

No. 463181-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHERYL A. STRONG,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES iii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT5

 A. STRONG CANNOT RAISE THE ISSUE OF DEPUTY NELSON’S TESTIMONY STATING HE BELIEVED STRONG HAD COMMITTED THE CRIME OF HARASSMENT BECAUSE SHE DID NOT OBJECT BELOW AND IT IS NOT A MANIFEST CONSITUTIONAL ERROR5

 1. Standard Of Review.....6

 2. Strong Did Not Object To Deputy Nelson’s Testimony That He Believed She Had Committed This Crime And She Cannot Show The Alleged Error Is Manifest6

 B. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED STRONG’S PRIOR CONVICTONS THAT WERE MORE THAN 10 YEARS OLD FOR IMPEACHMENT PURPOSES11

 1. Standard Of Review.....12

 2. The Trial Court Did The Required Balancing Test To Admit Strong’s Prior Convictions12

 3. If There Was Error, Strong Was Not Prejudiced By The Admissions Of The Older Convictions15

 C. STRONG RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.....16

 1. Standard Of Review.....17

2.	Strong's Attorney Was Not Ineffective During His Representation Of Strong Throughout The Jury Trial.....	17
a.	Strong's attorney was not ineffective for failing to object to Deputy Nelson's testimony that he believed Strong committed this crime	18
b.	Strong's attorney was not ineffective for failing to propose WPIC 5.05, the limiting instruction for crimes of impeachment.....	20
D.	THE CUMULATIVE ERROR DOCTRINE DOES NOT REQUIRE REVERSAL IN STRONG'S CASE	22
IV.	CONCLUSION.....	23

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Barragan</i> , 102 Wn. App. 754, 9 P.3d 942 (2000).....	20
<i>State v. Blake</i> , 172 Wn. App. 515, 298 P.3d 769 (2012)	8
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	12
<i>State v. C.J.</i> , 148 Wn.2d 672, 63 P.3d 765 (2003)	12
<i>State v. Donald</i> , 68 Wn. App. 543, 844 P.2d 447, <i>review denied</i> , 121 Wn.2d 1024 (1993)	20
<i>State v. Dow</i> , 162 Wn. App. 324, 253 P.3d 476 (2011)	20, 21
<i>State v. Edwards</i> , 169 Wn. App. 561, 280 P.3d 1152 (2012).....	6
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999)	12
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000)	22
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003)..	18, 20, 22
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009)	8
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996)	12
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009).....	7, 8
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	6, 7, 17, 18
<i>State v. Neidigh</i> , 78 Wn. App. 71, 895 P.2d 423 (1995)	18, 19
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	6, 7, 8
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27, <i>review denied</i> , 155 Wn.2d 1018 (2005)	20
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)....	17, 18

<i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996).....	13
<i>State v. Russell</i> , 104 Wn. App. 422, 16 P.3d 664 (2001).....	13
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046 (1991).....	21
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 210 P.3d 1029 (2009).....	20
Federal Cases	
<i>Hunt v. Smith</i> , 856 F. Supp. 251, (D. Md. 1994).....	23
<i>Mullen v. Blackburn</i> , 808 F.2d 1143, (5th Cir. 1987).....	23
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984)	17, 18
<i>Thompson v. Calderon</i> , 109 F.3d 1358, (9th Cir. 1996).....	22
Constitutional Provisions	
Washington Constitution, Article I § 21	8
Washington Constitution, Article I § 22	8
U.S. Constitution, Amendment VI	8
U.S. Constitution, Amendment XIV	8
Other Rules or Authorities	
ER 609.....	12, 13, 17, 21
RAP 2.5(a).....	6
WPIC 5.05	20

I. ISSUES

- A. Was Deputy Nelson's testimony that he believed Strong committed this crime improper opinion testimony of Strong's guilt that may be raised for the first time on appeal?
- B. Did the trial court err when it admitted Strong's prior convictions that were more than 10 years old for impeachment purposes?
- C. Did Strong receive ineffective assistance from her trial counsel?
- D. Was there cumulative errors that when taken together require reversal?

II. STATEMENT OF THE CASE

In March 2014 Cheryl Strong's seven year-old son, Chris, attended White Pass Elementary School (WPES), in Lewis County, Washington. RP 68-71, 132-34. On March 5, 2014 Strong called WPES to inform the school of a change in address. RP 70-71, 132.¹ Strong told the office worker "that Chris would be riding home that day to 105 Shady Lane and he would be riding the bus there the next day and from there on forward. We changed the bus route information, notified the transportation department." RP 70-71. Christie Collette, the secretary at WPES, made a bus note for the teachers, bus driver and herself so every person was aware that Chris was going to a new address. RP 71.

¹ Ms. Collette's testimony was that the change of address occurred March 5 while Strong testified she called the school on March 4.

Around 3:10 p.m. on March 5, 2014 Strong called the office at WPES, she was upset and said to Ms. Collette, “What the fuck have you done with my son?” RP73. Ms. Collette instantly recognized Strong’s voice. RP 73. Ms. Collette told Strong where Chris was, on the bus to take him to 105 Shady Lane. RP 73. Strong informed Ms. Collette that she had told Chris to tell the bus driver that he was going to a new address that day. RP 73. According to Ms. Collette they do not take a child’s word that they are supposed to go to another address, the parent must call or write a note. RP 73.

On March 6, 2014 Ms. Collette listened to her voice mails and heard an alarming, threatening voice mail from Strong. RP 74. To leave a message on the school voice mail you have to call the main number and then press another number to transfer you to the office. RP 82-83. The message Strong left said, “Sorry Chris, but I’m gonna fucking shoot everybody that goes to your fucking school, works there.” Ex. 1; RP 52, 74. Strong does not pause during the message and there is no background noise that can be heard. Ex. 1. Ms. Collette immediately notified her supervisor, Rebecca Miner the superintendent and acting principal of WPES. RP 74, 84-85. Ms. Miner listened to the message, put the campus

into lockdown and called 911. RP 74, 86. The tone of Strong's voice made Ms. Miner and Ms. Collette fearful; it was also a direct threat to the school campus and the people who attend and work at the school. RP 76, 86-87. It was a traumatizing event for the staff, students and parents. RP 77, 86-87, 124, 126.

Lewis County Sheriff's Deputy Robert Nelson responded to WPES in regards to Strong's threatening voice mail. RP 51. Deputy Nelson listened to the voice mail and observed that Ms. Miner and Ms. Collette were very concerned for their safety and the safety of the students. RP 52-53. Deputy Nelson, concerned for his safety and the safety of those at the school, asked for assistance in locating Strong. RP 55. Deputy Nelson knew Strong from living in the same community. RP 51. Strong called the school in an attempt to pick up her son after hearing about the lockdown. RP 56. Deputy Nelson instructed Ms. Collette to call back Strong and tell her to come pick up her son and find out what Strong would be driving and who would be with Strong. RP 56-57. Deputy Nelson did this "[s]o I would know what she was driving, who might be with her when I contacted her. At this point in time I believed she had committed this crime." RP 57.

Deputy Nelson was able to apprehend Strong when she was en route to WPES to pick up her son. RP 57-58. Strong was cooperative and did not have any weapons on her or in her vehicle. RP 64-65, 141. Strong told Deputy Nelson that she had not made any calls to the school, did not make any threats and she did not know the school had an answering machine. RP 58. Later Strong said she did not mean the threat, she did not mean to leave the message and she was talking to herself, not the staff at WPES. RP 59, 136-37. According to Strong, "Sorry Chris" was a statement to her son, not to the school. RP 137. Strong also remarked to Deputy Nelson that she needed to be more careful about what she says in the future. RP 59

The State charged Strong, by second amended information, with two counts of Harassment – Threats to Kill, alleging the aggravating factor of that "the offense involved a destructive and foreseeable impact on persons other than the victim." CP 11-12. Strong elected to have her case tried to a jury. RP. Prior to the commencement of trial the State filed a motion in limine, seeking to use prior convictions for impeachment purposes that were committed outside of 10 years prior. CP 13-16. The trial court heard argument on the issue. RP 13-18. The trial court ruled in the State's

favor and allowed the State to use the older crimes for impeachment purposes should Strong take the witness stand. RP 17-18. Strong acknowledged the convictions when she testified. RP 144-46.

Strong was convicted as charged. RP 202; CP 67-70. Strong was sentenced to 38 months in prison. RP 226; CP 77-88. Strong timely appeals her conviction. CP 89-101.

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

III. ARGUMENT

A. **STRONG CANNOT RAISE THE ISSUE OF DEPUTY NELSON'S TESTIMONY STATING HE BELIEVED STRONG HAD COMMITTED THE CRIME OF HARASSMENT BECAUSE SHE DID NOT OBJECT BELOW AND IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Strong argues, for the first time on appeal, that Deputy Nelson's testimony that he was attempting to contact Strong away from the school because he believed she had committed this crime was improper opinion testimony and requires this Court to reverse Strong's conviction. Brief of Appellant 6-8. The alleged error is not manifest constitutional error and therefore, Strong 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. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Strong Did Not Object To Deputy Nelson's Testimony That He Believed She Had Committed This Crime And She Cannot Show The Alleged Error Is Manifest.

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.*

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.

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). Strong did not object to the following testimony from Deputy Nelson:

A. And I was advised that Ms. Strong was advised that the school is under lockdown and that she wasn't going to be able to come pick up her kid at that time, and I instructed Ms. Collette to call her back and say that she could come pick up her child, but to find out what she was driving and who would be with her.

Q. Why did you do that?

A. So I would know what she was driving, who might be with her as I contacted her. At this point in time I believed she committed this crime.

RP 56-57. Strong does not explain how she is able to raise the issue for the first time on appeal, nor does she show that she was prejudiced by the deputy's explanation.

Strong simply states that the testimony "was a direct comment on Strong's guilt and denied her a fair and impartial trial." Brief of Appellant 7. Strong states that "this Court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial." *Id.*

There must be a showing that the error is manifest; that Strong was actually prejudiced by the error, and Strong 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 Strong's own voice on the voice mail told it all. Ex. 1. There was no hesitation, there was no

background noise and Strong's voice was loud and clear because she was talking directly into the phone. Ex. 1. The jury heard, "Sorry Chris, but I'm gonna fucking shoot everybody that goes to your fucking school, works there." Ex. 1; RP 52, 74. Strong initially denied calling WPES and making threats to the staff and students. RP 58. Strong even insisted she did not know the school had an answering machine. RP 58. Later Strong said she did not mean to leave a message and it was not a threat to the WPES staff and students but Strong actually talking to herself. RP 136-37.

The jury heard testimony from Ms. Collete that Strong had called the school at 3:10 p.m., upset, and said, "What the fuck have you done with my son?" RP 73. Shortly after this exchange, at 3:41 p.m., Strong called and left the threatening message. Ex. 1. Ms. Collette also explained that to leave a message on her voice mail a person had to call the number for the White Pass schools, then press four for the elementary school and finally press zero to get to the office. RP 82-83. Strong had to make a number of deliberate acts in order to leave the threatening messages on Ms. Collette's voice mail. This was no accident.

Strong has not met her burden to show that she was prejudiced by Deputy Nelson's testimony that he believed she had

committed this crime. First, Deputy Nelson did not state which crime he believed she had committed. Second, the jury was properly instructed. CP 49-66. Third, the other evidence against Strong was overwhelming. This is not simply a he said she said case. The jury heard Strong's own words on that voice mail. Ms. Collette and Ms. Miner testified how fearful they were that Strong would carry out the threat. RP 76, 86-87. Without prejudice the error is not manifest. There is no reasonable probability that the alleged error affected the outcome of the trial. Strong cannot raise this issue for the first time on appeal and this court should affirm her conviction.

B. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED STRONG'S PRIOR CONVICITONS THAT WERE MORE THAN 10 YEARS OLD FOR IMPEACHMENT PURPOSES.

Strong argues the trial court erroneously allowed the State to use convictions that were outside the 10 year time period presumptively allowed for impeachment purposes. Brief of Appellant 11-15. Strong argues that the trial court did not conduct a meaningful analysis prior to ruling the convictions would be admissible and Strong was denied a fair trial by the ruling. *Id.* 13-15. Strong is incorrect, the trial court performed the required analysis, on the record, and did not abuse its discretion when it

ruled the prior convictions outside the 10 year time period were admissible.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

2. The Trial Court Did The Required Balancing Test To Admit Strong's Prior Convictions.

A witness's credibility may be attacked with criminal convictions for offenses involving crimes of dishonesty. ER 609. However, when more than 10 years has elapsed from the release

of the witness from confinement imposed for the conviction, the court must find, on the record, that the probative value substantially outweighs the prejudicial effect. *State v. Russell*, 104 Wn. App. 422, 433, 16 P.3d 664 (2001); ER 609(b). In weighing the prejudicial effect, the Court must consider and weigh the following factors:

(1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

State v. Rivers, 129 Wn.2d 697, 705, 921 P.2d 495 (1996). The trial court is required to “make specific findings on the record as to the particular facts and circumstances it has considered” in rendering its decision. *Russell*, 104 Wn. App. at 436-37 (citation and emphasis omitted).

Strong argues that the trial court “conducted no meaningful test as required by ER 609(b).” Brief of Appellant 13. This argument does not hold water. The trial court went through and weighed each of the six factors and determined the prior convictions were admissible. RP 17-18. The trial court stated,

She has what I would consider to be a moderately lengthy criminal history. The prior convictions, as far as I'm concerned are not all that remote. The nature of the prior crimes we're talking about Burglary and

Theft and Forgery and they are all -- they all deal with the issue of taking a property and/or other crimes or acts of dishonesty.

Assuming she takes the stand -- plus she was 35, she wasn't a young adult at the time that these were committed, the issue of credibility here weighs heavily. If she denies making the call which she apparently did, when she talked to law enforcement, denied making a threat, said she didn't mean anything, the jury needs to have the opportunity to balance those claims, with what her criminal history shows in the past.

Balancing -- looking at the elements that I'm supposed to look at, as far as balancing them, my decision is all four of them are available for use by the State under rule 609 for impeachment should the defendant choose to testify.

RP 17-18. The trial judge evaluated the length of Strong's criminal record; moderate. RP 17. The trial judge looked at the remoteness of the prior conviction; not all that remote. RP 17. The trial court discussed the nature of the prior crimes; all which dealt with the taking of property or were crimes of dishonesty. RP 17. The trial court stated the age and circumstances of Strong; that she was not a young adult, she was 35 years old, at the time of the prior crimes. RP 17. The trial court found that credibility was a central issue of the trial. RP 17-18. Finally, the trial court found that the impeachment value of the prior convictions were sufficient to allow the State to present them. RP 17-18. Therefore, the trial court did

the required balancing test to determine if the prior convictions outside of 10 years would be admissible for impeachment purposes. There was no error and this Court should affirm Strong's convictions.

3. If There Was Error, Strong Was Not Prejudiced By The Admissions Of The Older Convictions.

Arguendo, if the trial court erred in its analysis for determining whether Strong's prior convictions that were more than 10 years old should be admitted for impeachment purposes, Strong has not established that she was prejudiced by the trial court's error.

Strong had one conviction for Forgery that was within the 10 year presumptive admissible time that the State could use for impeachment purposes. RP 14-15, 17. The other three convictions were Theft in the Second Degree, Burglary in the Second Degree and Theft in the First Degree. RP 17. Those three convictions were committed in 2001 to 2002. RP 17. Strong acknowledged during direct examination that she had been convicted of Forgery back in 2004 and a couple of other felonies in 2001 and 2002. RP 144-45. On cross-examination the State asked about each conviction and asked Strong if she was attempted to gloss over them because the case was about credibility and Strong wanted the jury to believe her

version of the events. RP 145-46. Strong maintained that she was not given the opportunity to discuss the prior felony convictions. RP 146.

The addition of the three older felony convictions did not prejudice Strong. Strong already had one impeachable prior conviction, the Forgery from 2004. While the State did mention all of the convictions when discussing credibility during its closing argument, Strong's trial counsel discussed that it had been 10 years and Strong has turned her life around and been a productive member of society. RP 174, 184. The evidence, as argued in the above section was more than just he said she said. The jury was able to hear the voice mail, could hear the anger in Strong's voice and the lack of delay or background noise which makes her story about accidentally leaving the message not plausible. Strong has not shown she was prejudiced by the improper inclusion of the older convictions and therefore her claim fails. This Court should affirm Strong's convictions.

C. STRONG RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Strong's attorney provided competent and effective legal counsel throughout the course of her representation. Strong asserts

her trial was ineffective for failing to object to Deputy Nelson's statement that he believed she committed this crime and for failing to ask for a limiting instruction for the ER 609 impeachment evidence. Brief of Appellant 9-10, 15-16. Strong's attorney was not ineffective in any of the areas of his representation of Strong. If Strong's attorney was deficient in any way, Strong cannot show she was prejudiced by her attorney's conduct and her 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. Strong's Attorney Was Not Ineffective During His Representation Of Strong Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Strong 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. Strong's attorney was not ineffective for failing to object to Deputy Nelson's testimony that he believed Strong committed this crime.

Failure to object to testimony will constitute ineffective assistance of counsel only in "egregious circumstances" or testimony central to the State's case. *State v. Neidigh*, 78 Wn. App.

71, 77, 895 P.2d 423 (1995). If trial counsel's failure to object could have been a legitimate trial tactic counsel is not ineffective and the ineffective assistance claim fails. *Neidigh*, 78 Wn. App. at 77. In this case, Strong's attorney may have wanted to avoid calling attention to Deputy Nelson's testimony that he wanted to know what Strong was driving and who was with her because "at this point in time [he] believed she committed this crime." RP 57. It was a fleeting reference, Deputy Nelson did not state he currently believed Strong was guilty of Harassment, only that he believed at the time she had committed "this" crime. It was a legitimate trial tactic to just let that statement go and not object to draw attention to Deputy Nelson's testimony.

Arguendo, if it was deficient for Strong's attorney to not object to the testimony, Strong suffered no prejudice from the error. Deputy Nelson never states which crime he believed Strong committed. Deputy Nelson was explaining why he took the precautions he did. He never stated Strong was guilty. Further given the evidence presented, there is not a reasonable probability that but for failing to object to Deputy Nelson's testimony that he believed Strong had committed this crime that the outcome of the

trial would have been different. See *Horton*, 116 Wn. App. at 921-22. Trial counsel was not ineffective.

b. Strong's attorney was not ineffective for failing to propose WPIC 5.05, the limiting instruction for crimes of impeachment.

Strong's claim that counsel was required to request a limiting instruction also fails. The decision whether to request a limiting instruction is a classic tactical decision. Limiting instructions reemphasize the evidence. "We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence." *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011); *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993). Moreover, counsel, who is in the courtroom and sitting in the presence of the jury, is in the best position to determine the impact of a particular piece of evidence, and whether the impact was such that reemphasizing the evidence is worth that risk. Trial counsel's failure to object to the remarks at the time they were made "strongly suggests to a court that the argument or event in question

did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

In *Dow*, a burglary case, the Court of Appeals held that the defendant was not denied effective assistance of counsel by his attorney's decision not to request a limiting instruction following the admission of a prior conviction under ER 609. *Dow*, 162 Wn. App. at 335-36. The Court could have held in *Dow* that the admission of a prior conviction under ER 609 requires counsel, as a matter of law, to request a limiting instruction. The *Dow* Court made no such holding.

Strong argues that the jury, absent the limiting instruction, was free to consider the prior convictions for any purpose, including Strong's propensity to commit crimes and the result cannot be deemed harmless. Brief of Appellant 16. The State's argument during closing argument was brief and entirely proper under ER 609. RP 174. The State only mentioned her prior convictions, did not go through what each one was, when discussing Strong's credibility. RP 174. "Like, for example, the dishonest things she's stated here and her crimes of dishonesty, you get to consider all of that, when you decide how credible is it that she didn't make the

phone call to threaten somebody?” RP 174. Trial counsel's decision not to request a limiting instruction was a legitimate tactical decision.

Further, there is not a reasonable probability that but for failing to request the limiting instruction that the outcome of the trial would have been different. See *Horton*, 116 Wn. App. at 921-22. Strong's counsel was able to argue that she had spent 10 years crime free and was a productive citizen. RP 184. Strong was not denied effective assistance of counsel because counsel's decision was a legitimate tactical decision and because she suffered no prejudice. This Court should affirm Strong's convictions.

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT REQUIRE REVERSAL IN STRONG'S CASE.

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). When a defendant/petitioner fails to demonstrate prejudice arising from any single error, he is not entitled to relief under a cumulative error analysis. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996). Alleged errors that are individually

insufficient to require relief do not become meritorious simply by aggregating them into one claim. “The fact that many claims of . . . error are pressed does not alter fundamental math – a string of zeros still adds up to zero.” *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (“Twenty times zero equals zero.”).

IV. CONCLUSION

Deputy Nelson’s testimony regarding his belief that Strong had committed this crime was not improper opinion testimony. The trial court conducted the required balancing test on the record before properly admitting Strong’s convictions that were more than 10 years old for impeachment purposes. Finally, Strong received effective assistance from her trial counsel. This court should affirm Strong’s convictions.

RESPECTFULLY submitted this 24th day of February, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



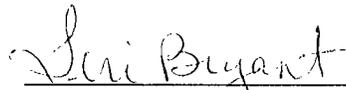
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. CHERYL A. STRONG, Appellant.	No. 46318-1-II DECLARATION OF SERVICE
---	--

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 24, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Thomas Edward Doyle, attorney for appellant, at the following email address: ted9@me.com.

DATED this 24th day of February, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 24, 2015 - 2:05 PM

Transmittal Letter

Document Uploaded: 3-463181-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 46318-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

ted9@me.com