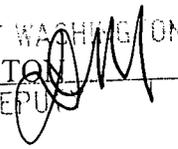


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DIVISION II

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STATE OF WASHINGTON  
BY   
DEPUTY

NO. 41379-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

DEBRA JANE TSUGAWA, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00184-1

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT'S FINDINGS OF FACT ON THE CrR 3.6 MOTION TO SUPPRESS WERE NOT ENTERED IN ERROR.
- II. THE TRIAL COURT DID NOT "DENY" MS. TSUGAWA'S MOTION TO SUPPRESS. HER MOTION, WHICH WAS LIMITED TO THE EVIDENCE OBTAINED DURING THE SEARCH OF HER VEHICLE, WAS GRANTED. SHE DID NOT MOVE TO SUPPRESS THE EVIDENCE OBTAINED FROM THE SEARCH OF HER PURSE, WHICH SHE STIPULATED WAS LAWFUL.
- III. MS TSUGAWA DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY CHOSE NOT TO OBJECT TO CERTAIN TESTIMONY.
- IV. THE PROSECUTOR DID NOT ARGUE A FACT NOT IN EVIDENCE.

B. STATEMENT OF THE CASE

On June 21, 2008 Ranger Brandon Erickson of the Washington State Parks and Recreation Commission was working in Battleground Lake State Park. RP, p. 3-4. At around 10:15—a time when the park is closed to anyone other than registered campers—he was alerted by a park aide that there was a person sleeping in a car. RP 5. The car was parked in the day use parking lot. RP 5. He came upon the car and found it was a red truck and there was an “unresponsive” woman sitting in the driver’s seat. RP 6. Ranger Erickson tried to rouse the woman by tapping on the

window with both his hand and his flashlight. RP 7. He spent fifteen minutes trying to wake the woman up. RP 7. Unsuccessful in his efforts, he went to check on some noisy campers. RP 8. He returned about twenty-five minutes later and found the woman in the same position. RP 8. At that point he began pounding on the window with his flashlight until the woman finally woke up. RP 9.

After repeatedly having to wake her and trying to get her to roll down the window, the woman finally opened the car door. RP 9. After she opened the door Ranger Erickson asked her for identification, at which point she reached into her purse and handed him a bottle of perfume. RP 10. Ranger Erickson asked for her identification more than once, and the woman had difficulty staying awake. RP 10. After receiving a bottle of perfume in response to his request for identification, Ranger Erickson asked the woman if he could look in her purse to find out who she was. RP 10. In response, the woman handed him her purse. RP 10. He then asked her if she had taken any medication and if she came to the park to harm herself. RP 10. She told Ranger Erickson she took some medicine for her back and stomach but denied that she came to the park to harm herself. RP 10. When Erickson asked what medicine she took she gave an unintelligible response. RP 11. Ranger Erickson asked for her vehicle registration and she gave him a notebook with a blank page from the area

of the center console. RP 11. The woman actually looked at the blank page, as though reading it, before handing it to Ranger Erickson. RP 11.

Fearing that she had, in fact, come to the park to harm herself, Ranger Erickson asked the woman if she had any weapons. RP 12. She denied having any weapons. RP 12. Ranger Erickson said it was very uncharacteristic to have someone in the park behaving this way, and that the park is a place where people come to do these types of things (i.e., commit suicide). RP 12.

Ranger Erickson told the woman to lie back in her seat and then began looking in her purse for identification. RP 13. In the purse he found makeup, pens, letters, keys, a wallet, driver's license, voter registration card, a mirror with white powder on it, and a glass pipe with white substance in it. RP 14. The driver's license and voter registration cards were not in her wallet; rather, they were loose in the purse. RP 14. He found the various items listed above while he was searching for her identification. RP 18. He discovered, by looking at her driver's license, that the woman's name was Debra Tsugawa. RP 14. He ran her license plate and found that the car was registered to Ms. Tsugawa as well as Lori Mays. RP 16. Ranger Erickson called the Clark County Sheriff's Office for assistance and two deputies arrived about twenty minutes later. RP 17, 28. During this time Ms. Tsugawa was asleep in the driver's seat of her

car. RP 18. The deputies were able to obtain Lori Mays' phone number.

RP 18. Although the officers attempted to contact Ms. Mays they were unable to reach her. RP 19. Deputy Cooney found Ms. Tsugawa to be groggy and incoherent, and saw that she was having difficulty holding her head up. RP 36.

Ranger Erickson arrested Ms. Tsugawa for criminal trespass in the second degree.<sup>1</sup> RP 19. Deputy Cooney advised Ms. Tsugawa of her Miranda rights and although she waived her rights, he decided not to ask her any questions about the allegation of criminal trespass. RP 38-40. She was transported to jail for that offense by the Sheriff's deputies. RP 24.

Ms. Tsugawa was charged with possession of methamphetamine. CP 1. Prior to trial, she moved to suppress the evidence that was obtained during the search of her car incident to her arrest for criminal trespass. CP 15-22. Ms. Tsugawa did not move to suppress the search of her purse for identification, telling the trial court that the search of her purse was lawful

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<sup>1</sup> The officers searched Ms. Tsugawa's car incident to her arrest for criminal trespass. RP 46. They found evidence which was later suppressed by the trial court because there is no authority, under article 1, §7, to search a vehicle incident to an arrest for this type of crime. For unknown reasons, she was not arrested at that time for use of drug paraphernalia or possession of a controlled substance based on the items found in plain view during the search of her purse—crimes which arguably would have provided authority to search the vehicle incident to arrest because those are the types of crimes for which one would reasonably expect to find evidence of the crime of arrest in the vehicle. *State v. Wright*, 155 Wn.App. 537, 230 P.3d 1063 (2010); *cf. State v. Swetz*, 160 Wn.App. 122, 247 P.3d 802 (2011). The search of Ms. Tsugawa's vehicle is not at issue in this appeal.

based on community caretaking.<sup>2</sup> RP 72. As such, neither the State nor the trial court had any reason to develop the record with a view toward defending the search of the purse. Id.

The now-retired deputy prosecutor who handled this case, Phil Meyers, prepared findings of fact and conclusions of law on the motion to suppress. CP 37-43. For unknown reasons, he included a proposed conclusion of law which stated the search of the defendant's purse was justified, and an order which stated "Defendant's motion to suppress evidence obtained from her purse is denied," which the court signed. CP 41, 43. This conclusion of law and order was wholly unnecessary because Ms. Tsugawa did not, in fact, move to suppress the evidence discovered in the search of her purse. See conclusion of law 4 at CP 15 (Defendant's motion to suppress limited to search of her vehicle and at no time mentions the search of her purse.) Playing on the State's inartful drafting of the findings and conclusions, Ms. Tsugawa states, at page 6 of her brief, that the trial court "refused to suppress the evidence seized from her purse." To the extent that statement, coupled with the trial court's

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<sup>2</sup> Ms. Tsugawa states in her brief that she filed "a motion to suppress all evidence the officers' seized." See Brief of Appellant at 5-6. This is yet another misstatement by Appellant. The motion to suppress clearly states that she "moves the court for the suppression of any and all evidence obtained by the plaintiff in its search *of defendant's vehicle*." CP 15.

conclusion of law, leaves the impression that Ms. Tsugawa preserved this issue for appeal, that impression is incorrect.

At trial, the jury heard that Ranger Erickson found a mirror with white residue on it and a pipe with white substance in it in Ms. Tsugawa's purse. RP 104-05. The jury heard that the substance found in the pipe was methamphetamine. RP 145. The State asked Deputy Cooney a series of questions related to his concern about Ms. Tsugawa's physical state and possible substance intoxication when he contacted her. RP 116-118. He testified that he wanted to find out if she was okay. RP 117. Cooney testified that Ranger Erickson had told him about finding items in Ms. Tsugawa's purse which would indicate that she might be under the influence of methamphetamine. RP 117. Based on that information Deputy Cooney asked Ms. Tsugawa how long it had been since she used methamphetamine and she said it had been a couple of weeks. RP 118. There was no objection to this testimony. *Id.* Ms. Tsugawa claims in her brief that Deputy Cooney testified that Ms. Tsugawa told him that she used methamphetamine "on a *number of prior occasions.*" See Brief of Appellant at p. 12. This is patently false. Deputy Cooney's testimony was: "I asked how long it had been since she had used meth and I believe she said a couple of weeks." RP 118. Where, in that statement, is there any mention of *multiple instances* of use? Deputy Cooney's testimony refers to

*one instance* of prior use that occurred a couple of weeks prior to this event. The State respectfully asks this Court to disregard that sentence in Ms. Tsugawa's brief as it is demonstrably false. In any event, defense counsel returned to this area in cross examination, asking Deputy Cooney whether it was true that Ms. Tsugawa had in fact said it had been a couple of months since she used methamphetamine rather than a couple of weeks. RP 128. Deputy Cooney conceded that he didn't make note of it in his report but that it could have been a couple of months. RP 127-28.

Deputy Arndt testified at trial as well. Deputy Arndt clarified, in response to a question by the State, that Deputy Cooney asked Ms. Tsugawa how long it had been since she "smoked" methamphetamine and that Ms. Tsugawa had replied that it had been a couple of months since she "smoked" it. RP 133. There was no objection to this testimony. *Id.* Ms. Tsugawa testified that she went to Battleground Lake State Park that day to commit suicide. RP 151. She took a large amount of Tylenol PM pills. RP 151. She testified that she didn't remember much of what happened in the park. RP 152. She testified that the pipe was not hers. RP 152. She testified that she didn't know the pipe was in her purse. RP 153. She claimed that the pipe belonged to her sister, who she had seen earlier that day. RP 153. She also claimed that much of the other property found in her purse belonged to her sister, such as the makeup, wallet and a set of

keys. RP 153. She testified she was unaware that any of that property was in her purse. RP 153. Although she testified that her sister had borrowed her car on the previous evening, she confirmed that her sister did not borrow her purse. RP 161. She claimed that she had seen the pipe in question in her barn, where her sister was staying. RP 161. She admitted to having used methamphetamine in the past, but only a half dozen times or so. RP 161. She testified that she puts it in her coffee and does not smoke it. RP 161. She testified she has never used a pipe. RP 161. The prosecutor asked Ms. Tsugawa, during cross examination, whether she told any of the officers on the night of her arrest that “if there was methamphetamine it was somebody else’s.” RP 165. Ms. Tsugawa replied that she didn’t remember what she had told them. RP 165. The prosecutor dropped the subject at that point and moved on. RP 166. Defense counsel did not object. Id.

At the conclusion of Ms. Tsugawa’s testimony the defense rested and the court excused the jury. RP 169. At that point the court expressed its opinion that the prosecutor had asked an impermissible question of Ms. Tsugawa because she was not required to volunteer information to the police officers. RP 169-174. The prosecutor disagreed with the court’s analysis. Id. The court told the prosecutor he was not permitted to return to the subject during closing argument (and the prosecutor complied). RP

174. Defense counsel never objected, sought a curative instruction or moved for a mistrial. RP 165-174.

The jury returned a verdict of guilty. CP 78. Ms. Tsugawa was given a standard range sentence. CP 91-101. This timely appeal followed. CP 107.

### C. ARGUMENT

#### I. THE TRIAL COURT'S FINDINGS OF FACT ON THE CrR 3.6 MOTION TO SUPPRESS WERE NOT ENTERED IN ERROR.

An appellate court reviews findings of fact for substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). “Substantial evidence exists when the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.” *State v. Foster*, 135 Wn.2d 441, 471, 957 P.2d 712 (1998). “The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence.” *Vickers* at 116. Notably, credibility determinations based on witness testimony cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Ms. Tsugawa challenges the portion of finding of fact number 8 on the motion to suppress, in which the court found that Ms. Tsugawa’s

behavior and the circumstances surrounding her discovery by Ranger Erickson “were similar to other incidents of attempted suicide in the park in the past. He believed she needed assistance and that in order to obtain assistance he needed to find out who she was and needed additional information to enable him to contact someone for her, or otherwise obtain assistance. His examination of her purse was done in good faith in furtherance of that goal.” CP 39.

This finding of fact was based on testimony offered by Ranger Erickson, and a credibility determination by the trial court that Erickson’s testimony was believable. Ranger Erickson testified that upon finding Ms. Tsugawa non-responsive in the park after hours he thought that she may have come to the park to harm herself, or perhaps even commit suicide. RP 12. He testified that her behavior was unusual park behavior and the park is a place where people “do come to do those types of things. RP 12. He also testified that he had experience with people coming to the park to harm themselves in that fashion before. RP 12. Ms. Tsugawa appears to complain that even if true, Ranger’s Erickson’s belief and his prior experience did not render his actions in seeking to identify her reasonable. Such a complaint would go the weight to be given to this fact, not whether it was supported by substantial evidence. Substantial evidence clearly supports finding of fact number 8. Moreover, this finding of fact is entirely

superfluous because Ms. Tsugawa, as already noted, did not challenge the search of her purse or seek suppression of any evidence obtained from her purse.

The same is true of the challenged portion of finding of fact number 10: It is superfluous. Whether or not Ms. Tsugawa had smoked (or used) methamphetamine for a couple of months is totally irrelevant to the question presented to the court at the motion to suppress—whether the search of her car was lawful. The court granted Ms. Tsugawa’s motion to suppress in full. The evidence obtained during the search of her car was suppressed because it could not be justified as either a search incident to arrest or a search based on consent. The evidence obtained from her purse—of which she did not seek suppression—would have been admissible irrespective of how long it had been since she smoked or used methamphetamine.

In complaining about this finding of fact, Ms. Tsugawa focuses on Deputy Cooney’s *trial testimony*, citing to pages 117-18 of the verbatim report of proceedings. If turnaround is fair play, it is worth examining Deputy Arndt’s trial testimony in which he testified that in his recollection, Deputy Cooney asked Ms. Tsugawa how long it had been since she “smoked” methamphetamine. See RP 133. She then replied that she hadn’t “smoked” methamphetamine for a few months. Again, this

portion of finding of fact number 10 is wholly unnecessary to the trial court's ruling granting Ms. Tsugawa's motion to suppress. The illegality of the search of her car did not turn on when she last smoked or used methamphetamine.

II. THE TRIAL COURT DID NOT "DENY" MS. TSUGAWA'S MOTION TO SUPPRESS. HER MOTION, WHICH WAS LIMITED TO THE EVIDENCE OBTAINED DURING THE SEARCH OF HER VEHICLE, WAS GRANTED. SHE DID NOT MOVE TO SUPPRESS THE EVIDENCE OBTAINED FROM THE SEARCH OF HER PURSE, WHICH SHE STIPULATED WAS LAWFUL.

Ms. Tsugawa argues that the trial court erred in denying her motion to suppress the evidence obtained from her purse. As noted in the statement of the case, Ms. Tsugawa did not move to suppress the evidence seized from her purse and has not preserved this issue for appeal.

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305,

*McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” *Robinson* at 305.

There are two ways in which a defendant can challenge a search or seizure for the first time on appeal: By demonstrating that the error—the failure to challenge the search or seizure below—is a manifest error affecting a constitutional right, warranting review under RAP 2.5 (a) (3), or by demonstrating that trial counsel was ineffective for failing to raise the issue below. The two concepts are similar in that they place the burden of proof on the defendant, and they require the defendant to demonstrate prejudice. To demonstrate prejudice, under either test, the defendant must demonstrate that the trial court would have granted the motion had it been raised below.

As explained in *McFarland*, supra RAP 2.5 (a) (3) is “not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “‘manifest,’—i.e. it must be ‘truly of constitutional magnitude.’” *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in

the context of the trial, the alleged error actually affected the defendant's rights. *McFarland* at 333. In the context of a claim of error based on the failure to bring a motion to suppress, this means that the defendant must demonstrate that the motion likely would have been granted had it been raised. *McFarland* at 333-34. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." *Id.* at 334. Further, if the facts necessary to adjudicate the claimed error are not adequately presented in the record on appeal, a defendant cannot show prejudice and the error is not manifest as a matter of law. *McFarland* at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). The *McFarland* Court recognized this conundrum: In order to show prejudice a defendant must show that the motion likely would have been granted based on the record in the trial court, yet the when a motion to suppress is not brought the record is usually not developed enough to make that determination. *McFarland* at 334, n. 2. While recognizing this predicament, the *McFarland* Court was nevertheless unmoved by it. The Supreme Court is empowered to soften this standard but declined to do so.

Here, Ms. Tsugawa has not met her burden of demonstrating manifest constitutional error affecting a constitutional right. The record on appeal contains argument by defense counsel that Ranger Erickson was

properly exercising his community caretaking function in seeking to identify Ms. Tsugawa:

COURT: Mr. Bennett, it is your motion so I will let you make argument. I have reviewed your brief and it didn't appear to me that you were contesting the search of the purse.

DEFENSE COUNSEL: We are not, Your Honor, because that is a caretaker type function and Ms. Tsugawa and I have talked about that. And, obviously, the ranger was concerned about her personal safety. So, we're—we're not contesting that.

RP 72.

Because defense counsel forcefully argued that the search of the purse was justified under the community caretaking exception to the warrant requirement, the prosecutor did not bother to argue this point, nor did he bother to examine Ranger Erickson in depth on this issue. The record was not sufficiently developed on this issue so it cannot be said that that the trial court would likely have granted this motion had it been brought. Ms. Tsugawa bears the burden of demonstrating that the motion would likely have been granted and has failed to do so. This Court should decline to review this issue under RAP 2.5 (a) (3).

Similarly, Ms. Tsugawa cannot demonstrate that counsel's performance was deficient in failing to bring a motion to suppress the evidence obtained from her purse. Even if she could demonstrate deficient

performance, she cannot show prejudice from counsel's deficiency because she cannot show that the trial court would have granted the motion. Ms. Tsugawa, in fact, has not alleged ineffective assistance of counsel in this assignment of error because she misrepresents to this Court that she did, in fact, move to suppress the evidence obtained from her purse. In the interest of being thorough, however, the State will address this second method of gaining relief on an issue raised for the first time on appeal.

“Courts engage in a strong presumption counsel's representation was effective.” *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

*McFarland* at 335; *State v. Byrd*, 30 Wn.App. 794, 800, 638 P.2d 601

(1981). The burden is on the defendant to overcome the strong

presumption of effective representation. Even assuming Ms. Tsugawa has

met this burden, she has failed in her additional burden of showing

prejudice based on this record for the same reason she failed to show

prejudice in the context of RAP 2.5 (a) (3). She must show that the

outcome of the proceeding would have been different—in other words,

that the trial court would have granted the motion had it been brought. *McFarland* at 337, *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004). She cannot do that here because defense counsel specifically argued that the search of her purse was justified, and the State relied on that representation and failed to develop the record with a view toward this issue.

Ms. Tsugawa cannot challenge the search of her purse for the first time on appeal where she cannot demonstrate manifest constitutional error affecting a constitutional right and she cannot demonstrate ineffective assistance of counsel.

III. MS TSUGAWA DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY CHOSE NOT TO OBJECT TO CERTAIN TESTIMONY.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

*Strickland* at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court

presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

**a. Prior methamphetamine use.**

Ms. Tsugawa complains that her counsel was ineffective for choosing not to object to testimony by two police officers that she had used methamphetamine in the past. The testimony at issue came from Deputies Cooney and Arndt. Prior to Deputy Cooney testifying about Ms. Tsugawa's prior meth use, he had been asked a series of questions about why he had been called to the park in the first place and about Ms. Tsugawa's physical and mental state. He testified that he had been called to the park because Ranger Erickson was concerned that she was trespassing and "might need medical attention." RP 117. Cooney then began speaking to Ms. Tsugawa to get information from her. Ranger Erickson had already told him that he found a methamphetamine pipe in

Ms. Tsugawa's purse, "...so I asked her long it had been since she used methamphetamine. I asked her if there was anybody we could contact so that we could get her vehicle so that it wouldn't have to be towed and there were probably some other little things that I talked to her about." Id. Cooney testified that they tried to reach Lori Mays to come and get the car but were unsuccessful. The prosecutor then asked "And, with respect to asking her about the indication of use of methamphetamine, what, if anything, did she respond to that?" RP 117-18. Deputy Cooney answered: "I asked her how long it had been since she had used meth and I believe that she said a couple of weeks. I would have to look at my report to be sure. (Witness reviews report). I don't have that indicated in here but I believe she told me it had been a couple of weeks." Id.

The matter was dropped until defense counsel brought it up again in cross examination. Defense counsel sought to impeach Deputy Cooney by asking whether Ms. Tsugawa had actually said it had been a few months since she last used methamphetamine rather than a few weeks. RP 127-28. Cooney conceded that she could have said "months" instead of "weeks." RP 127.

ER 404 (b) prohibits the use of evidence of other bad acts to prove a person has a propensity to commit such acts. *State v. Pogue*, 104 Wn.App. 981, 985, 17 P.3d 1272 (2001). It may be admissible for other

purposes, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404 (b); *Pogue* at 985.

In the context in which it was raised, it is clear that the prosecutor posed this question to Deputy Cooney in the context of asking about Ms. Tsugawa's physical state and possible need for medical attention. The jury already heard evidence (through Ranger Erickson) that Ms. Tsugawa was under the influence of something and went to the park seeking to harm herself. Contrary to her claim, this testimony was not offered to suggest that Ms. Tsugawa had a propensity to possess methamphetamine based on her singular use of methamphetamine in the past. In light of Ms. Tsugawa's unusual behavior the jury would have expected to hear that the officers conducted some sort of investigation into her well being. Counsel was not ineffective for failing to object to this testimony, or for clarifying Ms. Tsugawa's actual response during cross examination. This testimony also demonstrated that Ms. Tsugawa was candid and forthright with the deputy, which could enhance her credibility with the jury. Trying to come off as a saint could have hurt Ms. Tsugawa in the eyes of the jury. She was clearly very troubled and not averse to using substances which would harm her, based on what she was doing in the park in the first place.

It was through this testimony, also, that the jury heard Ms. Tsugawa's self-serving denial that she used methamphetamine on the day of her arrest, as well as her self-serving assertion that she hadn't used methamphetamine for quite some time. If these assertions were believed by the jury, they served to aid, rather than damage, Ms. Tsugawa's defense of unwitting possession. If she, in fact, hadn't used meth for several months, it is far more likely that this pipe belonged to someone else. Through this testimony, Ms. Tsugawa was able to put part of her story in front of the jury without taking the stand. Because the jury already heard she was in actual possession of a methamphetamine pipe, it could only have been to her benefit for the jury to hear that it had been a substantial period of time since she used methamphetamine. Without this testimony, Ms. Tsugawa would have been left with only her testimony that the pipe was not hers. She would have needed to give the jury more than that, and her attorney likely knew it. She would have had no choice but to address the question which would have been on every juror's mind—whether she has ever used methamphetamine. She most likely would have brought up the fact that she has used meth in the past (but is not a current meth user) herself. In other words, the jury would likely have gotten the same information from her mouth that they instead got from the deputies. Even if it can be claimed that it was improper for the State to elicit this

testimony from the deputies, Ms. Tsugawa must go further and demonstrate that it was ineffective for her attorney to fail to object to this testimony, which she has failed to do. Her attorney's decision not to object to testimony which established a self-serving fact—that she had not used methamphetamine for a substantial period of time—was a legitimate tactical decision. Because her attorney's decision was a legitimate tactical decision, this Court need not even reach the question of whether she suffered prejudice.

Even so, Ms. Tsugawa did not suffer prejudice and any error was therefore harmless. Ms. Tsugawa's defense was that she possessed the meth pipe unwittingly. "It was somebody else's" is a very difficult defense under the best circumstances. The most negative fact for Ms. Tsugawa was that the pipe was found in *her purse*. Not her car or a common area of her house, but her purse. A purse or wallet is one of the most personal items a person can carry. Even worse for Ms. Tsugawa, she testified that her sister *had not* borrowed her purse that day. Ms. Tsugawa's defense that she was unaware there was a meth pipe in her own purse—a purse which *only she* had possessed that day—strained credulity. It is important to remember that it doesn't matter who owned the pipe, it only mattered whether Ms. Tsugawa knowingly possessed it. The weight of the circumstantial evidence was heavily against Ms. Tsugawa. It is very

unlikely that the jury's verdict would have been for acquittal had they not heard that she used methamphetamine on a singular occasion at some point several months prior.

**b. Alleged comment on exercise of silence**

The deputy prosecutor, in an effort to impeach Ms. Tsugawa, asked her during cross examination: "So, you didn't tell Deputy Cooney or Deputy Arndt or for that matter, Ranger Erickson that night that—if there was methamphetamine it was somebody's else's?" RP 165. She answered: "To be honest, I don't know what I told them." Id. At that point, the prosecutor dropped the subject and never returned to it. Defense counsel did not object, seek a curative instruction or a mistrial.

The officers in this case did not converse with Ms. Tsugawa after she was placed under arrest and Mirandized. RP 40. Ms. Tsugawa did not remain silent prior to arrest and conversed voluntarily with the officers. RP 54-56, 117-18, 132-33. The rules pertaining to whether and when a defendant's whole or partial silence can be brought up at trial are presented below.

It is impermissible for the State to ask the jury to draw an inference of guilt based upon a defendant's exercise of his or her right to remain silent. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996); *State v.*

*Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996); *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008); *see also* Fifth Amendment, U.S. Const.; Article 1, §9, Washington State Constitution. Pre-arrest silence is distinguishable from silence exercised after the issuance of *Miranda* warnings:

The *Fifth Amendment* prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial. Due process under the *Fourteenth Amendment* also prohibits impeachment based on silence after *Miranda* warnings are given, even if the accused testifies at trial. However, no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda* warnings.

*Burke* at 217 (internal citations omitted). Here, the alleged comment on the defendant's silence involved pre-arrest partial silence. In other words, a failure to offer a relevant fact while otherwise conversing freely with the officers. Further, Ms. Tsugawa testified. "[W]here the defendant testifies at trial, the State may constitutionally use his pre-arrest, pre-warning silence to impeach the defendant." *State v. Knapp*, 148 Wn.App. 414, 420, 199 P.3d 505 (2009).

The disagreement between the trial court and the prosecutor in this case involved whether this question truly went to impeachment where there was no evidence that the officers asked Ms. Tsugawa about the methamphetamine pipe. She was asked about her methamphetamine use,

but not specifically about the pipe. The trial court said: “You can certainly refresh my recollection but my recollection is from the 3.5 hearing that at no point was the pipe ever displayed or talked about with this witness where she was asked, ‘Is this your pipe? Do you know where it came from?’ Things of that nature.” RP 171. The prosecutor conceded that “[t]hey didn’t confront her over the presence of a pipe—any pipe.” RP 172. The court instructed the prosecutor to avoid this line of argument during closing and the jury never heard another word about it.

Here, the prosecutor’s questions were not designed to comment on Ms. Tsugawa’s pre-arrest silence. A “comment” occurs when the State uses the silence as “to suggest to the jury that the silence was an admission of guilt.” *Lewis* at 707. A mere reference, however, is not reversible error absent a showing of prejudice. *Lewis* at 706-07, *Burke* at 216. A mere reference to silence occurs if the reference is so subtle or brief that it does not “‘naturally and necessarily’ emphasize [a] defendant’s testimonial silence.” *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991), citing *State v. Crawford*, 21 Wn.App. 146, 152, 584 P.2d 442 (1978). The issue, as stated by the Supreme Court in *Crane*, is whether “the prosecutor manifestly intended the remarks to be a comment on that right.” *Crane* at 331. The *Burke* Court observed: “To determine whether a remark is a mere reference or a comment on silence, the reviewing court must

consider the purpose of the remarks, not necessarily their duration. *Burke* at 216.

Here, considering the purpose of the remark and its duration, the purpose was to impeach Ms. Tsugawa's credibility and the duration was extremely short. Notably, the prosecutor did not make any reference to Ms. Tsugawa's failure to inform the officers that the meth pipe was not hers in his closing argument. The prosecutor's remark was nothing but a mere reference to Ms. Tsugawa's pre-arrest partial silence. Even assuming the prosecutor's question was error, if defense counsel felt that this question caused prejudice to his client he had ample opportunity to object or seek a curative instruction. There is a legitimate tactic to be found in not emphasizing evidence in such a way that it appears a defendant would prefer to hide from it. "[D]efense counsel's decision not to object can be characterized as legitimate trial strategy or tactics. Counsel may not have wanted to risk emphasizing the testimony with an objection." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); see also *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447 (1993). Further, "[t]he 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. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613,

661, 790 P.2d 610 (1990). “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal.” *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Here, defense counsel was thoroughly unconcerned that the prosecutor’s question would carry the risk of prejudice to his client. That lack of concern could have been attributable to his client’s answer to the question, which was a good one: She couldn’t remember what she said to the police that evening. Her lack of memory was perfectly reasonable given her physical state that night, and Ms. Tsugawa again came off looking credible. But again, the issue in this case was not who owned this pipe, but whether Ms. Tsugawa knew it was in her purse. The jury could have concluded that Ms. Tsugawa was telling the truth about whose pipe it was but nevertheless had an abiding belief that she knew the pipe was in her purse. Assuming without conceding that defense counsel’s failure to object constituted ineffective assistance of counsel, Ms. Tsugawa suffered no prejudice because the result of her trial would not have been different absent the prosecutor’s question. As noted above, the prosecutor avoided any further reference to this subject and did not argue it during closing. It was a mere reference to Ms. Tsugawa’s partial pre-arrest silence on a

subject which she raised during her testimony—ownership of the meth pipe. Further, her answer to the question served to bolster her credibility rather than diminish it. The prosecutor scored no point here. Ms. Tsugawa received effective assistance of counsel.

IV. THE PROSECUTOR DID NOT ARGUE A FACT NOT IN EVIDENCE.

Ms. Tsugawa claims that the prosecutor argued a fact not in evidence when he commented, during closing argument, that Deputy Cooney asked her how long it had been since she smoked methamphetamine. The claim that this argument introduced a fact not in evidence assumes that the only testimony about Ms. Tsugawa's prior experience with methamphetamine was that she merely "used" methamphetamine rather than "smoked" it. However, Deputy Arndt testified that the question posed to Ms. Tsugawa by Deputy Clooney was how long it had been since she "smoked" methamphetamine. See RP 133. She then replied that it had been a couple of months (rather than a couple of weeks), according to Deputy Arndt's recollection. *Id.* The prosecutor did not argue a fact not in evidence. Deputy Arndt's testimony was in evidence. Defense counsel was not derelict in failing to lodge an objection on this ground. Ms. Tsugawa received effective assistance of counsel.

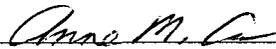
D. CONCLUSION

Each of Ms. Tsugawa's assignments of error fail and her conviction should be affirmed.

DATED this 26<sup>th</sup> day of Aug., 2011.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:   
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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
Respondent,

v.

DEBRA JANE TSUGAWA,  
Appellant.

No. 41379-5-II

Clark Co. No. 10-1-00184-1

DECLARATION OF  
TRANSMISSION BY MAILING

STATE OF WASHINGTON )

: ss

COUNTY OF CLARK )

On Aug 26, 2011, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk  
Court of Appeals, Division II  
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Tacoma, WA 98402-4454

John A. Hays  
Attorney at Law  
1402 Broadway  
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DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

[Signature]  
Date: Aug 26, 2011.  
Place: Vancouver, Washington.