

No. 49403-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ORLENA DRATH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni Sheldon, Judge

No. 11-1-00116-4

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Drath contends that her trial attorney provided ineffective assistance of counsel because by miscalculating the standard range sentence that Drath risked if she were convicted as charged at trial and that she was, therefore, denied the opportunity to make an informed decision about whether to accept a plea offer from the State rather than to proceed to trial. The State does not dispute Drath's allegation that her trial attorney erred, but the State contends that Drath's claim of ineffective assistance of counsel should fail because on the facts of this case Drath has not, and cannot, show prejudice resulting from her attorney's error.
2. While her case was pending trial, one of Drath's codefendants wrote love letters to her while he was in jail. The State called the codefendant as a witness at Drath's trial, and Drath sought to show the witness's bias by cross-examining him about the letters that he had written. The court excluded cross-examination about one of the five letters based on relevance but allowed cross-examination about the others. Drath contends that the trial court's relevancy ruling violated her constitutional rights to confront witnesses and to present a defense. The State contends that the trial court did not err because the letter at issue was properly excluded because it was irrelevant to whether the witness was biased when testifying, because the point that Drath sought to extrapolate from the letter was speculative, and because when the witness testified under oath he admitted the points that Drath wished to extrapolate from the letter, thus rendering the letter repetitive.
3. Drath contends that her trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's closing arguments. The State contends that Drath's claim of ineffective assistance of counsel should fail because, given the context of the entire record of the case and the closing arguments, the prosecutor's comments were not

improper. The prosecutor's comments reflected Drath's theory of the case, which was made apparent when Drath made substantively identical comments during her closing argument, and Drath has not, and cannot, show prejudice resulting from either the prosecutor's comments or her attorney's failure to object to the prosecutor's comments.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Drath's statement of facts, except where additional or contrary facts are offered, below, to develop the State's arguments in response to Drath's appeal brief. RAP 10.3(b).

C. ARGUMENT

1. Drath contends that her trial attorney provided ineffective assistance of counsel because by miscalculating the standard range sentence that Drath risked if she were convicted as charged at trial and that she was, therefore, denied the opportunity to make an informed decision about whether to accept a plea offer from the State rather than to proceed to trial. The State does not dispute Drath's allegation that her trial attorney erred, but the State contends that Drath's claim of ineffective assistance of counsel should fail because on the facts of this case Drath has not, and cannot, show prejudice resulting from her attorney's error.

In this appeal, Drath contends that one of her several attorneys in the trial court provided her with ineffective assistance of counsel. Br. of Appellant at 21. The standard of review on appeal for claims of

ineffective assistance of counsel is *de novo*. *State v. Estes*, 193 Wn. App. 479, 488, 372 P.3d 163, 168 (2016), *review granted*, 186 Wn.2d 1016, 380 P.3d 522 (2016), and *aff'd*, 188 Wn.2d 450, 395 P.3d 1045 (2017) (citing *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009)).

The trial court record shows that Drath had a series of five trial court attorneys in this case. RP 1435, 1449, 1464, 1485, 1540. The fourth attorney in this series of five attorneys represented Drath at the first trial of this case, which ended in a mistrial. RP 1485-87. The fifth attorney represented Drath at the second trial, which resulted in the convictions now under review. RP 1511-12. These convictions include guilty verdicts for the following offenses: residential burglary; burglary in the first degree; theft in the first degree; theft of a firearm; unlawful possession of a firearm in the first degree; unlawful possession of a firearm in the second degree; trafficking in stolen property in the first degree; and, bail jumping. RP 1350-51; CP 117-25.

Drath alleges that her fifth trial court attorney misinformed her regarding the maximum sentence she risked if the jury were to return guilty verdicts at trial. RCW 9.94A.589(1)(c) requires that Drath must serve consecutive sentences for her convictions for unlawful possession of

a firearm and her conviction for theft of a firearm, which in this case results in a combined standard range sentence of 103 to 136 months. CP 16, 19. If not for the consecutive sentencing requirement of subsection (1)(c) of RCW 9.94A.589, then all of Drath's convictions would have been sentenced concurrently under subsection (1)(a) and would have resulted in a standard range of 87 to 116 months. *Id.* Therefore, it follows that if Drath's fifth attorney misinformed her about the possibility of a consecutive sentence, then she risked the possibility of a standard range sentence that was 16 to 20 months greater (without calculating goodtime reductions) than what she expected from a concurrent sentence.

The record shows that, prior to trial, Drath's fifth attorney did indeed miscalculate the potential standard range sentence by calculating a concurrent sentence without applying the consecutive sentence requirement of RCW 9.94A.589(1)(c), and the record suggests that it is possible that the attorney never discussed the possibility of consecutive sentencing with Drath. RP 1527-29. However, the record also shows that, even though Drath's fifth attorney miscalculated the standard range sentence that Drath risked, her first attorney probably discussed the possibility of a consecutive sentence with her. RP 1438. And the record

also shows that Drath's second, third, and fourth attorneys certainly told her about the effect of RCW 9.94A.589(1)(c) and the possibility of consecutive sentencing. RP 1452, 1468, 1473, 1475-76, 1491-92, 1494. Still more, her third and fourth attorneys greatly emphasized the consecutive sentencing requirement when advising Drath. RP 1463-64, 1466, 1468, 1473, 1475-79, 1490-94.

Before her fifth attorney entered the case, and before the case proceeded to trial, Drath had opportunities to accept various plea bargains, but she rejected these offers. RP 1468, 1475, 1477-79, 1490-95. In conjunction with the first trial, which resulted in a mistrial, the State offered yet another plea offer, but the State withdrew the offer when it was not timely accepted. RP 1502-07. All the offers discussed here were made and rejected before Drath's fifth attorney entered into the case and were, therefore, untainted by the fifth attorney's mistaken sentencing calculation. *Id.* One of these offers was for a recommended sentence of about 41.5 months, but Drath rejected the offer, choosing instead, with full knowledge of the consecutive sentences, to risk conviction and a resulting range of 103 to 136 months. RP 1475, 1477-78. A subsequent offer, referred to in the record as the June 2 offer, would have resulted in a

sentencing range of 67 to 75 months, but with full knowledge of the operation of the consecutive sentencing required by RCW 9.94A.589(1)(c), Drath rejected that offer, too. RP 1494-95.

After Drath's fifth attorney entered the case, the State offered to reopen the June 2 offer. RP 1520. Drath counteroffered with a request for a recommendation of 40 months. RP 1522-23. The State counteroffered with a recommendation of 50 months. *Id.* The State would have made the 50-month sentence possible by deleting the trafficking in stolen property charge, which, with the two consecutive sentences, would have resulted in a 50-month sentence. *Id.* Drath rejected the plea offer. *Id.* This plea offer was the only plea offer that occurred after Drath's fifth attorney entered the case; thus, it is the only plea offer that could have been tainted by the fifth attorney's 16 to 20 month miscalculation of the sentencing range that Drath faced if she went to trial rather than to accept the State's plea offer. Any such taint, if there was a taint, could occur only if Drath somehow forgot or disregarded the advice that she had received from each of her prior attorneys – and only if she did so without asking her fifth attorney for any kind of explanation for the different advice that she was

receiving from her fifth attorney as compared to each of her prior attorneys.

Still more, when Drath testified, her attorney asked her the following question: “Had you known that your sentence, if convicted as charged, would be a hundred and three to a hundred and thirty-six months, would you have accepted a plea offer of fifty months?” RP 1548. To this question, Drath answered, “Yeah, I would have considered it.” *Id.* Her attorney sought clarification and asked, “Would you have accepted it?” *Id.* Drath answered, “I’m not sure if I can answer that.” *Id.*

The State contends that on the facts of this case, Drath cannot meet the two-part test for claims of ineffective assistance of counsel. To prevail on her claim of ineffective assistance of counsel, Drath must show that her attorney’s representation was deficient but must also show that the deficient representation resulted in prejudice to her. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). The State does not dispute that the record supports a finding that Drath’s fifth trial court attorney provided ineffective assistance by miscalculating the potential standard range sentence, but the State contends that Drath’s claim on appeal should fail because the record does not support a finding that she suffered any prejudice due to her attorney’s error.

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In this context, our Supreme Court defines prejudice as a reasonable probability that counsel’s error affected the outcome of the case. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (further citations omitted). The defendant bears the burden of showing prejudice from her attorney’s error, and to meet her burden, “the defendant must affirmatively prove prejudice and show more than a “conceivable effect on the outcome[.]’”” *Id.* (quoting *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). However, “a ‘reasonable probability’ is lower than a preponderance standard.” *Estes* at 458 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015)). In this context, prejudice is shown where an attorney’s error leads to a probability of prejudice that is “sufficient to undermine confidence in the outcome” of the case. *Estes* at 458 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

The instant case bears some resemblance to the facts of *Estes*, where the defendant’s attorney was unaware that if *Estes*, who had two prior strike offenses, was convicted of any felony offense that included a deadly weapon enhancement, the conviction would count as a third strike

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conviction and would trigger a sentence of life without parole. *State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017). But here, distinguishable from the facts of *Estes*, both parties engaged in active plea-bargaining throughout the pendency of the case. RP 1468, 1475, 1477-79, 1490-95 1502-07, 1520, 1522-23. Whereas in *Estes*, however, “[t]he Defendant, Mr. Estes, declined to enter into any negotiations whatsoever during the entire course of [the] case.” *State v. Estes*, 193 Wn. App. 479, 487, 372 P.3d 163 (2016). On review of the Court of Appeals decision, the Supreme Court noted as follows: “What we *do* know is that lacking knowledge about a key matter in his case, Estes declined to negotiate from the outset.” *State v. Estes*, 188 Wn.2d 450, 466, 395 P.3d 1045 (2017) (emphasis in original).

Still more, no fewer than three of Drath’s attorneys correctly informed her that she risked the consecutive sentencing provision of RCW 9.94A.589(1)(c), and with full knowledge of this fact, she nevertheless rejected numerous plea offers. 1468, 1475, 1477-78, 1494-95, 1502-07. Additionally, in *Estes* the unknown risk to the defendant was the risk of a life sentence without parole. *Estes*, 188 Wn.2d at 455-57. Whereas in the instant case, it is doubtful that Drath did not know that she faced the

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potential of consecutive sentences, and the risk of a consecutive sentence was to add 16 to 20 months to a sentence of 87 to 116 months (CP 16, 19), which was a much less substantial risk than the risk faced by Estes, which was the risk of a life sentence without parole. *Estes* at 455-57.

Finally, Drath's own trial court testimony does not support a finding that there is a reasonable probability that the outcome of the case would have been different if her fifth trial court attorney had, consistently with Drath's three previous attorneys, correctly calculated the potential standard range sentence. RP 1548. In light of the fact that Drath had rejected every other plea bargain that was available to her, it is doubtful that she was, or would have been, dissuaded from rejecting a plea offer based on the fact that, due to the consecutive sentencing requirement of RCW 9A.04.050(1)(c), she would risk an additional 16 to 20 months above the standard range sentence of 87 to 116 months. Even when viewed in hindsight, with all relevant information known to her, when her attorney asked her whether she would have accepted the State's final plea offer had she known about the additional risk of 16 to 20 months on top of the 87 to 116 month risk of going to trial, Drath's answer was, "I'm not sure if I can answer that." RP 1548.

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The State contends that these facts show that there is no reasonable probability that Drath would have accepted the State's 50-month plea offer if her fifth attorney had correctly advised her, but even if this Court were to find prejudice on these facts, the State contends that the remedy of a new trial would not be appropriate in this case. In *Estes*, the Supreme Court found that a new trial was the appropriate remedy, but in *Estes*, there was no plea-bargaining in the trial court. *Estes*, 188 Wn.2d at 453-54, 466. Here, however, there was extensive plea-bargaining, but there was only one plea offer that could have been affected by the mistake at issue, and that was the final offer of a 50-month recommended sentence. RP 1520, 1522-23. Even if this Court were to find that there is a reasonable probability that Drath would have accepted the offer of 50 months because she believed that she only risked a sentence of 87-116 months by going to trial, rather than the sentence of 103-136 months that she actually risked, the difference between the sentence that Drath was willing to risk and the sentence that she actually risked was only 16-20 months. Thus, the State contends that if a remedy is called for, the remedy should be a reduction of 16-20 months from Drath's sentence. *Lafler v. Cooper*, 566 U.S. 156, 167-68, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012);

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see also, *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014) (remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective). Or, if the Court rejects this remedy, then the remedy should be to allow Drath the opportunity to accept the 50-month plea offer that she rejected. *Id.* But in any event, a new trial would not correct the error that is alleged. *Id.*

In conclusion, however, the State contends that on these facts Drath has not met her burden of proving prejudice from her attorney's mistake as required by *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) and the line of cases cited therein. Because Drath has not met her burden of showing prejudice from her attorney's mistake, her claim of ineffective assistance of counsel should fail. *Id.*

2. While her case was pending trial, one of Drath's codefendants wrote love letters to her while he was in jail. The State called the codefendant as a witness at Drath's trial, and Drath sought to show the witness's bias by cross-examining him about the letters that he had written. The court excluded cross-examination about one of the five letters based on relevance but allowed cross-examination about the others. Drath contends that the trial court's relevancy ruling violated her constitutional rights to confront witnesses and to present a defense. The State contends that the trial court did not err because the letter at issue was properly excluded because it was irrelevant to whether the witness was biased when testifying, because the point that Drath sought to extrapolate from the letter was speculative, and because when the witness

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testified under oath he admitted the points that Drath wished to extrapolate from the letter, thus rendering the letter repetitive.

While codefendant Scott Herigstad was in jail awaiting trial in this case, he wrote letters to Drath. Five letters are at issue here. These five letters were marked as trial exhibits 173, 175, 176, 177, and 178. The trial court ruled that one of these letters, exhibit 178, was irrelevant. Drath contends that with this ruling the trial court violated her constitutional rights to confront witnesses and to present a complete defense. Br. of Appellant at 31, 35-36.

Appellate courts review alleged violations of the state and federal confrontation clauses *de novo*. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002) (citation omitted). Review of a trial court's ruling on the admissibility of evidence is for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or when based on untenable grounds. *Id.*

On cross-examination Drath sought to question Scott Herigstad about four of the five letters at issue here, exhibits 175, 176, 177, and 178. RP 612-16. During its direct examination, the State had already examined

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Herigstad about the fifth letter, exhibit 173, and Drath's trial attorney had already cross-examined him about it. RP 579-581, 602-03.

To establish the relevance of her questions about exhibits 175, 176, 177, and 178, Drath provided an offer of proof during which she explained that there were only a few points she intended to address in these letters, and she explained that her intent was to show that in these letters Herigstad started off being cordial, but as the letters progressed over time, he became hostile or angry. RP 612-19. Regarding exhibit 178, Drath explained that when reading the letter, "you can hear the anger escalating." RP 615. Drath explained, "there is clearly a turning point where he's no longer cordial, supportive. His testimony totally turns when he is rejected by Ms. Drath." RP 613. Although Drath used the word "testimony," there was no testimony contained in any of these letters, nor is there any showing that any testimony was in existence when Herigstad wrote the letters.

After a recess, the parties reached an agreement as to specific portions of exhibits 175 and 176 that Drath could reference or read into the record without objection. RP 619-20. But the prosecutor objected to admission of the third phrase that Drath offered from exhibit 177. RP 620.

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The court overruled the prosecutor's objection, but Drath's argument in favor of admission aids in understanding her theory for admission of the exhibit at issue in this appeal, exhibit 178. In response to the prosecutor's objection to exhibit 177, Drath explained as follows:

And our argument, our theory of the case, is that at some point, all the way through this he is saying I'm standing by you, I know you weren't involved, and then there's a turning point where he is starting – and this actually cements it. I will control things by taking a deal if they will cut you out of it and drop all charges on you is really his argument, and then he shift [sic]. The next time we read from him he's no longer saying any of that; he's saying now you've got a new man now. I don't know why you said all that stuff, and there's anger escalating. Am I out there saying -- did I make any statements? No, exclamation point, exclamation point. So, I think this is the last supportive one that says I'm still gonna try and control this from where I'm at. He still has not spoken to the detective or given a statement. He's still communicating, in all efforts, from defense's perspective, to stay in control of the outcome of the case, as to - at least as to Orlena at that point in time.

RP 622-23. In fact, however, Herigstad never said in any of his letters that Drath was not involved. Ex.s 173, 175, 176, 177, 178.

The trial court then asked Drath to explain the relevance of exhibit 177, to which Drath answered as follows:

The relevance is the theory of the defense is that Ms. Drath was not part of the burglary at all, that Mr. Cavanaugh and Mr. Herigstad concocted this after they both started kind of toppling and finding out what the consequences were against them. In fact, one of the discussions during an interview, which may or may not

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come in during Cavanaugh's trial, is that his belief was Scott was gonna take the fall for it and that he was gonna walk. So -- and that was his belief at that time. And I think this just supports the defense theory that that was Scott's - Scott was the primary; Scott was the principal, and when things didn't go his way romantically he started bringing in Ms. Drath as a retaliation.

RP 623-24. The trial court then ruled certain, specified portions of exhibit 177 to be admissible. RP 624. This trial court ruling is not at issue.

The court then addressed exhibit 178 (which is the exhibit at issue on appeal). RP 625. Drath attempted to explain the relevance of exhibit 178 as follows:

This is the turning point for Mr. Herigstad. This is where he's saying - the relevance is that he can see now that he's committed to the relationship, something happens, he hears about it. He reads the testimony of Ms. Drath in police reports or in his discovery. He's now at this point where he was like, I can't believe you think I told them it was all you when I haven't, to this day, given a statement. You said you read the discovery. Did you read any statement given by me? No. That's because I didn't give one. Ask Detective Rhoades.

And so the relevance of that is he's getting agitated. He's escalating and he's saying - you know, she hasn't responded to him for some time in these letters - and we'll get that from him. She didn't respond to the marriage proposal; she didn't respond to his letters after a certain point in time and now he's at this place where he's gotta try and figure it out.

He then says I'm not out there trashing you -- and so she's done something to trash him rather than work with law enforcement. And then he says I heard you have already found someone new. That was quick. And it's clear that he's gone from just being concerned about her making statements against him, escalating to this trying to justify why she's not answering in some

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way is my read on it, but not - he's not getting any answers, and his end result is, well, now you found somebody new, so that's when shortly after this we find that he's cooperating with law enforcement and now, for the first time in his statements, Ms. Drath is involved.

RP 625-26. However, despite counsel's "read on it" (RP 626), the actual words that Herigstad used in exhibit 178 included phrases such as "I'll always love you Lena, and will never forget you." The trial court ruled that exhibit 178 was irrelevant. RP 627.

Following the court's ruling on the exhibits, Drath then proceeded to cross-examine Herigstad. RP 628-36. During the cross examination, Drath questioned Herigstad about exhibit 175 and brought out the fact that Herigstad had asked Drath to marry him. RP 628-30. Drath then referenced exhibit 176 and questioned Herigstad about it. RP 630-32. Drath next referenced exhibit 177 and questioned Herigstad about it, too. RP 632-34. Drath then elicited testimony from Herigstad conceding that at some point Drath had stopped writing to him, that she apparently did not respond to his marriage proposal, that in any event they did not get married, and that at some point they fell out of favor and that he became angry with Drath. RP 634-35.

On appeal, Drath contends that “[t]he defense theory was that Herigstad was initially loving and supportive of Drath, but there was a turning point when Drath rejected him, after which he made statements implicating her” and that “[t]he contents of the letters were offered to demonstrate that shift.” Br. of Appellant at 29. But as the above citations to the record show, to court allowed cross-examination about all the letters other than exhibit 178, and by eliciting admissions from Herigstad, wherein he conceded every point that Drath wished to extrapolate from her interpretation of exhibit 178, Drath effectively showed the “shift” without reference to exhibit 178.

Also, during the State’s direct examination of Herigstad, the prosecutor had questioned Herigstad about a fifth letter, exhibit 173. RP 579-81. When asked by the prosecutor about the nature of Herigstad’s relationship with Drath when he wrote that letter, Herigstad answered as follows:

At that point in time we were still, you know, I thought we were still kind of together and I was writing her and then it went south. She - I had heard through some people that had come into the jail that she was saying a bunch of stuff that wasn’t true, and I was tired of it.

RP 580. Then, on-cross examination, Drath referenced exhibit 173 and engaged in the following questions and answers with Herigstad:

Q. In there, do you indicate that you learned somehow that Ms. Drath had told Rhoades everything and that she rolled on you?

A. That's what I had heard from people that had come into the jail....

Q. Were you angry with her at that time?

A. On and off, yeah. Who wouldn't be?

RP 603. These citations to the record further show that Drath was not prevented from presenting her theory of the case to the jury; nor was she deprived of the opportunity or right to confront the witness in pursuit of her theory of the case. Instead, Drath effectively made her point through concessions from Herigstad, himself, while he testified under oath. Therefore, reference to Herigstad's letter (exhibit 178) – which Herigstad wrote at a time that was remote from his live testimony, and from which it was necessary to speculatively extrapolate Drath's desired points from Herigstad's ambiguous comments – was unnecessary and was at best repetitive.

If the evidence is at least minimally relevant, a defendant has a right to confront witnesses against him with evidence of bias. *State v. Fisher*, 165 Wn.2d 727, 751-53, 202 P.3d 937 (2009); *State v. Hudlow*, 99

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Wn.2d 1, 16, 659 P.2d 514 (1983). “Bias includes that which exists *at the time of trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness’s accuracy *while the witness was testifying*.” *State v. Fisher*, 165 Wn.2d 727, 751-53, 202 P.3d 937 (2009) (quoting *State v. Dolan*, 118 Wn. App. 323, 327-28, 73 P.3d 1101 (2003) (emphasis in original)).

Here, Drath sought to introduce vague, argumentative, speculative evidence in the form of a letter, exhibit 178, to show that Herigstad was biased against Drath. A trial court has wide latitude to limit bias evidence that is speculative and remote. *Fisher*, 165 Wn.2d at 753. Even if the letter could be interpreted as showing some bias, or the reasons behind the bias, the letter was nevertheless useful only to show that Herigstad was previously biased, or previously had a reason for bias, at some point in the past prior to his testimony in court. A trial court may properly measure the admissibility of bias evidence by the proximity in time to the trial testimony. *Fisher*, 165 Wn.2d at 752 (citing *State v. Harmon*, 21 Wn.2d 581, 591, 152 P.2d 314 (1994)); *State v. Hylton*, 154 Wn. App. 945, 958, 226 P.3d 246, 253 (2010) (“the trial court may refuse evidence where the

circumstances only remotely tend to show bias or prejudice, or where the evidence is vague, merely argumentative, or speculative”).

In the instant case, however, the trial court did not refuse to permit Drath’s cross-examination of Herigstad about his potential bias; instead, the court only limited Drath’s use of one of five letters that Herigstad had at some point in the past written to Drath. RP 627. The State contends that on these facts the trial court did not err by excluding cross-examination about exhibit 178. *Fisher*, 165 Wn.2d at 752.

But even if this Court were to find that it was error to disallow cross-examination regarding exhibit 178, the error was nevertheless harmless beyond a reasonable doubt. Confrontation clause errors are reviewed under the constitutional harmless error test, which requires a showing that the error is harmless beyond a reasonable doubt. *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). The State contends that in the context of the instant case, the error, if any, is harmless beyond a reasonable doubt because “no rational jury could have a reasonable doubt that the defendant would have been convicted if the error had not taken place.” *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

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Here, because Herigstad provided testimony under oath that conceded every point that Drath wished to also make by speculatively extrapolating those same points from exhibit 178, the State contends that no rational jury would have been dissuaded from its guilty verdict by the addition of a cross-examination that was intended to argumentatively establish those points by extrapolating additional evidence of them from Herigstad's comments in exhibit 178.

On these facts the State contends that the trial court did not err by disallowing cross-examination about exhibit 178, and that in any event, the omission of exhibit 178 was harmless beyond a reasonable doubt.

3. Drath contends that her trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's closing arguments. The State contends that Drath's claim of ineffective assistance of counsel should fail because, given the context of the entire record of the case and the closing arguments, the prosecutor's comments were not improper. The prosecutor's comments reflected Drath's theory of the case, which was made apparent when Drath made substantively identical comments during her closing argument, and Drath has not, and cannot, show prejudice resulting from either the prosecutor's comments or her attorney's failure to object to the prosecutor's comments.

Here, Drath alleges that her trial attorney provided ineffective assistance of counsel by not objecting to a few statements the prosecutor

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made during closing argument. Br. of Appellant at 38. Drath characterizes the prosecutor's comments as "misconduct," but her only claim for relief on appeal is a claim that her attorney was ineffective for not objecting to the prosecutor's comments. *Id.* at 37-41.

A defendant alleging prosecutorial misconduct bears the burden of demonstrating "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 194, 189 P.3d 126 (2008)). Improper comments are prejudicial only "if there is a substantial likelihood that the prosecutor's comments affected the jury's verdict." *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016).

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). "To prevail on an ineffective assistance claim, a defendant alleging ineffective

assistance must overcome ‘a strong presumption that counsel’s performance was reasonable.’” *Id.* at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To demonstrate prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. *Strickland v. Washington*, 466 U.S. 668, 687, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. “Conceding guilt to the jury can be a sound trial tactic when the evidence of guilt overwhelms.” *State v. Hermann*, 138 Wn. App. 596,

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605, 158 P.3d 96 (2007), citing *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001). “Such an approach may help the defendant gain credibility with the jury when a more serious charge is at stake.” *Hermann* at 605, citing *Silva*, 106 Wn. App. at 599, 24 P.3d 477. “If the concession is a matter of trial strategy or tactics, it does not constitute deficient performance.” *Hermann* at 605, citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

The prosecutor’s closing arguments in this case occupy about 25 pages of transcript. RP 1300-15, 1337-47. Within these 25 pages of transcript, the prosecutor made a few comments that Drath now alleges were misconduct. Br. of Appellant at 38. Specifically, the prosecutor directed the jury to the focal point of his argument by pointing out that although there were multiple charges, he would focus his argument on the highly contested question of whether Drath was the one who committed the crimes alleged. RP 1301-03. The prosecutor did not say that the other elements were unimportant or that proof was unnecessary; instead, he merely explained his reasons for focusing instead on Drath’s involvement in the crimes rather than spend time arguing that the crimes had, indeed, occurred. *Id.* In this context, the prosecutor pointed out that the

allegations that the alleged crimes occurred would not be the primary focus of his arguments, because the evidence that those crimes occurred was overwhelming. *Id.*

In her closing argument, Drath made the same points. RP 1320-35. Drath argued that “there’s no question in this case that Ms. Karlmann and Mr. Maffei were violated. There’s no question that their home was invaded, that they had a burglary and they lost a lot. There’s no question as to what their losses are.” RP 1320. Soon afterward in her closing argument, Drath reiterated, as follows: “There’s no question this residence or this home or this building was invaded. There’s no question these items were taken.” RP 1321. Drath then, in the form of a rhetorical question, stated the focal point of her argument, as follows: “Who was it?” RP 1321.

Drath’s closing argument occupies about 20 pages of transcript. RP 1316-36. Within these 20 pages, Drath’s counsel made the following comment: “My client is charged, and that calls into question every element of every allegation.” RP 1335. But that is all that Drath’s counsel has to say on this subject. RP 1316-36. On appeal, Drath holds this comment out as proof that her trial “[c]ounsel clearly recognized the need to correct the prosecutor’s misleading argument.” Br. of Appellant at 40. From this comment, Drath argues that her trial counsel was ineffective because, “[i]nstead of seeking a

curative instruction from the court, [trial counsel] sought to cure the error herself....” *Id.* The State contends that it is more likely that Drath’s trial counsel uttered this comment reflexively when wrapping up her closing argument. The comment appears to be reflexive because it is universally true when wrapping up closing argument, it is single sentence that is near the end of 20 pages of argument, and it appears that Drath’s trial strategy was to build credibility with the jury by conceding that the crimes alleged by the State had occurred, but to then capitalize on that credibility when denying her own involvement in those crimes.

On these facts, Drath has not and cannot show that her trial counsel’s failure to object to the prosecutor’s comments was not a legitimate trial strategy. For this reason alone, Drath’s claim of ineffective assistance of counsel should fail. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). But still more, Drath also cannot show prejudice from her counsel’s failure to object to the prosecutor’s comments, because she asserted the same points as a part of her trial strategy. If she cannot show prejudice, her claim must fail. *Id.*

D. CONCLUSION

Drath alleges that her trial counsel was ineffective for two reasons.

She first alleges that her trial counsel miscalculated the standard range sentence that she risked if convicted as charged at trial and that, therefore, her attorney's mistake her the denied the opportunity to choose whether to accept a plea bargain rather than risk conviction at trial.

Although the record supports a finding that Drath's trial attorney miscalculated the standard range sentence, the record does not support a finding that there is a reasonable probability that the attorney's error had any effect on the outcome of the case. Therefore, Drath's claim of ineffective assistance of counsel on this point should fail.

Drath also claims that her trial counsel provided ineffective assistance of counsel by not objecting to comments by the prosecutor that Drath now alleges were improper. However, the comments at issue were not improper in light of the context of the entire record of the case and the total context of the closing arguments. The prosecutor merely set the stage by indicating that he was not going to dwell over facts that were not in real dispute, such as whether the crimes alleged had been committed by someone, but was instead going to dwell over the one fact that was greatly

in dispute, which was whether Drath was someone had committed the crimes that were alleged. Drath's arguments made the very same points that she now alleges were improper when made by the prosecutor. She made those points, and thus had no reason to object when the prosecutor made the same points, because her apparent strategy was to build credibility with the jury by conceding that all the crimes alleged had occurred, and to then benefit from that credibility when denying that it was she who had committed those crimes. On these facts, defense counsel was not ineffective for failing to object to comments that fit her trial strategy.

Finally, Drath alleges that the trial court erred when it would not allow her to cross-examine a testifying codefendant about one of five letters that he wrote to her while he was in jail before her trial. Drath sought to show the witness's bias. But the trial court did not err by disallowing cross-examination about this one letter, because any tendency to show bias from this letter was speculative and argumentative. Still more, when the witness testified under oath at trial, Drath succeeded in obtaining direct, unambiguous concessions from the witness to prove every point that Drath wished to extrapolate from the letter at issue.

Therefore, Drath did not suffer any prejudice from the court's ruling in regards to the letter at issue, rendering any error from its exclusion harmless beyond a reasonable doubt.

DATED: October 12, 2017.

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