that alcohol was consumed prior to the incident, Ex 17 at 16-17 of 25, the trial court ultimately determined that Mr. Grammont's statements were voluntary. RP (03/06/2007) at 36-37. This Court should not set aside the trial court's conclusion if there is substantial evidence to support that the defendant voluntarily made statements to the police. *Gardner*, 28 Wn. App. at 723-24.

Generally, when a *Miranda* warning is required, there are two tests to evaluate the voluntariness of the defendant's statements to law enforcement: (1) the due process test, and (2) the *Miranda* test. *State v. Reuben*, 62 Wn. App. at 624. "Voluntariness" for purposes of the *Miranda* test places a heavy burden on the State to prove that Mr. Grammont was fully advised of his rights, understood them, and knowingly and intelligently waived them. *Reuben*, 62 Wn. App. at 625 (citing *Miranda*, 384 U.S. at 475). However, as argued above this portion of the test is inapplicable because *Miranda* did not attach in the present

⁷ *State v. Gardner*, 28 Wn. App. 721 Wn. App. 721, 626 P.2d 56 (1981) addressed the issue whether the defendant's level of intoxication made the waiver of his *Miranda* rights involuntary.

case: Mr. Grammont was not in custody at the time he answered the initial questions. Because the *Miranda* test is inapplicable, this Court need only apply the “due process test.”

Under the due process test, the appellate courts review “whether the behavior of the State’s law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined.” *Reuben*, 62 Wn. App. at 624 (quoting *State v. Braun*, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973)). In the present case, despite some level of intoxication, there is no evidence of overreaching by the officers who responded to the 911 call. The officers sought Mr. Grammont’s and Ms. Cole’s permission to enter the residence. Ex. 17 at 8. Mr. Grammont invited the officers in to his home. Ex. 17 at 8. The officer’s asked questions to both Mr. Grammont and Ms. Cole to determine the nature of the underlying emergency. See Ex. 17 at 8-19. The officers encouraged Mr. Grammont to seek medical assistance. Ex. 17 at 9. Mr. Grammont engaged in casual conversations about his pets. Ex. 17 at 22. When faced with Mr. Grammont’s belligerent behavior, the officer simply asked that Mr. Grammont keep his voice down and talk calmly. Ex. 17 at 10-11.

Mr. Grammont’s statements were voluntary and were not coerced like the confessions in the cases upon which he cites to support his

argument. See Appellant's Brief at 15-16 (citing *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Gladden v. Unsworth*, 396 F.2d 373 (1968)). This Court should affirm the trial court's finding: "Neither the tone, the demeanor, nor the questions asked nor the circumstances would give right to believe... that [Mr. Grammont] was being interrogated in a manner that would render this statement involuntarily (sic)." RP (03/06/2008) at 36-37.

3.) Even if the trial court erred when it admitted the entire 911 recording, the error was harmless.

Should this Court conclude that the Mr. Grammont was "in custody" when the officers posed their initial questions without the benefit of *Miranda*, this Court should hold that the recorded statements constituted harmless error. To find harmless error with respect to a constitutional right, the appellate courts must find that there is overwhelming evidence that necessarily leads to a guilty verdict. *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009); *State v. France*, 121 Wn. App. 394, 400-01, 88 P.3d 1003 (2004).

In order to convict Mr. Grammont of second degree assault, the State had to prove the following elements of the crime beyond a reasonable doubt: (1) That on or about May 28, 2007, Mr. Grammont

intentionally assaulted Ms. Carroll, (2) that Mr. Grammont recklessly inflicted substantial bodily harm to Ms. Carroll, and (3) that the acts occurred in the State of Washington. RCW 9A.36.021(1)(a); RP (06/11/2008) at 12-13.

“Substantial bodily harm” means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss of impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part. 11 WAPRAC WPIC 2.03.01; RP (06/11/2008) at 13. Blacks Law Dictionary (8th ed., pp. 501) defines “disfigurement” as “[a]n impairment or injury to the appearance of a person or thing.” Webster’s Third New International Dictionary, pp. 649 (1993), defines “disfigurement” as “the act of disfiguring or the state of being disfigured.” “Disfigure” is an act “to make less complete, perfect, or beautiful in appearance or character.” Webster’s, *supra*, at 649. *State v. Atkinson*, 113 Wn. App. 661, 667-68, 54 P.3d 702 (2002).

In the present case, the jury heard extensive testimony regarding the savage assault and its harmful effect on Ms. Carroll. Ms. Carroll and Ms. Cole both testified that Mr. Grammont was the assailant, and that he savagely beat Ms. Carroll on May 28, 2007. RP (06/09/2008) at 33-36, 49, 52, 54-55, 65, 68; RP (06/10/2008) at 55-56, 78, 82. Additionally, the first portion of the 911 call played Ms. Cole’s recorded statements that

identified Mr. Grammont as the individual attacking her daughter, while Mr. Grammont can be heard, in real time, accosting Ms. Carroll. Ex. 17 at 1-8. Dr. Barrett and Dr. Birch testified that Ms. Cole suffered from temporomandibular joint disorder (TMJ), a cracked tooth, and migraine headaches following the attack. RP (06/09/2008) at 75, 77, 80, 83, 86-87, 93-94, 96-97; RP (06/10/2008) at 35-36, 41-42. Mr. Kanters testified that Ms. Carroll suffered extensive contusions and bleeding about her face. 2RP (06/10/2008) at 11, 21-22. Mr. Kanters also testified that Ms. Carroll suffered a concussion as a result of the attack. 2RP (06/10/2008) at 13. This Court should find that the State produced sufficient evidence to prove the elements of second degree assault beyond a reasonable doubt, regardless of the fact that the jury heard the latter portion of the 911 call that captured the police officer's questioning. This Court should find that any error in admitting 911 call in its entirety was harmless error.

B. THE STATE DID NOT COMMIT MISCONDUCT
IN ITS CLOSING ARGUMENT.

In order to establish prosecutorial misconduct, the defendant must prove that the prosecutor's conduct was (1) improper, and (2) that it prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Jackson*, ___ Wn. App. ___, 209 P.3d 553, 557 (2009). A defendant establishes prejudice only if there is a

substantial likelihood that the misconduct affected the jury's verdict. *Dhaliwal*, 150 Wn.2d at 578; *Jackson*, 209 P.3d at 557. This Court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578; *Jackson*, 209 P.3d at 557. If defense counsel fails to object to the prosecutor's statements, reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); *Jackson*, 209 P.3d at 557. Accordingly, reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Mr. Grammont contends that the prosecutor's closing argument was improper in two ways. First, he alleges that the deputy prosecutor voiced her personal opinion that the defendant lacked of credibility, while she affirmed the credibility of the State's witnesses. See Appellant's Brief at 18-19. Second, he claims that the deputy's argument improperly characterized the burden of proof because it allowed the jury to "convict simply by weighing Mr. Grammont's testimony against that

of [Ms.] Cole and [Ms.] Carroll. See Appellant's Brief at 19-20. This Court should find that Mr. Grammont's arguments are unpersuasive.

The excerpts from the record upon which Mr. Grammont relies shows no personal opinion, vouching, or burden shifting. Read in context, the prosecutor's comments demonstrate advocacy and nothing improper. The record shows that the deputy prosecutor properly tied each of her rebuttal arguments to the evidence.

1.) The prosecutor's argument only encouraged the jury to evaluate the differences in the testimony.

Mr. Grammont argues that "the prosecutor expressed her personal opinions about Mr. Grammont's credibility. Specifically, Mr. Grammont claims that she repeatedly called him a liar. RP (6/11/08) 23, 25, 25, 27, 29." See Appellant's Brief at 18. This Court should find that this is an unfair characterization of the record.

The relevant excerpts from the deputy prosecutor's rebuttal argument read as follows:

Officer Wright, when he testified, said the evidence is what the evidence is, and the evidence in this case shows you that someone is lying, because you have two radically different versions of the event. ...

RP (06/11/2008) at 23

The evidence shows that someone is lying. Let's first consider [Mr. Grammont's] statement. He's escorting her to the door and presumably they're side by side. She

manages to dig her fingernails into his arm. He would have to pivot in front of her in order to do this reflexive swat from him to pull her down on top of him the way he described.

Next you have the 9-1-1 tape and you can hear at the beginning of the tape him telling Selma Cole twice when the police were arriving, “Selma, close the door and lock it.” Now, why would he tell Selma, “close the door and lock it,” if he had already closed the door and locked it as he had already testified to?

Next, you have prosecution’s Exhibit No. 7. You can see this kind of a small area, you can see the dirt and you can also see the tracks, the tracks the door made when the officers came in. Now, if he had taken her body and slid it along the surface of the floor, it would have pushed the dirt to the side and you’d see a separate track that her body would have made going through the same marks that the door made when opened. The evidence shows that someone is lying.

You have prosecution’s Exhibit No. 9, which is the blood on the door frame. Again, you have the testimony from the defendant that he slid her along the floor, opened the door, slid her out, closed the door and locked it. If he did that, there would be, first of all, no reason for him to touch the frame while he’s trying to maneuver her out with the door open, and second of all, you can see the injuries – this is prosecution’s Exhibit 6 – are on the outside of his hands. He wouldn’t be leaving bloody prints on the frame. It was Ms. Carroll who left the bloody handprints on the frame as she was trying to escape.

The evidence shows that someone is lying, but the evidence also shows that someone is telling the truth. ...

RP (6/11/2008) at 25-26.

Now, you have the picture taken of Ms. Carroll in the ambulance and you can see that she’s bleeding a lot

around the face. And you also have her testimony that when she was down on the ground being kicked, she managed to kind of maneuver her head into the crook of her arm in order to protect herself, kind of like this.

I'm now showing you prosecution's Exhibit 1, it's her in the ambulance, and I want you to look at the odd patterns of the blood stains. You don't really see any drips going down her neck, but you do see a lot of blood here and then along her sleeve.

Now, if you had maneuvered your face to protect itself in the crook of your arm while being kicked you would expect to bleed on basically the corner, kind of the shoulder of her blouse, and you can see blood stains along her sleeve. Someone was telling the truth, and the stains on her shirt corroborate that. ...

RP (6/11/2008) at 26-27.

Also consider what the credibility of the witness is. You have the defendant who told you that he fabricated another person in the house because he believed that when a man and woman get in a fight, they man goes to jail. And he categorized that as poor judgment. So you have someone who will freely lie in order to avoid getting in trouble, and this is not something that he appeared to have any moral qualms about. In fact, he seemed to feel when he testified that he was perfectly justified in making something up to avoid the consequences of his actions.

This is someone who will lie to avoid trouble.

RP (6/11/2008) at 29

In order for a deputy's argument to rise to the level of reversible prosecutorial misconduct, it must be clear and unmistakable that a prosecutor is expressing his or her personal opinion. In the present case, the deputy prosecutor stated "the evidence shows that someone is lying,

but the evidence also shows that someone is telling the truth.” RP (6/11/2008) at 25-26. See also RP (06/11/2008) 23, 26-27. This is not an explicit declaration that Mr. Grammont is lying. Rather, it called the jury’s attention to the fact that only one version of the events was accurate. The deputy prosecutor left it to the jury to decide which version was the accurate account. While the deputy prosecutor did say “this is someone who will lie to avoid trouble,” RP (6/11/2008) at 29, the deputy’s argument was supported by Grammont’s own testimony. At trial, Mr. Grammont, himself, admitted that he was willing to lie to avoid going to jail. RP (6/10/2008) at 36, 39, 41.

The deputy prosecutor correctly noted that the testimony of Mr. Grammont, Ms. Carroll, and Ms. Cole relayed vastly different accounts of what transpired on May 28, 2007. RP (06/11/2008) at 21-22, 23-30. The prosecutor correctly told the jury that it was their task to determine credibility. See RP (06/11/2008) at 29. The prosecutor went on to explain how the evidence supported the State’s testimony, how the evidence did not support the defendant’s version of events, and urged the jury to consider all of the testimony in determining credibility. See RP (06/11/2008) 21-22, 23-29. This was not improper. More importantly, it is not the same as baldly stating that the defendant lied. A deputy prosecutor enjoys reasonable latitude in arguing inferences from the

evidence, including inference as to witness credibility. *Fisher*, 165 Wn.2d at 747; *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006); *Dhaliwal*, 150 Wn.2d at 578. Additionally, it is not misconduct when the deputy prosecutor argues that the evidence does not support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

However, should this Court find that the deputy prosecutor's comments were improper, they were not so egregious that a jury instruction, if one had been requested, would have been futile. *Compare Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996) (It is flagrant misconduct to shift the burden of proof to the defendant by arguing that in order to acquit, the jury must find that the State's witnesses were lying.), with *Fiallo-Lopez*, 78 Wn. App. 717, 731, 899 P.2d 1294 (1995) (Comments on a witness' veracity are proper in closing argument if they do not state a personal opinion and do not shift the burden of proof, but rather argue that the evidence supports the finding.) and *State v. Stover*, 67 Wn. App. 228, 232, 834 P.2d 671 (1992) (Any impropriety in comments that a witness "lied" could have been cured by a jury instruction.).

Here, the deputy prosecutor tied her arguments to the evidence. Additionally, Mr. Grammont never sought a curative instruction. This Court should find that the deputy's rebuttal arguments did not constitute

prosecutorial misconduct or, in the alternative, rise to the level of reversible error.

2.) The State did not shift the burden of proof to the Defendant.

Mr. Grammont argues that deputy prosecutor's rebuttal argument implied that the jury could convict the defendant "simply by weighing the conflicting testimony and decide who told the truth." See Appellant's Brief at 20. This Court should find that this claim is without merit.

The State has the burden of proving every element of the crime charged beyond a reasonable doubt. *State v. Fisher*, 165 Wn.2d 727, 753, 202 P.3d 937 (2009) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). The appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75 (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). Additionally, the appellate courts presume that juries follow all instructions that the trial court gives to them. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001); *State v. Keend*, 140 Wn. App. 858, 166 P.3d 1268 (2007).

In the present case, the trial court properly instructed the jury as follows:

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that [the court has] admitted during the trial. ...

RP (6/11/2008) at 7 (Instruction No. 1).

[The jury is] the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember the lawyer's statements are not evidence. The evidence is the testimony and the exhibits and the law as contained in my instructions to you. You must disregard any remarks, statement or argument that is not supported by the evidence or the law and my instructions. ...

RP (6/11/2008) at 7-8 (Instruction No. 1).

The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

RP (6/11/2008) at 10-11 (Instruction No. 3).

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about the 28th day of may, 2007, the defendant intentionally assaulted Linda Carroll; (2) that the defendant thereby recklessly inflicted substantial bodily harm on Linda Carroll; and (3) that this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

RP (6/11/2008) at 12-13 (Instruction No.7)

In the present case, the trial court properly informed the jury that the State had the burden of proof, to prove beyond a reasonable doubt, each element of the crime of second degree assault. RP (06/11/2008) at 10-11, 12-13 (Instructions 3, 7). As argued above, the deputy prosecuting attorney did not make improper rebuttal arguments, or arguments that could not have been corrected by a curative instruction (*i.e.*, to disregard statements or arguments that are not supported by the evidence). This Court should find that the State did not shift or mischaracterize the burden of proof. There is no reversible error.

Mr. Grammont relies on *State v. Fleming*, 83 Wn. App. at 213, to support his claim that the deputy prosecutor's rebuttal arguments shifted the burden of proof. In *Fleming*, the prosecutor argued that the jury could only acquit the defendants if they found that the State's witness lied or

was confused. *Id.* at 213-14. Division I found that this argument was improper because it misstated the law, which required the jury to acquit unless it had an abiding belief in the truth of the State's witness's testimony. *Id.* Additionally, Division I found that this misstatement of the law shifted the burden of proof at trial because it required the defendants, who exercised their right not to testify, to present evidence and disprove the State's case. *Id.* at 214.

In the present case, the trial court properly instructed the jury on the law – that the State had the burden to prove each element of second degree assault beyond a reasonable doubt. RP (06/11/2008) at 10-13 (Instruction No. 3 and 7). The deputy prosecutor did not make any misstatements of law similar to that which occurred in *Fleming*. See 83 Wn. App. at 213-14. And the prosecutor certainly did not suggest that the jury could use a preponderance of the evidence standard and merely weigh the testimony of the witnesses against one another.

As argued above, the deputy prosecutor tied her arguments to the evidence and its reasonable inferences. She allowed the jury to evaluate the credibility of the witnesses. Furthermore, the deputy presented sufficient evidence to prove each element of the crime beyond a reasonable doubt. This Court should find that prosecutor's arguments did not shift the burden of proof. There is no reversible error.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Grammont claims that his trial counsel was ineffective when he failed to object to the alleged instances of misconduct in the deputy prosecutor's rebuttal argument. See Appellant's Brief at 22-23. Mr. Grammont notes that his attorney objected twice during the deputy prosecutor's closing arguments, RP (6/11/2008) at 26, 29, but appears to argue that his attorney should have made additional objections (even though the trial court overruled said objections) or request a bench conference. See Appellant's Brief at 23. As argued above, the State did not commit prosecutorial misconduct. Thus, this Court should find that Mr. Grammont's claim fails.

The federal and state constitutions guarantee criminal defendants effective assistance of counsel. U.S. Const. amend VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). To show ineffective assistance of counsel, the defendant must prove both (1) that his attorney's performance was deficient, and (2) that this deficiency prejudiced him. *Strickland*, 466 U.S. at 687; *Hicks*, 163 Wn.2d at 486. Washington's appellate courts review ineffective assistance of counsel claims *de novo*. *In re Fleming*, 142 Wn.2d 853,

865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006).

To establish deficient performance, the defendant must demonstrate that the representation he received fell below an objective standard of reasonableness. *Hicks*, 163 Wn.2d at 486 (citing *State v. Townsend*, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001)). However, appellate courts review ineffective assistance claims with a strong presumption that defense counsel was competent. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). To satisfy the prejudice prong of an ineffective assistance of counsel claim, the defendant must show that, but for counsel's deficient performance, there is a "reasonable probability" that the outcome would have been different. *Hicks*, 163 Wn.2d at 486 (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)).

Mr. Grammont cannot satisfy either prong of an ineffective assistance of counsel claim. As explained above, the deputy prosecuting attorney's rebuttal arguments were proper. Thus, trial counsel was not deficient, nor was the defense prejudiced, when he did not object to each instance when the State drew a reasonable inference from the evidence and argued that it did not support defense counsel's theory of the case. Furthermore, Mr. Grammont fails to articulate how his attorney's failure

to protest every instance of alleged misconduct, or to request a bench trial, fell below an objective standard of reasonableness and prejudiced the defense after the trial court had already overruled two earlier objections. Accordingly, this Court should find that Mr. Grammont's ineffective assistance of counsel claim fails.

D. THE STATE CONCEDES THE TRIAL COURT
ERRED WHEN IT REQUIRED A MENTAL
HEALTH EVALUATION.

Washington's appellate courts generally review the imposition of a crime-related condition for abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). A trial court abuses its discretion if its exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007) (quoting *State ex re. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A decision rests on untenable grounds if it is based on facts that are unsupported in the record, or if the trial court applied the wrong legal standard. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

Former RCW 9.94A.505(9)⁸ authorized a trial court to order a mental health evaluation as a condition of community custody when

⁸ RCW 9.94A.505(9) was amended pursuant to Laws of Washington 2008 c. 231 § 25, effective August 1, 2009.

specific procedures are followed. Under the former statute, a trial court erred when it imposed a mental health treatment as a condition of community custody where (1) it has not obtained or considered a pre-sentence report or mental status evaluation, and (2) it has not made findings that the defendant was a person whose mental illness contributed to his crimes. *State v. Jones*, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). Here, the record does not satisfy these requirements.

In the present case, the State requested that trial court order Mr. Grammont to undergo a mental health evaluation and comply with any recommended treatment. RP (06/24/2008) at 6. The trial court found the condition was appropriate without finding that a mental illness contributed to the crime charged.

The State concedes that there is nothing in the record to show that the trial court obtained or considered a pre-sentence report. Nor did the trial court make a finding that Mr. Grammont suffered from a mental illness that contributed to the crime he committed. This Court should strike the condition that requires Mr. Grammont to undergo a psychological or mental health evaluation.

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E. THE RESTITUTION ORDER DID NOT VIOLATE
THE DEFENDANT’S DUE PROCESS RIGHTS.

Washington’s appellate courts review a trial court’s restitution order for an abuse of discretion. *State v. Morse*, 45 Wn. App. 197, 199, 723 P.2d 1209 (1986). The trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The application of an incorrect legal analysis or other error of law constitutes an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

The trial court’s authority to order restitution is derived from statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). RCW 9.94A.753(3) states, in relevant part, that restitution via court order “shall be based on easily ascertainable damages for ... actual expenses incurred for treatment for injury to persons.” Under RCW 9.94A.753(5), the trial court “shall” order restitution whenever an offender is convicted of an offense that results in injury to another, unless it finds that restitution is inappropriate under extraordinary circumstances set forth in the record. Additionally, RCW 9.94A.753(7) mandates that a victim receive restitution if entitled under the Crime Victims Compensation Act (CVCA).

If the trial court does not order restitution and the victim has been determined to be entitled to CVCA benefits, the Department of Labor and Industries (L & I) “may petition the court within one year of entry of the judgment and sentence for entry of a restitution order ... [and][u]pon receipt of [such] petition ... the court shall hold a restitution hearing and shall enter a restitution order.” RCW 9.94A.753(7). The CVCA’s purpose is to advance the “compelling state interests in compensating the victims of crime and in preventing criminals from profiting from their crimes.” RCW 7.68.300.

Although RCW 9.94A.753(7) mandates an order of restitution under the CVCA, the trial court has discretion to determine the amount of restitution. *State v. Mark*, 36 Wn. App. 428, 433, 675 P.2d 1250 (1984). The trial court must have an evidentiary basis for a restitution order. *State v. Pollard*, 66 Wn. App. 779, 784, 834 P.2d 51 (1992).

The Rules of Evidence do not apply at restitution hearings, but the evidence before the trial court must be sufficient to support the ultimate order. *Pollard*, 66 Wn. App. at 784. Evidence supporting restitution is sufficient “if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *Mark*, 36 Wn. App. at 434. A criminal defendant is entitled to due process protections under both the federal and stated constitutions. *See*

State v. Grenning, 142 Wn. App. 518, 530, 174 P.3d 706 (2008). Thus, the evidence presented at a restitution hearing must meet due process requirements: that it is reliable and offers the defendant an opportunity to refute it. *See Pollard*, 66 Wn. App. at 784-85.

Here, the State presented an itemize report of the sums that Crime Victims Compensation Fund (CVCF) paid for Ms. Carroll. RP (10/23/2008) at 17. The State provided the same report to defense counsel two months before the restitution hearing. RP (10/23/2008) at 7. The State called Ms. Carroll to testify regarding additional amounts that CVCF did not pay. RP (10/23/2008) at 12-17. However, defense counsel correctly noted that Ms. Carroll could also testify regarding the amounts itemized on the CVCF report:

My client was seeking to just have a little more clarification on [some of the items in the CVCF report]. But we also know the Court can be satisfied with testimony from a victim reporting that such services were needed and required for purposes of her losses or damages in this matter.

RP (10/23/2008) at 9. Defense counsel thoroughly examined Ms. Carroll regarding every itemization that Mr. Grammont questioned and identified in his “Motion For More Definite Statement Re: Restitution Claim.” RP (10/23/2008) at 18-25; CP 36. Ms. Carroll addressed each of defense counsel’s concerns, explaining that each visit was necessary as a

result of the attack she suffered from Mr. Grammont. *See* RP (10/23/2008) at 19-24.

Defense counsel never submitted evidence to challenge Ms. Carroll's testimony at the restitution hearing. *See* RP (10/23/2008) at 25. Thus, Ms. Carroll apparently satisfied defense counsel's concerns, except for the one item pertaining to services rendered by a Mr. Niemeyer. Defense counsel stated the following on the record:

[The] Court certainly is aware that documents have been submitted to the Washington State Crime Victim's Compensation Fund in Olympia and the agency has compensated those. But I certainly ask the Court to take note of the fact that for instance when queried about a visit to Dr. Niemeyer on May 15, 2008, Ms. Carroll could not recall that. ... [W]hen Ms. Carroll can not remember the likes of Mr. Niemeyer, which is on the second page of the Crime Victim's Compensation Fund, I think that calls in to question that request at least, and the Court I would respectfully request make such adjustment and otherwise use its experience to make a fair decision in this matter.

RP (10/23/2008) at 26-28. The trial court ordered Mr. Grammont to pay restitution, reasoning:

[I]n light of the nature of the testimony at trial, I'm somewhat surprised that the restitution sought is as low as it is. I would have expected it to be higher. ... These bills I think are easily ascertainable. I have no problem in believing that they are directly related to the injury event which occurred. So I'm going to impose the requested restitution of \$349.42 to Ms. Carroll, and the reimbursement to the State Crime Victim's of \$10,182.92.

RP (10/23/2008) at 29. Implicit in the court's reasoning was its agreement with the State's argument: "As the Court can see from the [itemized report] and from Ms. Carroll's testimony, these are not unreasonable expenses, that they were all associated with her injuries and recovery." RP (10/23/2008) at 26.

The State introduced sufficient evidence of causation, beyond the CVCF itemized report. Mr. Grammont had an opportunity to rebut the reliability of the itemized report when his attorney cross examined Ms. Carroll about the services for which CVCF paid. RP (10/23/2008) at 19-24. The trial court's restitution order was a reasoned decision in light of the testimony at trial, the testimony at the restitution hearing, and the reliable itemized report. See RP (10/23/2008) at 29. This Court should find that the trial court did not abuse its discretion, and that Mr. Grammont was afforded all of his due process rights at the restitution hearing. *See Pollard*, 66 Wn. App. at 784-85.

Mr. Grammont relies on *State v. Bunner*, 86 Wn. App. 158, 936 P.2d 419 (1997), to support his claim that the trial court erred when it imposed restitution. In *Bunner*, the defendant challenged the State's proof on a claim paid by the Department of Social and Health Services (DSHS). There, the State only provided the court with a DSHS medical recovery report, which itemized the amounts that the State paid for the

victim's medical treatment. *Bunner*, 86 Wn. App. at 159. The trial court relied solely on the fact that DSHS had already made a determination to pay benefits as sufficient proof. *Id.* Division I determined that the inference that DSHS would not have paid the medical bills if not related to the crimes was insufficient evidence. *Id.* at 60. Thus, the restitution order violated the defendant's due process rights. *Id.* Important to the court's decision was that the trial court admitted that it had "no idea" how the document by itself proved that the medical services were provided or how the costs incurred were connected to the crime. *Id.*

State v. Bunner can be distinguished. It is true that the trial court, in the present case, highlighted the fact that the State "zealously" guards the CVCF and does not reimburse victims unless it is satisfied that there is a causal connection between the victim's injury and the defendant's criminal acts. See RP (10/23/2008) at 10, 29. And, it is true that the trial court stated that (1) it relies on CVCF to make the right determination, and (2) it believes it is "pretty much bound" by CVCF's determination unless there is evidence that the determination is incorrect. See RP (10/23/2008) at 10. However, unlike *Bunner*, the record shows that the trial court considered more than the CVCF itemized report. See RP (10/23/2008) at 29. The trial court also considered the testimony at trial, and Ms. Carroll's testimony at the restitution hear to satisfy the

necessary link between the CVCF compensated services and the charged crime. *See* RP (10/23/2008) at 19-24, 29. Additionally, in *Bunner*, the trial court had “no idea” how the document supported the restitution reward requested by the State. In the present case, the trial court stated the bills are “easily ascertainable” and “directly related to the injury” that occurred. RP (10/23/2008) at 29. The present case is factually dissimilar to *Bunner*. This Court should hold that the trial court did not abuse its discretion, and that Mr. Grammont’s due process rights were not violated. There is no error.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm Mr. Grammont’s conviction and restitution order. The State concedes that it did not present sufficient evidence to justify the condition that Mr. Grammont undergo a mental health evaluation and abide by any treatment recommendations. Thus, the State joins Mr. Grammont’s requests that this Court strike the condition pertaining to the mental health evaluation.

DATED this 10th day of AUGUST, 2009.



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