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

1. Whether the defendant received constitutionally effective assistance of counsel?
2. Whether the prosecutor properly elicited testimony that the defendant served as the middleman between David Dickjose and a Lakewood Police Department confidential informant?
3. Whether entry of findings of fact and conclusions of law on April 15, 2011, sufficiently satisfies the court's obligation to enter written findings and conclusions under CrR 3.5?

B. STATEMENT OF THE CASE.

1. Procedure

On December 12, 2007, the Pierce County Prosecuting Attorney (the State) charged Kenneth Gross, hereinafter "the defendant," with three counts of unlawful delivery of a controlled substance - methamphetamine. CP 1-2. On December 9, 2009, the court granted the State's motion to join the defendant's Pierce County Cause No. 08-1-00210-3 with the 2007 case for trial. RP 11; CP 96. On December 17, 2009, the State filed an amended information adding three charges of intimidating a witness and one charge of felony harassment, all originally charged under the 08 cause number. CP 203-205.

The court held a CrR 3.5 hearing on December 10, 2009, Honorable James Orlando presiding. RP 20.¹ After hearing the evidence, the court found the defendant's statements made to Officer Conlon after the defendant was read his *Miranda*² rights were admissible. RP 48. Before the ruling, defense counsel stipulated on the record that Officer Conlon read the defendant his *Miranda* rights and the defendant's statements to Officer Conlon were made voluntarily. RP 47.

The case proceeded to jury trial on December 10, 2009. After hearing the evidence and deliberating on it, the jury found the defendant guilty of counts I, II, and III (unlawful delivery of a controlled substance – methamphetamine), and count VI (intimidating a witness). CP 162-164, 167. The jury found defendant not guilty of counts IV and V (intimidating a witness), and count VII (felony harassment). CP 165, 166, 168.

On January 8, 2010, the court sentenced the defendant. CP 213-226. The parties calculated the defendant's offender score at 5 for each count. *Id.* The court sentenced the defendant to 48 months for each count to run concurrently with each other. *Id.* After being sentenced, the defendant filed this timely notice of appeal. CP 234-248.

¹ The Verbatim Report of Proceedings is contained in four consecutively paginated volumes and will be referred to as "RP."

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

2. Facts

a. Unlawful Delivery of a Controlled Substance (Counts I, II, and III).

In 2007, the Lakewood Police Department entered into a confidential informant (CI) contract with Kenny Dussault. RP 59. Lakewood Police Officer Sean Conlon managed Kenny Dussault's CI arrangement. RP 59.

At trial, Officer Conlon testified the police department enters into contracts with individuals facing criminal charges to help police with drug investigations. RP 58. Those individuals who agree to work as a CI are given the opportunity to work off charges against them in exchange for helping the department arrest targeted drug dealers. *Id.* In the contract between Lakewood Police Department and Kenny Dussault, Dussault agreed to assist Lakewood Police Department in arresting three targeted drug dealers and in confiscating at least six pounds of methamphetamine. RP 60.

Before a CI can work on fulfilling the terms of their contract, the CI must complete two reliability buys to determine the CI's trustworthiness. RP 61. Dussault completed both reliability buys and was determined to be a reliable CI. RP 63.

On August 23, 2007, Officer Conlon worked with Dussault in an attempt to arrest target David Dickjose. RP 65-66, 132, 315. In such “controlled buys,” officers provide the CI with pre-recorded money to make a drug purchase. RP 69. Because of a falling out between Dussault and Dickjose, Dussault could not have direct contact with Dickjose. RP 132. Dussault therefore obtained drugs from Dickjose through the defendant. RP 66, 132.

Before executing the controlled buy, Officer Conlon searched Dussault’s car for money or narcotics. RP 68. Officer Conlon also performed a strip search of Dussault to search for anything on Dussault’s person. *Id.* A strip search of the CI’s person is conducted while the CI is naked. RP 69. Officer Conlon found no contraband or money in either of the searches. *Id.* Officer Conlon then gave Dussault pre-recorded money to use in the controlled buy. *Id.*

Dussault drove his vehicle to a house in the 5400 block of S. Warner Street in Tacoma, Washington. *Id.* Officer Conlon followed behind Dussault in an undercover vehicle and parked in a spot that allowed him to monitor the house. *Id.* Once at the house, Dussault went to the front door, spoke with the defendant and gave the defendant the buy money. RP 70. Dussault then left the house and waited for a call from the

defendant indicating Dussault could come back to pick up the drugs he purchased. RP 71.

After Dussault left the house, Dickjose arrived in a 2005 Dodge Ram Pickup, spoke with the defendant, and left the house. RP 204, 317. After Dickjose left the defendant's house, the defendant called Dussault. RP 71. Dussault returned to the defendant's house. *Id.* The defendant came outside and handed Dussault a brown paper bag. *Id.* Dussault then got into his car and drove to Officer Conlon's location. RP 72. Officer Conlon took the bag and field tested the contents for narcotics. RP 73. Before allowing Dussault to leave, Officer Conlon performed a second search of Dussault and Dussault's vehicle and found no money or narcotics. RP 73. The narcotics were sent to the Washington State Patrol Crime Laboratory for testing and were positively identified as 12.8 grams of methamphetamine. RP 282.

Officer Conlon worked with Dussault on a second controlled buy on October 25, 2007. RP 75, 139. Dickjose was once again the target, requiring Dussault to go through the defendant for the purchase. RP 76. Before the buy, Officer Conlon performed a strip search of Dussault and searched Dussault's vehicle, finding nothing. *Id.* Officer Conlon and Dussault both testified Dussault initially met the defendant at the defendant's father's office in Tacoma, Washington where Dussault gave

the defendant marked money for drugs. RP 77-78, 139. The defendant left the office to get drugs from Dickjose while Dussault went back to the defendant's house. RP 79. Dussault waited for the defendant inside the defendant's home for approximately 30 minutes before the defendant arrived. RP 80.

Shortly after the defendant arrived at the house, Dussault left, met up with Officer Conlon, and turned over a bag of methamphetamine. RP 81. Again, Officer Conlon searched the defendant and the defendant's vehicle, confirming the defendant had no other drugs or unaccounted for items in his possession. *Id.* Dussault admitted to smoking some of the methamphetamine with the defendant during this buy. RP 143.

Washington State Patrol Crime Laboratory confirmed the presence of 11.5 grams of methamphetamine in the drugs purchased by Dussault from the defendant. RP 287.

Officer Conlon worked with Dussault on one final controlled buy on December 5, 2007. RP 82, 144, 207, 258. The target was once again Dickjose. RP 83. As with the previous controlled buys, Officer Conlon stripped searched Dussault and searched Dussault's vehicle. RP 83. He found nothing during the searches. *Id.* After being searched, Dussault called the defendant and said he wanted to buy half an ounce of methamphetamine. RP 84. After speaking with Dussault, the defendant

met with Dickjose. *Id.* Both Dickjose and the defendant then drove to the defendant's home. RP 85. After Dickjose left the defendant's house, the defendant called Dussault. *Id.* Officer Conlon watched from a distance as Dussault gave the defendant pre-recorded bills in exchange for drugs. *Id.*

After receiving the drugs, Dussault met with Officer Conlon and turned over the drugs. RP 86. Officer Conlon found nothing improper in a subsequent search of Dussault's person and vehicle. RP 87.

The defendant testified at trial. RP 332. According to the defendant, he had known Dussault for 30 years. *Id.* Because Dussault and Dickjose had a falling out, the defendant agreed to act as a middleman between the two in helping Dussault sell certain items to Dickjose. RP 335, 349. The defendant testified that on August 23, 2007, he did not deliver a controlled substance to Dussault. RP 334. Rather, the defendant said he helped Dussault sell a diamond ring to Dickjose. RP 335.

The defendant testified that on October 25, 2007, he did not deliver a controlled substance to Dussault. RP 344-345. To the contrary, the defendant said Dussault brought methamphetamine to the defendant's house and the two smoked the methamphetamine together. *Id.*

Finally, the defendant stated he did not deliver methamphetamine to Dussault on December 5, 2007. RP 346-352. Rather, the defendant said Dussault asked the defendant to sell collectable cast iron cars to Dickjose

on Dussault's behalf. RP 349. The defendant took the cars and went with Dickjose to have the cars valued. RP 351. Dickjose gave the defendant money for the cars and the defendant gave the money to Dussault. RP 352. According to the defendant, when Dussault came by the defendant's home to pick up the money, he brought methamphetamine with him that the two smoked together. *Id.*

b. Intimidating a Witness (Counts IV, V, and VI).

On January 2, 2008, Dussault's ex-girlfriend, Christin Cerbes, called Officer Conlon at Dussault's urging. RP 188, 322. Officer Conlon testified Cerbes told him the defendant had been coming by her house and threatening to kill Cerbes and Dussault. RP 322; CP 164 (Count IV). Officer Conlon spoke to Cerbes again approximately four days later. RP 323. During this call, Cerbes told Officer Conlon the defendant drove by her house in his van and said Cerbes and Dussault were going to end up dead. RP 323; CP 166 (Count V).

Cerbes testified at trial that while she did speak with Officer Conlon on the phone, she did not tell him that the defendant had threatened to kill her or Dussault. RP 188. According to Cerbes, the defendant had stopped by her home to simply warn her that others were

angry with Dussault because of his work as a CI. RP 187. Cerbes denied ever speaking with the defendant on the phone. *Id.*

The defendant called Dussault's cell phone several times around January 5 and 6, 2008. RP 148. During these calls, the defendant called Dussault a snitch and threatened to kill Dussault. RP 149.

The final incident occurred on January 19, 2008. On that day, Dussault and Cerbes went to the Emerald Queen Casino. RP 149, 189. While at the casino, the defendant spotted and approached Dussault. RP 150, 359. Dussault testified the defendant called him a snitch and told him to go outside so the defendant could kill him. RP 150. The defendant testified that while he did call Dussault a snitch, he did not threaten to kill Dussault. RP 358. After the defendant left the casino, Dussault called Officer Conlon and reported the incident. RP 151; CP 167 (Count VI).

C. ARGUMENT.

1. THE DEFENDANT CAN NOT DEMONSTRATE
EITHER DEFICIENCY OF COUNSEL'S
PERFORMANCE OR RESULTING PREJUDICE.

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.").

Great deference is given to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The Washington Supreme Court recently reaffirmed this strong presumption that counsel's performance was reasonable. *See State v. Grier*, -- Wn. 2d --, -- P.3d -- (2011) (2011 WL 459466).

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; *see also Grier, supra*, at 10. 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."

Strickland, at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

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. *Thomas*, 109 Wn.2d at 225-26.

On appeal, the defendant claims he received ineffective assistance of counsel when his counsel failed to: 1) object to testimony by the State's witnesses that the defendant was the middleman in a drug operation, and 2) subpoena essential witnesses to testify on the defendant's behalf. Brief of Appellant at 13, 16. The defendant's arguments fail as he does not show any deficiency in counsel's performance or resulting prejudice.

- a. Defense counsel's decision not to object to evidence that the defendant served as the middleman between Dickjose and Dussault did not constitute deficient performance or result in prejudice.

The defendant argues that evidence explaining his role as a middleman in the transactions between Dussault and Dickjose was irrelevant and unfairly prejudicial under ER 401 and ER 403. Brief of Appellant at 13. The evidence was not only relevant to the unlawful delivery of a controlled substance charges, it was necessary to combat the defendant's claims that he did not deliver methamphetamine to Dussault. *See* RP 387. Where evidence is admissible, defense counsel's failure to object does not constitute deficient performance. *State v. Thompson*, 73 Wn. App. 654, 656 n.1, 870 P.2d 1022 (1994).

First, the evidence helped explain the arcane world of drug dealing and drug transactions and thus was helpful to the jury in understanding the evidence. In each transaction, Dussault contacted the defendant, gave the defendant money for drugs, and then left the defendant's home before returning and receiving the drugs. RP 70, 78, 84. This break in the transaction occurred so the defendant could use Dussault's money to purchase drugs from Dickjose and then deliver the drugs back to Dussault. RP 71, 80, 85. This evidence explained the purpose of the break; Dussault did not collect the drugs from the defendant immediately upon payment.

Second, the defendant's theory of the case, that he did not provide Dussault with methamphetamine, necessitated the middleman evidence to explain how Dussault obtained the drugs from the defendant. The defendant testified he acted as a middleman between Dussault and Dickjose by helping Dussault sell a ring and collectible tin cars to Dickjose. RP 335, 346.³ The evidence elicited by the State showed the defendant contacted Dickjose on each of the three occasions not to help Dussault sell items, but to obtain drugs from Dickjose to deliver to Dussault. Whether or not the defendant delivered methamphetamine to the defendant was a fact of consequence to the case. The evidence therefore helped prove the defendant delivered methamphetamine to Dussault. *See* ER 401.

Given the relevance of the challenged evidence in proving the State's charges against the defendant, the defendant cannot show any deficiency in defense counsel's decision not to object to the relevant and therefore admissible evidence. *See* ER 402.

Furthermore, the defendant fails to show how defense counsel's actions prejudiced the defendant. The jury heard testimony from five

³ It is clear from the record that the State was aware of the defendant's theory of the case. The State questioned both Officer Conlon and Dussault about whether a ring or collectible cars were ever exchanged between Dussault and the defendant. RP 108-109, 156, 166-167.

police officers who monitored the interactions between Dussault and the defendant. RP 55, 197, 232, 254, 314. Three officers were present during the controlled buys to track Dickjose's movements. RP 238, 261, 317. Without knowing the defendant's position as the middleman, the jury could have concluded the defendant played a much larger role in the transactions because so many officers were watching his home. Instead, the jury properly heard that a majority of the officers were present in order to monitor and follow Dickjose. *Id.* Rather than being prejudicial, the evidence actually diminished the defendant's role in these particular transactions by showing he had a small level of involvement in the delivery.

The defendant's counsel was not ineffective in not objecting to evidence that the defendant was merely a middleman in the drug transactions being monitored by Lakewood Police Department. As the defendant has not met his burden of showing any deficiency or prejudice, he cannot succeed on this challenge to the effectiveness of his counsel. ***Strickland***, 466 U.S. at 697.

- b. Defense counsel was not deficient in not subpoenaing two witnesses and the defendant was not prejudiced by the witnesses' absence.

On appeal, the defendant argues his counsel was ineffective for failing to subpoena Christin Cerbes and David Woslager to testify on his behalf. Brief of Appellant at 16. The presumption of counsel's competence can be overcome by showing counsel failed to subpoena necessary witnesses. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). The defendant fails to show Cerbes or Woslager were necessary witnesses. Therefore, the defendant fails to show how counsel's performance was deficient. Furthermore, as the jury found the defendant not guilty of the charges to which Cerbes's and Woslager's testimony pertained, the defendant can not show any prejudice flowing from defense counsel's actions.

Defense counsel stated he intended to call Cerbes and Woslager as witnesses in the defendant's trial. RP 435-436. Despite multiple attempts to contact both witnesses, defense counsel was unable to secure their appearance. *Id.*

Defense counsel expected Cerbes to testify that Officer Conlon misinterpreted what she said during phone discussions between the two regarding alleged threats made by the defendant toward Dussault. RP 437

(Count IV, V). This testimony was not necessary in presenting the defendant's theory of the case. Defense counsel had an opportunity to cross examine Cerbes when she testified during the State's case in chief. RP 192. During that testimony, Cerbes stated Officer Conlon misinterpreted what she said in their phone conversations. RP 188. Cerbes also stated the defendant did not threaten her or Dussault. RP 187-188. Defense counsel offered no additional evidence that would be elicited by recalling Cerbes. RP 437. Her additional testimony was therefore not necessary in presenting the defendant's theory of the case as it was already before the jury. *See* RP 438.

Defense counsel expected Woslager would testify the defendant used Woslager's phone to contact Cerbes on January 2, 2008, and that no threats were made during this call. *Id.* (Count IV). Both the defendant and Diane Jones had already testified that the defendant used Woslager's phone to call Cerbes. RP 353, 410. Additionally, Jones, the defendant, and Cerbes all testified no threats were made during these phone calls. RP 187-188, 354, 410. Woslager's testimony was therefore cumulative to testimony already before the jury and not necessary in proving the defendant's theory of the case. *See* RP 438.

Not securing the presence of Cerbes or Woslager did not amount to deficient performance. As the court stated on the record, Cerbes expected

testimony was already before the jury and Woslager's expected testimony was cumulative of three other witnesses' testimony. RP 438. In reviewing the entire record it is evident defense counsel conducted extensive investigations into the defendant's theory of the case and called three witnesses to support that theory. Furthermore, defense counsel cross-examined each state witness and argued defendant's theory of the case during closing argument.

As a result of defense counsel's work, the jury acquitted the defendant on three of the seven charges. CP 165, 166, 168. When looking at the entire record, defense counsel fails to overcome the strong presumption that counsel's performance is reasonable. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Furthermore, the defendant fails to show how defense counsel's actions prejudiced the defendant's case. As defense counsel stated on the record, Woslager's testimony went to the alleged intimidation charge from January 2, 2008. RP 436. After hearing the evidence presented, the jury found the defendant not guilty of that particular charge. CP 165 (Count IV). Additionally, Cerbes spoke with Officer Conlon for the first time on January 2, 2008, and then again approximately four days later. RP 322, 323. These phone calls could only have pertained to the intimidation charges stemming from incidents on January 2, 2008, and January 4, 2008.

The jury found the defendant not guilty of both charges. CP 165, 166 (Count IV, Count V).

As the jury found the defendant not guilty of the charges relevant to the missing testimony, no prejudice can be shown. As the defendant cannot satisfy either prong of the *Strickland* test, he cannot prevail on his ineffective assistance of counsel claim.

2. ELICITING TESTIMONY THAT THE DEFENDANT SERVED AS A MIDDLEMAN IN A CONTROLLED DRUG BUY DOES NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct were improper and that it 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). On appeal, the defendant states the prosecutor committed misconduct by improperly eliciting opinion testimony that the defendant was a middleman in a multi-level drug operation. Brief of Appellant at 17. The defendant's argument does not cite to specific places in the record where the alleged misconduct occurred and does not cite to legal authority supporting his claims. *Id.* Because the defendant provides

insufficient argument and no authority to support his claims, this court should decline to review the issues. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); RAP 10.3(a)(6).

If this court is inclined to address this issue, the defendant fails to show how the prosecutor engaged in misconduct. To prove a prosecutor's actions constitute misconduct, a defendant must show 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)). The court must ask whether the conduct, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).

If defense counsel fails to object to alleged misconduct at the trial court level, any challenge to the prosecutor's conduct is waived on appeal unless the challenged action is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). Defense counsel in the present case did not object to any "middleman"

evidence below. Therefore, to succeed on appeal the defendant must show the prosecutor's actions were flagrant and ill-intentioned. The defendant's arguments fail to show, and in fact never claim, the prosecutor's actions were flagrant and ill-intentioned. Brief of Appellant at 17.

As discussed *supra* at 11-13, defense counsel's decision to not object to the evidence did not constitute ineffective assistance of counsel because the evidence was relevant to the State's case and therefore admissible in the defendant's trial. It naturally follows that a prosecutor does not act improperly by eliciting relevant, admissible evidence. The middleman evidence helped the jury understand the facts of the defendant's case by explaining why Dussault gave money to the defendant, broke contact with the defendant, and then later made contact to pick up the drugs. Furthermore, the middleman evidence helped the jury understand Dussault's role as a confidential informant in the transaction and the reason for the police surveillance of the defendant's home. The prosecutor therefore properly elicited this testimony.

The defendant's argument that the prosecutor elicited improper opinion testimony also fails as the evidence does not amount to an opinion on the defendant's guilt. The prosecutor never asked police officers to express their opinions of the defendant's guilt or innocence and no witness at the defendant's trial expressed an opinion on the defendant's guilt.

Improper opinions on guilt usually involve an assertion pertaining directly to the defendant. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 65 (1993); *See, e.g., State v. Carlin*, 40 Wn. App. 698, 700, 700 P.2d 323 (1985) (police officer's testimony that tracking dog followed defendant's "fresh guilt scent" improper opinion testimony). Testimony that is not a direct comment on the defendant's guilt, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *Heatley*, 70 Wn. App. at 578. In determining whether testimony constitutes an impermissible opinion on the defendant's guilt, courts may consider: 1) the particular circumstances of the case; 2) the type of witnesses called; 3) the nature of the testimony and the charges; 4) defenses invoked; and 5) other evidence presented to the trier of fact. *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004).

In the defendant's case, two officers referred to the defendant as a middleman in the transactions between Dussault and Dickjose. RP 22-23, 201. Both references came in response to the prosecutor's questions about why each officer monitored the defendant's house on the day in question. *Id.* This type of question does not express an opinion as to the defendant's guilt, nor does it ask the witness to provide such an opinion. Rather, the prosecutor's line of questioning asked the officers to explain the

circumstances surrounding the controlled buys, and to explain the mechanics of a drug buy to the jury. *Id.*

Each officer that testified at the defendant's trial had multiple years of experience in street-level drug transactions. RP 21, 197, 232, 255, 314-315. To the extent that the officers could be said to be testifying as expert witnesses, their reference to the defendant as a middleman assisted the trier of fact because it stated conclusions the officers drew from their observations of the controlled buys. Such inferences and conclusions do not amount to an impermissible opinion of the defendant's guilt. *See State v. Fisher*, 74 Wn. App. 804, 809, 874 P.2d 1381 (1994) (officer's testimony that defendant was "involved in the transaction" proper in drug accomplice case).

Labeling the defendant as a middleman is not the same as saying the defendant is guilty of the specific crimes charged. Given the facts surrounding the controlled buys and the officers' roles in monitoring the controlled buys, the prosecutor conducted proper direct examinations of each officer resulting in relevant and admissible testimony. The defendant therefore cannot show the prosecutor acted improperly, much less in a flagrant and ill-intentioned manner.

Even if this court were to find the prosecutor's actions flagrant and ill-intentioned, the defendant shows no prejudice flowing from the

prosecutor's misconduct. Prejudice is shown if there is a substantial likelihood the misconduct affected the verdict. *State v. Borboa*, 157 Wn.2d 108, 122, 135 P.3d 469 (2006). In the defendant's case, the jury heard extensive evidence that officers searched Dussault and Dussault's vehicle before giving him buy money to purchase drugs from the defendant. RP 61, 63, 68, 73, 76, 83, 86. In each case, officers testified they monitored Dussault's interactions with the defendant. RP 72. After each controlled buy, the officers performed a follow up search of the defendant and in each case found nothing other than the drugs Dussault purchased as part of the controlled buys.

This information alone provides sufficient evidence to prove the defendant delivered controlled substances to Dussault. Therefore it is unlikely the middleman evidence affected the jury's verdict. The defendant fails to meet his burden as to this issue. The prosecutor did not commit misconduct in the defendant's trial.

3. THE COURT'S WRITTEN FINDINGS AND CONCLUSIONS SET FOR ENTRY ON APRIL 15, 2011, SATISFY THE REQUIREMENTS OF CrR 3.5(c).

After a CrR 3.5 hearing, the court shall enter written findings of fact and conclusions of law. CrR 3.5(c). If the trial court enters the findings of fact and conclusions of law after the defendant's appellate

brief is filed, the appellate court will reverse only if the findings prejudice the defendant's appeal or appear tailored to meet the issues raised in the defendant's appellate brief. *State v. France*, 121 Wn. App. 394, 88 P.3d 1003 (2004). Any error in failing to issue written findings is harmless if the court's oral findings are sufficient to permit appellate review, written findings are promptly filed once the State learns of the omission, and the delay was not intentional. *State v. Cunningham*, 116 Wn. App. 219, 65 P.3d 325 (2003).

Here, while the trial court did not enter written findings and conclusions before the defendant initiated this appeal, it did make sufficient oral findings and conclusions. RP 47. The defendant testified during the CrR 3.5 hearing and stated his conversation with Officer Conlon was voluntary. RP 46.⁴ After hearing this evidence and testimony from Officer Conlon, the court found it undisputed that Officer Conlon read the defendant his Miranda rights after the defendant's arrest. RP 48.

⁴ The following exchange occurred between the State and the defendant during the CrR 3.5 hearing. RP 46.

The State: Mr. Gross, so it's your testimony that you actually did have a conversation with Officer Conlon; is that correct?

Defendant: Yes, I did. You know.

The State: And that was a voluntary conversation that you had with him.

Defendant: Yes, it was.

The State: So what we have here is merely a dispute over what you said and what the officer says you said; is that correct?

Defendant: Yeah.

Furthermore, the court found the defendant indicated he would speak with Officer Conlon and subsequently made voluntary statements. *Id.* Defense counsel agreed on the record with the court's recitation of the facts. RP 47. The court stated on the record the only disputed facts pertained to the content of the defendant's statements, not the voluntariness of the statements. RP 48. Therefore the defendant's statements were admissible. *Id.* Based on the stipulation on the record by both parties to the voluntariness of the statements, and the defendant's own admission on the record that he made the statements voluntarily, the defendant was not prejudiced in his appeal by the late entry of the findings and conclusions.

The prosecutor in this case has set a hearing on April 15, 2011, to formally enter the written findings and conclusions. While not the preferred procedural practice, allowing late entry of findings and conclusions gives courts the opportunity to fix small errors not prejudicial to the defendant while avoiding the often lengthy appellate and remand process.

The written findings and conclusions will mirror the oral findings. Given the stipulation between the parties below as to the voluntariness of the statements, this appeal has not been prejudiced by the late filing. The belated findings and conclusions sufficiently satisfy the requirements of

