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COURT OF APPEALS
DIVISION II

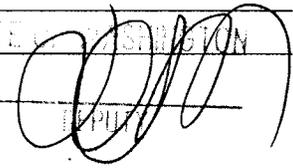
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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY



STATE OF WASHINGTON, RESPONDENT

v.

DEMARCO V. MCGOWN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 08-1-04547-3

BRIEF OF RESPONDENT

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WPIC 5.303

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

1. Whether the trial court properly overruled defendant's objections to the admission of out-of-court statements of Brennan Morford and Monteece Brewer where such statements were non-hearsay or admissible a statement of identification or as prior inconsistent statements for impeachment.

2. Whether the trial court properly instructed the jury with respect to the jury's use of the out-of-court statements of Brennan Morford and Monteece Brewer.

3. Whether Defendant has failed to show ineffective assistance of counsel where he bases his claim on the fact that his attorney failed to assert a non-meritorious claim at sentencing.

B. STATEMENT OF THE CASE.

1. Procedure

On September 30, 2008, Demarco Ventura McGown, hereinafter referred to as "defendant," was charged by information with first-degree assault with a firearm sentence enhancement in count I, drive-by shooting in count II, and first-degree unlawful possession of a firearm in count III.

CP 1-2.

Although Brennan Morford and Monteece Brewer were originally charged as co-defendants, their cases were dismissed prior to the trial of the defendant. RP 19-20, 249, 290, 406.

The defendant's case was called for trial on May 20, 2009, RP 1¹, and the defense moved to exclude gang evidence. RP 1-8. The parties then selected a jury on May 20 and 21, 2009. RP 15-17, 21-23; 2 RP 1-133.

The State gave its opening statement on May 21, 2009 and the defense reserved giving its statement. RP 33.

The State then called Officer Patrick Patterson, RP 34-72, Detective Jason Brooks, RP 84-113, Detective Steve Reopelle, RP 113-18, Detective Phillip Pavey, Jr., RP 119-42, Officer Donald Rose, RP 142-50, Susie McGown, RP 150-68, Toni Martin, RP 169-93, Donovan Velez, RP 193-217, Brennan Morford, RP 221-62, 267-322, Officer Damion Birge, RP 323-37, Officer Nicolas McClelland, RP 339-44, Kathryn Little, RP 344-52, Officer Jereme Vahle, RP 352-58, Billy-Ray Griffin, RP 360-97, Monteece Trusean Brewer, also known as Monteece Smith Lloyd, RP

¹ The same method of citation to the verbatim report of proceedings adopted by the Brief of the Appellant is used here.

403-30, Dorothy Ann Steadman, RP 443-60, Detective John Ringer, RP 461-521, 540-59, 572-93 , Dr. Thomas Patterson, RP 522-40, and Siieli Laupati, RP 565-72.

The parties stipulated that the defendant had previously been convicted of serious felony. RP 28-29; RP 595.

The State rested on June 2, 2009, followed by the defense, which called no witnesses. RP 600.

On June 3, 2009, the parties discussed jury instructions. RP 606-11. The State proposed a limiting instruction based on WPIC 5.30 regarding use of the taped interview of Brennan Morford, while the defense proposed that this instruction also address all out-of-court statements made by Brewer and Morford. RP 606-08. The Court gave the State's proposed instruction. RP 608.

The jury was instructed and the parties then gave their closing arguments. RP 612-29, 629-46, 647-64.

On June 3, 2009, the jury returned verdicts of guilty of first-degree assault as charged in count I, guilty of drive-by shooting as charged in count II, and guilty of first-degree unlawful possession of a firearm as charged in count III. RP 670-72. The jury also returned a special verdict with respect to count I, indicating that the defendant was armed with a

firearm at the time of the commission of the assault in the first degree. RP 670.

On July 10, 2010, the defendant was sentenced to 236 months plus a 60-month firearm sentence enhancement, or 296 months in total confinement on count I, 89 months on count II and 54 months on count III, to be served concurrently. RP 680. The court also imposed 24 to 48 months in community custody on count I and 18 to 36 months in community custody on count II. RP 680-81.

The defendant filed a timely notice of appeal the same day. RP 681-82; CP 133.

2. Facts

Billy-Ray Griffin, Jr. was a 33-year-old father from Tacoma, Washington. RP 361-62. On the evening of September 4, 2008, he was at El Hutchos bar located at 62nd and East McKinley Avenue in Tacoma, Washington. *Id.*; RP 36-37. He had a drink and was leaving for the night. RP 363. As Griffin was walking out, a car pulled up and the driver, who Griffin identified as Derrick Johnson, called out, "Is that BP?," a name Griffin sometimes uses. RP 364-68. Johnson then told the person sitting in the front passenger seat of the car to shoot Griffin. RP 367-71. Griffin

indicated that he saw the man in the front passenger seat holding a semi-automatic, .45-caliber handgun and that seconds after Johnson told the man to shot, he was shot. RP 371-74. Griffin reported hearing four shots and said that he was shot three times. RP 373.

Griffin had never seen the person sitting in the front passenger seat before, but described him as a young “fair skinned,” black man with long braided hair, a “pretty distinctive nose that was kind of long and skinny,” RP 368-71, RP 490, and “bug eyes.” RP 490. Griffin testified that the man was sitting down, so he could not tell how tall he was. RP 371. When asked if he saw the person who shot him in the courtroom, Griffin initially said, “no,” but then stated, “I mean, I don’t know.” RP 369. He went on to remind the court that it was dark at the time, that he had been shot shortly after first seeing this man, that he “was on the verge of dying” and “rushed to the emergency room” soon thereafter. RP 369-71.

Griffin described the car as a dark-colored “Dodge Neon or something like that.” RP 375. He said he didn’t see the make or model of the car. RP 376.

Griffin was shot two times in the chest and once in the stomach and was taken to the hospital where he underwent surgery. RP 376; RP 527-31. These shots caused damage to his colon, intestines, and lungs, and

required an initial one-month hospital stay. RP 377. Dr. David Patterson, the surgeon who treated Griffin, described Griffin's injuries as "obviously life-threatening." RP 524-25, 535. Griffin has been in and out of the hospital since then for follow-up treatment. RP 377.

Sioeli Laupati was driving past El Hutchos when he saw a man talking to people in a black car in the parking lot. RP 566-68. As Laupati was getting ready to turn, he heard gunshots, saw the car "take off" and the man clutching his stomach. RP 567-68. The shots came from the passenger side of the car. RP 568. Laupati walked over to the man, and confirmed he had been shot. RP 570. The man grabbed a hold of Laupati's arm. *Id.* Laupati stayed until the police arrived. *Id.*

Kathryn Little was at El Hutchos bar talking to a friend on the evening of the shooting. RP 345-46. The woman to whom she was speaking heard gunshots and ran outside. RP 347. When Little went out to check on her, she saw a man, who had been shot, stumbling towards her. RP 347. Little said that they got the man a chair and tried to keep him awake "because he kept fading out." RP 349. The man said, "I was shot" and pulled up his sweatshirt to put pressure on the wound. RP 350. Little saw "a couple bullet holes" in the man. *Id.*

On September 4, 2008, Tacoma Police Officer Patrick Patterson was on patrol with his partner Officer Frisbie in the area of "El Hutchos" Restaurant and Bar. Patterson noted that this area has more problems than other parts of the city. RP 38. The officers noticed a silver PT Cruiser and a black Dodge Intrepid parked next to El Hutchos. RP 38-42. The vehicles were still occupied, but no one was getting in or out of them. *Id.* The officers noted the license plates before leaving the area. *Id.* About five minutes later, the officers were advised of a possible shooting at El Hutchos. RP 42.

When they arrived back at the bar, they found a small crowd of people outside the front door, who flagged them down. RP 43-44. This crowd pointed to a man who had apparently been shot in the chest, with his shirt up and blood on his chest. RP 43-44. The man, later identified as Billy-Ray Griffin, Jr., was seated in a chair and was fading in and out of consciousness. RP 45. He was transported to the hospital for treatment of a gun-shot wound. RP 88. Neither the silver PT Cruiser nor the black Dodge Intrepid were still there. RP 43

Officer Patterson communicated the information concerning these vehicles to other units while Officer Frisbie tried, unsuccessfully, to get any information from the people in the crowd who seemed uncooperative

or afraid. RP 46-47. About a minute or two after Patterson broadcast the vehicle information, a PT Cruiser was found and stopped by other officers. RP 71.

Officer Patterson reviewed surveillance video with bar personnel, which showed Griffin apparently speaking with the occupants of the Dodge Intrepid before he fell over. RP 56-58. He then turned that video, stored on a USB drive, over to forensic technician Donovan Velez. RP 59.

Dorothy Steadman was driving the silver PT Cruiser which was parked at El Hutchos on the evening of the shooting. RP 445-47. She testified that she was waiting to pick up her friend, who was in the bar, when she heard the squealing of tires and saw a car behind hers. RP 445-49. Steadman said she heard three or four gunshots from that car. RP 450-51. She indicated that the vehicle drove away after the shots were fired. RP 451. Steadman also "took off," but was stopped by police officers. RP 452. She testified that the shots seemed to come from the rear of the vehicle, yet in her written statement, she had indicated that they came from the passenger side of the vehicle. RP 451-54.

Detective Jason Brooks was called to the scene on the evening of the shooting, RP 85, and was assigned to document the crime scene. RP 89-90. At that scene, he found a cigarette that appeared to have fallen to

the ground on the southeast corner next to the curb and a spent bullet, which was “right next to the curb in line with the cigarette to the south.” RP 95-96. The bullet had a red substance on it, which he believed to be “blood or some sort of biological material.” RP 96. Detective Brooks also found apparent drops of blood on the sidewalk, “a small black box that was like a gum box,” RP 97-98, and a drinking straw. RP 102,107.

Donovan Velez was dispatched to the El Hutcho’s shooting scene at 6201 McKinley Avenue. RP 194-97. Velez took overall photographs of the scene, RP 197-99, a video of the overall scene, RP 199-200, and made a scene diagram, RP 200. He then collected the spent bullet, drinking straw, empty gum box, and cigarette. RP 204. He noted that there was evidence of suspected blood on that bullet. RP 205.

Brennan Morford testified that the shooting occurred at El Hutchos at about eight o’clock at night. RP 231, and that he in fact witnessed the shooting. RP 240. Morford indicated that he was seated in the back seat of the black Dodge Intrepid at the time. RP 223-24. He testified that the car probably belonged to the defendant’s mother. RP 233. He said that Johnson was driving the vehicle and that he and Monteece Brewer were sitting in the backseat. RP 223-24. Morford testified that the weapon used to shoot Griffin was a semiautomatic handgun, RP 279, but said that

Johnson, never had a weapon during the incident. RP 244-45. He testified that both he and Brewer were drinking liquor and smoking “weed” during the incident. RP 242. Morford stated that neither he nor Brewer shot Griffin. RP 245, 292-93. However, Morford denied that the defendant was in the car or that there were any other occupants in the car. RP 224. He stated that, although the car seats four, there was no one in the front passenger seat. RP 232; 293.

Morford then claimed that Johnson shot Griffin. RP 245. He testified that Johnson said something to the effect of “Just shoot that nigger” or “Just pop that nigger,” RP 254-58, but he claimed that Johnson said this to himself. RP 258. Morford later acknowledged that this did not “make a whole lot of sense.” RP 292.

On September 27, 2008, Officer Nicholas McClelland stopped the defendant for speeding while driving the black Dodge Intrepid. RP 340-42. Monteece Brewer was a passenger at the time. RP 353-56. Brewer fled, but was apprehended. RP 355.

Valez processed the black Dodge Intrepid for evidence. RP 207-09. He took photographs of that vehicle, RP 208-10, and collected a latent fingerprint impression from its rear-view mirror. RP 211. He tried to find fingerprints throughout the remaining interior and exterior of the car, but

could not. RP 211-12. The vehicle itself had a fine layer of dust all over it, but it “clearly had wipe marks on both doors,” as well as “the windows on those doors.” RP 477-78.

Toni Martin, a latent fingerprint examiner with the Tacoma Police Department, received a fingerprint lifted from the rear-view mirror of a vehicle from Forensic Specialist Donovan Velez. RP 170-82. She then compared that print to known fingerprints of three people and found that the fingerprint lifted from the vehicle matched that of Monteece T. Brewer. RP 182-83.

At trial, Brewer indicated that he was in the car with Johnson, Morford, and the defendant on the evening of September 4, 2008. RP 409. Johnson was driving the vehicle. *Id.* He denied remembering anything else about the evening. RP 414. He did say that he remembered a telephone conversation that he had with Detective Ringer on September 9, 2008. RP 417-18.

Detective John Ringer was called to investigate the shooting at El Hutchos and assigned to be the case agent, meaning he was “ultimately responsible for preparing the case.” RP 462. Ringer spoke to the defendant’s mother regarding the location of the Dodge Intrepid used in the shooting, but got no information from her. RP 470-71.

Ringer contacted Morford, read him the *Miranda* warnings, and interviewed him in his vehicle, which was parked outside Morford's home. RP 497-500. Ringer obtained Morford's permission to record the interview. Morford identified the defendant as the shooter. RP 513-14. Ringer testified that Morford never referred to Johnson as the shooter. RP 514.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY OVERRULED DEFENDANT'S OBJECTIONS TO THE ADMISSION OF OUT-OF-COURT STATEMENTS OF BRENNAN MORFORD AND MONTEECE BREWER BECAUSE SUCH STATEMENTS WERE NON-HEARSAY OR ADMISSIBLE AS A STATEMENT OF IDENTIFICATION OR AS PRIOR INCONSISTENT STATEMENTS FOR IMPEACHMENT.

Although the defendant argues that the trial court erred by admitting "out-of-court statements of both Morford and Brewer because the statements were inadmissible hearsay," Brief of Appellant, p. 20, 12-32, he does not indicate with specificity the statements to which he refers.

Generally, "appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)(citing *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907

(1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). Indeed, “[a] party may assign evidentiary error on appeal only on a specific ground made at trial.” *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L. Ed. 2d 321 (1986)). Moreover, “[a]n objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review.” *Guloy*, 104 Wn.2d at 422. An “objection gives a trial court the opportunity to prevent or cure error.” *Id.* “The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. O’Hara*, 167 Wn.91, 98, 217 P.3d 756 (2009). The only exception to this general rule is that “a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right.” *Id.*

If properly preserved for appeal, a trial court’s decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not

consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

In the present case, the defendant made only thirteen un-sustained objections based on hearsay during the trial below, *see* RP 241, 415, 471, 472-73, 476, 477, 484-85, 504-10, 517-18, 519-20, 547-48, 548-49, and has raised no constitutional issues here. *See* Brief of Appellant. Because “[a] party may assign evidentiary error on appeal only on a specific ground made at trial,” *McFarland*, 127 Wn.2d at 332-33, review here should be limited to the evidence admitted over these thirteen objections.

a. The Court Properly Overruled Objections to the Admission of Statements Which Were Not Hearsay.

“Hearsay’ is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” ER 801(a).

The defendant objected five times to questions, which while they may arguably have called for hearsay, elicited none. The first two of these came during the testimony of Brennan Morford:

Q (By [DEPUTY PROSECTUOR]): Well, did individuals in the car say something to him [i.e., Griffin]?

A Driver [i.e., Johnson] called him over there.

Q And for what reason?

A I guess he knew him.

Q Okay. And what were they talking about?

[DEFENSE COUNSEL]: Objection, calls for hearsay, *State v. Crawford*.

[DEPUTY PROSECUTOR]: Your Honor, it's a foundational issue as well as a co-conspirator statement.

THE COURT: I will allow the question.

Q [By prosecutor] What was the subject matter? What were they talking about?

A I don't know exactly what they were talking about.

RP 241.

The second such objection occurred as follows:

Q All right. Well, apparently you remembered Ms. McGown called and told you the police had come by?

[DEFENSE COUNSEL]: Objection, hearsay.

THE COURT: Rephrase your question, please, Mr. Greer.

Q (By [DEPUTY PROSECUTOR]) You spoke with Ms. McGown on this evening where you and your friends had her car and she told you –

[DEFENSE COUNSEL]: Objection, hearsay, and she's an unavailable witness and it's testimonial.

[DEPUTY PROSECUTOR]: I haven't finished.

THE COURT: Go finish your question, please.

Q (By [DEPUTY PROSECUTOR]) She told you that the police were looking for you, correct?

[DEFENSE COUNSEL]: Renew my objection.

THE COURT: Overruled.

A Could you ask me that again?

Q (By [DEPUTY PROSECUTOR]) Ms. McGown called you, she and her boyfriend or whoever it is, Mr. Jackson, and talked to you saying that the police were looking for you. Do you remember that?

A I don't remember her saying police were looking for me. I remember she said – I don't really remember what she said.

RP 414-15.

Neither the response, "I don't know what they were talking about" nor "I don't remember what she said" includes "an oral or written assertion" of another person. Nor does either describe any "nonverbal conduct" of anyone else. Therefore, neither response was a "statement"

within the meaning of ER 801(a). Because “[h]earsay’ is a statement, other than one made by the declarant while testifying at trial,” and Brewer’s responses did not include such a statement, his responses did not include hearsay. Therefore, the court’s decisions to overrule the defendant’s objections were proper and it and the defendant’s convictions should be affirmed.

The third objection to a question which elicited no hearsay occurred during Detective Ringer’s testimony:

A We had forensics do their processing. ***And I was there at the time.*** They photographed it inside and out. ***We*** searched the vehicle with a superior court search warrant ***I obtained.*** And that happened after the photographs and processing. They dusted it for fingerprints, all of the things that they do.

Q Did they make you aware of whether they found any potential evidence?

[DEFENSE ATTORNEY]: Objection, calls for hearsay.

THE COURT: Overruled to that question. Just answer that question, please.

A I was there though the processing, and ultimately there was [sic] some results that were obtained.

RP 476 (emphasis added).

The fourth objection to a question which elicited no hearsay also occurred during Detective Ringer's testimony:

Q And in regard to the information that was gained, I believe you said that forensics fingerprinted the vehicle?

A Dusted it, yes.

Q Did they make you aware of the results of that?

[DEFENSE ATTORNEY]: Objection, calls for hearsay.

THE COURT: Overruled.

A *I was aware* of some of the findings.

RP 477. (emphasis added)

The responses "I was there through the processing, and ultimately there was some results that were obtained" and "I was aware of some of the findings" do not include "an oral or written assertion" of anyone aside from Detective Ringer. RP 476; ER 801(a). Nor do they include a description of anyone else's nonverbal conduct. Rather, they seem to be simply descriptions of what Detective Ringer, himself, did and observed. As Ringer testified, he was the one who obtained the search warrant for the vehicle, he was "there at the time" the warrant was served, he "searched the vehicle" himself, and he "was there through the processing" of that vehicle. RP 476. Thus, the statement that he and his co-workers

obtained “some results” from that search is not a statement of one of those co-workers, but a description of Ringer’s own actions and observations. Similarly, when Ringer stated, “*I was aware* of some of the findings,” he was referring to findings of which he himself was aware through his own actions and observations, not to anything that anyone else told him. If Ringer were, in fact, referring to other people’s findings, he would not use the qualifier “some” and would simply state, “I was aware of the findings.” Because these responses do not include either “an oral or written assertion” of anyone else or a description of anyone else’s nonverbal conduct, they were not ER 801(a) statements. Therefore, they were not hearsay and were properly admitted.

The fifth objection to a question which elicited no hearsay also occurred during the testimony of Detective Ringer:

Q And obviously the purpose –one of the purposes of you talking to her [i.e., Susie McGown] is to locate her vehicle?

A That’s correct.

Q Was she able to tell where her vehicle was?

[DEFENSE COUNSEL]: Objection, calls for hearsay.
State vs. Crawford, Washington vs. Crawford.

THE COURT: Well, just to that question I will overrule the objection. Just answer that question.

A She was not certain where the vehicle was at the time.

RP 471.

The response, “[s]he was not certain where the vehicle was at the time,” does seem to be a statement within the meaning of ER 801(a), but it was certainly not one offered to prove that McGown did not know where the suspect vehicle was. It was, therefore, not offered to prove the truth of the matter asserted, and in consequence, was not hearsay.

Out-of-court statements “may be admitted if offered for purposes other than to prove the truth of the matter asserted.” *State v. James*, 138 Wn. App. 628, 640, 158 P.3d 102 (2007)(quoting *State v. Davis*, 154 Wn.2d 291, 301, 111 P.3d 844 (2005)); *State v. Hamilton*, 58 Wn. App. 229, 231, 792 P.2d 176 (1990). See ER 801(c), 802.

In the present case, the testimony that McGown “was not certain where the vehicle was at the time” was not offered to prove that McGown did not know the suspect vehicle’s location. Such a proposition would have been irrelevant to whether the defendant committed the assault. Indeed, this piece of testimony was never mentioned during the deputy prosecutor’s closing argument. See RP 612-29, 647-64. Rather, it was admitted to show the competence of the police investigation. If the

detective knew where the suspect vehicle was located immediately after the shooting, there would have been no reason for the police to contact Mr. Jackson or to use officers to wait for the vehicle to return, RP 471-72, and there probably would have been a significantly shorter delay in apprehending the suspects and bringing the matter to trial. Because the statement, “[s]he was not certain where the vehicle was at the time,” was not offered to prove the truth of the matter asserted, it was not hearsay. *See* ER 801(c). Therefore, it was admissible and the court’s decision and the defendant’s convictions should be affirmed.

The sixth and final objection to a question which elicited no hearsay occurred shortly after the fifth:

Q What specific individuals were you looking for?

[DEFENSE ATTORNEY]: Objection, answer calls for reliance on hearsay, unavailable witness.

[DEPUTY PROSECUTOR]: Offered purely for the purpose of his investigation.

[DEFENSE ATTORNEY]: It’s the truth of the matter asserted. He’s asking him to say, you know, who did Ms. McGown tell you had the vehicle. He’s going to have to give that information, certainly for the purpose it is used for.

THE COURT: I think for purposes of identification, I think it’s allowed. I will allow it.

Q (By [deputy prosecutor]) Go ahead.

A We were looking for Derrick Johnson, Demarco McGown, Monteece Brewer, and Brennan Morford.

RP 472-73.

The response, “[w]e were looking for Derrick Johnson, Demarco McGown, Monteece Brewer, and Brennan Morford” was properly admitted for a number of reasons. First, it is not clear that the source of this information was anything other than the detective’s own investigation. Therefore, there is nothing to suggest that it contained “an oral or written assertion” or “nonverbal conduct” of any other person. If it did not, it could not have been hearsay because it could not have been a statement within the meaning of ER 801(a).

Even assuming Detective Ringer’s response was an ER 801(a) statement, it was not offered to show that these four individuals were suspects, a fact which had already come into evidence through the testimony of other witnesses, but, as the deputy prosecutor argued, to show the competence and chronology of Ringer’s investigation. Detective Ringer had earlier testified that he was the “case agent” on the investigation of the underlying matter and therefore, the one

[u]ltimately responsible for preparing the case, for making sure everything's done on the investigation, for tracking down, investigating leads, making sure reports are done, ***for assisting in identifying suspects and getting them arrested***, for interviews, ultimately presenting a package for the prosecutor's office for charging. And then following through on all the steps necessary to take the case to court and see that it's prosecuted.

RP 462-63 (emphasis added). The fact that Ringer had developed suspect information was relevant to showing that he had performed his job and hence, to his credibility, irrespective of what names he gave when asked the question at issue. Hence, the statement, “[w]e were looking for Derrick Johnson, Demarco McGown, Monteece Brewer, and Brennan Morford” was not offered to prove the truth of the matter asserted, and was, in consequence, not hearsay. *See* ER 801(c). Therefore, it was admissible and the court's decision and the defendant's convictions should be affirmed.

b. The Court Properly Overruled the Objection to Admission of a Statement of Identification.

ER 801(d)(1)(iii) provides that:

A statement is not hearsay if—

(1) ***Prior Statement by Witness***. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is... (iii) one of identification of a person made after perceiving the person

The basis for excluding statements of identification from the definition of hearsay is that “evidence of pretrial identification has greater probative value than a courtroom identification because the witness’ memory is fresher and the identification occurs before the witness can be influenced to change his mind.” *State v. Grover*, 55 Wn. App. 923, 931-32, 780 P.2d 901 (1989).

“[T]here is no logical reason to permit the introduction of a witness’s out-of-court identification and to exclude statements identifying the various physical characteristics, which is no more than the sum of the parts perceived.” *Id.* (quoting *Williams v. United States*, 756 A.2d 380, 387 (D.C.App. 2000)). Extrajudicial descriptions of clothing are also included in ER 801(d) statements of identification. *Id.* at 451. A witness’ “description of the offense itself is admissible under this exception only as to the extent necessary to make the identification understandable to the jury.” *State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007)(quoting *Porter v. United States*, 826 A.2d 398, 410 (D.C.App. 2003)).

In the present case, one of the remaining seven un-sustained objections came in response to a question asking for an ER 801(d)(1)(iii)

identification of a person. It occurred during Detective Ringer's testimony as follows:

Q I want to talk about specifically Top Dog [i.e. Derrick Johnson] first. How did he [i.e., Billy-Ray Griffin] describe Top Dog?

A Described him as an African-American male, roughly in his late twenties, bald head, dark skinned. I don't recall whether he specifically told me what he was wearing or not.

....
Q So what you described is what he told you regarding Mr. Johnson[also known as "Top Dog"]'s physical description?

A Physical description, yes. He also stated that he had been called over to the vehicle by a voice that he recognized.

[DEFENSE ATTORNEY]: Objection, hearsay. I won't object to the identification purposes, clearly allowable. But the other hearsay, I object.

THE COURT: I am going to overrule the objection. I think he answered that. You might want to clarify for the foundation there.

Q (By [deputy prosecutor]) Not talking about what he said, but he indicated to you that he recognized Mr. Johnson's voice when it was all over?

A Yes, he did.

RP 484-85.

Detective Ringer's responses, that Griffin "had been called over to the vehicle by a voice that he recognized" and that he recognized Johnson's voice, are both statements indicating that Griffin recognized the driver's voice as that of Derrick Johnson. In other words, both are statements of identification of a person made after perceiving the person. Consequently, neither is hearsay, ER 801(d)(iii), and both were properly admitted. Therefore, the court's decision to admit these statements and the defendant's convictions should be affirmed.

c. The Court Properly Overruled Objections to the Deputy Prosecutor's Impeachment with Prior Inconsistent Statements:

The remaining six un-sustained objections were all made in response to the deputy prosecutor's proper impeachment of Brennan Morford and Monteece Brewer through prior inconsistent statements. One of those six pertained to a tape-recorded statement of Morford, admitted as impeachment evidence, *see* RP 504-10, and the other five related to prior statements of Brewer. *See* RP 517-20, 547-49.

"The credibility of a witness may be attacked by any party, including the party calling the witness." ER 607. "In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent

with the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277 292, 975 P.2d 1041 (1999). "[A] witness's in-court testimony need not directly contradict the witness's prior statement." *Id.* at 294 (citing 5A Karl B Tegland, Washington Practice, Evidence Section 256, at 307 (3rd ed. 1989)). Rather,

inconsistency is to be determined, not by individual words or phrases alone, but the *whole impression or effect* of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the expressions appear to have been produced by inconsistent beliefs?

Id. (quoting *Sterling v. Radford*, 126 Wn. 372, 218 P. 205 (1923)(quoting 2 Wigmore on Evidence, sec. 1040, p. 1208) (emphasis in the original)).

To be received as a prior inconsistent statement, the contradiction, need not be in plain terms. It is enough if the "proffered testimony, taken as a whole, either by what it says or by what it omits to say" affords some indication that the fact was different from the testimony of the witness whom it sought to contradict.

Id.

"[T]he purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times" and "[f]rom this, the jury may disbelieve the witness's trial testimony." *Id.* at 293. "Courts and commentators have both acknowledged that the jury is better able to determine the value and

weight to give a witness's trial testimony if it knows that the witness expressed contrary views while the event was still fresh in the witness's memory and before the passage of time created opportunities for outside influence to distort the statement." *Id.* at 295. "Thus, to the extent that a witness' own prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible 'to impeach.'" *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995).

"If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach," but "even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling." *Newbern*, 95 Wn. App. at 293.

In *Newbern*, the State impeached a witness with her tape-recorded statement to a police detective, after previously impeaching her with non-taped statements made to that detective. *Id.* at 282. Over the defendant's objection at trial, the detective testified about an initial interview with the witness at Madigan Army Medical Center and "also produced a tape recording of the Harborview Medical Hospital interview, which the trial

court admitted into evidence over Newborn's hearsay objection." *Id.* The trial court noted:

Well, while the chronology of this statement is, in my opinion, somewhat consistent, very consistent, actually, with the chronology that Lakenya Jones and other witnesses have testified to, the entire tone and thrust of this statement is totally contradictory to what she attempted to portray at trial. It gives the exact opposite impression, in my opinion, and, in its totality, is simply an inconsistent version of what the jury has heard on the witness stand.

Id. at 282-83. On appeal, the defendant argued that "the trial court erred when it admitted Jones's Harborview interview because many of the statements she made at the hospital were consistent with her trial testimony and she admitted at trial that others were untrue." *Newbern*, 95 Wn. App. at 294. The witness, who had been shot by the defendant, said that she "had not been truthful" in her tape-recorded statement. This Court noted that "Jones testified at trial that the shooting was accidental" and that "the 'whole impression or effect' of the details she described at trial supported this allegation." It held that because "this testimony was directly contrary to the critical portions of the statements that she made to Bomkamp," "the trial court did not abuse its discretion when it admitted Jones's prior statements for impeachment purposes." *Id.* at 295.

In the present case, as in *Newbern*, the State impeached a witness, here Mr. Morford, with his tape-recorded statement to a police detective. RP 510. Like *Newbern*, the State produced a tape recording of an interview with the witness, which the trial court admitted into evidence over the defendant's hearsay objection. RP 504-10. In so doing, the trial court noted:

that Mr. Morford testified "that basically Detective Ringer was telling him what to say for the most part, giving him the suggested manner to form his statement. And I think there's a benefit to actually hearing the voice as used during the tape so they can judge that, hear Detective Ringer's voice on the tape and hear Mr. Morford's responses.

RP 441-42. The defendant here, like *Newbern*, now argues that the trial court erred when it admitted the tape-recorded statement because "many of the statements allowed in by the court... were *consistent*" and because Morford claimed that others were untrue. Brief of Appellant, p. 23-29; compare *Newbern*, 95 Wn. App. at 294. Nevertheless, in the present case, as in *Newbern*, the witness's trial "testimony was directly contrary to the critical portions of the statements that he gave to the detective" in the taped interview. Specifically, in his trial testimony, Morford stated that he did not know who owned the car from which the bullets were fired, RP 233, that the defendant was not even in that car at the time of the shooting,

RP 224, 232, that he did not remember stating that the driver, Derrick Johnson, called the victim over to the car, RP 253, and that when the driver then said “Just shoot that nigger” or “just pop that nigger” in reference to the victim, the driver was actually talking to himself. RP 255-58. However, when Morford spoke to Detective Ringer, he told him that the defendant’s mother owned the car from which the bullets were fired, that the defendant was in the front passenger seat at the time of the shooting, that Derrick Johnson called the victim over to the car, and that Johnson then told the defendant to shoot the victim. *See* RP 233-58; Exhibit 9, 47. Morford’s trial testimony was thus clearly inconsistent with these statements. Because these statements inculpated the defendant, they were undeniably critical portions of Morford’s taped statement. As a result, here, as in *Newbern*, Morford’s trial testimony was directly contrary to the critical portions of the statement made to the detective. Therefore, the trial court did not abuse its discretion when it admitted Morford’s tape-recorded statement for impeachment purposes, *see Newbern*, 95 Wn. App. at 295, and both its decision to do so and the defendant’s convictions should be affirmed.

Although the defendant now argues that it was improper to call Morford at all, Brief of Appellant, p. 20-21, he never objected to Morford

being called as a witness at trial. Because “[a] party may assign evidentiary error on appeal only on a specific ground made at trial,” *McFarland*, 127 Wn.2d at 332-33, this issue is not properly before the Court for review. Even if it were, Morford was properly called. Although a party “may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible,” *State v. Hancock*, 109 Wn.2d 760, 763-64, 748 P.2d 611 (1988), this was not the primary purpose of Morford’s testimony. Indeed, Morford was one of only two State witnesses present in the vehicle from which the gunshots at issue were fired. He had earlier told detectives that the defendant shot the victim, RP 236, 246, and had indicated before taking the stand that he would testify truthfully. RP 221. Neither party knew or could have known that he would testify inconsistently with his earlier statements. *See* RP 18, 31-32. Therefore, Morford could not have been called for the primary purpose of admitting impeachment testimony and it was proper for him to testify.

The trial court also properly admitted five of Monteece Brewer’s prior inconsistent statements as impeachment over the defendant’s hearsay objections.

During the State's direct examination of Mr. Brewer, he denied that Susie McGown had told him that the police were looking for him. RP 408.

The first two of the remaining five objections occurred when the deputy prosecutor impeached this testimony with prior inconsistent statements made to Ringer:

Q -- in this phone conversation? At what point in your conversation did you tell him [i.e., Mr. Brewer] why you wanted to talk to him?

A He had known we were interested in that particular vehicle.

Q Did he tell you how he knew that?

MR. SILVERTHORN: Objection, calls for hearsay, prior statement of a witness, also unsworn.

MR. GREER: It's impeachment, Your Honor. I addressed this issue with Mr. Brewer. He denied it.

THE COURT: Go ahead.

Q (By Mr. Greer) My specific question is: Did he tell you how he came to learn that law enforcement was looking for, interested in talking to him and/or finding his car?

A Yes. He had learned through Susie McGown.

Q Did he tell you when he first learned that?

MR. SILVERTHORN: Objection, double hearsay.

MR. GREER: It's impeachment, Your Honor.

THE COURT: Overruled.

A He replied that it was around midnight on the date in question, the 4th, when they talked on the phone.

RP 517-18.

During the State's direct examination of Mr. Brewer, he indicated that he was "not sure" whether he was with Brennan Morford and the defendant when they "picked up Susie McGown from work and took her home." RP 408.

The third objection occurred when the deputy prosecutor sought to impeach this testimony with prior inconsistent statements made to Ringer:

Q So let's talk then, just before eight o'clock or so, did he [i.e., Mr. Brewer] tell you where he was at eight o'clock on the 4th?

A He said they had gone and picked up—

MR. SILVERTHORN: Objection, Your honor, prior consistent statement, not an inconsistent statement. I think the witness testified where he went and acknowledged that he told the detective where he went. So it is not an inconsistent statement to be used for impeachment purposes. It must be used for inconsistent.

THE COURT: Rephrase the question, Mr. Greer.

Q (By Mr. Greer) Did he detail what he was doing and who he was doing things with?

A Yes

Q And was he with others?

A He was.

Q Where did he say he was?

MR. SILVERTHORN: Same objection.

THE COURT: Overruled.

MR. GREER: Impeachment, Your Honor.

A At one point in time he and others had gone to a car dealership on South Tacoma Way to pick up Susie McGown, give her a ride back to her residence at 12th and Warner.

RP 519-20.

On direct examination, Mr. Brewer had also denied stating that he asked Detective Ringer and his partner to stay because he felt “they are the only sane people [he] ha[d] talked to in law enforcement.” RP 428.

The fourth objection occurred when the deputy prosecutor impeached this testimony with Brewer’s earlier statement to Detective Ringer:

Q And you said that you have some sort of relationship with him [i.e., Mr. Brewer]. In the end of this interview, you said he wanted you to stay for some reason, something to that effect?

A Yeah. In fact, after spending an hour and 15 minutes with him, we told him we were going to leave –

MR. SILVERTHORN: Object to the hearsay, Your Honor.

MR. GREER: Again, impeachment, Your Honor. It has been discussed with Mr. Brewer.

THE COURT: I will just caution the jury that this particular testimony that's being offered is for impeachment purposes of the testimony given by Mr. Brewer.

Q (By Mr. Greer) You don't need to read directly. My question is just to – basically even a yes or no. Toward the end of the interview he didn't want you to go for some reason?

A No. He was enjoying the conversation, said we are the only sane ones. We talked to him recently, we reminded him we are police officer [sic], same police officers he had met earlier, and he said that we weren't street cops and that he would always be honest with us.

RP 547-48.

Finally, during direct examination, Mr. Brewer testified that he was not in the car when the defendant shot the victim. RP 420-21.

The fifth objection occurred during the following exchange:

Q Did he [i.e., Mr. Brewer,] ever admit to being in the back seat during the shooting?

A During the shooting – well, indirectly he did. He would not actually say, but he kept saying, “You know everything, you know where I was,” you know, you know, he was in the car.

MR. SILVERTHORN: Objection again of that was actually covered in Mr. Morford’s testimony.

MR. GREER: Actually –

MR. SILVERTHORN: Mr. Brewer rather, I am sorry.

MR. GREER: Let me interrupt. It was –

THE COURT: Again, this is impeachment purposes and offered for that. The jury will need to recall the testimony that was presented by Mr. Brewer.

A I can answer that. I told him he was in the vehicle at the time of the shooting and initially – he never denied it, but initially quoted – he said he was, quote, fucking drunk, end quote, that night, and that he didn’t know anyone was shot until the following day.

RP 548-49.

In each of these instances, Mr. Brewer’s trial testimony was plainly inconsistent with his earlier statements to Detective Ringer. Because a witness’s prior statement is admissible for impeachment purposes if it is inconsistent with the witness’s trial testimony,” *Newbern*, 95 Wn. App. at

292, each of these statements was admissible as impeachment in the trial of this matter.

While it is true that Mr. Brewer indicated that he did not remember being in the car when Susie McGown was picked up from work and taken home, his failure to remember this specific statement is irrelevant. “[E]ven if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling.” *Newbern*, 95 Wn. App. at 293.

Therefore, the trial court properly overruled the defendant’s objections and admitted Brewer’s prior statements. Both its decisions to do so and the defendant’s convictions should be affirmed.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH RESPECT TO THE JURY’S USE OF THE OUT-OF-COURT STATEMENTS OF BRENNAN MORFORD AND MONTEECE BREWER.

“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” ER 105; *State v. Redmond*, 150

Wn.2d 489, 78 P.3d 1001 (2003). “Although it is usually preferable to give a limiting instruction contemporaneously with the evidence at issue, it is within the trial court’s discretion to choose instead to give a limiting instruction at the close of all of the evidence.” *State v. Ramirez*, 62 Wn. App. 301, 304, 814 P.2d 227 (1991). Jury instructions are proper if they are not misleading, are a correct statement of the law, and allow the parties to argue their theories of the case. *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). The court has no duty to give an erroneous instruction. *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979). A limiting instruction may be given orally and need not be in writing. *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 451 P.2d 669 (1969). Regardless of the format, the trial court has broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983); *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968).

In the present case, as noted above, there were only six hearsay statements admitted over defense objection. These were the tape-recorded statement of Brennan Morford, RP 504-10, and the five statements of Monteece Brewer. RP 517-20, 547-49. Each was admitted as impeachment. RP 504-10, 517-20, 547-49. Although the defendant now

argues that the court failed to give proper limiting instructions pertaining to such testimony, Appellant's Brief, p. 30-31, he is mistaken.

With respect to the Morford's taped statement, the defendant did request that the court give a limiting instruction prior to its publication. RP 439. Before allowing the State to publish the taped statement by playing it for the jury, the court noted that it would give a limiting instruction and then read it for the parties. RP 508. The defendant did not object to this instruction, but simply stated, "thank you." *Id.* Shortly thereafter, and before the tape was played for the jury, the court instructed the jury:

Okay. And members of the jury, I want to read a limiting instruction to you.

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the taped statement of Brennan Morford and may be considered by you only for the purpose of judging or assessing his credibility. You may not consider it for any other purpose.

Any discussion of the evidence during your deliberations must be consistent with this limitation.

Okay?

RP 509-510. The defendant offered no objection and the tape was played for the jury. RP 510.

The Court also gave a written limiting instruction at the conclusion of the evidence:

Evidence has been admitted in this case for a limited purpose. This evidence consists of a tape recorded interview of Brennan Morford conducted by Det. John Ringer and may be considered by you only for the purpose of impeachment. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 82. This instruction properly limited the jury's use of Morford's tape-recorded statement to impeachment and no other purpose. CP 56-85. The defendant did not challenge this aspect of the instruction at the time and does not now argue that it improperly instructs the jury with respect to the tape. Brief of Appellant, p. 30-31. Because it was not misleading, is a correct statement of the law, and allowed the parties to argue their theories of the case, it was a proper instruction and the trial court should be affirmed. *See State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988).

With respect to the five statements of Brewer admitted over defense objection, although the defendant did not request them, the court gave two contemporaneous instructions to the jury. First, it stated, "I will just caution the jury that this particular testimony that's being offered is

for impeachment purposes of the testimony given by Mr. Brewer.” RP 547-48. Later, the court instructed the jury, “[a]gain, this is impeachment purposes and offered for that. The jury will need to recall the testimony that was presented by Mr. Brewer.” RP 548-49.

The defendant did not object to any of these instructions and requested no limiting instructions with respect to Brewer’s statements at the time they came into evidence. He cannot now complain that these instructions were improper. RAP 2.5(a).

Moreover, these contemporaneous instructions properly limited the jury’s use of the statements at issue to “judging or assessing” Morford and Brewer’s “credibility.” The court thereby properly instructed the jury with respect to the hearsay testimony admitted as impeachment. The court’s instructions complied with ER 105, and they and the defendant’s convictions should be affirmed.

Although the defendant now argues that the court should have given his proposed written limiting instruction, he is mistaken. The defendant’s proposed instruction read as follows:

Evidence has been introduced in this case during the testimony of Detective Ringer consisting of a taped statement of Brennan Morford, prior out of court statements of Brennen Morford, and prior out of court statements of Monteece Brewer. This evidence was introduced for the

limited purpose of impeachment. You must not consider this evidence for any other purpose.

CP 87. This instruction, however, was misleading and/or an inaccurate statement of the law. It would have required that the jury limit its use of all out-of-court statements of Morford and Brewer to “impeachment,” despite the fact that only the taped statement and five of Brewer’s statements were admitted solely for impeachment. The defendant’s instruction would have thereby improperly limited the jury’s use of evidence admitted substantively to impeachment. Indeed, it would have prohibited the jury from substantively considering evidence such as Brewer’s statement that the defendant was in the car from which the shots were fired, RP 520, or Morford’s identification of the defendant as the shooter. RP 236, 246. Because the court has no duty to give an erroneous instruction, *Robinson*, 92 Wn.2d 357, it properly declined to give the defendant’s proposed limiting instruction and its decision to do so should be affirmed.

Because the court, through its three contemporaneous limiting instructions and its written instruction 24, properly instructed the jury with respect to the jury’s use of the out-of-court statements of Morford and Brewer, the defendant’s convictions should be affirmed.

3. THE DEFENDANT FAILED TO SHOW
INEFFECTIVE ASSISTANCE OF COUNSEL
BECAUSE HE BASES HIS CLAIM ON THE
FACT THAT HIS ATTORNEY FAILED TO
ASSERT A NON-MERITORIOUS CLAIM AT
SENTENCING.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient

performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. 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. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001). “To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a

basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90.

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Cienfuegos, 144 Wn.2d at 229.

At sentencing, the presumption is that a defendant’s current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they “encompass the same criminal conduct.” RCW 9.94A.589(1)(a).

“[S]ame criminal conduct” means “two or more crimes that require [1] the same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim.” RCW 9.94A.589(1)(a); *State v. Walker*, 143 Wn. App. 880, 890, 181 P.3d 31 (2008); *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999). The Legislature intended the phrase “same criminal conduct” to be construed narrowly, *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994), and the absence of any one of these criteria prevents a finding of same criminal conduct. *Walker*, 143 Wn. App. at 890; *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Vike*, 125

Wn.2d 407, 410, 885 P.2d 824 (1994). Therefore, crimes involving more than one victim cannot encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 777-79, 827 P.2d 996 (1992). “Intent in this context means the defendant’s objective criminal purpose in committing the crime.” *Walker*, 143 Wn. App. at 891. To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on “the extent to which a defendant’s criminal intent, as objectively viewed, changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); *State v. Lessley*, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992).

In the present case, although the defendant argues that trial counsel was ineffective by failing to argue that his first-degree assault and drive-by shooting convictions were the same criminal conduct, he is mistaken.

These convictions were not the same criminal conduct. Although these crimes may have been “committed at the same time and place” and may have required “the same criminal intent,” they did not involve the “same victim.”

Jury instruction 13, required that among the elements that must be proved beyond a reasonable doubt “[t]o convict the defendant of the crime of assault in the first degree,” was “[t]hat on or about 4th day of

September, 2008, the defendant or an accomplice assaulted **B. Griffin.**” CP 56-85 (emphasis added). Conversely, instruction 18 required that, among the elements that must be proved beyond a reasonable doubt “[t]o convict the defendant of the crime of drive-by shooting,” was that the defendant’s discharge of a firearm “created a substantial risk of death or serious physical injury to **another person.**” *Id.* (emphasis added). Under the law of the case doctrine, because neither party objected to these instructions, *see* RP 601-12, they became the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997). Therefore, when the jury convicted the defendant of first-degree assault, it convicted him of assaulting B. Griffin and when it convicted him of drive by shooting, it convicted him of creating “a substantial risk of death or serious physical injury to **another person.**” Thus, Griffin was the victim of the first-degree assault, but everyone in the area of the shooting, except Griffin, was the victim of the drive-by shooting. The Supreme Court explained why this should be the case in noting that “the legislature aimed this relatively new [drive-by shooting] statute at individuals who discharge firearms from or within close proximity of a vehicle.” *State v. Rodgers*, 146 Wn.2d 55, 62, 43 P.3d 1 (2002). Moreover, the facts adduced at trial support this conclusion. Griffin was shot multiple times in the parking lot of what was described as a “neighborhood bar.” RP 346-49. According to Kathryn

Little, who was at the bar that night, there were two to three other people in the parking lot at the time. RP 349. There were also people sitting in the PT Cruiser, which was in the parking lot of El Hutchos at the time of the shooting. RP 445-52. Any of these people could have been within the line of fire or ricochet, particularly given that only three of four bullets hit their intended target. RP 373. Therefore, the defendant's first-degree assault and drive-by shooting convictions involve different victims, and cannot encompass the same criminal conduct.

Where a defendant's convictions are not the same criminal conduct, his defense attorney has no duty to argue that they are. *Walker*, 143 Wn. App. at 890-93. Because the defendant's convictions here were not the same criminal conduct, the defendant's trial counsel had no duty to argue that they were. As a result, trial counsel's performance could not have been deficient and the defendant's claim of ineffective assistance of counsel must fail. *See, e.g., Hendrickson*, 129 Wn.2d at 78. Even were trial counsel's performance to be considered deficient, however, the proper remedy would be "remand for a new sentencing hearing where defense counsel can make this [same criminal conduct] argument."

Saunders, 120 Wn. App. at 825, not reversal.

However, because trial counsel's performance was not deficient, the defendant's convictions should be affirmed.

D. CONCLUSION.

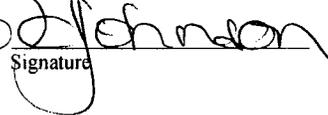
Because Brennan Morford was properly allowed to testify, the out-of-court statements at issue were properly admitted, the jury was properly instructed as to the use of such statements, and the defendant failed to show ineffective assistance of counsel, the defendant's convictions should be affirmed.

DATED: October 20, 2010

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Pierce County
Prosecuting Attorney


BRIAN WASANKARI
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WSB # 28945

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.

10/20/10 
Date Signature

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