

NO. 42924-1-II

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

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STATE OF WASHINGTON, Respondent

v.

MANOA VAIPAPALANGI MOTULIKI, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01376-6

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BRIEF OF RESPONDENT

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**A. RESPONSE TO ASSIGNMENTS OF ERROR**

- I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR RESIDENTIAL BURGLARY.
- II. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE DEFENDANT KNOWINGLY POSSESSED A STOLEN VEHICLE.
- III. THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL
- IV. THE TRIAL COURT PROPERLY IMPOSED COSTS FOR COURT APPOINTED COUNSEL AND MOTULIKI DID NOT OBJECT TO THESE COSTS BELOW.

**B. STATEMENT OF THE CASE**

Walter Raschke used to have a friend and neighbor named Bud Goodrich. RP 43. Bud Goodrich passed away in February of 2011. RP 43. Mr. Raschke kept an eye on Mr. Goodrich's house after he died. RP 43. On June 29th, 2011, Mr. Raschke saw a white pickup truck pull into the driveway of Mr. Goodrich's house and saw a person get out of the truck and try to open the front door. RP 42-43. Unable to gain entry through the front door, the intruder went to the side of the garage and appeared to be searching for something to step on. RP 44. There was a small window on the west side of the garage and the intruder tried to kick it in. RP 44. Unable to kick in the window, he moved around to look over the waist-high fence at the back of the house, then he returned to his pickup truck

and moved it out of Mr. Raschke's view. RP 44. Mr. Raschke called Mr. Goodrich's sister, Betty, whom he knew to be the executor of Mr. Goodrich's estate, and told her what he saw. RP 42-43. Betty told him to call 911, and he did. RP 43. Mr. Raschke observed the intruder to be wearing a dark brown or black leather or faux leather jacket. RP 45. He also described him as "medium" skin-toned, possibly Hispanic, with dark hair. RP 46. He also saw the intruder holding a manila envelope as he walked back to his car. RP 64-65.

After the intruder moved the truck he returned to the house without his jacket on. RP 45. He again approached the fence at the back of the house and climbed over it, again leaving Mr. Raschke's view. RP 47. In a short time two deputy sheriffs arrived at the house.

Deputy Kennison responded to the 911 call. RP 68. He parked a ways down the road from the Goodrich house for safety reasons and as he approached the house he saw a white truck parked on the road between him and the house. RP 68-69. Believing the truck could be involved he felt the hood of the vehicle and found that it was warm. RP 69. After other deputies arrived they approached the house. RP 69-70. Not seeing anyone near the front of the house Deputy Kennison moved to the rear and went over the fence. RP 70. At that time he looked to his right and saw the intruder leaving the back of the house. RP 70. Deputy Kennison also

described the intruder as having dark skin and hair, “lighter than African American, darker than a Caucasian individual.” RP 71. Deputy Kennison ordered the man to stop and identified himself as a police officer, but the man took off running. RP 71-72. The man ran through a neighbor’s property and escaped capture. RP 72-73. Although the police were unsuccessful in locating the burglar through a dog track, they found a sweatshirt in a park just east of the Goodrich home that matched the one the man was wearing when Deputy Kennison saw him come out of the house. RP 74, 97.

In looking for the point of entry into the house the deputies found a window that had been removed on the west side of the home, about four feet off the ground. RP 75. The window pane was lying on the ground right under the window. RP 75. A fingerprint was lifted from the window and it matched the defendant, Manoa Motuliki. RP 76, 177-78, 189. Deputy Kennison also examined and searched the truck left at the scene, which was a stolen truck. RP 76-77, 84. On the bench seat of the truck Kennison found a black jacket and a manila envelope. RP 77. The black jacket was on the driver’s side and the manila envelope was on the passenger side. RP 85. He also found several bags in the truck. RP 77. The bags contained items such as clothing, a Nintendo Wii, and women’s shoes. RP 85. Inside one of the bags was a notebook, and on the third page

of the notebook was a letter addressed to “Noah.” RP 91. The defendant uses the nickname “Noah.” RP 248. The police also found a cell phone in one of the pockets of the black jacket. RP 93. The telephone number of the cell phone was the same number that Monoa Motuliki gave to jail personnel when he was booked into jail on July 14, 2011. RP 201-202, 214-15.

The truck the burglar was driving had been stolen in early June from Mr. Benjamin Galloway. RP 59. When the truck was returned to Mr. Galloway after this incident it was in poor condition. RP 60-61. The starter wasn't working, the clutch was damaged, the “insides had been smashed,” the radio had been destroyed by someone's effort to remove it, and a taillight had been broken. RP 60-61. At the time the truck was stolen the only thing in it was Mr. Galloway's bag of tools. RP 62.

During the trial on this matter the defendant was impeached with his prior conviction for theft in the third degree. RP 239-40. The defendant initially denied that he was convicted of theft, but when shown the documentation of the conviction said “Oh, yes. Yes...I don't remember that I convicted on any theft, but I remember the date.” RP 239-40.

The defendant testified that the crimes in question were committed by “George,” last name unknown. RP 222-36.

Motuliki was convicted of Residential Burglary and Possession of a Stolen Motor Vehicle. CP 33-34. This timely appeal followed. CP 92-96.

**C. ARGUMENT**

**I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR RESIDENTIAL BURGLARY.**

Motuliki claims the evidence is insufficient to prove that he committed residential burglary because the State did not prove that Mr. Goodrich's home was a "dwelling" and because the State did not prove that Motuliki entered the dwelling.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable

inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

RCW 9A.04.110(7) defines "dwelling" as: "Any building or structure, though movable or temporary, or portion thereof, which is used or ordinarily used by a person for lodging." (Emphasis added). Mr. Goodrich's house was still furnished and his sister was preparing to have a garage sale. RP 132-33. It was also locked. RP 133. Mr. Goodrich's sister checked on the house about once a week. RP 132. Whether a house is a

dwelling “turns on all relevant factors and is generally a matter for the jury to decide.” *State v. McDonald*, 123 Wn.App. 85, 90, 96 P.3d 468 (2004). In arguing that the State failed to prove Mr. Goodrich’s house was a dwelling, Motuliki simply states “[t]he owner of the house had died four months earlier, and there was no evidence that the house was occupied or contained items needed for residence.” See Brief of Appellant at 8. In other words, Motuliki argues that a home can only be deemed a dwelling if it is actually, currently occupied by a resident. Motuliki makes this assertion without any citation to authority. This Court should not consider assertions which are not supported by argument and citation to authority. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) (“We do not review assigned errors where arguments for them are not adequately developed in the brief.”)The State presented sufficient evidence on which a rational trier of fact could conclude that Mr. Goodrich’s house was a dwelling as that term is defined in RCW 9A.04.110(7).

The State also presented sufficient evidence that Motuliki entered the residence. Deputy Kennison saw him coming out of the back of the house and his fingerprint was found on a window pane that was removed from a window and determined to be the point of entry. RCW 9A.52.010(4) defines the term “enter”: “The word ‘enter’ when constituting an element or part of a crime, shall include the entrance of the

person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her hand and used or intended to be used to threaten or intimidate a person or to detach or remove property.” The defendant argues that because Deputy Kennison was, in his view, standing too far away from Motuliki when he came out of the house, the evidence was insufficient to prove that it was Motuliki who entered the home rather than “George.” But this is a factual determination that was resolved by the jury. The jury heard Deputy Kennison’s testimony about where he was standing in relation to Motuliki and what he saw. The jury also heard Motuliki’s preposterous testimony regarding “George.” The jury elected not to believe Motuliki’s account. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A rational trier of fact could have found that the person who entered Mr. Goodrich’s home unlawfully was Motuliki rather than “George.” This assignment of error fails.

II. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE DEFENDANT KNOWINGLY POSSESSED A STOLEN VEHICLE.

Respondent incorporates the language from the preceding section regarding sufficiency of the evidence. Motuliki claims that the State failed to prove that he actually or constructively possessed the stolen truck because “no one testified they saw Mr. Motuliki in possession of the

pickup truck.” See Brief of Appellant at 10. This is a misstatement of the evidence. Mr. Raschke saw the burglar, which the State proved to be Motuliki, driving the truck. Motuliki further asserts that the State could only prove he was a passenger in the truck because Motuliki testified that the truck was driven by “George,” not him. Again, the jury, as the sole judges of credibility, rejected Motuliki’s version of events. Motuliki dismisses the fact that his property (along with a letter that was, in fact, addressed to him) was found in the truck as evidence he possessed the truck, but this was evidence on which a rational trier of fact could have found that Motuliki actually or constructively possessed the truck. Last, Motuliki claims the State did not prove he knew the truck was stolen. Mr. Galloway’s testimony described a truck that had been trashed and damaged, including the starter. The truck was stolen less than a month before it was found in Motuliki’s possession. Galloway’s property had been removed. Items belonging to Motuliki were found in the car along with electronics, clothing, and women’s shoes. It was a reasonable inference from the evidence that the driver of the stolen car knew it was stolen, particularly since the driver was in the process of committing a burglary. The jury resolves conflicting evidence and this Court may not review that resolution. *Camarillo*, supra, at 71. This assignment of error fails.

III. THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant argues that he received ineffective assistance of counsel because his counsel chose not to elicit testimony from him to the effect that he had previously been convicted of theft in the third degree, and because he elected not to reemphasize the evidence by requesting a limiting instruction. This claim fails.

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). “The decision of when or whether to object is a classic example of trial tactics.” *Madison*, 53 Wn. App. at 763. This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). 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).

The decision whether to elicit unfavorable testimony about one’s client, in so-called “anticipatory rebuttal,” lies within the discretion of defense counsel. In this appeal Motuliki relies entirely on *State v. Thang*, 145 Wn.2d 630, 646, 41 P.3d 1159 (2002) for the proposition that counsel is essentially required to engage in anticipatory rebuttal, or “preemptive disclosure,” of negative evidence about his client. But Motuliki’s reliance

on *Thang* is misplaced. In *Thang*, the defendant assigned error to the trial court's admission of a prior offense under ER 404(b) and the Supreme Court agreed that the admission of the evidence was improper. The Court of Appeals had declined to rule on the admissibility of the evidence under ER 404(b), instead holding that the defendant waived the issue because he had introduced the evidence preemptively. *Thang* at 646. In rejecting this holding, the Supreme Court discussed preemptive disclosure at length and held that a defendant does not waive his right to challenge evidence on appeal when, having unsuccessfully tried to keep the evidence out, he introduces it preemptively on the theory that it would blunt its effect. *Thang* at 646-47. The *Thang* Court did not hold, however, that defense counsel is compelled to engage in anticipatory rebuttal. Indeed, such a rule would interfere with the attorney/client relationship because the decision whether to introduce this type of evidence should be made in consultation with the client. The Supreme Court recently discussed the need for courts to respect the autonomy of the attorney/client relationship in the context of deciding whether to offer lesser included instructions:

The division of labor between the attorney and client...sheds further light on the fundamental flaws inherent in the third prong of the Court of Appeals' test. The inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude. At the same time, the ABA's emphasis on client participation in this decision

making process reinforces the subjective nature of this decision and suggests that courts should be loath to second-guess the defendant's approach, risky or not. In sum, the complex interplay between the attorney and the client in this arena leaves little room for judicial intervention.

*State v. Grier*, 171 Wn.2d 17, 39-40, 246 P.3d 1260 (2011).

Although Motuliki speculates that defense counsel actually didn't know about the conviction prior to trial, there is no support for this assertion in the record and Motuliki makes no attempt to support this speculative remark.

Defense counsel's decision not to introduce this evidence was a legitimate tactical decision. First, there was no guarantee that the State would have introduced this testimony. A cautious prosecutor trying a case involving overwhelming evidence of guilt might find it prudent to avoid this type of evidence because it frequently appears in appellate assignments of error. Stated another way, it's frequently more trouble than it's worth. A prosecutor might also forget to introduce the evidence. The wait-and-see approach is both tactical and legitimate. The value of anticipatory rebuttal is a matter of opinion. Again, this decision was between counsel and his client.

Even if this Court determined that counsel's tactical decision was illegitimate, Motuliki suffered no prejudice. "Criminal defendants are not guaranteed 'successful assistance of counsel.'" *State v. Dow*, 162 Wn.App.

324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. With respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43. Applying these principles, Motuliki was not denied effective assistance of counsel.

The evidence demonstrating Motuliki’s guilt was overwhelming. He was seen trying to break into the house, seen fleeing the scene of the crime, his fingerprints were found at the scene and his property was found inside the stolen vehicle that a witness saw him driving. The sole issue in this case, according to the defendant, was identity. See RP at 206. The introduction of this evidence was of minor moment in the overall trial. Moreover the prejudice, if any, to Motuliki flows from the fact that the jury heard about the prior conviction at all. That the conviction is admissible per se is not disputed by Motuliki. Irrespective of who introduced the conviction it was admissible, and the theory of its admissibility is that it suggests he is dishonest – an inference specifically

endorsed by the Washington Supreme Court. If Motuliki had introduced the evidence himself he would be in the same situation he is now – appealing his convictions for residential burglary and possession of a stolen motor vehicle. To the extent that Motuliki now claims that he would have told the truth rather than lied about the existence of the conviction during his testimony, and that his failure to tell the truth was a result of his attorney’s failure to “prepare” him for his testimony, there is no support for this claim in the record. Motuliki appeared confused about the nature of the prior conviction – he did not appear to be intentionally lying about its existence. It was not nearly the bombshell Motuliki now makes it out to be on appeal. Motuliki suffered no prejudice because the outcome of the trial would have been the same absent admission of this evidence.

Motuliki’s claim that counsel was required to request a limiting instruction also fails. The decision whether to request a limiting instruction is a classic tactical decision. Limiting instructions reemphasize the evidence. “We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence.” *Dow* at 335; *State v. Yarbrough*, 151 Wn.App. 66, 90, 210 P.3d 1029 (2009); *State v. Price*, 126 Wn.App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005); *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447, *review denied*, 121

Wn.2d 1024 (1993). Moreover, counsel, who is in the courtroom and sitting in the presence of the jury, is in the best position to determine the impact of a particular piece of evidence, and whether the impact was such that reemphasizing the evidence is worth that risk. Defense counsel's failure to object to the remarks at the time they were made "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. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Motuliki recognizes that objections and limiting instructions reemphasize evidence but baldly asserts that when the evidence in question is a prior theft conviction and the crime for which the defendant is on trial is one of dishonesty, the decision not to request a limiting instruction is ineffective as a matter of law. See Brief of Appellant at 19-20. Motuliki cites no authority for this proposition. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *Dow*, *supra* at 331; *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Indeed, in *State v. Dow*, *supra*, at 335-36, a burglary case, the Court of Appeals held that the defendant was not denied effective

assistance of counsel by his attorney's decision not to request a limiting instruction following the admission of a prior conviction under ER 609. The Court could have held in *Dow* that in cases where a defendant is being tried for a crime or crimes of dishonesty (as in this case), the admission of a prior conviction under ER 609 requires counsel, as a matter of law, to request a limiting instruction. The *Dow* Court made no such holding.

To the extent that Motuliki suggests that the trial court is required to give a limiting instruction anytime evidence under ER 609 is admitted (see Brief of Appellant at p. 16), his reliance on *State v. Brown*, 113 Wn.2d 520, 529-30, 782 P.2d 1013 (1989) is misplaced. The holding in *Brown* was not nearly so broad. The Court was dealing with the combined admission of a prior conviction under both ER 404(b) and ER 609 and stated:

Therefore, where evidence of a defendant's prior conviction is admitted for a substantive purpose under ER 404(b) and the evidence is also ruled admissible for impeachment purposes, the jury should be given limiting instructions as to each purpose for which it may consider the evidence.

*Brown* at 529-30.

Motuliki attempts to bolster his claim that counsel was ineffective for electing not to request a limiting instruction by arguing that the State misused the evidence during its closing argument. However, the State's argument was proper. The argument told the jury that they could consider

his prior theft conviction, and his apparent denial of it during his testimony, “in determining whether [the defendant’s] story’s credible. And I suggest to you that this makes that story just incredible.” RP, p. 296. This is the proper role of this evidence. As the Supreme Court stated in *State v. Brown*, supra at 551-52:

Crimes of theft involve stealing, and are clearly encompassed within the term dishonest...The act of taking property is positively dishonest...[t]he sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant’s credibility as a witness...This purpose is met by allowing admissibility of prior convictions evidencing dishonesty, regardless of the fact that the conduct had as its purpose the taking of another’s property.

The State’s argument was brief and entirely proper under ER 609. Defense counsel’s decision not to request a limiting instruction was a legitimate tactical decision and Motuliki suffered no prejudice in any event because the outcome of the trial would have been the same even if a limiting instruction had been given.

The defendant was not denied effective assistance of counsel because counsel’s decision was a legitimate tactical decision and because he suffered no prejudice.

IV. THE TRIAL COURT PROPERLY IMPOSED COSTS FOR COURT APPOINTED COUNSEL AND MOTULIKI DID NOT OBJECT TO THESE COSTS BELOW.

Motuliki claims that the trial court erred in imposing a \$1200 jury trial per diem fee. It must first be noted that Motuliki is confused about what this fee is. This is part of the reimbursement for his court appointed attorney. This is not a separate surcharge on having a jury trial, as Motuliki seems to believe. Indeed, the judgment and sentence makes clear that this is part of the court appointed attorney reimbursement. On page 5 of the judgment and sentence (found at CP 84), there is a line for “Fees for court appointed attorney.” On the line to the left it has an amount of \$1000. CP 84. To the left of that is a code, which is “PUB.” Id. Immediately below that line, but using the same “PUB” code, it says “Trial per diem, if applicable.” Id. To the left of that is a line with the amount of \$1200. CP 84. In other words, the judgment and sentence simply itemizes the court appointed attorney reimbursement on two lines. Indeed, Anthony Lowe, Motuliki’s trial counsel who has been a contracted court appointed defender in Clark County for well over a decade did not object to this fee, demonstrating that he understood it to be for court appointed counsel reimbursement. To the extent that Motuliki’s assignment of error is predicated on this misunderstanding (because he does *not* argue that the trial court lacks the authority to impose costs upon

him for reimbursement for his court appointed attorney, or that such reimbursement would be unconstitutional), his claim fails.

Motuliki makes two fleeting references to the trial court allegedly not having determined that Motuliki had an ability to pay costs before imposing them, but he makes these comments under the rubric of his argument that the fee in question is not an authorized fee, which in turn is based upon his misunderstanding of what “trial per diem” meant (discussed above). It does not appear this is a stand-alone claim. However, if it is a stand-alone claim, it fails because Motuliki did not object to the imposition of costs below.

The defendant was present for all portions of the sentencing hearing. The defendant signed the judgment and sentence after it was completed. CP 87. The defendant did not object to the trial court’s imposition of costs, fines, or fees. There is no indication that the State has attempted to collect on the defendant’s legal and financial obligations (“LFOs”).

The trial court has broad discretion to impose costs, fines, and fees. *See State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (stating trial court’s imposition of LFOs is reviewed for abuse of discretion). RCW 9.94A.760 entitled “Legal financial obligations”) allows the superior court to order a person who is convicted of a crime to pay a legal financial

obligation as part of his or her sentence. RCW 9.94A.760(1). Pursuant to RCW 9.94A.030(30), “legal financial obligation” means

a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, *court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.*

RCW 9.94A.030(30)(emphasis added). In addition, the trial court is not required to enter factual findings on a defendant’s ability to pay LFOs. *Curry*, 118 Wn.2d at 916.

The imposition of LFOs is a product of statute and is not an issue of constitutional magnitude. *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992). Consequently, RAP 2.5(a)(3) does not apply to issues regarding the imposition of LFOs. *Phillips*, 65 Wn. App. at 243-44. Therefore, a defendant waives any challenges to the imposition of LFOs on appeal if he does not object to their imposition at the time of sentencing. *Id.*

In addition, the trial court’s failure to enter findings regarding a defendant’s ability to pay (pursuant to RCW 10.01.160) is not a constitutional error that requires resentencing. *Phillips*, at 243, *citing Curry*, at 680-81; *State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55, 817

P.2d 867 (1991). Therefore, a defendant waives any challenge to the trial court's failure to make findings regarding his or her ability to pay if he does not object at the time of sentencing. *Id.*, at 243-44.

Constitutional principles will be implicated only if and when the government seeks to enforce collection of the assessments ““at a time when [the defendant is] unable, through no fault of his own, to comply.”” *Phillips*, at 244 citing see *United States v. Hutchings*, 757 F.2d 11, 14-15, (2d Cir.), cert. denied, [472] U.S. [1031], 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985) (quoting *United States v. Brown*, 744 F.2d 905, 911 (2d Cir.), cert. denied, [469] U.S. [1089], 105 S.Ct. 599, 83 L.Ed.2d 708 (1984)). “It is at the point of enforced collection of the principal or additional amounts, where an indigent may be faced with the alternatives of payment or imprisonment, that he ‘may assert a constitutional objection on the ground of his indigency.’” *Id.* (quoting *Hutchings*, 757 F.2d at 14-15).

Consequently, whether the trial court made sufficient findings regarding the defendant's ability to pay will become ripe for review only if and when the State attempts to collect LFOs. *Id.*, at 244 citing *Curry*, at 682 (noting “the various statutory safeguards already in place in Washington that might well eliminate any risk of a constitutional violation occurring at the time of collection”).

Here, the trial court's imposition of costs, fines, and fees was authorized by statute. In addition, the trial court was not required to enter findings regarding the defendant's present or future ability to pay. Consequently, the trial court did not abuse its discretion when it imposed LFOs and when it did not check a box regarding the defendant's ability to pay.

However, this Court need not, and should not, address the merits of the defendant's claim because the defendant failed to preserve this assignment of error for review. The defendant waived any challenge to the trial court's imposition of LFOs when he did not object to their imposition at the time of sentencing. RAP 2.5(a). Further, the defendant waived any challenge to the trial court's failure to check a box regarding his present or future ability to pay when he did not object at the time of sentencing. *Id.* In addition, whether the defendant has the present or future ability to pay is not yet ripe for review because there is no evidence that the State has attempted to collect on the defendant's LFOs.

No error occurred and no assignment of error was preserved for review. Therefore, the defendant's judgment and sentence should be affirmed. The trial court's order imposing costs should also be affirmed.

Assuming, this Court finds any error occurred (and that it was preserved for review), the limited remedy to which the defendant would be

entitled would be remand to the sentencing court for an entry of findings  
in support of the court's order.

DATED this 8<sup>th</sup> day of October, 2012.

Respectfully submitted:

ANTHONY F. GOLIK  
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Clark County, Washington

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# CLARK COUNTY PROSECUTOR

## October 08, 2012 - 3:10 PM

### Transmittal Letter

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Court of Appeals Case Number: 42924-1

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