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

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STATE OF WASHINGTON,  
Respondent,

v.

AARON JASON THOMAS,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE STEPHEN BROWN, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. Trial counsel was not ineffective by not moving to exclude witnesses.**
- 2. The prosecutor did not improperly advance his personal beliefs about the case during closing argument.**
- 3. A rational jury could and did find beyond a reasonable doubt that Mr. Thomas knew of the existence of the no contact order.**
- 4. The Trial Court did not abuse its discretion by refusing to order an exceptional downward sentence.**
- 5. There was no cumulative error and therefore no due process violation.**

## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

On November 20, 2018 at about 6:30 p.m., Aberdeen Police Officers Hoffman and Pearsall were dispatched to a report that two people were having sex in a car behind a tractor supply store on the east side of Aberdeen. The tractor supply store is located in the Gateway shopping center, which includes a Walmart, McDonalds, Ross, Goodwill, and other shops and stores. The Wishkah River abuts to the east and south side of the center. 01/25/2019 VRP 69, 81.

Upon arrival, the officers observed two vehicles behind the tractor supply store: a silver SUV and a whit four door car, both parked facing the

water. Officer Pearsall contacted the occupants of the white vehicle, as that matched the description provided by dispatch. 01/25/2019 VRP 70, 82.

Upon contact, Officer Hoffman observed a woman in the driver's seat and a man in the passenger seat. The woman's clothes were off and she was covering her lap with an article of clothing. The male appeared to be fixing his pants. 01/25/2019 VRP 71 - 72, 82.

Officer Pearsall asked the woman her name and she identified herself as Erika Garcia. When asked her date of birth she said 1999, then quickly changed it to 1991, which Officer Pearsall found odd. He believed she was lying to him so he asked her if the vehicle's registration was in her name, to which she replied "yes." He asked her if he could see it and she then told him her real name was Brittany Elzinga. This was also the name on the vehicle registration. 01/25/2019 VRP 83.

Officer Hoffman asked the male to identify himself, and the male handed him a Department of Corrections Identification card. The card identified the Appellant, Aaron Thomas. It contained his photograph, his name, and a date of birth of November 16, 1988. 01/25/2019 VRP 73 – 75.

The officers conducted a "wants" check which revealed the existence of an order of protection, with Brittany Elzinga listed as the

protected party and Appellant as the party restrained. The order was confirmed as valid and Appellant was placed under arrest. 01/25/2019  
VRP 84 - 85

### **ARGUMENT**

**1. Was defense counsel ineffective by not moving to exclude witnesses?**

**No. Defense counsel was not ineffective in failing to exclude witnesses as the witness not excluded was an agent of the State and thus an exception to the rule.**

**Standard of review.**

**Ineffective assistance of counsel.**

The Washington State Supreme Court has adopted the two prong Strickland test for analysis of the effectiveness of a defense counsel performance. See State v. Jeffries, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination...” State v. Carson, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing State v. Rhoads, 35 Wash.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts “review the entire record in determining whether a defendant received effective representation at trial.” *Id.*

Strickland explains that the defendant must first show that his counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Id. The scrutiny of counsel's performance is guided by a presumption of effectiveness. Id. at 689. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Carson at 216 (quoting Strickland at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. Strickland at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The defendant bears the “heavy burden” of proof as to both prongs. Carson at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. Strickland at 687.

Appellant’s allegation of ineffective assistance of counsel is predicated upon his “failure” to exclude the primary arresting officer who was seated at the prosecutor’s table. An analysis of that issue reveals defense counsels decision not to the officer was not only *not ineffective*, but plainly sound.

**Exclusion of witnesses.**

Washington’s ER 615 states that

“(at) the request of a party the court may order witnesses excluded so they cannot hear the testimony of other witnesses, and it may make the order of its own admission. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party’s cause.”

The intent of ER 615 is “to discourage or expose inconsistencies, fabrication, or collusion.” State v. Skuza, 156 Wash.App. 886, 896, 235 P. 3d 842 (2010) (citing Karl B. Tegland, *Washington Practice: Evidence Law and Practice* §615.2, at 623 (5<sup>th</sup> Ed. 2007).

Subsection two of ER 615 is the relevant controlling section with respect to the instant issue, as it specifically excludes the government's agents.

“In proceedings such as these, a Government's case agent fits the rule 615(2) exception for a party's representative.” United States v. Cueto, 611 F.2d 1056, 1061 (5<sup>th</sup>. Cir. 1980), citing United States v. Auten, 570 F.2d 1284, 1285 (5th Cir.), Cert. denied, 439 U.S. 899, 99 S.Ct. 264, 58 L.Ed.2d 247 (1978).

Clearly, given the rule, moving to exclude the officer would have served little purpose but delay the trial to argue the issue.

**2. The prosecutor did not improperly advance his personal beliefs about the case during closing argument.**

**Standard of review.**

A. Prosecutorial Misconduct

The appellant alleges prosecutorial misconduct in this case. An appellant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wash.2d 438, 442, 258 P.3d 43 (2011).

A defendant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. Thorgerson, 172

Wash.2d at 443. Where the defendant fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver unless the prosecutor's statement is “ ‘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.’ ” State v. Dhaliwal, 150 Wash.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997)).

In determining whether the misconduct warrants reversal, the Court will consider its prejudicial nature and cumulative effect. State v. Boehning, 127 Wash.App. 511, 518, 111 P.3d 899 (2005). The Court will review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Dhaliwal, 150 Wash.2d at 578.

**Application.**

Appellant contends that “(d)uring closing, the prosecutor repeatedly expressed his personal opinions.” (Brief of Appellant, p. 5). Cited examples include the prosecutor saying “‘I think that’s right here, right here, and right here,’ referring to exhibits” regarding proof of the Defendant’s knowledge; “‘it seems to me’ that Mr. Thomas should have realized he was not permitted to have contact with Ms. Elzinga”; and

“(s)o I think based on Ms. Elzinga’s testimony you can conclude beyond a reasonable doubt that they were in a domestic relationship. This is a domestic violence case” (Brief of Appellant, p. 5, 6). As appellant notes, defense counsel objected to none of these statements.

A closer reading of the record reveals that each instance cited was in reference to evidence. The first cited instance referred to two judgment and sentence documents and one protection order. The prosecutor asked the rhetorical question about what evidence supports the allegation that the Appellant knew of the existence of the order and then referenced that evidence, prefacing that with “I think.” That is hardly a comment on the evidence. With respect to the “it seems to me” comment, what is left out of Appellant’s brief is the next line, which reads “and you’re the ones who have to decide...” Finally, with respect to the “I think...” comment, this merely referenced Ms. Elzinga’s testimony and invited the jury to form their own conclusion (01/25/2019 VRP 120). Moreover, in a separate aside, the prosecutor took pains to point out to the jury that “(w)hat I say in this closing argument and what the defense attorney says in closing argument, none of this is evidence...if you think that I’ve said something wrong, you go off your own notes and your own memories in terms of

what you think the evidence was that was presented on the stand, so...”  
(01/25/2019 VRP 119).

In short, these comments were harmless, were nowhere near prejudicial, and because of this trial counsel rightly did not object.

**3. A rational jury could and did find beyond a reasonable doubt that Mr. Thomas knew of the existence of the no contact order.**

**Standard of Review.**

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Salinas, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing State v. Green, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Id. (citing State v. Partin, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Id. (citing State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622

P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” State v. Homan, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing State v. Jackson, 129 Wn.App. 95, 109, 117 P.3d 1182 (2005).)

This Court in State v. France, 129 Wn. App. 907, 911, 120 P.3d 654 (2005) endorsed the notion that the certified copy of the valid no contact order containing the defendant’s signature is sufficient evidence in itself to establish his knowledge of the order. At 910. Viewed in the light most favorable to the State, this evidence is sufficient for a reasonable juror to find beyond a reasonable doubt that Mr. Thomas had knowledge of the existence of the no contact order.

**4. The Trial Court did not abuse its discretion by refusing to order an exceptional downward sentence.**

**Standard of Review.**

The Division 1 Court of Appeals addressed this issue in State v. Garcia-Martinez, 88 Wash.App. 322, 944 P.2d 1104 (1997) and held that "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to

impose an exceptional sentence below the standard range. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection.” At 330.

Here, trial counsel requested a downward departure from the standard sentencing range based on the victim’s actions. (2/8/19 VRP

119). The Court and counsel conducted a colloquy, the Court considered trial counsel's request and denied it. As is clearly stated in Garcia-Martinez, "(s)o long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection. *Id.*

Here, the court clearly considered Appellants' argument for a downward departure, and rejected it. Therefore, the issue is not appealable.

**5 There was no cumulative error and thus no due process violation.**

**Standard of Review.**

The cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial's outcome. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

**CONCLUSION**

Mr. Thomas received a fair trial and was convicted by the jury as charged. Trial counsel was effective, and employed a sound legal defense

for his client. Prosecution statements during closing were harmless and in no way prejudicial. The State's presentation of a certified copy of the court order in question, containing Appellant's name, date of birth, and signature, were sufficient to prove knowledge of the order's existence. Finally, as there was not individual error, there is therefore no cumulative error. For these reasons, Mr. Thomas's conviction should stand.

DATED this 21<sup>st</sup> day of November, 2019.

Respectfully Submitted,



BY: \_\_\_\_\_  
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RKP /

**GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE**

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