

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Was the evidence adduced at trial sufficient to support the jury's guilty verdicts where the year defendant committed the offenses could be reasonably inferred from the testimony and exhibits? 1

2. Did the court err in allowing the prosecutor to argue inferences which could be made through common experience and understanding? 1

3. Did the prosecutor commit misconduct by arguing inferences from the evidence presented at trial and common sense and experience or by responding to defendant's closing argument by explaining the burden of proof?..... 1

4. Was defense counsel ineffective where his lack of objection to the prosecutor's closing argument was a valid trial strategy? 1

5. Was the jury improperly instructed as to the necessity for unanimity on a special verdict form? 1

B. STATEMENT OF THE CASE. 1

1. Procedure..... 1

2. Facts 3

C. ARGUMENT..... 4

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHERE, IN REBUTTAL TO DEFENSE COUNSEL'S CLOSING ARGUMENT, HE ARGUED FROM COMMON SENSE AND EXPERIENCE, NOR IN STATING THAT THE EVIDENCE DID NOT SUPPORT DEFENSE COUNSEL'S THEORY. 4

2.	THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICTS ON ALL EIGHT COUNTS OF VIOLATION OF A COURT ORDER.....	12
3.	THE COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO ARGUE FROM COMMON SENSE AND EXPERIENCE.....	15
4.	DEFENSE COUNSEL WAS EFFECTIVE IN NOT OBJECTING AND IN INSTRUCTING THE JURY ACCORDING TO THE CASE LAW OF THE TIME.	17
D.	<u>CONCLUSION</u>	23

Table of Authorities

State Cases

<i>Breckenridge v. Valley General Hosp.</i> , 150 Wn.2d 197, 199 n.3, 78 P.3d 944 (2003)	7
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)...	16
<i>State v. Barker</i> , 103 Wn. App 893, 14 P.3d 863 (2000)	15
<i>State v. Bashaw</i> , 144 Wn.App. 196, 182 P.3d 451, (2008).....	21, 22
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010)	21
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	18
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005)	7
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).....	15, 16
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007 (1998)	5, 9
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998)	5
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	13
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	18
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	18
<i>State v. Costello</i> , 29 Wash. 366, 69 P. 1099 (1902).....	15
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 577, 79 P.3d 432 (2003)	5, 9
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980).....	20
<i>State v. Frazier</i> , 55 Wn. App 204, 212, 777 P.2d 27 (1989)	15
<i>State v. Frost</i> , 160 Wn.2d 765, 771-72, 161 P.3d 361 (2007)	15
<i>State v. Furman</i> , 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).....	5

<i>State v. Gamble</i> , 168 Wn.2d 161, 178, 225 P.3d 973 (2010).....	8, 12
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	18
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	12
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	17
<i>State v. Kirkman</i> , 159 Wn.2d 918, 928, 155 P.3d 125 (2007).....	8
<i>State v. Koss</i> , ___ Wn. App. ___, 241 P.3d 415, 420-21 (2010).....	11
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991).....	19
<i>State v. Lubers</i> , 81 Wn. App 614, 619, 915 P.2d 1157 (1996)	13
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662, <i>review denied</i> , 113 Wn.2d 1002, 777 P.2d 1050 (1989).....	19
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	4
<i>State v. McFarland</i> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).....	19
<i>State v. McKenzie</i> , 157 Wn.2d 44, 53, 134 P.3d 221 (2006)	10
<i>State v. Millan</i> , 151 Wn. App. 492, 502-03, 212 P.3d 603 (2009), <i>review granted</i> , 168 Wn.2d 1005, 226 P.3d 781 (2010)	21
<i>State v. Perkins</i> , 97 Wn. App. 453, 457, 983 P.2d 1177 (1999).....	5
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995)	5
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003).....	12
<i>State v. Reynolds</i> , 51 Wn.2d 830, 833, 322 P.2d 356 (1958)	13
<i>State v. Rose</i> , 62 Wn.2d 309, 312, 382 P.2d 513 (1963).....	6
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	5, 6, 10
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	13
<i>State v. Saunders</i> , 91 Wn. App. 575, 578, 958 P.2d 364 (1998)	19

<i>State v. Slighte</i> , 157 Wn. App. 618, 624, 238 P.3d 83 (2010)	21
<i>State v. Stetson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)	15
<i>State v. Swan</i> , 114 Wn.2d 613,661, 790 P.2d 610(1990)	10
<i>State v. Tharp</i> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981)	16
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)	13
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	18
<i>State v. Warren</i> , 165 Wn.2d 17, 28, 195 P.3d 940 (2008)	12
<i>State v. Warren</i> , 165 Wn.2d 17, 30, 195 P.3d 940 (2008)	6
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952)	5
<i>State v. White</i> , 81 Wn.2d 223, 225, 500 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994)	19, 22
<i>State v. Young</i> , Wn.2d 613, 618, 574 P.2d 1171 (1978)	13

Federal and Other Jurisdictions

<i>Beck v. Washington</i> , 369 U.S. 541, 558, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962)	5
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S.Ct. 2574, 2582 (1986)	17
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	17, 18, 19, 20, 23
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 80 L.Ed.2d 657, 104 S. Ct. 2045 (1984)	17
<i>United States v. Fields</i> , 565 F.3d 290, 296 (5th Cir.2009), <i>cert. denied</i> , --- U.S. ---, 130 S. Ct. 298, 175 L.Ed.2d 199 (2009)	21
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <i>cert. denied</i> , 488 U.S. 948 (1988)	19

Constitutional Provisions

Sixth Amendment17, 23

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

1. Was the evidence adduced at trial sufficient to support the jury's guilty verdicts where the year defendant committed the offenses could be reasonably inferred from the testimony and exhibits?
2. Did the court err in allowing the prosecutor to argue inferences which could be made through common experience and understanding?
3. Did the prosecutor commit misconduct by arguing inferences from the evidence presented at trial and common sense and experience or by responding to defendant's closing argument by explaining the burden of proof?
4. Was defense counsel ineffective where his lack of objection to the prosecutor's closing argument was a valid trial strategy?
5. Was the jury improperly instructed as to the necessity for unanimity on a special verdict form?

B. STATEMENT OF THE CASE.

1. Procedure

On March 20, 2009, the Pierce County Prosecutor filed an information charging defendant, Gary Clark, with four counts of felony

domestic violence court order violation. CP 1-3. The State amended the charges on July 29, 2009, adding three additional counts. CP 10-13. On February 18, 2009, the State filed a second amended information charging defendant with nine counts of felony domestic violence court order violation, with no objection from defense counsel. CP 75-79, RP 13-14. On February 18, 2010, defendant pleaded not guilty to the amended charges, and trial began before the Honorable Rosanne Buckner in the Pierce County Superior Court. RP 4, 14, 16. Defendant stipulated that he had been convicted of two prior violations of a court order. RP 8. The State rested its case and defense counsel moved for dismissal of count nine of the second amended information because of a lack of sufficient evidence. RP 76. The State did not object to the motion, and the court dismissed the count. RP 76-77, CP 144-45. The court also noted that she had forgotten to read the stipulation to the jury, and the State moved to reopen its case in order for the stipulation to be read. RP 76. The court ruled that the error was harmless and allowed the State to reopen its case. RP 77. The court read the stipulation to the jury, and the State rested. RP 85-86.

Defendant did not testify in his own defense, nor did he present witnesses. RP 75.

After deliberations, the jury convicted defendant of eight counts of felony violation of a court order, and entered a finding of “yes” on

domestic violence special verdict form. RP 114-15, CP 80-88. The court polled the jury and confirmed unanimity on all verdicts. RP 115-16.

The court sentenced defendant to 60 months, with credit for 19 days served. RP 135, CP 123-138. Sixty months is the standard range sentence for defendant's offender score of thirteen. RP 123, 133, CP 123-138.

2. Facts

On September 11, 2006, the victim, Deanna Reed, sought and received an order of protection against defendant. RP 25. On September 5, 2008, the court issued a second order of protection against defendant. RP 88. Defendant continued to contact the victim, sending text messages to her beginning on September 5, 2009, and continuing through January 24, 2010. RP 33, 38-42. Defendant also left voice messages for the victim on December 24, 2009, January 4, 2010 and January 7, 2010. RP 45-46, 92, 101.

The victim was nervous while testifying and was unable to recall specific dates, however, she testified that even after she got this protection order, defendant still contacted her by visiting her house, calling her on her cell phone or sending text messages. RP 27-28, 37. The victim testified that she would report the contact as soon as possible, and the police would come out to look at the text messages. RP 34, 48.

The victim also identified photographs of her cell phone, and stated that the only way the police could have photographs of the text

messages she received was because they were taken when she brought her phone in to the detective at the police station. RP 28-29. She could not recall each specific text message that she received because she had “reported so many.” RP 34.

Detective Christine Coulter testified that she met with the victim on January 29, 2009, after receiving the report of the January 24, 2009, contact. RP 55. The victim went to the Tacoma Police Department headquarters and a forensic technician took photographs of each text message from defendant. RP 59. The victim also played the voice mail messages for Detective Coulter, who made an audio recording of them. RP 70-72. This audio recording also contained the automated voice from the answering machine which indicated when the message was left. RP 73-74.

C. ARGUMENT.

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHERE, IN REBUTTAL TO DEFENSE COUNSEL’S CLOSING ARGUMENT, HE ARGUED FROM COMMON SENSE AND EXPERIENCE, NOR IN STATING THAT THE EVIDENCE DID NOT SUPPORT DEFENSE COUNSEL’S THEORY.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor’s actions were improper and he did not act in good faith. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246

(1952)). Before an appellate court reviews a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice. . .” *Beck v. Washington*, 369 U.S. 541, 558, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Thus, a defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Perkins*, 97 Wn. App. 453, 457, 983 P.2d 1177 (1999), quoting *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994).

Allegedly improper comments are reviewed in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *Dhaliwal*, 150 Wn.2d at 578, quoting *Pirtle*, 127 Wn.2d at 672; accord *Brown*, 132 Wn.2d at 561.

- a. The prosecutor did not make improper or prejudicial remarks in closing argument by arguing inferences from the evidence.

In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (internal citations omitted). Thus, it is not misconduct for a prosecutor “to argue that the evidence does not support the defense theory” or “to argue reasonable inferences from the facts concerning witness credibility.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *Russell*, 125 Wn.2d 24, 87 (internal citations omitted).

In this case, the prosecutor argued during rebuttal closing argument that the text messages were sent in 2008 because you can “use a calendar and count back.” RP 106. The automated voice on the first phone message stated it had been left on Wednesday, December 24, 2008. RP 105. The prosecutor reasoned that because December 24, 2008, was a Wednesday, that December 23, 2008 was a Tuesday, and brought to the jury’s attention that the text message in exhibit 8 says it was sent on Tuesday, December 23. RP 105. He went through this analysis for exhibit 7 as well. RP 106. These were reasonable inferences from the evidence presented at trial.

The prosecutor was not introducing new evidence as defendant suggests. He was arguing from the common sense and experience of the jurors and the evidence admitted during the trial. Defendant relies on *State v. Boehning* to support his contention that an argument based on the calendar was relying “matters not in evidence.” 127 Wn. App. 511, 111 P.3d 899 (2005), Appellant’s brief at 11. In *Boehning* the prosecutor relied, in closing argument, on three dismissed rape charges against the defendant to support the current allegations. 127 Wn. App. at 519. The case at hand is not analogous. Here, the jurors were not being given any information to which they were not already privy. The average person is already aware of how many days there are in a week, in each month, and how the progression of days on a calendar works.

Moreover, evidence is extrinsic when it is “outside all the evidence admitted at trial.” *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 199 n.3, 78 P.3d 944 (2003). The evidence which the court ruled was extrinsic in that case was information that a single juror brought into the jury room from his own experience, and imparted to the jury in the manner of an expert. *Id.* at 202 n. 10. The juror effectively confirmed the testimony about the standard of care in the medical practice by relating his own personal experiences to the rest of the jury.¹

¹ The court in *Breckenridge* determined that while the juror did bring information not subjected to cross examination into deliberations, such information inhered in the verdict, and the case was affirmed. 150 Wn.2d 197.

A calendar is not a specialized or personal experience that only one juror brings into the jury room. It is a part of each juror's common experience, thus the prosecutor did not commit misconduct in arguing its application. Defendant has not met his burden of showing that the prosecutor's argument was improper.

Further, even if this court were to find that the argument was an improper introduction of extrinsic evidence, the verdict is unlikely to have been affected by the argument. The instructions in this case told the jury that "'circumstantial evidence' refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in the case." CP 95. A juror could reasonably infer the year of the text messages based on the circumstantial evidence presented during trial. Additionally, because what is at issue in the case is the date of the contacts, the jury would likely have reached an analysis of the calendar of their own accord.

A jury is presumed to have followed the instructions given unless there is something in the record which overcomes this presumption. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010), *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Jury instruction 1 informed the jurors that:

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits I have admitted, during the trial. If evidence was not admitted, or

was stricken from the record, then you are not to consider it in reaching your verdict...

The exhibits that have been admitted will be available to you in the jury room...

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

CP 92-94. The instructions clearly tell the jury that they are not to rely on the lawyers' arguments for proof of any matter at issue in the case, nor are they to consider any evidence which was not admitted at trial. *Id.* If the calendar the prosecutor used is considered to be an exhibit, the jury clearly knew they were not to consider *that* calendar in their deliberations as it did not go with them to the jury room. There is no indication from the record that the jury failed to follow their instructions, thus it is not a substantial likelihood that the jury's verdict was affected by the prosecutor's argument.

- b. The prosecutor did not improperly shift the burden of proof in his rebuttal to defense counsel's closing argument.

Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Dhaliwal*, 150 Wn.2d at 578, quoting *State v.*

Brown, 132 Wn.2d at 561. If an admonition to the jury could have cured the error and the defense failed to request such a curative instruction, then reversal is not required. **State v. Dhaliwal**, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), citing **State v. Russell**, 125 Wn.2d at 85. In addition, “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” **Russell**, 125 Wn.2d 24, 87 (internal citations omitted). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” **State v. McKenzie**, 157 Wn.2d 44, 53, 134 P.3d 221 (2006)(quoting **State v. Swan**, 114 Wn.2d 613,661, 790 P.2d 610(1990))(emphasis in original).

Defendant argues that the prosecutor shifted the burden of proof to the defense in closing argument. Neither statement that defense claims lead to the burden shifting was objected to during closing argument. Appellant’s brief at 14-15, RP 108. Thus, the defendant bears the burden of showing that the prosecutor’s remarks were flagrant and ill-intentioned, and could not have been cured by an instruction from the court. **Dhaliwal**, 150 Wn.2d 559.

Here, taken in context, the prosecutor was not shifting the burden of proof. His argument was that the prosecution is not required to prove each element of the crime beyond *any* doubt, but rather beyond *reasonable* doubt. RP 107-09. Such argument is an accurate statement of the law,

and is permissible. *State v. Koss*, ___ Wn. App. ____, 241 P.3d 415, 420-21 (2010). In this case, the prosecutor was responding to defense counsel's arguments about the evidence that the state did not provide. RP 100-02. Defense counsel highlighted the lack of corroboration from defendant's telephone services provider that the number actually belonged to defendant. *Id.* Defense counsel also suggested that it could have been another person named Gary who called and left messages, and that it may have been someone else with defendant's phone sending text messages. *Id.*

The prosecutor argued that the evidence presented at trial did not support defendant's theories, not that defendant had a duty to support his own theories. RP 108. The prosecution's argument that defendant's theory was not supported by the evidence presented, was sandwiched between explanations of the burden of proof, and framed by referring the jury to their instruction on that burden. RP 104-05, 108-9. Because the prosecution's arguments were in response to the argument of defense counsel, and in context were meant to show that the prosecution had met its burden of proof, they did not amount to flagrant and ill-intentioned misconduct.

If the Court finds that the prosecutor engaged in misconduct, reversal is still not required absent a showing that a curative instruction

could not have solved the problem. Here, had defense counsel asked for a curative instruction, the court could have admonished the jury to disregard any statement which could be understood to imply defendant had a burden to disprove. *See for e.g. State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (holding that flagrantly improper statements by the prosecutor in closing argument were cured where the court stopped the prosecutor and issued an instruction to the jury). Such an instruction would have given the jury no room to misunderstand what the prosecution was arguing, and would have prevented the jury from using any improper remarks of the prosecutor in their deliberations. Because juries are presumed to follow their instructions, such an admonition would be curative. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

2. THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICTS ON ALL EIGHT COUNTS OF VIOLATION OF A COURT ORDER.

In determining whether the evidence presented at trial was sufficient to support a guilty verdict, the question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Any

reasonable inferences from the evidence must be interpreted most strongly against defendant in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Challenging a verdict based on insufficiency of the evidence admits all evidence presented by the State and any reasonable inferences as true. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence is no less reliable than direct evidence. *State v. Lubers*, 81 Wn. App 614, 619, 915 P.2d 1157 (1996). When there is a conflict in the evidence or testimony, it is in the hands of the jury to determine which is credible. *Id.* (See also *State v. Young*, Wn.2d 613, 618, 574 P.2d 1171 (1978); *State v. Reynolds*, 51 Wn.2d 830, 833, 322 P.2d 356 (1958)). Determinations of credibility are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Even if the prosecutor should not have been permitted to argue from the calendar, the evidence presented at trial was sufficient to support the jury's verdicts on all eight counts of violation of a court order. The evidence presented at trial showed that the defendant had been under a court order not to contact the victim since November 11, 2006. RP 25. The second order of protection was entered on September 5, 2008, and the defendant signed the order on that day. On September 5, though there is no year listed on the message, the victim sent a text message that said, "I love you, BYBOX." RP 33. The jury could reasonably infer that the

defendant sent his message in response to receiving the second no contact order.

Moreover, the victim told the jury that she was in the habit of reporting each contact as soon as possible after receiving it. RP 48. The police would respond to view the messages after the victim called. RP 28. A police detective asked the victim to come down to the station so that she could record a copy of the voice messages and take photos of the text messages. *Id.* Detective Christine Coulter met with the victim at the police station on January 29, 2009. RP 55. Detective Coulter called the victim on January 28, 2009, after receiving the assignment from her sergeant. *Id.* This was in response to the last contact on January 24, 2009. *Id.* The jury could rationally infer from this testimony that the contacts from the defendant were shortly before the police response, i.e. in 2008, rather than the police waiting over a year to respond, or the victim waiting more than a year to report them.

Additionally, the jury heard the voice messages which contained additional information. The messages were played for the detective to record on January 29, 2009. The automated voice states that the message was left on December 24, 2008. RP 101. The next message has an automated voice that says the message was left on Sunday, January 4th, followed by a message left Wednesday, January 7th. *Id.* There is no year listed by the automated voice on either of the messages left in January. *Id.* However, it is a rational inference that because the messages were played

the same year they were left, the automated system does not repeat the year. The message left in December of the previous year was repeated with the date and the year rather than the day and the date because it was not left during the year in which it was played.

Taken together, the evidence strongly supports the jury's guilty verdicts on each of the eight counts.

3. THE COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO ARGUE FROM COMMON SENSE AND EXPERIENCE.

“It is well established that trial courts possess broad discretionary powers over the scope of counsel's closing arguments.” *State v. Frost*, 160 Wn.2d 765, 771-72, 161 P.3d 361 (2007). A case should not be reversed on appeal because of arguments of counsel unless the trial court abused its discretion as to the range of argument. *State v. Costello*, 29 Wash. 366, 69 P. 1099 (1902). A trial court's ruling on both admission of evidence and on the prosecutor's comments are reviewed for abuse of discretion. *State v. Barker*, 103 Wn. App 893, 14 P.3d 863 (2000), citing *State v. Stetson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997), *see also State v. Frazier*, 55 Wn. App 204, 212, 777 P.2d 27 (1989) (holding that a court's decision regarding the scope of closing argument is reviewed for abuse of discretion). Discretion is abused where a decision is based on untenable

reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Should this court find an abuse of discretion, such error is subject to harmless error analysis. The error “is not prejudicial to the defendant unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The court need not find harmless error beyond a reasonable doubt where the error in question is not from a constitutional mandate. *State v. Bourgeois*, 133 Wn.2d at 403.

Here, defendant objected to the prosecutor’s use of the calendar because it had not been admitted into evidence. RP 105. The prosecutor contended that the argument was common sense, and the judge overruled the objection. *Id.* The trial court’s ruling was not an abuse of discretion because it was not based on untenable grounds. Rather, as discussed above, the argument was based on the common understanding and experiences of the jurors, and was not presenting new information.

Should this court find that the trial court abused its discretion in overruling the objection, any error was not prejudicial for the reasons discussed above in regards to the prosecutor’s statements. The jury is presumed to have followed their instructions, which here, clearly explained that the arguments of counsel are not proof. Additionally, even without the State’s argument, the prosecution presented sufficient

evidence from which the jury could find the defendant guilty of all eight counts. Defendant has thus failed to meet his burden for reversal based on judicial error.

4. DEFENSE COUNSEL WAS EFFECTIVE IN NOT OBJECTING AND IN INSTRUCTING THE JURY ACCORDING TO THE CASE LAW OF THE TIME.

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

A defendant who raises a claim of ineffective assistance of counsel must demonstrate that: (1) his attorney's performance was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, matters that

go to trial strategy or tactics do not show deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, defendant must show that a reasonable probability exists that the result of the trial would have been different, but for counsel's errors. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of an attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether the court can conclude that defendant received effective representation and a fair trial, after examining the whole record. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* 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).

- a. Counsel's lack of objection to the State's closing argument was trial strategy.

The reviewing court will defer to counsel's strategic decision when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot form a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Defendant must show, from the record as a whole, that defense counsel lacked a legitimate strategic reason to support his or her challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In order to prevail on a claim of ineffective assistance of counsel for a failure to object at trial, defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Counsel's choice of whether or not to object at trial is a "classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). "Only

in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.*, (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)).

Defendant claims that the prosecutor effectively shifted the burden of proof in his rebuttal closing argument, and that defense counsel was ineffective for failing to object. Appellant's brief at 19-20. However, the prosecutor's argument, when taken as a whole did not shift the burden, as discussed above in the analysis of the claim of prosecutorial misconduct.

Defendant's argument was that the evidence does not support the defense theory that defendant may not have been the person making contact with the victim. Because the prosecutor was responding to closing arguments made by defense counsel, and a similar objection had been overruled, it is unlikely that any objection to them would have been sustained by the court. Moreover, because the jury had received the court's instructions, and the prosecutor's argument restated those instructions, it is unlikely that an objection would have affected the result of the case, even if it had been sustained.

Defendant has failed to meet his burden of proof for ineffective assistance of counsel based on a failure to object at trial.

- b. Defense counsel was not ineffective in allowing the jury to be instructed based on current law where the instruction was found to be improper post-hoc.

Sufficient performance by counsel does not require anticipating changes in the law. *State v. Millan*, 151 Wn. App. 492, 502-03, 212 P.3d 603 (2009) *review granted*, 168 Wn.2d 1005, 226 P.3d 781 (2010), *see also State v. Slighte*, 157 Wn. App. 618, 624, 238 P.3d 83 (2010), *United States v. Fields*, 565 F.3d 290, 296 (5th Cir.2009), *cert. denied*, --- U.S. ----, 130 S. Ct. 298, 175 L.Ed.2d 199 (2009) (recognizing that a majority of circuits of the United States Courts of Appeals find that it is not ineffective assistance for counsel to fail to anticipate changes in law). The State concedes that under current case law, the jury instruction regarding the special verdict was an incorrect statement of the law. CP 114, *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). However, the instructions in this case were given to the jury on February 22, 2010, and a verdict was returned the same day. RP 85, 115, CP 80-88, 91-114. The decision in *Bashaw* was issued by the Washington Supreme Court on July 1, 2010. 169 Wn.2d 133 (*reversing State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451, (2008)). This decision reversed the holding of the court of appeals from nearly two years prior. *Id.* The decision of the court of appeals stated: “The jury was expressly told: ‘Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.’”

144 Wn. App. at 201. The court stated that special verdicts were not intended to have a unanimity requirement which was different from those of general verdicts. 144 Wn. App. at 202. The instruction given in this case was the same as that specifically upheld by the court of appeals. 144 Wn. App. at 202, CP 114. Accordingly, under the case law in Washington at the time the jury in this case was instructed the instruction was valid. Counsel was not ineffective for allowing the jury to be instructed according to current law.

Defendant's focus of these two individual actions by defense counsel distracts this Court from the standard of review for claims of ineffective assistance of counsel. Such claims are evaluated based on the record as a whole. *State v. White*, 81 Wn.2d at 225. Defense counsel was clearly not deficient when the record is examined in its entirety.

There are ample indications in the record that defense counsel's representation was not deficient. Defense counsel moved for dismissal of count IX of the second amended information, and the count was dismissed after the state rested. RP 76-77, CP 144-145. Defense counsel cross examined the victim after she was called by the State. RP 49-52. Defense counsel objected throughout the course of the trial to testimony, questioning and evidence, and responded to objections made by the State. RP 49, 56, 58, 72, 77. Counsel made an opening statement, as well as a closing argument, in which he presented alternative theories to poke holes in the State's evidence by calling into question how much the State's

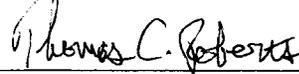
evidence really showed. RP 93-104. The record as a whole provides overwhelming indications that defense counsel was competent, and effective. Defendant has failed to meet the burden imposed on him by *Strickland* to show that he was denied his right to counsel under the Sixth Amendment.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that the Court affirm defendant's convictions and sentences.

DATED: December 30, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

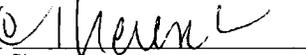
Margo Martin
Legal Intern

STATE OF WASHINGTON
BY _____
DEPUTY
11 JAN-4 PM 1:21

COURT OF APPEALS
DIVISION II

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.

12/30/10 
Date Signature