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

STATE OF WASHINGTON, RESPONDENT

v.

RENEE CURTISS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 08-1-01504-3

BRIEF OF RESPONDENT

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

1. Whether the trial court abused its discretion in admitting the defendant's pretrial statements to police, after finding that they were made after a knowing and voluntary waiver of defendant's right to remain silent?
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5. Whether the prosecutor's argument, which was unobjected to, was so flagrant and ill-intentioned as to result in prejudice that could not be cured by a jury instruction?

6. Whether the defendant has demonstrated that trial counsel's performance was deficient, and was prejudiced by the deficient performance?

B. STATEMENT OF THE CASE.

1. Procedure

On March 25, 2008, the Pierce County Prosecuting Attorney (State) filed an Information charging Renee Curtiss (the defendant) with one count of murder in the first degree for the death of Joseph Tarricone. CP 1, 2-3. The case was assigned to Hon. Kitty-Ann van Doorninck for trial. 1 RP¹ ff.

Before jury selection and the trial testimony, the court conducted a hearing pursuant to CrR 3.5 to determine the admissibility of statements made by the defendant. 2 RP. After hearing the testimony of the witnesses and the argument of counsel, the court decided that the statements were admissible. 2 RP 173. The court entered Findings of Fact and Conclusions of Law reflecting its decision. CP 444-455.

At the conclusion of the trial, the jury found the defendant guilty, as charged, of murder in the first degree. CP 435. The court sentenced the

¹ The Report of Proceedings of the trial are labeled as Volumes I-X. Volumes III and IV are combined, as are Volumes VIII-X. Volumes I, II, and III all begin with page 1. For clarity, the record will be referred to by volume in Arabic, followed by the page in that volume; e.g. 2 RP 27.

Tarricone had left a Mercedes automobile and a pick-up truck and camper at her the house. 5 RP 209. She said that the victim had signed ownership of the truck/camper over to her mother. *Id.*

In 1990, Gypsy Tarricone, another daughter of the victim's, started to investigate her father's disappearance. 5 RP 92. Her purpose was to discover what had happened to her father in general, and to settle his affairs by having him declared legally dead. 5 RP 92, 96. Her investigation led her to the owners of the rental house at 104th and Canyon Rd. in Pierce County, where the defendant and her mother lived. 5 RP 93. The owners gave her contact information for the defendant's family. *Id.*

This information led her to the defendant. Hoping to get more information regarding their father, Gypsy Tarricone and her brother, Dean, called the defendant, falsely claiming that the victim had left a life insurance policy naming the defendant as a beneficiary. 5 RP 97, 111. The Tarricones recorded the phone call. 5 RP 98, 114.

The defendant told them that the victim had returned to Alaska after she last saw him. 5 RP 99. The defendant said that the victim had sold his truck/camper "real cheap." 5 RP 116. The Tarricones found this suspicious because the victim prized the truck/camper highly and would never have sold or given it away. 5 RP 78, 101.

On June 4, 2007, Travis Haney had been hired to excavate a property at Canyon Road and 104th street in Pierce County near Puyallup to prepare for new construction. 5 RP 44. While excavating where the

defendant on April 24, 2009, and set a minimum sentence, as required by former RCW 9.95.011. CP 456-463, 475-477.

The defendant filed a timely notice of appeal on April 24, 2009, after the sentence was imposed. CP 466.

2. Facts

Joseph Tarricone was a meat distributor in Alaska with several children from a previous marriage. 5 RP 84. After his divorce in 1976, Tarricone remained in close contact with his children. 5 RP 119. He called them weekly (5 RP 69, 80, 108) and visited them regularly. 5RP 80. He paid child support without fail. 5 RP 122.

In August of 1978, Joseph Tarricone went to visit his girlfriend Renee Curtiss who lived in Puyallup, Washington. 5 RP 72. During the trip, he saw his daughter Gina Chavez who also lived in Washington. 5 RP 74. That was the last time any of the children ever saw him alive or heard from him again. RP 75, 82, 91.

In March of 1979, Ms. Chavez filed a missing persons report with the Des Moines Police Department. 5 RP 76. Based upon information supplied by Chavez, (since retired) Det. Jerry Burger of the Des Moines Police Dept. began an investigation. 5 RP 209. He contacted the defendant. She told him that Tarricone had come to her house with two airline tickets to Rome and asked her to marry him. She stated that when she refused, he threw down the tickets and left. *Id.* She reported that

garage had been, he uncovered what appeared to be a garbage bag filled with bones. 5 RP 50-51. Mr. Haney discovered more bones in a dirt pile on the site. 5 RP 53. He stopped the excavation and called 911. 5 RP 54.

Detective Jason Tate of the Pierce County Sheriff's Department (PCSD) responded to the scene. 5 RP 61. When he examined the bag he found bones, clothing remnants, rope and twine. 5 RP 62.

The forensic services unit of the Pierce County Sheriff's Department managed and supervised the excavation and collection of the bones found at the scene. 6 RP 270. The bones found were determined to be human. 6 RP 270. Forensic investigators worked for days sifting the soil at the scene. 5 RP 125, 6 RP 274. Investigators discovered ribs, vertebrae, and cervical bones (5 RP 126) a partial skull and lower jaw (5 RP 127), a pelvis, and a scapula. 5 RP 140. The bones were taken to the Pierce County medical examiner's office. 6 RP 256.

PCSD Detective Benson was assigned to investigate the case. 6 RP 280. He contacted the owner of the property where the bones were found, Marilyn Miller. 6 RP 282. He learned that during the summer of 1978, the house had been rented to Mrs. Geraldine Hesse. 6 RP 282. Ms. Hesse was Renee Curtiss' mother. 6 RP 283.

Det. Benson learned from the King County Sheriff's Dept. that there was a missing person report regarding Joseph Tarricone and that Tarricone was last seen at the house at 104th and Canyon Rd. in 1978. 6

RP 285. Based on the information in that report, Benson contacted Gypsy Tarricone. 6 RP 286.

Some of the recovered bones and a DNA sample from the victim's sister were sent to the Federal Bureau of Investigation lab for DNA testing. 6 RP 232. Dr. John Stewart, a mitochondrial DNA examiner for the FBI, compared mitochondrial DNA samples from Joseph Tarricone's sister to the bones. 6 RP 246. The mitochondrial DNA profiles were the same. 6 RP 246. He found he could not exclude Joseph Tarricone as the source of the DNA from the bones. 6 RP 247.

Dr. Erick Kiesel, the medical examiner of Pierce County, examined the bones recovered from the site off Canyon Road. 6 RP 255. Dr. Katherine Taylor, a forensic anthropologist at the King County medical examiner's office, was also brought in to examine the bones. RP 667. Both concluded that many of the cut marks on the bones were consistent with a chain saw. 6 RP 261, 7 RP 370. Dr. Taylor concluded that the bones were from a male skeleton over forty years old. 7 RP 383-384. Based upon all the information from the investigation, the medical examiner concluded that the cause of death was homicide and that the bones were those of Joseph Tarricone. 6 RP 266, 268.

March 24, 2008, Detectives Benson and Wood contacted the defendant at her place of employment in Seattle. 6 RP 150, 290. The detectives told the defendant they had just arrested her brother, Notaro, for the murder of Joseph Tarricone. 6 RP 296. The defendant admitted that

she had known Tarricone. 6 RP 159-160. She admitted that she knew about the murder. 6 RP 165. She did not remember if she was present when it occurred and did not believe that she was. 6 RP 173-174, 303-304.

The detectives arrested her after the interview. 6 RP 175.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEFENDANT'S STATEMENTS TO POLICE.

When a court determines whether statements obtained during a custodial interrogation are admissible, the court examines the totality of the circumstances surrounding the interrogation. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Circumstances that are potentially relevant in the totality-of-the-circumstances analysis include the “crucial element of police coercion;” the length of the interrogation; its location; its continuity; the defendant’s maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation. *Id.*, at 101, citing *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). The totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

In *Unga*, the Supreme Court stated:

A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."

165 Wn. 2d at 102 (interior citations omitted).

The Court went on to say that the real issue is whether the interrogating officer's statements or tactics were so manipulative or coercive that the suspect was prevented from making a rational, independent decision whether to confess or make a statement. 165 Wn. 2d at 102.

Detective Wood's statement to Curtiss that the statute of limitations for rendering criminal assistance had expired did not render her waiver of constitutional rights involuntary. In fact, the statute of limitations for rendering criminal assistance had expired two years after the commission of the murder. A person is guilty of rendering criminal assistance in the first degree if she renders criminal assistance to a person who had committed murder in the first degree or any Class A felony. Rendering criminal assistance in the first degree is a gross misdemeanor if the actor is a relative. RCW 9A.76.070 and .060.

When Detectives Wood and Benson went to interview the defendant, they did not know what extent, if any, Curtiss was involved in Joseph Tarricone's murder. They did not believe that they had probable

cause to arrest her. 2 RP 45-46. Curtiss's brother, Nicholas Notaro, had just confessed to the murder of Joseph Tarricone. 2 RP 29. But, Notaro specifically told them that his sisters were not involved at all. 2 RP 28.

The failure of the defendant to realize the full consequences of her actions does not affect the voluntariness of the statement. *State v.*

Heggins, 55 Wn. App 591, 599, 779 P.2d 285 (1989)(abrogated on other grounds by *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002)) (defendant thought his statements were off the record).

Deception by law enforcement does not make a statement inadmissible as

a matter of law. Rather, under *Miranda*,² the inquiry is whether the

deception was such as to make a waiver of constitutional rights

involuntary. *State v. Gilcrist*, 91 Wn.2d 603, 607; 590 P.2d 809 (1979).

The test of voluntariness is "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined -- a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." *Gilcrist*, *supra* citing *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).

In *State v. Rupe*, 101 Wn.2d 664, 670, 683 P.2d 571 (1984), the defendant was questioned multiple times over several days before coming to the police station for a polygraph test. Following his polygraph

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

examination, he was informed that the polygraph indicated he was not being truthful. As a result, Rupe confessed. Rupe argued that the police tactics had been improper. The court disagreed and stated the following:

The police tactics employed were neither overly zealous nor coercive. They consisted solely of psychological appeals to defendant's conscience. Such appeals might result in an involuntary confession where the defendant is in a weakened physical or emotional state or of below normal intelligence. Defendant here, however, did not have these handicaps. . . .

Rupe, supra, at 679.

In the present case, the totality of the circumstances shows that the tactics of Detectives Benson and Wood were neither coercive nor was the defendant's will overborne. Curtiss was 54 years old when the detectives contacted her. She had had previous contact with law enforcement. Between 1996 and 2002, she had been arrested for driving under the influence of intoxicants or physical control and advised of her *Miranda* rights five times. CP 452-453.

Despite the fact that she was not in custody during this interview and police did not have probable cause to arrest her (2 RP 46, 110, 115), they advised of her *Miranda* rights. 2 RP 108. She was interviewed in her office at her place of work. 2 RP 35. She was not handcuffed or restrained. 2 RP 33. She was free to go. 2 RP 35, 40. Curtiss was coherent throughout the interview, appeared to understand the questions asked of her, and responded appropriately to questions. She was in good physical condition,

and did not appear to be under the influence of alcohol or drugs. Given the totality of the circumstances of the interview, her will was not overborne by the detectives.

Unchallenged findings of fact entered following a CrR 3.5 hearing are verities on appeal. *Broadaway*, 133 Wn.2d at 131. The defendant does not challenge the Findings, therefore they are verities on appeal. She challenges Conclusion 11 as “simply ignoring the evidence to the contrary.” App. Br. at 39. But, it does not matter that other evidence may contradict the finding, because the trial court determines the weight and credibility of the testimony, and that determination is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts do not weigh conflicting evidence. *See State v. O’Connor*, 155 Wn. App. 282, 288, 229 P. 3d 880 (2010).

Here, the court considered the totality of the circumstances. Conclusion 9, CP 454. Its finding or conclusion number 11 is supported by the evidence and the other Findings. The court did not abuse its discretion in finding that the defendant’s statement was made after a voluntary and knowing waiver of her rights.

2. THE DEFENDANT FAILED TO PRESERVE
OBJECTIONS TO TESTIMONY OF THE
DETECTIVES WHERE SHE FAILED TO
OBJECT AT THE TRIAL BELOW.

In order to preserve error for review, a party must object and make a record in the trial court. ER 103(a). For the defendant to raise the present issues for the first time on appeal, she must demonstrate a manifest error affecting a constitutional right. RAP 2.5(a); see *State v. Elmore*, 154 Wn. App. 885, 897, 228 P.2d 760 (2010). “Manifest error” requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

In order to be found to be an issue that can be raised for the first time on appeal, this court must find that the statements made by Det. Wood were explicit or almost explicit comments on a witness's credibility, thereby creating a potential manifest error. See *Kirkman*, at 936. In *Kirkman*, detectives testified about competency protocols that they used to determine if a victim had the ability to tell the truth. *Id.* at 930, 934-935. There, the Court looked at several statements made and determined that they were not explicit, and therefore the issue could not be raised for the first time on appeal. The Court found that such statements were not explicit and therefore the issue was not properly preserved for appeal. *Id.*, at 938.

In the present case, the jury was instructed as the jury was in *Kirkman*. There, the Court determined the instruction was “relevant (and

curative) in claims of judicial comment on the evidence.” *Id.*, at 937. The juries in *Kirkman* and in the present case were both instructed that they “are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each.” *Kirkman*, at 937, *see State v. Ciskie*, 110 Wn.2d 263, 280, 282-283, 751 P.2d 1165 (1988).

In the present case, the jury was instructed, “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.” CP 419. Because the jury, similar to the jury in *Kirkman*, was instructed that they alone are the judges of credibility, any possible error was alleviated.

3. DETECTIVE WOOD’S STATEMENTS WERE NOT IMPERMISSIBLE OPINION TESTIMONY AS THEY WERE OFFERED TO PLACE CONTEXT AROUND THE INTERVIEW AND DEFENDANT’S STATEMENT.

Generally, testimony given by lay and expert witnesses may not directly or by inference refer to defendant’s guilt. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). But, “an opinion is not improper merely because it involves ultimate factual issues.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(citing *Heatley*, at 578 (citing ER 704).

To determine “whether testimony constitutes an impermissible opinion on the defendant’s guilt” the court looks to the circumstances of each case. *Olmedo*, at 531. In doing this, courts should consider factors that “include the type of witness, the nature of the charges, the type of defense and the other evidence.” *Demery*, at 759, (citing *Heatley*, at 579).

In the present case, Detective Wood testified about his interview with defendant. On direct examination by the prosecuting attorney, the following exchange took place:

Q: And when the tape recorder was turned off, what occurred?

A: Well, we just kind of sat there for a few minutes looking at each other. I was looking at [Det. Benson], he was looking at me, we were looking at Renee and just sat there in silence.

Q: Then did you say something to Ms. Curtiss?

A: I did.

Q: What did you say?

A: I told her that I thought she was there when Joseph was killed. I also told her that I thought she called her brother and asked him to kill Joseph.

6 RP 171-172.

The prosecutor went on to ask about the defendant’s response:

A: She just sat and stared at me. She didn’t get angry, she didn’t get mad, she didn’t deny it; she just sat and stared at me.

- Q: And did she eventually respond?
...
- A: Her response was, quote: "I don't know if I was there. I can't remember."
- Q: Did you ask her anything else?
- A: Yes. Again I told her I believe she called her brother to come and deal with Joseph Tarricone.
- Q: And did she respond?
- A: She again denied it. I asked her if she was upstairs or downstairs when the shooting happened as well. I just continued on with the direct confrontation.
- Q: And what was the defendant's response?
- A: Quote: "I don't remember if I was there. I don't think I was."

6 RP 173.

Detective Wood's comments were not impermissible opinion testimony. Rather, Detective Wood was explaining what occurred during his interview with defendant. In context, the interview had reached an impasse. Det. Wood described the transition "from an interview interrogation in the taped statement to a direct confrontation." 6 RP 172. As quoted above, Det. Wood again characterized this portion of the interview as a "direct confrontation." 6 RP 173. His testimony regarding his statement that he did not believe defendant was not a comment on defendant's guilt. It was a description of a police tactic used to interrogate

suspects and witnesses to challenge or confront the witness to be forthcoming and to determine whether the witness will change her story.

This is similar to what occurred in *Demery, supra*. In *Demery*, the court admitted, over objection, a taped interview of Demery's interrogation without redacting statements made by officers which suggested that Demery was lying during the interview. *Demery*, 144 Wn.2d at 757. The court held that the officer's statements were solely designed to see whether Demery would change his story during the interview, and thus not opinion testimony. *Demery*, 144 Wn.2d at 761. The court went further to say that "unlike those statements offered by a witness during trial to impeach the defendant's credibility, the officer's statements in this case were admitted solely to provide context for the responses offered by the defendant." *Demery*, 144 Wn.2d at 761.

Det. Woods' testimony was not improper, and the defendant did not object to it. Issues must be raised in the trial court to preserve them for review. RAP 2.5(a), see *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). If not objected to at trial, witness opinion testimony may be reviewed only if it rises to the level of a manifest constitutional error where the witness makes "... an explicit or almost explicit... statement on an ultimate issue of fact." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Failure of a defendant to object for tactical reasons does not constitute reversible error. *Id.* at 937.

The issues regarding opinion testimony in the present case are also similar to those in *Kirkman*. In *Kirkman* and its consolidated case, *State v. Candia*, both defendants challenged testimony given at trial that pertained to the credibility of the victim in their trials of first degree child rape. *Kirkman*, 159 Wn.2d at 922. In each case, a detective who interviewed the victim, and a doctor, who examined both victims, testified about statements the victims made to them. *Kirkman*, 922-25. The detective in *Kirkman*'s trial testified that he had determined the victim's ability to tell the truth through the preliminary competency protocol, and the victim had promised to tell him the truth. *Id.* at 923. The detective in *Candia*'s trial also testified that she had given the victim the preliminary competency protocol, and that she asks the victims to tell her the truth. *Id.* at 925. The doctor testified in both trials about the results of the physical examinations, the statements the victims made to him, and how the examinations and the statements compared. *Id.* at 923-25.

The Supreme Court held that none of those witnesses offered improper opinion testimony. 159 Wn.2d at 938. Part of the rationale for the Court's ruling was that neither defendant could show actual prejudice that resulted from the testimony at issue. *Id.* at 937. In order for a claim of constitutional error to rise to the level of being "manifest," defendant must show actual prejudice. *Id.* at 935. The Court noted, "It also appears from the respective records that defense counsel for both *Kirkman* and *Candia* chose not to object to the testimony for tactical reasons." *Id.*

Here, even if the detectives' testimony was impermissible opinion evidence, there was no resulting prejudice because there was no manifest constitutional error. The trial court in the present case properly instructed the jury as to their role in weighing opinion evidence. The trial court instructed the jury, "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." CP 419 (Jury Instruction 1).

These instructions mirror those the trial court gave the jury in *Kirkman*. The Supreme Court cited the proper instructions as curative of any prejudice resulting from improper opinion evidence in that case. *Kirkman*, 159 Wn.2d at 937. It is presumed that jurors follow the instructions of the trial court. *Id.* The *Kirkman* court pointed to these jury instructions as evidence that Kirkman and Candia did not suffer "actual prejudice" from any improper opinion testimony. *Id.*

Also, as in *Demery*, in the present case the defense attorney chose not to ask for a limiting instruction. *Demery*, 144 Wn.2d at 757. *Demery* held that although a court may choose to give a limiting instruction to give context to the third party statements:

such a limiting instruction was not required in this case because the jury clearly understood from the officer's testimony that the statements were offered solely to provide context to the defendant's relevant responses.

Demery, 144 Wn.2d at 762.

Detective Wood's statements in the present case were elicited and offered for the same purpose as why the officers' statements in *Demery* were not redacted. As such, they are not impermissible opinion testimony which comments on defendant's guilt. Rather, they provide context for the interview and defendant's statement.

Also, the trial court is supposed to have the first opportunity to apply the *Demery* test. *Demery*, 144 Wn.2d at 759 ("In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the circumstances of the case, including the following factors..."). If defense counsel had objected to the detectives' testimony, it would be appropriate for this Court to apply the *Demery* test.

However, by failing to object, defendant took the opportunity away from the trial court to apply *Demery* to the testimony of the detectives. Defense counsel's failure to object also removes the opportunity for this Court to analyze the trial court's reasoning under *Demery*, because none exists. Therefore, the standard on appeal is not the one articulated in *Demery*, but the manifest constitutional error standard articulated in *Kirkman*. Defendant cannot meet the *Kirkman* standard of manifest constitutional error, because defendant is unable to show actual prejudice that resulted from the detectives' testimony.

4. WHERE THE PROSECUTOR’S ARGUMENT WAS PROPER, OR WAS NOT FLAGRANT OR ILL-INTENTIONED AS TO BE INCURABLE BY INSTRUCTION, THE DEFENDANT WAIVES THE ISSUE ON APPEAL WHEN SHE FAILED TO OBJECT AT TRIAL.

a. The defendant has the burden to show prosecutorial misconduct and prejudice.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed 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.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) citing *Gentry*, 125 Wn.2d at 593-594.

- b. The prosecutor did not commit misconduct in eliciting testimony that was unobjected to and the court had ruled admissible.

Generally, a prosecutor cannot elicit testimony regarding, or comment on, a defendant's exercise of her right to remain silent. *See State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008). However, if the defendant testifies, her pre-arrest silence may be used to impeach her testimony. *Id.*, at 206. There is no constitutional violation if a defendant testifies at trial and is impeached for remaining silent before arrest and before *Miranda* warnings. *Id.*, at 217, citing *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

Here, unlike *Burke*, the defendant did not exercise her right to remain silent. After the CrR 3.5 hearing, the court clearly found:

At no time throughout the interview with defendant Renee Curtiss; including the exchange that occurred after the recorder had been turned off, did the defendant invoke her right to remain silent.

Finding 66 (CP 451). *See also* Finding 28 (CP 448), and Finding 56 (CP 450). She spoke with the detectives at length, which was the reason for the CrR 3.5 hearing.

Here, the prosecutor did not elicit testimony regarding the defendant's post-*Miranda* silence. *Cf. State v. Knapp*, 148 Wn. App. 414, 199 P.3d 505 (2009). In *Knapp*, the prosecutor elicited testimony that, when identified by a witness, the defendant hung his head, but did not say anything. *Id.*, at 419. In closing, the prosecutor commented on the

defendant's silence, implying that if the defendant was innocent, he would have said so. *Id.*, at 420.

At trial, the defendant testified in her own defense. When a defendant does not remain silent and talks to law enforcement officers, the State may comment on what the defendant does not say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001). In addition, if the defendant waives the right to remain silent and makes a post-*Miranda* statement, the prosecutor may draw the attention of the jury to the fact that a story told at trial was omitted from that statement. *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988).

In the present case, the prosecutor did say in closing argument: "She did not deny the accusations." 9 RP 603. This referred to the part of the police interview where Det. Wood confronted the defendant about her presence and participation in the crime. However, the argument was not a comment on the defendant's silence or an implication that her lack of denial was an admission of guilt. The argument was about credibility.

When the defendant took the stand, she specifically said that she did not call the victim to come to the house, did not know that he was coming over (7 RP 409), and denied that she was present when the victim was killed (7RP 414). The argument contrasted her "I don't know, I don't remember" answers to the detectives with the certainty of her trial testimony and put it in context of the rest of the evidence.

The prosecutor did not comment on the defendant's right to remain silent. Proof of the defendant's knowledge and participation in the crime was largely circumstantial. The prosecutor argued the circumstantial evidence in much of her closing. *See, e.g.*, 9 RP 602, 683.

The prosecutor argued the defendant's credibility. In closing, the prosecutor argued that the defendant's version was not credible in light of all the evidence. 9 RP 605, 609. The prosecutor quoted exactly from Instruction 1 (CP 419), which tells the jurors that one of the factors that they may consider in evaluating the testimony is "the reasonableness of the witness' statements in the context of all the other evidence." 9 RP 618.

Where the prosecutor discussed the defendant's statements in the interview, it was in the context of arguing credibility. 9 RP 621-623. The prosecutor pointed out the defendant's memory of what occurred immediately after the murder was detailed. 9 RP 619. The prosecutor contrasted this to the interview, where the defendant repeatedly stated that she "could not recall" and "could not remember" significant facts. *See, e.g.*, 9 RP 622. In discussing Det. Wood's confronting the defendant in the interview, it was again in the context of arguing credibility. 9 RP 602-604.

The prosecutor spent a great deal of time picking apart the defendant's testimony, contrasting it with her previous statements and the rest of the evidence. *See e.g.*, 9 RP 623-627. None of this argument commented on her pre-arrest or post- *Miranda* silence. (And, as argued

above, she never invoked her right to silence.) Nor did the prosecutor argue that Det. Wood did not believe the defendant.

In rebuttal, the prosecutor again reminded the jurors that they were the sole judges of credibility. 9 RP 685. She then went on to again argue that the defendant had a selective memory during the interview and that defendant's version of events changed at trial. *Id.* This was all in the context of arguing credibility, which is proper argument. See *Belgarde, supra.*

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Here, the trial court instructed the jury regarding burden of proof and reasonable doubt per WPIC 4.01:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an *abiding belief in the truth of the charge*, you are satisfied beyond a reasonable doubt.

Instruction 2(emphasis added). CP 421.

The trial court also properly instructed the jury that:

The lawyer's 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. The evidence is the testimony and the exhibits. *The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

Instruction 1 (emphasis added), CP 419.

The defendant does not allege that the jury instructions were in error. Defense counsel at trial did not object to the prosecutor's closing argument. This issue is waived unless the defendant can show the remark is flagrant and ill-intentioned and prejudiced to defendant. The defendant does not demonstrate that an instruction by the court could not have cured potential prejudice. See *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). She does not meet her burden.

c. Arguing that a trial is a search for the truth is not misconduct.

In her rebuttal, the prosecutor argued that the “trial is a search for the truth and a search for justice.” 9 RP 686. Indeed it is, or should be.

In *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the United States Supreme Court considered whether the prosecution had violated the defendant’s rights by withholding evidence in a capital case. The Court noted the “special role played by the American prosecutor in the search for truth in criminal trials.” In *State v. Wright*, 87 Wn.2d 783, 786, 557 P.2d 1 (1976) (*overruled on other grounds by, State v. Straka*, 116 Wn. 2d 859, 810 P.2d 888 (1991)) the Washington Supreme Court noted that law enforcement and investigatory agencies were required to insure every criminal trial is a “search for truth, not an adversary game.” In *State v. Gakin*, 24 Wn. App. 681, 686, 603 P. 2d 380 (1979), this Court described the search for truth as “the ultimate objective of a criminal trial.” In his dissent in *In re Personal Restraint of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992), Justice Utter wrote:

We must bear in mind that a criminal trial should be the search for truth, and this purpose is not furthered if the rules of the game turn the trial into a mere “poker game” to be won by the most skilled tactician.

Id., at 902. Urging the jury to do justice or to render a just verdict is not improper. See *Anderson*, 153 Wn. App. at 429.

This part of the prosecutor's argument was supported by the law. It was not improper. It was certainly not misconduct.

d. Use of a jigsaw puzzle analogy regarding reasonable doubt is not misconduct.

In an effort to explain reasonable doubt to the jury, the prosecutor used the example of putting a puzzle together. 9 RP 640-641. The State argued that once enough pieces are placed into the puzzle, a person is able to recognize the picture in the puzzle. This description during closing argument did not misstate the law, it was an illustration or analogy. 9 RP 640. The State attempted to pattern its illustration after Jury Instruction No. 2, which correctly defined reasonable doubt. CP 421.

Even if the prosecutor's statements were error, if any prejudice arose in the analogy, a curative instruction could have resolved it. But defendant did not ask for such an instruction. Even assuming that these comments were a misstatement of the law, had defense counsel objected, the trial court could have instructed the jury to ignore these comments as inaccurate statements of the law, and reminded or instructed the jury correctly. These comments were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice.

An attorney may properly use a jigsaw puzzle analogy to help jurors to understand the concept of listening to all the evidence, and not

making a decision until all they have heard and seen all the evidence. In some cases, numerous witnesses testify regarding a small aspect of a case, or piece of seemingly insignificant evidence, which at the end the prosecutor will argue adds up to proof beyond a reasonable doubt.

Prosecutors sometimes use the analogy to describe that it is possible to have an abiding belief in the truth of the charge, even though there are some “holes” or “pieces” missing. The puzzle analogy does not diminish the State’s burden. It is merely one way to argue the concepts of “piecing together” evidence and that of reasonable doubt.

Different attorneys have different ways of arguing these same concepts to a jury. Some may find the puzzle analogy helpful. Others may find it homespun or trivial. It is not improper. Nor is it misconduct.

- e. The prosecutor’s argument was not flagrant or ill-intentioned and did not result in prejudice that could not have been cured by a jury instruction.

In her closing argument in this case, the prosecutor said that “The word “verdict” in Latin means “to speak the truth.” 9 RP 642. She went on to ask the jury to return a verdict that the jurors knew spoke the truth. *Id.* In a recent case, this Court has found a similar “speak the truth” argument to be improper. See *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273

(2009). However, unlike the argument in *Anderson*³, the prosecutor in the present case did not ask the jury to “declare the truth.” *Cf.*, *Anderson*, at 429.

In fact, the word *verdict* does come from two Latin words: *vere*, meaning “truly;” and *dictum*, meaning “something said.” So, a verdict is something “truly said.” Webster’s Third New International Dictionary (unabridged) 2002.

This Court has subsequently found that argument improper. The jury was correctly instructed on the law. They were told what standards to apply and also to disregard any remarks that were not supported by the law or the court’s instructions. The State’s remark was not flagrant or ill-intentioned. Even if this Court finds it was in error, the jury was still properly instructed and presumed to follow the court’s instructions on the law.

5. THE DEFENDANT CANNOT DEMONSTRATE THAT TRIAL COUNSEL WAS DEFICIENT, NOR THAT A DEFICIENCY PREJUDICED HER.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong 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

³ It should be noted that this trial occurred before *State v. Anderson* was published.

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. 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 guilt."). 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.

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). 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).

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). 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.

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. 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).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d at 225-26.

Here, the defendant was accused of being an accomplice to a murder that occurred 30 years ago. In the interview with Det.’s Wood and Benson, the defendant repeatedly stated that she did not remember what happened, and that she did not believe that she was present when her brother killed the victim. RP 173, 174, 303, 304, 305. Defense counsel

pointed out in cross examination that Notaro had already admitted killing Tarricone and had told the detectives that the defendant was not involved. RP 179. Counsel went on to elicit that the detectives used interrogation techniques to keep the defendant talking and that the detectives lied to the defendant or deceived her to get her to talk. RP 180-181.

The defendant testified that she was not present when the victim was killed. RP 409. She testified that she did not kill the victim and did not explicitly or implicitly request that her brother do so. RP 414. Notaro was called as a witness and testified consistently with his previous statement to police: that he alone killed Tarricone, and that the defendant had neither participated nor requested the murder. RP 487, 488, 491, 497. He testified that the defendant even objected to murder or harm to the victim. RP 492.

The defense strategy was to admit that the defendant had participated in covering up the crime in order to protect her mother and brother. RP 413. Defense counsel's closing admitted this. 9 RP 652-653. The crux of defense counsel's argument was that the defendant had been placed in an impossible situation when she arrived home to find that her brother had killed Tarricone. 9 RP 680. She could turn in her mother and brother or help cover it up and keep her mouth shut. *Id.* He further argued the utter lack of evidence (9 RP 651) in general, and forensic evidence in particular (9 RP 657) of the defendant's participation.

The strategy regarding the defendant's statements was to challenge the value and meaning of the statements. 9 RP 668. Counsel minimized the defendant's statements to the detectives by pointing out the ambiguous nature of the statements. *Id.* He made the best of the remaining evidence, pointing out that it was consistent with the defendant's testimony, and that none of it proved that the defendant participated in the murder, nor requested the victim's death. He attacked the police questioning, pointing out that they did not ask the defendant the crucial question: i.e., whether the defendant had requested that Notaro kill Tarricone. 9 RP 677. Counsel argued that this was because the police did not want to know the answer; as she testified under oath: that she did not request the death or harm of Tarricone. *Id.*

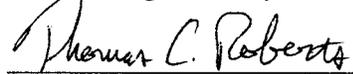
Analysis of ineffective assistance of counsel begins with a strong presumption of attorney competence and deference to strategic choices made by counsel. *See Strickland*, 466 U.S., at 689; *McFarland*, 127 Wn. 2d, at 335. Counsel's strategy in this case is readily apparent from the record. His performance and strategy are not deficient. The defendant cannot show that a different strategy would likely have resulted in an acquittal. The defendant cannot demonstrate ineffective assistance of counsel.

D. CONCLUSION.

The trial court heard testimony and argument regarding the circumstances and admissibility of the defendant's statements to police. The court's ruling was supported by the law and evidence. At trial, the parties argued the law and evidence to the jury without objection by either side. The defendant received a full, fair trial after which the jury found her guilty as charged. For the reasons argued above, the State respectfully requests that the judgment be affirmed.

DATED: JULY 14, 2010

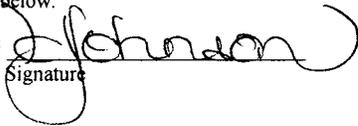
MARK LINDQUIST
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Certificate of Service:

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.

7/14/10 
Date Signature

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