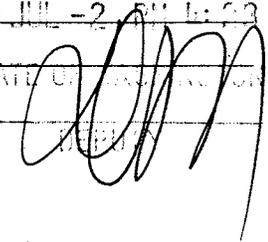


NO. 38042-1

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN THOMAS. SKUZA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper, the Honorable Sergio Armijo
and the Honorable Bryan Tollefson

No. 07-1-04206-9

BRIEF OF RESPONDENT

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

1. Were defendant's rights against self incrimination violated when the prosecutor was discussing defendant's refusal to cooperate with a police officer?
2. Did the prosecutor commit misconduct when he argued a theme based on facts presented at trial?
3. Did the trial court properly sentence defendant for third degree assault when the judgment and sentence expressly state the term of confinement should not exceed the statutory maximum?

B. STATEMENT OF THE CASE.

1. Procedure

On April 28, 2008, the Pierce County Prosecutor's Office charged STEVEN THOMAS SKUZA, hereinafter "defendant," by an amended information with one count of assault in the third degree (count one), one count of assault in the fourth degree (count two), one count of driving while in suspended or revoked status in the first degree (count three), and one count of bail jumping (count four). CP 12-13.

The case proceeded to trial on June 18, 2008, before the Honorable Brian Tollefson. RP 1. The jury found defendant guilty of all charges. CP 76-79; RP 400. As to counts one and four, defendant was sentenced to

a total of 57 months of confinement, to be followed by 9 to 18 months of community custody. CP 84-96; RP 416. As to counts two and three, defendant was given a suspended sentence of 365 days in confinement with credit for 52 days served. CP 99-103; RP 416.

2. Facts relevant to appeal

On August 9, 2007, Defendant and Shelia Anson were driving home together from a narcotics anonymous (NA) meeting. RP 82. Defendant was angry that Ms. Anson refused to read a saying at the NA meeting and so they left the meeting early. RP 83-84. Defendant was driving their mini van while Ms. Anson sat in the passenger seat. RP 83, 85.

Because Ms. Anson refused to talk to defendant, he became very angry. RP 86. Defendant punched Ms. Anson with a closed fist on the side of her face. RP 87. Ms. Anson tried to block her face as defendant hit her multiple times on her face and behind her ear. RP 87. Between punches, defendant yelled phrases like “you’re just like Jill, prostitute” which made no sense to Ms. Anson. RP 88. Defendant hit Ms. Anson approximately 15 to 20 times. RP 88.

As this was occurring, Monte Edenfield was driving his Dodge Durango on his way home from his sister’s house. RP 158. As he slowed down to go over a set of railroad tracks, he was facing the defendant’s mini van which was at the opposite end of the intersection. RP 161.

Through the clear windshield, the inside of defendant's van was illuminated by the sun entering through a sky light as it was around 7:30 pm. RP 163-64. Mr. Edenfield saw defendant hit Ms. Anson in the face with a closed fist. RP 164, 166. He testified that prior to getting hit by defendant, Ms. Anson had been sitting still in the passenger seat. RP 165. Mr. Edenfield saw defendant hit Ms. Anson two to three more times as Ms. Anson slumped over in the passenger seat. RP 165.

Mr. Edenfield testified that after he passed defendant's mini van, he pulled into a grocery store and turned his car around to get back on the road and follow defendant in his mini van. RP 167. As he followed defendant's mini van, it continually jerked right five to six times. RP 167-68. Mr. Edenfield could see through the back window that defendant continued to strike Ms. Anson. RP 167. Defendant's mini van has tinted back windows. RP 111.

When he saw the car behind them, defendant said "now look what you did" to Ms. Anson and he hit her again. RP 88. When defendant turned left, Mr. Edenfield believed defendant was trying to elude him. RP 168-69. Defendant continued to make more turns as Mr. Edenfield followed him. RP 169.

Eventually, defendant did an illegal u-turn so he and Mr. Edenfield were facing each other with the driver's sides of each vehicle next to one another. RP 169. Mr. Edenfield told defendant he was calling the police and dialed 911 on his cell phone. RP 170. Mr. Edenfield testified that in

response, defendant made an obscene gesture with his middle finger. RP 170. Mr. Edenfield turned around and continued to follow defendant while relaying their location to 911. RP 170. After Mr. Edenfield had given the 911 operator defendant's license plate, she told him to stop following defendant, which he did. RP 171.

Defendant drove to his father's home in Lakewood. RP 90. He got out of the van and started pacing on the lawn. RP 90. As he returned to the van, Officer Brian Weekes arrived. RP 90. Defendant continued to get into the driver's seat of the van. RP 91.

Officer Weekes was dispatched to the scene in response to a domestic violence assault in a vehicle that was reported. RP 208. Officer Weekes activated his emergency lights and pulled in behind defendant's mini van as it began backing out of the driveway. RP 211. Defendant's van was parked to the right of another vehicle so there was a small gap in between the two cars. RP 211-12, 228. Officer Weekes approached the van and asked defendant for his driver's license. RP 91, 212. He saw Ms. Anson in the passenger seat. RP 214. She was shaking, crying and appeared to be very scared. RP 214. Ms. Anson testified she was crying in the passenger seat of the van because the side of her face and ear hurt. RP 92. Ms. Anson also testified that Officer Weekes had an attitude while talking with defendant. RP 113.

Officer Weekes testified that defendant asked him why he was there. RP 215. Defendant said he had done nothing wrong. RP 215.

Officer Weekes said defendant appeared very upset. RP 215. In response to Officer Weekes request for defendant's driver's license, defendant stated he did not have one and that Officer Weekes had no right to stop him. RP 215-16. Officer Weekes ordered defendant out of the van. RP 217. Defendant responded that he did not have to get out of the vehicle. RP 217. When Officer Weekes ordered him out again, defendant reached under the passenger seat. RP 217. Officer Weekes told defendant to get his hands out from underneath the seat. RP 218. Defendant ignored Officer Weekes' request. RP 218.

Officer Weekes gave defendant multiple commands to get out of the vehicle. RP 217-18. Defendant refused to comply. RP 217-18. Officer Weekes grabbed defendant's left arm through the driver's window that was down. RP 217-19. Because defendant continued to resist, Officer Weekes called for priority backup on his radio. RP 220. Officer Weekes testified that he was eventually able to get defendant out of the van. RP 220. Ms. Anson testified that defendant cooperated and got out of the van. RP 92. She said that as defendant got out, the door hit Officer Weekes which made him angry. RP 92.

Once outside of the vehicle, defendant continued to resist Officer Weekes' orders to get on the ground. RP 220-21. Officer Weekes testified that there was enough room between the van and the other vehicle for defendant to get on the ground. RP 221. Officer Weekes said that defendant continually pounded his body between Officer Weekes and the

cars. RP 222. Defendant pushed Officer Weeks in the chest multiple times. RP 223. Defendant eventually complied with Officer Weekes commands to get on the ground after Officer Weekes pulled out his pepper spray and threatened to use it. RP 223.

Officer Weekes placed defendant in handcuffs. RP 223-24. Defendant's father came out of the house and began yelling at Officer Weekes as other officers arrived. RP 224. The other officers calmed defendant's father down. RP 224. Officer Weekes placed defendant in the back of his patrol car and went to talk to Ms. Anson. RP 225.

When Ms. Anson was first contacted by the police, she refused to answer questions. RP 93. Officer Weekes stated that Ms. Anson had obvious bruising and swelling on the left side of her face. RP 225. He was able to feel two large hematomas on the back of Ms. Anson's head. RP 225-26. Ms. Anson refused medical aid, refused to allow officers to photograph her injuries and refused to make a written statement. RP 227.

Lucas Sarysz testified at trial that he was doing a ride a long with Officer Weekes on the day of the incident. RP 184. While Officer Weekes responded to the call regarding defendant, Mr. Sarysz sat in the patrol car to observe. RP 186. Mr. Sarysz testified that the windows of defendant's mini van were tinted but he could see movement through them. RP 196-97. Mr. Sarysz watched as Officer Weekes approached the driver's side of defendant's mini van. RP 187. He testified that Officer Weekes did not seem upset. RP 201. Mr. Sarysz heard Officer Weekes

ask defendant for his driver's license. RP 188. He then heard Officer Weekes ask defendant two or three times to get out of the vehicle. RP 190.

Mr. Sarysz testified that he got out of the patrol car and stood in the street. RP 188. He watched as a struggle began between Officer Weekes and defendant. RP 188. Mr. Sarysz saw Officer Weekes open the driver's side door of the mini van and start to pull defendant out of the vehicle. RP 190. Officer Weekes had defendant in a headlock and was trying to get him on the ground. RP 191-92. Mr. Sarysz testified that he believed defendant was trying to cooperate, but because defendant and Officer Weekes were between two cars, it was difficult. RP 192, 194. Mr. Sarysz saw defendant throw a swing at Officer Weekes and miss. RP 199-200. After 15-20 seconds, defendant got on the ground and Officer Weekes handcuffed him. RP 192.

Defendant testified at trial that on the way home from the NA meeting, Ms. Anson hit him above his eye twice. RP 263. Defendant admitted he hit her back. RP 264. Defendant testified that his windows are tinted so that one cannot see inside his mini van. RP 266. Defendant said that he never crossed any railroad tracks on his way home and had taken a different route than what Mr. Edenfield described. RP 268. Defendant testified that he never made any motions like reaching underneath his seat when Officer Weekes was at his door talking to him.

RP 269. Defendant admitted he had been driving without a license. RP 298.

Regarding the bail jumping, defendant admitted during trial that he knew he had a court date on August 30, 2007, and missed his court date. RP 275. He testified that he believed the date was regarding his electronic home monitoring system and he was not required to come into court. RP 275. Instead, he thought he only had to call the court. RP 275.

During trial, it was brought to the court's attention outside the presence of the jury that defendant had violated one of his conditions of release by coming into contact with the victim in the case, Ms. Anson. RP 43. Detective Kevin Johnson from the Pierce County Sheriff's Domestic Violence Unit testified that Ms. Anson had come to his office to report that defendant had contacted her outside the courthouse the day before. RP 48-50.

Ms. Anson told Detective Johnson that defendant wanted her to tell the court when she testified that he was not driving during the incident. RP 50. Ms. Anson said she responded to defendant that she was going to tell the truth. RP 50. Detective Johnson testified that Ms. Anson said defendant told her that "he kicked her ass" because he said she was lying. RP 50. While crying, Ms. Anson also told Detective Johnson that there was more but she did not want to get defendant in trouble. RP 51. She told Detective Johnson that the bruises on her arm were from defendant

assaulting her the previous week. RP 51. Ms. Anson said she had been living with defendant since the driving incident occurred. RP 53.

Defendant testified that he had not initiated contact with Ms. Anson. RP 59. He said that Ms. Anson had yelled at him across the parking lot. RP 59. Defendant testified that Ms. Anson has tried numerous times to make contact with him. RP 59. The court found that defendant had violated his conditions upon release and ordered defendant to be taken into custody at the end of the day. RP 65.

During the trial, the prosecutor called Ms. Anson to testify that defendant had tried to get her to say things during her testimony that were untrue. RP 90-107. Defendant's objection was overruled.

The court later made a record outside the presence of the jury that the judge had witnessed defendant speaking with a bail bondsman, another witness in the trial. RP 307. The court said he distinctly heard the bail bondsman say "well, I am going to testify to this and that, to the defendant." RP 307. Because of this incident, over defendant's objection, the court precluded the bail bondsman from testifying as a witness. RP 310-11.

During the testimony of defendant's father, Robert Skuza, the prosecutor asked him the last time he had spoken to defendant. RP 326. Robert Skuza testified that defendant had called him on the phone that day and they spoke prior to him coming to court. RP 326. The prosecutor asked if Robert Skuza was aware that defendant should not be talking with

witnesses. RP 326. Robert Skuza said no. RP 326. Robert Skuza denied discussing anything about his future testimony with defendant. RP 327.

C. ARGUMENT.

1. DEFENDANT’S RIGHTS AGAINST SELF
INCRIMINATION WERE NOT VIOLATED.

The Fifth Amendment provides, in the relevant part, that “no person shall ... be compelled in any criminal case to be a witness against himself.” In 1964, the Supreme Court made the Fifth Amendment applicable to the States via the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964), overruling *Twining v. New Jersey*, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97, (1908). At the core of this constitutional right is the guarantee that the State may not force an accused to take the stand in his criminal trial and, through questioning, force him to provide evidence with which the prosecution may prove its case against him. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990)(“The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants”); *see also, Chavez v. Martinez*, 538 U.S. 760, 766, 123 S. Ct. 1994, 155 L.Ed.2d 984 (2003)(a person who was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case cannot claim a violation of the Fifth Amendment). The Supreme Court has also determined that the Fifth

Amendment also prohibits comment on the defendant's silence when he exercises his right and does not testify on his own behalf. *Griffin v. California*, 380 U.S. 609, 614, 89 S. Ct. 1229, 14 L.Ed.2d 106 (1965).

Courts generally treat a comment on defendant's post-arrest silence as a violation of a defendant's right to due process. *State v. Easter*, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996). Such a claim of manifest constitutional error can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). The State violates a defendant's Fifth and Fourteenth Amendment rights by introducing evidence of his exercise of *Miranda* rights as substantive of guilt or to suggest to the jury that the silence was an admission of guilt. *State v. Curtis*, 110 Wn. App. 6, 12, 37 P.3d 1274 (2002); *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). But, the Supreme Court has held that an officer's indirect reference to the defendant's silence is not an error absent further comment inferring guilt. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (citing *State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996)).

In the present case, the following exchange took place while the defense attorney was cross examining Officer Weekes:

DEFENSE COUNSEL: Now, at any time do you recall
[defendant] telling you that she hit
him; that he had marks on his face?
Did you notice those?

OFFICER WEEKES: No.

DEFENSE COUNSEL: Okay. You don't recall him telling you anything about that?

OFFICER WEEKES: No. **After I Mirandized him, he refused to answer any questions.**

DEFENSE COUNSEL: Now, when you said you punched him in the chest, how hard are we talking about here?

RP 238 (emphasis added).

Defense counsel, not the State, elicited the reference to defendant's silence. Officer Weekes' statement was an answer to a question posed by defense counsel. Therefore, Officer Weekes' response was not improper.

It was not the State that introduced this evidence, but rather defense counsel while cross examining Officer Weekes. As such, there was no effort on the part of the State to introduce testimony inferring defendant's guilt. This is unlike most courts that have generally held it is an error for the State to introduce such evidence of defendant's silence. *See Curtis*, 110 Wn. App. at 12; *Lewis*, 130 Wn.2d at 707. Furthermore, defense counsel chose not to move to strike the response after it was made. Instead, he continued his line of questioning.

When put in context, Officer Weekes' statement is an indirect reference to the defendant's silence, not a comment inferring guilt of the defendant. In *Lewis*, the Washington State Supreme Court cited a Wyoming case, *Tortolito v. State*, 901 P.2d 387, 390 (Wyo.1995), which held that a mere reference to silence which is not a "comment" on the

silence is not reversible error absent a showing of prejudice. *Lewis*, 130 Wn.2d at 706-07. The court defined a comment on an accused's silence as being when it is "used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *Lewis*, 130 Wn.2d at 707.

Officer Weekes' statement was not a comment on defendant's guilt. Rather, the statement was a response to two questions asked by defense counsel. Defense counsel asked Officer Weekes twice if he recalled defendant making the specific statement that the victim hit defendant. Whether Officer Weekes "recalled" implied that the statement was made, but that Officer Weekes did not remember it. Officer Weekes' response makes clear that no statement was made and explains why.

Nothing within the statement was meant for the jury to infer guilt; it simply referenced the fact that defendant did not make any other statements about his injuries to Officer Weeks after he was *Mirandized*. It was neither used by the State as substantive evidence of guilt, nor was it used to suggest to the jury that such silence was an admission of guilt. Without those components, Officer Weeke's statement cannot be described as a comment on defendant's guilt.

Instead, the comment can be described as a mere reference to defendant's silence as described in *Lewis*. 130 Wn.2d at 706-07. In *Lewis*, the court noted that most jurors know that an accused has a right to remain silent, and absent a statement to the contrary by the State, would probably

fail to derive an implication of guilt from defendant's silence. *Lewis*, 130 Wn.2d at 706.

Defendant's refusal to answer questions after being notified he had the right to an attorney is also similar to the situation in *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999), which is cited in the *Romero* opinion. The Supreme Court in *Sweet* held "no reversible error existed when an officer testified the defendant said he would be willing to take a polygraph examination after he had discussed the matter with his attorney." *Romero*, 113 Wn. App. at 788. (citing *State v. Sweet*, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999)). Similarly, Officer Weekes' statement about defendant's refusing to answer questions after having been *Mirandized* is "nothing more than a reference to silence" as the officer's testimony in *Sweet* was characterized as. *Romero*, 113 Wn. App. at 788.

Defendant's silence in the present case is distinguishable from cases where courts have found statements to be inferences of the defendant's guilt. In *State v. Easter*, an officer testified that the defendant "totally ignored" him and looked down, refusing to answer questions when asked by the officer what had happened. *State v. Easter*, 130 Wn.2d 228, 232, 922 P.2d 1285 (1996). The officer also testified that he "felt at the time that the defendant was being smart drunk" explaining that he felt the defendant was "trying to hide or cloak" his intoxication by avoiding

the officer. *Easter*, 130 Wn.2d at 233. The *Easter* court held that:

Officer Fitzgerald's testimony that [the defendant] was evasive in response to pre-arrest questioning and was a "smart drunk" was elicited to insinuate Easter's guilt, and was in violation of the trial court's pretrial order excluding such commentary. This testimony embodied Officer Fitzgerald's *opinion* [the defendant] was hiding his guilt. As such, it was impermissible.

Easter, 130 Wn.2d at 242 (emphasis included).

Although the officer described defendant's silence pre-*Miranda*, the inference of guilt is clearly emphasized. The officer not only made a comment about defendant's silence, but went on to describe to the court that why he believed the defendant's silence was indicative of the defendant's guilt. This differs from Officer Weekes' statement which was made to clarify the silence of the defendant. Officer Weekes' statement about defendant's silence was in response to a question about defendant not having said anything else about his injuries to the Officer. Officer Weekes did not use the statement to infer defendant's guilt, nor did he go on to explain that he believed the defendant's silence meant he was guilty as occurred in *Easter*. Therefore, the two cases are distinguishable.

The current case before the court is also distinguishable from *State v. Romero* for similar reasons. In *Romero*, a sergeant was testifying as to what occurred when he arrested the defendant, and the following exchange took place:

PROSECUTOR: Okay. And what happened there?

SERGEANT: I brought him into the station and put him in the holding cell, he was somewhat uncooperative

DEFENSE COUNSEL: Your Honor, I would object, I previously objected to that.

THE COURT: Just respond to the question, sir, please

SERGEANT: Okay, we put him into the holding cell, I read him his Miranda warnings, which he chose not to waive, would not talk to me.

Romero, 113 Wn. App. at 785.

The court held that “the testimony surrounding [the defendant’s] silence served no probative purpose other than to infer that his silence and lack of cooperation ‘was more consistent with guilt than with innocence.’” **Romero**, 113 Wn. App. at 785. (quoting **State v. Curtis**, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002)).

Unlike in **Romero**, the statement by Officer Weekes in the present case was elicited by defense counsel. It was made to inform the court that the defendant made no other statements concerning his injuries or account of what happened after he was **Mirandized**. It was not made in the context to infer guilt based on defendant’s silence, but rather explain why the witness knew the fact that the defendant made no further statements to the officer concerning the incident. Officer Weekes attached no negative

connotation about defendant being uncooperative, hiding or manipulating his story. Rather, Officer Weekes simply states that defendant refused to answer any more questions about the matter.

The present case is similar to *Lewis* and *Sweet* and distinguishable from *Romero* and *Easter*. Officer Weekes' statement did not infer guilt or an admission of guilt on the part of the defendant. The statement can be characterized as simply a reference to defendant's silence in not answering more questions regarding the nature of his injuries. As such, defendant's Fifth Amendment rights against self-incrimination were not violated and reversal is not required.

- a. Defendant received effective assistance of counsel.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 80 L.Ed.2d 657, 104 S. Ct. 2045 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and

prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S. Ct. 2574, 2582 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to

claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a 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*, 488 U.S. 948 (1988). 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 defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v.***

McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant in the present case contends that defense counsel was ineffective for failing to object or move for mistrial in regards to Officer Weekes' statement. (*See Issue One*). But, as described previously in Issue One, there was no error on the part of Officer Weekes in making the statement.

In addition, the Appellate Court may presume that defense counsel made a tactical decision to move on to another topic rather than objecting to the response to his question. It may be prudent for counsel to do so in order to avoid highlighting or emphasizing the answer for the jury. *See*, e.g. *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (defense counsel's failure to object was a tactical decision to avoid highlighting or emphasizing damaging evidence). Defendant has failed to satisfy both prongs of *Strickland* and show deficient performance or prejudice.

2. DEFENDANT HAS FAILED TO SHOW THAT PROSECUTORIAL MISCONDUCT OCCURRED.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and his 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)).

Before an appellate court reviews a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they 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). Allegedly improper comments are reviewed in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529,

561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); **State v. Bryant**, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” **Dhaliwal**, 150 Wn.2d at 578, *quoting Pirtle*, 127 Wn.2d at 672; *accord Brown*, 132 Wn.2d at 561. Remarks by the prosecutor, even if improper, should not be reversed if they were invited or provoked by defense counsel and are in reply to his or her acts or statements. **State v. Dennison**, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. **Binkin**, 79 Wn. App. at 293-294. The absence of an objection by defense counsel “*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” **State v. McKenzie**, 157 Wn. 2d 44, 53, 134 P.3d 221 (2006)(quoting **State v. Swan**, 114 Wn.2d 613,661, 790 P.2d 610 (1990))(emphasis in original). 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.*

- a. The prosecutor committed no misconduct in describing the jury's role and discussing the credibility of witnesses.

Defendant contends that the prosecutor committed misconduct during closing arguments when he explained that the jury's role was to seek the truth, and discussed the credibility of one of the State's witnesses. Defendant failed to object to these instances of alleged prosecutorial misconduct during closing arguments. RP 355-59. He therefore bears the burden of showing that the statements made were: (a) flagrant and ill-intentioned, and (b) constituted enduring prejudice that could not have been cured by an instruction. *McKenzie*, 157 Wn. 2d at 53. Defendant fails to satisfy both of these burdens.

During closing arguments, the prosecutor may argue an inference from the evidence as to why they would want to believe one witness over another. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Counsel are permitted wide latitude to argue the facts in evidence and any reasonable inferences there from. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Unless it is "clear and unmistakable" that counsel is expressing a personal opinion, such as personally vouching for the credibility of the witness, no prejudicial error will be found. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)(quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

In his brief, defendant cites multiples statements made by the prosecutor during closing arguments which explain the jury's role in the court process. Defendant incorrectly alleges that these statements, coupled with an analysis of Mr. Edenfield's credibility, are evidence of prosecutorial misconduct. Defendant writes "by telling the jury that it had to figure out 'the truth' and by focusing on whether Mr. Edenfield had a motive to lie and 'make up' what he said he saw [defendant] doing the day of the incident, the prosecutor clearly invoked the idea that the jury had to find that Edenfield was lying in order to acquit." Appellant's Brief at 27.

In *State v. Wright*, 76 Wn. App. 811, 888 P.2d 1214 (1995), the court distinguished the prosecutor's argument from *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991), where the court found the prosecutor had committed misconduct. In *Wright*, the court held the prosecutor's argument was not objectionable and differed significantly from *Barrow* when "[the prosecutor in *Wright*] argued that, to *believe* (as opposed to acquit) [defendant], the jury would need to believe that the State's witnesses were *mistaken* (as opposed to lying)." *Wright*, 76 Wn. App. at 824 (emphasis in original). In *Barrow*, the prosecutor "told the jury that, to *acquit* the defendant or find him or her not guilty, it must conclude that the State's witnesses were *lying*." *Wright*, 76 Wn. App. at 824 (emphasis in

original). The court essentially found that it is improper and misleading for the prosecutor's argument to present the jury with the false choice of either believing the State's witnesses or acquitting the defendant.

In the present case, the prosecutor did not "invoke the idea that the jury had to find that Edenfield was lying in order to acquit" as in *Barrow*. Appellant's Brief at 27. Rather, the prosecutor was responding to the defense attorney's argument that Mr. Edenfield's account of what occurred at the railroad crossing was false. RP 376-77, 388. The defense attorney suggested to the jury that Mr. Edenfield could not have seen what occurred because he passed the defendant's vehicle going 40 mph and only made eye contact for two to three seconds at most. RP 377. In response, the prosecutor argued in rebuttal:

Ladies and Gentlemen, apparently the dispute between Mr. Edenfield and Mr. Skuza deals with the railroad crossing. What motive does Mr. Edenfield have to make up any of it? Absolutely none. Mr. Edenfield wasn't someone who was looking for trouble that day. Mr. Edenfield wasn't someone who was out beating up on women and not complying with laws. He's just trying to get somewhere and perhaps on some level, unfortunately for Mr. Edenfield, he saw what he saw and he decided he was going to do the right thing and help someone. He has no motive to make up any of this. And you know a lot of it matches up. So what motive does he have to make up specifically the part about the railroad crossing? He doesn't.

The only way for Mr. Edenfield to tell you what he saw and the fact that they were at the railroad crossing, was because it really happened.

RP 388.

To allege that this argument suggests to the jury that they had to find that Mr. Edenfield was lying in order to acquit is a mischaracterization. The prosecutor is arguing the credibility of the witness and why that witness' account of what occurred is likely true. This is similar to the argument in *Wright* that in order to believe the defendant's version, the jury would have to find the witness was mistaken. The court in *Wright* explained it well when it said:

where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other. This argument is well within the "wide latitude" afforded to the prosecutor "in drawing and expressing reasonable inferences from the evidence.

Wright, 76 Wn. App. at 825 (quoting *State v. Hoffman*, 116 Wn.2d 51, 95, 804 P.2d 577 (1991)).

In the present case, the defense attorney also clearly failed to see any evidence of prosecutorial misconduct when he failed to object at any point. The argument by the prosecutor can in no way be considered prosecutorial misconduct, let alone flagrant and ill intentioned.

Furthermore, the jury is told by the judge that they are the sole judges of credibility and should consider any bias or factors that might affect a witness' testimony. The jury instructions read:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of 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 the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 48-74, Instruction No. 1. (WPIC 1.02)

Jurors are presumed to follow instructions given by the court.

State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281, *review denied*, 100 Wn.2d 1008 (1983). Therefore, if the jury had any confusion about their role or the statement's made by the prosecutor concerning the credibility of witnesses, they only need to look to this instruction to clarify the confusion.

The prosecutor committed no misconduct in his closing argument to the jury. Defendant fails to show that any statements were evidence of prosecutorial misconduct, let alone flagrant and ill intentioned. Defendant further fails to show that any such statements constituted an enduring prejudice that could not have been cured by an instruction.

- b. The prosecutor committed no misconduct in closing arguments as his statements were supported by facts presented at trial.

Defendant also argues that the prosecutor committed misconduct in closing argument when he discussed the theme that defendant “plays by his own rules.” RP 368. This argument fails because the prosecutor was discussing the pattern of behavior that defendant exhibited from the evidence presented at trial, and drew an inference of defendant’s attitude from that. Such an argument does not appeal in any way to the passions or prejudice’s of the jury, nor does it mislead the jury.

Misconduct occurs during closing arguments if a prosecutor expresses a personal opinion on the credibility of witnesses. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Prejudicial error does not occur unless it is clear that the prosecutor is not arguing inferences from the evidence. *Copeland*, 130 Wn.2d at 290. Prosecutors may argue inferences from the evidence, including where it relates to the credibility of the defendant. *Copeland*, 130 Wn.2d at 290.

For instance, in *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006), the court held that the prosecutor did not commit misconduct when she called the defendant a rapist multiple times in closing argument. *McKenzie*, 157 Wn.2d at 56. Each time the prosecutor called defendant a rapist, she commented on the evidence and reiterated her theme to respond

to defense counsel's theory of innocence. *McKenzie*, 157 Wn.2d at 56.

The court found that the defendant could not meet the burden of showing the prosecutor's use of the word was improper when "in each instance the deputy prosecutor was either rebutting defense counsel's interpretation of the evidence or emphasizing facts supporting the State's theory of the case." *McKenzie*, 157 Wn.2d at 56-57.

A similar situation occurred in the present case. During the prosecutor's rebuttal of closing arguments, the following exchange took place:

PROSECUTOR: Now, I brought up the fact that [defendant] is someone who plays by his own rules. I think it actually goes a little farther than that. He doesn't just play by his own rules, he expects other people to play by his own rules. He expects that he can impose his will, that he can do what he wants without being held accountable. He's someone that frankly thumbs his nose at the law, manipulates situations, manipulates people.

DEFENSE COUNSEL: Objection. Counsel – this is not testimony, that evidence was presented. This is counsel's opinion.

PROSECUTOR: Your Honor, this is argument.

THE COURT: Objection denied.

PROSECUTOR: There are many, many examples throughout this case of what [defendant] is like. Department of Licensing tells [defendant] not to drive. Most people would not drive. Not [defendant]. Does he care? No. He's going to drive.

RP 392.

The prosecutor went on to describe specific examples of defendant “playing by his own rules” in the record. They included: defendant disregarding the general societal norm that people should not hit women; defendant disobeying traffic laws by performing an illegal u-turn; defendant disobeying common courtesy by motioning an obscene gesture at Mr. Edenfield while he called the police; defendant failing to cooperate with Officer Weekes and get out of his vehicle; defendant failing to appear in court when he was required to; and defendant disobeying direct orders from the court that he is not to have any contact with any witnesses when he spoke with Ms. Anson and his father. RP 394-95. All of these events go to the credibility of the defendant and the fact that he does “play by his own rules.” The prosecutor’s argument was a theme that stemmed from specific instances and facts presented at trial, and was used to rebut defense counsel’s theory of the case, which is analogous to *State v. McKenzie*.

Furthermore, the jury instructions also address this issue. The court’s instructions clearly describe the jury’s role in the trial and explain how it is to construe statements made by the attorneys.

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 that the lawyers' statements are not evidence...you must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 48-74, Instruction No. 1.

Courts recognize there is a “distinction between *the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*” ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006)(quoting ***State v. Swan***, 37 Wash. 51, 54-55, 79 P. 490 (1905))(emphasis in original). While it is improper for a prosecutor to express his personal opinion, arguments made in closing arguments sometimes appear as such if not looked at in light of the entire case. ***State v. McKenzie***, 157 Wn.2d 44, 53-4, 134 P.3d 221 (2006). By looking at the total argument, it may become apparent that counsel is arguing an inference from the evidence and trying to convince the jury to reach such a conclusion. *Id.* In the present case, when the prosecutor's argument is looked at in light of the entire case, it is clear the prosecutor is arguing an inference relating to the theme of defendant's repetitive behavior as supported by the facts presented at trial.

Defendant also argues in his brief that the prosecutor's theme that defendant “plays by his own rules” was improper as it was designed to appeal to the passions and prejudices of the jury. This argument is without

merit as the prosecutors closing argument was proper and based entirely on facts presented at trial.

Statements which appeal to the jury's passion and prejudice, as well as prejudicial allusions to matters outside the evidence, are inappropriate. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). It is improper for a prosecutor to call to the attention of the jury any matters or considerations which the jury has no right to consider. *Belgarde*, 110 Wn.2d at 508. The question the court should ask is "whether there was a 'substantial likelihood' the prosecutor's comments affected the verdict." *Belgarde*, 110 Wn.2d at 508 (citing *State v. Reed*, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978)).

Courts have found arguments to be improper in inciting the passions and prejudices of the jury and constituting irreversible error in cases where the prosecutor brings in facts not in evidence solely to appeal to the passions and prejudices of the jury. See *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988)(where the prosecutor discussed defendant's association with the American Indian Movement and asked the jury to remember what happened at Wounded Knee); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984)(where the prosecutor of a small town asked the jury if they were going to let big time city lawyers make the decision for them); *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978)(where the prosecutor made remarks concerning the defendant's

spouse's failure to testify); *State v. Clafin*, 38 Wn. App. 847, 690 P.2d 1186 (1984)(where the prosecutor read a graphic and emotional poem by a rape victim).

Unlike cases where the appellate courts have found reversible error, in the present case, the prosecutor argued a theme based entirely on facts and evidence presented at trial (as stated above). The prosecutor here argued conclusions to be drawn from the evidence. His argument did not appeal to the passions and prejudices of the jury, let alone become so flagrant and ill intentioned as to require reversal. As such, defendant fails to show any evidence of prosecutorial misconduct occurred during trial.

But even if the court finds any of these arguments to be improper, any prejudice from the alleged misconduct could have been eliminated by a curative instruction that repeated instructions previously given. Defendant's argument that this alleged misconduct existed, let alones so egregious as to constitute reversal is meritless.

3. THE TRIAL COURT PROPERLY ENTERED DEFENDANT'S SENTENCE FOR THIRD DEGREE ASSAULT AS THE JUDGMENT AND SENTENCE EXPRESSLY STATES THE TERM OF CONFINEMENT SHOULD NOT EXCEED THE STATUTORY MAXIMUM.

The defendant was sentenced to 57 months of incarceration to be followed by 9-18 months of community custody for his third degree assault conviction. CP 84-96. Third degree assault is a Class C felony.

RCW 9A.36.031. Pursuant to RCW 9A.20.021(1)(c), Class C felonies may not exceed a term of confinement of 60 months or five years.

Because a sentence may not exceed the statutory maximum, defendant in the present case argues his sentence violates RCW 9.94A.505(5) as his term of confinement and subsequent community custody sentence has the potential to exceed the statutory maximum of 60 months. Until recently, all divisions of the Court of Appeals were in agreement in how to address this issue.

Division I of the Court of Appeals first addressed this issue in 1997 with *State v. Vanoli*, 86 Wn. App. 643, 937 P.2d. 1166 (1997). Vanoli was convicted of delivering LSD to minors. *Id.* His standard range, plus his sentence enhancements, took his total to the statutory maximum of 10 years. *Id.* at 654. The court also imposed a period of community custody as required by statute. *Id.* Division I affirmed the sentence, reasoning that if the defendant earned early release credits, he could be placed on community custody, and if not, he would be released at the statutory maximum of 10 years. *Id.* at 655.

In 2004, Division I applied *Vanoli* to Class C sex offenses in *State v. Sloan*, 121 Wn. App. 220, 87 P.3d. 1214 (2004), *overruled by State v. Linnerud*, 147 Wn. App. 944, 197 P.3d 1224 (2008). Sloan was convicted of third degree child rape, and third degree child molestation. *Id.* at 222. There, the Court adopted the *Vanoli* reasoning and held that the sentencing court could both comply with RCW 9.94A.715, and avoid

imposing a sentence over the statutory maximum by including language in the judgment that the combined sentence of incarceration and community custody could not exceed the statutory maximum. *Id.* at 223-24.

Division II of the Court of Appeals recently approved the *Sloan* analysis in *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (2008). *Vant* had been convicted of violation of a protection order and FTRSO. *Id.* at 595-96. The trial court sentenced him to 18 months incarceration and 36-48 months of community custody. *Id.* at 597. The statutory maximum sentence was 60 months. *Id.* This Court affirmed the sentence, with directions to the trial court to correct the judgment and sentence to include a statement that the combined total of total confinement and community custody could not exceed the maximum term, as required by *Sloan*. *Id.* at 605-606.

In two recent cases, Division III of the Court of Appeals also approved the *Sloan* analysis. In *State v. Hibdon*, 140 Wn. App. 534, 166 P.3d 826 (2007), the defendant had been sentenced for delivering marijuana. *Id.* at 536. The standard range was 51-68 months in prison and the court imposed the statutory maximum of 60 months. *Id.* The parties mistakenly believed that community placement was not required, so the court did not order it. *Id.* The defendant later demanded that the court impose 12 months of community custody and reduce his prison sentence by 12 months to accommodate the community custody requirement. *Id.* at 537. Division III rejected the request and used the

analysis from *Vanoli* and *Sloan. Hibdon*, at 538. Division III also held that the trial court erred when it did not impose community custody and remanded for sentencing. *Id.* at 538-39. The court approved of imposing a term of confinement and “such community custody to which the offender may become eligible.” *Id.* at 539.

In *State v. Torngren*, 147 Wn. App. 556, 196 P.3d 742 (2008), the defendant was sentenced to 60 months in prison to be followed by 9-18 months of community custody for third degree assault and felony eluding. *Id.* at 560. Again, Division III used the *Sloan* analysis in affirming the sentence. *Torngren*, at 566.

Recently, Division I departed from its own holding in *Sloan*. See *State v. Linderud*, 147 Wn. App. 944, 197 P.3d 1224 (2008). In *Linderud*, Division I held that “a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum.” *Id.* at 948. Division I soon followed *Linderud* with a similar holding in *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008).

In another Division I case, *State v. Davis*, 146 Wn. App. 714, 192 P.3d 29 (2008), the court affirmed the trial court which ordered an exceptional sentence down on the confinement portion of the sentence in order to include the term of community custody without exceeding the statutory maximum. *Id.* at 719-22. There, the trial court felt that the

additional community custody was more important for the sentence of that offender than additional incarceration. *Id.* at 718.

At this time, neither Division II nor Division III have joined Division I in abandoning *Sloan*. It should also be noted that Division I is still divided on the issue, as shown in its recent decision upholding *Linerud* in *State v. Hagler*, ___ Wn. App. ___, ___ P.3d ___ (2009) (No. 61107-1, 2-1 decision). Justice Ellington's dissent in *Hagler* criticized the court's ruling in *Linerud* and suggested that Division I should return to its holding in *Sloan*. *Id.* (slip op. dissent at 1).

This court should continue to follow the reasoning set forth in *Sloan*. The *Sloan* and *Vanoli* analysis remain the best way for sentencing courts to follow the sentencing scheme intended and mandated by the Legislature without risk of a defendant serving longer than the statutory maximum.

Furthermore, as the court in *Sloan* required, the judgment and sentence of defendant in the present case expressly states:

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

CP 84-96 at paragraph 4.6.

The judgment acknowledges that terms of community custody must defer to the statutory maximum. As such, the sentencing court committed no error.

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CLERK

D. CONCLUSION.

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

DATED: July 2, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Thomas C. Roberts
THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Chelsey McLean
Chelsey McLean
Rule 9 Legal Intern

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.

7-2-09 Chelsey McLean
Date Signature