

No. 310396

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHRISTOPHER J. REID,

Appellant,

v.

PULLMAN POLICE DEPARTMENT,

Respondent.

AMENDED BRIEF OF RESPONDENT

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INTRODUCTION

As the trial court properly found, Pullman did not violate the Public Records Act (“PRA”) in responding to Appellant, Christopher Reid’s request for records of his criminal case. Pullman produced every record that it possessed in Mr. Reid’s case file. Mr. Reid accuses Pullman of “silently withholding” records—but Pullman could not silently withhold documents it did not have. On *de novo* review, this Court should affirm the trial court’s finding that the record amply supports the conclusion that Pullman complied with the PRA. In particular, (1) certain law enforcement database records; (2) the records relating to photo lineups; (3) an audio recording of the victim’s interview; and (4) the recording of the victim’s 911 call are all documents or information that was either produced to Mr. Reid, or are documents/materials that did not exist in the Pullman records.

Mr. Reid argues that the trial court lacked sufficient evidence to reach these conclusions because the record did not include a declaration from retired Officer Orsborn or a showing of compliance with retention schedules. He is wrong. Pullman submitted seven detailed, sworn statements, with exhibits containing over 1,000 records, including Mr. Reid’s entire criminal case file. The affidavits set forth the information contained in the files and protocol at the time for obtaining information, retaining information, and/or what would or would not be included in a criminal case file. The record presented to the trial court shows no

violation by Pullman, and instead supports the conclusion that Pullman complied with the PRA.

Finally, the trial court did not abuse its discretion in denying Mr. Reid's motion to inject a claim for declaratory relief regarding Pullman's compliance with the Preservation and Destruction of Public Records Act ("PDPRA") into his PRA action. The trial court properly denied Plaintiff/Appellant Reid's motion for a "counterclaim" because it was not only procedurally flawed, but as a matter of law, the claim substantively could not stand alone. Providing declaratory relief to Mr. Reid based on claims under the PDPRA would have been error because the statute does not give Petitioner any rights to enforce in a declaratory judgment action or any other action. The PDPRA does not support a private cause of action. This Court should affirm the trial court's order.

ISSUES ON APPEAL

- I. Whether on *de novo* review the trial court properly found that Pullman complied with the Washington Public Records Act (RCW 42.56 *et seq*) in responding to Mr. Reid's request for all records for his case No. 07-P07290 when it produced all documents contained in Mr. Reid's case file.
- II. Whether the trial court abused its discretion in denying Mr. Reid declaratory relief where the request for relief was procedurally improper and substantively barred under the Preservation and Destruction of Public Records Act (RCW 40.14 *et seq*) which gives Mr. Reid no legal rights.

STATEMENT OF THE CASE

A. Factual Statement

This Court upheld Mr. Reid’s rape conviction in 2010, and he is still serving time at Stafford Creek Corrections Center. CP 1; Brief of Petitioner (“Brief”) pp. 1-2; *State v. Reid*, 155 Wn. App. 1032 (2010), attached to Appendix as Exhibit A.¹ After losing his appeal in his criminal case, on February 3, 2011, Mr. Reid submitted a records request addressed to the Pullman Police Department (“PPD”), seeking records for his criminal case. CP 63-64.

Mr. Reid’s records request asks for the contents of his criminal case file. CP 63-64. His request asks for a laundry list of documents that might be found in a criminal case file, including “police – files, statements, reports ... and all other records of this case, 07-P07290.” CP 63.

Pullman timely responded to his request and ultimately produced the entire case file on a rolling basis. Carey Murphy, a records specialist at the PPD, testified via sworn affidavit that she produced a copy of the case file in eight installments. CP 196 at ¶ 8. Some pages were redacted as required by law. Ms. Murphy followed Mr. Reid’s instruction and did not provide duplicate copies in order to reduce his costs. Otherwise, a

¹ *State v. Reid* is an unpublished opinion. Unpublished opinions may not be cited “as an authority.” GR 14.1. However, unpublished opinions may be “cited to establish facts in a different case that are relevant to the current case.” *State v. Seek*, 109 Wn. App. 876, 878, n. 1, 37 P.3d 339 (2002).

copy of the entire contents of criminal case file number 07-P07290 was produced to Mr. Reid. CP 196 at ¶¶ 8-10. A copy of both the redacted produced pages and a complete, unredacted copy of Mr. Reid's criminal case file were part of the trial court record, and are part of the record on review. CP 196 at ¶¶ 8-10; see also CP 484-85 (with unredacted and sealed documents attached as Exhibit 1 for *in camera* review at trial court's docket 57B.)

The trial court found that Pullman's production of the case file satisfied its obligations under the PRA. The trial court specifically addressed Mr. Reid's four alleged deficiencies related to (1) certain law enforcement database records; (2) certain records relating to photo lineups; (3) an audio recording of the victim's interview; and (4) the recording of the victim's 911 call. CP 124-29.² CP 1-9. Based on the record evidence, Pullman met its burden showing compliance with the PRA because it either produced the records and materials, or Mr. Reid's requested document/materials were not a part of the Pullman record.

In sum, the trial court concluded that certain information was only verbally communicated in 2007; that only records deemed relevant to the investigation were printed and/or retained; that Pullman's

² On appeal, Mr. Reid mentions only briefly the alleged 911 recording and initial audio recorded statement from his victim. While they are not expressly set forth in Appellant's assignments of error, Pullman nonetheless raises these issues because of Appellant's broad assignment of error relating to the PRA and in order to fully respond to any errors Mr. Reid alleges as a *pro se* litigant.

explanation with respect to the absence of certain database records credible and logical; that Pullman produced every record in its possession and control at the time the records request was made; that no violation of the PRA occurred; that Pullman has no obligation as a matter of law to create or produce a record that is nonexistent; and that Mr. Reid is wrong that there ever was an audio recording of the victim's interview. CP 124-129. Mr. Reid's claims were dismissed. *Id.*

B. Procedural Statement

On May 18, 2012, Mr. Reid filed a motion to "order the Defendant to show cause on why it has refused to allow copying of public records." CP 9. Mr. Reid specifically requested that any "hearing be conducted solely on affidavits," citing to RCW 42.56.550. *Id.* On May 18, 2012, the Court entered a Show Cause Order. CP 139.

On May 30, 2012, Pullman submitted its Memorandum of City of Pullman in Response to Order to Show Cause Re: Ch. 42.56 RCW. CP 67-77. Pullman's memorandum was supported by seven sworn statements from Pullman's employees and counsel. CP starting at 133; 136; 140; 142; 144; 195; and 484. In addition, Pullman also submitted numerous exhibits, including a complete, unredacted copy of Mr. Reid's criminal case file submitted for *in camera* review. CP 484-85 (with unredacted and sealed documents attached as Exhibit 1 for *in camera* review at trial court's docket 57B.)

Rather than respond to Pullman's memorandum, Petitioner instead filed a Motion for Leave to File Counterclaims and Supplemental Pleadings in Reply to City's Memorandum. CP 78-103. Mr. Reid's motion sought new declaratory relief, including relief related to Petitioner's criminal cases, and to alleged violations of the PDPRA (RCW 40.14 *et seq.*) CP 86-87.

On June 29, 2012, Pullman filed its Memorandum of City of Pullman in Response to Motion for Leave to File Counterclaims and Supplemental Pleadings. CP 104-110. Among other arguments, Pullman argued that Civil Rules 13(e) and 15(d) did not support Petitioner's attempt to inject counterclaims and supplemental pleadings into a show cause proceeding under RCW 42.56.550. CP 107-08. Pullman also argued that the PDPRA did not afford Petitioner a private right of action, making declaratory relief under the PDPRA improper. CP 108-09.

The trial court agreed with Pullman; denied Mr. Reid's motion and relief; and specifically adopted in its Order the arguments and authority as set forth in Pullman's memorandum. CP 124-29. On July 11, 2012, the trial court concluded that Pullman did not violate the PRA, denied Mr. Reid's motion, counterclaims, and other various requests for relief, and dismissed his case with prejudice. CP 128-29. The matter was decided on the affidavits, record evidence, and legal authority without oral argument. On July 25, 2012, Petitioner appealed.

ARGUMENT

I. PULLMAN COMPLIED WITH ITS OBLIGATIONS UNDER THE PUBLIC RECORDS ACT.

A. *The Trial Court's Decision is reviewed de novo.*

Judicial review of an agency's response to a public records request is *de novo*. *Zink v. City of Mesa*, 140 Wn. App. 328, 335-37, 166 P.3d 738 (2007); RCW 42.56.550(3). Where the court has "not seen or heard testimony requiring it to assess the witnesses' credibility or competency," an appellate court is not bound by the trial court's factual findings and stands "in the same position as the trial court." *Dragonslayer, Inc. v. Washington State Gambling Cmm'n*, 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007). This is a common procedural posture for PRA cases, because the PRA expressly permits a "hearing based solely on affidavits." RCW 42.56.550(3). In such hearings, "purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith." *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384, 389 (2012).

B. *Washington's Public Records Act governs actions regarding document disclosure.*

Washington's Public Records Act is Washington's analogue to the federal Freedom of Information Act ("FOIA"). *Forbes*, 288 P.3d at 388. The purpose of the PRA is to allow Washington residents to remain

informed and retain control of their state and local governments and agencies by requiring the disclosure of public records upon request. RCW 42.56.030. Under the PRA, subject to certain exemptions and limitations, a state or local agency that receives a public records request must promptly produce the requested records. *See West v. Thurston County*, 168 Wn. App. 162, 182, 275 P.3d 1200 (2012); RCW 42.56.140-480 (exemptions to production); RCW 42.56.520 (requiring prompt response to records requests).

The PRA also expressly provides for judicial review of agency actions in responding to public records requests. RCW 42.56.550. The PRA sets out a streamlined process for judicial review whereby a party seeking records can file a show cause motion rather than a pleading. RCW 42.56.550(1). The agency bears the burden of proving that it complied with the PRA, at least where the agency *withholds* a responsive record on the basis that a statute exempts or prohibits disclosure. RCW 42.56.550(1) and (2).³ In such actions, the court can consider records *in camera* and “may conduct a hearing solely on affidavits.” RCW 42.56.550(3).

³ Neither the PRA nor Washington case law expressly sets out the burden of proof in a case where an agency has not produced a record because it is not in the agency’s possession. Out of an abundance of caution, Pullman assumes that it bears the burden of proof in this instance. The Court need not decide this issue here, because the question of who bears the burden of proof is not dispositive; the evidence in this case demonstrates that Pullman did not have the requested records.

The PRA provides broad relief to prevailing parties, although recent amendments to the PRA restricts the relief for inmates. First, the court can compel production of the requested records. Second, the court awards a prevailing records requester their reasonable costs and attorney fees. RCW 42.56.550(4). Third, the court also awards a statutory penalty of up to \$100 per day the agency improperly withheld requested records. *Id.* While other records requesters can obtain statutory penalties solely on the basis that an agency improperly withheld records, an inmate can only receive statutory penalties if the court finds the agency “acted in bad faith in denying the person the opportunity to inspect or copy a public record.” RCW 42.56.565(1).

The PRA does not govern records retention prior to receipt of a public records request, rather the PRA requires that an agency not destroy public records until after resolution of a request for responsive records. RCW 42.56.100. Records destruction and deletion are governed by the Preservation and Destruction of Public Records Act (RCW 40.14 *et seq*), not the PRA. The PDPRA establishes the division of archives and records management in the office of the secretary of state, which then establishes retention schedules for public records. While violating the PDPRA by improperly destroying documents is a felony, that statute does not give rise to a private cause of action. RCW 40.16.010 – 020.

C. *On de novo review, this Court should affirm the trial court and find that Pullman produced all records in compliance with the PRA.*

Pullman did not violate the PRA. The only reason Pullman did not provide the records Mr. Reid argues it should have produced is because it did not have them. Where an agency “did not deny the requestor an opportunity to inspect or copy a public record, because the public record he sought did not exist,” “there is no agency action to review under the [PRA].” *Building Industry Ass’n of Washington v. McCarthy*, 152 Wn. App. 720, 740, 218 P.3d 196 (2009); quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 137, 96 P.3d 1012 (2004). In other words, Pullman did not claim “exemptions” regarding the requested documents, but instead advised Mr. Reid that either the documents did not exist or did not exist in Pullman’s files.

Mr. Reid focuses on the “did not exist” language in this legal standard, construing it to mean that as long as a record exists somewhere—even if it does not exist in Pullman’s possession—Pullman’s failure to produce the record violates the PRA. Brief, pp. 8-9. Mr. Reid is mistaken. Under the PRA, what matters is whether a record exists in the files of the agency that receives the records request at issue, not whether another agency happens to have the record. *See Building Industry Ass’n of Washington*, 152 Wn. App. at 728-29 (Stating email did not exist because it was not in agency’s possession, but not examining whether sender still had copy of email); *Smith v. Okanogan*

County, 100 Wn. App. 7, 22, 994 P.2d 857 (2000) (No liability where “County had nothing to disclose” because requested records “did not exist or were not in the [agency’s] possession.”).

As the trial court properly found, Pullman produced all responsive records in its possession when it produced Mr. Reid’s entire criminal case file, and as such did not violate the PRA.

1. Pullman did not improperly withhold Law Enforcement Database Records accessed from the Washington State Patrol records because these records were not a part of Mr. Reid’s criminal case file.

Mr. Reid allegedly obtained a number of records from the Washington State Patrol (“WSP”) that he did not receive from Pullman, leading him to argue that Pullman violated the PRA in not producing these records. (Brief of Appellant at pp. 2, 4-6, 8-9.) To the extent Pullman ever actually received these records, they were not in Mr. Reid’s criminal case file when Pullman received his records request years later. Mr. Reid asserts that emails, web messages, and other electronic data was missing from his file.

Based on the record evidence, the trial court properly found that Pullman’s “explanation with respect to the absence of certain database records credible and logical.” CP 126. Mr. Reid argues that “the decision was wrong because Respondent produced no facts explaining why the Law Enforcement Database Records were *exempt* when he requested them. “ (Brief of Appellant at p. 9.) Pullman did not assert an

“exemption”, rather it advised that the documents were not part of the criminal case file.

Pullman submitted seven sworn statements from Pullman employees and counsel that provided insight into how police officers obtained and stored information received from the Washington State Patrol (“WSP”) during a criminal investigation. CP 124-126. The record evidence also provided all information about what was produced to Mr. Reid, including testimony regarding compiling, obtaining, and retaining documents as part of the criminal file. CP starting at 133; 136; 140; 142; 144; 195; and 484.

The PPD’s Property and Evidence Specialist testified that police officers out in the field obtained information from Washington State Patrol (“WSP”) databases by radioing requests to Whitcom, a regional dispatch center, and then receiving results over the radio. CP 134. An officer would generally not request printouts for insertion into the case file. *Id.* Even if printouts were requested and did make their way into the case file, an officer might remove them over the course of an investigation “in light of new information that tended to show the WSP record was irrelevant.” CP 133-135.

Pullman police officers also had the ability to view WSP records at the station. As Officer Michael Crow testified, these records were frequently viewed but not printed, and he generally did not print WSP records he viewed on his desktop for inclusion into a case file. CP 136-137.

Based on these affidavits, along with the other affidavits showing all the records produced to Mr. Reid and/or context of certain records, the trial court reasonably concluded that “Defendant provided every such record in its possession and control at the time the records request was made and that no withholding of records or violation of the Act occurred.” CP 126. The records Mr. Reid alleges were “silently withheld” were either never put into his criminal case file, or they were removed during the course of the investigation that led to his conviction. CP 125-26.

Mr. Reid did not submit his records request until February 2011, after the investigation was complete, after his criminal trial, and after this Court affirmed his conviction on appeal. Appendix Ex. A; CP 63-64. Upon receipt of Mr. Reid’s records request, the uncontroverted testimony of Ms. Murphy is that she produced to him a copy of his entire file. CP 196 at ¶ 10. The sworn testimony of Mr. Peringer, Officer Crow, and Ms. Murphy, viewed in conjunction with a copy of the criminal case file at issue, supports the trial court’s conclusion that Pullman complied with the PRA by producing all responsive records in Pullman’s possession. Mr. Reid asked for his criminal case file, and that is what he received.

2. Pullman did not improperly withhold photo lineup records because all documents created were produced.

Mr. Reid complains that some of the documents related to photo lineups are not as detailed as he would like, but provides no evidence that more detailed records exist. (Appellant's Brief at 2-4) The trial court properly found that "Officer Orsborn did not create a record identifying the officers he gave photo lineup sheets to and that all records Defendant possesses relating to photo lineups have been provided." CP 126. The trial court further went on to properly state that "Defendant has no obligation to 'create or produce a record that is nonexistent.'" (citation omitted.) CP 126.

As the records specialist who responded to Petitioner's records request testified, she "produced the entire case file to Mr. Reid." CP 196 at ¶ 10. This led the trial court to conclude that Pullman "did not withhold records or violate the Act with respect to photo lineup records." CP 127. While Mr. Reid, a *pro se* Appellant, does not expressly assign error regarding the photo lineup issue, he nonetheless devotes two pages to this issue ruled upon by the trial court. (Appellant's Brief at 2-4) This court should affirm the trial court's finding that Pullman did not withhold records or violate the act with respect to the photo lineup records.

3. Pullman did not improperly withhold an audio recording of an interview with Mr. Reid's rape victim because no such recording exists.

Mr. Reid claimed to the trial court that Officer Scott Kirk of the Pullman Police Department made an audio recording of the initial interview with Mr. Reid's rape victim—but Mr. Reid is wrong. As the trial court found, no such record was ever created. CP 127. Officer Kirk testified by declaration, "I never took an audio recorded statement of the victim in this case. This record does not exist." CP 142-43.

The basis for Mr. Reid's erroneous belief that Officer Kirk made an audio recording of his initial interview with Mr. Reid's victim rests on a flawed interpretation of a report Officer Kirk made with his Dictaphone containing the phrase "End of tape." CP 57-59. All police officers have digital Dictaphones which they use to make their reports. CP 140-141. These audio files are then transcribed, with the original audio file automatically deleted after 60 days. *Id.*

As the administrative specialist who transcribed Officer Kirk's report testified by affidavit, she typed "End of tape" at the end of her transcription to alert Officer Kirk to the possibility that the report might be incomplete, not because there was any audio statement from the victim. *Id.* This is consistent with Officer Kirk's testimony. He declared, "I believe 'end of tape' was added by the transcriptionist as a note to herself to make sure that I did not supplement the report with an additional dictation." CP 142.

As the trial court properly found, a “review of the format and content of [Officer Kirk’s report] confirms that this is not a transcription of a recorded interview of the victim. Rather, as the Defendant contends, it is clear that this is Officer Kirk’s narrative summary of an unrecorded interview.” *See* CP 57-59, 127.

While Officer Kirk used his Dictaphone to submit a report summarizing his interview with the victim—a report that Pullman produced—he never made an audio recording of this interview. Pullman was unable to produce an audio recording of Officer Kirk’s initial interview with the victim because this record never existed.

On *de novo* review, this Court should affirm the trial court and find that there was no audio recording of an interview of Mr. Reid’s rape victim. While Mr. Reid, a *pro se* appellant, does not expressly assign error to this issue, he raises this issue in his Appellant’s brief (p. 2), and it is an express finding of the trial court below.

4. Pullman did not improperly withhold a 911 call recording of Mr. Reid’s rape victim because Pullman did not have the recording.

Pullman did not produce a copy of the victim’s 911 recording because, as Pullman notified Mr. Reid, Pullman “does not have the audio recording of the victim’s 911 call in this case.” CP 195-196 at ¶ 4. Instead, Pullman directed Mr. Reid to the Whitcom Dispatch Center, the agency most likely to have this record. *Id.* Pullman did not produce the 911 recording because Pullman did not possess this record. As the trial court properly found, Pullman had “no obligation under the Public

Records Act to produce records it does not possess,” so not producing the 911 call recording did not violate the PRA. CP 128.

On *de novo* review, this Court should affirm the trial court and find that there was no audio recording of an interview of Mr. Reid’s rape victim. While Mr. Reid, a *pro se* appellant, does not expressly assign error to this issue, he raises this issue in his Appellant’s brief (p. 2), and it is an express finding of the trial court below.

5. An affidavit by retired Officer Orsborn was not an evidentiary prerequisite for Pullman to show it did not violate the PRA.

Pullman submitted seven detailed, sworn statements attaching over 1,000 pages of records and demonstrating that it produced Mr. Reid’s entire criminal case file, but Mr. Reid asserts on appeal that Pullman was required to submit an affidavit from retired Officer Orsborn, as well as a destruction log for the WSP records Pullman did not produce.⁴ Brief pp. 10-13. Mr. Reid fails to assert legal authority for these propositions. Arguments in appellate briefs must contain legal argument supported by citations to legal authority. RAP 10.3(a)(6). Mr. Reid’s argument that this evidence is required does not meet this minimum legal requirement and deserves no consideration.

⁴ Mr. Reid characterizes the trial court’s ruling in Pullman’s favor without an Orsborn affidavit or destruction logs as “relieving” Pullman of its burden of proof. Brief pp. 9, 11. The trial court’s memorandum decision and order does not use this language, but instead concludes that Pullman proved its compliance with the PRA. CP 124-129.

Regardless, Officer Orsborn's testimony in this case is not required. Mr. Reid appears to be arguing that the testimony of the creator or primary user of a public record (electronic information requests sent to the WSP and DOL) is required to prove compliance with the PRA. Brief pp. 9-10. Nothing in the text of the PRA imposes this requirement. See RCW 42.56, *et seq.* Rather, in PRA cases, the agency's burden is to establish, "beyond material doubt," the reasonableness of its search for documents, and "[t]o do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith." *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wash. 2d 702, 720-21, 261 P.3d 119 (2011) (emphasis added).

Additionally, if the PRA were to require such evidence, agencies would lose PRA actions whenever a record's creator or primary user was unavailable. Due to death, retirement, and other reasons, agency employees regularly become unavailable, so adopting Mr. Reid's requirement would open up agencies to enormous liability beyond that intended under the PRA. Mr. Reid's proposed requirement that a records creator or primary user must submit testimony for an agency to prove compliance with the PRA would be poor policy, unsupported by law, and would fly in the face of basic rules of Civil Procedure; i.e. 30(b)(6) testimony.

6. Compliance with the PRA does not first require a threshold showing of compliance with records management guidelines and retention schedules.

It appears that Mr. Reid argues that compliance with the PDPRA must be shown to prove compliance with the PRA, Appellant's Brief at p. 11-13, but this argument has already been rejected as a matter of law. A PDPRA violation does not support a private right of action. *Daines v. Spokane County*, 111 Wn. App. 342, 350, 44 P.3d 909 (2002) *overruled in part on other grounds by Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wash. 2d 702, 261 P.3d 119 (2011); *West v. Washington State Dept. of Natural Resources*, 163 Wn. App. 235, 244-45, 258 P.3d 78 (2011) (no PRA liability for inadvertently destroying email before receiving records request). Under the PRA, document destruction is only actionable in one circumstance: where destruction occurs **after receipt** of a request for responsive public records. RCW 42.56.100; *Building Industry Ass'n of Washington*, 152 Wn. App. at 740.

Here, Pullman has explained why the records Mr. Reid seeks are not in his criminal case file, and has produced a complete copy of his case file. Obviously, Ms. Murphy could not have produced a complete copy of Mr. Reid's file as she testified if records were removed from the case file and destroyed after receipt of Mr. Reid's request. Knowing exactly when and how records (if any) may have been destroyed/deleted prior to receipt of Mr. Reid's request is not necessary to show Pullman complied with the PRA.

As the trial court properly found, compliance with the PDPRA was not required and Pullman's explanation of how it complied with the PRA is "credible and logical." CP 125-26. In other words, there was no evidence whatsoever that anything from Mr. Reid's file was removed or destroyed after Mr. Reid made his public record's requests, including any e-mails, web messages, or metadata. Mr. Reid's assignment of error that the trial court somehow relieved Pullman from its burden of proof is ungrounded and without merit as a matter of law. The trial court's Memorandum Decision and Order should be affirmed in its entirety.

7. The record on appeal demonstrates that Mr. Reid's assertion of PDPRA violations is unfounded.

The record before the trial court and on appeal does not support the conclusion that Pullman violated the PDPRA. Mr. Reid claimed to the trial court that Pullman violated the PDPRA. CP 86-90. However, in his Brief, Mr. Reid does not allege that Pullman violated Washington statute or regulations, instead claiming only that, in 2007, Pullman did not follow guidelines for email retention that were promulgated in 2001. Brief pp. 11-13. These guidelines, which do not appear to be binding and which may have been out of date in 2007, do not appear anywhere in the record. Mr. Reid has not provided a copy of these guidelines to this Court for review, instead only attaching what he claims to be one page from the guidelines in the appendix to his Brief about e-mails. Brief, Appendix A. Not only is this exhibit unauthenticated but, by its terms,

this page is inapplicable because it discusses the retention of electronic emails, not criminal case files.⁵

As for printouts of emails, it states that they should be retained “according to the retention approved for that series by the Local Records Committee,” but does not include the applicable series. While Mr. Reid tries to make an issue of Pullman’s alleged violation of the PDPRA, the record before this Court does not substantiate his claim.

II. THE TRIAL COURT PROPERLY DENIED MR. REID’S REQUEST FOR DECLARATORY RELIEF.

As the trial court properly ruled, Mr. Reid’s motion for declaratory relief was substantively flawed and procedurally improper. CP 128, 107-109, and CP 78-103. A court’s decision to entertain claims for declaratory relief and consideration of CR 15 motions is for an abuse of discretion. *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 373-74, 112 P.3d 522 (2005) (court has discretion regarding CR 15 motions); *King County v. Boeing Co.*, 18 Wn. App. 595, 602, 570 P.2d 713 (1977) (granting declaratory judgment is discretionary). As such, the trial court may only be reversed if its decision to deny Mr. Reid’s declaratory relief was “manifestly unreasonable, or exercised on

⁵ It appears that this page is not properly before the Court. Documents contained in an appendix generally must be part of the record unless they are some form of legal document. See RAP 10.3(a)(8) and 10.4(c); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593-95, 849 P.2d 669 (1993).

untenable grounds, or for untenable reasons.” *Hines*, 127 Wn. App. at 374.

- A. The trial court did not abuse its discretion in denying Mr. Reid’s motion to add claims for declaratory relief under the PDPRA because substantively the PDPRA does not support a private right of action.

Mr. Reid’s motion to add a claim for declaratory relief fails as a matter of law because the PDPRA does not grant a private right of action. *See Daines v. Spokane County*, 111 Wn. App. 342, 350, 44 P.3d 909 (Div. III, 2002) (Requester had “no right under chapter 40.14 RCW that a declaratory judgment would secure.”), *overruled in part on other grounds; accord, Bainbridge Citizens United v. Washington State Dept. of Natural Resources*, 147 Wn. App. 365, 375-76, 198 P.3d 1033 (2008) (citing *Daines*); *West v. Washington State Dept. of Natural Resources*, 163 Wn. App. 235, 244-45, 258 P.3d 78 (2011) (no PRA liability for inadvertently destroying email before receiving records request). The PDPRA contains no provision giving rights to private litigants, so no such right exists. *See RCW 40.14 et seq.; Davenport v. Washington Education Ass’n*, 147 Wn. App. 704, 717-20, 197 P.3d 686 (2008) (omission of language in statute providing private right of action indicates no such right of action exists). Consequently, Mr. Reid could not bring a declaratory judgment action for violation of the PDPRA. The trial court did not abuse its discretion in denying Mr. Reid’s motion to add these claims.

For the first time on appeal, Mr. Reid argues in passing that his claim for declaratory relief should still be heard because this claim involves “issues of major public importance.”⁶ Brief p. 15. In a handful of cases, Washington courts have concluded that an issue of major public importance may be adjudicated even if the dispute is not justiciable. *See Kitsap County v. Smith*, 143 Wn. App. 893, 902-903, 180 P.3d 834 (2008). Mr. Reid argues that his claim for declaratory relief is an issue of major public importance because, without incorporating a requirement of compliance with the PDPRA into the PRA, the PRA “would be rendered meaningless to all Washington citizens.” Brief p. 15. He is mistaken.

The PRA is not meaningless. The PRA imposes liability on agencies that destroy records after receipt of a records request to which the records are responsive. RCW 42.56.100. Agencies do not have a free pass to destroy records as Mr. Reid suggests.

The PDPRA is also not meaningless as currently written. A violation of the PDPRA is a felony. *See* RCW 40.16, *et seq.* In addition to the need for an agency to keep records for its own operations, the

⁶ Because Appellant raises this argument only briefly here and did not raise it below at all, the appellate court should not consider it. *State v. Pearsall*, 156 Wn. App. 357, 360-61, 231 P.3d 849 (2010) (citing RAP 2.5(a) in declining to consider constitutional argument not raised below). Issues that only receive “passing mention in an appellant’s brief” do not merit appellate review, so the court should not consider this argument. *Graves v. Dept. of Employment Sec.*, 144 Wn. App. 302, 311, 182 P.3d 1004 (2008). Nonetheless, Respondent sets forth its response.

PDPRA provides a strong incentive for government employees to properly retain records. Mr. Reid fails to demonstrate that a private right of action for violation of the PDPRA is necessary to create appropriate incentives for the proper retention and dissemination of public records.

Assuming the relationship between the PRA and PDPRA is an important issue as Mr. Reid argues, the Declaratory Judgment Act (“DJA”) is still the wrong tool for grafting the PDPRA into the PRA. *See, e.g., Bainbridge Citizens United*, 147 Wn. App. at 375-76 (citing *Daines*). The purpose of the DJA is to provide a judicial vehicle for reducing uncertainty about legal rights. RCW 7.24.050, 060, and 120. Here, the law is settled that the PRA does not require compliance with the PDPRA. As the Court of Appeals for Division II recently held:

[Petitioner] relies on the records retention act, chapter 40.14 RCW, for the proposition that unless courts apply this statute, agencies will circumvent the PRA and improperly destroy records. **But we have rejected this argument before.**

West, 163 Wn. App. at 245. (citations omitted) Using the DJA to overturn well-established legal principles actually contravenes the purpose of the DJA by increasing uncertainty regarding what is otherwise a settled issue. Additionally, the DJA was designed to clarify legal rights, not create them, so creating a new, private cause of action for violation of the PDPRA goes beyond the DJA’s purpose.

B. The trial court did not abuse its discretion in denying Mr. Reid's motion to add claims for declaratory relief under the PDPRA because it was procedurally improper.

Mr. Reid initiated his action in the lower court with a motion—no pleadings of any kind were filed in this action. CP 1-9. Mr. Reid did not seek declaratory relief until after the trial court had entered a show cause order and Pullman had filed its show cause memorandum. Only then did Mr. Reid file a motion for leave to file counterclaims and supplemental pleadings under CR 13(e) and 15(d). *See* CP 78-90.

Neither of these Civil Rules provides adequate procedural support for Mr. Reid's attempt to inject declaratory relief related to the PDPRA into his motion-based lawsuit. CR 13(e) and 15(d) apply to pleadings, and there are no pleadings in this case. CR 13 discusses the types of claims a pleading can contain, so it has no application here, in a case where there are no pleadings. Similarly, CR 15(d) governs supplemental pleadings, but in this case there were no pleadings to supplement. These Civil Rules do not support Mr. Reid's request to add claims for declaratory relief at the eleventh hour. The trial court did not abuse its discretion when it ruled that these "supplemental pleadings are beyond the scope of a motion under RCW 42.56.550 for judicial review of a governmental agency's response to a public records request." CP 128.

CONCLUSION

On de novo review, this Court should affirm the trial court's findings that Pullman did not violate the PRA when responding to Mr. Reid's public records requests. Additionally, the trial court did not abuse its discretion when denying Mr. Reid's motion to add claims for declaratory relief, which motion was both substantively and procedurally flawed. Mr. Reid is not entitled to an award of costs on appeal. For all reasons set forth in the record below and on appeal, this Court should affirm the trial court's decision and order. CP 124-129.

DATED this 14th day of May, 2013.

K&L GATES LLP

By 
Laura D. McAloon, WSBA # 31164
Theresa L. Keyes, WSBA #24973
Attorneys for the City of Pullman

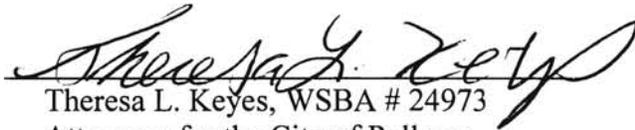
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2013, I caused to be served a true and correct copy of the foregoing on the persons below stated via U.S. Mail, postage prepaid and addressed as follows:

Christopher Reid
Stafford Creek Corrections Center
H5-87 U #324543
191 Constantine Way
Aberdeen, WA 98520

Legal Mail



Theresa L. Keyes, WSBA # 24973

Attorneys for the City of Pullman

APPENDIX

Exhibit A

1. *State v. Reid*, 155 Wn. App. 1032 (2010).

Not Reported in P.3d, 155 Wash.App. 1032, 2010 WL 1544392 (Wash.App. Div. 3)
 (Cite as: 2010 WL 1544392 (Wash.App. Div. 3))

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Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 3.
 STATE of Washington, Respondent,
 v.
 Christopher Jack REID, Appellant.

No. 27724-1-III.
 April 20, 2010.

West KeySummaryCriminal Law 110  1901

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1901 k. Jury Selection and Composition. Most Cited Cases

Counsel's failure to object when the court informed jurors that the case did not involve the death penalty did not prejudice the defendant, and thus was not ineffective assistance. The judge asked whether any juror could not assure that they would be able to follow the court's instructions, and mentioned that the death penalty as one of three areas, none of which were at issue, where some jurors might have trouble following the law instead of personal beliefs. The main question presented at the trial was the identity of the rapist, and the court's statements did not suggest that the jury should not give careful consideration to whether the evidence established the defendant as the rapist. U.S.C.A. Const.Amend. 6.

Appeal from Whitman Superior Court; Honorable John David Frazier, J.

Kenneth H. Kato, Attorney at Law, Spokane, WA, for Respondent.

Denis Paul Tracy, Whitman Co. Prosecutor, Colfax, WA, for Respondent.

KORSMO, J.

*1 Christopher Reid appeals his Whitman County Superior Court convictions for second degree rape, first degree burglary, and two counts of residential burglary. He primarily argues that the trial court erred by not granting a continuance and that his counsel erred in several instances, resulting in ineffective assistance. We conclude that the trial court did not abuse its discretion in denying the continuance and that Mr. Reid has not shown that his attorney performed so deficiently that he was denied his right to counsel. The convictions are affirmed.

FACTS

Mr. Reid formerly worked in the adult film industry and visited Pullman on September 12, 2007, after completing filming of a movie in Seattle. Mr. Reid's screen name was "Jack Venice." Reid introduced himself by that name to people at Munchies, a Pullman restaurant. Reid told Colin Tuggle that he was a "porn star" and asked Tuggle if he knew any women interested in making a movie with him. Tuggle did not. Tuggle also noticed that Venice had a tattoo on the back of his neck, and he also claimed to have bullet tattoos around his leg. Tuggle later identified Exhibit 6, a picture of Mr. Reid's neck tattoo, as the same tattoo that Venice had.

Colin Davis and Kyle Schott were friends. Around 9 or 10 p.m. they went to Stubblefield's, a Pullman bar. Schott was wearing a bandage on his arm that evening. At the bar the two met a man named Jack Venice.^{FN1} Other patrons of the bar recognized Venice from his film career; he agreed that he was the person in the films.

^{FN1}. Davis identified Reid in court as the man he knew as Venice.

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After an hour or two at Stubblefield's, Davis, Schott, and Reid (Venice) went to Valhalla, a nearby bar. They stayed there for about 45 minutes before returning to Stubblefield's. Davis went home to go to bed; the other two entered the bar. Maria Scherrer testified that she served several drinks to Mr. Reid, who was with a man with a bandage on his arm. Mr. Reid made several sexually offensive remarks to her.

The two men left the bar at closing, which Ms. Scherrer referred to as "1:45 which is two o'clock bar time." Mr. Reid wanted to find a party; the two men found one at an apartment down the hill from the bar. They were admitted to the party and joined two men in a drinking game called "beer pong." Reid told the men that he was in the adult film industry and asked if they knew any women who might want to make movies with him. Reid offered to pay for use of the apartment's bedroom for filming. The men did not believe Reid, so he used a computer to access Internet sites displaying his work. He then dropped his pants to show the partygoers his bullet tattoos. They asked him to leave.

Reid and Schott left and went looking for another party. They arrived first at the Pi Beta Phi sorority house. Schott believed Reid was looking for women to have sex with. Reid climbed up on a porch and entered the building through a window. He later threw pillows and other items out of a third floor window; Schott threw them back up to the third floor. Reid came out of the front door of the house.

*2 The two men moved down the street to the Delta Gamma sorority house. Schott boosted Reid through a window of the house; Reid then let Schott in through the front door. There they each started drinking soft drinks found in the building. A woman arrived and told the two to leave. The men left and tried punching numbers on the keypad for the Alpha Gamma Rho fraternity across the street. Two men came to the door and told the pair to leave. They again departed.

The two next came upon the Kappa Alpha Theta sorority. Mr. Reid again entered the building through a window and then let Mr. Schott in through the front door. The two used a computer in a second floor study lounge before moving up to the third floor. There they saw a light from a television set coming from one of the rooms. They entered and saw a woman, K.E., asleep on the floor.

Reid told Schott that this was what he had been looking for and that he would "hook up" with the woman. Reid pulled his pants down to his knees and began caressing K.E. with his hand. He asked Schott for a condom; Schott provided it. Schott began touching K.E.'s vagina and eventually penetrated her with his finger. Reid placed the condom on and rubbed his penis against K.E.'s vagina.

K.E. woke to the sound of a candy wrapper being opened and realized that she was being touched in several places. She turned and saw a face. She identified Mr. Reid at trial as the person she saw. She heard him say something to the effect of, "go, she's awake." The two men fled the building.

FN2. Schott testified that he saw Reid run from the room and followed him. Reid then told Schott that the woman had awakened.

Charges were promptly filed against both men. Mr. Schott reached a plea agreement with prosecutors and entered guilty pleas to charges of third degree rape and second degree burglary. He agreed to testify against Mr. Reid.

Mr. Reid was charged with second degree rape, first degree burglary, two counts of residential burglary, and one count of attempted second degree burglary. He was arraigned and the trial date was originally scheduled for November 26, 2007. A series of continuances and rescheduled trial dates followed: March 10, 2008; May 19, 2008; September 15, 2008; October 20, 2008. FN3

FN3. This court has not been provided

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with the trial scheduling/continuance orders or the transcripts of those hearings (if any). This record is found in the trial court's comments while denying a continuance of the October 20 setting.

Defense counsel sought to extend the trial date one more time. The court heard the motion telephonically on October 10. Defense counsel advised the court that he was in trial in Spokane County and that delays in that proceeding would keep him in trial through October 16. He needed to meet with his client and interview the victim, but the other witness interviews had been completed. He also advised the court that if ordered to trial on the 20th, "I could, I do have concerns about whether I would be fully prepared but I could do it. I would feel very uncomfortable about it." Report of Proceedings (Oct. 10, 2008) 6.

The court reviewed the record and determined that while several of the previous continuances had been for evidence analysis, one of the prior continuances had been granted at defense request. The court noted that significant efforts had been made to re-set the court's calendar to accommodate the October 20 trial setting. In light of these circumstances, it was "not reasonable" to continue the case again because there had been adequate time to prepare.

*3 Trial started October 20 as scheduled without a further request for a continuance. K.E. identified Mr. Reid as the assailant in the courtroom. At a side bar, defense counsel indicated he would cross examine her about a photo montage in which she had identified Mr. Reid with only modest confidence. The prosecutor then elected to present the montage during K.E.'s testimony. Defense counsel did cross examine her about the uncertainty of her montage identification.^{FN4} Later in the trial, the court commented that the montage was suggestive in the manner in which it permitted K.E. to rule out Mr. Davis. The court also commented that the montage did not play a role in K.E.'s in-court identification of Mr. Reid.

FN4. K.E. put her confidence in the identification as five or six out of ten.

DNA testing of the condom wrapper established that about one-third of the population could have contributed the DNA found there. Mr. Reid, Mr. Schott, and K.E. were all potential contributors. The testimony on this topic was admitted without objection.

Defense counsel argued the case on the theory that Schott was the rapist and that he implicated Reid for his own benefit; Colin Davis likely was Schott's accomplice. Counsel also argued that K.E.'s identification was weak and effected by the suggestive nature of the montage as well as the constant publicity concerning Mr. Reid's occupation. As a "porn star" who gets paid to have sex with women, he did not "need" to rape anyone.

The jury acquitted Mr. Reid on the attempted burglary charge involving the fraternity house, but found him guilty on all other counts. The trial court imposed a low-end minimum sentence. Mr. Reid timely appealed to this court.

ANALYSIS

The issues in this appeal include whether the trial court erred by not granting the continuance and whether counsel was ineffective.^{FN5} Mr. Reid also challenges the sufficiency of the evidence to support the convictions. We address each challenge in turn.

FN5. Mr. Reid has also filed a *pro se* Statement of Additional Grounds (SAG) which we will address in the course of the ineffective assistance analysis.

Continuance

A trial court's decision to grant or deny a continuance of trial is reviewed for manifest abuse of discretion. *State v. Campbell*, 103 Wash.2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); *State v. Early*, 70 Wash.App. 452, 458, 853 P.2d 964

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(1993), *review denied*, 123 Wash.2d 1004, 868 P.2d 872 (1994). When a case has been previously continued, an even stronger showing in support of the subsequent request is necessary. *State v. Barnes*, 58 Wash.App. 465, 471, 794 P.2d 52 (1990), *aff'd*, 117 Wash.2d 701, 818 P.2d 1088 (1991). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

The trial court certainly had tenable grounds for denying the request. There had been four prior continuances, and the October 20 setting had been entered after great efforts to rearrange the court's calendar and assure a date that all counsel could meet. While the unexpected delays in the Spokane County case understandably cut into his preparation time, counsel still had four days to meet with his client and interview the victim. All other interviews were complete. Most tellingly, defense counsel did not renew his request for a continuance on the 20th nor claim that any preparation work remained.

*4 The stronger showing needed in support of yet another continuance was not made. Counsel agreed that he would be ready, but simply would be "uncomfortable" with his preparation. In the absence of some showing of prejudice to the defense, the trial court did not abuse its discretion by denying yet another continuance of this trial. *Early; Barnes; State v. Honton*, 85 Wash.App. 415, 423, 932 P.2d 1276, *review denied*, 133 Wash.2d 1011, 946 P.2d 401 (1997); *State v. Roth*, 75 Wash.App. 808, 825-826, 881 P.2d 268 (1994), *review denied*, 126 Wash.2d 1016, 894 P.2d 565 (1995).

The trial court did not err in denying the continuance request.

Effective Assistance of Counsel

Mr. Reid argues that his defense attorney did not provide effective assistance of counsel as required by the Sixth Amendment. Much of the allegedly defective behavior involved tactical choices left to the discretion of counsel.

The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Comment on Death Penalty. Mr. Reid first argues that his counsel erred in not objecting when the court informed jurors that the case did not involve the death penalty. This issue arose during voir dire when the court asked:

Is there anyone here that can't assure the court that they'll be able to follow the court's instructions if they have a personal opinion or belief that differs from the law?

Okay. Does this concept give anyone any concern[?]

And we have some touchy issues that aren't involved in this case, so I'll throw those out. Abortion, and gun control, and death penalty. And sometimes people can have strong personal or religious beliefs that are different than what-what's on the books. But you'd be required-The jury doesn't get to decide what the law is. And you have to follow the court's instructions. Is there anyone that has any concern or anyone that can't assure me they'll be able to do that?

RP 71 (emphasis added). Defense counsel did not object to these statements or seek to have the court clarify them.

The Washington Supreme Court has determined that it is improper for a trial judge to tell a jury

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being selected for a murder trial that the case does not involve the death penalty. *State v. Townsend*, 142 Wash.2d 838, 840, 15 P.3d 145 (2001). Defense counsel is deficient for failing to object to such an instruction. *Id.* at 847, 15 P.3d 145. However, if the error does not affect the outcome of the case, the prejudice prong of the Strickland test is not satisfied. *Id.* at 849, 15 P.3d 145.

*5 The reason that telling a jury the death penalty is not involved is error arises from the fear that jurors may take their case less seriously. *Id.* at 846-847, 15 P.3d 145. We do not believe that problem is implicated in this case. First, this was not a murder case and there is no reason to think that the jury would have construed the statement as denigrating its responsibility to give careful consideration to this case. More importantly, the context of the court's statement here is totally different. Rather than instruct that this was not a capital case, the court simply mentioned the death penalty as one of three areas, none of which were at issue, where some jurors might have trouble following the law instead of their own consciences. Unlike a murder trial, use of the capital punishment example in this context simply did not present the possibility that the jury might disregard its obligations to give serious consideration of the case. It instead was used to help identify jurors who might disregard the law.

Thus, it is unclear that counsel erred at all. We need not decide that, however, because even if this was error, it was not prejudicial to the defense case. While Mr. Reid argues that the case against him was weak due to identification difficulties, we do not agree. More to the point, the question presented at this trial was the identity of the rapist. Commentary that this was not a capital case simply did not impact that issue. The court's statements did not suggest to the jury that it should not give careful consideration to whether or not the evidence established that Mr. Reid was the rapist.

Failure to object to the court's comment that this was not a death penalty case did not change the outcome of this case. Counsel did not fail his client.

Juror No. 9. Appellant next contends that his counsel erred by not striking juror 9, a clergyman who had strong personal feelings against pornography and adult films. The juror also had been falsely accused of sexual assault. Neither party challenged the juror for cause. Neither party used all of its peremptory challenges.

The juror stated that he could set aside his personal feelings and fairly try the case. Thus, it is doubtful that a challenge for cause would have succeeded. The juror's background as a person who had falsely been accused of sexual assault likely resonated with the defense since it was the same theme being used by Mr. Reid. He, too, claimed to be wrongly accused. Under these circumstances, it is understandable that the defense would not challenge juror 9. This decision appears to be a classical tactical decision that is immune from challenge under *Strickland*.

Accepting juror 9 was a tactical choice that cannot be a basis for finding that counsel somehow erred.

Photo Montage and Identification. Mr. Reid next challenges counsel's decision to permit the photo montage to be introduced into evidence and failing to seek exclusion of K.E.'s in-court^{FN6} and out-of-court identification of him. These, too, were clear tactical choices.

FN6. Argued by Mr. Reid in his SAG.

*6 The prosecutor initially decided not to seek admission of the montage. After the victim's strong in-court identification of Mr. Reid, defense counsel decided that he would seek to use the montage. The prosecutor then admitted the montage without objection and examined K.E. about her identification. Defense counsel cross examined K.E. about it at some length. He then used that testimony in closing argument to impeach her in-court identification, stressing that her recent identification was the result of a year's worth of publicity about Mr. Reid and contrasting it with the uncertainty of her September

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2007 identification. This approach, along with attacking Schott's motivation, was the primary thrust of the defense closing argument.

The decision to use the montage and the out-of-court identification was clearly a tactical choice. It does not establish any failure by defense counsel. *Strickland*.

Appellant also argues that counsel should have sought to exclude K.E.'s in-court identification as the fruit of a suggestive montage. However, the evidence does not support the argument. As noted, K.E.'s identification from the montage was of modest strength. At trial, K.E. explained that her identification was based on seeing Mr. Reid's face in front of her rather than on a memory of the photograph, which she did not see again until after the in-court identification. Any motion to suppress would not have been likely to succeed.

Any error here would also have been harmless. All of the identification testimony at trial pointed at Reid, not Davis, as Schott's late evening companion. Schott's testimony figured prominently at trial as well. There was no testimony suggesting that K.E. misidentified Mr. Reid as her assailant.

Neither prong of the *Strickland* standard is met in this instance. Mr. Reid has not shown that his trial counsel committed error that prejudiced him in the handling of the identification testimony.

DNA Evidence. Appellant next contends that counsel erred by not seeking to exclude the DNA evidence. He contends that the results were not definitive enough to have been admitted.

The evidence was certainly relevant. Because the test results did not exclude Reid, Schott, or K.E. as contributors, it did tend to support the State's theory of the case. It was therefore relevant evidence. ER 401. Relevant evidence is admissible. ER 402. Any motion to exclude the evidence would undoubtedly have been denied. Questions about the weight to be given DNA evidence are factual mat-

ters for the jury to consider rather than being a basis for exclusion. *State v. Copeland*, 130 Wash.2d 244, 270-277, 922 P.2d 1304 (1996); *State v. Kalakosky*, 121 Wash.2d 525, 540-543, 852 P.2d 1064 (1993); *State v. Cauthron*, 120 Wash.2d 879, 889-891, 898-899, 846 P.2d 502 (1993).

There was no basis for excluding the DNA evidence. Counsel did not err when he declined to challenge the testimony.

Prior Acts. Finally,^{FN7} Mr. Reid argues that his counsel erred by not objecting to the testimony of Mr. Tuggle and Ms. Scherrer, and by not challenging the frequent references to Mr. Reid's occupation ("porn star").^{FN8} This evidence, too, was clearly admissible on the question of identity. Counsel did not err by failing to challenge it.

FN7. Appellant also argues that the accumulation of counsel's errors established ineffective assistance. Since we do not believe any errors occurred, let alone an accumulation of them, we do not separately address this argument.

FN8. The latter claim is raised in the SAG.

*7 The testimony from Mr. Tuggle established Mr. Reid's presence in Pullman and used Mr. Reid's own description of himself as "Jack Venice" and a "porn star." He also showed a distinctive neck tattoo. Mr. Reid (Venice) also told Tuggle he was seeking women to star with him in adult movies. All of this testimony was relevant to showing that Mr. Reid was in Pullman's college hill area and what one of his motivations was for being there.

Similar testimony was elicited from Ms. Scherrer, who also testified about Reid's comments about sexual activities. Her testimony was important to tying Reid to Schott (and only Schott) in the early morning (1:45 a.m.) shortly before the charged offenses occurred. As a bartender at a college area tavern, Scherrer's identification of a young man who appeared once in her bar a year earlier would