

No. 38985-1--II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

CASEY BIRCHER

Appellant.

09 DEC - 1 PM 12: 29
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

MICHAEL GOLDEN
Lewis County Prosecuting Attorney

By: Lori Ellen Smith
Deputy Prosecuting Attorney
WSBA No. 27961

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. BIRCHER HAS NOT SHOWN THAT HIS TRIAL
 COUNSEL WAS INEFFECTIVE.....1**

**B. THE TRIAL COURT DID NOT ERR WHEN IT
 DENIED BIRCHER'S MOTION FOR A MISTRIAL AND
 MOTION FOR A NEW TRIAL.....17**

**C. BIRCHER'S OFFENDER SCORE WAS
 CORRECTLY CALCULATED.....19**

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

<u>Bremerton v. Corbett</u> , 106 Wn.2d 569, 723 P.2d 1135 (1986).....	5, 6
<u>In re Pers. Restraint of Cadwallader</u> , 155 Wash.2d 867, 123 P.3d 456 (2005).....	20
<u>In re Pers. Restraint Petition of Goodwin</u> , 146 Wash.2d 861, 50 P.3d 618 (2002)	20
<u>State v. Benn</u> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)	2
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996)	3
<u>State v. Briggins</u> , 11 Wn.App. 687, 524 P.2d 694 (1974), <i>review denied</i> , 84 Wn.2d 1012 (1974)	4
<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	18
<u>State v. Carpenter</u> , 52 Wn.App. 680, 763 P.2d 455 (1988).....	3
<u>State v. Flowers</u> , 99 Wn.App. 57, , 991 P.2d 1206 (2000).....	6, 7
<u>State v. Foster</u> , 140 Wash.App. 266, 166 P.3d 726, 730 - 731 (2007)	22, 25
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	13
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).	4
<u>State v. Hopson</u> , 113 Wash.2d 273, 778 P.2d 1014 (1989)	18
<u>State v. Huff</u> , 119 Wash.App. 367, 80 P.3d 633 (2003)	21, 22, 25
<u>State v. Hughes</u> , 118 Wn.App. 713, 77 P.3d 681 (2003)	13
<u>State v. Mak</u> , 105 Wash.2d 692, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).....	18
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	2, 3, 5, 13
<u>State v. Meyer</u> , 37 Wn.2d 759, 226 P.2d 204(1951)	6

<u>State v. Neidigh</u> , 78 Wn.App. 71, 895 P.2d 423 (1995)	4
<u>State v. Neslund</u> , 50 Wn.App. 531, 749 P.2d 725, <i>review denied</i> , 110 Wn.2d 1025 (1988)	6
<u>State v. Rodriguez</u> 146 Wash.2d 260, 45 P.3d 541(2002)	18
<u>State v. Ross</u> , 152 Wash.2d 220, 95 P.3d 1225 (2004)	20, 25
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 757 (1994).	13, 18, 19, 21
<u>State v. Saunders</u> , 91 Wn.App. 575, 578, 958 P.2d 364 (1998).....	4, 17
<u>State v. Smith</u> , 115 Wn.2d 775, 801 P.2d 975 (1990	i, 5, 10
<u>State v. Solomon</u> , 73 Wn.App. 724, 870 P.2d 1019, <i>review denied</i> , 124 Wn.2d 1028, 883 P.2d 327 (1994).....	6
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	1, 3
<u>State v. Walden</u> 69 Wash.App. 183, 847 P.2d 956 (1993)	12, 14

Treatises

1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. SUBSTANTIVE CRIMINAL LAW § 1.4(b) at 24	6
---	---

FEDERAL CASES

<u>Bullock v. Carver</u> , 297 F.3d 1036, (10 th Cir. 202).....	4
<u>Campbell v. Knicheloe</u> , 829 F.2d 1453, (9 th Cir. 1987), <i>cert. denied</i> , 488 U.S. 948 (1988).....	3
<u>Cuffle v. Goldsmith</u> , 906 F.2d 384, (9 th Cir. 1990).....	4
<u>Hendricks v. Calderon</u> , 70 F.3d 1032, (9 th Cir. 1995).	3
<u>Mickens v. Taylor</u> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002).2	
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)	1

United States v. Layton, 855 F.2d 1388, (9th Cir. 1988), *cert. denied*, 489
U.S. 1046 (1989)3

Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).....3

STATEMENT OF THE CASE

Except as otherwise cited below, and without waiving the right to later challenge Appellant's recitation of the facts, Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. BIRCHER HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

Bircher argues that his trial counsel was ineffective for failing to object to the admission of his statements under the *corpus delicti* rule, and for failing to object when the prosecutor "twice asked Mr. Bircher if the police officer was mistaken in his testimony." Brief of Appellant 8, 9. The State disagrees.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-pronged test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *see also* State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Id. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional

errors, the result of the proceeding would have been different.”
State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995);
see also Strickland, 466 U.S. at 695 (“When a defendant
challenges a conviction, the question is whether there is a
reasonable probability that, absent the errors, the fact finder would
have had a reasonable doubt respecting guilty.”) Thus, defects in
assistance that have no probable effect upon the trial’s outcome do
not establish a constitutional violation. Mickens v. Taylor, 535 U.S.
162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002).

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).

This is because

[w]hat 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 (9th Cir. 1995).

Accordingly, there is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. 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). Furthermore, as the Supreme Court has stated, "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

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

regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). And decisions by trial counsel as to when or whether to object are trial tactics. State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995). Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn.App. 687, 692, 524 P.2d 694 (1974), *review denied*, 84 Wn.2d 1012 (1974). Nor is an attorney required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 384, 388 (9th Cir. 1990). Moreover, the lack of awareness of the relevant law, standing alone, is insufficient to establish ineffective assistance of counsel. Bullock v. Carver, 297 F.3d 1036, 1048 (10th Cir. 202).

When the claim is based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting challenged conduct; (2) that the objection to the evidence would likely have been sustained; and that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). Bircher has not met this burden here because Bircher has not shown that the

result of his trial would have been different absent the alleged errors of his trial counsel. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695.

Corpus Delicti Issue

Bircher first claims his counsel should have objected to the admission of his statements under the *corpus delicti* rule.

In Washington, a confession alone is insufficient to establish the *corpus delicti* of a crime. The "*corpus delicti* rule" is stated as follows:

the confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is *independent proof* thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

State v. Smith, 115 Wn.2d 775, 780-81, 801 P.2d 975 (1990)(italics in original), *citing* Bremerton v. Corbett, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986)(other citations omitted). "The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. *It is sufficient if it prima facie established the corpus delicti.*" Id.(emphasis in original). "In this context, 'prima facie' means that there is 'evidence of sufficient

circumstances which would support a logical and reasonable inference' of the facts sought to be proven." Id., citing Corbett, 106 Wn.2d at 578-79. In general, the *corpus delicti* rule requires proof, independent of the accused's statements, "that a crime was committed by someone." Corbett, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986). "It does not require '[p]roof of the identity of the person who committed the crime.'" State v. Flowers, 99 Wn.App. 57, 60-64, 991 P.2d 1206 (2000), citing Corbett, 106 Wn.2d at 574; State v. Meyer, 37 Wn.2d 759, 763, 226 P.2d 204(1951); State v. Solomon, 73 Wn.App. 724, 728, 870 P.2d 1019, *review denied*, 124 Wn.2d 1028, 883 P.2d 327 (1994); State v. Neslund, 50 Wn.App. 531, 542, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. SUBSTANTIVE CRIMINAL LAW § 1.4(b) at 24. Occasionally, however, the identity of the particular person who committed the crime must be proven. See e.g., Corbett, supra. But, contrary to the way Bircher sets out this rule, the correct interpretation is

there are *certain sets of facts* where the identity of a particular person must be established as part of the corpus delicti-e.g., the facts in State v. Hamrick and the facts in the four consolidated cases in Bremerton v. Corbett. There are no "certain crimes" for which identity is always a part of corpus delicti. In other words, the showing required for corpus delicti-that someone committed the charged crime-depends on

the *evidence*, and not on the statutory elements of the crime charged.

State v. Flowers, 99 Wn.App. 57, 61,62, 991 P.2d 1206

(2000)(emphasis in original). Furthermore,

[t]his case-by-case view is consistent with State v. Hamrick, wherein we held no more than the following: "While the corpus delicti of most crimes does not involve the issue of identify, the corpus delicti for the offense of driving while under the influence of intoxicating liquor in this case requires evidence that defendant operated or was in actual physical control of a vehicle while he was under the influence of intoxicating liquor.

Flowers, at 62 (emphasis in Flowers), quoting Hamrick, 19 Wn.App. at 419.

In the present case, sufficient evidence--independent of Bircher's admissions--was presented to establish the *corpus delicti* of the crime of *attempted* trafficking in stolen property in the first degree. Here, the evidence shows that on the day in question, officers were alerted to a "possible wire theft in progress on Highway 6 west of the bridge." RP 14. Officer Hickey headed to the scene and as he approached, he saw "a van matching the description of the suspect vehicle pulling onto the roadway from a pullout on Highway 6." RP 14. Officer Hickey described the "pullout" area as being the area where vehicle weights are checked. RP 14. Officer Hickey turned around and began

following the suspect vehicle. RP 15. The driver of the suspect vehicle pulled over to the side of the road even though Officer Hickey had not activated his lights or his siren. Id. Nancy Eastman was the driver of the vehicle and the passenger was the defendant, Casey Bircher. RP 16.

Other officers then arrived at the scene to assist with the investigation. Id. Officer Gary Wilson said he was dispatched to the scene to look "for a gray minivan that was allegedly cutting wire from posts along State Route 6. RP 18,19. Officer Wilson said the area where the wire theft was possibly occurring was an area where the State Patrol weighs trucks coming off Highway 6. RP 20. Officer Wilson went to that area and looked at poles there and found one that looked to have "freshly-cut" copper wire. RP 20. Officer Wilson described the wire that had been cut as "a copper wire that runs down most poles, the way I understand it is a grounding wire made of copper, it was cut." RP 21; Ex. 2-7. Deputy McCurdy arrived on scene and assisted in taking pictures of the pole that appeared to have evidence of cutting of its copper wire. RP 31. Deputy McCurdy said that on the side of the pole, "you could see the wire was sticking out from the side as if it had been cut." RP 32; Ex. 2-7. An employee of the local utility district

confirmed that the same pole in the same location had had the wire cut. RP 39, 40. The utility district employee said that the wire had only been cut and pulled out, but no wire was missing. RP 42. Detective Tim English, an officer with the "copper wire team" was also called to assist. RP 23. Detective English said that at the time of this incident, law enforcement was "dealing with an epidemic of copper wire thefts." RP 23. Officer Hickey, Officer Wilson, Detective English, and Deputy Fulton all identified the defendant, Casey Bircher, as being in the suspect van. RP 16, 19, 24, 47.

Inside the van, just in front of the two front seats, officers found two different styles of wire cutters. RP 27, 49,50-53; Ex.1. According to Deputy English, one of the cutters appeared to have "on the lower part of it strippers to strip insulation off the wires. On the right side is a pair of tin snips." RP 27. This particular cutter was found on the passenger side of the vehicle. Id. No cooper wire was found inside the van. RP 28.

Thus, what all of the previously-described (and cited) testimony shows--*without any of Bircher's statements*-- is that on the day in question Officers were dispatched to a possible copper wire theft "in progress" at a pullout on Highway 6 in Lewis County, where vehicles are weighed. Dispatch described the suspect

vehicle as being a "gray mini van." Officer Dickey headed to the scene and saw the suspect vehicle pull out *from that location*. The suspect vehicle pulled over without Officer Hickey even turning on his lights and siren. Defendant Bircher was a passenger in the suspect vehicle--the same vehicle seen leaving the area where the copper wire had been cut. Upon reaching the pullout area where the van had been seen, Officers found a pole on which the copper wire appeared to have been "freshly-cut." After the van pulled over to the side of the road and other officers arrived, two pairs of wire cutters were found inside the van--one pair of the cutters was found on the passenger side of the van where defendant Bircher had been sitting.

Independent of any admissions by Bircher, the above-set-out evidence supports a "logical and reasonable inference" that the crime of attempted trafficking in stolen property in the first degree had been committed. Smith, supra. This evidence showed that Bircher was a passenger in the van that was in the area where the pole with the copper wires cut was located. And it shows that wire cutters were found inside the van on the passenger side. From here, it is reasonable to infer that the only reason Bircher would cut copper wire on that pole was to take the wire and sell it. Why else

would anyone try to cut copper wire from a pole? What else would a person do with such copper wire, other than remove it for resale? Or are we required to remove our common sense when determining whether this evidence shows a "reasonable and logical inference" that Bircher committed the crime of attempted first degree trafficking in stolen property? As the trial court noted, "people don't go out and cut down public wire to have it around home, they're going to transfer it to somebody for some reason. I think circumstantially that's the case. So. . . you wouldn't have . . . dismissal for failure to establish a corpus delicti. . ." 1/21/09 RP 31,32.

The State presented sufficient evidence independent of Bircher's admissions to establish the *corpus delicti* of the charged crime. Furthermore, as mentioned above, the trial court believed *corpus* was met in this case. Id. Accordingly, Bircher cannot show that even if his counsel had made a *corpus* objection, that the trial court would have sustained the objection. Therefore, Bircher has not met his burden to show that his trial counsel was ineffective as to the *corpus* issue.

Failure to Object To Alleged Prosecutor Misconduct

Bircher also claims his trial counsel was ineffective for failing to object when the prosecutor asked Bircher on cross examination whether a police officer was "mistaken" in his testimony. Brief of Appellant 9,10. As did the prosecutor below, Respondent concedes that the prosecutor's questions were improper. RP 92; See, e.g., State v. Walden 69 Wash.App. 183, 185-186, 847 P.2d 956 (1993)(cross examination designed to compel another witness to express an opinion as to whether other witnesses were lying constitutes misconduct)(citations omitted). While Respondent concedes the prosecutor's questioning was improper, whether it should be considered actual "misconduct" *per se* is perhaps another issue entirely. See e.g., State v. Wright, 76 Wn.App. 811, 824-26, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995), *superceded by statute on other grounds*, RCW 9.94A.360 (1995)(classifying the same improper questions used by the prosecutor here as "objectionable conduct" rather than prosecutorial misconduct). Whatever we decide to call it, the prosecutor's questioning of Bircher where the prosecutor asked Bircher whether another witness was "mistaken" was not reversible error. This is because Bircher cannot show that he was prejudiced

by his counsel's failure to object to the prosecutor's conduct, as discussed below.

In order to find that Bircher's trial counsel was ineffective for failing to object to the prosecutor's conduct, Bircher must also show that the prosecutor's conduct affected the outcome of the trial. Strickland, supra; McFarland, supra. Bircher 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). Put another way, 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).

Here, the State has conceded that the prosecutor's questioning was improper. Furthermore, it is also true that Bircher's trial counsel did not object to the prosecutor's improper questioning. However, even though Bircher's trial counsel failed to object to the prosecutor's improper questioning, the trial court itself *did* stop the prosecutor from continuing the improper cross examination. RP 89.

After the trial court removed the jury, it strongly (and correctly) admonished the prosecutor that his questioning was extremely improper. RP 89. Then, Bircher's trial counsel requested a mistrial. RP 89,90. The trial court denied the motion for a mistrial. RP 90-92.

Another factor that Respondent believes lessens the prejudicial impact of the prosecutor's conduct here is that the prosecutor here asked the witness whether another witness was "mistaken." RP 88. The prosecutor did not ask if the officers were "lying." Id. While using the word "mistaken" is still improper, that word seems somewhat less egregious a term than asking whether the witnesses were "lying," as pointed out by the Walden Court when it noted, "[a]sking a witness whether another witness is lying is certainly more prejudicial than asking whether another witness is merely mistaken." Walden 69 Wash.App. at 186-187(emphasis added).

The trial court agreed with this sentiment, stating:

it is a less stringent standard to evaluate this when it [sic] is asked to comment on whether a person is mistaken or not, and interestingly enough it is not even objectionable as long as it is relevant. And in State v. Wright the court says, where, for example, there are conflicts between part, but not all the various witness versions of the events, such cross examination may be relevant and helpful to the jury. I'm not sure that it was here, but at the very most it is only objectionable, it is not misconduct.

1/21/09 RP 29, 30. Be that as it may, the point is that although Bircher's counsel failed to object to the prosecutor's improper questioning, the prosecutor was stopped by the trial court and the jury was removed. RP 88,89. The trial court also noted this fact when it stated, "I determined that because I preempted this, that it had not gotten to the point where it was mistrial material. . . and, therefore, the ineffective assistance of counsel argument fails."

1/21/09 RP 33. Thus this certainly was not a situation where the basis for the objection (that it is improper to ask a witness to comment on the credibility of another witness) was heard by the jury. *Id.* Indeed, it really is not altogether clear that the *jury* actually *heard* Bircher's response that the officer was "lying." The trial court noted this too, when it said:

[n]ow, the response, if we go strictly by the record here, there is nothing about lying or mistaking at all. But I think there's been a stipulation here that the court reporter didn't pick it up because . . . I was talking over the answer. . . . In any event, I think there is a fair stipulation here that the accusation by the defendant that the detective is lying actually made it out. But we don't know, if the court reporter didn't hear it, she's trained to hear things like that, it is hard to say that the jury actually heard it and the question itself is not objectionable. And the answer, that the detective was lying about that, is technically nonresponsive to what was asked with those two things.

1/21/09 RP 30,31. Again, the trial court *did* stop the prosecutor before he could utter the word "mistaken" for a second time, and removed the jury before admonishing the prosecutor that his questioning was improper. RP 89.¹ Thus, the jury would not have heard any elaboration as to why the prosecutor's question was improper. And, after the court admonished the prosecutor, Bircher's trial counsel did request a mistrial. RP 89, 90. That request was denied, because the trial court did believe that the conduct could be corrected with a curative instruction. RP 94. But trial counsel--as is common in such a situation--refused the curative instruction because "it would highlight a mistake was made." RP 94.

In sum, the prosecutor's improper questioning was stopped by the trial court, and the jury was removed before the trial court admonished the prosecutor--thereby minimizing the impact of the conduct on the jury. So, even though Bircher's counsel may have been ineffective for failing to object to the prosecutor's questions,

¹ Despite the trial judge's statement that there was one instance of the prosecutor's using the word "mistaken" but that the prosecutor, in essence, "was headed" towards using the same terminology a second time (without actually uttering the word), at the motion for new trial, Bircher's new counsel counted *three* instances where the prosecutor asked Bircher to comment on the credibility of the officers. See 1/21/09 RP 13-16. Respondent does not concur with that view, and neither did the trial court. 1/21/09 RP 27,28.

the trial court--in essence--"objected" for him, so neither the prosecutor's improper questioning, nor Bircher's counsel's failure to object could have affected the outcome of the trial. State v. Saunders, 91 Wn.App. 575, supra.; 1/21/09 RP 31,32 (trial court stating Bircher had not been prejudiced by the prosecutor's improper questioning). Accordingly, Bircher cannot show that he was prejudiced, and his ineffective assistance claim fails on this ground as well.

B. THE TRIAL COURT DID NOT ERR WHEN IT DENIED BIRCHER'S MOTION FOR A MISTRIAL AND MOTION FOR A NEW TRIAL.

Bircher further claims that the trial court should have granted his request for a mistrial or should have granted a new trial because of the prosecutor's improper questioning of a witness. This argument is not persuasive. Furthermore, because this issue necessarily examines issues already discussed in the previous section (improper questioning by the prosecutor), Respondent will not repeat that argument in detail here, but will simply summarize and incorporate by reference the argument previously made in detail above.

A trial court's decision denying a motion for a mistrial is reviewed for abuse of discretion. State v. Rodriguez 146 Wash.2d

260, 269-270, 45 P.3d 541(2002), citing, State v. Hopson, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). The same standard applies when reviewing a decision denying a motion for a new trial. State v. Burke, 163 Wn.2d 204,210, 181 P.3d 1 (2008). A reviewing court will find abuse of discretion only when “ ‘no reasonable judge would have reached the same conclusion.’ ” *Id.* (quoting Sofie v. Fibreboard Corp., 112 Wash.2d 636, 667, 771 P.2d 711 (1989)). Further, a trial court's denial of a motion for mistrial will only be overturned when there is a “ ‘substantial likelihood’ ” that the error prompting the mistrial affected the jury's verdict. State v. Russell, 125 Wash.2d 24, 85, 882 P.2d 747 (1994) (quoting State v. Crane, 116 Wash.2d 315, 332-33, 804 P.2d 10 (1991)). Additionally, trial courts “should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” State v. Mak, 105 Wash.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). Bircher has not met this burden here.

Here, the conduct that prompted the request for a mistrial (and for a new trial) was improper cross examination by the prosecutor when he asked a witness whether another witness was

mistaken. Respondent has already set out in the section above the reasons that the prosecutor's improper cross examination was not likely to have affected the outcome of the trial--something that Bircher would have to show before this Court will find that the trial court abused its discretion when it refused to grant a mistrial or refused to grant a new trial. State v. Russell, 125 Wash.2d at 85. Suffice it to say that because there is no substantial likelihood that the prosecutor's improper conduct affected the verdict (as argued at length above)--and because that conduct was the basis for the request for a mistrial--the trial court did not abuse its discretion in refusing to grant a mistrial. Accordingly, Bircher's argument to the contrary is without merit.

C. BIRCHER'S OFFENDER SCORE WAS CORRECTLY CALCULATED.

Bircher further complains that his offender score was improperly calculated because according to the stipulation on prior record, his last felony conviction was in 1998. Stipulation on Prior Record, Supp. CP. Bircher signed the stipulation on prior record with the assistance of counsel (including that none of his convictions washed out), and should not be allowed to raise this issue now.

It is true that “a sentence based on a miscalculated upward offender score is in excess of statutory authority and generally may be challenged at any time.” In re Pers. Restraint of Cadwallader, 155 Wash.2d 867, 874, 123 P.3d 456 (2005). But, see generally In re Pers. Restraint Petition of Goodwin, 146 Wash.2d 861, 873-876, 50 P.3d 618 (2002) (discussing certain cases in which waiver may be found). In other words, although generally “[t]he defendant cannot agree to a sentence in excess of that which is statutorily authorized,” Cadwallader, 155 Wash.2d at 874, 123 P.3d 456, “[w]aiver of a challenge to an allegedly invalid sentence ‘can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.... [W]aiver may be found where a defendant stipulates to incorrect facts.’ ” Cadwallader, 155 Wash.2d at 875, 123 P.3d 456 (citing Goodwin, 146 Wash.2d at 874, 50 P.3d 618).

For example, in State v. Ross, Ross's counsel acknowledged that an out-of-state prior conviction was properly included in Ross's offender score. State v. Ross, 152 Wash.2d 220, 225, 95 P.3d 1225 (2004). On appeal, Ross argued that the sentencing court improperly calculated his offender score because the State failed to prove that his out-of-state conviction was

comparable to a Washington crime. Ross, 152 Wash.2d at 225, 95 P.3d 1225. But because Ross had already been released from confinement and his appeal was moot, our Supreme Court considered two identical claims by two other defendants. Ross, 152 Wash.2d at 228-229, 95 P.3d 1225.. The other two defendants were Russell J. Hunter, who pleaded guilty to second degree attempted robbery and disputed the comparability of two out-of-state convictions, and Donald J. Legrone, who a jury found guilty of unlawful possession of cocaine with intent to deliver and argued that the court should have counted his two prior out-of-state convictions as only one prior conviction in his offender score. Ross, 152 Wash.2d at 226-227, 95 P.3d 1225. In addressing these remaining two claims, the Court held that a defendant's affirmative acknowledgement of the "existence and comparability" of out-of-state convictions need not be supported by further proof and can be included in the defendant's offender score at the time of sentencing. Ross, 152 Wash.2d at 233, 95 P.3d 1225; see also, State v. Huff, 119 Wash.App. 367, 372-73, 80 P.3d 633 (2003) (defendant's stipulation sufficient to establish prior criminal history and defendant could not raise the issue on direct appeal).

In Huff, the defendant stipulated to his criminal history and offender score and stipulated that none of his prior convictions had washed. Huff, 119 Wn.App. at 369. Huff also stipulated that a prior marijuana manufacturing conviction was equivalent to a class C felony in Washington. Huff, 119 Wn.App. at 369. The court relied upon this stipulation at sentencing. On appeal, Huff argued that because the record was unclear whether the marijuana conviction had washed out, he was entitled to a hearing. Huff, 119 Wn.App. at 370-71. This Court disagreed, holding that Huff's stipulation included the facts necessary to support a finding that the offense had not washed.

Similarly, in a situation similar to the facts presented here, this Court, in State v. Foster, 140 Wash.App. 266, 274-276, 166 P.3d 726, 730 - 731 (2007)(*published in part*) upheld the defendant's prior stipulation, *including his stipulation that his priors did not wash*, stating that, "Foster's stipulation to the comparability of the Kansas conviction to a Washington class B felony and to the fact that it had not washed out is an admission of its existence . . . its comparability, and its continuing viability for inclusion in his offender score. [Accordingly] [t]he stipulation here relieved the

State of its burden of proof on these facts." Id. The same should be found here.

The bottom line here is that Bircher, represented by counsel, *agreed* that his criminal history as listed on the stipulation was correct, including his agreement that none of those convictions washed. Supp. CP. Bircher and his counsel no doubt did so because he and his counsel knew very well that Bircher had intervening misdemeanor convictions that prevented any of his priors from washing. Supp. CP. Unfortunately, however-- apart from Bircher's stipulation that none of his priors washed-- there is nothing in the record that expressly states *why* the prior convictions did not wash. On the other hand, the State is not aware of any authority requiring a "crimes-do-not-wash stipulation" to expressly list every intervening misdemeanor conviction which interrupted the wash out period (and Bircher recites none).

Apparently, then, Bircher's position is that the State is not allowed to trust a represented defendant's written agreement which merely states that the defendant agrees that his prior felonies do not wash. If this is the standard, then where does this end? According to Bircher's reasoning, *even if* all of Bircher's misdemeanor conviction history were expressly listed in this

stipulation, crime-by-crime, date-by-date--it would mean nothing-- because under Bircher's theory, a defendant could challenge *any* agreement regarding criminal history. This simply cannot be true. The State is held to good faith in such stipulations, yet a represented defendant is not held to the same standard? What is the alternative? That the State must present detailed evidence at every sentencing to prove a defendant's criminal history regardless of the fact that the defendant and his counsel agree that the State's recitation of the history is correct?

At Bircher's sentencing hearing, his new counsel said, "I'm sure the court has had an opportunity to review Mr. Bircher's conviction record. The court should note that those convictions essentially ended in 1998 I believe was the last conviction." 1/21/09 RP 38. Thus, even though Bircher's counsel took note of the fact that there had been many years since Bircher had a felony conviction--he did not further dispute that those prior convictions washed out. Furthermore, Bircher and his attorney acknowledged reading and signing the judgment and sentence, which also sets out Bircher's felony criminal history. Bircher's counsel said, "I previously reviewed the judgment and sentence, I reviewed it again in terms of the added material." 1/21/09 RP 41. Then the trial court

asked Bircher, ". . .you signed that judgment and sentence, Mr. Bircher, have you had an opportunity to review it and satisfied [sic] that it says what I said it should say?" Bircher answered, "yes."
1/21/09 RP 52.

Both the stipulation on prior record and the judgment and sentence list Bircher's criminal history and Bircher--represented by counsel--signed both documents. And the stipulation also said that none of Bircher's convictions washed. Supp. CP. Bircher's knowing stipulation to his criminal history, done with the assistance of competent counsel, waives his right to challenge his offender score now. Ross, Huff, and Foster, supra. Bircher's argument to the contrary is without merit and his conviction should be affirmed.

CONCLUSION

For the foregoing reasons, Bircher's conviction should be affirmed in all respects.

DATED THIS 29th day of November, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:


LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

DECLARATION OF MAILING

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of this response brief was served upon the Appellant by placing a copy of said document in the United States Mail, postage prepaid, addressed to Appellant's Attorney of Record as follows: BACKLUND AND MISTRY, 203 East Fourth Avenue, Suite 404, Olympia, WA 98501.

DATED THIS 29th day of November, 2009.

Chri Smith

FILED
COURT OF APPEALS
DIVISION II
09 DEC - 1 PM 12: 29
STATE OF WASHINGTON
BY _____
DEPUTY