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Court of Appeals
Division III
State of Washington

NO. 32407-9-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

OMAR CARLOS, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable Evan E. Sperline

No. 13-1-00726-9

Brief of Respondent

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

1. Did the trial court properly exercise its discretion to deny defendant's continuance when defendant fails to show any prejudice or demonstrate how the result of the trial would have been different?
2. When considering the evidence in the light most favorable to the State, was there sufficient evidence to convince a rational trier of fact that defendant was guilty of first-degree burglary and second-degree assault of a child?
3. Has defendant failed to demonstrate that his counsel's performance was both deficient and prejudicial to his defense?

B. STATEMENT OF THE CASE.

1. Procedure

On November 22, 2013, the Grant County Prosecuting Attorney's Office (State) charged Omar Carlos (defendant) with residential burglary,¹ assault of a child in the second degree,² and violation of a court order³—each as crimes of domestic violence.⁴ CP 1–3. Specifically, the State alleged defendant committed assault of a child in the second degree under

¹ RCW 9A.52.025.

² RCW 9A.36.130(1)(a), RCW 9A.36.021(1)(g).

³ RCW 26.50.110(1).

⁴ RCW 10.99.020.

three alternative means: (1) by recklessly inflicting substantial bodily harm or intentionally assaulting a child, (2) while using a deadly weapon, or (3) by strangulation. CP 2.

According to the parties, defendant's case was called ready for trial at least three times⁵ before the State amended the information at another readiness hearing on March 10, 2014. RP 5–19. The amended information charged burglary in the first degree⁶ instead of residential burglary and dropped Count 3, violation of a court order. CP 5–6. However, under Count 2 (assault of a child in the second degree), the amended information mistakenly omitted the third of the three alternatives stated above—strangulation. *See* CP 6.

Nine days later on March 19, 2014, defendant's jury trial began under the Honorable Evan E. Sperline. RP 33. Before selecting a jury, the State moved to amend the information to correct two errors, including the previous omission of the alternative means of strangulation under Count 2. RP 5–19; CP 7–8. Defendant objected to the State's motion, arguing the addition of the alternative means of strangulation prejudiced his client at that point in the proceedings. RP 6–7. The court overruled defendant's objection and permitted the filing, so defendant requested a one-week continuance. RP 6–7. The court denied the motion, reasoning the parties

⁵ It appears the trial was continued several times for courtroom availability. *See* RP 6–7.

⁶ RCW 9A.52.020.

understood the State intended to proceed under the alternative means of strangulation and finding the omission of the alternative means from the second amended information was obviously a scrivener's error. RP 19.

After hearing the evidence the jury found defendant guilty as charged. CP 9–12.

On March 25, 2014, the court sentenced defendant to 31 months in custody for burglary in the first degree and 46 months for assault of a child in the second degree. CP 39 (Judgment and sentence, paragraph 4.1).⁷ On April 11, 2014, defendant timely filed a notice of appeal. CP 33.

2. Facts

On November 20, 2013, D.G., defendant's ex-wife who had primary custody of their children L.C. and J.C., was in Seattle for a business trip when she called defendant to see if he had safely picked up their kids from school.⁸ RP 53. Defendant's response was short, "What do you want? You're a fucking whore, a piece of shit," then he hung up. RP 53. D.G. called defendant again and asked if she could speak to L.C., the older of her children, but defendant repeated the derogatory slurs above and hung up the phone. RP 54. After some time, defendant called D.G.

⁷ For his conviction of burglary in the first degree, defendant had an offender score of 3 with a standard range of 31–41 months. CP 37 (paragraph 2.3). For assault of a child in the second degree, defendant had an offender score of 3 with a standard range of 46–61 months. CP 37 (paragraph 2.3).

⁸ The State will refer to the victim (L.C.) by his initials because he is a minor, as well as his mother and siblings for privacy considerations.

back to tell her that he had just “kicked [their] son’s ass.” RP 55.

Leading up to the events on November 20, D.G. and her children lived in Moses Lake, Washington, where she had a parenting plan that permitted defendant to take the children every other weekend and every Wednesday for a couple of hours. RP 48–49. D.G. had never provided defendant with a key to her house, nor had she ever given defendant permission to enter the home after changing the locks post-divorce. RP 51–52.

On November 20, D.G. had prearranged defendant to pick up L.C. and J.C. from school and had asked her mother to stay with them overnight while she was in Seattle. RP 56. As planned, defendant picked up twelve-year-old L.C. and seven-year-old J.C. from school and took them to a local pizza shop for dinner. RP 75. Defendant had a beer with his dinner and when finished, drove the children to their house. RP 76–78.

While driving home, L.C. heard defendant speaking to D.G. on the phone, calling her a “bitch” and a “whore” before hanging up. RP 78. L.C. heard defendant speak with D.G. again after they arrived at the house, complaining that nobody was at the house to watch the kids. RP 79. L.C. tried telling defendant that he and his little brother were okay, but defendant stepped out of the vehicle, closed the door, and made another phone call. RP 79. After a few moments defendant got back into the truck

and vulgarly ordered the children out, commanding, “get the fuck out of my truck.” RP 79–80. L.C. emotionally responded, “Fuck you, dad,” got out of the truck with J.C., and started walking for the door. RP 80–81.

Defendant opened his door, stormed at L.C., grabbed him by the hood of his sweatshirt, threw him against the garage, and head-butted him. RP 81–82. Defendant put his hands around L.C.’s throat and yelled, “Don’t disrespect me L.C., you -- fuck you, L.C., you’re just like your mother, fuck you, L.C., don’t disrespect me like that, I’m not your mother.” RP 86. Defendant then grabbed L.C. behind the ears and threw him into a nearby patch of gravel. RP 86.

Defendant stepped over L.C. in the gravel, picked him up, and threw him into the garage once more before returning to his vehicle. RP 89. Frightened, L.C. and J.C. ran into their home where L.C. went to the mirror to look at any injuries he sustained from the assault. RP 92. L.C. grabbed some ice for his wounds and broke down crying with J.C. in the house, telling J.C. to hide somewhere just in case their father came back. RP 92–95.

Defendant, as predicted, returned. RP 103. After unsuccessfully trying to open the locked front door, he went to the garage and opened it with a passkey. RP 103. L.C. ran over to the door connected to the garage and peaked out to see defendant waiting for the garage door to open. RP

104. Fearing defendant's entry, L.C. attempted to blockade the inside door while J.C. hid behind the living room's entertainment center. RP 104. Despite L.C.'s efforts, defendant entered the house. RP 104.

L.C. repeatedly yelled at defendant to leave the house. RP 105. Defendant picked L.C. up by his collar and threw him onto the ground injuring L.C.'s shoulder. RP 105. Defendant reached out and picked L.C. up again, told him he was a "piece of shit," demanded L.C. not to "disrespect me," and furthered insulted L.C.'s mother, stating, "your mother's a whore, I wish your mother would die." RP 106. Eventually, defendant left the residence. RP 114–15.

Fearing for her children's safety, D.G. called Rita Morfin and asked her to stop by the house and call the police. RP 128. Ms. Morfin complied, and Moses Lake Police Department Officer Curt Ledeboer arrived to investigate. RP 134–35. The officer found L.C. and J.C. safely in their grandmother's care—defendant had already left the scene. RP 135. He also saw L.C. had noticeable swelling on his head and face.

Officer Ledeboer met with L.C. the next day and further documented L.C.'s injuries. RP 143. L.C. sustained a large bruise on his head, face, and both sides of his neck, scrapes to his back and elbow, and swelling near his jawbone. RP 143. He had cuts on the backs of both of his ears. RP 145. Officer Ledeboer indicated the bruising on L.C.'s neck

appeared “dark and noticeable,” and finger-sized in shape. RP 143. L.C. also testified his throat was very sensitive for the next few days. RP 120.

In an interview with Officer Ledebauer, defendant stated that he was only trying to discipline L.C. when their heads accidentally struck each other. He claimed he only picked up L.C. by the collar to yell at him, but he did not remember whether there was any more physical contact or how L.C. sustained any of the other injuries. Pl. Ex. 12 (Omar’s Statement).

At trial, defendant did not testify, but instead relied on the cross-examination of the State’s witnesses to argue his actions were defensible as parental discipline.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION TO CONTINUE BECAUSE DEFENDANT FAILS TO SHOW ANY PREJUDICE OR DEMONSTRATE HOW THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

This court reviews a trial court’s decision to deny a motion to continue for a manifest abuse of discretion. *State v. Hartley*, 51 Wn. App. 442, 445, 754 P.2d 131 (1988). A trial court abuses its discretion “only if no reasonable person would have taken the view adopted by the trial court.” *State v. Barker*, 35 Wn. App. 388, 397, 667 P.2d 108 (1983)

(internal quotations omitted). The reviewing court should not overturn a trial court's decision to deny a continuance unless defendant makes a showing that he was prejudiced or that the result of the trial would have been different had the motion been granted. *Id.*; *State v. Peters*, 47 Wn. App. 854, 862, 737 P.2d 693 (1987).

An amendment to the information on the morning of trial may be a cause for a continuance. *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986). However, the reviewing court should consider the totality of the circumstances pertaining to the continuance and closely examine the reasons presented to the trial judge. *See Hartley*, 51 Wn. App. at 445; *see also State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982) (recognizing that the reviewing court should also consider factors such as diligence, materiality, due process, and the need for orderly procedure).

The trial court in this case properly denied defendant's motion to continue because defendant could not demonstrate to the court how the State's amended information—even if filed on the morning of trial—would prejudice his right to a fair trial. As outlined in the procedural history above, the State originally filed an information on November 22, 2013, alleging defendant committed assault in the second degree by means including strangulation. CP 2. For the next three and a half months, defendant prepared for trial anticipating evidence of strangulation. In fact,

defendant called the case ready for trial three times under the allegation.

See RP 9–10, 18.

After both parties had called the case ready for trial several times, the State filed a second amended information at readiness on March 10, 2014, which omitted the means of strangulation. CP 5–6. However, the omission was simply a scrivener’s error quickly corrected by the State just nine days later on the morning of trial. CP 7–8. Even the trial court recognized the confusion as a scrivener’s error that defense counsel should have understood and anticipated:

Okay. Because the – *it does appear relatively clear* that the issue in regard to count two is a scrivener’s error, that is, it’s not new facts that have arisen. it’s not [a] new charge, it’s an alternative means that was apparently dropped by scrivener’s error from the amended information. . . .

RP 8 (emphasis added).

The trial court emphasized defendant’s right to a fair trial would not be prejudiced under the new information even though defense counsel alleged their trial strategy would have to be altered. The trial court correctly recognized that defense counsel had already prepared to defend against strangulation and had called the case ready for trial three times under the original information:

Because of the unique circumstances of this particular case, the motion for – and the background for it, the motion for continuance should be denied. *This is a case*

where it is relatively clear that there was a scrivener's error in the process of amending the information. The defendant had long opportunity to prepare for the allegation of strangulation. It was alleged in the police reports upon which the file – the filing was originally based, and prepared for that until March 10 when the information was amended with that error included.

So I do not find any prejudice to Mr. Carlos, other than the discomfort that's, I suppose, involved in shifting strategies back to a previous strategy that there was plenty of time to develop and was well developed. The motion for continuance is denied and we'll proceed.

RP 19 (emphasis added). As the trial court concluded, except for the nine days leading up to trial, defendant adequately prepared for three and a half months to defend against strangulation.

The record demonstrates the trial court properly exercised its discretion to deny defendant's continuance because it thoughtfully considered the totality of the peculiar circumstances of this case.

Defendant did not demonstrate how he would be prejudiced—especially when considering he had called the case ready for trial several times under the original information. This court should uphold the trial court's determination in this regard.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVINC A RATIONAL TRIER OF FACT THAT DEFENDANT WAS GUILTY OF FIRST-DEGREE BURGLARY AND SECOND-DEGREE ASSAULT OF A CHILD.

In a challenge to the sufficiency of the evidence, this court must

review the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All inferences must be interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable on review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Determinations regarding conflicting evidence or credibility are up to the trier of fact and not subject to review. *Id.* Specifically regarding credibility determinations, the Washington State Supreme Court has held that "great deference" must be given to the trier of fact's determinations because "[i]t, alone, has had the opportunity to view the witness' demeanor and to judge his veracity." *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

- a. Sufficient evidence showed defendant was guilty of first-degree burglary beyond a reasonable doubt.

To find the defendant guilty of burglary in the first degree, the

court instructed the jury that they had to find the State proved each of the following elements beyond a reasonable doubt:

1. That on or about November 20, 2013 the defendant entered or remained unlawfully in a building;
2. That the entering or remaining was with the intent to commit a crime against a person or property therein;
3. That while in the building the defendant assaulted a person; and
4. That any of these acts occurred in the State of Washington.

CP 82 (Instruction No. 4).⁹ The court defined “unlawful entry or remaining” as a person who “is not then licensed, invited, or otherwise privileged to so enter or remain.” CP 83 (Instruction No. 5).¹⁰

Defendant does not contest the sufficiency of the evidence for the second, third, or fourth elements of the crime: defendant’s intent to assault L.C. was manifest when he forced his way into the house through L.C.’s frightened blockade, picked L.C. up, and threw him on the ground. RP 104–05. Furthermore, for the third element, defendant’s actions constituted assault because the attack was offensive, if not harmful, when he lifted L.C. off of his feet and threw him down injuring his shoulder. *See* RP 105. For the fourth element, the State provided testimony that these acts occurred in Washington. RP 50.

For the first element, the State presented uncontested evidence that

⁹ *See* RCW 9A.52.020(b).

¹⁰ *See* RCW 9A.52.010(5).

defendant entered or remained unlawfully in D.G.'s house because he was prohibited from entering the home without D.G.'s express permission:

[Prosecutor]. Okay. So do you know where Omar Carlos was living on November 20th, 2013?

[D.G.]. I assumed he was living with his mom and dad. I don't know.

Q. Was he living with you?

A. No.

Q. Did he have a key to your house?

A. No.

Q. Were the locks on your house on November 20th 2013 the same locks that were on your house in July of 2013 [when the divorce was finalized]?

A. No.

....

Q. How did the locks get changed?

A. We had to change them, and so we have a – like a number lock, you know, where you punch in the numbers now, instead of having a key to the front door.

Q. How many times have you changed that lock since you moved in?

A. Before we put the coded one, we changed it twice.

Q. Okay. And what about the garage door, how does that open?

A. Well, with the control in your car or you can punch in a

code like a pad right there on the side of the door.

Q. Okay. Is that the same pad that was on the garage in July of 2013?

A. I had that changed once.

.....

Q. Okay. So at any point after July 2013, did you give Omar Carlos a key?

A. No.

Q. What about the combination to your garage door?

A. No.

Q. Okay. Did Mr. Carlos have permission to enter your house on November 20th of 2013?

A. No.

Q. Okay. Did he maybe have a standing invitation to kind of go in whenever he wanted?

A. No. Unless he was invited or asked to go in.

RP 50–52 (emphasis added).

Defendant’s impermissible entry was also evidenced by D.G. changing the locks after the divorce (RP 50–51), L.C. locking the door on the night in question (RP 92), and L.C.’s repeated pleading for defendant to “get out” after unlawfully entering (RP 103–05).

Defendant argues that previous to the assault he had enjoyed a “limited privilege to enter and remain in the house” under a parenting

plan. Appellant's Opening Brief at 20. He argues that this limited privilege somehow extended to the events of November 20 even though no evidence supports this argument. It does not matter whether defendant had a limited privilege to enter with the permission of D.G. prior to November 20—ultimately, he still required D.G.'s permission, which he did not secure prior to entering on the night of the assault. RP 52.

Even though an adult was not present when defendant dropped his children off, such an excuse does not justify his impermissible entry into the home. D.G.'s children were generally old enough to be alone in the house for an hour until somebody could arrive. RP 70–71. D.G.'s mother was scheduled to stay with the boys. RP 56. In his impatience, defendant unlawfully forced entry into the home and quickly assaulted his oldest son when he could have otherwise simply waited outside.

Finally, defendant also relies on *State v. Cordero*, 170 Wn. App. 351, 284 P.3d 773, 779 (2012), which is not helpful to his case. While the opinion discusses familial responsibilities in the most general terms, it does not stand for the broad proposition that parents have a statutory obligation to provide for their children and therefore, in the case of divorce, a divorcé may unlawfully enter the home of the divorcée with intent to assault their children. Defendant's argument fails especially when considering the divorcée testified in court that defendant had absolutely no

right, without invitation, to enter her locked, protected home.

D.G.'s testimony was sufficient to prove defendant unlawfully entered the home and committed the crime beyond a reasonable doubt. The court must consider her testimony in the light most favorable to the State. Defendant did not have permission to enter that evening, and D.G. confirmed that to the jury. This court should affirm his conviction.

- b. Sufficient evidence showed defendant was guilty of assault of a child in the second degree beyond a reasonable doubt.

A defendant's right to a unanimous jury verdict under the State Constitution applies to the alternative means by which the State alleges defendant committed the crime. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707–08, 881 P.2d 231 (1994). However, a unanimity instruction to distinguish between the means is not necessary if there is sufficient evidence to support each of the alternative means presented to the jury. *Owens*, 180 Wn.2d at 95.

To convict the defendant of second-degree assault of a child, the jury had to find:

1. That on or about November 20, 2013, the defendant:
 - (a) intentionally assaulted [L.C.] and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted [L.C.] by strangulation;
2. That the defendant was eighteen years of age or older and [L.C.] was under the age of thirteen; and
3. That any of these acts occurred in the State of

Washington.

CP 84 (Instruction No. 6).¹¹ The date of the crime and elements two and three are not at issue in this case. For the remaining element, substantial evidence supported both alternative means by which defendant committed second-degree assault of a child.

i. The State provided sufficient evidence that defendant intentionally assaulted L.C. and recklessly inflicted substantial bodily harm.

The court instructed the jury that “substantial bodily harm” means “bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.”

CP 85 (Instruction No. 7).¹²

Bruising and swelling that lasts for several days is sufficient to support a jury finding of “temporary but substantial disfigurement.” *See, e.g., State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (finding facial bruising, swelling, and lacerations to head and arms was sufficient to support temporary but substantial disfigurement); *see also State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (finding that bruises consistent with being struck with a shoe were sufficient to affirm a

¹¹ *See* RCW 9A.36.130, RCW 9A.36.021(a), (g).

¹² *See* RCW 9A.04.110(4)(b).

conviction for second-degree assault).

The State offered substantial evidence defendant intentionally assaulted L.C. and thereby inflicted bruising and swelling significant enough to support a finding of guilt. When considering the evidence in the light most favorable to the State, defendant got out of his truck, picked up L.C., and head-butted him, causing significant swelling for the next few days. Officer Ledeboer testified the swelling had worsened when he documented the injuries the next day. Defendant also choked L.C. and repeatedly threw him down onto the ground both within and outside the house. L.C.'s bruising lasted several days. RP 68–69, 143.

In total, L.C. suffered bruising on his head, face, neck, chest and jaw, and cuts to his back, elbow, and ears. RP 68–69, 143–46. Similar to the victims' injuries in *McKague* and *Ashcraft*, L.C. experienced temporary but substantial disfigurement.

ii. The State provided sufficient evidence defendant assaulted L.C. by strangulation.

At trial, “strangulation” was defined as a “means to compress a person’s neck, thereby obstructing the person’s blood flow *or ability to breathe*, or doing so with the intent to obstruct the person’s blood flow or

ability to breathe.” CP 85 (Instruction No. 7) (emphasis added).¹³

The State satisfied its burden of proof regarding strangulation because L.C. testified defendant put his hands around L.C.’s neck, held L.C. for approximately a minute and a half, and obstructed L.C.’s breathing:

[Prosecutor]. Okay. Levi, while you were standing at the garage wall, did your dad put his hands on your neck?

[L.C.]. Yes.

Q. Okay. So you said you were standing there for three minutes. Do you know about when his hands changed from your collar to your neck?

A. A minute and a half probably.

Q. Okay.

A. From the start.

Q. Was he using one hand or two hands?

THE COURT. On The neck?

[Prosecutor]. Yes, on the neck.

A. Yes.

Q. Did it hurt?

A. No.

Q. Okay. How was your breathing?

¹³ See RCW 9A.04.110(26).

A. Okay.

Q. *Were you able to breathe normally while his hand was on your neck?*

A. *No.*

RP 86–87 (emphasis added).

Defendant argues L.C.’s response that his breathing was “okay” undermines State’s evidence on this element. Appellant’s Opening Brief at 26. But the court must consider L.C.’s response above in the context of his entire testimony. L.C. clarified, just one question later, that he was unable to breathe normally while defendant choked him. The State thus satisfied the definition of “strangulation” because defendant obstructed, even if only partially, L.C.’s “ability to breathe.” *See* CP 85 (Instruction No. 7).

The subsequent bruising on L.C.’s neck verified the degree of pressure by which defendant gripped the 12-year-old’s throat. Officer Ledeboer observed the injuries the next day, noting:

You could see bruising on – on the left and right side of his neck. . . . The right side I don’t believe was as pronounced as the left side. You could see on each side what appeared to me to be finger-sized type bruises in terms of width of an adult finger when compared to my own and in length.

RP 143–44. When questioned further about the bruises, Officer Ledeboer stated “[t]hey were both obviously noticeable to me,” the bruises were “dark and noticeable,” and that they ran at an angle up L.C.’s neck

consistent with fingers. RP 144.

The evidence, when considered in the light most favorable to the State, was sufficient to convince a rational trier of fact that defendant had assaulted L.C. by means of strangulation. Accordingly, a unanimity instruction was not required because sufficient evidence supported both alternative means of second-degree assault of a child.

3. DEFENDANT FAILS TO DEMONSTRATE THAT COUNSEL'S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL TO HIS DEFENSE.

Defense counsel adequately and competently represented his client. The State presented a compelling case against a defendant who had previously confessed to most of his actions to the police. The State requests the court to deny defendant's claim of ineffective assistance of counsel.

To establish a claim of ineffective assistance of counsel, defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). "Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 l. Ed. 2d 284 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88. There is a strong presumption that counsel's performance was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court reviews counsel's performance in the context of all of the circumstances. *Id.* at 334–35.

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *McFarland*, 127 Wn.2d at 335. 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." *Strickland*, 466 U.S. at 695 (emphasis added).

There is a strong presumption that defendant received effective representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). 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; *see also Grier*, 171 Wn.2d at 44. 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." *Strickland*, 46 U.S. at 690.

- a. Defense counsel's decision to waive opening statement was a legitimate trial strategy when considering defendant decided not to testify and the defense did not present any other evidence.

Defense counsel's decision to waive an opening statement "does not constitute deficient performance under the *Strickland* test." *In re Davis*, 152 Wn.2d 647, 715, 101 P.3d 1 (2004).

Here, defendant waived opening statement. There was no need for counsel to offer an opening statement because defendant did not testify, nor did they present evidence. Opening statements simply give a lawyer an opportunity to highlight evidence they intend to introduce:

opening statement. (1848) At the outset of trial, an advocate's statement giving the fact-finder a preview of the case and of the evidence to be presented. Although the opening statement is not supposed to be argumentative, lawyers – purposefully or not – often include some form of argument.

Black's Law Dictionary 1200 (9th 2009).

Criminal trials, like this one, routinely rest on the merits of defense counsel's cross-examinations and the sufficiency of the evidence in the State's case-in-chief. Defendant cannot demonstrate deficient performance or prejudice for his counsel waiving opening statement because it was a tactical decision.

- b. Defense counsel was not deficient for not objecting to the challenged testimony, defendant has not identified whether the trial court would have granted the objection, and there was no prejudice requiring reversal.

To prove a counsel's failure to object constituted ineffective assistance, a defendant must show the trial court would have likely sustained the objection in addition to demonstrating deficient performance and prejudice. *See Davis*, 152 Wn.2d at 714.

Defendant argues his counsel was deficient for failing to object to allegedly speculative testimony that L.C. knew something was going to happen after he heard his father's truck door slam shut behind him. Appellant's Opening Brief at 32. This argument fails because the testimony was not speculative. Evidence Rule 701 permits lay witnesses to testify about his or her observations that are rationally based perception. ER 701. Here, moments after L.C. had an argument with his father in the truck, L.C. jumped out and was immediately followed by defendant. RP 81. Based on what L.C. heard (i.e., his observations), he "knew something was going to happen." RP 81. The statement did not indicate one way or the other what was about to occur so it was not speculative.

Neither did the testimony suggest (as defendant asserts) any prior physical abuse from defendant. But even if the court assumed evidence of prior bad acts existed in the record, even though there is none, the

testimony probably might have been admissible under ER 404(b) to show L.C.'s knowledge or motive out of fear for reacting the way he did.

Regardless, it is questionable whether the trial court would have even sustained the objection based on the reasons above. And defendant cannot show the result of the trial would have been different if his attorney had objected because L.C. testified that defendant beat him shortly thereafter. The un-objected testimony did not impact the outcome of the trial.

Next, defendant argues Officer Ledebouer's testimony that he took defendant to jail was so prejudicial it requires reversal of his conviction. Appellant's Opening Brief at 142. Officer Ledebouer investigated defendant for assaulting a child in the second degree. He took photographs of L.C.'s injuries, *Mirandized* defendant, and interviewed him. Surely the jury understood defendant was arrested and taken to jail after Officer Ledebouer completed his investigation.

Officer Ledebouer's testimony, even if objected to at trial, did not alter any of the evidence the State presented against defendant: L.C. still testified his father choked him, picked him up by his collar, head-butted him, and threw him on the ground. The testimony likely had little, if any, impact on the jury's determinations.

- c. Defense counsel adequately cross-examined the witnesses and argued defendant's case. His performance was not deficient or prejudicial for failing to pursue a trial strategy, argued by defendant on appeal, that was wholly unsupported by the evidence.

“The constitution does not guarantee successful assistance of counsel.” *State v. Carpenter*, 52 Wn. App. 680, 685, 763 P.2d 455 (1988).

The State presented a very strong case against defendant: the testimony was not contradicted (and likely could not be), there were no alternative explanations for L.C.'s injuries, and defendant all but admitted to the crimes in his interview with Officer Ledeboer (Pl. Ex. 12). And yet, in hindsight, defendant challenges his counsel's performance.

Defense counsel competently pursued a trial strategy that adequately challenged the sufficiency of the State's case. Defense counsel effectively cross-examined L.C. to highlight that L.C. had asthma—potentially to explain away his breathing problems from the strangulation. He attempted to get D.G., L.C., and Officer Ledeboer to downplay the seriousness of L.C.'s injuries. Counsel effectively emphasized that D.G. did not feel comfortable leaving her children alone at night, perhaps to soften the jurors' minds about defendant's entry into the home.

When considering the totality of the circumstances (e.g., defense counsel's total performance, the strength of the State's case, etc.), the

record shows defense counsel competently represented defendant.

Defendant insists that trial counsel should have pursued a defense theory that he had a limited parental privilege to enter the house and discipline his children based on L.C.'s conduct. *See* Appellant's Opening Brief at 34–39. In doing so, defendant repeatedly overlooks the following exchange between the deputy prosecuting attorney and D.G.:

Q. Okay. Did Mr. Carlos have permission to enter your house on November 20th of 2013?

A. No.

Q. Okay. Did he maybe have a standing invitation to kind of go in whenever he wanted?

A. No. Unless he was invited or asked to go in.

RP 50–52 (emphasis added). Nothing in the record suggests D.G. or anybody in the household invited defendant into the home. Defendant did not have permission to enter the home. Whatever privileges he enjoyed, D.G. was clear that defendant did not have permission on November 20 to enter the house. Accordingly, it would have been fruitless for counsel to argue to the jury that somehow defendant was entitled to enter when nothing supported that theory.

Additionally, defense counsel could not refute the injuries L.C. received because his client did not testify, and he was left with a police interview where defendant admitted to taking his discipline too far. *See* Pl.

Ex. 12. Defense counsel could do nothing more to refute the State's evidence pertaining to the events of November 20.

- d. Defense counsel secured a low-end standard range sentence for his client. Moreover, no case law supports defendant's argument.

Finally, defendant argues counsel was ineffective for not recommending a downward-exceptional sentence for his client. However, counsel argued for, and secured, the bottom of the standard range for his client. CP 37. At sentencing, defense counsel reminded the court that his client was remorseful and generally cooperated with police, and counsel insisted the punishment did not fit this particular crime. *See* RP 357. The court agreed and sentenced defendant to the low end on both the burglary and assault charges. CP 37. It cannot be argued his counsel failed at sentencing when he secured the minimum sentence allowed by law.

No case authority requires defense counsel to ask for a mitigated sentence. In fact, the Sentencing Reform Act already considers most of the factors defendant raises on appeal as a basis for his ineffective assistance claim. *See, e.g., State v. Freitag*, 127 Wn.2d 141, 144–45, 896 P.2d 1254 (1995) (recognizing that the standard ranges under the SRA already consider a defendant's criminal history, a defendant's manifest desire to improve oneself, etc.); *see generally State v. Ha'Mim*, 132 Wn.2d 834, 940 P.2d 633 (1997).

D. CONCLUSION.

The trial court properly denied defendant's motion to continue because defendant could not identify any prejudice to his defense. Additionally, sufficient evidence supported the jury's verdict beyond a reasonable doubt: defendant did not have a privilege to enter the home and thus committed burglary when he unlawfully entered to assault his son. The evidence also supported defendant's assault conviction because L.C. suffered bruising and swelling that lasted several days, and defendant obstructed L.C.'s ability to breathe when he choked him against the garage.

Finally, defense counsel—with limited mitigating facts in the case—adequately defended defendant's charges. For these reasons, the State respectfully requests this court to affirm defendant's convictions for first-degree burglary and second-degree assault of a child.

DATED: March 16, 2015.

GARTH DANO
Grant County
Prosecuting Attorney


KIEL WILLMORE
Deputy Prosecuting Attorney
WSB # 46290

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 324079
)	
vs.)	
)	
OMAR CARLOS,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on Chris A. Bugbee, Attorney for Appellant, receipt confirmed, pursuant to the parties' agreement:

Chris A. Bugbee
Bugbee Law Office, P.S.
chrisbugbee@bugbeelaw.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Omar Carlos - #373277
1313 N. 13th Ave.
Walla Walla WA 99362

Dated: March 16, 2015.



Kaye Burns