

No. 44816-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JASON EVERETT GAMBILL,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did the trial court violate Gambill's constitutional rights to counsel when it failed to appoint new counsel?
- B. Was the witnesses' use of the word "stolen" an improper opinion testimony of Gambill's guilt of Possession of a Stolen Motor Vehicle?
- C. Did witness testimony violate the presumption of innocence by making Gambill appear to be particularly dangerous?
- D. Did the deputy prosecutor commit misconduct by shifting the burden of proof?
- E. Did Gambill waive raising for the first time on appeal a suppression issue regarding his alleged unlawful seizure?
- F. Did Gambill receive effective assistance from his trial counsel?
- G. Did the trial court improperly impose the cost of indigent attorney fees?

## II. STATEMENT OF THE CASE

On March 8, 2013 Jeffrey Strode went to the Pony Espresso stand to get coffee a little after 5:00 a.m. JRP<sup>1</sup> 35-36. While waiting in line to get his coffee Mr. Strode's truck was hit by another vehicle in line at the espresso stand. JRP 37. Leah Greenwood, the barista, asked Mr. Strode if the car behind him hit his truck. JRP 37, 39-41. Mr. Strode and Ms. Greenwood described the car that hit

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<sup>1</sup> There are three verbatim report of proceedings. The State will refer to the jury trial which occurred on 4/22/13 as JRP, the sentencing hearing that occurred on 4/23/13 as SRP, and the motion hearings occurring on 4/11/13, 4/15/13, and 4/18/13 as MRP.

Mr. Strode's truck as a blue Toyota Camry. JRP 37, 41. Mr. Strode and Ms. Greenwood identified Gambill as the person driving the blue Camry. JRP 38, 41. Ms. Greenwood believed Gambill may have been drinking because he was acting strange. JRP 43.

Washington State Patrol Trooper Thornburg was on patrol on March 8, 2013 when he saw a disabled vehicle on the northbound shoulder of Interstate 5 after 5:00 a.m. JRP 45, 47-48. When Trooper Thornburg pulled up behind the Camry he activated his patrol vehicle's emergency lights and could see a man, later identified as Gambill, standing to the right front corner of the car, near the guardrail. JRP 48-50. Trooper Thornburg asked Gambill if the car was disabled, which Gambill said it was and he had called AAA. JRP 49. Trooper Thornburg inquired if AAA told Gambill they were dispatching Grant's Towing and Gambill said yes. JRP 49. Trooper Thornburg asked dispatch to call Grant's to get an estimated time of arrival for the tow truck, which is common practice for the trooper. JRP 50. Trooper Thornburg was seated in his patrol vehicle when he observed Gambill walk towards the car, put on a backpack, pick up a bag, and then walk across the northbound lanes of Interstate 5. JRP 50-51. Trooper Thornburg told Gambill to stop, but Gambill continued across the southbound lanes and out of

Trooper Thornburg's site. JRP 51. Trooper Thornburg believed the Camry may be stolen. JRP 51.

Selma Alsalman discovered, after she was contacted by the Washington State Patrol, that her car, a blue Camry had been stolen sometime overnight and on March 8, 2013. JRP 28-29. Ms. Alsalman lives in Portland, Oregon and the car had been stolen from the driveway at her residence. JRP 28-29. Ms. Alsalman admitted that she had inadvertently left the keys in the car. JRP 30.

Trooper Thornburg, with the assistance of Trooper Sills, Trooper Brunstad, and Trooper Hicks attempted to locate Gambill. JRP 52-54, 70-71, 75-77, 81-83. The troopers were able to locate Gambill and took him into custody. JRP 54. Inside a small cloth grocery bag Trooper Thornburg located a rearview mirror that belonged to the Camry. JRP 55-56.

Gambill was charged with Possession of a Stolen Vehicle. CP 1-3. At one point Gambill's case was set for a change of plea on April 15, 2013. MRP 2-3. At the change of plea hearing the deputy prosecutor informed the court that Gambill would not be changing his plea and was requesting new counsel. MRP 3. Gambill's trial counsel, David Brown, informed the court that Gambill no longer wanted Mr. Brown to represent him and was not taking the State's

offer to resolve the case. MRP 3-4. Gambill sent a letter to Judge Brosey on April 15, 2013 that had not yet made it to the judge at the time of the hearing. MRP 4; CP 21. Judge Brosey stated he would address Gambill's concerns at the next hearing on Thursday, April 18, 2013, which also happened to be the trial confirmation hearing. MRP 4-6. Judge Brosey denied Gambill's request for new counsel and confirmed the case for trial. MRP 5-6.

Prior to trial commencing on April 22, 2013 Gambill renewed his request for a new attorney. Judge Lawler, the trial judge, went through Gambill's complaints on the record and denied Gambill's request. JRP 8-15. Gambill was convicted as charged. JRP 107-08. Gambill was sentenced to 57 months in prison. SRP 5; CP 4-14. Gambill timely appeals his conviction. CP 15.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT VIOLATE GAMBILL'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.**

Gambill claims the trial court violated his right to counsel as guaranteed by the Fourteenth and the Sixth Amendments of the United States Constitution. Brief of Appellant 9-13. Gambill argues

that by failing to adequately inquire and address the breakdown in his relationship with his trial counsel the trial judge infringed on his right to counsel. Brief of Appellant 10. The trial court's inquiry was sufficient given the allegations that Gambill asserted and the judge did not violate Gambill's right to counsel.

### **1. Standard Of Review.**

A trial court's refusal to appoint new counsel is reviewed for abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.2d 80 (2006). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Whether a defendant was denied his right to counsel is reviewed de novo. *Cross*, 156 Wn.2d at 605.

### **2. The Trial Court Did Not Deny Gambill His Constitutional Right To Counsel When It Refused To Appoint New Counsel.**

A criminal defendant has a right to effective assistance of counsel. U.S. Const. amend VI; U.S. Const. amend XIV. "Effective assistance of counsel does not mean successful assistance of counsel." *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). A trial court's refusal to appoint new counsel when there is

a complete collapse in the relationship between the defendant and counsel denies a defendant his or her Sixth Amendment right to an attorney. *Cross*, 156 Wn.2d at 606. “There is a difference between a complete collapse and mere lack of accord.” *Id.*

A defendant does not have the right to discharge appointed counsel unless the motion to the trial court is upon the proper grounds and timely. *Id.* The reviewing court considers three factors when it determines if a trial court’s denial to appoint new counsel was permissible, “(1) the extent of the conflict, (2) the adequacy of the trial court’s inquiry, and (3) the timeliness of the motion.” *Id.* at 607 (internal quotations and citations omitted).

Gambill only argues to this court that the trial court abused its discretion by failing to adequately inquire into Gambill’s conflict with his attorney and denying his request for new counsel. Brief of Appellant 10-13. Gambill fails to address the untimeliness of his motion for new counsel, simply stating he had informed the court three times that his relationship with his attorney had broken down. Brief of Appellant 11. The first time it is mentioned within the record that Gambill asserted he wanted new counsel was a comment by the deputy prosecutor on April 15, 2013, which the deputy prosecutor stated Gambill had asked for new counsel on April 11,

2013. MRP 3.<sup>2</sup> Gambill, at the April 15, 2013 hearing, told the judge he wrote a letter and sent it to the judge that day. MRP 4. Gambill's trial counsel informs the judge that Gambill refused to meet with him the previous Friday. MRP 3. Gambill's trial attorney next informed the judge he met with Gambill that morning (April 15, 2013) and Gambill indicated he did not want trial counsel to represent him. MRP 3-4. The judge told the parties he would address the matter on Thursday, trial confirmation, after he had a chance to review Gambill's letter. JRP 4. On April 18, 2013 the judge denied Gambill's request for new counsel after confirming the case for trial and suggested Gambill start communicating with his attorney. MRP 6. The judge did state he had reviewed the letter and all he had were conclusory allegations. MRP 5-6; CP 21. The trial judge similarly denied Gambill's request for counsel the first day of trial, April 22, 2013. JRP 12-15.

The earliest it could be said that Gambill requested new counsel was 11 days prior to trial. MRP 3. April 15, 2012 is the first time we have an actual record of Gambill requesting new counsel. MRP 4; CP 21. The letter Gambill wrote to Judge Brosey was dated

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<sup>2</sup> The VRP states the hearing was April 15, 2012 but that is a scrivener's error. The Thursday before April 15, 2012 was April 11, 2012, as the 15<sup>th</sup> was a Monday. The State would note that the hearing Gambill had transcribed on April 11, 2013 makes no mention that Gambill was present or requesting new counsel.

April 15, 2013. CP 21. Therefore, the first time Gambill addresses the matter in the record is April 15, 2013, a mere seven days prior to the beginning of his jury trial. Gambill's request for a new attorney was not timely.

Next, this Court should look at the nature of the conflict. The State cannot deny that there was some type of breakdown in the relationship between Gambill and his trial attorney. MRP 3-6; JRP 8-15; CP 21. Trial counsel informed Judge Brosey there were communication issues. MRP 3-6. Many of the conflicts Gambill alleged were preposterous. Gambill alleged his trial counsel threatened his life, threatened and intimidated his family, violated his constitutional rights, referred to Gambill vulgarly, and did not review the charges or discovery with Gambill. JRP 8-15, CP 21. Judge Brosey appeared to decide the matter only on the timeliness issue, noting that it was not a complex case. MRP 6. Judge Lawler listened to Gambill and allowed him to go through his concerns and found a number of conflicts Gambill raised unbelievable. JRP 12, 14.

Finally, the sole issue Gambill raises to this Court is the adequacy of the trial judge's inquiry. Arguendo, if Judge Brosey's inquiry the week of April 15<sup>th</sup> was not adequate, the same cannot

be said for Judge Lawler's inquiry the morning of trial. MRP 3-6; JRP 8-15. Judge Lawler listened to Gambill's claims, and as stated above, found a number of them unbelievable. JRP 12-14. It appears from the inquiry that Gambill did not like the advice he was being given by his trial counsel, he did not like Mr. Brown's evaluation of the case, and felt that Mr. Brown was not doing an adequate job. JRP 8-15. Perhaps there was some truth to some of the issues Gambill raised, but he lost credibility with the trial judge when he made allegations that were contrary to Judge Lawler's knowledge of Mr. Brown. JRP 12-14. At best there appears to be a difference of opinion between Gambill and his trial counsel and at worst it appears Gambill is simply trying to delay his trial by making wild accusations of absurd conflicts with his attorney. There was an adequate inquiry and this Court should find that the trial court did not violate Gambill's Sixth and Fourteenth Amendment right to counsel.

**B. THE WITNESSES' USE OF THE WORD STOLEN WAS NOT IMPREMISSIBLE. IF USE OF THE WORD STOLEN WAS IN ERROR, GAMBILL CANNOT RAISE FOR THE FIRST TIME ON APPEAL BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Gambill argues, for the first time on appeal, that police officers' testimony using the word stolen to describe the vehicle

was improper opinion testimony and requires this Court to reverse Gambill's conviction. Brief of Appellant 16-19. The witnesses' fleeting use of the word stolen in regards to the vehicle was permissible. If this Court were to find the use of the word stolen is a constitutional error, the alleged error is not manifest and therefore, Gambill cannot raise this issue for the first time on appeal.

**1. The Troopers' Use Of The Word "Stolen" Was Not An Impermissible Opinion Of The Ultimate Issue, Whether Gambill Was Knowingly In Possession Of A Stolen Vehicle.**

Generally a witness may not give an opinion, while testifying, of the veracity or guilt of a defendant. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to both lay and expert witnesses. *King*, 167 Wn.2d at 331. The reason for this rule is "such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *Id.* (internal quotations and citations omitted). A law enforcement officer's testimony can carry a "special aura of reliability" and therefore may be especially prejudicial to the defendant. *Id.* (internal quotations and citations omitted). The reviewing court will consider a number of factors and circumstances to determine if there was impermissible opinion testimony, "(1) including the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4)

the type of defense, and (5) the other evidence before the trier of fact.” *Id.* at 332-33.

Gambill argues that troopers Thornburg and Brunstad both testified the vehicle Gambill was driving was stolen and these statements provided explicit opinions of Gambill’s guilt regarding an element of the crime. Brief of Appellant 18. The State had to prove that Gambill was knowingly in possession of a stolen vehicle. RCW 9A.56.068; CP 1-3, 28-29. The four times the troopers uttered the word stolen during their collective testimony was not improper opinion testimony regarding Gambill’s guilt.

Trooper Thornburg used the word stolen three times during his testimony. The first time was when he explained that Gambill’s actions, walking across Interstate 5, made him pause and think that the vehicle Gambill had been standing outside of might be stolen. JRP 51. The second and third time Trooper Thornburg used the word stolen he said,

...I had already asked previously for dispatch to try to get a phone number for the owner of the car and contact the owner to determine if the car had been stolen. I was notified that they did - - dispatch did contact the owner, Selma that was in here earlier, and confirmed that the car had been stolen.

JRP 56. These three instances, two of which the trooper is simply testifying that he was attempting to determine if the car was stolen does not constitute an improper opinion of guilt.

Trooper Brunstad used the word stolen once, stating, “[w]hen we were handcuffing him at that time dispatch came back and stated that the car that Trooper Thornburg had checked on had come back stolen out of Portland.” JRP 77-78. This fleeting statement, which explained the series of events and the troopers actions, was not an improper opinion statement of Gambill’s guilt.

There was no error and testimony from the troopers was permissible.

**2. If The Testimony Was Impermissible It Is Not A Manifest Constitutional Error And Therefore Gambill May Not Raise The Issue For the First Time On Appeal.**

The State is not conceding the use of the word stolen was in error. Arguendo, Gambill did not object when the troopers used the word stolen in regards to the vehicle. RP 51, 56, 77-78. Gambill must show that the alleged error is a manifest constitutional error to raise it for the first time in his appeal.

**a. Standard of review**

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

**b. Gambill did not object to the troopers' use of the word stolen and cannot raise the issue for the first time on appeal because the alleged error is not a manifest constitutional error.**

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must

be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Admission of opinion testimony, without objection, from a witness regarding the guilt of the defendant is not automatically reviewable as a manifest constitutional error. *State v. Blake*, 172 Wn. App. 515, 530, 298 P.3d 769 (2012). If the testimony is improper opinion testimony then it must be determined if the defendant was prejudiced by the testimony. *O'Hara* 167 Wn.2d at 99. "Important to determination of whether opinion testimony prejudices the defendant is whether the jury was properly

instructed.” *Blake*, 172 Wn. App. at 531. If the jury is properly instructed this eliminates the possibility of prejudice. *Id.*

The alleged error does encompass a constitutional right, the right to a trial by jury, and therefore the only question is whether the alleged error is manifest. U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22; *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Gambill did not object to the use of the word stolen by the troopers. RP 51, 56, 78. Gambill has not shown that he was prejudiced by the troopers’ use of the word stolen.

Gambill simply states, “[t]estimony providing an ‘explicit or nearly explicit’ opinion of guilt of the accused or the credibility of the alleged victim constitutes manifest error affecting a constitutional right.” Brief of Appellant 16-17. (citing to *King* at 332). Gambill does not explain or argue how he was prejudiced by the alleged improper statements, likely because he uses this conclusory statement that the error is a manifest error. But, *King* actually states, “[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not *automatically* reviewable as a ‘manifest constitutional error.’ But, ‘an explicit or nearly explicit’ opinion on the defendant’s guilt or a victim’s credibility **can** constitute manifest error.” *King* at 332 (italics original, bold

emphasis added). The distinction between Appellant's version and the actual wording in *King* is important. There must be a showing that the error is manifest; that Gambill was actually prejudiced by the error, and Gambill has failed to meet this burden. There is no prejudice, and therefore, the error is not manifest and cannot be raised for the first time on appeal.

There is no prejudice because the owner of the vehicle, Ms. Alsalman, testified that her car had been stolen sometime overnight and on March 8, 2013 she discovered the car had been stolen when she was contacted by Washington State Patrol. JRP 28-29. Ms. Alsalman lives in Portland, Oregon and the car had been stolen from the driveway at her residence. JRP 28-29. Ms. Alsalman admitted that she had inadvertently left the keys in the car. JRP 30. The unequivocal testimony from Ms. Alsalman, prior to the troopers testifying, eliminated any prejudice that could have been incurred by the troopers' use of the word stolen.

**C. GAMBILL CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE ALLEGED ERROR REGARDING THE WITNESSES' TESTIMONY VIOLATING HIS PRESUMPTION OF INNOCENCE.**

Gambill is attempting to raise, for the first time on appeal, that his presumption of innocence was violated by testimony of two of the State's witness which he alleges made him appear

particularly dangerous. Brief of Appellant 19-22. Gambill cannot raise the issue for the first time on appeal because the alleged error is not manifest. Further, the State was unable to find any law on point regarding testimony of a witness invading a defendant's presumption of innocence by making the defendant look particularly dangerous.<sup>3</sup>

### **1. Standard Of Review.**

A claim of a manifest constitutional error is reviewed de novo. *Edwards*, 169 Wn. App. at 566.

### **2. The Alleged Error, Violating Gambill's Presumption Of Innocence, Is Not A Manifest Constitutional Error And Therefore Not Reviewable For The First Time On Appeal.**

The State set forth the law regarding reviewing an alleged error for the first time on appeal above. Gambill argues his presumption of innocence was violated because two of the State's lay witnesses proffered testimony that made him appear particularly dangerous. Brief of Appellant 21-22. Gambill did not object to the testimony of Ms. Greenwood and Mr. Strode that he now assigns error to. JRP 43, 38. Gambill must show that the alleged error is a manifest constitutional error to raise it for the first time in his appeal.

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<sup>3</sup> Cases cited by Gambill all deal with physical indications of dangerousness such as being shackled in the courtroom.

A criminal defendant has a constitutional right to a fair trial by an impartial jury. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I, § 3; Const. art. I, § 21; Const. art. I, § 22. “The right to a fair trial includes the right to the presumption of innocence.” *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (citations omitted). The presumption of innocence is the “bedrock foundation in every criminal trial.” *Gonzalez*, 129 Wn. App. at 900, citing *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). The trial court has a duty to be alert to any factor which “could undermine the fairness of the fact-finding process.” *Id.* Therefore, the alleged error is of constitutional magnitude. RAP 2.5(a); *O’Hara*, 167 Wn.2d at 98.

The only issue left to be determined by this Court is if the alleged error is manifest. *Id.* at 99. Gambill must show that the alleged error had an identifiable and practical consequence at trial. *Id.* Gambill argues that his trial was “peppered with testimony that was only relevant to prove that Mr. Gambill is inherently dangerous or frightening person.” The testimony Gambill complains of was when Ms. Greenwood stated she finished making Mr. Strode his coffee and said, “Oh, God, don’t leave me here with him.’ I figured it’s not very common that people have hit other customers in my

drivethrough [sic]. So I'm like, 'Good God, he's probably drunk or something like that.'" JRP 43. Mr. Strode testified that Ms. Greenwood had asked him not to leave her alone with Gambill and he told her he did not plan on it. JRP 38. There was also later testimony by Trooper Hicks that Ms. Greenwood had commented that Gambill gave her an uneasy feeling. JRP 84. Gambill also argues to this court that the testimony should have been inadmissible under ER 403 as more prejudicial than probative.

Ms. Greenwood and Mr. Strode were the only State's witnesses that could place Gambill behind the wheel of the stolen car. See JRP. The story regarding Gambill's strange behavior is relevant because it explains why Ms. Greenwood and Mr. Strode would remember Gambill. Further, counsel fails to point out to this Court that his trial attorney made use of this testimony he now complains of during his closing argument, in which he sought to explain alternative reasons why his client would act strangely and cross all the lanes of Interstate 5. JRP 104. There were no practical or identifiable consequences from the testimony, apart from the use of it as part of Gambill's trial attorney's strategy, which was to Gambill's benefit. Therefore, Gambill cannot raise this alleged error for the first time on appeal.

### **3. If There Was Error, It Was Harmless Beyond A Reasonable Doubt.**

When there is an error of constitutional magnitude, prejudice is presumed and it is the State's burden to prove the error was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citations omitted). A constitutional error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (citation omitted).

While the State is not agreeing the testimony was an error, *arguendo*, any error was harmless beyond a reasonable doubt. The fact that a barista and her customer found Gambill strange after he hit Mr. Strode's vehicle in the espresso drive-thru and Ms. Greenwood expressed discomfort with being left alone with Gambill was harmless. The evidence in this case was overwhelming. Gambill was driving a stolen vehicle. JRP 28-31, 37-38. Gambill had a mirror belonging to the vehicle in his bag. JRP 31-33, 55. When contacted by law enforcement regarding the disabled car, Gambill walked across all lanes of traffic on a freeway, in a 70 mile

per hour zone, to get away from the trooper and the vehicle. JRP 51-52. There was overwhelming evidence that Gambill was knowingly in possession of a stolen vehicle. This Court should affirm Gambill's conviction.

**D. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT BY SHIFTING THE BURDEN OF PROOF DURING CLOSING ARGUMENT.**

Gambill argues that the deputy prosecutor committed prosecutorial misconduct<sup>4</sup> by shifting the burden of proof. Brief of Appellant 14-16. The deputy prosecutor did not shift the burden of proof and therefore did not commit misconduct.

**1. Standard Of Review.**

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

**2. The Deputy Prosecutor Did Not Commit Misconduct By Shifting The Burden Of Proof During His Closing Argument.**

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the

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<sup>4</sup> "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct. *State v. Fisher*, 165 Wn. 2d 727, 740, fn1, 202 P.3d 937 (2009).

prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial misconduct, it is the defendant’s burden to show that the deputy prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor’s conduct, full trial context includes, “the evidence presented, ‘the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *State v. Monday*, 171 Wn. 2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when “there is a

substantial likelihood the misconduct affected the jury's verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007(1998).

“[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

A prosecutor commits prosecutorial misconduct when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor may commit misconduct during closing argument by mentioning that the defendant failed to present a witness. *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012). A prosecutor may also commit misconduct by telling the jury it should find the defendant guilty simply because the defendant failed to present evidence to support his defense theory. *Sells*, 166 Wn. App. at 930.

However, the mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. A

prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case.

*Id.*

Gambill argues the deputy prosecutor shifted the burden the burden of proof two different times. Brief of Appellant 15-16. Gambill argues that the deputy prosecutor claimed only one element of the charged offense was issue. Brief of Appellant 15. Gambill also claims the deputy prosecutor argued the jury should convict Gambill because he failed to present sufficient evidence to back up his defense theory. Brief of Appellant 15. Gambill mischaracterizes the deputy prosecutor's statements, none of which shift the burden of proof.

At the beginning of his initial closing argument the deputy prosecutor stated, "This case basically hinges on one thing: Did the defendant know the car was stolen. He's charged with being in possession of a stolen vehicle, a motor vehicle." JRP 98. The deputy prosecutor did not say the State did not need to prove the other elements of Possession of a Stolen Motor Vehicle. The deputy prosecutor was cuing the jury into the one element he felt was most at issue in the case. The deputy next went through the elements and the evidence supporting that the vehicle was stolen and that Gambill was in possession of it. JRP 98-99.

The deputy prosecutor, in his rebuttal closing argument, addressed the alternative theories Gambill's trial attorney came up with for reasons Gambill would walk away from Trooper Thornburg.

JRP 105. During closing, Gambill's attorney stated:

Why else would he leave? Well, you heard a lot of evidence about possibly intoxicated; definitely disoriented, I can't remember the third word that was used here, behavior was strange. So, if you're driving a motor vehicle that becomes disabled, you're intoxicated and you suddenly realize, oh, my gosh, I'm talking to a law enforcement officer, I best get out of here, does that create a reasonable doubt because of the lack of evidence of why he left the scene?

All you know is that he left. There's a number of different reasons. Could be a mental health issue. Could be intoxicated. The State wants you to guess and say take the one we're asking you to, that he knew the car was stolen and that's the reason he left.

JRP 104. In response to this argument the deputy prosecutor, in his rebuttal closing argued:

The bottom line here is you haven't heard any evidence that a defendant was intoxicated. He may have appeared disoriented, may have appeared intoxicated, but there's no evidence that he was intoxicated. There's no blood draw. There was no breath test. You heard no evidence he suffered from mental health issues. There's been no testimony about that whatsoever. What are you left with? You are left with the defendant was in possession of a stolen vehicle and he knew it and that's why he ran.

JRP 105. The deputy prosecutor did not state that Gambill failed to present a witness or that the jury should find Gambill guilty because

Gambill failed to present evidence to support his defense theory. The deputy prosecutor did argue that there was no evidence to support the defense theory, which is permissible. *Sells*, 166 Wn. App. at 930.

None of the above statements by the deputy prosecutor constitute prosecutorial misconduct as neither shifts the burden of proof onto Gambill. Therefore, Gambill's claim of prosecutorial misconduct fails because there was no misconduct. This Court should affirm the conviction.

**E. GAMBILL WAIVED ASSIGNING ERROR TO HIS ALLEGED UNLAWFUL SEIZURE BY NOT RAISING THE ISSUE IN THE TRIAL COURT BECAUSE THE ALLEGED ERROR IS NOT MANIFEST.**

Gambill argues that he was unlawfully seized by law enforcement in violation of his Fourth Amendment rights and his Washington Constitution Article 1, Section 7 rights. Gambill did not raise the issue of an unlawful seizure in the trial court. The record is not sufficient to adjudicate the issue on appeal and therefore it is not a manifest error of constitutional magnitude that can be raised for the first time on appeal.

**1. Standard Of Review.**

A claim of a manifest constitutional error is reviewed de novo. *Edwards*, 169 Wn. App. at 566.

**2. The Record Below Is Not Sufficient To Determine The Merits Of The Alleged Error, Therefore The Alleged Error Is Not Manifest And May Not Be Raised For The First Time On Appeal.**

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. Art. I, § 7. The Washington State Constitution grants greater privacy rights to an individual than the Fourth Amendment of the United States Constitution. *State v. Einfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008).

A person is seized within the meaning of the Fourth Amendment when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L. Ed.2d 497 (1980). Not every encounter between an officer and an individual amounts to a seizure. *Id.* at 551-55.

Generally, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and Article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 51 (2002). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence

becomes fruit of the poisonous tree and must be suppressed. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000).

In evaluating investigative stops, the court must determine: (1) whether the initial interference with the suspect's freedom of movement was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In evaluating the proper scope of a contact to determine whether the intrusion on a suspect's liberty is so substantial that its reasonableness is dependent upon probable cause, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, 102 Wn.2d at 740. Courts have not adopted any specific outside time limitation for a permissible *Terry* stop. *Id.*

Courts generally recognize that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. See, e.g., *Terry v. Ohio*, 392 U.S. at 22. Thus, exceptions to the warrant requirement exist to provide for those cases where the societal costs of obtaining a warrant outweigh the

reasons for prior recourse to a neutral magistrate. *Duncan*, 146 Wn.2d at 171. These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *Id.* at 171-2. The State must show that the particular search or seizure in question falls within one of these exceptions. *Id.* at 172.

To justify a seizure on less than probable cause, *Terry* requires a reasonable suspicion based on the totality of the circumstances that the person seized has committed or is about to commit a crime. *Duncan*, 146 Wn.2d at 172. An officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the detention. *State v. O'Neal*, 148 Wn.2d 564, 576, 62 P.3d 489 (2003). Accordingly, the court determines the existence of such reasonable suspicion based on an objective view of the facts known to the officer. *State v. Mitchell*, 80 Wn. App. 143, 147, 906 P.2d 1013 (1995). Additionally, the court takes into account and gives deference to an officer's training and experience when determining the reasonableness of a *Terry* stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 60 (1991). While an inchoate hunch is insufficient to justify a stop, circumstances that appear innocuous

to the average person may appear incriminating to a police officer in light of past experience. *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). The officer is not required to ignore that experience. *Id.* Further, reasonableness is measured not by exactitudes, but by probabilities. *Id.*

Subsequent evidence that the officer was in error regarding some of the facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) (“The Fourth Amendment does not proscribe ‘inaccurate’ searches only ‘unreasonable’ ones”). Also, before initiating a *Terry* stop, the officer need not rule out all possibilities of innocent behavior. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988). The means of investigation need not be the least intrusive available, but police must reasonably try to identify and pursue less intrusive alternatives. *State v. Mackey*, 117 Wn. App. 135, 139, 69 P.3d 375, 377 (2003).

The State set forth the law regarding reviewing an alleged error for the first time on appeal above. Gambill argues, for the first time on appeal, that he was unlawfully seized by the troopers, after a showing of force, when there was not even articulable suspicion that a crime had occurred. Brief of Appellant 22-26. Gambill argues

the evidence obtained from this unlawful seizure, a mirror found inside a bag he was carrying, should have been suppressed and he was prejudiced by the introduction of the evidence at trial. Brief of Appellant 25-26.

Trooper Thornburg initiated the contact with Gambill as part of his regular duties and a community caretaking function by checking on a car that appeared to be disabled on the shoulder of the freeway. JRP 48-49. Trooper Thornburg spoke to Gambill, who told the trooper he had called AAA and was waiting for a tow truck. JRP 49. Trooper Thornburg contacted dispatch and asked them to call Grant's Towing to get an estimated time for the tow truck's arrival. JRP 50. While in his patrol vehicle Trooper Thornburg observed Gambill grab a bag and put on his backpack. JRP 50. Trooper Thornburg watched as Gambill walked across all lanes of Interstate 5. JRP 51. Trooper Thornburg testified that the thought that the car was probably stolen went through his mind and he ordered Gambill to stop, but Gambill continued on and Trooper Thornburg lost sight of him. JRP 51.

The record is not developed enough to explain why Trooper Thornburg believed the vehicle was stolen. Similarly, the record was not developed enough to determine if Trooper Thornburg also

had other reasons to stop Gambill such as a traffic infraction (walking across a limited access freeway), further community caretaking because of the safety risk of crossing an interstate highway, or any one of a number of legitimate reasons why Trooper Thornburg would order Gambill to stop. Also the record is not developed upon when exactly the troopers were told that dispatch had confirmed the car was stolen, as this was not an issue during the trial.

The testimony a prosecutor elicits at trial is often not as detailed in regards to the reasons for a stop or the exact timing of certain events as it would be during a suppression hearing because the focus of the proceedings is different. In this case the record is not sufficient because Gambill did not file a suppression motion. There is no prejudice if the necessary facts to adjudicate the alleged error are absent from the record. *O'Hara*, 167 Wn.2d at 99. Without prejudice the alleged error is not manifest. *Id.* The insufficient record leaves this Court unable to determine the merits of the alleged error and bars Gambill from raising the issue for the first time on appeal. *Id.* This Court should decline to review the alleged error and affirm Gambill's conviction

**F. GAMBILL RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.**

Gambill's attorney provided competent and effective legal counsel throughout the course of his representation.

Gambill asserts his trial attorney was ineffective for seven different reasons, (1) advocating against his client, (2) failing to object to prosecutorial misconduct, (3) failing to object to improper opinion testimony, (4) failing to object to testimony undermining the presumption of innocence, (5) failing to seek suppression of evidence after an unlawful seizure, (6) failing to subject the State's case to meaningful adversarial testing, and (7) that there was cumulative error warranting reversal. Brief of Appellant 29-38. Gambill's assertion that his attorney was ineffective is false.

Gambill's attorney was not ineffective in any of the areas of his representation. If Gambill's attorney was deficient in any way, Gambill cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

**1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal

and extrinsic evidence outside the trial record will not be considered. *McFarland*, 127 Wn.2d at 335 (citations omitted).

**2. Gambill's Attorney Was Not Ineffective During His Representation Of Gambill Throughout The Jury Trial.**

To prevail on an ineffective assistance of counsel claim Gambill must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the

defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

**a. Gambill’s attorney did not advocate against his client.**

A defendant must demonstrate that there is “an actual conflict of interest adversely affecting his lawyer’s performance” in order to establish that the defendant’s right to counsel was violated due to a conflict of interest. *State v. Regan*, Wn. App. 419, 427, 177 P.3d 783 (2008). If the standard is met this Court presumes prejudice. *Regan*, Wn. App. at 427. For a conflict to be an actual conflict it must affect the attorney’s performance. *Id.* at 427-28. A defendant need not show prejudice but must show, “that some plausible alternative defense strategy or tactic might have been pursued but was not and that alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interest. *Id.* at 428 (internal quotations and citations omitted). The conflict had to either, “cause some type of lapse in representation contrary to the defendant’s interest,” or would have

likely affected particular aspects of the attorney's advocacy on behalf of his client. *Id.* (internal quotations and citations omitted).

Gambill argues that his case is analogous to *Regan* because his attorney had a classic actual conflict of interest and was given the choice of advocating for his client or his own interests. Brief of Appellant 28. Gambill's argument hinges on Mr. Brown's assertion that he had reviewed the discovery with Gambill, contrary to Gambill's representation to the trial court. See JRP 9-10. These two statements, that discovery had been reviewed with Gambill does not rise to Mr. Brown advocating his own interest over his client's interest. It is painfully evident that Gambill was seeking to delay the proceedings. It is curious that Gambill did not allege in his letter that Mr. Brown did not review any documentation with him. See CP 21. Whatever the case, this is not similar to *Regan* where an attorney was called to testify against the client in a bail jumping trial and a subordinate attorney was faced with angering her boss by interfering with his vacation by proceeding to trial on time and advocating for her client's right to a speedy trial, which he clearly wanted to exercise. See *Regan*, 143 Wn. App. 428-32.

Mr. Brown's ability to defend Gambill and advocate on Gambill's behalf was not affected by any conflict. There was no

actual conflict in this case and Gambill's ineffective assistance of counsel claim thereby fails.

**b. There was no prosecutorial misconduct therefore Gambill's attorney was not ineffective for failing to object during the deputy prosecutor's closing argument.**

Gambill argues his attorney was ineffective for failing to object to the instances of prosecutorial misconduct during closing argument that shifted the burden of proof onto Gambill. As argued earlier in this brief, the deputy prosecutor did not commit misconduct during his initial closing argument or during his rebuttal closing argument. It is not ineffective to fail to object to argument that is permissible. An objection would have done nothing to change the outcome of the trial because it would not have been sustained. Gambill's attorney was not ineffective when he failed object to the deputy prosecutor's statement regarding what the case hinged upon or when the deputy prosecutor pointed out the lack of evidence to substantiate the defense theory of the case.

**c. Gambill's attorney did not unreasonably fail to object to improper witness testimony.**

As argued earlier in this brief, the use of the word "stolen" was not impermissible opinion testimony. It is not ineffective to fail to object to testimony that is permissible and relevant. An objection

would not have been sustained. Gambill's attorney was not ineffective when he failed to object to Trooper Thornburg and Trooper Brunstad's use of the word "stolen."

Arguendo, if it was deficient for Gambill's attorney to not object to the testimony, Gambill suffered no prejudice from the error. Ms. Alsalman testified, prior to the troopers' testimony, that the car belonged to her and had been stolen from her home in Portland. JRP 28-29. There is not a reasonable probability that but for failing to object to the troopers' use of the word "stolen" that the outcome of the trial would have been different. See *Horton*, 116 Wn. App. at 921-22. Trial counsel was not ineffective.

**d. Gambill's attorney did not unreasonably fail to object to testimony undermining the presumption of innocence.**

Gambill argues his attorney was ineffective for failing to object to the testimony of Ms. Greenwood and Mr. Strode regarding Ms. Greenwood's uneasiness of being left alone with Gambill. Brief of Appellant 33-34. This ignores that there was a legitimate tactical reason for Gambill's attorney to allow in the testimony regarding how strange Gambill was acting. As argued above, Gambill's attorney used the testimony to offer alternative explanations of why Gambill may have chosen to walk across an interstate highway to

get away from Trooper Thornburg. See JRP 104. The State also maintains that the testimony did not undermine the presumption of innocence and therefore there was no reason to object to it.

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. Because there is a strong presumption that an attorney's performance in his or her representation of the client was reasonable, "[t]o rebut this presumption the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel's performance." *Id.* at 42.

Gambill's trial attorney argued that his client's behavior had been strange. JRP 104. It was argued that Gambill may have been intoxicated or perhaps even have mental health issues and that is why Gambill chose to walk across a dangerous highway to get away from Trooper Thornburg. JRP 104. There was no reason to object to testimony that made Gambill appear intoxicated or not completely all there as it was a legitimate part of the defense

strategy. Gambill's attorney was no ineffective for failing to object to Mr. Strode or Ms. Greenwood's statements regarding Gambill's alarming behavior.

**e. Gambill's attorney was not ineffective for failing to seek suppression of the evidence.**

Gambill argues his attorney was ineffective for failing to file a motion to suppress the evidence obtained as a result of his unlawful seizure. Brief of Appellant 34-35. While Gambill is correct, failure to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel, Gambill has not made a proper showing that his counsel was ineffective for failing to raise a motion to suppress in his case. See *Reichenback*, 153 Wn.2d at 137.

It is true that the only evidence in the trial record regarding the reason for the initial seizure of Gambill is Trooper Thornburg's passing statement that he thought the car might be stolen, this one statement does not mean Gambill's attorney was ineffective for failing to raise a suppression issue. The record does not contain enough information for adequate review. Gambill cannot demonstrate he would win on appeal because the motion was never made and we do not know what evidence would have been

introduced at a suppression hearing. See *McFarland*, 127 Wn.2d at 337.

Even if a suppression motion was warranted and trial counsel was deficient for failing to file it there is no prejudice. The only item obtained from the subsequent search was the review mirror. JRP 55-56. While the deputy prosecutor did liken the review mirror to a souvenir in his closing argument, it was only mentioned once, and the case did not rest on the review mirror in Gambill's bag. JRP 101.

Gambill has not shown that the outcome of his trial would likely be different but for his trial attorney's failure to seek a motion to suppress. *Horton*, 116 Wn.2d at 921-22. Gambill's ineffective assistance of counsel claim fails.

**f. Gambill's attorney subjected the case to meaningful adversarial testing and his decision to focus solely on the knowing element was a strategic decision.**

A criminal defendant is entitled to counsel that provides assistance in his or her defense of the charge pending against the defendant. *United States v. Cronin*, 466 U.S. 648, 653-54, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984). This right entails an attorney who will act as an advocate and protect the adversarial process. *Cronin*, 466 U.S. at 656. A defendant is denied effective assistance of

counsel if his or her attorney “entirely fails to subject the prosecution’s case to meaningful adversarial testing...” *Id.* at 659. This right does not mean the defendant is entitled to an error free trial. *Id.* at 656.

In a trial setting, if an attorney’s conduct can be characterized as legitimate tactics or trial strategy the attorney’s performance is not deficient. *Grier*, 171 Wn.2d at 33. If an attorney’s actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Id.* Because there is a strong presumption that an attorney’s performance in his or her representation of the client was reasonable, “[t]o rebut this presumption the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel’s performance.” *Id.* at 42.

Gambill complains that his trial counsel did not subject the State’s case to meaningful adversarial testing. Brief of Appellant 36. Gambill lists six issues he believes evidences that his attorney failed to subject the State’s case to meaningful adversarial testing. One issue Gambill argues was his attorney’s failure to have a suppression hearing. As argued above, there is no evidence that a

hearing would have been successful or necessary. The remainder of Gambill's issues occurred during the actual trial.

Gambill argues that his attorney's failure to make an opening statement, conduct cross-examination of five of the seven State's witnesses, the limited cross-examination of two State's witnesses, and failure to make any objections during trial evidence that there was no meaningful adversarial testing of the State's case. This is simply not the case. The facts of this case are straight forward, Ms. Alsalman's car was stolen, Gambill was seen driving the car, Trooper Thornburg encountered Gambill at the disabled car on the freeway, and Gambill ran from the trooper. JRP 28-30, 38, 41, 48-51. Gambill's trial attorney established, through cross-examination, that Ms. Alsalman did not know who stole her car. JRP 34-35. Gambill's trial counsel asked Trooper Thornburg if he had collected fingerprints from inside the vehicle or the mirror that had been located in Gambill's bag. JRP 65-66. It is a tactical decision to not waste the time of the court and the jury to ask superfluous questions that would add nothing to one's client's case. The facts were not in dispute in this case, Gambill's knowledge, the mens rea of the crime, was in dispute.

There was no reason to raise any objections, because, as argued above, the questioning of the witnesses by the State was not objectionable, nor was the State's closing argument. Constant objections that would get overruled are not helpful to Gambill. It is also common practice for many practitioners to reserve opening statement. There was no later opening statement because Gambill obviously elected not to testify. JRP 85-86. Finally, Gambill's trial attorney made an excellent closing argument, attempting to poke holes in the State's case and give alternative explanations, using the State's evidence, as why Gambill may have walked away from the trooper. JRP 102-04. That trial counsel was not successful at persuading the jury does not mean he did not subject the case to adversarial testing or effectively advocate for Gambill.

Gambill has not made the required showing that his attorney's performance was deficient and his ineffective assistance claim fails. This Court should affirm Gambill's conviction.

**g. There is no cumulative error warranting reversal of the conviction and remand for a new trial.**

The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial.

*State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted).

The State does not concede there were any errors committed by Gambill's trial counsel. If this Court does find that trial counsel should have filed a suppression hearing, this one error did not deny Gambill a fair trial. Therefore, the cumulative error doctrine does not apply. This Court should find no cumulative error and affirm the conviction.

**G. GAMBILL CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE SENTENCING COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Gambill argues, for the first time on appeal, that the sentencing court impermissibly assessed the cost of attorney fees without proper findings of his ability to pay. Brief of Appellant 38-42. The alleged error is not a manifest constitutional error and therefore, Gambill cannot raise this issue for the first time on appeal.

**1. Standard Of Review**

A claim of a manifest constitutional error is reviewed de novo. *Edwards*, 169 Wn. App. at 566.

**2. Gambill Did Not Object To The Imposition Of Attorney Fees And Cannot Raise The Issue For The First Time On Appeal Because The Alleged Error Is Not A Manifest Constitutional Error.**

The Washington State Supreme Court determined that the imposition of legal financial obligations alone is not enough to implicate constitutional concerns. *State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992). A defendant's failure to object at his sentencing hearing to the court's finding that the defendant has the current or likely future ability to pay legal financial obligations can preclude appellate review of the sufficiency of the evidence that supports the finding. *State v. Blazina*, 171 Wn. App. 906, 911, 301 P.3d 492 (2013).

There was no objection to the imposition of legal financial obligations at the sentencing hearing. SRP (4/23/13) 3-9. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814,

822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

The sentencing court did not make an affirmative finding that Gambill had the present or future ability to pay. CP 7. The boiler plate language of the judgment and sentence does state,

The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 6. Below this statement are two potential check boxes, neither of which is checked. CP 7. While there was not an oral ruling regarding the above statement, it does not mean that the sentencing court did not consider the items listed based upon its knowledge of the defendant and his reason for indigency. Gambill was 28 years old when he was sentenced to nine months. CP 3-4. There is nothing in the record that would support Gambill's inability in the future to make payments on his legal financial obligations.

Moreover, even though the affirmative finding was not made in this case, because the determination that the defendant either has or will have the ability to pay during initial imposition of court

costs at sentencing is clearly somewhat “speculative,” the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation. *State v. Crook* 146 Wn. App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). Another reason to refuse to review the issue at this time is that the superior courts often keep the financial declaration (reviewed at the time public counsel is appointed) under seal and not accessible to the prosecutor. This type of documentation, as stated above, could have been what the sentencing court considered in this case.

The State notes that an appellant making this claim should provide a fair review of the record, i.e. the transcript of the hearing at which public counsel is appointed (at which time the court inquired into a defendant’s employment and assets) and the financial declaration form, if any. Gambill’s first appearance was March 11, 2013 at which time counsel was appointed. Supp. CP PA.<sup>5</sup> This hearing has not been transcribed.

The alleged error is not of constitutional magnitude. Even, if this Court finds the error alleged by Gambill is an error of

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<sup>5</sup> The State will file supplemental Clerk’s papers designating the Clerk’s minutes from the preliminary appearance hearing.

constitutional magnitude, the error is not manifest because there is not a sufficient record for this Court to review the merits of the alleged error. *O'Hara*, 167 Wn.2d at 99; *McFarland*, 127 Wn.2d at 33. Under RAP 2.5(a) Gambill cannot raise the imposition of legal financial obligations for the first time on appeal and this Court should affirm the sentencing court's imposition of legal financial obligations.

#### IV. CONCLUSION

Gambill did not have his constitutional right to counsel violated, the witnesses testimony was proper, the deputy prosecutor did not commit misconduct, he waived any issue regarding an unlawful seizure by failing to raise it in the trial court, he received effective assistance from his counsel and the trial court's imposition of fees was not improper. This court should affirm Gambill's conviction.

RESPECTFULLY submitted this 24<sup>th</sup> day of October, 2013.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

**October 24, 2013 - 4:16 PM**

## Transmittal Letter

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Court of Appeals Case Number: 44816-5

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