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No. 52494-5

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

STATE OF WASHINGTON,

Respondent,

v.

MANUEL R. BARNARD
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 18-1-00184-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a prosecutor commits misconduct by referring to an inmate accused of custodial assault as an inmate, and arguing reasonable inferences from the evidence that the inmate was not following the jail's rules.
2. Whether a trial attorney's strategic decision not to object to testimony regarding a defendant's status in custody, when charged with custodial assault, constituted ineffective assistance of counsel.
3. Whether Barnard has demonstrated the cumulative error has deprived him of the right to a fair trial, where none of the claimed improper actions caused prejudice or a likelihood that the verdict would have been any different.

B. STATEMENT OF THE CASE.

On January 30, 2018, the appellant, Manuel R. Barnard, was an inmate in the Thurston County jail, housed in the c-unit, which includes lockdown, disciplinary, and administrative segregation prisoners. RP 80, 83-84.¹ Inmates housed in that unit are locked down for 23 hours and allowed out for one hour, generally one inmate per hour. RP 81.

Barnard was out of his cell and was using the kiosk in the unit, which is a system where inmates can make calls or video chat

¹ The State received the Verbatim Report of Proceedings in four volumes. Volume 1 contained the State's Motion to Continue Trial, dated April 19, 2018, and will not be otherwise referenced herein. Volumes 2 and 3 contained the jury trial June 18 and 19, 2018, and will collectively be referred to herein as RP. Volume 4, contained the sentencing hearing July 18, 2018, and will be referred to herein as 4 RP.

with people. RP 84-85. Barnard's time concluded, and Barnard was advised that he needed to go back to his cell. RP 85-86, 87. Correctional Deputy Seth Jensen told Barnard that he was going to do welfare checks, and when he was done, Barnard needed to be done with his messages. RP 88. When Jensen completed the welfare checks, he gave Barnard numerous directives to get off the kiosk. RP 88. Barnard responded by calling the deputy vulgar names and becoming upset. RP 89.

Another Correctional Deputy, Joseph Gerkman, came to the area and gave Barnard similar directives to leave the kiosk and go back to his cell. RP 89-90; 162. Barnard continued to reply with vulgar language and derogatory names. RP 90, 165. The deputies then asked a control technician to turn off the kiosk, which further upset Barnard. RP 90-91; 166. While continuing to utter derogatory comments, Barnard got up and started to move toward his cell. RP 91; 167.

Barnard was told several times to return to his cell. RP 92. He walked "nonchalantly, very slowly, continuing to talk back" to the deputies using names and vulgar language. RP 92, 167. The deputies did not say anything to further antagonize Barnard. RP 92. Deputy Gerkman repeated, "Lockdown, return to your cell." RP

167-168. Once Barnard got to the doorway of his cell, immediately inside the door jam, he turned toward the deputies and got in a "bladed stance" with his feet shoulder width apart and switched to his dominant side after making a full circle. RP 93; 168. A bladed stance could be a sign of aggression or fighting posture. RP 93-94.

Barnard did not go into his cell, and instead stood in the door jam. RP 94. Deputy Gerkman continued to give directives to try to get Barnard to go into his cell, but Barnard stood in the bladed stance with his fists clenched. RP 94-95, 168. Deputy Gerkman approached Barnard and placed his hand on Barnard's chest and his other hand on the door in an effort to guide Barnard into the cell. RP 95-96. Gerkman described the effort, stating, "one hand, I had on the cell door; another hand, I tried to guide him - - I wouldn't even consider it a push." RP 170. Instead of going into the cell, Barnard, "launched forward pushing Gerkman backwards," into the day room area. RP 96. Gerkman testified, "Immediately when I began to guide him towards the cell, it was both hands, he stepped forward and did a push against my person." RP 171. Deputy Gerkman attempted to gain control of Barnard and started delivering closed-fist strikes along with a kick. RP 97.

Deputy Gerkman stated, "Once I placed my hands on him and grabbed him and tried to gain control of him potentially using level-one tactics is what I was thinking, he immediately grabbed me." RP 179. Deputy Gerkman used a kick-push to try to set Barnard off-balance and regain advantage, but Barnard was still driving forward from the momentum of his steps. RP 180, 182. Barnard's hand came up to Gerkman's face and neck area, striking him on the neck. RP 182. Barnard continued going towards Gerkman, so Gerkman began striking Barnard on the head. RP 183-184.

Deputies Gerkman and Jensen continued to try to gain control of Barnard and gave him commands to stop fighting, but Barnard continued to fight them. RP 97-98. As Barnard attempted to move around and get away from their control, Gerkman delivered three knee strikes. RP 187. Five correctional deputies responded, and Barnard finally stopped fighting when Corrections Deputy Thomas drew his taser and told Barnard that he would be tased if he did not stop resisting. RP 99, 189. Once Barnard was restrained, the deputies "ended up having to carry him to his cell." RP 99. When Barnard was asked to walk into his cell on his own power, he responded, "Fuck you." RP 124. When Barnard was

asked if he wanted to see medical, he responded that CD Gerkman hits like a pussy. RP 100, 124. Gerkman's recollection differed slightly, believing that Barnard told him that he "hit like a bitch." RP 191.

Gerkman had an abrasion on his neck from the incident. RP 100, 144, Exhibits 1, 2, and 3. There was a little bit of blood and the skin was broken slightly. RP 191. The incident was video recorded in the jail. Exhibit 4. The video was referred to during both Correctional Deputy Jensen's and Correctional Deputy Gerkman's testimony. RP 101-108; 113-123 194-210.

Barnard was charged with custodial assault. CP 1, 2. Following a trial, the jury convicted Barnard as charged in the first amended information. CP 118. With an offender score of nine, Barnard was sentenced to 60 months incarceration; however, the trial court ordered that it be concurrent to his 60-month sentence in cause number 17-1-02133-34. CP 136, 155-165; 4 RP 23. This appeal follows. Additional facts will be provided as necessary in the argument section below.

C. ARGUMENT.

1. The prosecutor did not make improper statements to the jury that undermined the presumption of innocence or appealed to the jury's passion or prejudice; even if

certain comments were arguably improper, they were neither flagrant nor ill-intentioned and could have been cured with a limiting instruction.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "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).

A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

Barnard argues that the prosecutor committed misconduct by arguing that Barnard’s presence in the administrative segregation unit of the jail demonstrated that he was unable to follow the rules and likely to commit custodial assault. Brief of Appellant, at 10. Barnard’s argument fails to consider the record as a whole.

Toward the beginning of his initial closing argument, the prosecutor indicated that he was going to talk about the instructions and the facts to try to apply the instructions to the facts. RP 262-263. He pointed out that the elements of the offense of custodial

assault were the issue in the case. RP 263. The prosecutor indicated that “probably the best evidence that you see is in the video.” RP 268. While discussing testimony from the case, the prosecutor noted that Barnard became aggressive and used demeaning language towards the officers and calling them names. RP 273. He then said, “Certainly corrections deputies are used to that. You know inmates are going to act immaturely, and they’re going to make poor decisions. That’s why they’re inmates.” RP 273.

That statement was consistent with the testimony of the deputies. During cross-examination, defense counsel asked Deputy Jensen, “in your experience, have inmates previously called officers vulgar names?” to which he responded “yes.” RP 126. The defense attorney followed up with, “and you’ve been called vulgar names?” to which he responded “yes.” RP 126. While going through Exhibit 4 with Deputy Gerkman, defense counsel asked, “Would you agree, it’s not good for a corrections deputy to lose control of an incident in a correctional facility?” to which Gerkman responded “yes.” RP 214. The prosecutor’s comment did little more than argue an inference from the evidence that deputies have

to deal with immature and potentially dangerous situations in a correctional facility.

Immediately following that statement, the prosecutor transitioned the facts stating,

“But he was given a lawful order to go back to his cell on at least three occasions at this point. So, Deputy Jensen has told him twice, and Deputy Gerkman has told him once. But he continues to ignore them.”

RP 273. The prosecutor was arguing the facts of the case.

The prosecutor continued to relay how Barnard had acted immaturely, stating, “The deputies again direct Mr. Barnard to go to his cell. He did not follow that directive, and he continued to curse and use abusive language towards the officers.” RP 273. Later, the prosecutor stated that Barnard was “indicating that he’s frustrated and that he’s angry, and that, quite frankly, he’s immature because he doesn’t do what he’s told.” RP 274. The prosecutor was specifically referring to the facts presented at trial to argue the inference that Barnard doesn’t do what he’s told.

The prosecutor later stated,

“Now remember, he’s in administrative segregation. He’s in the jail because he can’t follow society’s rules. He’s in administrative segregation because he can’t follow the jail’s rules. And at some point, the officer has to move him into his cell, and that is the point in

which Deputy Gerkman places his left hand on Mr. Barnard's chest and tries to, he says, guide back."

RP 276. Contrary to Barnard's assertions, the prosecutor never argued that Barnard was guilty of custodial assault because he was in custody or because he was in administrative segregation. The comment was specifically related to the need for Deputy Gerkman to get him into his cell.

The prosecutor followed that statement by discussing the video and arguing about how Barnard responded, stating Barnard "acting in an aggressive manner in that he pushes - - first, he tries to knock Gerkman's hand off his chest, and then he pushes him, such that Gerkman is pushed backwards. He takes a couple steps backwards." RP 276. The prosecutor informed the jury that the push was an assault. RP 276.

The prosecutor's primary focus in his closing argument was on the video and testimony. The portions that Barnard assigns error to were made as part of an argument that Gerkman needed to control the situation and were related to the defense argument that Barnard had acted in self-defense. While arguing that Barnard had assaulted Gerkman, the prosecutor, referring to Gerkman stated, "he has to take control of the situation. The defense would be like,

well, why didn't they just de-escalate him? They tried. At a certain point, unfortunately, the officer has to use force to get things done."

RP 277.

The prosecutor continued this theme while discussing self-defense, stating,

"Who is the person who is causing this movement? It's this man, because he keeps coming after the officer. He doesn't put his hands up. He doesn't return to his cell. He doesn't lay down. He keeps charging forward. That's a bad decision for Manuel Barnard in this case, because, first of all, it's assaultive, but second of all, the deputy now has no other choice but to hit him. And he hits him several times. And the deputy shouldn't have to apologize for that, because he's reacting to a situation that Mr. Barnard caused."

RP 278. The prosecutor concluded his closing argument by saying,

"Mr. Barnard was having a bad day, for whatever reason, and he decided he wanted to lash out, and he lashed out at the people who were there, who were the corrections officers. That's what this case is about. It's as simple and concise as that."

RP 290. During the closing argument, the prosecutor used a PowerPoint presentation. CP 45-105. On one slide, which the prosecutor titled, "Focus on the Actions of the Accused," the prosecutor included, "Who is in the jail because they cannot follow the rules of society," and "who is in administrative segregation because they cannot follow the rules." CP 98. Those lines were in

the middle of slide, surrounded by other statements, such as “Who would not follow lawful orders to return to their cell,” “Who was agitated, irritated, and aggressive,” and “who was challenging the directives given.” CP 98.

Defense counsel began his closing argument with the statement, “Who exactly assaulted who is a question you may have you may have at this point.” RP 293. Defense counsel implied that Deputy Gerkman did something to cause Barnard to stop going back into his cell. RP 296-297. The defense attorney argued that the deputies were “relatively new,” and stated, “He’s got a young CO who is angry at him, who is shoving him in there. What happens if he goes to a spot where there’s no cameras. Is there a risk of imminent serious injury?” RP 299, 301. Counsel argued, “He didn’t go into his cell because he was going to get hurt where no one could see.” RP 301.

Further arguing self-defense, defense counsel argued that Barnard has exercised remarkable restraint because, “What else could it be that Mr. Barnard has an angry, probably a great guy, but someone who lost it, an angry deputy. Mr. Barnard is holding him off, he’s being punched repeatedly in the face.” RP 302.

In rebuttal, the prosecutor responded that the question for the jury was, "has the State proven that Manuel Barnard assaulted Corrections Deputy Gerkman." RP 304. The prosecutor responded to the defense argument stating:

"this is the defense, well, it's the victim's fault right? Well, Deputy Gerkman caused Mr. Barnard to act this way. That's not what the evidence showed you. As a matter of fact, the evidence has shown you the accused's actions. He would not return to his cell. He returns to his cell, no issue, end of situation, right? But does he do that? No. He was irritated, agitated, and aggressive. I've said this before and I'll say it again. He's in jail for a reason. He can't follow the rules of society. We have laws, and you're bound to follow those laws as a citizen, and Mr. Barnard cannot. He cannot even follow the rules in jail, because again, that's not Mr. Barnard. He doesn't want to follow the rules."

RP 306. The testimony from Deputies Jensen and Gerkman supported the assertion that Barnard was not following the jail's rules. The prosecutor then discussed the defense argument, "what caused Mr. Barnard to turn around?" stating, "Mr. Barnard made the decision to do that, for whatever reason." RP 307. The prosecutor concluded his rebuttal stating,

"You heard Deputy Gerkman has dealt with him many times in the jail. They had no incidents. So the defense wants you to believe that Officer Gerkman just decided today was the day. Or was it inmate Manny Barnard, who was angry, aggressive, irritated and was fighting back against everyone. That's what

occurred. It's as simple as that, and you should find him guilty."

RP 309.

The prosecutor never argued that the fact that Barnard was in custody made him guilty, or simply by the nature of his in-custody status he was unable to follow rules and therefore guilty. Instead, the comments of the prosecutor noted that it is common for people in custody to have difficulty following the rules, an inference that was supported by the record, and used specific conduct from the evidence to show that Barnard was one of those who has difficulty following the rules.

These remarks were largely in response to the defense theory of the case, self-defense. Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d at 86.

As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such

remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Russell, 125 Wn.2d at 87. See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

Barnard argues that the inclusion of two lines in a single slide of a PowerPoint presentation enhanced the prejudicial effect of the allegedly improper statements by citing to In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012). The slide that Barnard alleges was improper is not close to the conduct that was complained of in Glasmann, where the modified photographs with superimposed red letters, including letters across an image of Glasmann that said "Guilty." Id. at 701-702. PowerPoint slides containing editorial comments which are directly linked to the evidence are not improper. State v. Rodriguez-Perez, 1 Wn.App.2d 448, 465, 406 P.3d 658 (2017). The prosecutor in this case was arguing inferences from the record, not modifying admitted exhibits with inflammatory text.

Barnard's argument that the prosecutor referred to him "exclusively" as "Inmate Barnard" in front of the jury is simply incorrect. Brief of Appellant at 4, 7, 11. Out the outset, it was clear that Barnard was an inmate of the Thurston County jail at the time of the assault, a fact that was relevant to the charge of custodial assault and the self-defense claim. RP 80, 83-84. ER 401. The prosecutor's reference to Barnard as "Inmate Barnard" was factually correct and was a fact that the jury necessarily was well aware of based on the facts of the case.

"The prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence." State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986). Even stronger references have been held proper when justified by the evidence. See, e.g., State v. McKenzie, 157 Wn.2d 44, 57, 134 P.3d 221 (2006) (not misconduct to refer to defendant as "rapist"); State v. Hunter, 35 Wn. App. 708, 715, 669 P.2d 489, review denied, 100 Wn.2d 1030 (1983) (not misconduct to refer to defendant as "pimp"); State v. Buttry, 199 Wn. 228, 248, 250, 90 P.2d 1026 (1939) (prosecutor's reference to murder defendant as a "vicious

killer” was not improper). The use of the word Inmate to describe Barnard was a reasonable inference from the evidence.

The prosecutor’s references to Barnard as “Inmate Barnard” were not made to incite passion or prejudice in the jury or otherwise undermine the presumption of innocence. In fact, the prosecutor referred to Barnard as “Inmate Barnard,” “Mr. Barnard,” and “Manuel Barnard” interchangeably throughout the trial. During just the initial direct examination of Correctional Deputy Jensen, the prosecutor referred to Barnard as “Mr. Barnard” at least 54 times. RP 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 103, 104, 106, 107, 113, 115, 118, 119, 120, 121, 122, 123. The prosecutor referred to Barnard as “Mr. Barnard” during the direct examination of Deputy Terri Coty. RP 141, 142.

During the direct examination of Corrections Deputy Gerkman, the prosecutor referred to Barnard as “Mr. Barnard” several times. RP 163,164,168, 169, 170, 178, 192, 197, 198, 199, 204, 205, 206, 207, 208, 211. During closing his closing argument, the prosecutor referred to Barnard as “Mr. Barnard” approximately 42 times. RP 273, 274, 276, 278, 279, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290. During his last chance to speak to the jury, the prosecutor initially referred to Barnard as “Manuel

Barnard.” RP 304. During the remainder of his rebuttal argument, the prosecutor referred to Barnard as “Mr. Barnard” approximately 12 times, and as “Inmate Barnard” approximately 4 times. RP 305, 306, 307, 308, 309. One time, during rebuttal, the prosecutor made a reference to Barnard as, “the inmate, Manuel Barnard.” RP 305.

Barnard’s argument that the prosecutor argued that his guilt was predetermined because he was in jail is simply not supported by the record. The prosecutor argued factual inferences that Barnard was not following the rules of the jail. He reminded the jury that it was their job “to figure out whether the State proved its case.” RP 305.

The trial court instructed the jury, “it is your duty to decide the facts in this case based upon the evidence presented to you during this trial,” and that their “decisions as jurors must be made solely upon the evidence presented during these proceedings.” RP 252. The trial court further instructed, “the lawyers’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence.” RP 254. The trial court also properly instructed the jury that the defendant was presumed innocent and that the presumption continued

throughout the trial. RP 256-257. On review, this Court should presume that the jury followed the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

The prosecutor acknowledged that that State had to prove the elements of the offense beyond a reasonable doubt. RP 264. When the alleged improper statements are considered in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions, it becomes evident that the prosecutor's statements were not improper. The prosecutor never asked the jury to convict Barnard simply because he was in custody. To the contrary, the prosecutor focused the jury on the video of the incident and the testimony of the deputies regarding the incident.

Even if this court were to find that the prosecutor's statements to the jury were improper, it is clear that they were not a flagrant and ill-intentioned attempt to infringe upon the presumption of innocence as Barnard argues. In an unpublished decision, State v. Moody, No. 72767-2-I, 2015 Wash.App. LEXIS 503 (2015), Division I of this Court considered a prosecutor's statements

regarding jail in the context of a custodial assault allegation.² In that case, the prosecutor argued, “And let’s face it, it’s jail. People do bad things in jail. Bad people are in jail, and they know how to take bad things into jail.” Id. at 10-11. The Court held that

“the prosecutor’s comments were not flagrant and ill intentioned. He never mentioned that the jury should convict Moody because he was a bad person. It is evident from the context that the prosecutor was merely explaining the reasons why officers need to see inside an inmate’s cell.”

Id. at 12. The Court concluded, “Moody fails to establish flagrant or ill-intentioned closing remarks, or that a curative instruction would have been ineffective. Accordingly, the issue is waived. But even if no waiver occurred here, there is no likelihood the remarks affected the verdict.” Id. at 13.

As in Moody, Barnard has failed to demonstrate the prosecutor’s allegedly improper statements were flagrant or ill-intentioned. “Prosecutorial misconduct is flagrant and ill-intentioned only when it crosses the line of denying a defendant a fair trial.” In re Pers. Restraint of Phelps, 190 Wn.2d 155, 166, 410 P.3d 1142 (2018). The prosecutor never argued that Barnard was guilty simply because of his in-custody status. None of the alleged improper

² An unpublished decision has no precedential value and is cited to only for whatever persuasive value this Court deems appropriate. GR 14.1.

statements were objected to during the trial, therefore, the issues were waived. Even if no waiver had occurred, there is no likelihood that any of the alleged improper statements affected the verdict. Everyone knew Barnard was in custody. In fact, while certainly possible given the plain language of RCW 9A.36.100, it is difficult to imagine a scenario where a person would be charged with assaulting a correctional deputy who was performing their official duties at the time when the person was not in the custody of a local detention facility.

The assault was video recorded, and both deputies testified regarding Barnard not following their directives that he return to his cell. The allegedly improper statements by the prosecutor had no impact on the verdict. Barnard has not demonstrated that he is entitled to relief based on prosecutorial misconduct.

2. Barnard was not denied effective assistance of counsel based on a failure to object to testimony regarding the nature of the C-unit of the Thurston County jail, because the evidence was admissible, and there were strategic reasons for counsel not to object.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient;

and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 695-696. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective

assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. at 687; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). When a claim of ineffective assistance of counsel is based on failure to object to evidence, the appellant must show an absence of legitimate strategic or tactical reasons supporting the challenged conduct; that an objection to the evidence would likely have been sustained; and that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Barnard argues that his trial counsel provided ineffective assistance of counsel by failing to object to testimony regarding the “pod” of the jail that he was incarcerated in. Brief of Appellant at 15. Barnard’s allegation of error centers on three sections of testimony. First, Corrections Deputy Jensen described the C-D pod of the Thurston county jail. RP 80-81. Deputy Jensen indicated that the pod is generally used for “Lockdown, disciplinary, administrative segregation.” RP 80. He acknowledged that

inmates assigned to that area “usually receive some classification because of their behavior in the jail that they would be sent to that administrative segregation.” RP 80-81. Deputy Jensen then described that inmates in that section of jail “get one hour allotted to them a day,” and “it’s one inmate per hour in Charlie, unless it’s their roommate or cellmate.” RP 81.

The second portion of testimony that Barnard assigns error to involved testimony from Deputy Coty regarding when deputies carry tasers. Deputy Coty stated that whether officers carry tasers depends on the unit that they work in, and stated, “Well, our max inmates that are dangerous possibly, you would carry tasers in that department. That would be C unit, our max unit.” RP 138. Deputy Coty described the C unit as “a max unit” that “is also considered administrative segregation.” RP 139.

Third, Barnard assigns error to his counsel failing to object to testimony from Corrections Deputy Gerkman’s testimony, that he could not let another inmate out while Barnard was outside his cell. RP 163. Deputy Gerkman stated the reason was,

“Because of the people housed within that unit and their known behavioral problems. We are not allowed to do that because it can create potential conflicts. These are individuals that have potentially shown that they do not cohabitate well, so we need to make sure

we're preventing altercations for the safety of everyone."

RP 163.

In addition to those portions of testimony, Barnard argues that his counsel should have objected to testimony that Barnard had been in the administrative segregation unit before the incident on January 30, 2018. RP 83-84, 157. Specifically, the prosecutor asked Deputy Jensen if he had encountered Barnard previous to January 30th, 2018 and asked whether Barnard had been in the administrative segregation unit before January 30th, 2018. RP 84. The prosecutor also asked Deputy Gerkman if he had "dealings with Inmate Barnard prior to January 30th, 2018," and "had he been in that unit before January 30, 2018?" RP 157.

Barnard argues that these statements were inadmissible pursuant to ER 404(b) and ER 403. Pursuant to ER 404(b),

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The primary substance of the testimony that Barnard assigns error to was not prior misconduct. The evidence instead went to

Barnard's status at the time of the events. The prosecutor never attempted to elicit the specific reasons that Barnard was incarcerated or in administrative segregation. The fact that he was in administrative segregation was a present fact, not prior misconduct.

Relevant evidence "is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. In general, relevant evidence is admissible. ER 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

Barnard's status as an inmate in the C-unit was highly relevant to the charge of custodial assault, an element of which requires that the victim be a corrections deputy who was performing his official duties at the time of the assault. RCW 9A.76.100. The fact that Barnard was only allowed one hour out, and due to the nature of the unit, other inmates could not be let out unless he went back into his cell was relevant in explaining the deputies' actions in attempting to get him to return to his cell. The evidence presented showed that Barnard was not new to the unit, and therefore

supported an inference that he was aware of the one hour out rules and the need to return to his cell in a timely manner. For these reasons, Barnard cannot show that objections to the testimony would have been granted, even if they had been made.

The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel. State v. Kolesnik, 146 Wn.App. 790, 801, 192 P.3d 937 (2008), *citing*, State v. Madison, 53 Wn.App. 754, 763, 703 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989).

There are many strategic reasons for Barnard's defense counsel not to object to the testimony at issue. First, the jury was well aware of the fact that Barnard was in custody and the fact that Barnard was finishing his one hour out and had to return to his cell was inextricably linked to the charge. Barnard argues that his counsel could have objected and kept the information simply to the fact that Barnard was in "solitary" confinement, but such a course of action may have had the effect of confusing the jury and leading to speculation. It was a legitimate strategy to allow testimony regarding the nature of the unit. Again, there was no testimony as to the specific reason that Barnard was housed in that unit.

Another strategic reason to allow information regarding the Barnard's experience in the unit and familiarity with the deputies was because the information could be used in the self-defense argument that was being proffered. During closing argument, defense counsel argued that it looked like Barnard was responding to actions of Deputy Gerkman. RP 296. Moreover, the fact that Barnard was in a portion of the jail subject to 23-hour lock-down was used by the defense to provide a reason why Barnard was "cranky." Defense counsel stated, "yeah, he's cranky. He's in jail. This sucks. He's being told to lock down. He's trying to get the machine to work." RP 296. Not objecting to the information regarding the unit, and the specific restrictions on inmates in the unit had a legitimate strategic purpose. Defense counsel's decision not to object to testimony was not egregious in this case and cannot support a claim of ineffective assistance of counsel. See State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (there is no claim of ineffective assistance of counsel when the challenged action goes to a legitimate trial strategy or tactic).

Considering all of the facts and circumstances in this case, Barnard has not overcome the strong presumption that his counsel's performance was not deficient. Even if Barnard were

able to demonstrate inadequate performance, he cannot demonstrate prejudice. As noted previously, the fact that Barnard was in custody was inextricably linked to the crime. The assault was video recorded, and that recording of the assault occurring just outside of Barnard's cell was played for the jury numerous times. Exhibit 4, RP 102, 194, 213, 282, 295, 316. With the video and testimony of the deputies, the evidence was overwhelming and the decision of Barnard's counsel to object or not object to the allegedly improper testimony had no reasonable probability of effecting the verdict.

Barnard has demonstrated neither deficient performance of his counsel, nor prejudice. His claim of ineffective assistance of counsel must fail.

3. Cumulative error did not deprive Barnard of a fair trial.

The cumulative error doctrine "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The cumulative error doctrine does not apply where there are few errors which have little, if any, effect on the result of the

trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007).

“The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” State v. Yarbrough, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). “Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial.” The doctrine does not apply in the absence of prejudicial error. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005).

Here, when the testimony, arguments and instructions to the jury are viewed as a whole, it is clear that Barnard received a fair trial. As argued above, he was not prejudiced by any of the factors that he assigns error to, therefore, his claim of cumulative error must also fail.

D. CONCLUSION.

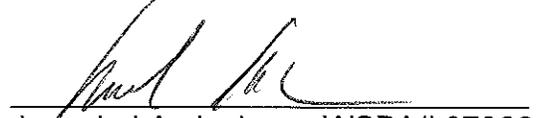
Manuel Barnard received a fair trial. The prosecutor argued rational inferences from the evidence. The fact that Barnard was in custody was inextricably linked to the charge of custodial assault. Barnard did not object to any of the complained of statements of the prosecutor and he cannot demonstrate that they were so flagrant or ill-intentioned that any prejudice allegedly caused by

them could not have been cured. His claim of prosecutorial error is not supported by the record. Barnard has not demonstrated that this counsel's performance of trial was deficient, nor has he shown that his counsel's performance at trial prejudiced him. The evidence against him was overwhelming. Finally, as Barnard has not shown that his case was prejudiced by any of the alleged improprieties, his claim of cumulative error is unsupported.

The State respectfully request that this Court affirm Barnard's conviction and sentence in all aspects.

Respectfully submitted this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of MARCH, 2019, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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