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

STATE OF WASHINGTON, Respondent

v.

KENNETH STEPHEN HART, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02245-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not err as it never ruled that the victim's supposed memory issues could not be the subject of cross-examination at trial. The trial court also properly ruled that the victim's mental health diagnosis and medication history could not be admitted at trial as the evidence was not relevant and was highly prejudicial.**
- II. Hart cannot show he received ineffective assistance of counsel or that he was prejudiced by his attorney's actions.**
- III. The trial court properly sentenced Hart.**
- IV. Hart's right to be free from double jeopardy has not been violated.**

STATEMENT OF THE CASE

Kenneth Stephen Hart (hereafter 'Hart') was charged by information with two counts of Assault in the Second Degree by strangulation or suffocation – domestic violence, Assault in the Fourth Degree – domestic violence, and Felony Harassment Death Threats – domestic violence, for an incident that occurred on October 23, 2016 involving his then-wife, Erin Hart. CP 4-5. At trial, Ms. Hart testified that she met Hart in 2003 and they dated until they married in August 2007. RP 450. They have two sons together who were, at the time of trial, a just turned six-year-old and an almost eight-year-old. RP 450. Prior to the incident that occurred on October 23, 2016, they lived together at a home

in Clark County, Washington. RP 450. At the time of trial, Ms. Hart and Hart were proceeding through a divorce. RP 451.

Ms. Hart had an emotional affair with another person in August 2016. RP 451-52. This affair was never physical, and she never met the other person in-person. RP 452. Ms. Hart decided to tell her husband about it and he was hurt and very angry, but they decided to try to work through their marriage. RP 452. As part of working through their issues, Ms. Hart gave up her social media accounts, the two were trying to spend more time together as a couple, and spent more time talking with each other. RP 453.

In early September 2016 the couple had an argument during which Hart referred to Ms. Hart's "whorish behavior" and said that she deserved to die, and told her that if she had any respect for him or love for their children that she would kill herself. RP 454. During that argument, that lasted all night, Hart would throw items at Ms. Hart, including his chewing tobacco, cans, and garbage. RP 454. At one point he hit her on the head with a mason jar. RP 457. The mason jar cut her on the scalp, causing her to bleed. During this night, Hart made threats to Ms. Hart that he would have her raped and set on fire because that was what she deserved. RP 457. The argument turned physical, and Hart started punching Ms. Hart on the right side of her body. RP 457. Hart targeted his

punching to areas of Ms. Hart's body where she had previously had surgery. RP 458. Later, Hart put a loaded gun into Ms. Hart's mouth. RP 458. Ms. Hart had bruising to her body for nearly a full month after this incident. RP 461.

After the September incident, things were still rough between Hart and Ms. Hart, though there were periods of normalcy. RP 462. On the evening of October 22, 2016, Ms. Hart was hoping she and her husband could be intimate, hoping to forge a connection with her husband, hoping for more normalcy. RP 462. One of the things that Hart had suggested could help him forgive Ms. Hart was if she let him strangle her during sex. RP 463. On that night, October 22, 2016, she suggested that he do that; she brought it up, hoping to appease him and to please him. RP 463. About an hour later, Hart takes Ms. Hart up on her suggestion of intimacy and they engaged in consensual sexual intercourse. RP 464-65. During the intercourse, Hart placed his hands somewhat lightly around Ms. Hart's neck, but did not put pressure on her neck, did not cut off her breathing, did not put pressure on her windpipe, and did not cause her to lose consciousness. RP 465. After that portion, Ms. Hart began giving Hart oral sex, but Hart became angry because he believed Ms. Hart was being "sloppy" in how she was giving oral sex, and he began yelling at her. RP 466.

After the intercourse ended, the couple began arguing. RP 467. Hart told Ms. Hart she was a whore and that she deserved to die and she should kill herself. RP 467. Hart told Ms. Hart to repeat those things back to him, to repeat to him that she was a whore. RP 467. Hart then started punching Ms. Hart in the face, by her eyes, sinuses, and head. RP 467-68. He then told her again that she deserved to die, but that she would never kill herself, which she agreed with, so Hart told her, “Well, I guess I’m going to have to do it for you,” and he wrapped his hands around her throat, with his thumbs on her windpipe. RP 468-69. When this happened, Ms. Hart started to get tunnel vision, and everything got light. RP 469. Ms. Hart was laying down and Hart was above her, his face full of rage. RP 469. Ms. Hart was unable to speak while this was going on. RP 469. Ms. Hart was scared because she believed him that he would kill her. RP 470.

About 20 minutes later, after they had been arguing some more, Hart took both of Ms. Hart’s hands in one arm and held them down, and put his forearm across her throat as he was directly above her. RP 471. While his arm was against her throat, Ms. Hart could not breathe and she couldn’t talk, and she again experienced the tunnel vision sensation she felt before. RP 472. Once again, her husband’s face was full of rage. RP 472.

Hart had taken Ms. Hart's phone from her during the argument so that she couldn't call 911. RP 474. Ms. Hart didn't feel like she could physically leave with her sons either, and she was too scared to leave without her children as Hart had threatened to drown their sons that night. RP 475. But eventually, after their children were awake in the morning, Ms. Hart noticed that her husband was in another room in their house with the door closed. RP 479. She quickly ran downstairs, grabbed the keys to her neighbor's house that she had, grabbed her sons, and told them they had to leave, and they ran. RP 479. They left the house in their pajamas, what they were already wearing, and without shoes, and physically ran. RP 480.

Once she arrived at her neighbor's house, Ms. Hart didn't knock, she didn't ring the bell, she just let herself and her sons inside and they then ran up the stairs inside the neighbor's house. RP 481. Her neighbor was still in her night clothes and the neighbor's house alarm was going off. RP 481. Her neighbor asked Ms. Hart if she wanted to call 911 and Ms. Hart said yes. RP 481-82. Police responded and interviewed Ms. Hart. RP 482-83. They took photos of the injuries to Ms. Hart's face and body. RP 483. Ms. Hart also saw a doctor about her injuries. RP 484. The bruises that occurred that night lasted about three weeks to a month. RP 485.

Hart claimed that any rough sex the couple engaged in was only done at Ms. Hart's request, never his, and that any bruises Ms. Hart had to her body was from her own self-massage. RP 743-48, 752. Hart also claimed that during consensual sex on October 23, 2016, his wife bit him on the penis so hard that he started bleeding profusely, and in responding to the bite he lashed out and hit her with closed fists and his hands. RP 761-62, 782-83. Hart also testified that he then went into the other room, took three Tylenol PM and fell asleep, only to be awoken by the police and arrested. RP 771-77.

Prior to trial, the State moved, in limine, "to exclude any evidence of Ms. Hart's past or present mental health conditions or medications." CP 68. As part of its pretrial investigation, defense had subpoenaed medical records belonging to the victim. RP 2-4, 11; CP 78-83. The trial court had reviewed those records *in camera* and had released portions of the records to the parties. RP 1, 20, 34. Within the records there was a diagnosis from a provider that the victim, Ms. Hart, had bipolar 2 disorder and was on certain psychiatric medications. CP 68-69; RP 2-4, 135-36. Accordingly, the State moved to prohibit introduction of any evidence that Ms. Hart was diagnosed as bipolar 2 disorder or did have that disorder and that she was on psychiatric medication. CP 68-69. The trial court held a hearing on this issue, initially granting the motion in October 2017, but allowing the

defense a continuance to obtain an expert to review the medical records to then move for reconsideration of the court's ruling on the motion in limine. RP 147-58. The trial court again held another hearing on the issue after defense obtained an expert and found that the evidence of Ms. Hart's bipolar 2 diagnosis and her medications was very minimally relevant and highly prejudicial and therefore did not allow it to be admitted at trial. RP 266-68.

After hearing the evidence presented at trial, the jury convicted Hart of both counts of Assault in the Second Degree – domestic violence, and the Felony Harassment – domestic violence. RP 915-918; CP 151, 153, 155. At sentencing, the State agreed that one of the assault convictions must be vacated to avoid a double jeopardy violation. RP 926. The trial court dismissed count 2 without prejudice “due to double jeopardy.” CP 166. The trial court sentenced Hart to a standard range sentence. CP 166. Hart was also sentenced to 18 months of community custody, which included performing affirmative acts as required by DOC, participating in crime-related treatment or counseling services as directed by DOC, and complying with crime-related prohibitions as directed by DOC. CP 167-68. Hart then timely appealed. CP 177.

ARGUMENT

I. The trial court did not err as it never ruled that the victim's supposed memory issues could not be the subject of cross-examination at trial. The trial court also properly ruled that the victim's mental health diagnosis and medication history could not be admitted at trial as the evidence was not relevant and was highly prejudicial.

a. The trial court never ruled on Hart's now-claimed error.

Hart claims the trial court violated his right to confrontation by prohibiting him from cross-examining the victim, Ms. Hart, on her supposed memory problems. Initially, this claim completely mischaracterizes the issue that was presented to the trial court – the trial court was never asked to prohibit the defense from cross-examining Ms. Hart on her supposed memory issues, but rather, the State moved in limine to prohibit defense from introducing evidence that Ms. Hart had been diagnosed with bipolar 2 disorder and that Ms. Hart was on certain medications. RP 135; CP 68-69. Hart never once asked the judge if he could cross-examine Ms. Hart about her memory issues, and he never once attempted to cross-examine Ms. Hart about her memory issues. Therefore, the trial court never ruled upon the admissibility of memory evidence as Hart now claims. Instead, the trial court properly prohibited Hart from lambasting Ms. Hart about her mental health diagnosis as such diagnosis was not relevant, and any relevance was greatly outweighed by

the potential prejudice. The trial court properly excluded evidence related to Ms. Hart's mental health diagnosis and her medications, and Hart has now waived any claim that he should have admitted evidence of Ms. Hart's memory issues as he never moved to admit such evidence and never attempted to ask questions of any witness regarding such evidence.

The State moved in limine to exclude evidence of Ms. Hart's past or present mental health condition or medications. RP 135; CP 68-69. What the State moved to preclude Hart from producing evidence of at trial was the fact that Ms. Hart had been diagnosed with certain conditions, such as Bipolar 2 and that she was on certain medications, like Cymbalta or Lamicta. RP 135. The State did not move to prevent Hart from questioning Ms. Hart about her memory or from questioning her about the fact that she had potentially previously admitted to medical professionals that she had memory issues. There were easy ways of raising the fact of memory issues without raising a diagnosis or the fact that she had been prescribed medications. The fact that the specific issue of poor memory was not raised was the defendant's choice. It's very clear from the arguments to the court that what the State sought to exclude was evidence of Ms. Hart's diagnosis and her medications. The State argued, "...based on the information that the Court has, there's not a nexus between the fact that this person in one place said that she had poor memory, that should

then make it relevant to bring in all of her mental-health issues and all of her medication, especially in light of the fact that there is such a stigma surrounding mental health in the community.” RP 140-41. Furthermore, it’s very clear that the trial court ruled only on the State’s motion as it was presented. When the court issued its ruling it started out saying, “...as to the particular motion here excluding evidence of Ms. Hart’s past or present mental-health conditions or medication, I will begin the analysis focusing on Evidence Rule 401 to what extent the information is relevant...” RP 144-45. There was never any pretrial motion by the State and no pretrial ruling by the court on whether Hart could question Ms. Hart about her memory issues. The only ruling was that Hart could not question his ex-wife about her mental health diagnosis and medications. The trial court therefore never prevented Hart from cross-examining Ms. Hart about her memory issues as he now claims the trial court did.

When Hart sought out additional evidence via an expert, in an attempt to convince the trial court of the relevance of the victim’s mental health diagnosis, as Hart wanted to be able to tell the jury that the victim had Bipolar 2 disorder, the trial court asked,

“But he hasn’t rendered an opinion that would go along the lines of someone with a bipolar disorder would not be able to properly perceive or to take into account events as they occurred in late October? His reference is, ‘These are the reports that were made by Ms. Hart of what her conditions

were and this was the diagnosis that the providers at the time identified'? I just want to make sure that we're on the same page with that."

RP 221.

It was once again made clear what the trial court was ruling on when the Court said, "So, I am technically reserving on the issue regarding the use of the medical records' reference to medications and/or Ms. Hart's medication condition for further determination by the Court." RP 236. It was very clear throughout the numerous hearings on the issue that the State's motion had been to exclude mention of Ms. Hart's medications and her mental health condition/diagnosis. The State did not move to prevent the defense from cross-examining Ms. Hart regarding her memory or any potential memory issues. Defense never asked the court to rule on the admissibility of cross-examination on that subject. Therefore, the trial court never prohibited cross-examination of Erin Hart on memory problems as Hart now claims it did. What the trial court did, was properly prohibit admission of evidence of Ms. Hart's diagnosis of bipolar 2 disorder and her medications.

- b. The trial court properly prohibited admission of evidence of the victim's mental health diagnosis and medications.

As an initial matter, the correct standard of review for the issue before this Court is abuse of discretion. Hart asks this Court to review this

issue de novo, claiming that because it involves the right to confront witnesses, it should be reviewed de novo. However, it has long been clear that this Court reviews a cross-examination scope limitation for a manifest abuse of discretion. *State v. Arredondo*, 188 Wn.2d 244, 265, 394 P.3d 348 (2017). While this Court would review a complete bar to cross-examination de novo, it reviews a limitation to the scope of cross for an abuse of discretion. *See State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). In addition, “where a defendant premises an alleged constitutional violation on a trial court’s evidentiary ruling, we review for abuse of discretion.” *State v. Salsbery*, 4 Wn.App. 1023¹ (Div. 2, 2018) (citing *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017)). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or is made for untenable reasons. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Though a criminal defendant has the right to confront the witnesses against him, and this is principally done through cross-examination, that right is not absolute. *Arredondo*, 188 Wn.2d at 265-66 (citing U.S. CONST. amends VI, XIV; *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct.

¹ GR 14.1 permits citation to unpublished opinions of the Court of Appeals. These opinions are not binding on this Court and may be given as much weight as this Court chooses.

1105, 39 L.Ed.2d 347 (1974); *Darden*, 145 Wn.2d at 620). “The scope of such cross-examination is within the discretion of the trial court.” *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994). It is important that trial courts “retain wide latitude...to impose reasonable limits on ...cross-examination based on concerns about...prejudice...or only marginal[] relevan[ce].” *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). There are three steps a Court may follow to determine if a trial court’s limitation on cross-examination violated the defendant’s right to confront a witness against him. *Darden*, 145 Wn.2d at 622. In order for the limitation on cross-examination to violate the defendant’s right to confrontation the evidence sought by the defendant, which the trial court excluded, must 1) be minimally relevant, 2) not be so prejudicial as to disrupt the fairness of the fact-finding process at trial, and 3) the defendant’s need for relevant but prejudicial information must outweigh the State’s interest in withholding that information from the trier of fact. *Id.*

In this case, the trial court found that the victim’s mental health diagnosis had very, very minimal relevance, that it was prejudicial and would disrupt the fairness of the fact-finding process, and that the defendant’s need for the information did not outweigh the State’s interest. RP 266-67.

In *Arredondo*, the Supreme Court upheld the trial court's limitation on the scope of cross-examination regarding a witness's mental health diagnosis. 188 Wn.2d at 267-68. There, the Supreme Court relied upon *United States v. Love*, 329 F.3d 981 (8th Cir. 2003), an Eighth Circuit case which held that a trial court should apply two factors to assess whether past mental health issues are permissible on cross-examination: "1) the nature of the psychological problems; 2) whether the witness suffered from the condition at the time of the events to which the witness will testify; [and] 3) the temporal recency or remoteness of the condition." *Love*, 329 F.3d at 984 (citing *Boggs v. Collins*, 226 F.3d 728, 742 (6th Cir. 2000)). In *Arredondo*, our Supreme Court adopted these factors, finding they "provide trial courts an effective means to consider the relevancy, probative value, and prejudicial effect from the disclosure of a witness' mental health limitations." *Arredondo*, 188 Wn.2d at 267. In Hart's case, the trial court did consider the factors set forth by *Love* and adopted by the *Arredondo* Court. RP 260-68.

In *Arredondo*, the witness had previously been diagnosed with depression, anxiety, PTSD, and had problems with concentration. *Arredondo*, 188 Wn.2d at 268. The witness, however, claimed his memory was fine and he had no problems remembering. *Id.* The trial court found the witness's past mental health diagnoses had nothing to do with the

witness's ability to recall and describe the events. *Id.* While the trial court found there was *some* minimal relevance, on the other hand, the prejudicial effect "is enormous." *Id.* The trial court found the defense could easily label the witness a "mental case," and make it so the jury "would disbelieve anything he had to say because he has some type of psychiatric disorder." *Id.* Upon that finding, the trial court prohibited defense from inquiring into the witness's mental state, both past and present. *Id.* The Supreme Court affirmed the trial court's findings, holding the court's ruling was neither manifestly unreasonable or based upon untenable grounds. *Id.* at 269.

This case is similar to *Arredondo*. As our trial court correctly pointed out, the relevance of the victim's bipolar 2 diagnosis was at most extremely minimal. There was no evidence to suggest, and no expert to opine that those who suffer from bipolar disorder 2 have an inability to accurately perceive events, to accurately store events, or to accurately remember events as they occurred. In addition, there was no evidence that someone with bipolar 2 disorder is unable to tell the truth or unable to be an accurate historian when called to the witness stand, and there was no offer of proof or any suggestion that Ms. Hart was unable to truthfully or accurately recall the events that occurred when she was to be called to the witness stand due to her bipolar 2 diagnosis. The same is true for the

medication she was prescribed (which defense agreed was not relevant and chose not to pursue admission of at trial).

The prosecutor said it best to the trial court,

Mental health carries, particularly bipolar disorder, carries a huge stigma in society, and defense made a statement that I think cuts to the heart of why it is so potentially prejudicial. And what I wrote down relates to her being able to be truthful, or it relates to her ability to relate things truthfully, and essentially the argument I am hearing from defense that they're making is that, and this may be the subtext, if not the kind of outward argument, that because this person may have been diagnosed with a mental-health disorder, that that somehow relates to her truthfulness or untruthfulness, her ability to be truthful or untruthful, which is simply not the case. And I think that there is certainly a danger in defense – from what I am hearing right now, there is a subtext to that in their argument. There's a huge leap that's being made based on the medical records. At no point has Ms. Hart said she could not recall or remember, or did not perceive what occurred.

RP 137. Because Ms. Hart was diagnosed with bipolar 2 disorder, Hart wanted to use that information to paint her as untrustworthy, potentially even as a liar to the jury. This was exactly the hope of using this information and exactly why it was way more prejudicial than it was probative. As no medical professional, even the expert Hart hired, was able to say that someone with bipolar 2 disorder cannot recall events that occur or cannot truthfully recount what occurs to them, there was no reason why her mental health diagnosis was in any way relevant in this case. The trial court noted that there was nothing from the defense's expert

indicating that a bipolar diagnosis or that someone with bipolar is unable to properly perceive events, or has memory deficit problems that prevents them from actually or accurately recalling events. RP 265. The trial court also noted that defense's expert did not conclude that any prescriptions Ms. Hart was on could have impacted her ability to perceive events or to understand them. RP 265-66. The trial court accurately indicated that there is a stigma and there was significant potential for the jury to misuse and misunderstand this evidence. As the trial judge it was his duty to ensure that irrelevant and prejudicial evidence not reach the hands of the jury. The trial court did its job in this situation and did with an appropriate exercise of its discretion.

Thus, the trial court found "[t]here's simply not an adequate connection demonstrated between the symptoms and the incident, the perception or incident reporting that could have been involved." RP 266-67. The trial court found very little probative value could come from this evidence. RP 266-67. In addition, the trial court found that if the jury heard about a bipolar diagnosis that there would be a potential for misperception and misunderstanding by the jury and that he had concerns about the prejudicial effect that would come from the stigma of mental health issues. RP 267. The judge found there "is a substantial prejudicial effect from simply a diagnosis of bipolar being referenced and presented

to the jury. I think it does substantially outweigh the minimal probative value that would be present here.” RP 267-68.

The issue that Hart raised on appeal is a non-issue: Hart never once asked the trial court to rule on the admissibility of evidence of the victim’s alleged memory problems. The State asked the trial court to rule on its motion in limine to prohibit defense from introducing evidence that the victim had been diagnosed with bipolar 2 disorder and to prohibit defense from introducing evidence that she was on certain medications. There were no other motions involving the victim’s mental health records, medical records, or anything to do with the victim’s memory made or heard pretrial or during trial. Thus, on the issue raised for the first time on appeal, Hart cannot seek relief as he never sought to do what he now claims the trial court prevented him from doing. The trial court never prevented him from seeking to introduce evidence related to the victim’s memory issues. The trial court prohibited Hart from introducing evidence that she suffered from bipolar 2 disorder, the name of the disorder, and that she took certain medications. There was no ruling or discussion, as there was no motion from Hart to introduce this evidence, about whether Hart could cross-examine her about whether she had admitted to having memory issues in the weeks leading up to the assault. There is no error the trial court made in regards to that issue. Regarding the actual evidentiary

ruling the trial court made, it was done with all the correct legal standards in mind, knowing the correct law, giving Hart extra time to come up with an expert witness to show how the evidence was relevant. And yet he was unable to do so because the evidence was simply not relevant. The trial court correctly found that the evidence was not relevant and was so minimally relevant that the prejudice outweighed its relevance. The trial court did not violate the defendant's right to confrontation by limiting the scope of cross-examination of Ms. Hart. The trial court should be affirmed.

II. Hart cannot show he received ineffective assistance of counsel or that he was prejudiced by his attorney's actions

Hart claims that his attorney was ineffective for failing to ask him about the harassment charge during his direct examination. However, attorneys are presumed competent and any potential legitimate explanation for counsel's action should be honored. As there is a potential legitimate tactical reason for counsel's action, and in any event, no prejudice to the outcome of Hart's case, Hart cannot show he was denied the effective assistance of counsel. His claim fails.

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.*

It is an attorney’s conduct that must be objectively reasonable, and not that counsel actually had thought through a cunning defense strategy, in order to satisfy the *Strickland* criteria. When a defendant takes the stand, he waives his privilege against self-incrimination about the subjects on which he testifies. If he remains silent on certain subjects, he is not allowed to be cross-examined on those subjects. *State v. Hart*, 180 Wn.App. 297, 304-05, 320 P.3d 1109 (2014). Therefore, it is reasonable strategy to not ask a defendant questions about one charge while having

him testify about other charges so as to insulate him from cross-examination about that one charge. *See id.* Here, Hart was not subject to cross-examination on the harassment charge because he did not testify about it on direct examination. He retained his right to remain silent on that charge. *Id.* This is an objectively reasonable defense strategy and as such, is not deficient performance of defense counsel.

However, even if it was deficient performance, it is clear the jury did not believe anything Hart had to say. The jury rejected Hart's claim that he did not assault his wife, and rejected his claim that the strangulation was consensual during rough sex, and clearly would have as well rejected any contention that he did not verbally harass his wife. By virtue of the verdict, the jury rejected the defendant's version of the events. The jury found he was not a credible witness. Had the defendant given additional testimony in an attempt to discredit the harassment charge, he only would have further harmed his own credibility. Consequently, the defendant cannot show he was prejudiced by his inability to tell a false tale on the stand. His claim of ineffective assistance of counsel fails.

III. The trial court properly sentenced Hart.

Hart claims the trial court violated the separation of powers doctrine by delegating the authority to set conditions of community

custody to the Department of Corrections. However, the trial court properly sentenced Hart and is allowing the Department of Corrections to set the type of treatment needed as it determines is necessary as is allowed by law. Hart's claim fails.

Sentencing courts may delegate some aspects of community placement to the Department of Corrections. *State v. Sansone*, 127 Wn.App. 630, 642, 111 P.3d 1251 (2005). “[T]he execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.” *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). While it is appropriate to delegate the setting of some conditions to the Department of Corrections, issues arise when the courts set unconstitutionally vague conditions that allow the probation officers “unfettered power of interpretation.” *Sansone*, 127 Wn.App. at 642 (quoting *United States v. Loy*, 237 F.3d 251, 266 (3rd Cir. 2001)).

In *State v. McWilliams*, 177 Wn.App. 139, 311 P.3d 584 (2013), this Court addressed a similar argument now raised by Hart. There, McWilliams argued that the trial court had impermissibly delegated its sentencing authority to the Department of Corrections when the trial court

ordered “conditions per DOC; CCO” on the judgment and sentence. *McWilliams*, 177 Wn.App. at 152. However, this Court disagreed with *McWilliams* and found the trial court “properly delegated the specifics of *McWilliams*’s community custody conditions to the DOC.” *Id.* at 154. Finding that RCW 9.94A.704(2)(a) authorizes the Department of Corrections to “establish and modify additional conditions of community custody based upon the risk to community safety,” the Court found the Department was authorized to establish additional conditions and that the trial court’s delegation of the specifics of community custody conditions to the Department was within the Department’s authority as set forth by *Sansone, supra. McWilliams*, 177 Wn.App. at 154. This Court therefore concluded that the sentencing court did not impermissibly delegate sentencing authority to the Department of Corrections.

McWilliams is directly on point with Hart’s case and Hart has not shown that *McWilliams* is incorrect or harmful and therefore it should be followed. The trial court’s order that Hart participate in crime-related treatment or counseling services as directed by DOC and that he comply with crime-related prohibitions as directed by DOC is permissible and authorized by RCW 9.94A.704 and *McWilliams, supra*, and *Sansone, supra*. The trial court’s sentencing order should be affirmed.

IV. Hart's Right to be Free from Double Jeopardy Has Not Been Violated.

Hart claims his right to be free from double jeopardy was violated because the additional count against him was dismissed at the time of sentencing. He asks this court to remand the matter to vacate the count, however, vacation would have the same effect as dismissal, and therefore Hart has not been harmed by the trial court's order.

Double jeopardy is a sentencing issue as the provision prohibits someone from twice being punished for the same offense. U.S. Const. Amend. V. Wash. Const. art. I, sec. 9. Hart claims that a charge that has been dismissed still remains valid, yet offers no proof or case law to support this. There is no remaining validity to count 2, it has been dismissed, it no longer exists. Hart has not been twice punished for the same offense and therefore his right to be free from double jeopardy has not been violated. This Court need not order this matter remanded to make any changes to the judgment and sentence as there remains no continuing validity to count 2 and Hart's claim is nonsensical and would provide no relief that he does not already enjoy.

CONCLUSION

Hart has not shown that the trial court erred in admitting evidence, that his attorney was ineffective, that the trial court improperly delegated

its authority to the Department of Corrections, or that his right to be free from double jeopardy was violated. Accordingly, the trial court should be affirmed in all respects.

DATED this 24th day of April, 2019.

Respectfully submitted:

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