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STATE OF WASHINGTON

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DEWAYNE JONES, APPELLANT

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

No. 08-1-00445-9

**BRIEF OF RESPONDENT**

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

1. Has defendant failed to show prosecutorial misconduct when the prosecutor's closing argument was proper and any misstatements were not so flagrant or ill-intentioned that an instruction could not have cured any prejudice?
2. Has defendant failed to show that he received ineffective assistance of counsel where counsel was not required to object to proper argument?

B. STATEMENT OF THE CASE.

1. Procedure

On January 25, 2008, the State charged ANTHONY DEWAYNE JONES, hereinafter "defendant," with one count of unlawful possession of a controlled substance with intent to deliver (cocaine), and two counts of unlawful possession of a controlled substance (oxycodone and methadone). CP 1-2. Prior to trial, the State filed an amended information, alleging that the intent to deliver charge occurred within 1,000 feet of a school bus stop. CP 147-48; RP 3.

On July 6, 2009, the court held CrR 3.5 and 3.6 hearings to determine whether defendant's statements to the arresting officers were admissible and whether the officers stopped defendant based on a pretext. CP 14-29; RP 11-75. Defendant also moved to dismiss the case under

*Knapstad*<sup>1</sup>. CP 7-13; RP 75. The court heard testimony from Officer Kenneth Smith and defendant before denying defendant's *Knapstad* motion. RP 78. The following day, the court denied defendant's motion to suppress his statements to the officers and determined that the stop was reasonable. RP 91-96.

After the suppression hearings, defendant moved for a new attorney. RP 97-99. Defendant stated that he believed his appointed counsel was too busy to properly represent him and he wanted to hire a private attorney. RP 97-99. The court denied his motion as the case had already been called for trial and noted that counsel was a "well-experienced trial attorney." RP 99-100.

On July 8, 2009, the jury found defendant guilty as charged. CP 142, 144, 145; RP 315-16. It also found that defendant's crime of intent to deliver had occurred within 1,000 feet of a school bus stop. CP 146; RP 316.

At sentencing, the State requested that the court invoke the doubling statute<sup>2</sup> in order to impose a high-end, standard-range sentence of 120 months, together with a 24-month sentence enhancement, for a

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<sup>1</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

<sup>2</sup> See RCW 69.50.408(1) ("Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.").

total of 144<sup>3</sup> months. RP 326. Defendant requested the low end of the standard range. RP 329. The court followed defendant's recommendation. CP 153-66; RP 338.

Defendant filed a timely notice of appeal. CP 149.

## 2. Facts

On November 21, 2007, Tacoma Police Officers Smith<sup>4</sup> was on routine patrol when he observed defendant's vehicle traveling in the opposite direction. RP 106. As defendant passed, the officer saw defendant was not wearing a seatbelt. RP 108. Officer Smith performed a U-turn, as defendant's car turned into a 7-Eleven parking lot. RP 109-10. Officer Smith pulled in behind defendant's car and contacted him on the driver's side. RP 110.

As Officer Smith approached defendant's car, defendant remained in the car, but opened the driver's side door. RP 110. Officer Smith informed defendant that he stopped him because defendant was not wearing a seatbelt. RP 111. Defendant claimed to be unaware that it was unlawful to not wear a seatbelt. RP 111.

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<sup>3</sup> Defendant had an offender score of eight, giving him a standard range sentence for Count I of 60+ to 120 months. CP 153-66. Counts II and III had a standard range of 12+ to 24 months. CP 153-66.

<sup>4</sup> Tacoma Police Officer Betts, who on patrol with Officer Smith, also testified on behalf of the state. RP 161. Officer Betts provided cover to Officer Smith and was not involved in the search of defendant or his car, or any conversation with defendant. *See* RP 162-71.

Within a few moments of talking to defendant, Officer Smith noticed several pills spilled out in a console near the bottom of the driver's side door. RP 112. From his vantage point, he could see a pill bottle with no visible label, and the number "512" stamped on several of the pills. RP 112. In Officer Smith's training and experience, the "512" pills were oxycodone. RP 113. When Officer Smith asked about the pills, defendant stated that they were Percocet<sup>5</sup>. RP 114. Defendant claimed to be unaware that it was unlawful to possess oxycodone without a prescription. RP 118.

Defendant told Officer Smith that the pills belonged to his wife and that she had a prescription, but he did not. RP 114. Officer Smith placed defendant under arrest, read his *Miranda*<sup>6</sup> warnings, and patted him down for weapons. RP 118. When Officer Smith reached defendant's front pants pocket, defendant stated, "[t]his is not good; I am fucked." RP 119. Due to safety concerns, Officer Smith immediately stopped searching defendant and asked what was in defendant's pocket. RP 119-20. Defendant replied, "I got some stuff in there that I should not be having." RP 120. Officer Smith looked in defendant's pocket and observed a plastic baggie with several smaller plastic baggies inside. RP 120. The smaller baggies contained small, off-white rocks, which later

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<sup>5</sup> Percocet is another name for oxycodone, a Schedule II controlled substance. RP 114.

<sup>6</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

tested positive for cocaine. RP 120-21. Officer Smith asked defendant if the rocks were fake, but defendant responded, “[n]o, that’s some coke.” RP 122.

Officer Smith searched defendant’s car incident to arrest. RP 122. In the door console, he found two pill bottles with no labels. RP 122. The larger pill bottle was empty, but loose in the compartment were 16 pills stamped “512,” 20 pills stamped “10/325” and “M523,” and 3 pills stamped with “M57/71.” RP 125-26. The pills stamped “M57/71” were methadone; the rest were various milligrams of oxycodone. RP 125-26. The smaller bottle contained 10 methadone pills. RP 126. Officer Smith verified the content of the pills by calling the poison control center and speaking with a pharmacist. RP 126.

Defendant told the officers that he had gone to the 7-Eleven to meet someone, in order to sell the pills and the cocaine. RP 131. Defendant then asked if he could speak to someone who might be able to help him get out of trouble. RP 152. Officer Smith called Special Agent Brady, who arrived and discussed using defendant in controlled buys. RP 152, 154.

Defendant’s wife, Kelley Jones, testified on defendant’s behalf. RP 204. Mrs. Jones stated that defendant had ongoing drug addiction issues since 2005. RP 205. Despite claiming that defendant never brought his drugs into the house, she testified that she has seen him taking the pills: six per day at least. RP 209. Mrs. Jones also testified that she gives

defendant money, approximately \$500.00 every two weeks, to buy groceries, but she does not check to make sure he is not buying drugs. RP 218.

Contrary to his counsel's advice, defendant testified on his own behalf. RP 219-21. Defendant claimed he has a severe drug problem and that all the drugs Officer Smith<sup>7</sup> recovered were for his personal use. RP 248. Defendant testified that he had gone to the 7-Eleven that day to get something to drink or put minutes on his prepaid cellular phone. RP 235. He admitted that he possessed the Percocet without a prescription, but was unaware that there was methadone. RP 238. Defendant claimed that, when he bought 20 Percocets earlier that day, the seller must have mixed the methadone in with his purchase. RP 237-38. Defendant also admitted that he had cocaine in his pocket. RP 241. He had forgotten that the cocaine was in his pocket because he was high on pills all the time and had used the cocaine the night before. RP 241.

Defendant testified that he had purchased the cocaine from a friend a few days prior to his arrest. RP 242. He explained that they were individually packaged because he just offered his friend \$140.00 for \$300.00 worth of pre-packaged cocaine. RP 244.

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<sup>7</sup> Defendant insisted that the Officer Smith who testified was not the Officer Smith who contacted and arrested him in November, 2007. RP 256-57.

Defendant testified that he never said he was selling the drugs and that clearly he was only a user. RP 248. Then he claimed that he lied to the officers about selling drugs in order to gain credibility. RP 264. Defendant claimed to be acting like a drug dealer to get out of the situation by becoming an informant. RP 264, 267.

C. ARGUMENT.

1. HAS DEFENDANT WAIVED ANY CLAIM OF PROSECUTORIAL MISCONDUCT WHERE HE FAILED TO OBJECT AT TRIAL AND THE CHALLENGED STATEMENTS WERE NOT FLAGRANT, ILL-INTENTIONED, OR PREJUDICIAL?

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing

essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

A new trial will be ordered only if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578-79, 79 P.3d 432 (2003).

If an instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, 79 Wn. App. at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Here, defendant claims that the prosecutor committed “serious, prejudicial, and constitutionally offensive” misconduct during closing argument by minimizing the State’s burden of proving defendant’s guilt beyond a reasonable doubt and misstating the evidence. Appellant’s Opening Brief at 14. Yet defendant did not object to any of the statements to which he now assigns error. Defendant has waived this issue unless he can show that the statements were so flagrant or ill-intentioned that any prejudice could not have been cured by instruction. As the prosecutor’s arguments were neither improper nor prejudicial, defendant has failed to make this showing.

- a. The prosecutor's arguments in rebuttal closing argument were fair response to defendant's arguments and were proper statements of the law.

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A prosecutor is also allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is also entitled to make a fair response to the arguments of defense counsel. *Id.*

Defendant challenges the prosecutor's statements that 1) the question before the jury as whether defendant was "not guilty beyond a reasonable doubt;" 2) an abiding belief is the equivalent of just thinking defendant committed the crime; and 3) using the game show "Wheel of Fortune" to illustrate the reasonable doubt standard. *See* Appellant's Opening Brief at 1. Not only did defendant fail to object to any of the arguments to which he now assigns error, but he takes each statement out

of context in an effort to show misconduct. Each of these statements, taken in context, were proper statements of the law.

To begin, the court provided the jury with the following instruction:

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

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.

CP 112-41 (Jury instruction 2). This instruction clearly sets out defendant's presumption of innocence and the burden of proof required of the State to overcome that presumption.

The court also instructed the jury that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. 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.

CP 112-41 (Jury Instruction 1). These instructions were proper statements of the law.

When taken in the context of the entire argument, the prosecutor's statements were not improper. At the beginning of the prosecutor's closing argument, he stated that he was going to "explain what I have to prove beyond a reasonable doubt, elements I have to prove, explain the evidence that shows that proof, and then I am going to ask you to find the defendant guilty." RP 278. He explained that the "to convict" instructions explain to the jury "what I need to prove and only what I need to prove for you to find the defendant guilty of those charges." RP 278. The prosecutor explained that he even had to prove that the crimes occurred in Pierce County in order to prove every element of the crimes charged. RP 279-80. The prosecutor completed his argument by explaining that, according to the jury instructions, he was not required to prove that defendant actually delivered cocaine, but only that defendant intended to deliver the cocaine he possessed. RP 281. Then the prosecutor discussed the evidence he had to prove defendant's intent to deliver. RP 281.

Defendant argued in closing that the State presented insufficient evidence to convict him of possession with intent to deliver cocaine. RP 301. Defendant asserted that the State could not prove intent to deliver beyond a reasonable doubt unless it provided the jury with evidence of scales, crib notes, a pager, a cell phone, a weapon, and large amounts of cash on defendant's person at the time of arrest. *See* RP 300-01.

In response, the prosecutor made the following argument in rebuttal:

Counsel got up here and kind of said, "Well, the State should have given you more. They should give you more."

...

And the key is is that I don't have to prove this crime to you beyond all doubt. That is not the burden that's required by the State.

...

He can always think of something else I should have done or should have given you. That isn't the same as saying the State didn't meet its burden. Key distinction there. Just because he can come up with some scenario in which I could have possibly given you more evidence, that is not the same as saying the defendant is not guilty beyond a reasonable doubt.

...

Reasonable doubt -- and the instruction you got just is if you have an abiding belief. That's the instruction you have before you. I ask you to go back there as a reasonable

person. If you go -- you look at this evidence and you go, "Yeah, he did that, he possessed that with the intent to deliver," then you have that abiding belief.

The way I like to explain it is this, is that we've all seen the game show Wheel of Fortune. They pop up letters, people pop up letters, the words start spelling out in front of you, at some point there's enough letters up there where you can guess the word. You know what the word is.

What counsel's trying to say is, well, not every letter is lit up; not every letter is turned over. You don't know what the word is yet.

That's proof beyond all doubt. I don't need to turn over every single one of those letters. What I need to do is I need to keep turning them over until we all know what the word is. Right?

RP 303-06. The prosecutor continued by pointing out that each piece of evidence, by itself, may have been insufficient; however, when taken as a whole, "I've turned over enough letters for you to know what the word is. The word is guilty." RP 306.

Defendant's first claim, that the prosecutor informed the jury that it had to find defendant not guilty beyond a reasonable doubt was clearly taken out of context. The entire sentence, as noted above, was "Just because he can come up with some scenario in which I could have possibly given you more evidence, that is *not* the same as saying defendant is *not* guilty beyond a reasonable doubt." RP 304 (emphasis added). Reading the sentence in its entirety shows that the prosecutor was not suggesting that the jury had to find defendant not guilty beyond a

reasonable doubt, but rather that the State was not required to present evidence to cover every possible scenario for the jury to be convinced that defendant *was* guilty beyond a reasonable doubt. This was an accurate statement of the law and the State's burden of proof, as well as a fair response to defendant's argument at closing.

Defendant next claims that the prosecutor misstated the State's burden of proof by describing they have an "abiding belief as simply thinking the defendant did that." *See* Appellant's Brief at 16 (internal quotations omitted). Again, defendant takes the statements out of context.

The prosecutor argued:

Reasonable doubt - - and the instruction you got just is if you have an abiding belief. That's the instruction you have before you. I ask you to go back there as a reasonable person. If you go - - you look at this evidence and you go, "yeah, he did that, he possessed that with the intent to deliver," then you have that abiding belief.

RP 305-06. As the instruction informed the jury that if it has "an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt," the prosecutor's argument was obviously a correct statement of the law when viewed in context. *See* CP 112-41 (Jury Instruction 2).

Finally, defendant claims that the prosecutor's reference to the television program "Wheel of Fortune" compares the State's burden of proof beyond a reasonable doubt to the certainty required for people to play a guessing game. *See* Appellant's Opening Brief at 16-17.

Defendant again considers the prosecutor's argument in isolation without considering the entire statement.

As noted above, defendant argued that since the State did not provide the jury with evidence of specific items which may be common in drug dealing, there was insufficient evidence for the jury to convict. *See* RP 300-01. The prosecutor's rebuttal argument discussed the difference between the burden the defendant attempted to place upon the State; i.e. beyond any doubt, with the State's actual burden of beyond a reasonable doubt. This was proper argument as it was consistent with the law as provided to the jury by the court.

Since defendant failed to object to any of the statements to which he now assigns error, he is required to show that each statement was so flagrant or ill-intentioned that any prejudice could not be cured by instruction. When correctly viewed within the entire context of the argument, none of the challenged statements were improper, let alone flagrant or ill-intentioned. Defendant's argument fails.

- b. The prosecutor's single, passing, and brief misstatement of a fact of the case was neither flagrant nor ill-intentioned and did not prejudice the defense.

Defendant next contends that the prosecutor committed reversible error by arguing that *both* Officer Smith and Officer Betts testified that defendant said "I'm here to sell the pills and crack." *See* Appellant's

Opening Brief at 24. Only Officer Smith testified as to defendant's statement that he was selling drugs. *See* RP 131. Officer Betts had no recollection of the conversation. RP 172. Yet the prosecutor's slight misstatement was neither flagrant nor ill-intentioned, and was obviated by the court's instructions to the jury as well as defendant's own testimony.

Despite defendant's assertion on appeal that his position was that he was merely a drug user, defendant actually presented a far more convoluted theory at trial. Essentially, defendant claimed he was a drug user, who lied to the officers about selling drugs in order to give himself leverage for negotiations. *See* RP 296-99. Defendant testified that he was trying to act like a drug dealer to the officers. RP 264. While defendant claimed he never said, "I am selling these drugs," he did admit that that when one officer asked him if he was selling the drugs, he said "yes." RP 265. Whether one officer testified about defendant's statement or both, defendant admitted he wanted the officers to have the impression that he was dealing drugs. Given defendant's testimony and theory of the case, the prosecutor's statements that suggested Officer Betts heard defendant's claim he was selling drugs was neither flagrant nor ill-intentioned, and would have had little impact on the jury.

In addition, the court instructed the jury that the lawyer's arguments were not evidence and it was to "disregard any remark, statement or argument that [was] not supported by the evidence." Juries

are presumed to follow the court's instructions. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). The prosecutor's minor misstatement, which conformed with defendant's testimony and theory of the case, did not affect the outcome of the trial.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT NOR RESULTED IN PREJUDICE

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

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 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).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

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).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

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 222, 225-26, 743 P.2d 816 (1987).

Generally, a defense attorney's failure to object to a prosecutor's closing argument is not deficient performance because lawyers "do not commonly object during closing statement 'absent egregious misstatements.'" *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *U.S. v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)).

Here, defendant claims that he received ineffective assistance of counsel for his counsel's failure to object to the prosecutor's "repeated, comprehensive and compelling misstatements of the law and the reduction of his constitutionally mandated burden of proof and the misstatements of crucial evidence." See Appellant's Opening Brief at 27. Defendant can show neither deficient performance nor prejudice.

As argued above, the prosecutor's arguments properly reflected the court's instructions to the jury and were accurate statements of the law. Counsel's failure to object to proper argument was not deficient performance.

Where the prosecutor misstated the evidence by arguing that both officers remembered defendant's confession that he was selling drugs when only one officer so testified, defendant fails to show that counsel's lack of objection was either deficient performance or prejudiced his defense. As noted above, the prosecutor's misstatement was actually consistent with defendant's theory of the case that he was trying to give the officers the impression he was a drug dealer. The only real issue in the case was whether defendant had lied to the officers at the time of his arrest, or whether he was lying to the jury during trial. Defendant wanted the jury to believe he lied to the officers; the State wanted the jury to believe defendant was lying at trial. Counsel's failure to object to a statement admitted by defendant was a legitimate strategy to attempt to build credibility with the jury.

In addition, defendant's focus on counsel's performance during the State's rebuttal closing argument leads the court away from the proper standard of review under *Strickland* and its progeny. 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. *Ciskie*, 110 Wn.2d at 263. The Sixth

Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Gentry*, 540 U.S. at 8.

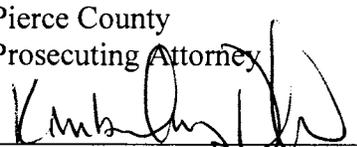
The entirety of the record reveals that defendant received his Sixth Amendment right to counsel. He had an attorney that gave an opening statement. RP 204. He made objections, cross-examined the State's witnesses, and presented witnesses on the defendant's behalf, RP 114, 132, 159, 177, 198, 204. He made a motion to dismiss the case at the close of the State's case. RP 202-03. He counseled defendant against taking the stand on his own behalf. RP 221. He made a coherent closing argument. RP 289-303. It is clear that defendant had counsel and that his attorney tested the State's case. Looking at the entirety of the record, defendant cannot meet his burden on either prong of the *Strickland* test.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: May 12, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



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KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

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BY     *Cm*      
DEPUTY

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.

5.14.13      *Theresa K*  
Date                  Signature