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Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

VERNON CURRY,

Petitioner.

NO. 54033-9-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Whether petitioner's ineffective assistance of counsel claims should be denied when petitioner has failed to demonstrate that trial counsel rendered deficient performance that prejudiced him by (1) not challenging the State's expert firearm ballistic testimony; (2) not moving for a mistrial based on Karin Curry's testimony; (3) not objecting to the admission of Karin Curry's 911 call on Confrontation Clause grounds; (4) not seeking a limiting instruction regarding the 911 call; and (5) not seeking a limiting instruction regarding the State's "Y Gang" evidence.
2. Whether the trial court erred and caused a miscarriage of justice when it admitted Karin Curry's 911 call into evidence.
3. Whether the "cumulative effect" of any "errors" deprived petitioner of his rights to due process and a fair trial.
4. Whether petitioner's claim that his appellate counsel was ineffective should be denied when petitioner has failed to demonstrate that appellate counsel rendered deficient performance that prejudiced him by choosing not to raise on appeal the arguments set forth in the instant Petition.

B. STATUS OF PETITIONER:

Petitioner, VERNON CURRY, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 14-1-03668-1. Appendix, Attachment A (Felony Judgment and Sentence).¹ After trial, a jury convicted petitioner for murder in the first degree and unlawful possession of a firearm in the first degree. The trial court sentenced him to 570 months in prison. App., Attach. A.

Petitioner filed a direct appeal. He argued that the trial court erred by (1) denying his motion to dismiss based on government misconduct, (2) denying his motion for a mistrial based on improper opinion testimony, (3) admitting improper impeachment evidence, and (4) refusing to instruct the jury on the lesser included offense of first degree manslaughter. Appendix, Attachment E (Court of Appeals Unpublished Opinion, Case No. 49026-9-II). Petitioner also argued that (5) the prosecutor committed misconduct during closing argument by improperly vouching for the credibility of its witnesses and relying on evidence outside the record. App., Attach. E. This Court disagreed with petitioner's arguments and found that he waived any argument regarding admission of the "Y Gang" impeachment evidence by failing to request a limiting instruction. App., Attach. E. Accordingly, this Court affirmed petitioner's convictions and sentence. App., Attach. E. The Washington Supreme Court denied petitioner's petition for review. *State v. Curry*, 191 Wn.2d 1020, 428 P.3d 1172 (2018). The final mandate issued on November 27, 2018, and this timely Personal Restraint Petition followed.

In his instant Petition², petitioner alleges that his continued restraint is unlawful and unconstitutional because he was deprived of his right to effective assistance of trial counsel under the Sixth amendment to the United States Constitution and article I, § 22 of the

¹ All references to "Appendix" refer to the Appendix and Attachments attached to petitioner's Petition filed November 20, 2019.

² The State has no information to dispute petitioner's claim of indigency.

Washington State Constitution when his trial counsel (1) failed to challenge the State's expert's firearm ballistics testimony, (2) failed to move for a mistrial on the basis of Karin Curry's hearsay testimony, (3) failed to object to Karin Curry's 911 call on Confrontation Clause grounds, (4) failed to seek a limiting instruction regarding the 911 call, and (5) failed to seek a limiting instruction regarding the State's "Y Gang" evidence. Personal Restraint Petition (hereafter "PRP") at 21-45.

Petitioner also claims that the trial court erred and caused a miscarriage of justice by admitting Karin Curry's 911 call (PRP at 45-48), that his conviction and sentence is unlawful and unconstitutional because the cumulative effect of the errors raised herein deprived him of his rights to due process and a fair trial (PRP at 48-49), and that his conviction and sentence is unlawful and unconstitutional because his appellate counsel was ineffective for failing to appeal the issues set forth herein (PRP at 49-50). This response follows.

C. ARGUMENT:

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4 of the State constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (citing *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. *Id.*

In a collateral action, the petitioner must prove constitutional error resulted in actual prejudice. Mere assertions are inadequate to demonstrate actual prejudice. The rule that constitutional error must be proven harmless beyond a reasonable doubt has no application. *In re Personal Restraint of Mercer*, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); *In re Hagler*, 97 Wn.2d at 825. A petitioner must show a fundamental defect resulted in a complete miscarriage of justice to obtain collateral relief for alleged non-constitutional error. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than actual prejudice. *Id.* at 810. Inferences must be drawn in favor of the judgment's validity. *In re Hagler*, 97 Wn.2d at 825-826.

Reviewing courts have three options in evaluating personal restraint petitions:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
2. If a petitioner makes a prima facie showing of actual prejudice or a miscarriage of justice, but the merits cannot be determined on the record, the court should remand for a hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudice arising from constitutional error or a miscarriage of justice, the petition should be granted.

In re Personal Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In a personal restraint petition, “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Personal Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (citing *In re Personal Restraint of Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). That phrase means “more is required than

that the petitioner merely claim in broad general terms that the prior convictions were unconstitutional.” *In re Williams*, 111 Wn.2d at 364.

The evidence presented to an appellate court to support a claim in a personal restraint petition must also be in proper form. On this subject, the Washington Supreme Court has stated “[i]t is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will in future cases accept no less.” *In re Personal Restraint of Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). The petition must include a statement of the facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); *In re Williams*, 111 Wn.2d at 365. Affidavits, transcripts, and clerk's papers are readily available forms of evidence that a petitioner may employ to support his claims. *Id.* at 364-365. Bald assertions and conclusory allegations will not support the holding of a hearing, rather they require the dismissal of the petition. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *In re Williams*, 111 Wn.2d at 364-365. If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed. *In re Williams*, 111 Wn.2d at 364.

1. PETITIONER’S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS ARE WITHOUT MERIT AND SHOULD BE DISMISSED AS HE HAS NOT DEMONSTRATED THAT COUNSEL RENDERED DEFICIENT PERFORMANCE THAT PREJUDICED HIM

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. 2045, 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 of the United States Constitution 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, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

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, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

The presumption of counsel’s competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations. *Thomas*, 109 Wn.2d at 230. The adequacy of a pretrial investigation turns on the complexity of the case and trial strategy. The decision to either call or not call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance. *Id.*

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

The fact that a particular strategy was ultimately unsuccessful does not establish ineffective assistance of counsel. “While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.” *State v. Renfro*,

96 Wn.2d 902, 909, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). Counsel is presumed to be effective, and petitioner must show an absence of legitimate strategic reasons to support his counsel's challenged conduct. *McFarland*, 127 Wn.2d at 335-36; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics’” (quoting *Renfro*, 96 Wn.2d at 909)).

When, whether, and how to object are legitimate tactical and strategic decisions afforded exceptional deference by a reviewing court. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. at 763); *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007). Refraining from objection is included among those legitimate strategic decisions. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Counsel may strategically decline to object to avoid highlighting harmful admissible evidence. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The same strategy may be employed in regard to inadmissible evidence. *State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014). Refraining from objection can also be a tactical choice when the evidence supports the defendant's theory of the case or is beneficial to its presentation. *In re Tortorelli*, 149 Wn.2d 82, 95-96, 66 P.3d 606 (2003); *State v. Harstad*, 153 Wn. App. 10, 29, 218 P.3d 624 (2009).

Ineffective assistance of counsel based on lack of objection is only established when (1) there was no legitimate strategic or tactical reason for refraining from objection; (2) the objection likely would have been sustained; and (3) 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). “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). Error for lack of objection must truly be “manifest” as demonstrated by a “plausible showing ... the asserted error had practical and identifiable consequences in the trial of the case.” *Kirkman*, 159 Wn.2d at 935 (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

The United States Supreme Court has reiterated just how strong a presumption of competence exists under *Strickland*: “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) (citing *Strickland*, 466 U.S. at 690). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). A petitioner carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *Ciskie*, 110 Wn.2d at 263.

A petitioner must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the petitioner makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d at 225-26. In the present case, petitioner does not attach any affidavits or declarations in support of his ineffective-assistance-of-counsel arguments.

A. Petitioner’s Trial Counsel Did Not Render Ineffective Assistance by Choosing Not to Challenge the State’s Ballistic Expert Testimony

Petitioner claims that his trial counsel rendered ineffective assistance by “failing” to challenge the State’s ballistic expert testimony either by failing to object to such

testimony under ER 702 or effectively cross-examining the expert. PRP at 23-36.

Petitioner's claim should be rejected as the admission of the ballistic testimony was proper, and thus any objection under ER 702 would have been futile, and because trial counsel made a legitimate tactical decision to cross-examine the State's expert regarding the lack of a connection between the weapon and petitioner rather than whether the weapon fired matched the recovered bullets fragments.

At trial, the State's ballistics expert witness, Brenda Walsh, testified that the bullets that killed Ward came from the .40 caliber Sig Sauer that was retrieved from the yard at 3816 South Park. Appendix, Attachment B (Combined Verbatim Report of Trial Proceedings) ("VRP") at 1007-1045. She stated that she had the ability to conduct comparisons of bullets and cartridge cases to bullets and cartridge cases test fired from a given firearm to determine if the firearm fired the bullets. VRP 1007. She testified that she had performed such comparisons thousands of times. VRP 1008. She proceeded to explain how she compares spent bullets and cartridges, telling the jury that markings on .40 caliber shell casings are unique. VRP 1011-15, 1033-34. She explained the manufacturing processes, such as sanding and tumbling:

leave random microscopic imperfections on the items that produced by those tools, and those are the marks that I'm looking at that [are] unique. Other individual characteristics occur during use and abuse and wear of the firearm itself. All of those things can work together to produce marks that are unique to a particular firearm.

VRP 1035.

Doing a fragment or jacket analysis of the exhibits, Walsh testified that she "concluded" and "determined" that the casings "were fired from" the .40 caliber Sig Sauer. VRP 1037-40. Walsh also received bullets from the medical examiner containing biological material, and testified that she was "able to determine affirmatively" that the bullets came from the Sig Sauer, Plaintiff's Exhibit No. 12, stating further that "Plaintiff's

Exhibit No. 12 is the firearm that fired Plaintiff's Exhibit 44, 46 and 47 [the bullets recovered from Ward's body]." VRP 1040-41.

No DNA profile was obtained from the .40 caliber Sig Sauer because the amount of DNA recovered was insufficient testing. VRP 994. There were also no latent fingerprints found on the gun or the magazine. VRP 940. Police ran a "trace" on the recovered firearm, which revealed that it was stolen during a burglary in 2012. VRP 1298. Petitioner was not linked to the burglary or the owner of the weapon. VRP 1298.

Petitioner first alleges that his trial counsel's decision not to object to the State's expert ballistic testimony under ER 702 constituted ineffective assistance. However, as this testimony was properly admitted, and thus any objection would have been futile, counsel did not perform deficiently in choosing not to make such an objection. For the same reason, petitioner was not prejudiced by counsel's decision.

ER 702 addresses expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Although petitioner spends about ten pages of his briefing claiming that the science underlying the testimony of the State's ballistic expert is faulty, and specifically arguing that the 2008 and 2009 reports of the National Research Council of the National Academy of Sciences (NAS) and the 2016 President's Council of Advisors on Science and Technology (PCAST) report call the validity of the science into question, Washington

courts have consistently and recently held that such testimony is proper under the *Frye*³ test.⁴ See *State v. DeJesus*, 7 Wn. App.2d 849, 436 P.3d 834 (2019).

In *DeJesus*, the challenged scientific evidence stemmed from a Washington State Patrol Crime Laboratory analyst's comparison of two spent shell casings and conclusion that they were fired from the same gun. *DeJesus*, 7 Wn. App.2d at 858. DeJesus argued that there was a "significant dispute among qualified scientists in the relevant scientific community about the validity of ballistic identification methodology." *Id.* at 860. He cited the 2008 and 2009 NAS reports and the 2016 PCAST report in support of his argument. *Id.* at 861. The court rejected his contention, finding that:

[T]he reports on which DeJesus relies do not affect the general scientific acceptance of ballistic identification. Instead, the problems they espouse bear on the question of reliability of the individual test and tester at issue. These questions are then considered by the trier of fact in assessing the weight to be given the evidence.

Id. at 863–64. The court also looked to other jurisdictions and concluded that "[c]ourts from around the country have universally held that toolmark analysis is generally accepted." *Id.* at 865.

As the court in *DeJesus* considered the same challenges petitioner makes to the validity of the evidence here, this Court may rely on this previous judicial determination that this method of ballistics identification satisfies the *Frye* test. Accordingly, petitioner's trial counsel did not render deficient performance for not objecting to admissible evidence,

³ *Frye v. United States*, 293 F. 1013 (1923).

⁴ Washington State has adopted the *Frye* test which involves two questions: (1) whether the underlying theory is generally accepted in the appropriate scientific community and (2) whether the technique used to implement that theory is also generally accepted. *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993), *overruled in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997).

an objection that the trial court would have overruled. For the same reason, petitioner suffered no prejudice from trial counsel's decision.

Petitioner also claims that his trial counsel erred in failing to cross-examine the State's ballistic expert regarding the science underlying her testimony. Here, too, petitioner fails to demonstrate any ineffective assistance of counsel. Given the validity of the science in question and trial counsel's reasonable decision not to object to the expert's testimony based on this science, counsel reasonably chose to focus his cross-examination not on the link between the murder weapon and the bullets, but on the lack of evidence tying petitioner to that weapon.

Here, counsel cross-examined the expert regarding the lack of fingerprints on the recovered shell casings and the ejection pattern of the murder weapon. VRP 1060-63. Doing so was a reasonable tactical decision emphasizing the lack of a link between the murder weapon and petitioner because the evidence showed that no DNA profile was obtained from the .40 caliber Sig Sauer (VRP 994) and no latent fingerprints were ever found on the gun or the magazine. VRP 940. The police also ran a "trace" on the recovered firearm, which revealed that it was stolen during a burglary in 2012 and that petitioner was not linked to the burglary or the owner of the weapon. VRP 1298.

The decisions of trial counsel regarding the State's ballistic expert were reasonable and such decisions did not result in any prejudice to petitioner. Accordingly, petitioner's claim of ineffective assistance of counsel must fail.

B. Petitioner's Trial Counsel Did Not Render Ineffective Assistance by Choosing Not to Move for a Mistrial on the Basis of Karin Curry's Testimony

Petitioner argues that his trial counsel rendered ineffective assistance by failing to move for a mistrial based on Karin Curry's "hearsay" testimony. PRP at 36-38.

Petitioner's argument should be rejected as he has shown neither deficient performance by counsel in not making such a motion nor that he was prejudiced by counsel's decision.

Karin Curry, petitioner's stepmother, called 911 in the evening of September 7, 2014, following Ward's murder, after having heard about the homicide in the news that morning. VRP 576. When she saw petitioner that afternoon, petitioner told her he was not feeling well because he drank too much at the club with his girlfriend in Seattle the prior night. VRP 578. Ms. Curry did not notice anything unusual about his demeanor, other than that he appeared to still be drunk. VRP 578. Ms. Curry testified that her grandson's mother (petitioner's ex-girlfriend, Uta Martinez) "was saying that there was speculation that [petitioner] could possibly be involved" in Ward's death. VRP 579. Following this testimony, defense counsel objected on hearsay grounds, and the trial court sustained this objection. VRP 579-80.

Although the trial court sustained counsel's objection, petitioner faults counsel for not also making a motion for a mistrial based on this hearsay. A trial court has wide discretion to cure trial irregularities and "should grant a mistrial 'only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" *State v. King*, 131 Wn. App. 789, 799, 130 P.3d 376 (2006) (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). When reviewing a motion for mistrial based on a witness's objectionable remark, the testimony must be examined "against the backdrop of all the evidence." *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Based on the above criteria, petitioner's trial counsel's decision not to move for a mistrial was reasonable because such a motion would have been denied by the trial court. Petitioner identifies only one brief instance of inadmissible hearsay and acknowledges that

his counsel promptly objected to this statement and the trial court sustained the objection. Juries are instructed to disregard any inadmissible evidence and a jury is presumed to follow the court's instruction. WPIC 1.02; *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). Given the "backdrop of all the evidence," which here includes overwhelming evidence that petitioner murdered Ward, Martinez's statement to Ms. Curry that she "thought" petitioner may have been involved in the shooting was harmless, especially as it was not repeated by either side in argument. Given that the inadmissible statement was an isolated instance, the overwhelming evidence against petitioner, and the instructions to the jury, petitioner was not "so prejudiced that nothing short of a new trial [could] insure that [he] will be tried fairly."

Therefore, petitioner's trial counsel did not render deficient performance by not moving for a mistrial based on the one objected-to part of Ms. Curry's testimony because the trial court would have denied such a motion. For the same reason, counsel's decision did not prejudice petitioner. Accordingly, petitioner's claim of ineffective assistance should be denied.

C. Petitioner's Trial Counsel Did Not Render Ineffective Assistance by Choosing Not to Object to Karin Curry's 911 Call on Confrontation Clause Grounds

Petitioner argues that his trial counsel rendered ineffective assistance by "failing" to object to Karin Curry's 911 call on Confrontation Clause grounds. However, the only statement that petitioner identifies as violating the Confrontation Clause is Martinez's alleged statement to Ms. Curry that Martinez thought that petitioner may have been involved in a shooting. PRP at 38-40. As that statement was not made to law enforcement and not included in Ms. Curry's 911 call, petitioner's trial counsel properly decided not to

make an objection on Confrontation Clause grounds as any such objection would have been overruled by the trial court. For the same reason, counsel's decision did not prejudice petitioner.

At trial, the prosecutor asked Ms. Curry if her reason for calling 911 was because petitioner was involved in Ward's murder. VRP 586. Ms. Curry denied that this was her reason for calling 911. VRP 586. In response, the prosecutor asked to play Plaintiff's Exhibit No. 86, a recording of Ms. Curry's call to 911. VRP 586-87; see Appendix, Attachment D (Plaintiff's Exhibit No. 86). Petitioner's counsel initially did not object. VRP 587. However, after some portion of the recording was played, counsel asked to stop the video and conference with the court outside the hearing of the jury. VRP 588. At that point, he objected to Exhibit No. 86 on hearsay grounds. VRP 588.

Outside the presence of the jury, Ms. Curry stated that, subsequent to her 911 call, she told Detective Katz that Martinez contacted her after the shooting and "expressed concern that [petitioner] might have been somehow involved in the shooting." VRP 589; App., Attach. D. Ms. Curry stated further "she did not know why Martinez thought [petitioner] was involved in the shooting because she told Martinez not to talk about it anymore and then called the police." VRP 589; App., Attach. D. Petitioner's counsel asserted that because Ms. Curry's 911 call merely relayed what Martinez told her, it constituted inadmissible hearsay. VRP 589.

In the 911 call itself, however, Ms. Curry stated that she thought petitioner was possibly involved in the shooting but did not provide the basis for that belief. VRP 589-90. Petitioner's counsel asserted the 911 call nonetheless constituted hearsay because, based on Ms. Curry's subsequent statements, it was clear that she was merely repeating

hearsay information from Martinez. VRP 59091. Counsel therefore reasserted his objection that the 911 call is inadmissible hearsay, not relevant, and prejudicial. VRP 590. Petitioner's counsel did not object on Confrontation Clause grounds. The trial court overruled the objection, admitted Exhibit No. 96, and allowed the State to play the entire 911 call in which Ms. Curry said that she thought petitioner may have been involved in Ward's death. VRP 590-91.

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. CONST. amend. VI. The Confrontation Clause embodies the belief that criminal defendants should have the opportunity to test evidence against them in the adversarial “crucible of cross-examination.” *Michigan v. Bryant*, 562 U.S. 344, 361, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). To this end, where the Confrontation Clause applies, it excludes a declarant's out-of-court statements unless the declarant either appears at trial for cross-examination or is unavailable for trial but the defendant had a prior opportunity for cross examination. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The Confrontation Clause, by its own terms, however, applies only to *witnesses*, meaning those who “bear testimony” against the defendant. *Crawford*, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). To determine whether one making a statement to a law enforcement officer or agent has become a witness, courts look to the speaker's primary purpose in making the statement. *Bryant*, 562 U.S. at 353-354; *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A witness's statements are testimonial because he or she makes “[a] solemn declaration or affirmation ... for the

purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (definition of “testimony”)). Testimonial statements include those that are the functional equivalent of in-court testimony or that “were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 52.

Petitioner asserts that because Ms. Curry’s 911 call saying that she thought petitioner may have been involved in the shooting was “based solely on what Martinez said to her” and Martinez did not testify at trial, the 911 call was “plainly inadmissible” under the Sixth Amendment’s Confrontation Clause as “Martinez was a witness against [petitioner] by virtue of the introduction of the 911 call recording.” Petitioner therefore contends that his counsel rendered deficient performance by failing to object on Confrontation Clause grounds.

However, as set forth above, the Confrontation Clause only bars out-of-court *testimonial* statements, i.e., those statements made to law enforcement “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Although Martinez did not testify at trial and petitioner did not have a prior opportunity to “cross-examine” her, the prosecution did not seek to admit *any* statement made by Martinez. And Ms. Curry’s 911 call did not contain *any* statement allegedly made by Martinez. Furthermore, petitioner provides no authority that would support a finding that any statement made by Martinez to Ms. Curry, even if it may have been the basis for her 911 call, is implicated by the Confrontation Clause when this statement was not sought to be introduced.

Therefore, any objection petitioner's counsel may have lodged to Ms. Curry's 911 call on Confrontation Clause grounds would have been denied by the trial court. Because counsel is not required to make meritless arguments, Petitioner's counsel did not render deficient performance. For the same reason, counsel's decision not to make such an objection did not prejudice petitioner. Petitioner's claim of ineffective assistance of counsel should be denied.

D. Petitioner's Trial Counsel Did Not Render Ineffective Assistance by Choosing Not to Seek a Limiting Instruction Regarding Karin Curry's 911 Call

Petitioner claims that his trial counsel rendered ineffective assistance by "failing" to seek a limiting instruction regarding Karin Curry's 911 call. Specifically, petitioner argues that because the trial court admitted the 911 call as impeachment evidence, trial counsel was obligated to seek a limiting instruction to advise the jury on the limited use of such evidence. PRP at 40-43. Petitioner's argument should be denied. Petitioner's trial counsel made a reasonable tactical decision not to seek a limiting instruction rather than have such an instruction serve the purpose of potentially emphasizing harmful evidence. Furthermore, given the innocuous nature of the 911 call, and contrasted against the overwhelming evidence of guilt, petitioner was not prejudiced by his counsel's decision.

As set forth above, during her testimony, Ms. Curry *denied* that the reason she made her 911 call was because she thought that petitioner was involved in Ward's murder. VRP 586. In response, the prosecutor asked to play Plaintiff's Exhibit No. 86, a recording of Ms. Curry's call to 911. VRP 586-87; App., Attach. D. After discussion outside the jury, the trial court overruled petitioner's counsel's hearsay objection. In the 911 call itself, Ms. Curry stated she thought petitioner was possibly involved in the shooting but did not provide the basis for that belief. VRP 589-90. The trial court found that the contents

of the 911 call were “clearly different than what she just testified to.” VRP 589-90.

Therefore, although the trial court did not specifically state whether it was allowing the call into evidence as substantive or impeachment evidence, the court implicitly admitted the 911 call as impeachment evidence. Petitioner’s trial counsel did not request a limiting instruction.

As petitioner notes, when impeachment evidence is permitted, a party can request an instruction cautioning the jury to limit its consideration to that intended purpose. See ER 105; *State v. Price*, 126 Wn. App. 617, 648-49, 109 P.3d 27 (2005). The jury would be presumed to follow such an instruction. *Grisby*, 97 Wn.2d at 509.

However, the decision not to request such a limiting instruction is a tactical choice counsel can make to avoid emphasizing potentially harmful evidence as long as that choice is reasonable and legitimate. See *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993); *State v. Powell*, 150 Wn. App. 139, 153-54, 206 P.3d 703 (2009).

Although petitioner claims that “[t]here can be no conceivable tactical reason for allowing the jury to consider Ms. Curry’s 911 call as substantive, rather than merely impeachment, evidence,” such a tactical reason is readily apparent. Here, the trial court permitted the jury to hear that petitioner’s stepmother called 911 as she thought he may have been involved in a shooting. Any limiting instruction could potentially emphasize this evidence to the jury, one of the only pieces of “impeachment” evidence offered at trial. Because there was a reasonable and legitimate reason not to request a limiting instruction, petitioner’s counsel’s decision not to seek such an instruction was not deficient performance.

In addition, counsel's decision did not prejudice petitioner. Although the information contained in Ms. Curry's 911 call was not helpful to the defense, this evidence pales in comparison to the overwhelming evidence admitted at trial showing that petitioner murdered Ward. In the 911 call, Ms. Curry states only that "I'm a parent, and I think there's a possibility that my son was involved [in a shooting]." App., Attach. D. Although this call may have prompted the investigation, it was the law enforcement investigation that uncovered the overwhelming evidence against petitioner. Against the backdrop of that overwhelming evidence, any failure by trial counsel in not requesting a limiting instruction advising the jury that the 911 call could only be used for impeachment could not have prejudiced petitioner. Accordingly, petitioner's claim of ineffective assistance of counsel should be denied.

E. Petitioner's Trial Counsel Did Not Render Ineffective Assistance by Choosing Not to Seek a Limiting Instruction Regarding the State's "Gang" Evidence

Petitioner claims that his trial counsel rendered ineffective assistance by "failing" to seek a limiting instruction regarding the State's "gang evidence." PRP at 43-45. Petitioner's argument should be denied. As evidenced by his comments at trial, petitioner's counsel made a reasonable tactical decision not to seek a limiting instruction rather than have such an instruction serve the purpose of potentially emphasizing harmful evidence. Furthermore, contrasted against the overwhelming evidence of guilt, petitioner was not prejudiced by his counsel's decision.

Petitioner was involved in a business venture called YLyfe. VRP 1592. YLyfe was identified as a record, video and media company involved with hip hop music. VRP 1592. At trial, petitioner denied that this hip-hop music condoned street violence when cross-examined by the State. VRP 1592. The State also asked petitioner if he had other

business dealings with entities called YG Entertainment or Young Gangster Entertainment, which Petitioner denied. VRP 1593.

The State then sought to impeach petitioner with evidence of a hip-hop video produced by YLyfe that allegedly promoted street violence. VRP 1600- 1601, 1616. The defense objected, indicating that it was a backdoor method to improperly introduce alleged gang evidence. VRP1595. Petitioner made an offer of proof that the referenced video was a political one about the death of Trayvon Martin. VRP 1620.

The court excluded the video, but allowed a photo showing petitioner associated with the term “Y Gang.” VRP 1623. Prior to presenting the photographs, the State proposed a limiting instruction that informed the jury that the photographs and associated line of questioning may be considered “for assessing the defendant’s credibility and for no other reasons.” VRP at 1686. Petitioner’s counsel stated he did not want the instruction because he did “not want argument that he’s part of a gang and it’s a gang shooting” and did not want the court to “give an instruction on we’re about to show you a picture of the defendant in a gang - -.” VRP 1687-88. He added that giving the instruction is tantamount to “saying don’t consider this gang evidence, except for credibility.” VRP 1688. Petitioner ultimately identified a photo of him posing in a “Y Gang Entertainment” photo. VRP 1698-1699. Petitioner’s counsel ultimately declined a limiting instruction regarding this evidence.

On appeal, petitioner argued that the trial court erred in admitting impeachment evidence in the form of pictures associating him with an entity called the “Y Gang.” App., Attach. E; see also Appendix, Attachment I (Trial Exhibits 174A and 175A.) This Court rejected this argument because defense counsel waived it by failing to request a limiting instruction. App., Attach. E at 11.

However, this Court's finding of waiver does not transform petitioner's counsel's decision not to seek a limiting instruction into ineffective assistance of counsel. As set forth above, the decision not to request a limiting instruction is a tactical choice counsel can make to avoid emphasizing potentially harmful evidence as long as that choice is reasonable and legitimate. *Barragan*, 102 Wn. App. at 762; *Donald*, 68 Wn. App. at 551; *Powell*, 150 Wn. App. at 153-54.

Here, petitioner's counsel provided on the record the reasons he chose not to request a limiting instruction or agree to the State's proposed limiting instruction. Petitioner's counsel stated he did not want the instruction because he did "not want argument that he's part of a gang and it's a gang shooting" and did not want the court to "give an instruction on we're about to show you a picture of the defendant in a gang - -." VRP 1687-88. He added that giving the instruction is tantamount to "saying don't consider this gang evidence, except for credibility." VRP 1688.

All of the reasons counsel gave for his tactical decision to not request a limiting instruction were legitimate and reasonable. Requesting such an instruction (or agreeing to the State's proposed instruction) would run the risk of emphasizing unfavorable information – that petitioner was in a gang or at least was in the gang life or associated with gangs. Although petitioner claims that nothing in the State's proposed instruction referred to the photographs as gang evidence or otherwise characterized the evidence, even references to consider exhibits 174A and 175A "for assessing the Defendant's credibility and for no other reason" (VRP at 1686) had the potential to emphasize the photographs that petitioner claimed on appeal prejudiced him. Because there were reasonable and legitimate reasons to not request a limiting instruction, petitioner's counsel's decision not to seek such an instruction (or agree to the instruction proposed by the prosecution) was not deficient performance.

In addition, counsel's decision did not prejudice petitioner. Here, the prosecution did not use the photograph improperly and did not argue that it had any impact other than on petitioner's credibility. Although this evidence, too, was not helpful to the defense, it also pales in comparison with the overwhelming evidence admitted at trial showing that petitioner murdered Ward. Against the backdrop of that overwhelming evidence, any failure by trial counsel to request a limiting instruction advising the jury that the photograph of petitioner in association with "Y Gang" could only be used to evaluate his credibility could not have prejudiced petitioner. Accordingly, petitioner's claim of ineffective assistance of counsel should be denied.

II. THE TRIAL COURT PROPERLY ADMITTED KARIN CURRY'S 911 CALL

Petitioner argues that the trial court erred in admitting Karin Curry's 911 call because it constituted double hearsay and its prejudicial impact substantially outweighed its probative value. Petitioner further argues that this "error" caused a miscarriage of justice because it allowed the jury to hear his "stepmother repeating allegations from [petitioner's] ex-girlfriend that [he] murdered Ward, evidence that is highly prejudicial and which the jury should never have heard." PRP at 45-48. Petitioner's claim should be denied. Any statement made by Martinez to Ms. Curry was not hearsay, as Ms. Curry did not mention any statement by Martinez in her 911 call, and the 911 call was admitted to impeach Ms. Curry's credibility as a witness, a non-hearsay purpose.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay evidence is not admissible unless an exception or exclusion applies. ER 802. However, a prior statement of a witness offered to impeach that witness is not hearsay. ER 801(d)(1); see also *State v. Williams*, 79 Wn. App. 21, 26-27, 902 P.2d 1258 (1995)

(comparing prior inconsistent statements of witness, which are not hearsay because they are not offered to prove the truth of the matter asserted, with inconsistent statements of different declarant, which generally are hearsay as they are offered for substantive purposes). The credibility of a witness may be attacked by any party, including the party calling the witness. ER 607.

Here, as set forth above, the trial court properly found that the 911 call did not contain hearsay. VRP 589. Nowhere in the 911 call did Ms. Curry state that she was told something by Martinez or anyone else. Even if information learned from Martinez was the impetus for Ms. Curry to call 911, petitioner is simply incorrect in asserting that admitting the 911 call “allowed the jury to hear [petitioner’s] stepmother repeating allegations from [his]ex-girlfriend that [he] murdered Ward.” See *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (“A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement”). Accordingly, the 911 call did not contain hearsay.

Furthermore, the 911 call itself was admitted for a non-hearsay purpose – to impeach the credibility of Ms. Curry. As set forth above, during her testimony, Ms. Curry *denied* that the reason she made her 911 call was because she thought that petitioner was involved in Ward’s murder. VRP 586. In response, the prosecutor asked to play Plaintiff’s Exhibit No. 86, a recording of Ms. Curry’s call to 911. VRP 586-87; App., Attach. D. After discussion outside the jury, the trial court overruled petitioner’s counsel’s hearsay objection. In the 911 call itself, Ms. Curry stated that she thought petitioner was possibly involved in the shooting but did not provide the basis for that belief. VRP 589-90. The trial court found that the contents of the 911 call were “clearly different than what she just testified to.” (VRP 589-90). Thus, the 911 call was admitted to impeach Ms. Curry’s credibility as a witness.

Petitioner argues that the 911 call should not have been admitted as impeachment evidence under ER 801(d)(1) because “a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” *State v. Babich*, 68 Wn. App. 438, 444, 842 P.2d 1053 (1992) (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984)), rev. den., 121 Wn.2d 1015, 854 P.2d 42 (1993). However, petitioner provides no evidence or argument demonstrating that the prosecution here used such a ruse and relies only on rank speculation. Similarly, petitioner’s assertion that “the prosecutor had no legitimate reason for inquiring into the contents of that call other than to induce Ms. Curry to make an inconsistent statement and then introduce the recording as impeachment evidence” is made with no support.

In addition, petitioner’s argument that the trial court should have excluded such evidence under ER 403 because its probative value was “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” should be rejected. Although petitioner asserts that Ms. Curry’s credibility was not an important issue in the case, her credibility was, in fact, very important. Ms. Curry lied on the stand when she stated that she did not call the police because she thought petitioner was involved in a shooting. The contents of the 911 call impeached her credibility because it indicated that she *did* call 911 because she thought petitioner was involved. Because a defendant’s stepmother may already have bias toward a defendant, exploring such a witness’s credibility can be crucial for a jury evaluating her testimony.

In addition, any prejudicial impact of this statement was limited by the other evidence admitted at trial. As set forth above, any potentially harmful information contained in Ms. Curry’s 911 call pales in comparison with the overwhelming evidence

admitted at trial showing that petitioner murdered Ward. On the 911 call, Ms. Curry states only that “I’m a parent, and I think there’s a possibility that my son was involved [in a shooting].” App., Attach. D. Contrary to petitioner’s assertions, Ms. Curry never mentions Martinez or that her stepson was “a murderer.” Although this call may have prompted the investigation, it was the law enforcement investigation that uncovered the overwhelming evidence against petitioner. Against the backdrop of that overwhelming evidence, the probative value of this impeachment evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, petitioner’s claim should be denied.

III. PETITIONER’S WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY ANY “CUMULATIVE” ERRORS

Petitioner claims that the “cumulative” errors made during trial deprived him of his right to a fair trial. VRP at 48-49. This claim should be rejected.

“The test to determine whether cumulative errors require reversal of a defendant’s conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014), abrogated on other grounds, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). There is no prejudice if the evidence is overwhelming. *Id.* at 691. The cumulative error doctrine “does not apply where the errors are few and have little or no effect on the outcome of the trial.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006).

Petitioner here fails to show that any error affected the outcome of his trial. As set forth above, each of petitioner’s individual claims lack merit and should be denied. What the defendant alleges was ineffective was actually strategic and tactical and did not prejudice him. His evidentiary claims involve information properly admitted or that could

not affect the outcome. In addition, any instances that might be characterized as error did not affect the outcome of trial given the great weight of the evidence against petitioner.

See *Weber*, 159 Wn.2d at 279. Petitioner's claim of cumulative error should be denied.

IV. PETITIONER'S INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM IS WITHOUT MERIT AND SHOULD BE DISMISSED AS HE HAS NOT DEMONSTRATED THAT APPELLATE COUNSEL RENDERED DEFICIENT PERFORMANCE THAT PREJUDICED HIM

Petitioner claims that he received ineffective assistance of appellate counsel. VRP at 49-50. This claim should be denied as petitioner fails to demonstrate that appellate counsel rendered deficient performance that prejudiced him.

To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show how he or she was prejudiced. *In re Personal Restraint of Netherton*, 177 Wn.2d 798, 801, 306 P.3d 918 (2013). Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney's role. *In re Personal Restraint of Dalluqe*, 152 Wn.2d 772, 787, 100 P. 3d 279 (2004).

The petitioner must show deficiency of counsel, e.g., failing to raise a legitimate legal issue; and prejudice, i.e., that the issue was dispositive. To meet this standard, the petitioner must show that "but for counsel's errors the outcome of the proceedings would have been different." *State v. Varga*, 151 Wn.2d 179, 198, 86 P. 3d 139 (2004) (quoting *State v. Brett*, 126 Wn.2d at 199).

Appellate counsel need not raise every colorable claim on behalf of a client. *Jones v. Barnes*, 463 U.S. 745, 752–754, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Appellate counsel decides which issues to concentrate on in order to maximize the likelihood of success on appeal. See *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). The *Strickland* test applies to appeals. *Robbins*, 528 U.S. at 289. “[a] court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. “The challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.’” *Id.* at 687. And in assessing whether *Strickland*’s first prong is satisfied, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. The reviewing court must be watchful “to eliminate the distorting effects of hindsight.” *Id.* at 689.

Here, petitioner claims that appellate counsel should have raised each of the issues he raises in the instant petition. However, petitioner fails to show that any claim of error he raises affected the outcome of his trial. As set forth above, each of petitioner’s individual claims lack merit and should be denied. What petitioner alleges was ineffective assistance was actually strategic and tactical and did not prejudice him. His evidentiary claims involve information properly admitted or that could not affect the outcome. In addition, any instances that might be characterized as error did not affect the outcome of trial given the great weight of the evidence against petitioner.

Therefore, petitioner fails to show that appellate counsel rendered deficient performance or that appellate counsel’s decision not to raise the issues petitioner sets forth

here prejudiced him. Accordingly, petitioner's claim that appellate counsel rendered ineffective assistance should be denied.

D. CONCLUSION:

The State respectfully requests that this Court dismiss petitioner's Petition. Petitioner has failed to show that either trial counsel or appellate counsel rendered deficient performance that prejudiced him. Petitioner's evidentiary claims involve information properly admitted or that could not affect the outcome. In addition, any instances that might be characterized as error did not affect the outcome of trial given the great weight of the evidence against petitioner. Petitioner has thus failed to show that he suffered any actual and substantial prejudice and therefore fails to demonstrate unlawful restraint.

DATED: June 12, 2020

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Certificate of Service:

The undersigned certifies that on this day she delivered by EFILE to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her 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.

06/12/20 s/Aeriele Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 12, 2020 - 2:50 PM

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