

NO. 48798-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD EARL KIRKLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01187-0

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

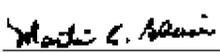
SERVICE	John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3cquitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 3, 2016, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us
----------------	---	--

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

III. ARGUMENT7

 A. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT WHERE THE EVIDENCE WAS ARGUABLY ADMISSIBLE AND HIS OBJECTION THEREFORE WOULD NOT HAVE BEEN SUSTAINED, WHERE THERE WERE TACTICAL REASONS FOR NOT OBJECTING, AND WHERE NO PREJUDICE IS SHOWN BECAUSE ANY ERROR IN ADMITTING THE EVIDENCE WAS HARMLESS.7

 1. Counsel was not ineffective because the evidence in issue can be seen as not hearsay and, hearsay or not, the police testimony was harmless.9

 2. The rehabilitation of a witness accused of lying is not improper and not objectionable.16

 B. ALTHOUGH KIRKLAND DOES NOT SHOW SUFFICIENT REASONS FOR AN ORDER DISALLOWING APPELLATE COSTS, THE STATE WILL NOT SEEK THEM IN THIS MATTER.19

IV. CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	8
<i>In re Rice</i> , 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992).....	8
<i>State v. Bradley</i> , 17 Wn. App. 916, 567 P.2d 650 (1977).....	17
<i>State v. Chenoweth</i> , 188 Wn. App. 521, 354 P.3d 13 (2015).....	11, 12
<i>State v. Crowder</i> , 103 Wash.App. 20, 11 P.3d 828 (2000).....	10
<i>State v. Denton</i> , 58 Wn. App. 251, 792 P.2d 537 (1990).....	18
<i>State v. Gonzalez-Gonzalez</i> , 193 Wn. App. 683, 370 p.3d 989 (2016).....	10
<i>State v. Green</i> , 119 Wn. App. 15, 79 P.3d 460 (2003), <i>rev denied</i> , 151 Wn.2d 1035 (2004), <i>cert. denied</i> , 543 U.S. 1023	17, 18
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	8
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010).....	17, 18
<i>State v. Iverson</i> , 126 Wn. App. 329, 108 P.3d 799 (2005).....	12, 13
<i>State v. Lillard</i> , 122 Wn. App. 422, 93 P.3d 969 (2004).....	12
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 856 (1992).....	8
<i>State v. Madison</i> , 53 Wn.App. 754, 770 P.2d 662 (1989).....	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	8
<i>State v. Smith</i> , 85 Wn.2d 840, 540 P.2d 424 (1975).....	14
<i>State v. Williams</i> , 85 Wash.App. 271, 932 P.2d 665 (1997).....	13
<i>State v. Yoakum</i> , 37 Wn.2d 137, 222 P.2d 181 (1950).....	18
<i>Strickland v. Washington</i> ,	

466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 8, 16

RULES AND REGULATIONS

ER 801 (d) (1)..... 17
ER 801(a)..... 10
ER 801(c)..... 10
ER 801(d) (2) 14
ER 803(a) (3) 14

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the out-of-court statements of witnesses testified to by investigating officers was inadmissible hearsay and, if so, was counsel ineffective for failing to object?

2. Whether the state may rehabilitate a witness after the witness has been cross examined about lies the witness told police?

3. Whether appellate costs should be awarded if the state substantially prevails? (without concession, the state will not seek costs)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Richard Earl Kirkland was originally charged by information filed in Kitsap County Superior Court with robbery in the first degree. CP 1. Later, a first amended information was filed that maintained the robbery charge and added one count of possession of stolen property in the second degree and one count of possession of stolen property in the third degree. CP 26.

A jury found Kirkland guilty on all three counts. CP 63. Kirkland was sentenced within the standard range. CP 79. He was assessed mandatory legal financial obligations only. CP 84. This appeal was timely filed. CP 90.

B. FACTS¹

Kitsap County Sheriff Deputy Meyer was dispatched to a robbery with a gun at Catherine's, a clothing store in Silverdale, Washington. 2RP 32. Deputy Meyer and a second deputy met Leslie Kitt at the locked door. 2RP 33. She was shaken-up: her hands were trembling and she appeared as though she had been crying. 2RP 34. Another employee, Trisha Nace, was also at the store. Id.

Ms. Kitt is the assistant store manager at Catherine's. 2RP 36. The evening of the robbery, Ms. Nace had gone to the restroom and Ms. Kitt was on the phone when a hooded man wearing sunglasses and a scarf over his face walked in and demanded money. 2RP 38. The robber approached her and displayed a weapon, pointing it at her. 2RP 39. He told her to get off the phone and grabbed the phone from her. Id. Ms. Kitt complied and began to access a cash register. 2RP 45. She struggled briefly with the passwords and while doing so advised the robber that Ms. Nace was in the bathroom. 2RP 45-46. As she struggled to open the register, the gun was pointed directly at her. 2RP 47.

Eventually, the register was opened and she placed cash in a small store bag. 2RP 48. She then approached a second register when she heard Ms. Nace leaving the restroom. 2RP 49-50. The robber grabbed

¹ Citation to the VRP: "2RP" refers to VRP volume II, 2/24/16; "3RP" refers to VRP volume III 2/25-26/16; "4RP" refers to VRP 3/25/16.

the bag of cash and fled. Id.

Law enforcement responded and interviewed Ms. Kitt. 2RP 52. She described the robber as wearing a jacket with hood and zipper up, sunglasses and a mask, and gloves, describing the gloves as “basic black gloves.” Id. She described the robber as about 5 feet 5 inches tall; she, being 5 feet tall, was looking up at him. 2RP 53. He could have been taller or shorter by a few inches. 2RP 57. She estimated that the robber was between 18 and 24. Id. All of his clothing was black or dark colored. Id. A small bit of skin on the robber was exposed and Ms. Kitt described him as possibly Hispanic. 2RP 54.

Ms. Nace was a sales associate at the store. 2RP 58-59. When she came out of the bathroom, she saw the hooded man grab the bag of money and run out the door. 2RP 60. She saw him for a few seconds only. 2RP 64. She described the robber as slim and a bit taller than Ms. Kitt. Id.

Sherriff’s office detectives investigated the robbery. 2RP 70-71. They were advised of a witness, Nicolas Galloway, and met him at the Sherriff’s office for interview. 2RP 72. Mr. Galloway provided “names, location, clothing descriptions and what he had overheard in a conversation” which led the detective to seek out some other individuals. 2RP 73. Galloway provided an address and names and descriptions of a suspect. Id. He said one EJ was the robber. Id. EJ was with subjects

named Marty Major and Nicolas Beckstead-Braghetta. 2RP 73-74. The detective determined that EJ was the defendant, Richard Kirkland. *Id.* The police went to find the individuals mentioned by Galloway. *Id.*

Police went to a house and found Messrs. Major and Beckstead-Braghetta. 2RP 77. Beckstead-Braghetta's clothing description was consistent with those given by victims at Catherine's. 2RP 77-78. This consistency was important to the police in assessing the credibility of what they were being told. *Id.* Mr. Beckstead-Braghetta was reluctant to speak at first, but became more cooperative, providing a fluid statement that was consistent with someone with knowledge of the facts. 2RP 107-08. Acting on what they had been told, the police decided that they would attempt contact with EJ the next day. 2RP 79.

A search warrant was issued for a residence that was associated with the suspect and his girlfriend. 2RP 79. A SWAT team was attempting entry and, after numerous calls for Kirkland to come out, he finally did. 2RP 80. He was taken into custody. 2RP 83-84. The house was searched but no gun was found. 2RP 89-90. No Christine's bag or quantities of money were found. 2RP 90-91. Police did find a pair of black gloves and a brown holster. 3RP 232. Police also found a checkbook that did not belong to Kirkland and a prescription drug bottle that also did not belong to Kirkland. 2RP 212 (pill bottle), 2RP 213 (checkbook).

At trial, Ms. Lisa Sanch testified that she had been the victim of a car prowl. 3RP 242-243. A prescription bottle had been taken out of her car. Id. She identified the prescription bottle found in Kirkland's room as the one stolen from her car. Id. Ms. Stephanie Smith testified that her purse had been stolen out of her car. 3RP 245. She identified the checkbook found in Kirkland's room as belonging to her and her husband and as having been stolen when her purse was taken. 3RP 248.

Detectives interviewed Kirkland's girlfriend, Lindsay Potts. (named at 2RP 202). The girlfriend had seen Kirkland with a fake gun and related that her brother had seen it too. 2RP 85. The brother, Cody Hertenstein, was contacted. 2RP 86. He had lived with his sister and EJ. 2RP 202. He had moved out but related that on a visit to the house he had seen a plastic gun on the floor of his sister and EJ's bedroom. 2RP 205, 206-07.

Mr. Beckstead-Braghetta testified that he was hanging out in Silverdale and was going to call his uncle, Mr. Major, for a ride home. 2RP 164. He related being at McDonalds when Kirkland approached. 2RP 165. Kirkland asked to use his phone, which was not operational, and then showed Mr. Beckstead-Braghetta a gun. 2RP 166. Kirkland told him that he intended to rob something around there, focusing on Macy's. Id. The gun did not make a metal sound when tapped on the table so Mr. Beckstead-Braghetta did not believe it was real; but it

looked like a real gun. 2RP 167. The two left McDonalds and walked near the front of Catherine's where Kirkland said "wait right here." 2RP 169. Kirkland pulled a mask over his head and went inside. Id. As Mr. Beckstead-Braghetta watched, Kirkland pulled the gun out and held it to "this oldish lady." Id. Mr. Beckstead-Braghetta ran away. 2RP 170.

Mr. Beckstead-Braghetta met up with his uncle, Mr. Major, and they proceeded to Wendy's. 2RP 173. He told his uncle what had happened. Id. They went Wendy's to talk to Kirkland's girlfriend. 2RP 174. They arrived at Wendy's and Mr. Beckstead-Braghetta saw Kirkland there. 2RP 175. Kirkland was dressed differently and the gun was not seen at this time. 2RP 178. The men got in Mr. Major's car, drove to a store for cigarettes, and Mr. Beckstead-Braghetta was dropped off at home. 2RP 176.

Mr. Beckstead-Braghetta admitted that he had lied to the police when they first came to the house at four in the morning. 2RP 177. He was afraid of being a snitch and afraid of being arrested because he was there when the robbery occurred. 2RP 177. Apparently, he had not initially told the police that he had seen the robbery. 2RP 195-96. He was asked "why did you lie then but are telling the truth now?" by defense counsel. 2RP 196. The difference was his realization that he could get in trouble if he did not tell the truth. Id. On redirect, the prosecutor asked him about his memory of events. 2RP 197. He agreed

that it was easier to remember the truth than to remember a lie. Id.

III. ARGUMENT

A. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT WHERE THE EVIDENCE WAS ARGUABLY ADMISSIBLE AND HIS OBJECTION THEREFORE WOULD NOT HAVE BEEN SUSTAINED, WHERE THERE WERE TACTICAL REASONS FOR NOT OBJECTING, AND WHERE NO PREJUDICE IS SHOWN BECAUSE ANY ERROR IN ADMITTING THE EVIDENCE WAS HARMLESS.

Kirkland argues that defense counsel's failure to object to various instances of repeating hearsay by police witnesses constitutes ineffective assistance of counsel. This claim is without merit because in this eye-witness case, the out-of-court statements related by the police witnesses were admissible as explanation of the actions taken by police in their investigation or where Kirkland's own statements offered against him. Defense counsel knew this and attacked the eye-witness about his prior inconsistent statements to police. Defense counsel did not object for tactical reasons.

The police witnesses recounted their investigation of the robbery, explaining the information they received at each step of the investigation. The testimony may have intruded into the hearsay rule, but the crucial evidence was Mr. Beckstead-Braghetta's testimony that he actually saw

Kirkland commit the crime.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*,

466 U.S. at 687. Finally,

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse, and we explicitly are not referring to counsel in this case, it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

State v. Madison, 53 Wn.App. 754, 762-63, 770 P.2d 662 (1989), *rev denied* 113 Wn.2d 1002 (1989).

1. Counsel was not ineffective because the evidence in issue can be seen as not hearsay and, hearsay or not, the police testimony was harmless.

Here, defense counsel did not object to the testimony of police witnesses that described the actions they took in their investigation. This testimony included out-of-court statements of witnesses they interviewed. Aside from Mr. Beckstead-Braghetta’s rehabilitation testimony discussed below, we here address the police testimony identified by Kirkland in his brief. The complained-of evidence may be characterized as not hearsay. But, even if it is characterized as inadmissible hearsay, its admission was harmless error. Moreover, defense counsel may well have withheld objection for tactical reasons.

A court reviewing the question as to whether or not a statement is

hearsay reviews the record de novo. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688-89, 370 p.3d 989 (2016). The *Gonzalez-Gonzalez* Court summarized the rules applicable to the present case

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). A “statement” is an oral or written assertion, or a person's nonverbal conduct if that person intends that conduct to be an assertion. ER 801(a). “Whether a statement is hearsay depends upon the purpose for which the statement is offered.” *State v. Crowder*, 103 Wash.App. 20, 26, 11 P.3d 828 (2000). “A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement.” *Edwards*, 131 Wash.App. at 614, 128 P.3d 631. However, where an out-of-court statement is offered for the truth of what someone told the witness, the statement is hearsay even though the witness only implies the out-of-court statement. *Hudlow*, 182 Wash.App. at 276–77, 331 P.3d 90. In determining whether the statement was offered to prove its truth instead of for a benign purpose as the State asserts, we examine whether the benign purpose was relevant. *Id.* at 278–80, 331 P.3d 90.

193 Wn. App. at 689-90. Erroneous admission of hearsay is, however, harmless “unless, within reasonable probabilities, the improper evidence affected the outcome of the trial.” *Id.* at 690-91. The statements testified to by the police in this case were of the type that has been held not to be hearsay because not asserted for the truth of the matter but rather for the purpose of explaining the police activity in their investigation. But even if it is hearsay, this purpose militates in favor of a finding of harmless error.

The record is clear that the victims of this robbery, Ms. Kitt and Ms. Nace, could not see through Kirkland’s disguise. The description of the disguised individual was given but there is little doubt that that

description would not allow for identification of Kirkland without more evidence. The police testimony explained for the jury how they found Kirkland. The use of the statements was not for the truth of the matter, but to explain the steps taken in investigation.

In *State v. Johnson*, 189 Wn. App. 1046, 2015 WL 5099531 (UNPUBLISHED) (2015), for example, defense counsel's failure to object to a grandmother's testimony about a child rape victim's out-of-court allegations was the basis of an ineffective assistance claim. The court noted that "[n]ot all out of court statements constitute hearsay." *Id.* at 11. It was noted that

In some cases, the courts have held that a statement is not hearsay if it is offered as 'background' (typically explaining why a person did or said something) or to supply a context for some other statement that is admissible. Usually these cases involve statements implicating the defendant in a criminal case, but offered for the limited purpose of explaining actions taken by police and others.

Id. (internal quotation omitted). The testimony assailed in the present case can easily be fitted within this rule and regarded as not hearsay.

In *State v. Chenoweth*, 188 Wn. App. 521, 354 P.3d 13 (2015), the Court considered hearsay of the victim's statements that was repeated by four different witnesses. *Id.* at 532. Since the victim's disclosures were not close in time to the event, the Court rejected admissibility under the fact of the complaint doctrine. *Id.* However, the Court noted that none of

the witnesses repeated the substance of the allegations and thus

This testimony was not offered for the truth of the allegations, but to show what the witnesses did next and to provide a basis for their testimony. At his mother's suggestion, C.C. contacted Adult Protective Services, he was referred for a mental health evaluation, and he told the mental health assessor that he had been sexually abused by his father. The case was then referred to the police and assigned to a social worker, who determined that he was a vulnerable adult. Thus, as in *Iverson* [*State v. Iverson*, 126 Wn. App. 329, 108 P.3d 799 (2005)] C.C.'s disclosures were not hearsay because they were not offered for the truth of the disclosures, but to give context for the investigation.

Id. at 534. In candor, the *Chenoweth* analysis was driven by the sentiment that “[h]ere, there was no testimony about the content of the disclosures, so there was no “truth” to be asserted other than the fact that C.C. disclosed the allegations.” Id. at 534-35 (quotation by the court). But, again, the case stands for the proposition that hearsay is admissible or not depending on its use. Showing what a witness did next in the story is a permissible use. See *State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004) (“Out-of-court statements offered for a purpose other than the truth asserted do not qualify as hearsay and are not barred by confrontation clause.”).

The *Chenoweth* Court, as seen, relied on *State v. Iverson*, *supra*. There, an officer investigating a protection order violation was greeted at the door by a woman who identified herself as the victim. 126 Wn. App. at 332-333. The victim did not appear at trial and over defense objection,

the officer was allowed to testify that she had identified herself at the residence. On appeal, the issue was resolved by first noting that the trial court had admitted the testimony as not for the truth of the matter. *Id.* at 336. Further

The statement was nevertheless relevant to explain why the officers, who were by then aware of the protection order and its contents, then conducted further investigation. When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible. *See, e.g., State v. Williams*, 85 Wash.App. 271, 280, 932 P.2d 665 (1997) (holding that officer's statement to another that he smelled alcohol on the breath of the defendant was not offered to prove the truth of the matter, but to show why the officer then requested the defendant to perform a Breathalyzer test, and was not inadmissible hearsay). Thus, the court did not err in admitting the woman's self-identification for the limited purpose of showing that she did so and to help explain the officers' subsequent investigation.

Id. at 337. Significant in *Iverson* is that the state's case would certainly have been insufficient without evidence that the protected person was then present. The hearsay was the only evidence that Iverson contacted the protected person and thus proved an element of the offense. In the present case, the police evidence may have established a circumstantial case against Kirkland but the police provided no direct evidence of the crime.

The cases, then, allow for out-of-court statements admitted to explain the police investigation and not for the truth of the matter. Another theory of admissibility is that the statement shows "the existence of a Design or Plan to do a specific act is relevant to show that the act was

probably done as planned.” *State v. Smith*, 85 Wn.2d 840, 854, 540 P.2d 424 (1975); *see also* ER 803(a) (3). Further,

The only limitations as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this Exception, namely the statements must be of a Present existing state of mind, and must appear to have been made in a natural manner and not under circumstances of suspicion.

Id. (internal citation omitted). Here, Kirkland’s complaint includes the following by detective Blankenship

Q. And did he [Nicolas Braghetta] provide any further information on identity, or how did—how did you determine who EJ was?

A. We found that little earlier on when Nicolas Braghetta got into the car with his Uncle Marty, and he told him about a conversation he had had with a subject named EJ and what the plans EJ had described to him, what he planned to do.

2RP 77-78. Similarly, the testimony of Detective Gundrum, relating out-of-court statements by Nicholas Galloway, discusses Mr. Galloway’s presence when Kirkland outlined his plan to commit a robbery. 2RP 95-97. That Kirkland related his plan to commit a robbery is clearly relevant to the issues in the case and his statements were not made under circumstances where he was under suspicion.

Finally, any reference to Kirkland’s own statements are not hearsay under ER 801(d) (2). Kirkland’s statements were his own and were offered against him and as such are not defined as hearsay. For this reason alone, much of what Kirkland argues here would not have resulted in a sustained objection. And, as argued, the rest of the out-of-court

statements merely explained how the police went about their business.

Defense counsel, viewed under the presumption that he provided effective representation, is charged with knowing the above none-hearsay reasons for admission of the police testimony. Given that, he may well have held his objection in order to not underline the sequence of events leading to the discovery that his client committed the robbery. It is likely that because of the none-hearsay purpose of the testimony, his objections would not have been sustained. Moreover, counsel must have been aware that the recounting of what his client said constituted an admission by party-opponent and as such was not objectionable. Thus there were both tactical and legal reasons to withhold objection. There was no deficient performance in the case.

Finally, it should be obvious that none of the police testimony changed the crucial fact that Mr. Beckstead-Braghetta saw Kirkland commit the robbery. The investigation into the identity of "EJ" and where he was to be found had no impact on the eye-witness testimony. To be sure, Mr. Beckstead-Braghetta's testimony was assailed by the defense on grounds of his inconsistent statements to the police. But the jury clearly accepted the witness's explanation for those inconsistencies and having done that had little reason to consider much if any other evidence in deciding the case. If the evidence complained of was inadmissible

hearsay, its admission did not change the result of the trial. The error was harmless and the prejudice prong of the *Strickland* test fails.

2. *The rehabilitation of a witness accused of lying is not improper and not objectionable.*

Kirkland also claims that counsel was ineffective for failing to object to rehabilitation of Mr. Beckstead-Braghetta after he had been accused of lying.

During his direct testimony, the witness admitted that he had lied when he first spoke with police. 2RP 177. He explained that he did not want to be a snitch and was very nervous during the interview because he did not know if he was going to be arrested. *Id.* On cross-examination, the defense breached the subject, asking “And you—you said you—you lied. Is that what you told us?” 2RP 193. Mr. Beckstead-Braghetta answered in the affirmative and proceeded under questioning to admit that he initially told the police that he knew nothing. *Id.* The inaccuracies in the initial statement were explored by the defense for several pages of transcript. 2RP 193-96. In the end, counsel asked “And why did you lie then but are telling the truth now?” 2RP 196. He answered “I don’t know. It’s—I realized the whole, like, big—I can get in trouble for not telling the truth, you know.” *Id.*

In this context, then, after having been assailed by the defense at

length for lying, the exchange between the prosecutor and Mr. Beckstead-Braghetta occurred. Notably, this exchange does not include any hearsay. Thus ER 801 (d) (1) is of dubious application since his effort to distinguish his lies from his true statements did not include a reference to either prior consistent or prior inconsistent testimony. The passage essentially goes to his memory of the events and asks whether he believes his memory is accurate. This is simply rebuttal to the defense cross-examination that raised an inference of recent fabrication. *See e.g. State v. Bradley*, 17 Wn. App. 916, 919-20, 567 P.2d 650 (1977) (proper rebuttal evidence is not limited by the recent fabrication requirement for admission of prior consistent statements).

In *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010) the Court considered the admissibility of a plea agreement that promised lenient treatment of a defendant if he testified truthfully against Ish. The court's long analysis of the situation with the plea agreement is not directly on point with the present issue. However, the ultimate holding in that case elucidates the present situation: "Once the witness's credibility has been attacked during cross-examination, the prosecutor may reference the witness's promise to testify truthfully on redirect." *Id* at 200; *accord State v. Green*, 119 Wn. App. 15, 79 P.3d 460 (2003), *rev denied* 151 Wn.2d 1035 (2004), *cert. denied* 543 U.S. 1023 (2004).

These cases show the latitude the prosecution is allowed when a witness's credibility has been attacked. Rehabilitation in *Ish* and *Green* went so far as to allow reference to a prior agreement by the witness to truthfully testify. The crucial point is that the defense had attacked credibility, hear underlining Mr. Beckstead-Braghetta's admission that he lied, and the prosecution need not simply leave that attack unanswered; she may rehabilitate the witness. Moreover, the questioning herein addressed Mr. Beckstead-Braghetta memory, he agreeing that it is easier to remember the truth. Nowhere in the exchange can the prosecutor be seen to be asserting her own belief about anything the witness said.

With due respect, the state cannot determine why *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990), cited by Kirkland, applies to this issue. There defense counsel wanted to cross-examine a state's witness with information she had personally received from another witness. This second witness refused to testify and counsel was not allowed to attempt impeachment the first witness armed only with her personal knowledge. Similarly, the state wonders of the applicability to this issue of *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950), also cited by Kirkland. There, a prosecutor cross-examined a witness that he, the prosecutor, had personally interviewed. The uncooperative witness was attacked with the questions and answers from the personal interview. The prosecutor was

essentially testifying to facts that the witness would not adopt and which were found nowhere else in the record. This was error.

In the present case, as argued, the prosecutor simply attempted to rehabilitate her witness by asking about his memory—that truth is easier to remember. The prosecutor advance no outside-the-record fact in doing so. She did not seek rehabilitation from her personal knowledge. Those cases do not apply. And, since the defense opened the door with its credibility attack on this witness, the prosecutor’s brief rehabilitation was not error. Thus, counsel was not deficient in failing to object as an objection would not have been sustained. Kirkland’s ineffective assistance claim fails.

B. ALTHOUGH KIRKLAND DOES NOT SHOW SUFFICIENT REASONS FOR AN ORDER DISALLOWING APPELLATE COSTS, THE STATE WILL NOT SEEK THEM IN THIS MATTER.

Kirkland next claims that he should not be assessed appellate costs if the state substantially prevails in this case. The state questions the notion that this 20 year old defendant will never have the ability to pay costs. It stretches things too far to suppose that this young man will remain indigent forever. Even if he serves every minute of his 56 month

sentence, he will be 25 when he is released and nothing in this record supports the idea that he will at that time be unable to work for his living and pay his bills. The state does not believe that there should be a blanket rule based on the unremarkable reality that a person who cannot pay attorney's fees because he is in custody is indigent for the purposes of litigation.

However, this office is aware of the *Sinclair* Court's policy statements that include that it is doubtful that the state will ever recoup the appellate costs. For this pragmatic reason, the state will not seek appellate costs in this matter.

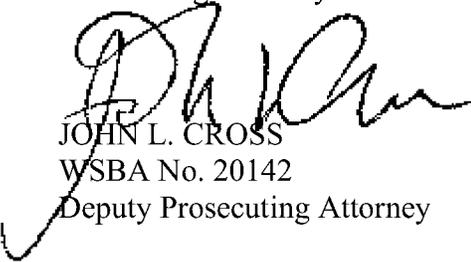
IV. CONCLUSION

For the foregoing reasons, Kirkland's conviction and sentence should be affirmed.

DATED October 3, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

October 03, 2016 - 10:37 AM

Transmittal Letter

Document Uploaded: 3-487985-Respondents' Brief.pdf

Case Name: State of Washington v Richard Kirkland

Court of Appeals Case Number: 48798-5

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: Respondents'

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: Marti E Blair - Email: mblair@co.kitsap.wa.us

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

jahays@3equitycourt.com