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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER SAUNDERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh, Judge

No. 17-1-02830-6

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 3

1. Has Defendant raised a meritless ineffective assistance claim based on his counsel’s strategic decision to avoid highlighting prejudicial information about Defendant’s failure to register as a sex offender when the omitted objections were unlikely to be sustained and incapable of affecting the trial’s outcome?..... 3

2. Is Defendant’s prosecutorial misconduct claim unfounded when the prosecutor’s challenged remarks highlighted the improbability of Defendant’s version of events and were otherwise harmless given the court’s instructions and the totality of the evidence? 3

3. Does Defendant also raise inadequately developed claims of ineffective assistance that do not warrant review? 3

4. Should this case be remanded so the sentencing court can strike the filing fee, DNA fee, and interest accrual provision since that result is supported by recent case law and legislation? 3

B. STATEMENT OF THE CASE..... 3

1. PROCEDURE..... 3

2. FACTS 5

C. ARGUMENT 11

1. DEFENDANT CANNOT PROVE IT WAS INEFFECTIVE FOR HIS COUNSEL TO TACTICALLY WITHHOLD OBJECTIONS THAT WOULD HAVE UNDULY EMPHASIZED UNFAVORABLE ADMISSIBLE EVIDENCE AS HE STRATEGICALLY FOCUSED ON PRESENTING DEFENDANT’S THEORY OF THE CASE 11

2.	THE PROSECUTOR’S REMARKS IN CLOSING ARGUMENT HIGHLIGHTED THE IMPROBABILITY OF DEFENDANT’S CLAIM OF VALID REGISTRATION AND DID NOT AFFECT THE JURY’S VERDICT GIVEN THE COURT’S INSTRUCTIONS AND THE TOTALITY OF THE EVIDENCE PRESENTED.....	29
3.	THE APPELLATE COURT SHOULD DECLINE TO CONSIDER THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON A FAILURE TO MOVE TO DISMISS THE CASE OR OBJECT DURING CLOSING ARGUMENT AS NO LEGAL AUTHORITY OR FACTUAL ANALYSIS WAS OFFERED IN BRIEFING	36
4.	THIS COURT SHOULD REMAND SO THAT THE CRIMINAL FILING FEE, DNA FEE, AND INTEREST ACCRUAL PROVISION MAY BE STRICKEN IN ACCORDANCE WITH HB 1783	37
D.	CONCLUSION.....	39

Table of Authorities

State Cases

<i>Carson v. Fine</i> , 123 Wn.2d 206, 225, 867 P.2d 610 (1994).....	17
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....	37
<i>In re Davis</i> , 152 Wn.2d 647, 714, 101 P.3d 1 (2004).....	14
<i>In re Disciplinary Proceeding against Whitney</i> , 155 Wn.2d 451, 467, 120 P.3d 550 (2005).....	37
<i>In re Elmore</i> , 162 Wn.2d 236, 257, 172 P.3d 335 (2007)	12
<i>In Re Stenson</i> , 174 Wash.2d 474, 276 P.3d 286 (2012).....	29
<i>Matter of Estate of Lint</i> , 135 Wn.2d 518, 532, 957 P.2d 755 (1998)	37
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 779 P.2d 249 (1989)	37
<i>State v. Adams</i> , 76 Wn.2d 650, 458 P.2d 558, <i>rev'd on other grounds by</i> , 403 U.S. 947, 91, S. Ct. 2273, 29 L. Ed. 2d 855 (1971).....	33
<i>State v. Aguilar</i> , 176 Wn. App. 264, 273, 308 P.3d 778 (2013).....	19
<i>State v. Anderson</i> , 153 Wn. App. 417, 428-29, 220 P.3d 1273 (2009).....	34
<i>State v. Benn</i> , 120 Wn.2d 631, 663, 845 P.2d 289 (1993).....	13
<i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....	33
<i>State v. Brockob</i> , 159 Wn.2d 311, 351, 150 P.3d 59 (2006)	27
<i>State v. Brown</i> , 132 Wn.2d 529, 571–72, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).....	24, 25

<i>State v. Campbell</i> , 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).....	26
<i>State v. Carleton</i> , 82 Wn. App. 680, 685, 919 P.2d 128 (1996).....	26
<i>State v. Contreras</i> , 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).....	32
<i>State v. Crow</i> , No. 35316-8, 438 P.3d 541, 556 (2019).....	14
<i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)	27
<i>State v. Curtiss</i> , 161 Wn. App. 673, 698, 250 P.3d 496 (2011).....	29
<i>State v. Darden</i> , 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).....	17
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003)	35
<i>State v. Elliott</i> , 114 Wn.2d 6, 15, 785 P.2d 440 (1990)	37
<i>State v. Emery</i> , 174 Wn.2d 741, 761, 278 P.3d 653 (2012).....	31
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 175, 163 P.3d 786 (2007)	25, 26
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994)	12
<i>State v. Gentry</i> , 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995).....	31
<i>State v. Grier</i> , 171 Wn.2d 17, 42, 246 P.3d 1260 (2011)	12
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled on other grounds by <i>Carey v. Musladin</i> , 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)	12, 13
<i>State v. Hoffman</i> , 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).....	33
<i>State v. Jackson</i> , 145 Wn. App. 814, 818, 187 P.3d 321 (2008)	19
<i>State v. Johnson</i> , 159 Wn. App. 766, 773, 247 P.3d 11 (2011).....	25
<i>State v. Johnston</i> , 143 Wn. App. 1, 19, 438 P.3d 541 (2007).....	14
<i>State v. Jones</i> , 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993).....	30

<i>State v. Kirkman</i> , 159 Wn.2d 918, 935, 155 P.3d 125 (2007)	14
<i>State v. Kloeppe</i> r, 179 Wn. App. 343, 317 P.3d 1088 (2014)	14, 15
<i>State v. Kyllo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009)	12
<i>State v. Lane</i> , 125 Wn.2d 825, 831, 889 P.2d 929 (1995)	22
<i>State v. Lough</i> , 125 Wn.2d 847, 859, 889 P.2d 487 (1995)	25
<i>State v. Lynn</i> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992)	14
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662 (1989)	13, 14
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985)	29
<i>State v. Matthews</i> , 75 Wn. App. 278, 284, 877 P.2d 252 (1994)	25
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)	12
<i>State v. McKenzie</i> , 157 Wn.2d 44, 57-60, 134 P.3d 221 (2006)	32
<i>State v. Millante</i> , 80 Wn. App. 237, 250, 908 P.2d 374 (1995)	32
<i>State v. Neal</i> , 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)	27
<i>State v. Powell</i> , 126 Wn.2d 244, 264, 893 P.2d 615 (1995)	17, 26
<i>State v. Ramirez</i> , 191 Wn.2d 732, 747, 426 P.3d 714 (2018)	38
<i>State v. Rice</i> , 48 Wn. App. 7, 12, 737 P.2d 726 (1987)	17
<i>State v. Russell</i> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)	30
<i>State v. Saunders</i> , 91 Wn. App. 575, 578, 958 P.2d 364 (1998)	14
<i>State v. Schaffer</i> , 63 Wn. App. 761, 769, 822 P.2d 292 (1991)	22
<i>State. v. Shipp</i> , 93 Wn.2d 510, 516, 610 P.2d 1322 (1990)	21

<i>State v. Smiley</i> , 195 Wn. App. 185, 195, 379 P.3d 149 (2016).....	31, 36
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	29, 30, 31, 32
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P. 2d 610 (1990)	31, 35
<i>State v. Tharp</i> , 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981).....	23, 27
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	12
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	29, 31, 32
<i>State v. Warren</i> , 165 Wn.2d 17, 30, 195 P.3d 940 (2008) <i>cert. denied</i> , 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).....	30
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	29
<i>State v. Wolohan</i> , 23 Wn. App. 813, 821, 598 P.2d 421 (1979).....	25
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 91, 210 P.3d 1029 (2009).....	13

Federal and Other Jurisdictions

<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).....	11
<i>Old Chief v. United States</i> , 519 U.S. 172, 117 S.Ct. 644 (1997).....	22
<i>Strickland v. Washington</i> , 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	11, 12, 13
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).....	11, 27

Constitutional Provisions

Sixth Amendment	11, 27
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Statutes

RCW 43.43.7541 38

RCW 9A.08.010..... 21

RCW 9A.44.130..... 18

RCW 9A.44.130(4)(a)(1)..... 18

RCW 9A.44.130(5)..... 19

RCW 9A.44.130(6)..... 19

RCW 9A.44.132..... 18

RCW 9A.44.132(1)..... 21, 22

Rules

ER 401 17, 22

ER 402 22

ER 403 17, 22

ER 404(b)..... 24, 25, 26

RAP 10.3(a) 37

RAP 10.3(a)(6)..... 37

Other Authorities

House Bill 1783 37, 38, 39

INTRODUCTION

Defendant Christopher Saunders was found guilty for failing to register as a sex offender during the time period of June 22, 2017, through July 7, 2017. Defendant alleges his counsel was ineffective for refraining from objections that would have highlighted the State's evidence of his guilt, and that the prosecutor committed misconduct in closing argument by inviting the jury to draw the permissible inference that Defendant's claim of valid but lost registration was not credible.

Defendant was released from custody on June 16, 2017, triggering a duty to register at the Sheriff's Department within 3 business days. Evidence Defendant knew of this duty to register included two successful registrations on March 17, 2017, and June 1, 2017, after periods of incarceration.

Admissible circumstantial evidence Defendant failed to register included his movements and GPS violations prior to the charging period, his total absconsion from DOC supervision, the inability of law enforcement to find him, and his motive to avoid law enforcement contact at the Sheriff's Department while in violation of his DOC conditions. Counsel strategically pursued Defendant's claim of successful but lost registration throughout trial while tactically declining to draw attention to the State's admissible evidence of his guilt.

During closing argument, the prosecutor drew attention to the inconsistency in Defendant's claim of valid registration during the charging period while admitting to lack of registration in a subsequent time period when the conditions motivating non-compliance with the statute were the same. The prosecutor's argument was based on permissible inferences derived from the evidence and did not encourage the jury to return a verdict based on an uncharged time period.

The State asks the Court to reject Defendant's claims of ineffective assistance of counsel and prosecutorial misconduct and affirm the jury's verdict of guilt. The State asks the Court to disregard Defendant's improperly developed claims regarding counsel's failure to move to dismiss and failure to object during closing argument. The State asks the Court to remand Defendant's case so the trial court can strike the filing fee, DNA fee, and interest accrual provision on Defendant's judgment and sentence consistent with recent changes in the law.

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has Defendant raised a meritless ineffective assistance claim based on his counsel's strategic decision to avoid highlighting prejudicial information about Defendant's failure to register as a sex offender when the omitted objections were unlikely to be sustained and incapable of affecting the trial's outcome?
2. Is Defendant's prosecutorial misconduct claim unfounded when the prosecutor's challenged remarks highlighted the improbability of Defendant's version of events and were otherwise harmless given the court's instructions and the totality of the evidence?
3. Does Defendant also raise inadequately developed claims of ineffective assistance that do not warrant review?
4. Should this case be remanded so the sentencing court can strike the filing fee, DNA fee, and interest accrual provision since that result is supported by recent case law and legislation?

B. STATEMENT OF THE CASE

1. PROCEDURE

Defendant was charged by amended information for failing to register as a sex offender on or between June 22, 2017, and July 7, 2017. CP 8-9. The information also alleged he had been previously convicted of failure to register as a sex offender on two or more prior occasions and

was under community custody when he committed his most recent offense. CP 8-9. Defendant proceeded to trial. 1RP 1 – 3RP 329.¹

To strategically avoid the presentation of prejudicial evidence, Defendant stipulated to five facts at trial: 1) He was previously convicted of a Class A felony sex offense, giving rise to a lifetime duty to register as a sex offender; 2) He has been convicted of two adult felony sex offenses in total, giving rise to a lifetime duty to register as a sex offender; 3) He was convicted of a felony sex offense on or after February 28, 1990; 4) He was under an ongoing duty to register as a sex offender, which included the period of time between June 22, 2017, and July 7, 2017; and 5) Prior to the time period between June 22, 2017, through July 7, 2017, he had two or more prior convictions for felony failure to register as a sex offender. CP 15-17, 26.

Defendant claimed at trial he had registered as required by law. 2RP 276-77, 281-86. His counsel remained focused on strategically presenting this defense and raising doubt about the State's evidence of registration failure. 1RP 96, 104-05, 128, 132-33, 2RP 168-69, 228-29, 264-66, 277, 311. Counsel cross-examined the State's witnesses in a manner consistent with the defense theory. 1RP 104-05, 128, 132-33, 2RP

¹ The State refers to the verbatim reports of proceedings as follows: 1RP – Volume 1, 3/19/18; 2RP – Volume 2, 3/20/18; 3RP – Volume 3, 3/21/18; 4RP – 5/11/18.

168-69, 228-29, 264-66, 277. Counsel challenged the reliability of the Sheriff's Department's record-keeping system for sex offender registration. 2RP 168-69. Counsel argued in closing the State failed to call witnesses to counter Defendant's claim. 2RP 311.

The prosecutor properly argued in closing that the evidence at trial showed Defendant's guilt. 2RP 301-08. She recalled the jury to the court's instructions. 2RP 303-04. She argued inferences against Defendant's credibility by pointing out his admission to a registration failure taking place outside the charging period. 2RP 302-03, 304, 306-07, 312-13.

The jury convicted Defendant as charged. CP 40, 41. The court sentenced Defendant to 51 months incarceration at the Department of Corrections. 4RP 45-60. The court imposed the criminal filing fee, DNA fee, and interest accrual provision on Defendant's judgment and sentence. 4RP 45-60. Defendant was found indigent for purposes of appeal. 4RP 21. Defendant timely appealed. CP 61.

2. FACTS

The Pierce County Sheriff's Department (PCSD) manages sex offender registration in Pierce County. 2RP 172. PCSD's sex and kidnap offender registration unit assists offenders in registering, monitors sex offenders, and maintains copies of registration records indefinitely. 2RP 172-74, 181. Each time a sex offender registers with PCSD, that individual

fills out paperwork regarding residential address or physical location, if transient. 2RP 174-78. PCSD uses the information to update law enforcement databases and the paperwork is stored electronically. 2RP 173, 176, 180-81, 227-29, 266-67. Andrea Conger, the PCSD records custodian who testified at trial, could not recall any occasion PCSD lost or misplaced registration paperwork in the almost 10 years she had been assigned to the unit. 2RP 171-73, 264-65.

Defendant Christopher Saunders has been registering as a sex offender in Pierce County since 1993. 2RP 264. He is required to register throughout his lifetime because he has been convicted of a Class A sex offense, and because he has been convicted of two felony sex offenses in total. CP 15-17, 26, 48. Defendant had experience complying with his duty to register before the charged offense. 2RP 200-221, 264. He has properly registered as transient, at a fixed address, and following release from custody. 2RP 200-221, 264.

Defendant was most recently released from prison on February 9, 2017. 1RP 110-11. That day, his community corrections officer Sally Saxon picked him up and transported him to PCSD to register as a sex offender. 1RP 113-15. Defendant registered as living at 1947 South Sheridan, a location serving as transitional housing for sex offenders in Tacoma. 2RP 194-197. DOC paid his rent for two months and thereafter it

was paid by his mother through July 7, 2017. 1RP 111-12. Defendant was on community custody throughout this time period, which includes the charging period of June 22 – July 7, 2017. 1RP 110-11.

DOC imposed conditions of supervision on Defendant and monitored his physical location and address. 1RP 109-10, 112. His conditions included reporting to DOC as instructed, providing UAs if requested, refraining from contact with minors or going to places frequented by minors, remaining within Pierce County, notifying DOC of any change of address, and registering as a sex offender with PCSD as required by law. 1RP 112. Defendant was also required to report to DOC every Wednesday to meet with Saxon. 1RP 122-23, 129. To monitor his physical address, Saxon performed in-person checks at Defendant's residence once per month. 1RP 129. She had difficulty verifying he was living at 1947 South Sheridan as he was rarely there when she was. 1RP 129. DOC repeatedly reminded Defendant of his duty to register as a sex offender. 1RP 112-15.

Defendant frequently violated the terms of his community custody. 1RP 116. This led to him being incarcerated on three occasions leading up to the registration failure underlying his conviction. 1RP 95, 116, 2RP 189, 191. Following each release from custody, Defendant was required to report to DOC within 24 hours. 1RP 132-33. At these meetings, DOC

reminded him of his duty to register as a sex offender within 3 business days of his release. 1RP 115, 2RP 177. He was required to show Saxon proof of that at his next weekly meeting with her. 1RP 115. PCSD provides registering sex offenders with cards showing the date of registration that can be used for this purpose. 2RP 39. Defendant successfully registered with PCSD after periods of incarceration on March 17, 2017, and June 1, 2017. 2RP 184-93. The latter was 21 days before the first day of the charging period for his conviction on this case. 2RP 184-93, CP 8-9.

At her last appointment with him on May 31, 2017, Saxon placed Defendant on GPS and imposed a curfew after determining he met DOC criteria for these conditions. 1RP 118-19. Defendant was arrested by Saxon on June 7, 2017, after giving explanations for curfew violations inconsistent with data from his GPS device. 1RP 121. He was booked into the SCORE detention facility the same day. 1RP 121. When he was released on Friday, June 16, 2017, a DOC officer met with him and instructed him to register as a sex offender within 3 business days as required by law. 1RP 121-122. Defendant's next weekly meeting with Saxon was scheduled for Wednesday, June 21, 2017. 1RP 121-122.

Defendant had no further contact with DOC after June 16, 2017. 1RP 133, 2RP 278. His GPS device showed he returned to the 1947 South

Sheridan address that day for approximately two hours. 1RP 122. He then traveled to various locations within Tacoma for two days without ever returning to his registered address. 1RP 122. On Sunday, June 18, his GPS device stopped functioning. 1RP 122. On Tuesday, June 20, DOC officers looked for Defendant at all the locations his GPS device showed he had traveled. 1RP 122-23. They could not find him. 1RP 122-23. DOC issued a warrant for his arrest on June 22, 2017. 1RP 123-24. The Tacoma Police Department (TPD) was notified of the warrant and his noncompliance with DOC supervision. 1RP 123-24, 2RP 158-59, 165, 168.

The last registration form Defendant provided PCSD was filled out on June 1, 2017. 2RP 169, 221-22. He reported he was living at 1947 South Sheridan. 2RP 169, 221-22. On July 7, 2017, TPD Detective Christie Yglesias performed a sex offender verification check at that address after receiving information from Saxon about Defendant's non-compliance. 2RP 165-166, 168. Detective Yglesias spoke with the house manager. 2RP 165. She determined Defendant was not at the residence and his whereabouts were unknown. 2RP 165. Detective Yglesias checked law enforcement databases and verified Defendant was not in custody. 2RP 165, 168, 170. Detective Yglesias documented Defendant's failure to register. 2RP 165-166.

Defendant testified and said he registered at PCSD on Monday, June 19, 2017, within 3 business days of his release from custody as required by law. 2RP 276-77, 281-86. Defendant was unable to name the employee who assisted him with registration, but said it was an “older lady,” and he was “pretty sure it was the same two ladies that generally work there at the front desk.” 2RP 276, 281-82. He said his GPS tracking device stopped functioning on the bus ride to PCSD that Monday and blamed this on DOC, saying the device died because of “a faulty cord they had given me.” 2RP 277-78, 283.

Defendant said he “didn’t think” he returned back to his house after the registration. 2RP 277. Defendant also claimed he remained living at 1947 South Sheridan through July 7, 2017. 2RP 270, 280-81. He admitted to lack of contact with DOC following his meeting on June 16. 2RP 278-79, 283. He said he purposefully avoided contact with DOC because he violated his conditions by using controlled substances. 2RP 278-79, 283. Defendant admitted he never reported back to DOC and was out of custody in the community until his arrest on October 18, 2017. 2RP 279. Defendant admitted that from July 7, 2017, to October 18, 2017, he was not living at the 1947 South Sheridan address and was not registered with PCSD during that time frame. 2RP 281.

C. ARGUMENT

1. DEFENDANT CANNOT PROVE IT WAS INEFFECTIVE FOR HIS COUNSEL TO TACTICALLY WITHHOLD OBJECTIONS THAT WOULD HAVE UNDULY EMPHASIZED UNFAVORABLE ADMISSIBLE EVIDENCE AS HE STRATEGICALLY FOCUSED ON PRESENTING DEFENDANT’S THEORY OF THE CASE

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must prove his counsel’s performance was deficient and the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v.*

Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Trial counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Rather, a defendant must show the “absence of any conceivable legitimate tactic explaining counsel’s performance,” and that but for counsel’s errors, there is a reasonable probability the result of the trial would have been different. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (internal citation omitted); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

“Strickland begins with a ‘strong presumption that counsel’s performance was reasonable.’” *Grier*, 171 Wn.2d at 42 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Exceptional deference must be given to counsel’s tactical and strategic decisions. *In re Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007) (citing *Strickland*, 466 U.S. at 689). “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. Judicial scrutiny of a defense attorney's performance must be “highly deferential in

order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993).

- a. Defendant cannot show counsel’s performance was deficient for strategically withholding objections to unfavorable evidence while effectively presenting Defendant’s theory of the case

Defendant cannot show deficient performance when counsel’s lack of objections avoided highlighting circumstantial evidence of Defendant’s failure to register, prevented speculation by jurors on the lack of evidence, and allowed counsel to direct attention on Defendant’s theory of the case. A valid trial tactic is not deficient performance. *State v. Yarbrough*, 151 Wn. App. 66, 91, 210 P.3d 1029 (2009); *Hendrickson*, 129 Wn.2d at 77-78. The decision of when, whether and how to object, and what to argue are classic examples of tactical decisions. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. at 763).

Ineffective assistance of counsel claims based on lack of objection require the defendant to prove: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that the objection would have likely been sustained; and (3) that the result of the trial would

have been different if the objection was successful. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). The asserted error for lack of objection must truly be “manifest,” demonstrated by “a plausible showing ... the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Refraining from objection may be a strategic decision. *Kirkman*, 159 Wn.2d at 935. Counsel may decline to object to avoid highlighting particular evidence, a legitimate tactical decision to be afforded exceptional deference. *State v. Crow*, No. 35316-8, 438 P.3d 541, 556 (2019); see also *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Counsel may even tactically decline to object to inadmissible evidence. *State v. Kloeppe*r, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014). “Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.” *State v. Johnston*, 143 Wn. App. 1, 19, 438 P.3d 541 (2007) (quoting *Madison*, 53 Wn. App at 763).

Counsel’s lack of objection to harmful but admissible evidence is a well-recognized tactical decision. *In re Davis*, 152 Wn.2d at 714. Defendant now argues counsel should have objected to evidence of his

violation history while on community custody. By objecting, however, counsel would have emphasized the importance of Defendant's community custody violations, incarcerations, and subsequent successful registrations to the State's proof he knew he had to register within 3 days of release. Similarly, Defendant now argues counsel should have objected to evidence of his GPS violations and movements in the days immediately prior to the charging period. If he had objected, counsel would have drawn more attention to circumstantial evidence Defendant had abandoned his residence and had motive to avoid law enforcement, proper purposes for admission of this evidence to prove he failed to register.

Even where the evidence was arguably inadmissible, counsel's lack of objection was a valid tactic to avoid potentially harmful juror speculation. *Klopper*, 179 Wn. App. at 355. Defendant now argues his counsel should have objected to Saxon's testimony about his GPS and curfew violations throughout his supervision. Given the relevance and admissibility of his incarcerations during supervision, however, it was a strategic decision to let jurors know of the more nominal violations leading to these incarcerations rather than speculate Defendant had done something more serious.

Counsel's tactical avoidance of needless and potentially distracting objections allowed unwavering attention to Defendant's claim of valid

registration. Counsel pursued Defendant's theory throughout every phase of the trial and through the cross examination of every State witness. 1RP 96, 104-05, 128, 132-33, 2RP 168-69, 228-29, 264-66, 277, 311.

In opening statement, counsel introduced Defendant's stance he was in compliance with the statute. 1RP 96. He cross examined the records custodian from the SCORE jail about her lack of knowledge of Defendant's whereabouts after his July 16 release. 1RP 104-05. He questioned Saxon about Defendant's rent being paid at the 1947 South Sheridan address through the end of the charging period, raising the inference Defendant had no reason to fail to register. 1RP 128, 132-33. He questioned Detective Yglesias about how she was notified of Defendant's last registration with PCSD in line with his theory there was a newer, but lost registration. 2RP 168-69. He questioned Conger about the accuracy of PCSD's record-keeping system, whether mistakes had been made in the past, and whether mistakes had been made in the past with Defendant's paperwork in particular. 2RP 228-29, 264-66. He presented Defendant's testimony he complied with registration. 2RP 276-77, 281-86. In closing, he emphasized the State had not called witnesses who may have seen Defendant register at PCSD on June 19. 2RP 311.

The unwavering focus on Defendant's claim, while refraining from giving the impression of needing to hide negative information, bolstered

the credibility of the defense theory. Counsel's strategy was apt in a case in which juror knowledge of some prior misconduct in the form of admissible and relevant evidence was unavoidable. Defendant cannot show his counsel's decision to withhold objections was not tactical.

- b. Defendant cannot demonstrate prejudice because the challenged evidence was admissible for proper purposes and would not have been excluded upon objection

Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). A fact bearing on the credibility or probative value of other evidence is relevant. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

Relevant evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice. ER 403. The burden is on the party seeking to exclude the evidence to demonstrate the danger of unfair prejudice. *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). Unfair prejudice exists where the evidence may encourage jurors to make an emotional rather than rational decision. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Evidence of Defendant's GPS violations and movements immediately prior to the charging period, his incarcerations while on supervision, his housing history, his DOC supervision requirements, and his GPS requirements was relevant to prove Defendant's knowing failure to register and explain the circumstances and history of his offense. Defendant cannot demonstrate deficiency of counsel as the court was unlikely to sustain any objection to this evidence.

- i. The challenged evidence was admissible circumstantial evidence Defendant failed to register as a sex offender

Defendant's GPS history and movements prior to the charging period was circumstantial evidence Defendant absconded from authorities, was no longer living at his residence, and had motive to avoid law enforcement at PCSD. An individual commits the crime of failure to register as a sex offender if the person has a duty to register and knowingly fails to comply with the requirements of RCW 9A.44.130. RCW 9A.44.130; RCW 9A.44.132. A registered sex offender has various duties under the statute depending on residential status. RCW 9A.44.130; RCW 9A.44.130; RCW 9A.44.132. An offender held in custody in a local jail must "register within three business days from the time of release with the county sheriff for the county of the person's residence." RCW 9A.44.130(4)(a)(1). An offender who moves from a fixed residence must

provide notice to the county sheriff within three business days. RCW 9A.44.130(5). An offender who becomes transient must notify the sheriff within three business days and thereafter report weekly to provide an accurate accounting of physical locations during the week. RCW 9A.44.130(6).

“Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.” *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008) citing Washington Practice Pattern Jury Instructions 5.01. Circumstantial evidence and the inferences stemming from it can be used to prove an element of a crime. *State v. Aguilar*, 176 Wn. App. 264, 273, 308 P.3d 778 (2013).

Defendant was released from incarceration on June 16, 2017, triggering a duty to register at PCSD by Wednesday, June 21, 2017, 3 business days later. Defendant had a simultaneous duty to notify PCSD of any change in address or change in status to transient. RCW 9A.44.130(5); RCW 9A.44.130(6). Proving a negative, that Defendant failed to do the mandated act of registration, required circumstantial evidence from which the jury could infer guilt. It required not only presenting the lack any registration paperwork at PCSD after June 16, 2017, but also the

surrounding circumstances to show beyond a reasonable doubt Defendant failed to register.

Inferences from Defendant's movements immediately prior to the charging period were relevant to proving the offense within the charging period. After meeting with DOC on June 16, 2017, Defendant returned to his registered address for just two hours. 1RP 22. He then proceeded to move around Tacoma for two days without returning, during which time he let his GPS unit power down. 1RP 22. He never reported to nor communicated with DOC again. 2RP 278.

Defendant cannot show this information would have been excluded upon objection, because it is highly probative circumstantial evidence the lack of registration paperwork at PCSD was not a mistake, but part of his total absconsion from both DOC supervision and his legal duty to keep law enforcement aware of his location. The inferences from this evidence, in conjunction with law enforcement's inability to find him between June 20, 2017 and July 7, 2017, include that Defendant stopped living at the 1947 South Sheridan address, had no intention of returning, and was not registering to avoid law enforcement contact and knowledge of his whereabouts. As the State argued in closing, Defendant did not register because he "did not want to be found." 2RP 306. The challenged evidence

was admissible circumstantial evidence Defendant failed in his duty to register.

- ii. The challenged evidence was admissible circumstantial evidence Defendant *knowingly* failed to register

In addition to proving Defendant failed in his duty to register, the State was required to prove beyond a reasonable doubt Defendant did so knowingly. RCW 9A.44.132(1). A person acts knowingly if they are aware of a fact described by statute as an offense. RCW 9A.08.010. Proving an act was done knowingly may be established by circumstantial evidence. *State. v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1990).

The most powerful evidence Defendant knew of his duty to register within 3 days of release from custody during the charging period was that he had very recently done so twice, on March 17, 2017, and June 1, 2017, while supervised by DOC. 2RP 184-93. Defendant objects to Saxon's statement that "there was quite a period of time between the February and the June date that he was in either violation in the SCORE jail or on warrant status, quite regularly enough that we got to know each other and understand each other's expectations." 1RP 116. This testimony relates to the violations and incarcerations leading to Defendant's successful registrations, directly relevant to his knowledge of his duty to

register. The statement is also relevant to Defendant's knowledge as Saxon repeatedly reminded Defendant of his duty to register.

The State has the burden of proof and in most circumstances is not required to limit its use of admissible evidence of guilt. *Old Chief v. United States*, 519 U.S. 172, 186-87, 117 S.Ct. 644 (1997). Defendant's argument the evidence relevant to his knowledge could have been presented solely through Conger is unpersuasive, as except in specific circumstances, the State may prove its case upon evidence of its choosing. *Id.* The evidence of Defendant's two recent successful registrations upon release is highly probative evidence admitted for the proper purpose of showing a knowing violation of the registration statute. ER 401, 402, 403; RCW 9A.44.132(1). Defendant cannot show this evidence was likely to be excluded upon objection.

iii. The challenged evidence was admissible res gestae evidence

Evidence of Defendant's general community custody conditions was admissible res gestae evidence. Evidence and testimony is admissible as res gestae if it "constitutes proof of the history of the crime charged." *State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (internal citation omitted). Evidence is also res gestae if it "complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)

(quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980),
aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981)).

The jury's understanding of the highly probative evidence of Defendant's violation history, GPS monitoring, and periods of incarceration followed by release, required contextual information including Defendant's basic supervision conditions and the criteria for being placed on GPS. Regarding Defendant's conditions, Saxon testified:

[H]e is to report and be available to Department of Corrections 24 hours a day. He is to report as instructed, provide UAs as instructed. He is not to have contact with minors, not to go to places that minors frequent. He is not to leave Pierce County without written permission. And he is to keep -- notify the department of any change in his address, employment or schooling, as well as to register as a sex offender with the Pierce County Sheriff's Department. 1RP 112.

Defendant's conditions were presented as general conditions applicable to a sex offender on supervision. They did not imply Defendant had a drug problem or victimized children specifically, as Defendant argues on appeal. Evidence of these basic conditions was necessary context for the jury to understand Defendant's violation history and his requirement to keep DOC and law enforcement apprised of his location.

Regarding Defendant's enrollment on GPS, Saxon testified:

[T]he Department of Corrections places specific individuals on GPS for a variety of reasons: The first 30 days out of prison; risk to the community; stability in housing; employment; programming.

We have a criteria that we go through to meet qualifications. And Mr. Saunders met all qualifications to be placed on GPS. 1RP 118.

Again, these requirements were presented as general guidelines as to why offenders are placed on GPS, relevant for the jury's understanding of Defendant's violation history. That Defendant met the qualifications to be on GPS did not unduly emphasize any one factor, or give the jury any reason to believe Defendant was a particular risk to the community above that of an average sex offender on community supervision. Defendant cannot show objections to this evidence were likely to be sustained as it was admitted for the proper purpose of assisting the jury in understanding the circumstances of the offense.

- iv. The challenged evidence was admissible under 404(b) as evidence of motive, lack of mistake or accident, res gestae, and circumstantial evidence

Evidence of other misconduct is not admissible to show bad character, but is admissible for proper purposes. ER 404(b). The decision to admit evidence of other misconduct lies within the sound discretion of the trial court; it will not be disturbed absent an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571–72, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds. *Id.*

Evidence of other misconduct is admissible under ER 404(b) to prove motive, to show knowledge, as *res gestae*, and as circumstantial evidence of a crime. ER 404(b); *See State v. Brown*, 132 Wn.2d at 570-70 (404(b) evidence admissible as *res gestae*); *State v. Johnson*, 159 Wn. App. 766, 773, 247 P.3d 11 (2011) (404(b) evidence admissible as circumstantial evidence of crime); *State v. Wolohan*, 23 Wn. App. 813, 821, 598 P.2d 421 (1979) (404(b) evidence admissible to show knowledge); *State v. Matthews*, 75 Wn. App. 278, 284, 877 P.2d 252 (1994) (404(b) evidence admissible to show motive). "ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but ... to prevent the State from suggesting ... a defendant is guilty because he... is a criminal-type person who would likely commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

A trial court applying ER 404(b) is to: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, i.e., whether the purpose for which the evidence is offered is of consequence to the outcome of the action and tends to make the existence of an identifiable fact more probable; and (3) balance the probative value of the evidence against its prejudicial effect on the record. *State v.*

Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995). Although balancing should always be articulated on the record, a trial court's ER 404(b) ruling may be affirmed in the absence of explicit balancing if the appellate court can determine the evidence was properly admitted from its review of the entire record. *See Powell*, 126 Wn.2d at 264-65; *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996).

Defendant argues that the challenged evidence consists of “other misconduct” under 404(b). It was admitted and used for the proper purposes, however, of motive, knowledge, *res gestae*, and circumstantial evidence of guilt. ER 404(b). It was never used to show Defendant was “criminal-type person.” *Foxhoven*, 161 Wn.2d at 175. The evidence was highly probative Defendant knew of his duty to register and failed in that duty. It was also necessary for the jury to understand the context and history of the offense. The probative value of the challenged evidence far outweighed its prejudicial effect. Although the court did not conduct a 404(b) balancing test on the record, the record supports the admission of this evidence for these purposes, and Defendant has failed to show that the evidence would have been excluded had his counsel objected.

c. Defendant cannot show prejudice because the result of the trial would not be different had any of the evidence been excluded

Defendant cannot show that the result of the trial would change if the now challenged evidence was excluded. Proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronin*, 466 U.S. at 656. Lack of objection leading to erroneous admission of evidence is not of constitutional magnitude unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006); *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." *Neal*, 144 Wn.2d at 611.

Error admitting any of the challenged evidence would not warrant reversal given the great evidence of Defendant's guilt. *See Neal*, 144 Wn.2d at 611; *Tharp*, 96 Wn.2d at 599; *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Defendant fled from authorities immediately upon leaving his meeting with DOC on June 16, 2017. 1RP 133, 2RP 278. He went back to 1947 South Sheridan for only two hours and never returned. 1RP 122. He let his GPS power down, preventing

authorities from locating him, and never used it again. 1RP 122. DOC personnel and a TPD detective attempted to locate him by going to his residence, going to the locations he had visited, speaking with the house manager at 1947 South Sheridan, and checking law enforcement databases. 1RP 122-23, 2RP 165, 168, 170. None of this effort produced information on Defendant's whereabouts. 2RP 165-66. PCSD does not have any record Defendant registered between June 16 and July 7, 2017, and Conger testified she was unaware of PCSD misplacing or losing registration paperwork. 2RP 169, 171-73, 221-22, 264-65. Defendant himself testified he was purposefully avoiding DOC because he had violated his conditions by using drugs. 2RP 278-79, 283. The evidence shows Defendant disappeared after June 16, 2017, evaded law enforcement, was no longer living at the 1947 South Sheridan address, and never registered with PCSD as required by law. 1RP 122-23, 133, 2RP 165, 182, 278.

Because Defendant's violation history was relevant, the details of that history did not result in additional prejudice. Defendant challenges his counsel's lack of objection to his losing DOC housing funding after two months, and the jury hearing he cut off his GPS bracelet on prior occasions. Even if these details had been excluded, the jury would have heard evidence of Defendant's ongoing violations as relevant to his

knowledge and failure to register, making the same outcome likely.

Defendant cannot show any prejudice due to the conduct of his counsel as the evidence was strong and even upon exclusion of the challenged evidence the verdict would have remained the same.

2. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT HIGHLIGHTED THE IMPROBABILITY OF DEFENDANT'S CLAIM OF VALID REGISTRATION AND DID NOT AFFECT THE JURY'S VERDICT GIVEN THE COURT'S INSTRUCTIONS AND THE TOTALITY OF THE EVIDENCE PRESENTED

To prove that a prosecutor's actions constitute misconduct, a defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Curtiss*, 161 Wn. App. 673, 698, 250 P.3d 496 (2011) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) *post-conviction relief granted by In Re Stenson*, 174 Wash.2d 474, 276 P.3d 286 (2012)). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole 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). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Id.* at 86. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993). A prosecutor is, however, allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87.

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant

and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 455).

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990). “Accordingly, reviewing courts focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction.” *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

- a. The prosecutor's argument properly related to the credibility of Defendant's account of lawful registration and highlighted the improbability of his explanation in light of the surrounding circumstances.

The prosecutor's remarks regarding Defendant's failure to register during the charging period and beyond emphasized the improbability of Defendant's claim of valid registration during a time frame he was continuously out of compliance with his obligations to the State and actively avoiding authorities. In closing argument, a prosecutor is afforded reasonable latitude in drawing and expressing reasonable inferences from the evidence. *Stenson*, 132 Wn.2d at 718. That includes arguing that evidence does not support the defense theory. *State v. Thorgerson*, 172 Wn.2d at 449; *see also State v. McKenzie*, 157 Wn.2d 44, 57-60, 134 P.3d 221 (2006). "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

A prosecutor's wide latitude in arguing inferences from the evidence includes commenting on the credibility of witnesses. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (citing *State v.*

Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). For this reason “prosecutors may argue ... inferences as to why the jury would want to believe one witness over another.” *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). The same rule has been applied as to the credibility of a defendant. *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558, *rev'd on other grounds by*, 403 U.S. 947, 91, S. Ct. 2273, 29 L. Ed. 2d 855 (1971) (it was not improper for the prosecutor to call the defendant a liar when the prosecutor referred to specific evidence, including defendant’s own testimony, which demonstrated the defendant had lied).

In this case, Defendant said he did not appear at his June 21, 2017, DOC meeting because he was using drugs. 2RP 278-79, 283 He admitted he had no further contact with DOC until his October 2017 arrest, and he did not register as a sex offender between July 7, 2017, and October 18, 2017. 2RP 279-81. Notwithstanding these circumstances, Defendant alleged he registered as required by law on June 19, 2017. 2RP 276-77, 281-86.

In her closing argument, the prosecutor notes, “you can infer from his actions that he intentionally did not want to be found and was not registering with the Pierce County Sheriff’s Department.” 2RP 306-307. When stating that Defendant “fully admits that even when he moved his residence he never went in and registered with the Pierce County Sheriff’s

Department,” she emphasizes the inconsistency in Defendant’s assertion he registered as required by law prior to the charging period, despite having motive to avoid law enforcement, but during the subsequent period of time when the circumstances were the same, he did not go to PCSD to register. 2RP 306-307. The prosecutor’s argument attacks Defendant’s theory and invites the jury to draw the permissible inference that Defendant’s behavior prior to and after the charging period was inconsistent with valid registration. The statements were not flagrant or ill-intentioned, but a valid response to Defendant’s defense. Defendant cannot show that the prosecutor made improper arguments when she drew permissible inferences from his testimony and attacked his credibility.

b. Defendant cannot show the prosecutor’s arguments were unduly prejudicial in light of the court’s instructions and the evidence presented at trial

Defendant cannot show the prosecutor’s arguments were unduly prejudicial when they are examined in light of the totality of her closing argument and the jurors were properly instructed to make their decision based on the charging period. A jury is presumed to follow the court’s proper instructions. *State v. Anderson*, 153 Wn. App. 417, 428-29, 220 P.3d 1273 (2009). Furthermore, an appellate court reviews a prosecutor’s comments during closing argument in the context of the *total* argument

and the evidence addressed in that argument. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (emphasis added).

In the portions of argument Defendant alleges are improper, the prosecutor does not urge the jury to convict based on an uncharged time period as Defendant asserts in briefing. Rather, she states Defendant failed to register in *both* time periods.² The prosecutor in each instance stresses Defendant did not go in to register as required by law after his release from custody prior to the charging period, and did not register again in the following period, when he admitted he was off the radar of authorities until his arrest. Each time she makes this argument, she invites the jury to infer Defendant's claim of registration lacks credibility because the reasons for avoiding registration were unchanged throughout this continuous period of time.

Defense counsel did not object to this argument, demonstrating that the argument was not "critically prejudicial" within the context of the evidence at trial. *Swan*, 114 Wn.2d at 661. A defendant cannot remain silent, speculate on a favorable verdict, and, when it is adverse, use the alleged misconduct to obtain a new trial on appeal. *Id.* Furthermore, none of the State's allegedly improper statements were of such a flagrant nature

² The argument appears in the following locations: 2RP 302-303, 304, 306-307, 312-313.

that any potential prejudicial could not have been addressed by a curative instruction had counsel objected. *Smiley*, 195 Wn. App. at 195.

The trial court properly instructed the jury to return a verdict based on the charging period. 2RP 291-92. The trial court also properly instructed the jury that the attorney's statements were not evidence and they were to rely on the evidence produced at trial during their deliberations. 2RP 286-89. Given the presumption the jury followed the court's instructions, as well as the challenged arguments pertaining to inferences drawn from Defendant's continuous failure to register while out of compliance with DOC, Defendant cannot demonstrate the arguments were unduly prejudicial. The State asks the Court to deny Defendant's claim the prosecutor committed misconduct and affirm the jury's verdict of guilt.

3. THE APPELLATE COURT SHOULD DECLINE TO CONSIDER THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON A FAILURE TO MOVE TO DISMISS THE CASE OR OBJECT DURING CLOSING ARGUMENT AS NO LEGAL AUTHORITY OR FACTUAL ANALYSIS WAS OFFERED IN BRIEFING

Defendant alleges in a heading his counsel was ineffective for failing to move to dismiss the case for insufficient evidence and failure to object to the State's improper argument. *See* Brf. of App. at 7. However, Defendant fails to argue or discuss these arguments in his brief. An

appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record. RAP 10.3(a)(6).

Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a).

Defendant asserts in a heading his counsel was ineffective for failing to move to dismiss the case for insufficient evidence and failure to object to the State's improper argument in closing. He then apparently abandons these claims by failing to address them in the body of his opening brief. This Court should decline to review these assignments of error.

4. THIS COURT SHOULD REMAND SO THAT THE CRMINAL FILING FEE, DNA FEE, AND INTEREST ACCRUAL PROVISION MAY BE STRICKEN IN ACCORDANCE WITH HB 1783

The State agrees this Court should remand for the trial court to strike the filing fee, DNA fee, and interest accrual provision in the

judgment and sentence based on a recent change in the law. The trial court found Defendant to be indigent at sentencing. CP 21. House Bill 1783, effective June 7, 2018, prohibits the imposition of the \$200 filing fee on defendants who were indigent at the time of sentencing. As held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. Based on the finding of indigency, the State agrees that the criminal filing fee of \$200 that was imposed in this case should be stricken.

Defendant also appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior qualifying conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *Ramirez*, 191 Wn.2d at 747. The State’s records show that this appellant’s DNA was previously collected and is on file with the Washington State Patrol Crime Lab. The State agrees the \$100 DNA collection fee should be stricken.

Although not raised by Defendant, the State further agrees that House Bill 1783 eliminates any interest accrual on no restitution legal financial obligations. This Court should remand the case for the trial court to strike the filing fee, DNA fee, and interest accrual provision.

D. CONCLUSION

Defendant's counsel was not ineffective for focusing on Defendant's theory of the case while tactically withholding objections that would have emphasized admissible and highly probative evidence of Defendant's guilt. Defendant suffered no prejudice as objections to the challenged evidence were unlikely to be sustained. The prosecutor did not commit misconduct by drawing the jury's attention to the improbability of Defendant's account of lawful registration. Any prejudice was addressed by the court's instructions and the totality of the prosecutor's arguments in closing.

First, the State asks the Court to reject Defendant's claims of ineffective assistance of counsel and prosecutorial misconduct and affirm

Defendant's conviction. Next, the State asks the Court to disregard the arguments not properly developed by Defendant. Finally, the State asks the Court to remand the case to strike the filing fee, DNA fee, and interest accrual provision on Defendant's judgment and sentence.

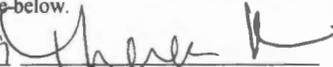
DATED: July 3, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


ERICA EGGERTSEN
Deputy Prosecuting Attorney
WSB # 40447

Certificate of Service:

The undersigned certifies that on this day she delivered ~~by U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.3.19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 03, 2019 - 2:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51895-3
Appellate Court Case Title: State of Washington, Respondent v. Christopher Saunders, Appellant
Superior Court Case Number: 17-1-02830-6

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