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State of Washington  
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NO. 50064-7-II

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

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STATE OF WASHINGTON, Respondent

v.

SHAUN CHRISTINE JOHNSON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01964-7

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly admitted opinion evidence.**
- II. There was no judicial comment on the evidence.**
- III. The trial court properly admitted evidence.**
- IV. The trial court properly denied Johnson's motion to suppress evidence.**
- V. The information and the jury instructions contained all essential elements of the crime.**
- VI. The prosecutor did not commit misconduct.**
- VII. Johnson received the benefit of effective counsel.**

## STATEMENT OF THE CASE

The State agrees with the Statement of the Case set forth by Johnson. Where necessary, the State includes additional facts pertinent to specific issues in the argument section below.

## ARGUMENT

- I. The trial court properly admitted opinion evidence.**

- a. The trial court properly admitted opinion evidence from Det. Luque.*

Johnson argues that the trial court erred in admitting evidence from Det. Luque that she was impaired. The trial court properly admitted this evidence and Johnson's claim fails.

Johnson argues that under *State v. Quaale*, 182 Wn.2d 191, 198, 340 P.3d 213 (2014), the opinion evidence from Detective Luque that was admitted at trial was not permissible. *Quaale* does not stand for the proposition that no officer may ever offer opinion evidence, and it is distinguishable from the facts at hand.

This court reviews decisions to admit evidence under an abuse of discretion standard. *State v. Demery*, 144 Wash.2d 753, 758, 30 P.3d 1278 (2001). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* “Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.” *Id.* However, the trial court does abuse its discretion on an evidentiary ruling if it is contrary to law. *State v. Neal*, 144 Wash.2d 600, 609, 30 P.3d 1255 (1996). “An abuse of discretion exists ‘[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.’” *Id.* (alteration in original) (quoting *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)). Here, the trial court properly applied the law, considered the arguments of the parties and came to a reasoned and reasonable decision. The trial court did not abuse its discretion.

In *State v. Quaale*, during a traffic stop, the Trooper performed one field sobriety test, the horizontal gaze nystagmus test (HGN), and

performed no other tests. From that test alone, at trial, the Trooper testified that “there was no doubt [the defendant] was impaired.” *Quaale*, 182 Wn.2d at 195. On appeal, the court held the Trooper’s testimony that there was “no doubt” regarding impairment cast an “aura of scientific certainty to the testimony” and it amounted to a prediction of the specific level of drugs present in a suspect. *Id.* at 198-99. The Court found it was the conclusion in “absolute terms” that gave the appearance that the HGN test alone may produce scientifically certain results that was inadmissible opinion evidence. *Id.* at 199.

In coming to its opinion in *Quaale*, the Supreme Court discussed the case of *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993). In *Heatley*, the officer gave his opinion of impairment based on all of the tests he gave as a whole, which included field sobriety tests, his observations, and physical appearance. *Heatley*, 70 Wn.App. At 576. There, the officer was asked his opinion on the defendant’s impairment due to alcohol consumption. *Id.* In response, the officer testified

Based on my, his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink that he’d been, he could not drive a motor vehicle in a safe manner.

*Id.* The Court in *Heatley* affirmed the defendant’s conviction, finding the officer’s opinion was admissible as it was based on the officer’s

experience and observations. *Id.* at 579-80. The Court in *Quaale* found the *Heatley* opinion evidence was proper, but the opinion evidence in *Quaale* was improper because it was solely based on the HGN evidence. *Quaale*, 182 Wn.2d at 201. The Court in *Quaale* therefore upheld the proposition that a “witness may express an opinion on another person’s intoxication when the witness had the opportunity to observe the affected person.” *Id.* (citing to *Heatley*, 70 Wn.App. at 580).

This case is more analogous to *Heatley* than to *Quaale*. In *Quaale*, the officer testified based on HGN alone, and here, the officer did not observe any clues on the HGN. Therefore his opinion was not solely based on the HGN, but rather based on his broad observations of the defendant’s behaviors, response time, responses, pupil size, general appearance and interactions with others. This officer’s testimony is more in line with that of *Heatley*, which our Supreme Court has cited with approval. Here, the trial court clearly did not make its decision for an untenable reason or on a misapplication of the law, and the evidence was properly admitted.

Johnson further argues this opinion by Detective Luque was an improper opinion on her guilt. ER 704 allows for opinion testimony that embraces an ultimate issue to be decided by the trier of fact. ER 704. “Testimony is not objectionable simply because it involves an ultimate issue.” *State v. Hayward*, 152 Wn.App. 632, 651, 217 P.3d 354 (2009)

(citing ER 704 and *State v. Demery*, 144 Wn.2d, 753, 759, 30 P.3d 1278 (2001) and *City of Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993))

Opinions on guilt are improper whether made directly or by inference. *State v. Montgomery*, 163 Wash.2d 577, 594, 183 P.3d 267 (2008). Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Kirkman*, 159 Wash.2d 918, 927, 155 P.3d 125 (2007). Some areas of opinion are not appropriate for admission into evidence, such as expressions of personal belief as to the defendant's guilt, the intent of the accused, or the veracity of witnesses. *Id.*

In *Heatley*, the court on appeal discusses that a police officer, despite being specially trained to recognize characteristics of intoxicated persons, is a lay witness who is permitted to express an opinion regarding the sobriety of another person. *Heatley*, 70 Wn.App. at 580 (citing to *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990)). In *Heatley*, the court found the officer's opinion on the defendant's impairment was an opinion that was "otherwise admissible" within the meaning of ER 704. *Id.* The same holds true here. Detective Luque, though he has significant training and experience, can still offer an opinion under ER 704, *Heatley, supra*, and

*Murphy, supra*. This holds especially true here as Detective Luque did not perform a formal DRE examination. RP 591-94. He used his training and experience to make observations of Johnson and opined that she was impaired, as the police officer did in *Heatley, supra* and *Murphy, supra*.

The trial court properly admitted Det. Luque's opinion and her claim the trial court abused its discretion in admitting the opinion testimony from Det. Luque fails.

*b. The trial court properly refused to give defense's proposed instruction on DRE testimony.*

Johnson claims the trial court erred in refusing to give an instruction she requested regarding the DRE procedure and protocol. Johnson's instruction was improper as it was an attempt to put forth evidence as opposed to have the court instruct the jury on the law. The trial court properly denied defense's requested instruction.

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when as a whole properly inform the trier of fact of the applicable law." *State v. Douglas*, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). Key to this is the requirement that jury instructions properly inform the trier of fact of the applicable law. Johnson requested the following instruction be given to the jury:

To determine whether a driver is under the influence of a specific category of drugs other than alcohol, DREs use a

12-step procedure based on a variety of observable signs and symptoms that are known to be reliable indicators of drug impairment. All DREs, regardless of agency, use the same procedures, in the same order, on all drivers. In theory, a DRE will not reach a final decision until the entire evaluation is complete.

The 12-steps of the protocol are:

- 1) Breath (or blood) alcohol concentration;
- 2) Interview of the arresting officer
- 3) Preliminary examination;
- 4) Eye examinations;
- 5) Divided attention tests;
- 6) Vital signs examinations;
- 7) Darkroom examination of pupil size;
- 8) Examination of muscle tone;
- 9) Examination of injection sites;
- 10) Statements, interrogation;
- 11) Opinion;
- 12) Toxicology analysis.

A DRE's opinion is not based on one element of the test, but on the totality of the evaluation. When in doubt, the DRE must find the driver is not under the influence.

CP 130; RP 762. This instruction was not appropriate in this case as the State did not offer Det. Luque's opinion as a DRE. The State never hid the fact that Det. Luque did not do the 12-step DRE examination, and the State never attempted to characterize it as such. Johnson attempted to argue at trial, and attempts to argue here, that if a police officer is a DRE who investigates a potential DUI, that officer could not give any opinion of intoxication unless that officer exactly followed the 12 steps in the DRE

examination. A non-DRE police officer may properly testify as to a defendant's intoxication based on his or her training and experience and a totality of the officer's observations. Simply because Det. Luque was trained as a DRE does not mean he cannot also give an opinion, as any police officer could, of what he observed and why it's significant.

But more importantly, Det. Luque testified that he did not follow the 12-step DRE protocol. The State never offered his opinion as a DRE, and this fact was made very clear by both the State and Defense in their examinations of Det. Luque. The jury had this information. Had the trial court instructed the jury as requested it would have led to confusion for the jury as no opinion by any witness was offered under the DRE protocol, but also, it would have unduly highlighted certain trial testimony. The trial court is not permitted to highlight or emphasize any particular witness's testimony or to comment on any testimony or evidence presented at trial. This instruction would have been a judicial comment on the evidence. There is no legal authority for the giving of this instruction, and no authority that supports the claim that Johnson was unable to fairly argue her theory of the case without this instruction. This same information was before the jury through Det. Luque's testimony. The trial court properly chose not to give an unnecessary and confusing instruction.

*c. The trial court properly admitted opinion testimony from Ms. Nelson.*

Johnson claims Ms. Nelson was improperly permitted to opine that Johnson showed signs consistent with methamphetamine use. This court reviews decisions to admit evidence, including opinion testimony, under an abuse of discretion standard. *State v. Demery*, 144 Wash.2d 753, 758, 30 P.3d 1278 (2001). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* “Where reasonable persons could take differing views regarding the propriety of the trial court’s actions, the trial court has not abused its discretion.” *Id.* However, a trial court abuses its discretion on an evidentiary ruling if it is contrary to law. *State v. Neal*, 144 Wash.2d 600, 609, 30 P.3d 1255 (1996). “An abuse of discretion exists ‘[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.’” *Id.* (alteration in original) (quoting *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)). Here, the trial court properly applied the law, considered the arguments of the parties and came to a reasoned and reasonable decision. The trial court did not abuse its discretion.

Under ER 701, a witness must have personal knowledge of a matter that forms the basis of her opinion and the testimony must be rationally based upon the perception, and the opinion must be helpful to

the jury. Here, Nelson testified that she herself used to use methamphetamine. RP 277-78. She testified she had seen others use methamphetamine. *Id.* at 278. She was familiar with the effects of methamphetamine on the human body. Without speculating it is difficult to quantify, but it is unlikely the majority of the jurors had personal experience with methamphetamine and thus the opinion of someone who has used it would be helpful to the jury.

A lay person's observation of intoxication is an example of a permissible lay opinion. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing *Heatley*, 70 Wn.App. at 580). Ms. Nelson clearly falls under this long-accepted example from *Montgomery* of a witness testifying to his or her observation of another's intoxication.

The trial court properly considered the evidence rules and case law in deciding this issue. RP 175-77. The trial court's decision is supported by the law. The trial court did not abuse its discretion in allowing Karen Nelson to testify to her opinion. This court should reject Johnson's claim.

**II. There was no improper judicial comment on the evidence.**

Johnson argues for the first time on appeal that the main investigating officer improperly testified about the fact that the officer sought and obtained a search warrant for her blood during his

investigation. This Court should not consider Johnson's claim as she did not object to the testimony at trial, and even herself introduced evidence on the subject and invited this line of inquiry. Even if this Court does consider Johnson's claim, it should reject her argument as there was no judicial comment on the evidence.

Johnson's claim focuses on the testimony of Detective Luque indicating that during his investigation he applied for a search warrant and that a judge approved the search warrant. *See* Brief of Appellant, pp. 38-41. As an initial matter, Johnson failed to object to the admission of this evidence and as such she has failed to preserve this issue for appeal. RAP 2.5 generally precludes an appellant from raising an issue for the first time on appeal. *State v. McNearney*, 193 Wn.App. 136, 141, 373 P.3d 265 (2016). One exception to this rule is when an appellant demonstrates manifest error that is of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). However, this exception does not allow defendants to obtain new trials whenever they identify a constitutional issue that wasn't addressed at trial. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn.App. 63, 76, 639 P.2d 813 (1982), *rev'd in part on other grounds*, 99 Wn.2d 663, 664 P.2d 508 (1983)). A "manifest" error is one where actual prejudice ensued. *McNearney*, 193 Wn.App. at 141. The appellant must

show that the asserted error had practical and identifiable consequences at trial. *State v. Irby*, 187 Wn.App. 183, 193, 347 P.3d 1103 (2015) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)). “Practical and identifiable error” is determined by considering whether the trial court could have corrected the error, had it been brought to its attention during the trial. *O’Hara*, 167 Wn.2d at 100. This Court does not typically address claims “where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” *See id.*

While an actual judicial comment on the evidence does involve an issue of constitutional magnitude, Johnson cannot show any actual error, let alone manifest error, and thus this Court should decline to review this issue. *See State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968). Johnson also invited any error, to the extent this Court may find there was error. It is well established that a defendant may not set up a claim for appeal. The invited error doctrine precludes a criminal defendant from seeking appellate review of an error she helped create, even if the alleged error involves constitutional rights. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). The invited error doctrine applies when a defendant affirmatively assents to an error, materially contributed to it, or benefited

from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Personal Restraint of Copland*, 176 Wn.App. 432, 442, 309 P.3d 626 (2013). It is clear from a review of the record that Johnson invited the questioning regarding the judge “approving” of the search warrant.

Initially, Det. Luque testified during his direct testimony only that he authored a search warrant to obtain a sample of Johnson’s blood for testing. RP 575-76. The State asked no questions about any judicial involvement and Det. Luque offered no testimony about judicial involvement or “approval” during his direct examination. On cross, Johnson elicited additional information from Det. Luque about his application for a search warrant for her blood. *See* RP 595-96. Johnson is the one who introduced evidence that Det. Luque had to ask a judge to grant his search warrant request and that Det. Luque called a judge and read him his search warrant application. *Id.* Johnson also questioned Det. Luque about his decision to obtain a search warrant, implying Det. Luque’s decision caused significant delay in obtaining the blood sample, thus affecting the results of the blood analysis. *See* RP 623-25. Johnson hammered Det. Luque about why he did not simply ask Johnson to consent to a blood draw, noting that Det. Luque could have obtained the blood sample much earlier had he done that. *Id.* It was only after Johnson raised these issues on her cross-examination of Det. Luque that the State

then introduced testimony on redirect from Det. Luque about why he sought a search warrant as opposed to the defendant's consent, and it was during this brief line of questioning that Det. Luque indicated a judge had approved his request for a search warrant. RP 627. From this it is clear that Johnson invited this line of questioning.

In addition, there simply was no judicial comment on the evidence. A judge is prohibited by article IV, section 16 of our State constitution from "conveying to the jury his or her personal attitudes toward the merits of the case" and from instructing a jury that "matters of fact have been established as a matter of law." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A remark by a judge that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as a judicial comment. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). In this case, the judge made no comment whatsoever regarding the search warrant. Johnson argues that a police officer, testifying about the actions he took in an investigation, caused the trial court to comment on the evidence. Further, Johnson argues that the officer's testimony, constituting the judicial comment on the evidence, established an element of the crime the jury was to determine. The trial court instructed the jury that they alone were to determine the credibility of all witnesses. CP 133. The trial court specifically told the jury it had not

commented on any evidence and if it had to disregard any comment or belief of the judge's opinion. CP 134. There was no testimony or other evidence submitted to the jury about what was required to obtain a search warrant. The legal standard was not discussed or offered to the jury for its consideration, and no witness testified that the judge had to believe the defendant was intoxicated in order to authorize a search warrant. The jury was clearly instructed on the standard of proof of beyond a reasonable doubt. CP 136. And the jury was instructed on the elements of the crime and what it needed to find proved beyond a reasonable doubt in order to return a guilty verdict. CP 144. Juries are presumed to follow the instructions. The detective's testimony, itself, simply does not and cannot amount to a judicial comment on the evidence. A witness's testimony is not a judicial comment on the evidence.

Further, Johnson cites to no authority on point for this assertion. The case law she cites to support her claim is completely inapposite. Johnson relies on *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136, 140 (2006) to support her position. In *Jackman*, the trial court included the victims' birthdates in the to-convict instructions on child sexual abuse charges, wherein the minority status of the victims was an essential element of the crime. *Jackman*, 156 Wn.2d at 743-45. This was considered an improper judicial comment on the evidence because the Court

essentially instructed the jury as to the victims' minority status, thus obviating the requirement that the jury find that element proved beyond a reasonable doubt. This case has no applicability to Johnson's case. Johnson does not allege instructional error, or even that her trial judge made any comment of any sort that was improper. Instead, Johnson attempts to turn a witness's testimony into a constitutional issue she can raise for the first time on appeal by characterizing it as a judicial comment on the evidence. *Jackman* is simply inapplicable and Johnson cites to no other authority to analogize this case to. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); *State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011).

Johnson has not shown any actual judicial comment on the evidence and accordingly, this Court should dismiss her claim.

**III. Johnson's right to confront the witnesses against her was not violated.**

Johnson claims her right to confront the witnesses against her was violated when the investigating officer was allowed to testify as to the amount of medication and method of delivery that Johnson received while

being treated at the hospital. Johnson did not object to this evidence on hearsay or confrontation grounds and thus has failed to preserve this issue for appeal. Furthermore, the evidence was properly admitted and did not violate Johnson's right to confront the witnesses against her. Accordingly, Johnson's claim should be dismissed.

As an initial matter, Johnson claims the trial court was put on notice of her objection to the testimony of Det. Luque as to the medications Johnson received while at the hospital. *See Br. of Appellant*, p. 43. However this claim is inaccurate. Johnson cites to RP 39-40 to support this statement, however at pages 39-40 of the report of proceedings the State is questioning Det. Luque about the medications the defendant received without any objection from Johnson. Therefore this citation does not support Johnson's contention that the court was on notice of her hearsay objection or the State's intent to introduce such evidence over Johnson's hearsay objection. Johnson also cites to RP 433, 453, 550-51, 546, 554-63 to support this allegation. RP 433 is the prosecutor's direct examination of the toxicologist, and while this portion of the testimony discusses narcotic analgesics and their effects on the human body, there is no reference to Johnson or the medications she received at the hospital. RP 453 is an offer of proof conducted by Johnson's attorney of the toxicologist about whether certain drugs would show up in a tox

screen. RP 550-51 is during the State's direct examination of Det. Luque. At RP 546 and 550, the State asks Det. Luque what drugs the medical staff at the hospital had told him they had administered to Johnson; this line of questioning is done with no objection from Johnson. RP 546, 550. Entirely without objection from Johnson, Det. Luque testifies that the medical staff told him they had administered fentanyl and dilaudid to Johnson while she was at the hospital and that she had received 150 milligrams of fentanyl and 1 milligram of dilaudid. *Id.* Johnson did not object to this evidence on any hearsay or confrontation grounds. Johnson only objected when Det. Luque was unable to remember how the drugs were administered to Johnson and the State sought to admit evidence of Det. Luque's prior testimony on the subject via the recorded recollection exception to the hearsay rule. RP 553. It is clear from a full reading of the transcript and especially Det. Luque's testimony that Johnson did not object to the admission of the hearsay she now complains of on appeal, but rather objected to the admission of the detective's prior testimony from the first trial, referring to that as hearsay. RP 553-56. The basis of Johnson's objection is made obvious by the ensuing conversation with the Court and Johnson's attorney's statements about whether the prior testimony qualified as a recorded recollection. RP 557-59. In fact, Johnson's attorney speaks on this objection for over a page of the transcript, and it is clear his

only objection is the propriety of admitting this evidence as a recorded recollection as the prior record was a transcript of the first trial, was not a document that the detective had created himself, and because the record was not made close in time to the actual event. RP 559-60. At no point did Johnson object on the grounds that the statements of the medical staff at the hospital were hearsay. Johnson's objection was that the prior transcript was hearsay and was not properly considered a recorded recollection. Johnson does not appeal on the same grounds as she preserved. The trial court was never given an opportunity to determine whether the statements Johnson now complains of were inadmissible hearsay or whether they were admissible due to some other hearsay exception. This failure to object also prevented the State from curing any error by calling the medical staff at trial or seeking to admit business records from the hospital which show this same evidence.

Generally an evidentiary error cannot be raised for the first time on appeal. RAP 2.5(a); *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) provides that "manifest error[s] affecting [] constitutional right[s]" may be raised for the first time on appeal. But not all asserted constitutional claims may be addressed for the first time on appeal. "Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms." *Lynn*, 67 Wn.App. at 342.

Hearsay involves a defendant's Sixth Amendment right to confront witnesses against him. Thus while Johnson's claimed error, admission of hearsay, does involve her constitutional right to confrontation, it still must be a "manifest error" to warrant review for the first time on appeal. This exception allowing certain issues to be raised for the first time on appeal "actually is a narrow one, affording review only of 'certain constitutional questions.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). In *Lynn*, the Court noted that "permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts." *Lynn*, 67 Wn.App. at 344.

To determine those constitutional issues which may be raised for the first time on appeal, our Courts look to whether the claimed error is manifest, meaning whether it had practical and identifiable consequences in the trial of the case. *Id.* If it did, then the reviewing Court will address the merits of the alleged error and if the Court finds error, it will determine whether that error was harmless. *Id.*; *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). In showing that the claimed error was manifest, Johnson must show how the alleged error actually affected her rights and

make a reasonable showing of a likelihood of actual prejudice. *Lynn*, 67 Wn.App. at 346.

The hearsay issue Johnson raises here is not manifest. Johnson needs to show that the admission of the testimony she claims she objected to at trial, the issue of *how* the medications were administered, not *that* medications were given, or even *how much* of each medication was given (as those issues were testified to without any objection from Johnson, and Johnson even addressed this evidence in her opening statement), but the admission of evidence of the *method of delivery* of the medications Johnson received at the hospital had practical and identifiable consequences in the trial of the case. *See Lynn*, 67 Wn.App. at 344. Determination of actual prejudice requires a focus on whether the error is ‘obvious on the record.’ *O’Hara*, 167 Wn.2d at 100. “It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” *Id.* The proper inquiry is whether, given what the trial court knew at the time, the court could have corrected the error. *Id.* A review of the record here shows the claimed error was not manifest. The admission of the method of delivery of the drugs Johnson received at the hospital did not have practical and identifiable consequences at trial. Johnson did not challenge

admission of the fact that she received medications or even the amount of medication she received. Johnson only objected on the way this information was introduced at trial, and not the facts contained within the information. This is strongly evidenced by the fact that Johnson never objected to the prosecutor's first question asking the detective how the medications were delivered. RP 551-52. In fact, the prosecutor elicited from detective Luque, without objection, that he had been informed on how the drugs were administered, but that sitting in court that day he did not remember. RP 551-52. The trial judge was entitled to assume that the defense had strategic reasons for choosing not to object to the testimony on confrontation clause grounds. *See State v. Fraser*, 170 Wn.App. 13, 28-29, 282 P.3d 152 (2012) (finding no manifest constitutional error when the trial judge was entitled to assume that the defense had strategic reasons for choosing not to object).

Even if this Court finds the admission of the hearsay evidence did have practical and identifiable consequences at Johnson's trial, the Court should decline Johnson's claim on the merits. The confrontation clause prohibits only the admission of testimonial hearsay. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). Out-of-court statements that are not admitted for the truth of the matter asserted are not hearsay. ER 801(c). The statements from the medical providers to Det. Luque were

admitted because they were information typically relied upon by Det. Luque in making his DRE determinations. Had Johnson actually objected at trial and raised the issue of the admissibility of the statements, this issue could have been fleshed out on the record. But, the statements would have been found to be admissible pursuant to ER 703.

ER 703 allows for an expert to base her or his opinion on inadmissible evidence if it is of a type reasonably relied upon by experts in their particular field. ER 703. The State admitted Det. Luque's opinion on Johnson's impairment as an expert; therefore the information Det. Luque relied upon may properly be admitted into evidence at trial. *See In re Detention of P.K.*, 189 Wn.App. 317, 358 P.3d 411, *rev. denied*, 186 Wn.2d 1009, 380 P.3d 493 (2015) (finding the trial court properly allowed an expert to testify as to the content of medical records containing information about a patient); *see also Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn.App. 279, 284 P.3d 749, *rev. denied*, 176 Wn.2d 1014, 297 P.3d 707 (2012) (finding trial court may allow admission of hearsay for purpose of showing basis of expert's opinion).

In *State v. Lui*, our Supreme Court affirmed the admission of hearsay statements that were relied upon by experts who testified at the defendant's murder trial. *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493, *cert. denied*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2842, 189 L.Ed.2d 810 (2014). There the

Court discussed the prior decade of Confrontation Clause jurisprudence and found that “[n]ot everyone who makes some affirmation of fact to the tribunal will fall under the confrontation clause. The word ‘against’ implied some adversarial element—some capacity to inculcate the defendant.” *Lui*, 179 Wn.2d at 481. The Court also noted that their holding would allow expert witnesses to rely on data prepared by others when reaching their own conclusions without a requirement that every technical witness take the stand. *Id.* at 483. The situation in Johnson is similar. Det. Luque’s opinion rested on his drug recognition evaluation, one of the steps being to determine if the defendant had received any medications or other drugs during her medical treatment. This evidence did not invoke the protections of the Confrontation Clause, but rather was evidence used to show that Det. Luque followed as much of the DRE procedure that he could given the circumstances, and to show why he came to the decision he did regarding Johnson’s impairment. Had he been informed she had not received certain medications, his assessment would likely have differed. Thus this information was relied upon, reasonably so, by Det. Luque in performing his job duties, and was properly admissible under ER 703 and ER 801.

Furthermore, any error in the admission of this evidence was harmless. Confrontation clause violations are subject to harmless error

analysis. *Lui*, 179 Wn.2d at 495. An error is harmless if this Court is persuaded that the jury would have reached the same result in absence of the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). It is clear that the evidence Johnson now complains of had no impact on the verdict and the other, untainted evidence was overwhelming. The evidence Johnson complains of, the administration of medication to her while a patient at the hospital soon after she crashed her vehicle, was only significant to the experts who analyzed Johnson and her blood. Under ER 703, an expert can base her or his opinion on inadmissible evidence. Therefore even if this evidence were not admissible, Det. Luque would still have been able to give his opinion on her impairment and Mr. Louis still would have been able to give his opinion on the contents of Johnson's blood and their significance. No other evidence was actually impacted by the admission of this evidence and its admission was harmless beyond a reasonable doubt.

In addition, though this evidence was clearly admissible, and was properly admitted, Johnson opened the door to this testimony, thereby inviting any potential error of admitting evidence that would have otherwise been inadmissible. In her opening statement, discussing Det. Luque's investigation, Johnson stated, "Part of the process is conducting a full investigation. Deputy Luque did not check when she was given

narcotics. He will testify that in his experience as both a DRE and an EMT, hospitals use both pills and injections. Injections, in his experience, react much quicker. Pills take much longer. He didn't check. He didn't check her chart. She spoke with him. He could have gotten a warrant to find out what was in – what she had been prescribed when. Didn't do it.” RP 236-37.

A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted in order to preserve fairness and determine the truth. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). In *State v. Wafford*, 199 Wn.App. 32, 397 P.3d 926 (2017) the Court found that a party may open the door by comments made during their opening statement. *Wafford*, 199 Wn.App. at 39. Johnson raised this subject in her opening statement, before the State had presented any evidence. Johnson told the jury that Det. Luque failed to properly investigate, that he did not do things he should have done, like determine if Johnson was given medications at the hospital, if so how much and how they were administered. RP 236-37. This comment, if left unrebutted, would have left an improper and untrue belief in the minds of the jury. In order to preserve fairness and determine the truth, it would have been appropriate for the State to rebut Johnson's contention with the evidence that Det. Luque testified to. Johnson did not object to the admission of the

evidence though until Det. Luque could not remember certain details and the State admitted evidence via the prior transcript from trial. Johnson did not give the trial court the opportunity to determine whether Johnson opened the door to the testimony as Johnson never objected to its admission, only as to the form of its admission.

Not only does Johnson's opening show yet another valid basis for the admission of this evidence, but it shows that Johnson did not find this evidence objectionable and it rebuts her current contention that she objected based on the fact that the medical providers' statements to Det. Luque were hearsay. Johnson knew about this evidence from the beginning and never objected; she raised the issue in her own opening statement; she did not move in limine to exclude this evidence. CP 112-23. In fact, Johnson used the information as a theme throughout the case, part of her argument that Det. Luque did an incomplete investigation and had a shoddy memory. In closing, Johnson highlighted that Det. Luque did not look at her chart at the hospital, that he did not have a great memory of the incident, that he had a passing conversation with a doctor about what drugs Johnson was given and when, and that that played a large role in his opinion. RP 833. If his information was faulty, then his entire opinion was unreliable. Johnson used this information from the very beginning to her advantage. She wanted some of this evidence admitted because it helped

her own theory of the case. She opened the door to the State being allowed to give the full truth to the jury on the subject, as in fairness we cannot let a misconception lie unchallenged when evidence exists to directly rebut the unfair and inaccurate comment by the defendant.

Johnson failed to preserve this issue for review and though it involves a constitutional issue, Johnson did not show that any potential error was manifest and therefore this Court should decline to review it. Furthermore, the evidence was properly admitted at trial. Johnson opened the door to the evidence, but also the evidence was already admissible pursuant to ER 703. And, even if there was some error in admitting the amount, type, and method of medications administered to Johnson at the hospital, this admission was harmless beyond a reasonable doubt. Johnson's claim should be denied.

**IV. The trial court properly denied Johnson's motion to suppress evidence.**

*a. The record contains substantial evidence to support the trial court's findings of fact. These findings relate only to the trial court's determination under CrR 3.5 and do not affect its analysis on whether the warrant was supported by sufficient probable cause.*

Johnson challenges findings of fact numbers 24, 26, 28, 29, 30, and 31. Contrary to her claim, these findings are supported by substantial evidence in the record. In making this challenge, Johnson cites both to the

record created at the CrR 3.5 hearing and the one created at trial. Because the findings of fact are based on a CrR 3.5 hearing, citing to trial testimony is inappropriate. Further, this hearing was actually a consolidated CrR 3.5 and CrR 3.6 hearing with testimony surrounding the CrR 3.5 issues and argument regarding both the voluntariness of Johnson's statements to law enforcement officers and whether the search warrant affidavit established sufficient probable cause. To the extent that Johnson claims the trial court's findings of fact are unsupported by the record, these findings have no bearing on the facts contained within the four corners of the search warrant affidavit. *See State v. O'Connor*, 39 Wn. App. 113, 692 P.2d 208 (1984) (stating that it is error for courts to "consider matters not contained within the affidavit for search warrant" to make a probable cause determination). Regardless the trial court properly entered these findings of fact and made the correct conclusions of law regarding the voluntariness of Johnson's statements.

Appellate courts use the substantial evidence standard to review a trial court's findings of fact regarding a motion to suppress evidence. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *Id.* (quoting *State v. Mendez*, 137 Wn.2d 208, 214 970 P.2d 722 (1999) (abrogated in part on other grounds by *United States*

*v. Brendlin*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

Conclusions of law are reviewed de novo. *Id.* Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Deference is given to the trial court on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Johnson first challenges finding of facts number 24, which states “[t]he Defendant agreed to submit to voluntary field sobriety tests (FSTs). Due to the Defendant’s injuries, and being hooked up to various monitoring equipment, Detective Luque was only able to check her eyes, and forgo the physical tests.” CP 164. This finding is supported by substantial evidence. At the suppression hearing, Detective Luque testified that Johnson agreed to perform voluntary field sobriety tests. RP 48. He first checked her eyes for nystagmus and found none. *Id.* He also observed that her pupil size was 3.5 millimeters. *Id.* The detective did not perform other physical tests. RP 78 – 82.

Finding of fact number 26 states “[i]n between the various medical procedures the hospital staff was doing with the Defendant, including x-rays and CAT scans, Detective Luque spent a combined total of

approximately 15 to 20 minutes evaluating the Defendant.” CP 164. This finding is supported by substantial evidence. Detective Luque testified on direct that he spent maybe 15 or 20 minutes with Johnson that was broken up by the needs of medical treatment but doesn’t remember the exact amount of time. RP 47 – 48. On cross, he testified that he could have spent a little more or less time with Johnson but it would not have been less than 10 minutes. RP 61 – 62. Because deference is given to the finding of fact regarding any conflicting testimony, the trial court’s finding that the detective spent 15 to 20 minutes with Johnson is supported by record.

Finding of fact number 28 states “[p]rior to contacting the Defendant, hospital staff had advised Detective Luque that she had just received 150 milligrams of Fentanyl and 1 milligram of Dilaudid for pain.” CP 164 – 65. Findings of fact number 29 states “Detective Luque knew that these were two potent opiate-based pain medications that are categorized as narcotic analgesics; and with the doses that she was given, the Defendant’s eyes should be constricted, and her vital signs should be significantly depressed, and she should have been knocked out or asleep, rather than being alert and wide awake.” CP 165. Finding of fact number 30 states “[b]ased on his observations, the Defendant’s statements, and his training and experience, Detective Luque believed that she was experiencing antagonistic effects of two or more different types of drugs

that were pulling her in opposite directions, and suspected that she was under the influence of one or more drugs, other than the pain medications that the hospital staff had administered to her.” *Id.* These findings are supported by substantial evidence. Detective Luque testified at the hearing that he spoke with hospital staff prior to evaluating Johnson. RP 39. He learned that Johnson had “received about 150 milligrams of Fentanyl and 1 milligram of Dilaudid for pain” shortly before he spoke with her although he doesn’t know exactly what time she received this medication or how it was administered. RP 39 – 40, 42, 68. The detective did note in his report that the Dilaudid was administered only seconds before his contact with Johnson. RP 85 – 86. The detective went on to explain that these are strong narcotic analgesics used for pain medication and that he would have expected Johnson to be groggy or sleepy with constricted pupils, a depressed pulse rate and low blood pressure. RP 40, 43 – 44. Instead the detective noticed that her pulse rate and blood pressure was higher than would be expected given the pain medications and that she was alert. RP 49 – 51, 53 - 54. Based on the detectives training and experience as a drug recognition expert he knows that the pain medication and methamphetamine would have opposite effects and he believed that his observations of Johnson were inconsistent with the having received the pain medication. RP 51 – 53, 58. Johnson argues that these findings of fact

are unsupported by citing to trial testimony and highlighting conflicting evidence but, again, deference is given to the finder of fact. Based on Detective Luque's testimony, the record contains substantial evidence to support findings of fact numbers 28, 29, and 30.

Finding of fact number 31 states "Detective Luque telephonically applied for a search warrant, seeking to obtain a sample of the Defendant's blood. District Court Judge Schreiber found probable cause was established, and authorized the search warrant for the Defendant's blood." CP 165. This finding is supported by substantial evidence. Detective Luque testified at the hearing that he authorized the search warrant on the day he evaluated Johnson at the hospital. RP 31 – 32. The warrant was then granted by Judge Schreiber. CP 54 – 55; RP 32, 57 – 58, 59. Johnson argues that this finding implies the warrant affidavit established probable cause. However, this finding merely identifies the facts of the case. The trial court independently determined that the affidavit contained sufficient probable cause in conclusion of law number six.

These findings of fact are supported by substantial evidence in the record of testimony at the CrR 3.5 hearing. However, they are wholly unrelated to the trial court's determination of whether the search warrant contained sufficient probable cause. To the extent that Johnson argues

error in the trial court's findings, they should not affect this Court's review regarding the propriety of the search warrant.

*b. The trial court properly denied Johnson's motion to suppress evidence.*

Although barely raised with the trial court,<sup>1</sup> Johnson now argues that the statements she made to Detective Luque at the hospital regarding her methamphetamine use were tainted by the illegal search of her purse and thus should have been redacted from the search warrant affidavit. She first argues that Washington has a bright-line exclusionary rule and that the attenuation doctrine is inconsistent with article 1, section 7 of the Washington State Constitution. This argument ignores Washington appellate court jurisprudence over the past several years and asks this Court to do so as well.

Johnson next argues that, even applying the attenuation doctrine, Johnson's admissions to Detective Luque at the hospital regarding drug use were not sufficiently attenuated from the search of her purse. Because of their distinct purpose, timing, location, and the fact that Johnson was

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<sup>1</sup> In her brief challenging the probable cause supporting the search warrant, Johnson only briefly cited to case law surrounding suppression of statements following an illegal search or seizure. However, she failed to actually make argument on this issue either with briefing or orally at the suppression hearing. CP 40; RP 103 – 08; 113 – 15; 117. Instead, testimony regarding the issue of Johnson's statements focused almost exclusively on its voluntariness for purposes of the CrR 3.5 hearing. RP 44 – 46. Presumably because this issue was not discussed at the pretrial suppression hearing, it is not explicitly presented in the trial court's findings of fact and conclusions of law from the joint CrR 3.5 and CrR 3.6 hearing. CP 160 – 67.

advised of her constitutional rights prior to questioning, the statements are sufficiently attenuated from the illegal search and are admissible both at trial and for purposes of establishing probable cause to issue a search warrant for Johnson's blood.

1. This Court should apply the attenuation doctrine to the facts of this case.

While not explicitly adopted by Washington Courts, the attenuation doctrine should be applied in this case just as other Washington appellate courts have applied it over the past several years. This doctrine has been implicitly adopted and should be followed here. In arguing that this doctrine is inconsistent with article 1, section 7 of the Washington State Constitution, Johnson concedes that it is appropriate under the Fourth Amendment to the United States Constitution. The State's argument will thus focus only on application of this doctrine under Washington law.

Johnson is correct that, in the search and seizure context, article 1, section 7 is more protective than the Fourth Amendment, however she is incorrect in arguing that Washington's exclusionary rule is not also aimed at deterring police misconduct. *State v. Eserjose*, 171 Wn.2d 907, 913, 259 P.3d 172 (2011) (citing *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982)) (stating that Washington's "rule is intended to protect individual

privacy against unreasonable governmental intrusion, to deter police from acting unlawfully, and to preserve the dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means”). Her argument that the attenuation doctrine is designed to deter misconduct and therefore inapplicable in Washington is thus invalid and should not be considered by this Court.

Johnson additionally points to *State v. Winterstein* and *State v. Afana* to argue that because Washington has rejected the inevitable discovery exception and the good faith exception to the exclusionary rule it should similarly reject the attenuation doctrine. This argument contradicts the reasoning of the lead opinion in *Eserjose* that these doctrines are fundamentally different, and thus not comparable. *Eserjose*, 171 Wn.2d at 927; *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009); *State v. Afana*, 169 Wn.2d 169, 233 P.3d 879 (2010). While these rejected exceptions to the exclusionary rule allow admission of illegally seized evidence under certain circumstances, the attenuation doctrine “admits evidence that is obtained *with* the ‘authority of law,’ provided that the evidence was not ‘come at by the exploitation’ of a prior illegal act” and thus comports with article 1, section 7’s “authority of law requirement.” *Eserjose*, 171 Wn.2d at 927 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Because

Johnson's statements to Detective Luque were obtained with the "authority of law," as analyzed below, this Court should apply the attenuation doctrine in this case.

Since the 1960's, Washington courts have utilized the attenuation doctrine. *E.g.*, *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (stating "[w]e have consistently adhered to the exclusionary rule expounded by the United States Supreme Court and have likewise embraced the 'fruit of the poison tree' doctrine..."); *State v. Vangen*, 72 Wn.2d 548, 555, 433 P.2d 691 (1967) (stating that the attenuation doctrine "fits the present situation with tailor-like exactness" and affirming the defendant's conviction); *State v. Rothenberger*, 73 Wn.2d 596, 601, 440 P.2d 184 (1968) (finding that "[t]he 'poison' ... which had adhered in the original unlawful arrest was so greatly attenuated by the time and circumstances intervening ... that it had lost its potency, if it ever had any"); *see also State v. Tan Le*, 103 Wn. App. 354, 12 P.3d 653 (2000); *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 2003).

In 2011, the lead opinion of the Supreme Court in *Eserjose* found that the attenuation doctrine has been, at least, implicitly adopted in Washington because it is so closely related to the "fruit of the poisonous tree" doctrine. *Eserjose*, 171 Wn.2d at 920. Although the lead opinion in *Eserjose* is not binding, this Court has assumed that the attenuation

doctrine is compatible with article 1, section 7. *See State v. Smith*, 165 Wn. App. 296, 313, 266 P.3d 250 (2011) (finding that the State met its burden to show that victims' trial testimonies were sufficiently attenuated from an illegal search).

Following this jurisprudence, the State respectfully asks this Court to follow the attenuation doctrine here.

2. The statements made to Detective Luque were sufficiently attenuated from the illegal search of Johnson's purse.

Johnson argues that the record does not contain facts proving attenuation between the illegal search of Johnson's purse and the statements that she made to Detective Luque at the hospital. She argues on appeal that this issue was brought before the trial court and the State failed to produce sufficient facts showing that any taint was dissipated. As mentioned above, this issue was only briefly mentioned in Johnson's brief to the trial court supporting her motion to suppress evidence and was never actually argued in her briefing or in the oral argument at the suppression hearing. CP 40; RP 103 – 08; 113 – 15; 117. Contrary to Johnson's assertion, the record does show that Johnson's statements to Detective Luque were not the product of the unlawful search of her purse hours before. Additionally, the State argued that sufficient attenuation existed in its briefing to the trial court even though this issue wasn't

discussed at oral argument. Therefore, the State has met its burden to show attenuation and the State has not waived this argument.

Appellate courts review conclusions of law de novo. *Levy*, 156 Wn.2d at 733. Evidence is not admissible if it is the product of an unlawful search. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). “But evidence will not be excluded as ‘fruit’ unless the illegality is at least the ‘but for’ cause of the discovery of the evidence [and] suppression is not justified unless the challenged evidence is in some sense the product of illegal governmental activity.” *State v. Thomas*, 91 Wn. App. 195, 201, 955 P.2d 420 (1998) (quoting *Segura v. United States*, 468 U.S. 796, 815, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (quoting *United States v. Crews*, 445 U.S. 463, 471, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980))). Appellate courts use common sense to evaluate the facts and circumstances surrounding a specific case to determine if a nexus exists between unlawful police conduct and the evidence in question. *Thomas*, 91 Wn. App. at 201 (citing *State v. Aranguren*, 42 Wn. App. 452 457, 711 P.2d 1096 (1985) (citing *United States v. Kapperman*, 764, F.2d 786 (11th Cir. 1985))). Where a statement is concerned, that statement is admissible when the connection between the unlawful search and the statement has “become so attenuated as to dissipate the taint.” *See Wong Sun*, 371 U.S. at 491. Factors this Court can use to consider whether there is sufficient

attenuation between unlawful activity and later evidence are “(1) the temporal proximity of the illegal search and subsequent [evidence]; (2) the presence of the intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of *Miranda* warnings.” *State v. Jensen*, 44 Wn. App. 485, 490, 723 P.2d 443 (1986) (citing *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982))

Here, the unlawful search of Johnson’s purse was not the “but for” cause of her statements to Detective Luque. It was not until well after this search that Justin Carey was discovered several feet away from Johnson’s car and a criminal investigation was opened. RP 93, 96 – 97. Only then was Detective Luque summoned to contact Johnson at the hospital to investigate the collision and observed that she appeared to be impaired by a substance other than the opiate-based medication she was given by medical personnel after the collision. RP 36 – 40; 43 – 44; 49 – 54; 58. During the course of his investigation, Detective Luque asked Johnson about the collision and her drug use after reading her the *Miranda* warnings. RP 44 – 46, 56. These were standard questions that he always asks drivers who are involved in serious crashes. *Id.* Even without the earlier discovery of methamphetamines in Johnson’s purse, because of the totality of the circumstances, it would be reasonable for Detective Luque to inquire about Johnson’s behavior and drug use. *Id.* Because of their

distinct purpose, timing, location, and the fact that Johnson was advised of her constitutional rights prior to questioning, the unlawful search at the scene by Deputy Gosch and Johnson's statements to Detective Luque at the hospital are sufficiently attenuated.

Evidence of Johnson's statements to Detective Luque were properly admitted by the trial court and correctly used to support a finding that the search warrant affidavit contained probable cause. These statements were attenuated from the earlier illegal search of the purse. This Court should thus uphold the trial court's determination that these statements are admissible.

*c. The affidavit for the search warrant contains sufficient probable cause for a search of Johnson's blood.*

Johnson claims the search warrant for her blood was improperly issued without probable cause. There was probable cause for the issuance of the warrant and the trial court did not abuse its discretion in upholding the validity and propriety of that warrant.

Washington Court Rules specifically authorize warrants to search for and seize evidence of a crime, contraband, the fruits of a crime, or things otherwise criminally possessed, weapons or other things by means of which crime has been committed or reasonably appears about to be committed. CrR 2.3(b). Case law has held that search warrants are the

avored means of police investigation, and supporting affidavits or testimony must be viewed in a manner that will encourage their continued use. *United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971); *United States v. Ventresca*, 380 U.S. 102, 108-09, 13 L.Ed.2d 284, 85 S.Ct 741 (1965). When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 314 P.2d 1024 (1957); *State v. Trasvina*, 16 Wn. App. 519, 557 P.2d 368 (1976).

A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. This determination should be given great deference by a reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Doubt as to the existence of probable cause will be resolved in favor of the warrant. *State v. J-R Distributions, Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). In reviewing the search warrant affidavit and making a determination as to whether to authorize the search warrant, the magistrate is to operate in a common sense and realistic fashion and is entitled to draw common sense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). In determining the validity of a search warrant, the court considers whether the affidavit, on

its face, established probable cause. *State v. Perez*, 92 Wn. App. 1, 4, 963 P.2d 881 (1998). A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *Cole*, 128 Wn.2d at 286. An affidavit is sufficient to support probable cause if it contains information from which an ordinarily prudent person would conclude a crime has been committed and evidence of a crime can be found at the place to be searched. *Id.* The standard of probable cause is governed by the probability, rather than a prima facie showing, of criminal activity. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 594-95, 989 P.2d 512 (1999) (quoting *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)).

The warrant here contains facts sufficient to establish probable cause. The magistrate did not abuse its discretion in issuing it and the trial court properly upheld its issuance. Even if this Court finds some of the trial court's findings of fact unsupported by the record, it will have no effect on whether the warrant contained sufficient probable cause because those facts exist outside of the four corners of the warrant.

The facts present in the affidavit allege that a vehicle driven by Johnson had collided with a pedestrian when it exited a straight roadway with no major visual obstructions. Later that day, a tow truck driver found

a 16 year old male lying in the heavy brush near the collision scene. He had sustained obvious injuries consistent with being impacted by a vehicle. Detective Luque contacted Johnson at Peace Health Medical Center and read Johnson her constitutional rights; she verbally acknowledged and waived the *Miranda* warnings. Johnson described traveling on NE 82nd Avenue when she dropped her cigarette on the passenger side floorboard then unbuckled her seatbelt and reached over to the passenger floorboard to obtain the lit cigarette. She also described removing her eyes from the roadway while traveling at approximately 45 MPH, and then hearing the sounds of gravel at which time she looked up to see only tall grass. Johnson additionally stated that she had seen children waiting for the school bus just prior to looking away from the road but did not recall impacting anyone or any objects believing she had just entered the ditch along the side of the roadway. Johnson admitted to using methamphetamine and marijuana two days prior and denied taking her medications for stomach ulcers and allergies the morning prior to the collision. She has a prior felony conviction for Possession of a Controlled Substance – Methamphetamine. Medical staff had advised Detective Luque that Johnson had received 150 milligrams of Fentanyl and 1 milligram of Dilaudid for pain prior to his arrival. The detective observed that Johnson's pulse was 100 beats per minute (oscillating between 94 and

117 beats per minute) and her blood pressure was 119/71. Her pupils were 3.5 millimeters in dilation in room light and she had small amounts of dried blood on her lips. Detective Luque observed that Johnson appeared depressed and sat slouched in bed, noting that her movements were slow and her speech was slow and delayed, however she was alert, awake, and responsive. Based on his training, knowledge, and experience as a DRE and a former EMT, Detective Luque knows that Dilaudid and Fentanyl are opiate-based narcotics and will present with depressed vital signs, to include pupil constriction. Johnson's vital signs, on the other hand, were elevated, she was alert and awake, and her pupils were additionally dilated when in comparison to what would be expected with the use of the narcotic medications.

Given these facts, the trial court did not abuse its discretion in finding the search warrant for Johnson's blood was properly authorized. The affidavit contains sufficient probable cause for the trial court to uphold the issuance of the search warrant and the magistrate did not abuse its discretion in issuing it. Even if this Court finds that Johnson's statements to Detective Luque should have been suppressed, the warrant affidavit still contains ample probable cause to believe that Johnson committed the crime of vehicular assault and that evidence of that crime could be found in her blood.

**V. The jury instructions and information included all essential elements of the crime.**

Johnson alleges the jury instructions for vehicular assault omitted an essential element of the crime, one of negligence. The jury instructions given by the court were proper, as negligence is not an element of the crime of vehicular assault. Furthermore, Johnson did not object to the to-convict instruction given at trial and she was put on notice of this issue and the need to object and/or propose her own instruction based on her first appeal in which she also raised this exact same issue. Despite raising this issue in her first appeal, Johnson did not bring it to the trial court's attention and attempt to have the trial court correct her perceived issue with the instructions. As such, Johnson cannot now complain of an error she clearly waived at trial.

As discussed above, this Court may decline to review issues which were not raised at the trial court. RAP 2.5. This is a classic example of a situation in which a defendant is aware of a claimed error and yet remains silent when the trial court sets out to commit the error, never raising the issue to the trial court and even letting the court know there were no issues with the instruction. RP 776. CrR 6.15 requires counsel to submit proposed instructions to the court prior to trial. Johnson did not propose any to-convict instruction to the trial court as required. Furthermore, any

objection to the instructions, as well as the grounds for the objections, must be put in the record to preserve review. *State v. Sublett*, 176 Wn.2d 58, 76, 292 P.3d 715 (2012) (citing *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 162-63, 795 P.2d 1143 (1990); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn.App. 609, 615-17, 1 P.3d 579 (2000)).

Nevertheless, despite Johnson's failure to object to the instruction given at trial and her failure to propose her own instruction, the trial court properly instructed the jury on the elements of the crime of vehicular assault. This Court reviews jury instructions to determine whether they "correctly state[] the law, [are] not misleading, and permit[] counsel to argue his theory of the case." *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). The to-convict instruction given in Johnson's case correctly stated the law and included all elements the State was required to prove.

Negligence is not an element of the crime of vehicular assault and therefore Johnson's claim fails on the merits. Johnson cites to *State v. Lovelace*, 77 Wn.App. 916, 895 P.2d 10 (1995) to support her argument that negligence is an essential element of the crime of vehicular assault. However, this case does not hold for that proposition. It holds that the defendant's operation of the vehicle being the proximate cause of the substantial bodily harm is necessary for the evidence to be sufficient. This was included as an element in the to-convict instruction. CP 144. The

instructions complied with *Lovelace*. Furthermore, after the *Lovelace* decision, the Supreme Court issued *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995), which Johnson fails to cite for this proposition, yet which is nearly directly on point.

In *State v. Rivas*, our state Supreme Court analyzed the history of the vehicular homicide statute since its inception in 1937 in order to answer the question of whether the State must prove a causal connection between a driver's intoxication and the injury to the victim in a vehicular homicide case. *Rivas*, 126 Wn.2d at 446-47. The Court also addressed statutory interpretation and the effect of *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989). After considering this issue and the history of the jurisprudence in our State, the Supreme Court concluded that the Legislature may create strict liability crimes and did so in creating the vehicular homicide statute. *Rivas*, 126 Wn.2d at 452. The vehicular homicide statute and the vehicular assault statute have the same language save for the level of injury required (death versus substantial bodily harm). It is clear from this Supreme Court authority that the instructions given to the jury and the information clearly set forth the proper elements as required by the Legislature. Johnson's argument that negligence is an additional element of the crime has been discussed and rejected by the Supreme Court in *Rivas, supra*. Johnson's claim the jury was improperly

instructed and she was improperly notified of the elements of the crime of vehicular assault have no merit.

Johnson also alleges that the information was deficient for failing to include a negligence element in the vehicular assault. Johnson's claim is without merit and should be denied.

An information must include all essential elements of a crime in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). As Johnson is challenging the sufficiency of the information for the first time on appeal, the information shall be construed "quite liberally." *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). Johnson cites to *State v. Lovelace*, 77 Wn.App. 916, 895 P.2d 10 (1995) and *State v. McAllister*, 60 Wn.App. 654, 806 P.2d 772 (1991) to support her contention. However, the Supreme Court's opinion in *State v. Rivas, supra*, controls here.

In *Rivas, supra*, the Supreme Court addressed the vehicular homicide statute, which has most of the same elements of vehicular assault, just a differing level of harm required, and determined that this crime was a strict liability crime and thus a mens rea, like negligence, was not required. *Rivas*, 126 Wn.2d at 452. Therefore, negligence is not an

essential element of the crime of vehicular assault and did not need to be included in the information.

Johnson's claim the information was lacking due to its exclusion of an element of negligence fails. Her claim should be denied.

**VI. The prosecutor did not commit misconduct.**

Johnson argues the prosecutor committed misconduct by introducing an improper judicial comment into evidence, by eliciting testimony that the victim will require a new prosthetic every two years, and by suggesting to the jury that it could presume guilt prior to deliberations. The prosecutor did not commit misconduct and Johnson was not prejudiced by any of the actions she deems improper. This claim fails.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper

remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a

prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction

would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

As discussed at length above, there simply was no judicial comment on the evidence as Johnson claims, and this purported judicial comment on the evidence did not have the impact Johnson appears to believe it did on her case. As discussed previously, the jury learned that the investigating officer obtained a search warrant for the defendant's blood and that the search warrant was approved by a judge. This does not establish, as Johnson appears to argue, that the jury believed a judge had already found that Johnson was impaired and therefore they did not have to reach that element of the crime. In fact, it's clear from the status of the case at the time the search warrant was obtained that the defendant's blood analysis, evidence the State relied upon in proving its case, was not available as the blood had yet to be drawn. How could a judge give her or his stamp of approval or agreement that the defendant was impaired based on the State's argument her blood results supported this inference prior to an analysis of the blood being done? The prosecutor did not commit

misconduct by eliciting this information in response to Johnson's cross-examination of Det. Luque.

Johnson's argument that the prosecutor committed misconduct by eliciting information about the extent of the victim's injuries is likewise without merit. The State had to show the victim had been injured to prove the elements of vehicular assault. Furthermore, the State had alleged the victim's injuries exceeded the level necessary to commit vehicular assault. Therefore, evidence of the victim's injuries, and the extent of those injuries was highly relevant. The trial court engaged in a balancing test prior to allowing the victim's mother to testify and found that the probative value outweighed the prejudicial effect. Similar to the admission of photographs of a victim's injuries, the evidence presented by the victim's mom here was properly admitted and the prosecutor did not commit misconduct for eliciting the evidence. The State has "the right to present [] evidence to amply prove every element of the crime charged, and to rebut all defenses, even if the effect was substantial duplication of the medical testimony." *State v. Daniels*, 56 Wn.App. 646, 649, 784 P.2d 579 (1990) (citing to *State v. Crenshaw*, 98 Wn.2d 789, 806-07, 659 P.2d 488 (1983)). Furthermore, some crimes simply cannot be explained in a "lily-white manner." *Crenshaw*, 98 Wn.2d at 807 (quoting *State v. Adams*, 76 Wn.2d 650, 656, 458 P.2d 558 (1969)). The evidence of the victim's

leg amputation and his need for prosthetic leg was relevant to show that the victim suffered an injury and that his injuries exceeded those necessary to commit vehicular assault. In this instance, this Court should determine whether there was a substantial likelihood that this line of questioning by the State affected the jury's verdict and thereby deprived the defendant of his right to a fair trial. *State v. Music*, 79 Wn.2d 699, 715, 489 P.2d 159 (1971); *State v. Wilson*, 20 Wn.App. 592, 595, 581 P.2d 592 (1978). The parties were clear in closing arguments, and the instructions were clear on the elements the State had to prove in order for the jury to convict Johnson. There is not a substantial likelihood that the fact that the victim wears a prosthetic and that isn't paid for by insurance caused the jury to convict a woman they would have otherwise acquitted of this crime. As such, Johnson cannot sustain her claim of prosecutorial misconduct.

Johnson also argues the prosecutor committed misconduct when he stated that everyone is gathered for a criminal trial because of the actions and choices of the defendant. *See* Br. of Appellant, p. 87. Johnson argues this statement suggested the defendant can be presumed guilty. The statement did not infer to the jury that the defendant should or even could be presumed guilty by them. The argument was an attempt to explain that the defendant's actions and choices, which constituted a crime, was the focus of the trial that week. This was also likely an attempt to explain to

the jury that it wasn't the police's actions which were the basis of the criminal prosecution, actions which Johnson criticized throughout the entire trial, but rather the defendant's actions and behaviors which constituted a crime. This Court should review the prosecutor's remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Then, after reviewing the argument in the context of the entire case, if this Court finds the prosecutor's comment was improper, the question is whether a curative instruction would have alleviated any prejudicial effect. And here it clearly would have. Especially given that the alleged improper remark comes at the beginning of the prosecutor's entire closing argument, the trial court could have easily instructed the jury to disregard the statement. Furthermore, Johnson cannot show that this statement had a substantial likelihood of affecting the jury's verdict. *See State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

As Johnson failed to prove any instance of prosecutorial misconduct she has not shown that the cumulative impact of multiple instances of misconduct violated her right to a fair trial. The defendant is entitled to a trial free from prejudicial error, not one that is totally error free. *See State v. White*, 72 Wash.2d 524, 531, 433 P.2d 682 (1967). In

reviewing the record, it is clear that the alleged instances of misconduct, taken individually or as a whole, did not affect the jury's verdict.

## **VII. Johnson received effective assistance of counsel.**

Johnson argues that if her assignments of error surrounding her claims of prosecutorial misconduct are not preserved because her attorney failed to object, then her attorney was ineffective.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that

the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel’s performance. *Strickland*, 466 U.S. at 689-91.

“Counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions.” *Id.* (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* This Court presumes that the failure to object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). Additionally, in a claim of ineffective assistance of counsel based on failure to object to prosecutorial misconduct, when the prosecutor’s arguments are not

improper, defense counsel is not deficient for failing to object. *See State v. Larios-Lopez*, 156 Wn.App. 257, 262, 233 P.3d 899 (2010) (stating “[b]ecause we have already determined that the prosecutor’s arguments were not improper, Larios-Lopez does not show that his counsel’s performance was deficient in failing to object to them.”). Further, in order to show her attorney was ineffective, Johnson must show that the objections to the complained-of conduct by the prosecutor would have been sustained. *See State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007) (citing to *Davis*, 152 Wn.2d at 748).

As argued above, Johnson has not shown that the prosecutor’s conduct was improper and therefore her attorney could not have been deficient in failing to object. Johnson’s claim of ineffective assistance of counsel should be rejected. Not only has Johnson failed to show any improper conduct on the part of the State, she has failed to show any prejudice, either from the prosecutor’s conduct, or from her attorney’s failure to object. Johnson suffered no prejudice from the prosecutor’s complained-of conduct or from her attorney’s choice not to object. A legitimate trial strategy may, at times, be to not object; an attorney also cannot be expected to make frivolous objections that will not be sustained. It can also be sound trial tactic to allow admission of evidence which

could arguably be excluded if that evidence could be used to help defense's theory of the case.

Johnson's claim of ineffective assistance of counsel for failing to object to prosecutorial misconduct is without merit. Johnson has not shown that her attorney's failure to object prejudiced her by either showing the outcome of the trial would have been different had her attorney objected, or that a reviewing court's analysis would have been different under the lesser burden afforded to preserved claims of prosecutorial misconduct. This claim fails.

#### CONCLUSION

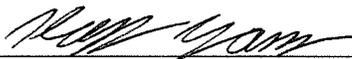
The trial court should be affirmed in all respects for the reasons set forth above.

DATED this 7 day of February, 2018.

Respectfully submitted:

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