

NO. 45376-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS EUGENE RINEHART,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion by admitting evidence under ER 404(b) of a prior incident where Rinehart suffocated the victim; Rinehart did not suffer ineffective assistance of counsel.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. Did the trial court abuse its discretion by admitting evidence of a prior suffocation by Rinehart against the victim under ER 404(b) when it conducted a balancing test pursuant to ER 403 and found that the probative value of this evidence outweighed the danger of unfair prejudice?**
- B. Did Rinehart suffer ineffective assistance of counsel when his attorney did not object during the prosecutor's closing argument?**

III. STATEMENT OF THE CASE

On June 21, 2013, Suzanne McKee was in her apartment in Kelso. RP at 24. McKee's on and off boyfriend, Travis Rinehart, was also in the apartment, as he had been staying with her for two or three weeks. RP at 24-25. At around 9:00 p.m., while Rinehart was sleeping on the couch, McKee left her apartment and went to the Maltese Tavern to call her cousin on a payphone and use her laptop computer.¹ RP at 26-27. Before McKee left, she left a note for Rinehart on the television in case he woke up while she was gone. RP at 27. While at the tavern, McKee did not

¹ Rinehart and McKee had engaged in sexual relations earlier, and he was naked when she left the apartment. RP at 41, 137.

drink any alcohol. RP at 27. McKee returned to the apartment at around 10:45 p.m. RP at 27.

When McKee returned home she changed into her pajamas. RP at 29. After McKee returned, Rinehart woke up and asked her where she had been. RP at 27. McKee told him that she had gone to the tavern to call her cousin and use the tavern's "wi-fi." RP at 27. After a few minutes, Rinehart told McKee, "Don't you ever leave the house when I'm sleeping again." RP at 28. Rinehart was "a little bit angry and aggressive." RP at 28. McKee responded to Rinehart's order not to leave by telling him he was being ridiculous and that she did not appreciate him talking to her like a two-year-old. RP at 28. McKee and Rinehart "went back and forth a little bit more verbally." RP at 28. Because Rinehart was getting loud, McKee asked him to lower his voice. RP at 28.

McKee washed the dishes. RP at 29. As she did, the two of them continued to argue. RP at 29. McKee eventually told Rinehart that if he was "going to have that attitude," she was done with the relationship and would buy him a ticket "back to Westport." RP at 29. McKee then decided to change her clothes and go for a walk. RP at 30. McKee got halfway dressed to the point that she was wearing pants and a bra. RP at 30. When McKee told Rinehart she was going to leave, his anger increased. RP at 30. Rinehart yelled at McKee to leave his tobacco and rolling paper

when she left. RP at 30. McKee told Rinehart that because she had bought the tobacco and they were her rolling papers, if he did not ask nicely, she was not going to do “anything like that for him.” RP at 31.

Rinehart, who was naked, jumped off the bed and ran at McKee. RP at 31, 35. McKee yelled to get her neighbors’ attention. RP at 31. Rinehart grabbed McKee by the neck and threw her down causing her to land on the floor by the heater. RP at 31. The floor of McKee’s apartment was above the ceiling of her neighbor Stephanie Cox’s apartment. RP at 31. On the ground, Rinehart jumped on top of McKee. RP at 32. Rinehart pinned McKee’s arms down with his legs and put both his hands over her nose and mouth “very hard” and “very tight.” RP at 32. McKee could not breathe for what seemed to her to be a “really long time.” RP at 32. Unable to breathe, McKee became dizzy and weak, and lost control of her bodily functions, urinating in her pants. RP at 33. McKee feared that Rinehart would not stop until she was dead. RP at 33. Rinehart kept one hand over McKee’s mouth, then used the other to punch her in the ribs. RP at 33. During the attack McKee yelled a couple of times. RP at 41. While punching McKee, Rinehart asked, “How do you like that?” and “Do you want some more?” RP at 34. He also said, “I don’t want to go to jail. You better shut up, you bitch.” RP at 34. McKee was unable to get Rinehart off of her. RP at 34.

Stephanie Cox was watching television with Jack Wohl in her apartment underneath McKee's when she heard a loud crash against her ceiling. RP at 51. Cox yelled to a neighbor, Helen Severn to call 911. RP at 53. Christopher Jeanette was in his backyard when his girlfriend told him that a woman was crying out for help and saying a man was trying to kill her. RP at 86. Jeanette met up with Cox and Wohl at the fence line. RP at 87. Wohl and Jeanette went to the door of McKee's apartment. RP at 53. As they approached the door, Wohl and Jeanette heard McKee yelling, "Help. Help. Call 911." RP at 80. As Wohl and Jeanette pounded on the door, McKee screamed for help. RP at 54, 87. McKee could hear her neighbors banging on her door. RP at 34. She also heard her neighbors shouting, "You better open this door because if you don't open the door, we're ready to kick it in." RP at 35. After a few minutes, Rinehart opened the door and tried to tell the neighbors everything was all right. RP at 35. McKee yelled to the neighbors not to leave and to call the police. RP at 36.

When Rinehart opened the door, he was naked with blood on his hands. RP at 54, 69, 88. McKee was laying on the floor and appeared to be in fear for her life. RP at 70. Wohl observed blood on McKee. RP at 72. Jeanette observed that McKee had blood on her face and her neck was red. RP at 90. McKee screamed that Rinehart was trying to kill her. RP

at 89. Rinehart slammed the door shut again. RP at 54, 89. Eventually, after allowing him to put on pants, Wohl and Jeanette forcibly moved Rinehart into the hallway. RP at 36, 55, 70.

In the hallway, Wohl and Jeanette informed Rinehart they were making a "citizen's arrest." RP at 71, 89. Rinehart attempted to leave; however Wohl and Jeanette refused to allow him to leave. RP at 72. Eventually, to escape, Rinehart pushed Jeanette. RP at 73. After Jeanette and Rinehart wrestled, Wohl and Jeanette detained Rinehart in a chair until the police arrived. RP at 73.

Cox went to McKee's apartment. RP at 55. McKee's nose was bleeding, she had fingerprint marks on her neck, and her ribs were hurting. RP at 36. McKee remained crying on the floor and in shock. RP at 42. When Cox observed McKee, she observed that McKee had "the fear of God" meaning the "fear of death." RP at 55. Cox observed that McKee was terrified, had no shirt on, and had "peed her pants." RP at 56. Severn also observed McKee after the incident. RP at 101. Severn observed that McKee had blood on her face and arms and that her neck was red. RP at 101. She also observed that McKee had urinated in her clothes. RP at 101.

Officer John Croco and Officer Tim Gower of the Kelso Police Department responded to the apartment. RP at 107, 123-24. When

Officer Croco responded, he spoke with an unidentified male who told him that a sexual assault had occurred upstairs. RP at 107. Officer Croco spoke with McKee, and she told him that she had not been sexually assaulted.² RP at 109, 111. Officer Croco observed that McKee was crying and hysterical, and that she had blood coming down the side of her face, coming from the nose, and on the corner of her mouth. RP at 111, 115. She also expressed to Officer Croco that her rib was in pain and he observed that she had urinated on herself. RP at 111, 119. Officer Croco observed red marks around McKee's neck and chest area. RP at 119. Officer Croco observed redness to McKee's leg. RP at 120. Officer Croco took pictures of McKee. RP at 37, 118-122. These pictures showed McKee's demonstration of how Rinehart pinned her to the floor, her bleeding nose, and the wet spot on her pants from where she urinated. RP at 38-39. Officer Gower arrested Rinehart. RP at 125. Rinehart had a small cut that appeared to be a bite mark on his hand. RP at 125. Rinehart told Officer Gower he had covered McKee's mouth with his hand to keep her from yelling. RP at 170.

² On page 109 of the report of proceedings Rinehart provided, Officer Croco testified that McKee was among those who did not tell him there had been a sexual assault. RP at 109. On page 111 of the report of proceedings, the prosecutor's question was transcribed as "[D]id she tell you she'd – there had been a sexual assault?" Officer Croco then responds, "Yes, she did." RP at 111. However, this was incorrectly transcribed. At trial the actual question asked by the prosecutor was, "Did she tell you she'd – there was no sexual assault?" to which Officer Croco replied, "Yes, she did." See *Objection to Report of Proceedings; Declaration of Court Transcriptionist; Corrected Report of Proceedings* at 111.

The State charged Rinehart with assault in the second degree, unlawful imprisonment, and assault in the third degree. CP at 1-2. The case proceeded to trial, and the jury heard testimony from McKee, her neighbors, and the police. RP at 23-126, 130-32, 170-72. The pictures Officer Croco took of McKee's injuries were admitted into evidence. RP at 37-40, 117-122.

Rinehart testified. RP at 135-168. Rinehart testified that he grabbed McKee by the hair and threw her to the ground. RP at 139-140. Rinehart claimed that to prevent McKee from screaming and spitting on him, he put his "hand up in front of her mouth." RP at 139. Rinehart admitted to assaulting McKee, that he hit McKee's face, but claimed that he did not block her breathing. RP at 139, 159. Rinehart claimed he put his hand in McKee's face to prevent her from screaming and that his hand was in her mouth. RP at 160, 164. Rinehart testified that he wanted McKee to be quiet so that he would not be arrested on a warrant for failing to undergo a domestic violence evaluation from a prior assault of McKee. RP at 140, 157-58.

After Rinehart testified, the State sought to recall McKee to testify in rebuttal about two prior incidents, one where Rinehart had strangled her in a trailer and another where he had suffocated her in a cabin. RP at 174, 193, 200. The jury was excused and McKee testified as to these incidents.

RP at 192-202. The court found by a preponderance of the evidence that the prior incidents had occurred. RP at 203. The court found that the prior incident of suffocation in the trailer was admissible under ER 404(b), but that the prior incident of strangulation in the cabin was not. RP at 205. The court explained the purpose of the evidence and its relevance. RP at 206-07. The court conducted a balancing test pursuant to ER 403 and determined the probative value outweighed the unfair prejudice of admitting the evidence. RP at 205-07. The trial court also provided a limiting instruction explaining the purpose for which this evidence was to be considered. RP at 231.

The limiting instruction stated:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Suzanne McKee's testimony claiming the defendant obstructed her ability to breathe on a prior occasion and may be considered by you only for the purposes of assessing the defendant's credibility, intent, knowledge, absence of mistake, or for assessing the credibility of Suzanne McKee. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP at 231; CP at 28. Rinehart did not object to this instruction. RP at 222.

During closing argument, the prosecutor argued that the evidence proved Rinehart was guilty of assault in the second degree by suffocation.

RP at 255-58. The prosecutor reviewed the definition of suffocation with the jury. RP at 256. First the prosecutor addressed the evidence showing that Rinehart had obstructed McKee's airway. RP at 256-57. After arguing the evidence proved Rinehart had obstructed McKee's airway, the prosecutor then argued that the evidence also showed Rinehart intended to obstruct her ability to breathe. RP at 257. The prosecutor stated:

And then, in addition to that, he had to intend to obstruct the other person's ability to breathe. And, he explained -- he's -- denying he put his hands over her mouth and nose. He's denying that. He's saying he just held them up. But, he admits that if you block someone's ability to make noise and put your hands over their mouth, you're also going to obstruct their ability to breathe at all. It just says, "Obstructs it." And, he doesn't get to put his hands over her mouth. He doesn't get to obstruct her ability to breathe. Really what right does he have to stop her from yelling? I mean, that's not self-defense, that's just blocking a person from, you know, expressing themselves and there's no legal authority to do that that you will find in these instructions. So, yeah, he had the intent. And, you know, we also heard that this isn't the first time this has happened. There was a prior incident. And, and that tells us a lot about his intent and his claim that he didn't do this. And then, the marks tell us about his intent. He was going to shut her up by whatever means was necessary to get her to submit, quit yelling, settle down, give up by blocking her airway is how he chose to do that. So, yes, he did assault her by suffocation.

RP at 257-58. Rinehart did not object to the prosecutor's closing argument. RP at 258. The jury found Rinehart guilty of assault in the

second degree and unlawful imprisonment. RP at 301-02. The jury found Rinehart not guilty of assault in the third degree. RP at 302.

- A. After Rinehart testified that he put his hand on the victim's face to prevent her from screaming, the trial court did not abuse its discretion by admitting evidence under ER 404(b) after conducting a balancing test pursuant to ER 403 and finding the probative value of his prior suffocation of the victim outweighed the risk of unfair prejudice.**

The trial court did not abuse its discretion when it admitted evidence of a prior suffocation of the victim by Rinehart pursuant to ER 404(b) after conducting a balancing test under ER 403. "The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse." *State v. Stubsjoen*, 48 Wn.App. 139, 147, 738 P.2d 306 (1987) (citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984)). Rinehart maintains that the trial court abused its discretion when it conducted a balancing test pursuant to ER 403 and found the probative value of evidence admissible under ER 404(b) outweighed the risk of unfair prejudice. Other than his claim of error in conducting the balancing test under ER 403, Rinehart does not argue that there was not a sufficient basis to admit the evidence under ER 404(b). Because Rinehart fails to show a manifest abuse of discretion, his argument fails.

While ER 404(b) prohibits the admission of evidence of other crimes or wrongs to prove character and show action in conformity therewith, “such evidence may be admissible for other purposes `such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ER 404(b). The uses listed specifically by ER 404(b) are not the only purposes for which such evidence may be admitted, as “[t]he list of other purposes for which evidence of a defendant’s prior misconduct may be introduced is not exclusive.” *State v. Grant*, 83 Wn.App. 98, 105, 920 P.2d 609 (1996). “A ruling under ER 404(b) is reviewed solely for abuse of discretion, which only occurs where the decision of the trial court was manifestly unreasonable or based on untenable grounds.” *State v. Freeburg*, 105 Wn.App. 492, 497, 20 P.3d 984 (2001) (footnote citations omitted). Prior to admitting ER 404(b) evidence the court must (1) find by a preponderance of the evidence the prior act of misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the risk of unfair prejudice pursuant to ER 403. *See State v. Thang*, 15 Wn.2d 630, 642, 41 P.3d 1159 (2002); ER 403.

There is a presumption favoring admissibility under ER 403, and “the burden of showing prejudice is on the party seeking to exclude the evidence.” *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994) (citing 5 K. Tegland, *Wash.Prac., Evidence* § 105, at 346 (1989)). “Because of the trial court’s considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion” *Id.* (citing *State v. Gould*, 58 Wn.App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski*, 40 Wn.App. 601, 610, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985)). “An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.” *State v. Nelson*, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987) (citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979)). “Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” *Gould*, 58 Wn.App. at 180 (citing *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984)).

It should be noted that evidence is only to be excluded when the probative value of the evidence is “substantially outweighed” by the danger of “unfair prejudice.” ER 403. “In determining whether or not there is prejudice the linchpin word is ‘unfair.’” *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987) (citing *State v. Bernson*, 40 Wn.App. 729, 736,

700 P.2d 758, *review denied*, 104 Wn.2d 1016 (1985)). “Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another. However ‘unfair prejudice’ is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors.” *Id.* (internal citations omitted); *see also, Gould*, 58 Wn.App. at 183 (drawing the distinction between prejudicial and unfairly prejudicial evidence).

In *State v. Baker*, 162 Wn.App. 468, 470, 259 P.3d 270 (2011), the defendant was charged with two counts of assault in the second degree by strangulation. The State sought to introduce evidence of two prior strangling incidents under ER 404(b), and the defendant objected. *Id.* 470-72. The trial court held the evidence was more probative than prejudicial and was admissible to show the nature of the relationship between the defendant and the victim, motive, absence of mistake or accident, and to assist in assessing the victim’s credibility. *Id.* at 472. The Court of Appeals found the trial court ruling to be proper for multiple reasons. *Id.* at 473-75. Prior assaults against the same victim were evidence of a hostile relationship that was admissible to show motive. *Id.* at 474. By asserting that he had placed his hand over the victim’s mouth to help the victim, the defendant had made relevant the issue of accident or mistake. *Id.* And, even though the victim had not recanted, prior assaults of the

victim by the defendant were relevant to the jury assessing the victim's credibility. *Id.* at 475. Because the victim's credibility was a central issue at trial, the jury was entitled to evaluate her credibility with "full knowledge of the dynamics of a relationship marked by domestic violence and the effect such relationship has on the victim." *Id.* (citing *State v. Grant*, 83 Wn.App. 98, 107-08, 920 P.2d 609 (1996)).

In *State v. Nelson*, 131 Wn.App. 108, 114, 125 P.3d 1008 (2006), the defendant opposed the trial court's admission of prior uncharged misconduct under ER 404(b). On review, the Court of Appeals found that the admission of this evidence fell within the requirements of ER 404(b). *Id.* at 116. The evidence was admissible to establish a plausible alternative explanation for the victim's inconsistent statements and "to rebut Mr. Nelson's claim that it showed she fabricated the assault." *Id.* Not only does *Nelson* demonstrate that prior uncharged misconduct may be admitted under ER 404(b), but that evidence may be admitted to rebut a claim made by a defendant.

Here, the trial court did not abuse its discretion in admitting the evidence when it found that the probative value of Rinehart's prior suffocation of McKee outweighed the danger of unfair prejudice. The prior suffocation of McKee by Rinehart was highly probative. As in *Baker*, it involved a prior similar act by the same defendant against the

same victim that demonstrated a hostile relationship between the parties. It permitted the jury to know the full dynamics of the relationship between McKee and Rinehart when evaluating her credibility. And, because Rinehart testified that his hands had been on McKee's face, in her mouth, and used to stop her from screaming or spitting, it was relevant to show the absence of a mistake and to show his intent had not been as benign as he had testified to.³ Further, as in *Nelson*, because the defendant's claim was that he had not covered McKee's mouth nor intended to obstruct her airway, the prior suffocation was probative to rebut this claim and allow the jury to assess Rinehart's credibility.

Rinehart's claims of unfair prejudice are illusory. He maintains that the State's case was weak; therefore the 404(b) evidence was more likely to have persuaded the jury.⁴ The State does not concede that this is the correct lens for conducting this analysis. At the time that ER 404(b) evidence is sought to be admitted, the court will often not be in a position to fully analyze the strength of the State's case. Rather the standard for reviewing "unfair prejudice" is where evidence causes the jury to have an

³ Rinehart's claims were inconsistent, as he told Officer Gower that he did place his hand over McKee's mouth. RP at 170.

⁴ It is noteworthy that Rinehart makes no argument for insufficient evidence. His characterization of the evidence as weak ignores several facts that made it a compelling case. *See infra*, Section B-3.

emotional response rather than reach a rational decision. This is the correct legal standard regardless of the strength of the State's case.

At the point the jury heard the evidence of the prior suffocation it was unlikely to have elicited an especially emotional response that overbore the jury's decision to reach a rational decision. First, the court gave a proper limiting instruction that specifically defined the purposes the evidence could be considered for. There is no evidence that the jury failed to follow this instruction. Second, the jury had already heard evidence that Rinehart had suffocated McKee by placing his hand over her mouth. The jury had also seen pictures showing McKee's bloody nose from having her mouth and nose forcibly-covered and a wet spot from where McKee had urinated on herself when she was unable to breathe. The jury heard from witnesses describing having heard McKee scream in fear and having seen her incredibly distraught immediately thereafter. Thus, there was minimal emotional shock in hearing McKee testify about having been suffocated by Rinehart on a prior occasion. Finally, the jury had already heard Rinehart testify that he had tried to stop McKee from screaming so that he would not be arrested on a warrant from having assaulted her in the past. Because Rinehart himself testified to having assaulted McKee in the past, the jury was less likely to experience a surprise emotional response from hearing about the prior suffocation. For these reasons, the trial court

did not abuse its discretion when it found that the probative value of Rinehart's prior suffocation of McKee outweighed the danger of unfair prejudice.

B. Rinehart did not suffer ineffective assistance of counsel.

Rinehart did not receive ineffective assistance of counsel when his attorney chose not to object during the prosecutor's closing argument because the argument was consistent with the court's instruction to the jury, there was a legitimate trial strategy for not objecting, and Rinehart did not suffer any prejudice. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was

afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

1. **Because the prosecutor’s statement was properly within the confines of the purposes for which the court had admitted the evidence under ER 404(b), an objection would not have been sustained; therefore Rinehart’s counsel was not ineffective when he chose not to object.**

Because the prosecutor’s argument was within the limited purposes for which the ER 404(b) evidence had been admitted, an objection would not have been sustained, therefore it cannot serve as a basis for ineffective

assistance of counsel. “Where a claim of ineffective assistance of counsel rests on trial counsel’s failure to object, a defendant must show that an objection would likely have been sustained.” *State v. Fortun-Cebada*, 158 Wn.App. 158, 172, 241 P.3d 800 (2010) (citing *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998)). Rinehart’s argument that the prosecutor argued for propensity evidence misconstrues the prosecutor’s statement. The prosecutor’s argument was in regard to whether Rinehart had the intent to obstruct McKee’s airway and to rebut Rinehart’s claim. This was within the limiting instruction that was given for consideration of the prior suffocation, to which Rinehart did not object.

“In closing argument, the prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence.” *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) (citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)). The prosecutor is permitted to argue inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Any allegedly improper statements should be reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Id.* (citing *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)). When a

prosecutor's closing argument is not focused on proving conformity with prior behavior but countering a defendant's claim, this is not a propensity argument. *See State v. Olsen*, 175 Wn.App. 269, 283, 309 P.3d 518 n.5 (2013).

Here, when the allegedly improper statement was made, the prosecutor was in the process of explaining why, despite Rinehart's claim to the contrary, Rinehart had intentionally obstructed McKee's airway. The context of this argument is important. Rinehart made inconsistent statements regarding covering McKee's mouth from which it could have been inferred that he accidentally obstructed her breathing. Rinehart told Officer Gower he covered McKee's mouth to stop her from screaming. Rinehart testified that he had put up his hands to stop McKee from screaming and spitting. Rinehart admitted on cross-examination that his hand had been on McKee's face and in her mouth. Yet, Rinehart also testified he did not cover McKee's mouth.

The prosecutor argued that, in spite of evidence from which the jury could have concluded that McKee's airway was blocked accidentally, the prior suffocation was evidence that when Rinehart covered McKee's airway he intended to obstruct her airway. The prior suffocation also rebutted Rinehart's claim that his hands were only used to stop her from screaming and spitting. This can be surmised from the prosecutor's

continuing argument for intent that occurred immediately afterward: “He was going to shut her up by whatever means was necessary and get her to submit, quit yelling, settle down, give up by blocking her airway is how he chose to do that.” RP at 258. This argument was consistent with the court’s limiting instruction that permitted the jury to consider the evidence of the prior suffocation to find intent, lack of mistake, and to assess Rinehart’s credibility.⁵

2. Even if the objection would have been sustained, because there was a legitimate trial strategy for not objecting it cannot serve as a basis for Rinehart’s claim of ineffective assistance of counsel.

Rinehart has failed to show that his attorney’s decision not to object was not a legitimate trial strategy. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). Even if it is assumed that the prosecutor’s statement was objectionable, there was a legitimate tactical reason not to object. Because the statement made was brief and the jury had received a limiting instruction for how to consider the prior suffocation; it was a legitimate trial strategy for the

⁵ Rinehart has not argued that his attorney was ineffective when he did not object to the court’s limiting instruction.

Rinehart's attorney to avoid highlighting this evidence by not objecting at the time the statement was made.

The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Trial counsel has "wide latitude in making tactical decisions." *Sardinia*, 42 Wn.App. at 542. "Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* (citing *Strickland*, 104 S.Ct. at 2065). In *Strickland*, the Supreme Court warned against using hindsight to hold counsel to unrealistic expectations:

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 proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 446 U.S. at 669.

Here, in addition to the likelihood that the objection would not have been sustained, there was also an important tactical reason for not objecting. The jury had already heard the prosecutor's statement, therefore Rinehart's attorney had to decide whether he should object and risk highlighting the statement to the jury or refrain from objecting and simply rely on the court's limiting instruction to address the issue.

Considering the brevity of the prosecutor's statement referencing the prior suffocation, it was a reasonable trial strategy for Rinehart's attorney to avoid a drawing attention to the evidence regarding the prior suffocation. This appears to be the tactic that was employed, as Rinehart's attorney made no mention of the prior suffocation during his closing argument. RP at 265-88. Under these circumstances, Rinehart's attorney employed legitimate trial strategy or tactics, therefore his decision not to object cannot serve as a basis for a claim of ineffective assistance of counsel.

3. Because Rinehart has not shown that he suffered prejudice as a result of his attorney's decision not to object, his claim of ineffective assistance of counsel also fails.

Because Rinehart has not shown that he suffered prejudice his claim of ineffective assistance of counsel also fails. To establish prejudice resulting from ineffective assistance of counsel, "[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient performance." *McFarland*, 127 Wn.2d at 337 (citing *Thomas*, 109 Wn.2d at 226). To establish ineffective assistance of counsel Rinehart must also show that his attorney's decision not to object to a statement in the prosecutor's closing argument caused him to suffer

prejudice. Because he did not suffer prejudice as a result, his argument fails.

With regard to allegedly objectionable statements made by the State during closing argument the Washington Supreme Court has stated:

To consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument 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) (internal citations omitted). Further, “[w]here the defense fails to object to an improper comment, the error is considered waived unless it is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (discussing the standard of review for a claim of prosecutorial misconduct). Jury instructions may protect against any potential harm from an errant comment by a prosecutor during closing argument as a reviewing court will “presume that juries follow all instructions given.” *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Here, in the context of the entirety of the trial, there is not a reasonable probability that had the prosecutor's comment not been made,

the result of the trial would have been any different. The jury was instructed on what purposes the prior suffocation could be considered for, and instructed that the attorneys' comments were not evidence. RP at 227, 231; CP at 23, 28. Further, contrary to Rinehart's assertions, the evidence against him in the case was strong. Unlike many incidents of domestic violence that go unnoticed, here several neighbors heard the altercation. McKee's testimony that Rinehart knocked her to the ground was corroborated when the neighbors living directly below McKee heard a loud thump against the floor above them. Red marks were seen around McKee's neck. McKee's testimony that Rinehart covered her nose and mouth and caused her to urinate was corroborated by witnesses and pictures showing her bloody nose and the wet spot on her pants from urinating, as well as Rinehart's bloody hand.

Additionally, Rinehart incriminated himself through many of his own admissions. He admitted to Officer Gower that he covered McKee's mouth. He testified to having assaulted McKee in the past, that he had placed his hand on her face, and used his hand to prevent her from screaming. He admitted that covering someone's mouth would also obstruct her ability to breath. The prior suffocation was also properly admitted and was a factor for the jury to consider when determining the Rinehart's intent. As in *Swan*, Rinehart's attorney's decision not to object

strongly suggests that the argument did not appear critically prejudicial in the context of the trial.

Rinehart makes three claims to attacking McKee's credibility; however none of these are impressive. First, he claims that because neighbors heard her screaming, her claims that he covered her mouth were not credible. This argument is countered by the fact that McKee testified to screaming prior to the suffocation, and by the likelihood that once Rinehart removed one of his hands to punch her, McKee would have had greater freedom to continue to call for help. His second argument is that McKee made a false claim of sexual assault. McKee never made any such claim.⁶ Rinehart's remaining claim is that McKee incorrectly identified which hand he had punched her with. However, McKee's testimony on this issue was not entirely clear in court:

Q: So, while he was punching you, did he have -- he obviously needed a hand to do that. What did he do with the other hand?

A: Yeah. He was only punching me with the one hand, with the right hand, and he still continued to --

Q: Was the other hand still over your nose and mouth?

A: -- have -- yes, yes.

⁶ See *State's Objection to Report of Proceedings; Declaration of Court Transcriptionist*. It is possible that the unidentified male's conclusion that a sexual assault had occurred was based on observations of Rinehart being naked and McKee being half-dressed.

RP at 34. From this testimony it is not entirely clear which hand McKee was describing as being over her mouth and which hand she was being punched with. One possible interpretation is that Rinehart was punching her with the left hand and with his right hand he continued to cover her nose and mouth. Additionally, even if McKee was confused over which hand was being used to strike while the other was being used to suffocate her, this was understandable considering she was relating a traumatic and embarrassing event to a jury comprised of strangers. For these reasons, Rinehart has not shown that his attorney's decision not to object caused him to suffer any prejudice.

IV. CONCLUSION

For the above stated reasons, Travis Eugene Rinehart's convictions should be affirmed.

Respectfully submitted this 10th day of June, 2014.

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Prosecuting Attorney

By:



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Deputy Prosecuting Attorney
Representing Respondent

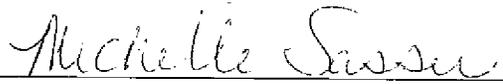
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 10th day of June, 2014.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

June 10, 2014 - 2:36 PM

Transmittal Letter

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