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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

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

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NO. 38407-8

STATE OF WASHINGTON,

Respondent.

vs.

LYNN JANELLE BELCHER,

Appellant.

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On Appeal from the Superior Court of Lewis County

**STATE'S RESPONSE BRIEF**

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## STATEMENT OF THE CASE

### ARGUMENT

#### **A. THE PROSECUTOR DID NOT COMMIT MISCONDUCT AND THE DEFENDANT MISREPRESENTS THE FACTS SURROUNDING THE PROSECUTOR'S AND THE OFFICER'S KNOWLEDGE ABOUT "THE ENVELOPE."**

Belcher makes the very serious allegation that the Deputy Prosecutor in this case "elicited false testimony from a police officer and when he failed to produce a key piece of physical evidence."

Brief of Appellant 7,11.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003); State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). However, if there was no proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on

appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have prevented the resulting prejudice. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991); State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993). "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) *cert. denied* 518 U.S. 1026 (1996).

Claims of prosecutorial misconduct are also subject to a harmless error analysis. A harmless error under the constitutional standard occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (19896).

In the present case, Belcher claims that "the record reveals that Officer Clary gave false testimony before the jury when he claimed that he had never seen the UPS envelope. . .and [t]he prosecutor's failure to correct the record when the officer gave this

false testimony constitutes misconduct.” Brief of Appellant 11. But, tellingly, there is no citation to the record to show that either the officers or the prosecutor were aware of the envelope’s existence during the trial. That is because there is absolutely no evidence whatsoever that the prosecutor knew, at trial, that the UPS envelope actually existed. At trial, Officer Clary said that Belcher had told him that the check came in a UPS envelope. RP 41. Officer Clary was also asked on cross whether he was shown the UPS package at any point. RP 45. Officer Clary said, “not that I recall.” RP 45. Similarly, Officer Hughes was also asked whether Belcher had said anything to him about how the check came to her. RP 52. Officer Hughes said, “yes, she said that—somewhere in there, she said she had received it in a UPS envelope.” RP 52. Hughes was then asked on cross, “did anyone produce that UPS envelope for you?” Officer Hughes replied, “not to me, no sir.” RP 52. These facts show that neither the officers or the prosecutor knew the whereabouts of the elusive UPS envelope. The facts do show that the officers were told by Belcher that the check came in a UPS envelope, and that the officers did not remember being physically given that envelope. Besides, Belcher also provided testimony to the jury about the existence of the UPS envelope.

Belcher testified that she had received the check in a UPS envelope but that it was “grabbed” out of her daughter’s hands by one of the officers. RP59. Then, Belcher’s daughter said that she got an envelope from UPS, and that the envelope had been “tied to the gate” by UPS. RP 68. Belcher’s daughter also said that “the younger cop grabbed the envelope.” RP 69, 70. Thus, Belcher got the evidence about the envelope before the jury in any event.

What is not in the transcript of the trial, however, is any indication whatsoever that the Deputy Prosecutor knew that the UPS envelope actually existed. Nor is there a scintilla of evidence that the Deputy Prosecutor knowingly elicited false testimony from either one of the officers. See Report of Proceedings (trial), *passim*. Indeed, the State defies Belcher to cite anywhere in the record where there is proof that the prosecutor intentionally suborned perjury. There is none-- as shown by Belcher’s accusatorial argument impugning the integrity of the prosecutor—without citing anywhere in the record that shows the prosecutor or the police deliberately lied about the missing envelope. Brief of Appellant 11. Belcher goes on to state that “the prosecutor’s failure to correct the record when the officer gave this false testimony constitutes misconduct.” Id. 11. But again, there is no

citation to the record indicating that the prosecutor knew anything about the existence of the UPS envelope during the trial. Id. In fact the prosecutor did not learn about the UPS envelope until after the verdict came down.

What happened is that Officer Clary discovered the envelope in his mailbox at the Centralia Police Station. CP 32 (State's response to defendant's motion for a new trial). This information was then relayed to the Prosecutor's Office and the prosecutor in turn disclosed this information to the defendant. CP 32. Thus, far from what Belcher alleges, there is nothing in the record to support the allegation that the prosecutor knowingly elicited false testimony from a witness. Once the prosecutor learned of this information, he disclosed it to the defendant. CP 32. Indeed, it is difficult to even respond to this type of allegation regarding a prosecutor eliciting a false statement from a witness, because it is difficult to prove a negative. Be that as it may, the record simply does not support Belcher's claim that the prosecutor knew about the existence of the UPS envelope at the time of the trial—or that the police deliberately covered up this evidence. Furthermore, given the testimony by the defense witnesses and Belcher—the jury heard all about the UPS envelope anyway. Thus, presenting the actual envelope—which did

not have a date on it—would have been merely cumulative evidence, as noted by the judge. CP 22-24 (Findings of Fact, Conclusions of Law, RE: Motion for New Trial).

In sum, Belcher's bold accusations that the prosecutor and police deliberately lied about, or covered up, the existence of the UPS envelope are simply false and unsupported by the record. Accordingly, this court should dismiss Belcher's argument to the contrary, and should affirm Belcher's conviction.

**B. BELCHER'S TRIAL COUNSEL WAS NOT INEFFECTIVE .**

Belcher also claims that his trial counsel was ineffective for failing to object when the "State elicited evidence that a witness believed the defendant was guilty." Brief of Appellant 12. This argument, too, is without merit.

In order to prove ineffective assistance of counsel an appellant must show that (1) trial counsel's performance was deficient and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers.

Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). It is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335. The defendant bears the burden of establishing both prongs before a reviewing court will deem trial counsel's performance ineffective. Strickland at 687, 104 S.Ct. at 2064. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 558, 705, 940 P.2d 1239 (1997), cert. den., 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). Moreover, a presumption exists that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland at 689, 104 S.Ct. at 2005.; State v. Hakimj, 124 Wn.App. 15,22,98P.2d 809 (2004)(The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct). A reviewing court will determine whether counsel was competent based on the entire trial record. State v. McFarland, 127 Wn.2d

322, 335, 899 P.2d 1251 (1995). But mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 66-78, 917 P.2d (1996). Indeed, an attorney has no duty to argue frivolous or groundless matters before the court. State v. Stockman, 70 Wn.2d 941, 946, 425 P.2d. 898 (1967). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. Absent egregious circumstances, counsel's failure to object will not constitute ineffectiveness requiring reversal. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)(failure to object will not constitute ineffective assistance of counsel except under egregious circumstances).; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy.)

Here, Belcher claims that his counsel was ineffective for failing "to object when the state elicited evidence through a police officer that the bank operations manager believed that the defendant was guilty." Brief of Appellant 13. This argument is misplaced.

The complained-of conduct in this case allegedly occurred when Officer Hughes testified about the reason he had been called to the Bank. When Officer Hughes was asked why he went to the bank that day, he said of the bank operations manager that, "she told us why she felt there was forgery in progress and why she suspected this check was fraudulent." RP 50. First off, this statement was not offered for its truth, but was instead offered to lay a foundation as to why the officers were dispatched to the bank in the first place. \* Next, given the context in which the questioning occurred, counsel's failure to object was not deficient.

Secondly, in context, the related statements of Ms. Coit do not constitute a statement of guilt by a witness. The officer only related that the bank employee "felt" there was a forgery and the "suspected" the check was fraudulent. RP 50. These are not statements of guilt. These statements merely indicate that the bank officer felt that an investigation was called for, not that an investigation and trial would necessarily result in a guilty verdict. Regardless, it is proper for a witness to make inferences, even though they may embrace issues to be determined by the trier of fact, unless the inferences would mislead the jury or must be made by an expert. State v. Madison 53 Wn.App. 754, 761-762, 770

P.2d 662, 666 (1989). The comments related by the officer were not at risk of misleading or swaying the jury. His statements were part of a brief background of his investigation and described the initial stages of his investigation. Reasonable jurors would not place weight on comments regarding the guilt of a defendant made in this context.

Thirdly, the statements were also based upon the bank officer's observations of the check. In this respect, the related statements are much like judgments that an individual is under the influence of alcohol that were approved in Seattle v. Heatley, 70 Wn.App. 573, 577-80 854 P.2d 658 (1993). In both circumstances, the statements are inferences based solely on a witness' experience and observations, which "directly and logically" supported the witness' conclusion. Heatley, 70 Wn.App at 579. Even assuming that the witness' remarks were a comment on Ms. Belcher's guilt, a defense attorney may still have reasonably chosen not to object. The comment came as the prosecutor was beginning his questioning and when he was merely seeking background information from the officer. Had the defense attorney called attention to the remark by objecting, any potential prejudicial effect would have been heightened. In this way defense counsel's

decision not to object was tactical. This court has found that "the decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. Madison, 53 wn.App. at 763 (quoting Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Additionally, given that Ms. Belcher's attorney objected frequently on various grounds during the trial and appears to have been otherwise competent, his failure to object here does not appear deficient.

Finally, Ms. Belcher has not shown her counsel's failure to object prejudiced her. To show prejudice Ms. Belcher must show that her counsel's performance was so inadequate that there is a reasonable probability that the result would have differed and thereby undermines this court's confidence in the outcome. Strickland, 466 U.S. at 694. The statements here were statements by a lay individual, so they did not carry the weight that exists if made by an officer who has the authority and experience to determine guilt and innocence. Moreover, assuming the testimony creates some inference as to Ms. Coit's belief of Ms. Belcher's guilt, it is no more than the inference present in most criminal cases. In

almost every case involving a law enforcement investigation, there exists a report by an individual who believed the defendant's behavior criminal. Officer Hughes merely related that there was such a report here. His testimony told the jurors nothing more than what they likely already knew. It is also likely that they would not place much weight on such a report. The fact that Ms. Coit felt that Ms. Belcher might have committed forgery, is not the same, in the mind of a reasonable person, as the police coming to the same conclusion after an investigation. We are all familiar with reports to law enforcement that turn out to be unfounded upon investigation. At most, had Belcher's trial counsel objected, she might have received an additional instruction to the jury. As it was, the criticized testimony was not so prejudicial as to have affected the trial's outcome. Thus, the lack of objection does not demonstrate prejudicial ineffective assistance of counsel. Belcher's argument to the contrary is without merit.

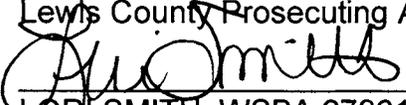
#### CONCLUSION

Belcher's claim that the prosecutor committed misconduct by eliciting a false statement from the officers is not supported by the record. This is because there is no indication whatsoever in the record that shows that the prosecutor knew of the existence of the

UPS envelope at trial. If the prosecutor did not know of the existence of the envelope while he was conducting direct examination of the officers at trial, he likewise could not have “elicited false” testimony about the piece of “evidence.” In any event, several witnesses, including Belcher, spoke about the envelope’s existence, so the jury heard of the envelope regardless of the fact that the envelope was not discovered until after the trial.

Belcher’s claim that her trial counsel was ineffective is also misplaced. Failure to object is usually considered a trial tactic, and such strategic decisions by defense counsel cannot be a basis for an ineffective assistance claim. Indeed, had counsel called attention to the alleged-improper remark by objecting, any prejudicial effect would have been heightened. In this way, counsel’s failure to object was a tactical decision, and was not so egregious as to have affected the trial’s outcome. Accordingly, this court should affirm Belcher’s conviction in all respects.

RESPECTFULLY SUBMITTED this 2 day of July, 2009.

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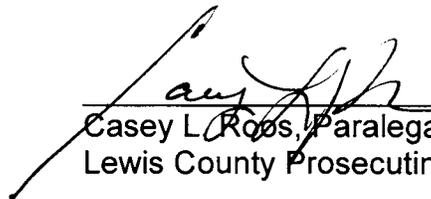
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Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 2, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 2nd day of July 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
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