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COURT OF APPEALS

NO. 39933-4-II

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STATE OF WASHINGTON

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

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STATE OF WASHINGTON, RESPONDENT

v.

DAVID DOUGLAS MOELLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 08-1-05488-0

BRIEF OF RESPONDENT

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

1. Whether the defendant preserved any speedy trial claims for appeal?
2. Whether the defendant received a speedy trial?
3. Whether the State properly complied with discovery requirements, as outlined in CrR 4.7 where the State timely provided discovery of photographs and medical records within its control?
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11. Whether the defendant met his burden to prove he received constitutionally ineffective assistance of counsel?

12. Whether the defendant has demonstrated cumulative, prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On November 18, 2008, the Pierce County Prosecuting Attorney's Office (the State) charged David Douglas Moeller (the defendant) with one count of rape in the first degree, one count of assault in the second degree, and one count of false imprisonment. CP 1-2. The State filed an amended information changing the crime date from "on or about November 14, 2008," to "on or about November 14, 2008 to November 17, 2008." CP 114-115.

On January 6, 2009, the defense requested a continuance to allow more trial preparation time. CP 11. On April 30, 2009, all parties requested an agreed continuance to interview the out-of-state victim. CP 65. On May 11, 2009, the defense requested a continuance due to an illness. CP 66. On May 12, 2009, the State requested a continuance to accommodate D.S.'s availability for an in-person interview with the defense. CP 70. On July 1, 2009, the defense requested a continuance and substitution of counsel as the defendant's original counsel fell severely ill and went on emergency medical leave. CP 71. The court granted one final continuance on August 31, 2009, so the prosecutor could be with his family in Seattle while his father underwent major surgery. CP 74.

The case came before the Honorable Bryan Chushcoff for jury trial on September 1, 2009. 9/1 RP 5.¹ Upon hearing and deliberating on the evidence, the jury found the defendant guilty as charged. CP169, 171, 172. The jury also answered affirmatively to three special verdict forms, finding: 1) the defendant exhibited an egregious lack of remorse; 2) the defendant's actions constituted deliberate cruelty; and 3) the defendant and victim were members of the same household. CP 173-175.

The parties appeared for sentencing on October 23, 2009. CP 179-198. The court calculated the defendant's offender score at 3 for the rape and assault convictions and 2 for the false imprisonment conviction. *Id.* Pursuant to former RCW 9.94A.712, the court sentenced the defendant to a minimum of 140 months in prison with the possibility of serving a life sentence, dependent on a review of the defendant's case by the Indeterminate Sentence Review Board (ISRB). *Id.* The defendant filed this timely notice of appeal. CP 207-225.

2. Facts

D.S.² and the defendant met and began dating in May 2008. 9/9 RP 47. Within a few months, the two moved into an apartment together at the Country Estates apartment complex in Lakewood, Washington. *Id.* 9/9 RP 121. On November 14, 2008, the couple received a three day pay

¹ The verbatim report of proceedings are referred to by date and page number. For example, the hearing conducted on April 30, 2009, is referred to as 4/30 RP.

² To protect the privacy of the victim in this case, the State will refer to her by her initials, D.S.

or vacate notice from the apartment complex's management. 9/9 RP 48, 9/14 RP 301. When D.S. received the notice, she began packing the apartment and drinking alcohol. 9/9 RP49. That night, the defendant used his hand to strike D.S. on the head. 9/9 RP 50. The blow gave D.S. black eyes. 9/9 RP 51. On Saturday, November 15, 2008, the defendant became increasingly violent. *Id.* Throughout the day the defendant strangled D.S. by wrapping his arm around her neck and completely cutting off her air supply. *Id.* 9/9 RP 53. The defendant strangled her for such long periods, D.S. become convinced he intended to kill her. 9/9 RP 52. In addition to the strangulation, the defendant continued to hit D.S. 9/9 RP 53.

At some point on November 15, 2008, the defendant demanded sex from D.S., stating, "Bitch, just go spread your legs." 9/9 RP 53. Worried he would continue to hit and strangle her if she refused, D.S. laid down on their bed and the defendant engaged in penile/vaginal intercourse with D.S. 9/9 RP 54. The beatings and strangulations continued into Sunday, November 16, 2008. 9/9 RP 55. On Sunday, the defendant ordered D.S. to douche and watched her perform the act. *Id.* D.S. believed the defendant ordered her to do this so she would wash away any rape evidence. *Id.*

D.S. wanted to escape but the apartment's small size allowed the defendant to keep D.S. in his sight and prevent her from leaving. 9/9 RP 56. When D.S. woke up early Monday morning she noticed the defendant had stacked a large number of boxes and large objects in front of the door,

preventing her from sneaking out. 9/9 RP 61; Exhibit 30. The defendant ordered D.S. to get back in bed and told her they would be taking a drive to the mountains later that day. 9/9 RP 63. This statement frightened D.S. as the defendant had once mentioned wanting to throw his ex-wife off a mountain. *Id.* D.S. testified that by Monday her face and neck were covered in bruises, she was scared, and her entire body hurt. 9/9 RP 63-64.

Later in the morning, the defendant demanded oral sex from D.S. 9/9 RP 64. Hoping he would fall asleep once she performed the demanded acts, D.S. agreed. 9/9 RP 64. The defendant did in fact fall asleep. *Id.* Once the defendant fell asleep, D.S. went into the living room and made small noises to see if the defendant would wake up. 9/9 RP 65. When he did not wake up, D.S. opened the living room window, pushed out the screen, and ran to a neighbor, Jim Hettich's house. 9/9 RP 66.

D.S. began banging on Mr. Hettich's door while yelling that the defendant was going to kill her. 9/14 RP 290. Mr. Hettich testified D.S. was wearing only a sweatshirt and appeared very upset. 9/14 RP 291. He refused to let her into his apartment, but agreed to contact the police and the apartment manager. 9/9 RP 66-67, 9/14 RP 291.

Lakewood Police Officers Greg Richards and Jason Cannon responded to the scene. 9/9 RP 120, 9/10 RP 213. Officer Richards found D.S. hiding in the bushes outside Mr. Hettich's apartment. 9/9 RP 122, 142. He testified D.S. appeared unclothed and badly beaten. 9/9 RP 122. Her

eyes were black and blue and so swollen he could barely see them. *Id.* Meanwhile, Officer Cannon approached the defendant's apartment. 9/14 RP 213. He noticed the screen popped off the apartment window. *Id.* After knocking on the door, defendant responded but could not actually open the door due to boxes and other items blocking the entrance. 9/14 RP 214-215. Officer Cannon tried to open the door himself but had to slam his shoulder against it before he could open it far enough to allow himself entry into the apartment. 9/14 RP 215.

Officer Richards attempted to speak with D.S. about what happened. 9/9 RP 122. He testified she appeared extremely upset and scared and was unable to engage in a calm, collected conversation. *Id.* 9/9 RP 124-127. She did manage to tell Officer Richards, "[the defendant] beat the shit out of me," and "[the defendant] made me suck him off." 9/9 RP 123, 133. Due to the seriousness of D.S.'s injuries, medical personnel quickly transported D.S. to a hospital. 9/9 RP 73, 127. Officer Richards did not remember smelling alcohol on D.S. 9/9 RP 134.

At the hospital, D.S. received treatment from the emergency room staff and sexual assault nurse examiners. Tara Lopez, a certified sexual assault nurse examiner with Multicare conducted a forensic exam on D.S. at the hospital. 9/10 RP 224. The exam revealed extensive and serious bruising on D.S.'s face, back, arms, wrists, head, and behind the ears. 9/10 RP 230. The neck injuries were indicative of strangulation. *Id.* D.S. told Ms. Lopez she had been slapped, choked, pushed, held down against

her will, tripped, and forced to engage in sexual intercourse with the defendant. 9/10 RP 237. D.S. also had severe pain and swelling in her neck area, difficulty and pain with swallowing, a large hemotoma on her head, broken capillaries in her eyes, and had vomited that morning. 9/10 RP 242-243. D.S. had such severe bruising on her head that Ms. Lopez brought the emergency room physician back to make sure D.S. had not suffered any skull fractures. 9/10 RP 244. Immediately after this incident, D.S. relocated to Florida. 9/9 RP 101.

C. ARGUMENT.

1. THE DEFENDANT FAILED TO PRESERVE HIS CLAIMED SPEEDY TRIAL VIOLATION FOR APPELLATE REVIEW.

This Court may refuse to review any claim of error not raised in the trial court. RAP 2.5(a). The rule is based on the belief that a defendant is obligated to seek a remedy to errors as they occur, or shortly thereafter. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

While an exception exists allowing criminal defendants to raise a “manifest error affecting a constitutional right,” for the first time on appeal, this does not mean a defendant can raise *any* constitutional question for the first time on appeal. *Id.* The defendant must demonstrate that the claimed constitutional error is 1) manifest, and 2) truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155

P.3d 125 (2007). Determining an error is manifest requires a showing of actual prejudice. *Kirkman*, 159 Wn.2d at 935.

For the first time on appeal, the defendant argues the trial court violated his speedy trial rights under Article I, section 22 and the Sixth Amendment to the constitution. Below, the trial court granted six continuances in the defendant's case, five of which defense counsel requested and each of which defense counsel signed.³ CP 11, 65, 66, 70, 71, 74. On each continuance form, the parties checked a box which read the continuance "is required in administration of justice pursuant to CrR 3.3(f)(2) and defendant *will not be prejudiced in his or her defense.*" *Id.* (emphasis added). As defense counsel requested these continuances and all parties, including the court, agreed the defendant would not be prejudiced by the continuance, the defendant fails to show any manifest error warranting consideration of this issue on appeal. The issue has not been preserved for appellate review.

2. THERE WAS NO VIOLATION OF THE
DEFENDANT'S CONSTITUTIONAL RIGHT TO
SPEEDY TRIAL.

Should this court consider the defendant's speedy trial claim, the defendant received a speedy trial as envisioned under Article I, section 22,

³ Because the defendant failed to properly object to the trial date, he cannot now complain that the date did not comply with the rule. CrR3.3. The defendant's trial date fell within the parameters of CrR 3.3 time for trial rules.

and the Sixth Amendment. Article I, section 22 and the Sixth Amendment provide criminal defendants with equal speedy trial protections. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). The constitutional right to a speedy trial “is not violated at the expiration of a fixed time, but at the expiration of a reasonable time.” *State v. Lackey*, 153 Wn. App. 791, 800, 223 P.3d 1215 (2009). A Sixth Amendment speedy trial claim is reviewed de novo. *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005).

In *Barker v. Wingo*, the United States Supreme Court set forth a test for determining whether a defendant’s Sixth Amendment right to a speedy trial has been violated. *Barker*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The four *Barker* factors are: 1) the length of the delay; 2) the reason for the delay; 3) whether the defendant asserted his right to a speedy trial; and 4) the prejudice caused by the delay. *Id.* at 533. On appeal, the defendant claims the pre-trial delay from November 18, 2008 to September 1, 2009 constituted a Sixth Amendment speedy trial violation.

To trigger a *Barker* analysis, the court must find a criminal defendant’s pretrial delay “presumptively prejudicial.” *Iniguez*, 167 Wn.2d at 293; *United States v. Loud Hawk*, 474 U.S. 302, 314, 96 S. Ct. 648, 88 L. Ed. 2d 640 (1986); *Barker*, 407 U.S. at 530. Whether a delay is presumptively prejudicial is a fact-specific inquiry dependant on the

circumstances of each individual case.⁴ *Iniguez*, 167 Wn.2d at 292 (citing *Barker*, 407 U.S. at 530-531); *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989). The length of the delay should be considered alongside other factors such as the complexity of the charges, and the degree of reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292.

The defendant's nine month delay was not presumptively prejudicial. In *Iniguez*, the Washington Supreme Court found Iniguez's eight months pretrial delay presumptively prejudicial based on the lone robbery charge and the State's reliance on eye witness testimony, but only "just beyond the bare minimum needed to trigger the *Barker* inquiry." *Iniguez*, 167 Wn.2d at 293. The facts in the defendant's case do not amount to the level of prejudice in *Iniguez*.

While in the case now before this court the defendant remained in custody for nine months prior to his trial, his case involved more complex charges and circumstances than the lone robbery charge in *Iniguez*. The State charged the defendant with first degree rape, second degree assault, and unlawful imprisonment. CP 114-115. In addition to the three charges, the State charged three aggravating factors: 1) deliberate cruelty; 2) lack of remorse, and 3) domestic violence. CP 173-175. Additionally,

⁴ In *Iniguez*, the Washington Supreme Court rejected the formulaic approaches adopted by many lower courts to determine when a pre-trial delay is presumptively prejudicial. *Iniguez*, 167 Wn.2d at 292-293. Therefore, the defendant's assertion that an eight month delay is automatically presumed prejudicial is no longer supported by case law. Brief of Appellant at 9, (citing *State v. Corrado*, 94 Wn. App. 228, 233, 972 P.2d 515 (1999)).

the defendant committed his crimes over a four day period, rather than during one isolated time frame, and D.S. moved from Washington to Florida. CP 114-115. The sheer complexity and seriousness of the charges in this case led to the first defense requested continuance. CP 11. Finally, while the State's case rested in part on eye witness testimony from D.S., and police officers, it also largely relied on physical evidence and medical testimony. CP 237-240.

The State presented a large number of photographs detailing the crime scene and D.S.'s extensive injuries. Additionally, the sexual assault nurse examiner testified from a detailed medical report that corroborated most of the eye witness testimony. This distinguishes the defendant's case from *Iniguez*, where the State relied primarily on eyewitness testimony.

If the facts in *Iniguez* constitute the bare minimum needed to trigger a *Barker* inquiry, the facts in the defendant's case clearly fall short. The defendant's pre-trial delay does not support a finding of presumptive prejudice.

If, however, this court finds the delay presumptively prejudicial, the *Barker* balancing test weighs in favor of the State. The first factor considers the length of the delay. *Barker*, 407 U.S. at 531. This factor is not considered in the same way as the "presumptively prejudicial" analysis. *Iniguez*, 167 Wn.2d at 293. Important in considering the first factor is how far beyond the bare minimum needed to trigger a *Barker* analysis the delay stretches. *Doggett v. United States*, 505 U.S. 647, 652,

112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). The longer the pretrial delay, “the closer a court should scrutinize the circumstances surrounding the delay.” *Iniguez*, 167 Wn.2d at 293. The court in *Iniguez* found the eight months pretrial delay “not necessarily an undue delay” given the circumstances in the case. *Id.* As such, the court found this first factor to weigh “only slightly” against the State. *Id.* As the facts in the defendant’s case render it even less presumptively prejudicial than those in *Iniguez*, the nine months delay is not undue and this factor should weigh only slightly against the State.

The second *Barker* factor considers the reasons for delay. *Barker*, 407 U.S. at 531. In considering this factor, the courts look at each party’s responsibility level in the delay, assigning different weights to those reasons. *Id.* Here, the State requested a continuance to facilitate defense counsel’s requested in person interview with D.S. CP 65, 70. The State did in fact schedule an in person interview for May 29. 7/1 RP 5. DAC cancelled the interview one week prior to D.S.’s arrival due to an illness. *Id.* As this continuance was requested, in large part, to facilitate the defendant’s trial preparation, and further delays stemmed from defense problems, these continuances should not weigh against the State. The State’s only continuance requested for personal reasons (a one day continuance) occurred the day before trial when the prosecutor wished to be with his family in Seattle while his father underwent major surgery.

8/31 RP 33. This short continuance for a serious reason should not weigh against the State.

More significant were the delays requested by the defense. Of those delays requested by the defense, one was in response to the complexity of the charges and the defense's investigation needs. CP 11. The defense requested its second delay to wait for an in person interview with D.S. CP 65. One delay occurred when defense counsel fell ill. CP 66. The fourth defense requested delay happened after a more serious illness forced a substitution of counsel. CP 71. The defense requested its final continuance the day before trial but the court did not find the continuance necessary, instead opting to set the trial over for one day. CP 74; 8/31 RP 36. Serious illness, substitution of counsel, and difficulty in juggling lawyers' and witnesses' schedules are all valid reasons to continue a trial and were reasonable continuance requests by the defense. However, as it was the defense, not the State, responsible for most of the continuances, this particular factor should weigh against defendant in this balancing test.

The third *Barker* factor, the defendant's assertion of his speedy trial rights, does not necessarily favor the defendant. The defendant refused to sign every continuance order, however, his attorney agreed to, and often requested, each continuance. CP 11, 65, 66, 70, 71, 74. "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . ." Const. art. 1, section 22, amend. 10.

“[T]here is no constitutional right, either state or federal, to ‘hybrid representation,’ through which an accused may serve as co-counsel with his or her attorney.” *State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564, *review denied*, 138 Wn.2d 1020, 989 P.2d 1139 (1999). In state courts as well as federal courts, the great weight of judicial authority is that there is no right to be represented by counsel and to simultaneously actively conduct one’s own defense. *State v. Hightower*, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984) (citations omitted). Trial courts have the discretion to grant continuances requested by defense counsel over a defendant’s objections if the continuance is necessary in the administration of justice. *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). It is important to note the defendant never requested to proceed pro se in his trial.

Denying a defense counsel requested continuance due to a pro se objection could force a premature trial and set up an ineffective assistance of counsel situation. Of particular concern are situations, like here, where criminal defendants object pro se to each and every continuance *regardless* of the reason behind the request. Continuances are often reasonable and necessary to protect other constitutional rights and

therefore a defendant's pro se objection to a continuance should carry little, if any, weight when considering this factor.⁵

The final *Barker* factor is prejudice to the defendant. *Barker*, 407 U.S. at 531. Prejudice is determined by considering the effect on the interests protected by the defendant's right to a speedy trial: 1) preventing harsh pretrial incarceration; 2) minimizing a defendant's anxiety, and 3) limiting impairment to the defense. *Id.* at 532. The defendant's pretrial incarceration was not presumptively harsh given the circumstances in his case. Additionally, while the defendant clearly wanted to resolve the case quickly, many, if not all, of the continuances were necessary to ensure the defendant received effective assistance of counsel. Rather than impairing the defense, the continuances gave the defense more time to interview out of state witnesses, seek exculpatory evidence, and locate defense witnesses. As discussed above, a large portion of the evidence against the defendant involved physical evidence unaffected by the delays. Also, witness testimony provided at trial was in line with the information available from pretrial interviews. The defendant cannot show any impairment to his defense and as discussed above, the delay length alone was not severe enough to be overly prejudicial given the facts in the defendant's case. As the State argued above, this issue fails on procedural

⁵ While this Court has placed some emphasis on pro se objections to a continuance, the Court's focus was on continuances granted *after* a time for trial violation occurred under CrR 3.3. *State v. Saunders*, 153 Wn. App. 209, 220 P.3d 1238 (2009). As mentioned above, the defendant's trial date did not violate CrR 3.3.

grounds. However, even an examination of the substantive facts connected to the issue does not support the defendant's claim on appeal.

3. THE STATE COMPLIED WITH CrR 4.7
DISCOVERY REQUIREMENTS.

CrR 4.7(a)(1) requires the prosecuting attorney to disclose certain materials within the prosecuting attorney's possession or control, no later than the omnibus hearing. CrR 4.7(a)(1). This includes, *inter alia*, the names and addresses of witnesses the State intends to call, reports made by experts in connection with the case, and photographs the State intends to use in the trial. CrR 4.7(a)(1)(i)-(vi). The prosecuting attorney's obligations under CrR 4.7 are limited to "material and information within the knowledge, possession, or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). The purpose of CrR 4.7 is to protect a defendant against prejudicial surprises. *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992).

If the prosecuting attorney violates a rule of discovery, the court may, within its discretion, "order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action, or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i). Dismissal for discovery violations is an extraordinary remedy. *Smith*, 67 Wn. App. at 852. Excluding evidence is also an extraordinary remedy that should be applied narrowly. *State v. Hutchinson*, 134 Wn.2d 863, 882, 959 P.2d 1061 (1998). A trial court's

decision in dealing with discovery violations is upheld absent a manifest abuse of discretion. *Smith*, 67 Wn. App. at 851.

- a. The defendant failed to preserve the claimed CrR 4.7 violations for appeal.

To preserve a discovery violation for appeal, the defendant must make a timely objection and request a remedy from the trial court. *State v. Wilson*, 56 Wn. App. 63, 66, 782 P.2d 224 (1989); *State v. Howell*, 119 Wn. App. 644, 653, 79 P.3d 451 (2003). Failure to properly preserve an issue waives review of that issue on appeal unless the issue is a manifest error affecting a constitutional right. *Id.*; RAP 2.5(a).

For the first time on appeal, the defendant argues the State violated CrR 4.7 by: (1) not naming the forensic examiner; (2) not disclosing photographs taken by the hospital; and (3) not providing medical reports. The defendant's arguments fail because: (1) the defendant did not properly preserve any of the above issues for appellate review; (2) the prosecutor did in fact disclose and provide to the defendant the above information and materials once the materials were in the prosecutor's possession; and (3) any delay in providing the above materials did not prejudice the defendant.

The State can find no place in the record, and the defendant cites to no place in the record, where the defendant objected to a CrR 4.7 violation in regards to the information and materials mentioned above.

Additionally, the State can find no place in the record, and the defendant

cites to no place in the record, where the defendant requested a remedy from the trial court in response to any alleged CrR 4.7 violations regarding the information and materials mentioned above. This failure to object does not provide an adequate record for review upon which relief may be granted. *See* RAP 10.3(a)(6).

b. The State complied with discovery rules.

The reason no objections appear in the record is likely because the State in fact disclosed all the challenged materials and provided them in a timely manner to defense counsel once in the materials were in the State's possession. First, the prosecutor did not learn the name or existence of Ms. Lopez, the sexual assault nurse examiner who testified at trial, until September 3, 2009, as the only information connecting Ms. Lopez to the case was her illegible signature on the forensic exam report. *Id.* After learning this information, the State immediately filed a second supplemental witness list adding Ms. Lopez. CP 240. As discussed above, the defendant did not object to the inclusion of this witness. 9/3 RP 21-22; 9/10 RP 217.

Second, despite the defendant's claim that the State failed to disclose "over 100 forensic photographs" taken during D.S.'s sexual assault exam, the defendant actually received information about these

pictures on July 21, 2009. 8/31 RP 34. Defense counsel informed the court:

Your Honor, as we were – [the defense investigator], and I were leaving the County-City Building on Friday after the interview, he asked me if I had copies of the 90 photographs taken by the sexual assault nurse. I have never seen those. I spoke with Mr. Nelson. He hasn't seen them either. It is indicated in the reports. I wasn't aware of those. The reports were obtained – I believe it was July 21. They were sent to my office and *I missed that when I was reading through those.*

8/31 RP 34 (emphasis added). The record shows that the prosecutor provided defense counsel with forensic reports on July 21, 2009. *Id.* Defense counsel then failed to notice the hospital had 90 photographs of D.S.'s injuries in its possession. *Id.* The photographs were not in the State's control and, in fact, the State had never viewed the photographs in question. *Id.* On appeal, not only does the defendant exaggerate the number of photographs at issue, but he attempts to portray the situation as a "surprise discovery" rather than oversight by defense counsel. Brief of Appellant at 17. Despite this mistake, the defendant received copies of the photographs the day after he noticed the oversight, and the same day the State received the photographs. CP 242. The defendant could not object to this issue because it was his oversight, not the State's, that led to the delay in viewing the photos.

Finally, the defendant argues the State violated a court order by not turning over medical records. Brief of Appellant at 22. The defendant incorrectly claims the records were not produced by August 31, 2009. *Id.* Rather, the defendant requested the records on May 12, 2009. 5/12 RP 25. The court agreed the defendant should receive these records. 5/12 RP 27. As the prosecutor explained, due to difficulties in getting a medical release waiver signed by D.S., who had since relocated to Florida, the prosecutor encountered unavoidable delays in getting the medical records released to the defendant. 8/31 RP 35. However, the defendant did receive the medical records in question on July 21, 2009, 42 days before trial. CP 241; 8/31 RP 34. This is in addition to the medical records the defendant received on December 9, 2008. CP 250. Because the medical records were outside the prosecutor's possession and control, the delay in procuring them does not violate CrR 4.7.

Based on the lack of objections, the above facts, and the extensive cross-examinations defense counsel conducted relating to the challenged evidence, the defendant cannot show that any CrR 4.7 violations occurred, were preserved, or prejudiced the defendant in any way.

4. THE DEFENDANT HAS FAILED TO SHOW
THE TRIAL COURT ABUSED ITS DISCRETION
IN MAKING ANY OF THE EVIDENTIARY
RULINGS CHALLENGED ON APPEAL.

The admission or exclusion of relevant evidence is within the sound discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.3d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. A trial court's evidentiary rulings will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected to below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991) (citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978)).

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), *Washington v. Texas*, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.

Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

The Confrontation Clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Kilgore*, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

On appeal, the defendant claims the trial court abused its discretion in 1) admitting multiple photos of D.S.'s injuries, 2) excluding bias evidence, 3) admitting D.S.'s out-of-court statements to Officer Richards, and 4) admitting D.S.'s out-of-court statements to the sexual assault examiner. Brief of Appellant at i.

a. The court did not abuse its discretion in admitting photographs of D.S.'s injuries.

The defendant claims the trial court abused its discretion when it “admitted 130 to 140 photographs of [D.S.’s] bruises” over the defendant’s objections that the photos were unnecessarily cumulative. Brief of Appellant at 23. Before reaching an argument on the merits, the State must clarify the facts pertaining to this issue. At trial, the State offered 116 photographs of D.S. taken at the crime scene, at the hospital, and at a follow up meeting several days after the rape, assault, and unlawful imprisonment occurred. 9/9 RP 67, 74, 83, 94; CP 243-249.⁶ Of those photographs, defendant objected during trial to 73 as cumulative and prejudicial. 9/9 RP 67, 75, 86, 94; CP 243-249.⁷ The court reviewed each photograph in relation to the other offered photographs and sustained the defendant’s objections to 10 exhibits. 9/9 RP 75, 89-90, 97; CP 243-249.⁸ As a result, the court admitted 106 photographs of D.S.’s injuries, not

⁶ See exhibits 9, 10, 12-26, 59-157.

⁷ See exhibits 9, 13, 15-17, 20-25, 59-68, 70-72, 75, 76, 78, 79, 81, 83, 84, 86, 88, 89, 91, 92, 94, 95, 97, 99, 101, 102, 104, 106, 108, 110, 111, 113, 114, 116, 118, 120, 121, 126, 128, 129, 131-133, 135, 136, 138, 140, 141, 143, 144, 146, 148, 149, 151, 152, 155, 156.

⁸ See exhibits 13, 67, 68, 86, 118, 126, 129, 140, 144, 149

“130 to 140” as claimed by the defendant. 9/9 RP 70, 76, 89-90, 97; CP 243-249.⁹

A brutal crime cannot be explained to a jury as anything other than a brutal crime. *State v. Adams*, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), *rev'd in part on other grounds*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971). Therefore, the State may introduce photographs to prove every element of the crime and to rebut all defenses. *State v. Gentry*, 125 Wn.2d 570, 609, 888 P.2d 1105 (1995). Unless it is clear from the record that the primary reason to admit photographs is to “inflame the jury’s passion,” appellate courts will uphold the trial court’s decision. *State v. Daniels*, 56 Wn. App. 646, 649, 784 P.2d 579, *review denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990).

Nothing in the record indicates the State admitted the photographs to inflame the jury’s passion. The defendant inflicted a large number of injuries on D.S. over a four day period. In order to prove the State’s charges, the prosecutor had a duty to show each injury to the jury. He had no duty to downplay the level of bodily injury inflicted upon D.S. by the defendant merely because such depictions were disturbing to view. As the prosecutor repeatedly stated on the record, he offered each photograph

⁹ See exhibits 9, 10, 12, 14-26, 59-66, 69-85, 87-117, 119-125, 127, 128, 130-139, 141-143, 145-148, 150-157.

because it showed a separate injury not visible in the other photographs, and gave the jury a clear picture of the full extent of D.S.'s injuries. 9/9 RP 69, 76, 87, 97.

A trial court has discretion in admitting cumulative evidence. *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994). To determine whether photographic evidence is cumulative, appellate courts review whether the photographs in question depict substantially the same material. *State v. Pirtle*, 127 Wn.2d 628, 654-655, 904 P.2d 245 (1995). Multiple photographs depicting the same scene, injury, or object may not be cumulative where each photograph is somewhat different from any other photograph. See *State v. Rupe*, 108 Wn.2d 734, 757, 743 P.2d 210 (1987) (Six photographs showing the scene of the crime admitted to demonstrate the blow-back effect not necessarily cumulative, and not overly prejudicial); *Pirtle*, 127 Wn.2d at 654-655 (differences in angle, distance, and visible detail in photographs ultimately showing the same object, scene, or condition not necessarily duplicative).

To prove the defendant committed first degree rape, the State had to prove beyond a reasonable doubt that the defendant inflicted physical injury. CP 135-168, Instruction No. 11. To prove the defendant committed second degree assault, the State had to prove beyond a reasonable doubt the defendant inflicted substantial bodily harm. CP 135-

168, Instruction No. 20. Additionally, the State alleged three aggravating factors, including that the defendant's conduct manifested deliberate cruelty toward D.S. CP 135-168, Instruction No. 25. Each photograph admitted by the court was probative in proving the defendant inflicted substantial bodily harm and manifested deliberate cruelty toward D.S.

The defendant groups the challenged photographs into six categories: 1) photographs showing D.S.'s eyes;¹⁰ 2) photographs showing D.S.'s back;¹¹ 3) photographs showing D.S.'s neck;¹² 4) photographs showing D.S.'s arms;¹³ 5) photographs showing D.S.'s legs;¹⁴ and 6) photographs showing bruises in unidentified locations.¹⁵ Brief of Appellant at 24. Of the 85 exhibits challenged on appeal, eight exhibits were not admitted at trial,¹⁶ and 30 exhibits were not objected to below.¹⁷ CP 243-249; 9/9 RP 75, 89-90, 97. As the defendant failed to object below to the 30 exhibits listed in footnote 17, no error associated with their admission has been preserved for appellate review. This leaves 47 exhibits properly challenged on appeal. However, the challenged exhibits

¹⁰ Exhibits 9, 10, 12-14, 16-19, 24, 59-65, 67, 68, 131, 135, 138-141.

¹¹ Exhibits 72, 73, 78, 113, 114, 116-119, 121, 125-127.

¹² Exhibits 66, 132, 142-145.

¹³ Exhibits 82, 88-90, 94, 111, 112, 120-123, 151, 155-157.

¹⁴ Exhibits 92, 93, 95-103, 105-110.

¹⁵ Exhibits 73-77, 79-82, 84-86, 90.

¹⁶ Exhibits 13, 67, 68, 86, 118, 126, 140, 144.

¹⁷ Exhibits 9, 12, 14, 18, 19, 73, 74, 77, 80, 85, 90, 93, 96, 98, 100, 103, 105, 107, 109, 112, 117, 119, 122, 123, 125, 127, 139, 142, 145, 157.

are not cumulative in nature, even when compared to those exhibits not challenged and admitted at trial.

The defendant clumps the exhibits into six broad categories. By doing this, he ignores the details these photographs are meant to show. For example, the defendant challenged 15 pictures of D.S.'s arms as cumulative. Included in this group are photographs of D.S.'s left forearm, right forearm, left shoulder, left elbow, left upper arm, right upper arm, left hand, and the wrists. *See* footnote 8. Additionally, the "arm" photographs include views of the entire arm, and photographs zoomed in and focused on particular areas, giving the viewer a better understanding of the injuries. *Id.* The same is true of the back photographs (showing a full view, left side view, right side view, shoulder and hip views, and zoomed in shots on specific bruises), the neck photographs (showing the left and right side of the neck, under the chin, the jaw line, and injuries around and behind the ears), and the eye photographs (showing each eye, the forehead, the nose, the left cheek, the right cheek, injuries along the hairline, and injuries to D.S.'s ears). Of those photographs the defendant claims are unidentifiable, seven are back photos,¹⁸ and five are arm photos.¹⁹ Finally, of the 17 photographs the defendant labels as "the legs,"

¹⁸ Exhibits 74-77, 79-81.

¹⁹ Exhibits 82, 84-86, 89.

eight are actually photographs of D.S.'s arms.²⁰ While D.S. did state she had preexisting leg bruises, she did not claim that all the bruising on her legs occurred before the assault. Exhibit 8. Therefore, the remaining photographs depicting leg bruises were probative to the State's case.

Given the seriousness and extent of D.S.'s injuries, the photographs were important to the State's case. In order to accurately show the jury the large number of injuries D.S. suffered, the State had to rely on a large number of photographs. The human body is full of angles, nooks, and creases making it nearly impossible to document injuries, like those suffered by D.S., in one or two photos as the defendant suggests. The defendant committed brutal assaults over a four day period. He cannot now claim the photographs of the injuries he inflicted were unfairly prejudicial to his case.

The trial judge gave much consideration to the admissibility of the photographs by reviewing each photo and making a determination on the record whether any photos were cumulative in nature. 9/9 RP 68-70, 74-76, 84-90, 95-97. By refusing to admit several of the photographs, the trial judge exercised his discretion. See *State v. Ames*, 89 Wn. App. 702, 950 P.2d 514 (1998). Therefore, the judge's decision on the cumulative

²⁰ Exhibits 92, 93, 95-100.

nature of and admissibility of the photographs does not constitute an abuse of discretion. See *State v. Swan*, 114 Wn.2d at 658.

b. The court properly excluded unreliable bias evidence.

The defendant argues the court improperly prevented him from offering two exhibits: a letter written by D.S. discussing prior allegations against the defendant, and a police report from an incident involving D.S. and the defendant in October 2008. Brief of Appellant at 25. The court did not abuse its discretion in excluding these two exhibits.

While cross-examining D.S., defense counsel attempted to impeach her using the two challenged exhibits. 9/10 RP 196-197. The State objected. 9/10 RP 197. The defendant revealed the contents of the exhibits during an offer of proof. 9/10 RP 206. The letter, dated October 2, 2008 and addressed to the Assistant City Attorney, states D.S. thinks she *may have* made false accusations against the defendant at some point in the past while drunk. 9/10 RP 197. The police report detailed an incident where the defendant called the police to report that D.S. planned on harming herself. *Id.* Both the letter and the police report are from incidents occurring more than one month prior to the crimes in this case. 9/10 RP 200. The court heard arguments from both parties regarding the exhibits' admissibility, then stated, "I don't think that you can use those

documents. You can ask [D.S.], I think, about whether or not she made prior false accusations about [the defendant] abusing her. I think that you can ask her that.” 9/10 RP 203. The court further stated defense counsel could potentially use the letter to refresh D.S.’s recollection but could not admit the letter into evidence because it was irrelevant. *Id.* This ruling did not constitute an abuse of discretion.

The confrontation right and associated cross-examination rights are limited by general considerations of relevance. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing ER 401, ER 403, *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). In the instant case, the trial court properly exercised its discretion in excluding irrelevant evidence.

The evidence offered by the defendant, at most, shows D.S. at one point thought she *might have* made false accusations against the defendant. 9/10 RP 202. In addition to being an unreliable source of information, the letter has no relevance to the defendant’s case. The court found the letter established only that D.S. thought she may have said something untrue about the defendant to someone while drunk at some point in the past. 9/10 RP 200. This does not make it more or less likely that D.S. lied about the abuse she endured during the current case. Had the defendant offered more proof that D.S. did in fact make false

accusations in the past, the letter may have had some relevance, however the defendant could offer nothing substantive to back up his claims. *See* 9/10 RP 203. The police report was completely irrelevant to the defendant's case. The fact that the defendant reported an incident where D.S. threatened to hurt herself had no bearing on whether the defendant raped, assaulted, and falsely imprisoned D.S. in this case.

The defendant has failed to show the trial court acted unreasonably, on untenable grounds, or for untenable reasons when sustaining the State's objection to the defendant's exhibits. The trial court did not abuse its discretion in prohibiting defense counsel from using the letter and police report as evidence.

- c. The trial court did not abuse its discretion in admitting evidence under ER 803(a)(2) (excited utterance exception).

Immediately after Officer Richards arrived at the crime scene, he spoke with D.S. During this conversation D.S., 1) identified the defendant as her assailant, 2) said the defendant "beat the shit out of me," and 3) described what occurred over the four previous days. At trial, the defendant only objected to the third set of comments, specifically agreeing with the court that the first and second out-of-court statements were admissible under the excited utterance exception to the hearsay rule. 9/9

RP 130. The court properly admitted the third set of statements under the excited utterance exception to the hearsay rule. 9/9 RP 132.

A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. In *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), the United States Supreme Court noted that the excited utterance exception to the hearsay rule is a "firmly rooted" exception which satisfies the requirements of the confrontation clause. *See also State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992).

"Excited utterances," for purposes of the excited utterance hearsay exception, are spontaneous statements made while under the influence of external physical shock before the declarant has time to calm down and make a calculated statement based on self interest. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). Three requirements must be met for hearsay to qualify as excited utterance: (1) a startling event or condition must have occurred; (2) the declarant must make the statement while still under the stress of the startling event; and, (3) the statement must relate to the startling event or condition. *Hardy*, 133 Wn.2d at 714. The circumstances surrounding D.S.'s statements to Officer Richards fall squarely within this exception.

When Officer Richards arrived at the scene, D.S. appeared badly beaten, unclothed, extremely upset, and scared. 9/9 RP 122. This is not surprising considering D.S. just escaped from an apartment in which the defendant had beat, raped, and imprisoned her for four days. This crime certainly qualifies as a startling event, satisfying the first excited utterance requirement. Based on Officer Richards' testimony, D.S. also showed clear signs that she was still under the stress of the startling event. Officer Richards described D.S.'s demeanor while he questioned her as "extremely scared," and testified her demeanor did not change at all while she answered his questions. 9/9 RP 125, 129. He also stated D.S. could see the defendant and kept looking nervously in his direction. 9/9 RP 127. This behavior demonstrates D.S. was still acting under the stress of a startling event, thereby satisfying the second excited utterance requirement. Finally, as D.S.'s statements to Officer Richards were only about the horrifying ordeal she experienced prior to his arrival, her statements satisfy the final requirement necessary to qualify as an excited utterance. *See Hardy*, 133 Wn.2d at 714.

In addition to the facts supporting the trial judge's ruling, after the defendant's objection to Officer Richards' testimony, the court excused the jury and conducted an offer of proof regarding the out-of-court statements. 9/9 RP 123-132. During this offer of proof the prosecutor,

defense counsel, and the trial judge questioned Officer Richards about

D.S.'s statements. 9/9 RP 129. Specifically, the judge asked:

The court: When you said that she was not responding to you right away, like you would ask her a question and then there would be a period of time before she would respond, you said that she was looking around like she was scared?

Officer Richards: Correct.

The Court: Did it appear that she was scared or did it appear that she was formulating an answer?

Officer Richards: In my opinion, it appeared that she was extremely scared.

The Court: You don't think that the delay was because she was trying to think about what the right answer is?

Officer Richards: No, I don't think that at all. I think that she was scared.

9/9 RP 129. This shows the trial judge used extreme care in determining whether he should admit the hearsay testimony. Based on the facts surrounding D.S.'s statement to Officer Richards, and the in depth offer of proof conducted outside the jury's presence, the trial court did not abuse his discretion in finding D.S.'s statements to Officer Richards constituted excited utterances.

- d. The trial court did not abuse its discretion in admitting evidence under ER 803(a)(4) (medical diagnosis or treatment).

ER 803(a)(4) allows the admission of out-of-court statements made for the purposes of medical diagnosis or treatment regardless of the declarant's availability; specifically, this includes:

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The rule encompasses statements to a wide range of medical personnel. *In re J.K.*, 49 Wn. App. 670, 675, 745 P.2d 1304 (1987). In the present case, the defendant assigns error to the admission of D.S.'s out-of-court statements to Ms. Lopez, a licensed sexual assault nurse examiner. Brief of Appellant at 34.

A statement identifying the perpetrator of abuse is recognized as information reasonably related to medical diagnosis and treatment as it assists medical professionals provide comprehensive treatment. *State v. Sims*, 77 Wn. App. 236, 239-240, 890 P.2d 521 (1995). Statements made to a person who is an integral part of the treating medical team are admissible under ER 803(a)(4) as that person has a duty to report any findings important to medical treatment. *In re J.K.*, 49 Wn. App. 670, 745 P.2d 1304 (1987); *State v. Ackerman*, 90 Wn. App. 477, 953 P.2d 816

(1998). This may include statements made to medical personnel even when there are forensic purposes behind the examination. *State v. Williams*, 137 Wn. App. 736, 747, 154 P.3d 322 (2007). In *Williams*, this Court found the trial court did not abuse its discretion in allowing a forensic nurse examiner to testify about statements D.S. made during the forensic examination as the purpose of the examination was not only to gather evidence, but to identify treatable injuries as well. *Id.*

Ms. Lopez testified that during the sexual assault forensic exam, D.S. revealed details about the crime location, the defendant, the rape, how the injuries occurred, her medical history, and her physical condition at the time of the exam. 9/10 RP 230-252. The defendant objected to this testimony, but the judge overruled the objection, finding the testimony fell under ER 803(a)(4). 9/10 RP 233. This does not amount to an abuse of discretion.

Ms. Lopez testified that in sexual assault cases, hospitals are *required* to notify her office so a sexual assault team can examine D.S. at the hospital. 9/10 RP 220. The purpose of the sexual assault exam is to collect forensic evidence, provide certain medical treatment, and report any previously undiscovered injuries or symptoms to hospital staff. 9/10 RP 222-223.

As hospital staff is required to bring a sexual assault unit to the hospital in such cases, Ms. Lopez was an integral part of D.S.'s medical team. She provides emergency contraceptive and STD antibiotics to victims if necessary and refers victims to the appropriate medical resources if further testing or treatment is needed. 9/10 RP 222. In fact, in the defendant's case, Ms. Lopez referred D.S. back to other members of the treatment team to ensure the extreme bruising behind D.S.'s ear did not indicate a skull fracture. 9/10 RP 244-245. While no fracture existed, the fact remains that based upon the background information D.S. provided, Ms. Lopez made a referral for further medical treatment. *See State v. Ackerman*, 90 Wn. App. 477, 953 P.2d 816 (1998).

Furthermore, the background information and crime details D.S. told Ms. Lopez were necessary to determine what tests and examinations Ms. Lopez needed to perform. 9/10 RP 230. As Ms. Lopez testified, sexual assault exams are highly invasive and crime details can help minimize the need to perform certain tests and procedures. *Id.* The background details also allowed Ms. Lopez to determine exactly what caused D.S.'s extensive injuries and how serious the injuries were. Furthermore, D.S.'s identification of the defendant was relevant to the examination as it indicated a domestic violence situation. *State v. Price*, 126 Wn. App. 617, 109 P.3d 27 (2005). D.S.'s out-of-court statements to

Ms. Lopez described her medical history, past and present symptoms, and the cause of her extensive injuries. These statements led Ms. Lopez to provide and seek medical treatment for D.S. 9/10 RP 244. The defendant cannot show the trial judge abused his discretion in admitting these out-of-court statements under the medical treatment hearsay exception.

Moreover, most of the challenged evidence was properly admitted through other witnesses. Ms. Lopez testified to what D.S. told her about the assault and rape. Officer Richards' unchallenged testimony included D.S.'s identification of the defendant and D.S.'s statement that the defendant assaulted her. 9/9 RP 123. D.S. also testified to what occurred during that four day period, corroborating the testimony provided by both Ms. Lopez and Officer Richards. 9/9 RP 49-73. Thus, the question of who assaulted D.S. was never really at issue and the jury heard similar evidence from a variety of sources that are not challenged on appeal. Any error the court made in admitting the challenged portions of Ms. Lopez's testimony is harmless.

5. THE COURT PROPERLY PROVIDED A
LIMITING INSTRUCTION TO THE JURY
PURSUANT TO THE STATE'S REQUEST.

ER 105 discusses the appropriate use of limited admissibility evidence; it provides:

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.

On appeal, the defendant claims the trial court improperly gave a *sua sponte* jury instruction limiting the use of Mr. Sizemore's testimony.

Brief of Appellant at 41. The record does not support this claim.

Mr. Sizemore testified during the defendant's case in chief. 9/14

RP 302. During the direct examination, the following occurred:

Defense counsel: On the day of [the defendant's] arrest, did you have a conversation with Mr. Hettich where he told you –

The State: Objection, Your Honor; hearsay.

The Court: I'm going to ask the jury to excuse us for just a minute. Please do not discuss the case.

9/14 RP 306. Outside the jury's presence, the court ruled that testimony about Mr. Sizemore's conversation with Mr. Hettich did constitute hearsay, however, the conversation would be admissible to impeach Mr. Hettich's testimony. 9/14 RP 306-307. The court therefore admitted the impermissible hearsay testimony for a limited purpose pursuant to ER 105. If evidence is admitted for a limited purpose and an appropriate limiting instruction is requested, the court may not refuse to give the instruction. *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990).

While preferred practice is to give the instruction at the time evidence is admitted, nothing in ER 105 requires the court to instruct the jury at that time. *State v. Ramirez*, 62 Wn. App. 301, 814 P.2d 227 (1991).

Based on the record, it appears the prosecutor and the defendant met with the trial judge off the record to discuss jury instructions. 9/15 RP 323. When back on the record, the trial judge indicated the State requested a limiting instruction regarding Mr. Sizemore's hearsay testimony. 9/15 RP 326. The defendant objected to the limiting instruction, claiming the State waived its request by not requesting the limiting instruction when the court admitted the evidence. 9/15 RP 324. The court did not err in giving the requested instruction.

Once the State requested the limiting instruction, the court had an obligation to provide it. The late request did not preclude the court from granting the request as required under ER 105. Any argument about whether a trial court can provide a *sua sponte* limiting instruction is unnecessary, given the record in this case.

6. THE DEFENDANT FAILED TO PRESERVE ANY OBJECTION TO PROSECUTING ATTORNEY'S STATEMENTS DURING CLOSING ARGUMENT.

On appeal, the defendant has the burden of establishing whether prosecutorial misconduct occurred. *State v. Stenson*, 132 Wn.2d 668,

718, 940 P.2d 1239 (1997). When reviewing an argument challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

Here, the defendant claims the prosecutor committed misconduct when he stated during closing argument, “Now, when you go back there, what you, essentially, have to say to yourself is, ‘I find the defendant not guilty, and my reason is blank.’ That is reasonable doubt.” Brief of Appellant at 43, (citing RP 346). The defendant did not object below to the statements now challenged on appeal. RP 346. Therefore, this issue is deemed waived unless the defendant can show the prosecutor’s comments were so “flagrant and ill-intentioned that [they evince] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *Gentry*, 125 Wn.2d at 593-594). The defendant cannot meet this burden.

A jury is presumed to follow the court’s instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). In the defendant’s case, the court instructed the jury on the law, including the reasonable doubt standard and the presumption of

innocence. *See* CP 135-168; Instruction No. 3; *see also* Washington Pattern Jury Instructions – Criminal, WPIC 4.01. Specifically, the court instructed, “a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” *Id.*

While arguing reasonable doubt, the prosecutor told the jurors “Now, when you go back there, what you, essentially, have to say to yourself is, I find the defendant not guilty, and my reason is blank.” Although the prosecutor correctly stated several times that the State has the burden of proof in a criminal case to prove each element of the charged crimes beyond a reasonable doubt (RP 328, 333, 340, 345, 346, 348, 360, 362), this Court has recently held “fill-in-the-blank” arguments by prosecutors may constitute prosecutorial misconduct. *State v. Anderson*, 153 Wn. App. 417, 431-432, 220 P.3d 1273 (2009); *State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813 (2010). However, as this Court stated in *Anderson*, this type of argument is not so flagrant and ill-intentioned that an instruction could not cure the prejudice. *Anderson*, 153 Wn. App. at 432. In fact, in *Anderson*, this Court found the prosecutor made not one, but three improper remarks during closing argument, that even when taken together did not amount to reversible

misconduct.²¹ *Id.* The *Anderson* court went on to say that *even if* the “fill-in-the-blank” argument was flagrant and ill-intentioned, the error would be harmless under the “substantial likelihood” standard and the constitutional harmless error standard.²² *Id.* at n.8. Given the overwhelming evidence of the defendant’s guilt in the present case it is unlikely the jury verdict would have changed had the prosecutor not made this argument.

To preserve the issue for appeal, defense counsel had to make a timely objection and request a curative instruction, which he failed to do. If he had done so, the court could have simply referred or repeated an appropriate instruction to the jury, thereby curing any prejudice. Or, the court could have clarified the instruction as the trial court did in *State v. Warren*, 165 Wn.2d 17, 25, 195 P.3d 940 (2008). The defendant’s failure to object below waived this issue for appeal. Even if this Court considers this issue, the defendant cannot show the State’s argument was flagrant and ill-intentioned and therefore fails to show any reversible error occurred during the prosecutor’s closing argument.

²¹ In *Venegas*, this Court reversed Venegas’s convictions, but under the cumulative error doctrine, not based on the prosecutor’s statement alone. *Venegas*, 155 Wn. App. at 526-527. Had the prosecutor’s statement been the only error found on appeal, it appears this Court would likely have affirmed Venegas’s judgment and sentence. *Id.*

²² The prosecutor employed this “fill-in-the-blank” argument on September 15, 2009, nearly three months *prior* to this Court’s decision in *Anderson*. He therefore did not have the opportunity to alter his closing argument to comply with the rulings in *Anderson* and *Venegas*.

7. THE COURT CORRECTLY SENTENCED THE
DEFENDANT FOR FIRST DEGREE RAPE AND
SECOND DEGREE ASSAULT.

The Washington and United States Constitutions' double jeopardy clauses prohibit multiple prosecutions and multiple punishments for the same criminal offense. *State v. McJimpson*, 79 Wn. App. 164, 167, 901 P.2d 354 (1995), *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1996). A defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). When faced with a claim of double jeopardy, the courts must look to what punishments the legislature has authorized before deciding whether there has been an unconstitutional imposition of multiple punishments for the same offense. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). However, when there is a separate injury to "the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element," the offenses may in fact be separate and would not merge for double jeopardy purposes. *Id.* at 778; *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979)). This exception shifts the focus

from legislative intent to the facts of the individual case. *Freeman*, 153 Wn.2d at 779.

In this case, an examination of the facts show D.S. suffered separate and distinct injuries constituting second degree assault, but independent from the first degree rape.

D.S. testified that the defendant first hit her on Friday, November 14, 2008 while the two were in their apartment. 9/9 RP 50. During this incident, the defendant hit D.S. in the head and backhanded her across the face. *Id.* The force of these blows to D.S.'s head gave her severe black eyes. *Id.* No sexual intercourse occurred between D.S. and the defendant on November 14 or November 16. *Id.* This single, isolated act constitutes a second degree assault completely separate from any other assaults and rapes that occurred the rest of the weekend. On November 15, 2008, and November 16, 2008, the defendant constantly hit D.S., strangled her, and forced her to engage in sexual intercourse with him. 9/9 RP 51-55. These acts brought about the first degree rape charge.

It is clear from the above facts that the Friday assault was separate from, and did not further, the Saturday and Sunday assaults and rapes. The Friday assault caused substantial bodily harm to D.S.'s head and eyes, however, the defendant did not use this particular assault to force her to engage in sexual intercourse. The later injurious acts occurring

immediately before and after the rapes on Saturday and Sunday amounted to the “serious physical injury” required for the first degree rape conviction. *See* RCW 9A.44.040. The prosecutor took particular care in parsing out the temporal aspects of the different crimes committed between November 14, 2008, and November 17, 2008. As separate and distinct facts proved each of the convictions, the defendant’s convictions for second degree assault and first degree rape do not violate double jeopardy protections.²³

8. THE DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article I, Sec. 22 of the constitution of the State of Washington. 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

²³ Even if this court were to find the rape and assault convictions violate double jeopardy, the assault conviction (the lesser crime) would merge into the rape conviction as it is the assault which raises second degree rape to first degree rape. *See Freeman*, 153 Wn.2d at 780; *State v. Kier*, 164 Wn.2d 198, 814, 194 P.3d 212 (2008). The defendant’s assertion that the rape conviction should be vacated on remand is incorrect. Brief of Appellant at 30.

defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.*

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the defendant must prove both deficiency of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of

prejudice without determining if counsel's performance was deficient.

Strickland, 466 U.S. at 697, *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991).

On appeal, the defendant claims he received ineffective assistance of counsel when his counsel failed to 1) contact essential witnesses, and 2) put the defendant on the witness stand. Brief of Appellant at 45-46. The defendant's arguments fail as he does not reference anything in the record upon which relief can be granted.

First, the only mention of witnesses not contacted by defense counsel occurred at the defendant's sentencing. 10/23 RP 58. While addressing the court, the defendant mentioned a mystery woman and a trip to the hospital. *Id.* Nothing in the record indicates defense counsel failed to investigate the case properly. Absent proof to the contrary, trial counsel is presumed effective. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Review is based on the trial record before the court. *McFarland*, 127 Wn.2d at 335. Based on the record before this Court, the defendant cannot show counsel failed to actively work on his case or failed to actively pursue all leads.

Second, despite the defendant's claims on appeal that defense counsel failed to put the defendant on the stand, it was in fact the defendant who chose not to testify. Before the defense rested, the court

specifically asked the defendant whether he wished to testify. 9/14 RP 315. The defendant responded, “I have experience with my attorney. I’m going with his recommendation.” *Id.* The defendant then once again confirmed his decision to not testify. *Id.* The decision to testify or not testify is a matter of trial tactic. *State v. Hardy*, 37 Wn. App. 463, 681 P.2d 852 (1984). The defendant had the opportunity to testify, which the court discussed on the record, yet clearly chose against the option. 9/15 RP 315. Defense counsel could not force the defendant to testify against his will or against his rights under the Fifth Amendment to the United States Constitution. Therefore, the defendant’s choice to remain silent cannot lead to an ineffective assistance of counsel claim on appeal.

The record provides no basis for determining whether the defendant was prejudiced by the lack of testimony from unnamed witnesses with undisclosed facts. Nor does the record show the defendant was prejudiced by his own decision to not testify. As the defendant cannot satisfy this prong of the *Strickland* test, he cannot prevail on his ineffective assistance of counsel claim.

9. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.

The doctrine of cumulative error recognizes that sometimes numerous errors, each of which standing alone might have been harmless

error, can combine to deny a defendant a fair trial. See *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). Reversals for cumulative error are reserved for truly egregious circumstances where a defendant is truly denied a fair trial. This could be because of the enormity of the errors see e.g., *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963), or because the errors centered around a key issue. See e.g., *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984). Cumulative errors must also be prejudicial. *State v. Stevens*, 58 Wn. App. 478, 795 P.2d 38 (1990).

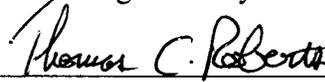
In the present case, the defendant identifies no great weight or pattern of small or particular errors committed, nor how they prejudiced him. The trial court did not commit cumulative error.

D. CONCLUSION.

For the reasons stated above, the State requests this court affirm the judgment and sentence below.

DATED: August 30, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

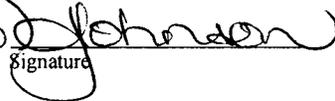


THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Amanda Kunzi
Rule 9

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.

8/30/10 
Date Signature