

33962-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEITH W. BEIERS

Consolidated with 35012-6-III

IN RE PERSONAL RESTRAINT OF:

KEITH W. BEIERS

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was any alleged prosecutorial misconduct so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice to the defendant?
2. Whether the prosecutor's questions and argument relating to the defendant's reticence to engage with police was a comment on his right to remain silent and suggested his guilt, or whether they involved classic impeachment?
3. Whether defendant's claim of instructional error was preserved where defendant agreed to the instructions as given by the court?
4. Whether an instruction on self-defense was necessary or appropriate for count two, where the defendant denied that any assault had occurred?
5. Whether the defendant has demonstrated that his counsel's representation was adversely affected by an alleged conflict of interest?
6. Whether the defendant has demonstrated that his counsel was ineffective for failing to make an opening statement?
7. Whether counsel was ineffective for failing to object to the state's questions and argument regarding defendant's reticence, where the decision not to do so was attributable to trial tactics?
8. Whether defendant has proven that counsel failed to interview witnesses and whether counsel strategically did not call defendant's girlfriend, Della James, to testify at trial?
9. Whether counsel was ineffective for not proffering a security video that impeached one witness on a collateral matter, and could have bolstered the other State's witnesses' direct testimony?
10. Whether counsel was ineffective for failing to delve deeply into one witness' criminal history, where the defendant cannot demonstrate he was prejudiced thereby?

11. Whether counsel was ineffective for telling prospective jurors that Mr. Beiers would not testify, when Mr. Beiers ultimately did testify, and where he has failed to demonstrate prejudice?
12. Whether counsel was ineffective for deciding not to admit inflammatory and slanderous emails authored by the defendant that were cumulative with defendant's own testimony, proved nothing other than the emails were sent, and could have prejudiced the defendant?
13. Whether any cumulative error occurred where the defendant has failed to rebut the presumption that counsel was effective and that his actions constituted legitimate trial strategy?

II. STATEMENT OF THE CASE

The State of Washington charged the defendant, Keith W. Beiers, in the Spokane County Superior Court with one count of first degree assault and two counts of second degree assault, all with firearms enhancements, from an incident occurring on or about November 3, 2012, in Spokane County. CP 1-2.

A. SUBSTANTIVE FACTS – THE STATE'S CASE¹

Nicholas and Callie O'Connor moved to their home at 106 East Rockwell in 2003 or 2004. RP 228.² Mr. O'Connor worked as a nurse's aide at Eastern State Hospital. RP 344-45. Mr. Beiers lived kitty-corner from the

¹ Defendant has, unsurprisingly, argued facts that are almost entirely contained only within his own trial testimony. This Court should assume that all or part of that testimony was rejected by the jury as it found him guilty of two of the three charged offenses, and rejected his claim of self-defense.

² The report of proceedings of Mr. Beiers' trial and sentencing consists of five consecutively paginated volumes.

O'Connors at 107 East Rockwell. RP 460; Ex. 14.³ Mrs. O'Connor recalled that the defendant acted like a "paranoid military person," who would circle the neighborhood on foot or in his car. RP 231, 347. Mr. Beiers used binoculars to look in other people's cars. RP 231. Mr. O'Connor recalled Mr. Beiers standing out on the sidewalk, staring through the O'Connor's window. RP 348. Beiers publicly cleaned his guns. RP 230. As a result of their observations of the defendant, the O'Connors kept their window blinds closed, and would call their children inside if he was outside. RP 235, 348. Mr. O'Connor recalled that, prior to November 2, 2012, the defendant would often park outside the O'Connor home on Mayfair, outside their daughter's window. RP 349.

On November 2, 2012, the O'Connors celebrated their tenth wedding anniversary at home. RP 236-37, 349. Before retiring to bed, Mrs. O'Connor went outside to smoke a cigarette. RP 237, 349. Mrs. O'Connor noticed the defendant's white Prius sitting outside of their house. RP 237-38, 350. Mr. O'Connor walked outside and knocked on the defendant's window to ask him to go home, as both Mr. and Mrs. O'Connor were uncomfortable to find the defendant parked immediately outside of their daughter's bedroom due to the history the defendant had with them

³ The State designated Exhibit P-14 on May 5, 2017 for the Court's convenience.

and other individuals in their neighborhood. RP 238, 350-51. Mr. O'Connor observed that Mr. Beiers' pants were pulled down, and his hands were covered by a towel draped over his lap. RP 351. Mr. O'Connor ran inside for his cellular phone to call 911. RP 240, 352. He was joined by Bret Easley, a neighbor, who had heard him yelling at Mr. Beiers. RP 353.

Mr. Beiers drove away, returning to his garage for a few minutes, while Mr. O'Connor was on the telephone with 911. RP 354. The defendant then turned south onto Mayfair from his driveway, while 911 was asking Mr. O'Connor if he could provide Mr. Beiers' license plate number. RP 354. Mr. O'Connor stepped into the street to obtain the defendant's license plate number at which time the defendant drove forward and hit Mr. O'Connor in the knees with his car. RP 243, 355. Mr. O'Connor's knees hyperextended, and he fell across the hood. RP 355. Mr. O'Connor, cellphone still in hand, grabbed the hood with the other, so as not to be run over. RP 243-44, 356.

Mr. Beiers stopped the Prius, and Mr. O'Connor slid off the hood. RP 244, 358. Mr. O'Connor asked Mr. Beiers what he was doing; Mr. Beiers then responded, calling Mr. O'Connor a "fucking punk." RP 358. Mr. O'Connor advised Mr. Beiers that he had called the police. RP 358. Mr. O'Connor approached Mr. Beiers to again ask him what he was doing. RP 360. He did so with his hands at his sides. RP 360. Mr. Beiers

stared at Mr. O'Connor blankly. RP 360, 400. Mr. Beiers then shoved Mr. O'Connor, causing him to fall. RP 361. Mr. O'Connor got to his feet, and said "what the hell"; Mr. Beiers again shoved Mr. O'Connor. RP 361. Mr. O'Connor warned Mr. Beiers that he "[didn't] want to do this" three times. RP 245, 361. Mr. Beiers raised his hands as if to shove Mr. O'Connor, and, in response, Mr. O'Connor hit Mr. Beiers. RP 361. Mr. O'Connor hit Mr. Beiers five or six times near his ear. RP 362.

Mr. Beiers then tried to get in his car and drive away, and Mr. O'Connor, in an attempt to keep him at the scene until police arrived, pushed the door against Mr. Beiers' torso. RP 362-63. Mr. Beiers then reached into his car, retrieved a gun, and pointed it at Mr. O'Connor's head. RP 363-64. Mr. O'Connor put his hands up to his face, and Mr. Beiers pulled the trigger. RP 365. Mr. O'Connor said that Mr. Beiers fired the gun toward him, rather than into the ground, because he "saw right down the barrel, basically, right before he shot it." RP 365-66. After regaining his bearings, Mr. O'Connor ran down the street, and, seeing his wife also on the street, told her to run. RP 248, 366. He ran west on Rockwell and north on Mayfair. RP 366-67.

Unbeknownst to Mr. O'Connor, Mrs. O'Connor ran behind and around the duplex at 4204 North Mayfair, in an attempt to return to her home. RP 249. When she did so, however, she slipped and fell, at which

time she saw Mr. Beiers walking toward her, with his gun still in hand. RP 250. He said to her, "I'm going to kill you all. Just leave me alone. I want to kill you all. I hate you all. I'm going to kill you all." RP 250-51. Mrs. O'Connor begged him not to kill her. RP 251.

After realizing he had been separated from his wife, Mr. O'Connor returned to the area, and observed Mrs. O'Connor on the ground with Mr. Beiers standing over her, his gun inches away from her forehead, saying, "I can kill you; I can mother-fucking kill you." RP 368. Mrs. O'Connor, who was crying, pled with Mr. Beiers, "please, no, no." RP 368. Police officers arrived shortly thereafter. RP 368.

Bret Easley lived at 104 East Rich Avenue, and also had prior issues with Mr. Beiers. RP 60-61, 292. Shortly after Mr. Easley moved to the East Rich residence, Mr. Beiers called the police to report Mr. Easley had shoveled snow onto Mr. Beiers' driveway. RP 61. The situation between Mr. Beiers and Mr. Easley did not improve - "it became issue after issue." RP 62. Mr. Easley testified the defendant would "creep around the neighborhood," in his car, and would use binoculars to look at his house, "thinking that we were selling drugs, when we're not."⁴ RP 63. Mr. Easley

⁴ Mr. Easley testified that he installed car stereos at his home, sometimes working until late in the evening, depending on his clients' schedules. RP 79, 88.

was aware that Mr. Beiers was keeping track of all of the license plates of vehicles that stopped at Mr. Easley's house. RP 79.

On November 2 or 3, 2012,⁵ Mr. Easley's wife advised him that Mr. O'Connor was yelling at Mr. Beiers, who was parked in front of the O'Connor residence. RP 66. At his wife's request, Mr. Easley joined Mr. O'Connor, and saw Mr. Beiers in his vehicle with his pants down and a towel in his lap. RP 68. Mr. Easley watched Mr. Beiers drive away from the O'Connor residence and return to his own property. RP 68. Mr. Easley returned to his own garage to call 911. RP 69. While on the phone with 911, Mr. Easley intended to return to the O'Connors', but as he did so, he heard a gunshot. RP 71. He then saw Mr. and Mrs. O'Connor running through a yard. RP 72. Mr. Beiers, who was following the O'Connors, pointed the gun in Mr. Easley's direction.⁶ RP 72. Mr. Easley, who was unarmed, also fled from Mr. Beiers. RP 72, 75. Mr. Easley testified that when he saw the O'Connors that evening, both were also unarmed. RP 76.

Stacey Rudd Easley testified that while she was growing up, she and Mr. Beiers had a good relationship; he was a second father figure to her. RP 193. However, in 2010, when she returned to the neighborhood with her

⁵ When asked on cross-examination, Mr. Easley estimated that the incident occurred earlier than midnight, but that he could not recall the exact time. RP 82.

⁶ The jury must have disbelieved some or all of Mr. Easley's testimony, as he was the only individual who testified that Mr. Beiers pointed a gun at him; the jury acquitted Mr. Beiers of the associated count of second degree assault.

husband, Bret Easley, Mr. Beiers began to keep track of the license plates of “anybody that we would have over to do anything” and turn them over to law enforcement; like the O’Connors, she kept her blinds closed. RP 193-96.

On November 3, 2012, Mrs. Easley observed Mr. Beiers’ car parked by the O’Connors’ house, and Mr. O’Connor on the sidewalk, “leaning in” talking to Mr. Beiers. RP 198. She told her husband what she saw, and Mr. Easley walked down the street to join Mr. O’Connor. RP 199. She then saw Mr. Beiers’ car driving up Mayfair toward Rich, and Mr. Easley running home, yelling at her to call 911. RP 199. She did so. RP 200.

According to Mrs. Easley, Mr. Beiers drove into his driveway, and then left the driveway via Mayfair, turning left onto Rockwell. RP 200-01. From her vantage point, Mrs. Easley could see the O’Connors crossing the street, heading north toward Rich Avenue. RP 201. As Mr. Beiers turned the corner onto Rockwell, Mrs. Easley observed him hit Mr. O’Connor with his car; Mr. Beiers was driving at a low speed, but did not stop his vehicle when he hit Mr. O’Connor. RP 202, 205. Her view was then obstructed until she saw her husband and the O’Connors run from the area. RP 202-03.

Judith Peterson, a resident of 4204 North Mayfair⁷ was also familiar with Mr. Beiers. RP 288. Mrs. Peterson had a six foot privacy fence installed in her backyard because the defendant would watch her and her company from his porch, making snide remarks at them. RP 289. Mr. Beiers also kept track of all of the license plates of Mrs. Peterson's guests. RP 288. Mrs. Peterson kept her blinds closed to prevent him from looking into her house.⁸ RP 290.

On November 3, 2012, Mrs. Peterson was in bed reading a book when she heard loud voices outside. RP 293. She looked out her window and recognized that the voices belonged to the O'Connors, who were outside. RP 293-94. Mr. Beiers' car was parked beneath the O'Connors' pine tree on Mayfair. RP 294. As she watched, Mr. Beiers' car left the O'Connor's residence, travelling up Mayfair, and turning east on Rich.⁹ RP 294. Mrs. Peterson soon saw Mr. Beiers drive back down Mayfair to Rockwell, and turn east at the corner. RP 294. Mrs. Peterson observed Mr. Beiers hit Mr. O'Connor with his car three times.¹⁰ RP 295. She observed Mr. O'Connor grab onto Mr. Beiers' vehicle so he would not be

⁷ Both Mrs. Peterson's residence and Mr. Beiers' residence are duplexes. RP 291.

⁸ Mrs. Peterson had also observed Mr. Beiers "peer[ing] through" her neighbor's kitchen window. RP 291.

⁹ Mrs. Peterson moved from her bedroom to her living room to observe the events. RP 294.

¹⁰ Mrs. Peterson returned to her bedroom before she observed Mr. Beiers strike Mr. O'Connor. RP 295.

dragged under the car. RP 295. Mr. Beiers then parked his car and grabbed Mr. O'Connor, throwing him to the ground. RP 296. The men then proceeded to hit each other. RP 297. Mr. Beiers got away from Mr. O'Connor, returned to his car, where he tried to shut the door, but Mr. O'Connor prevented him from doing so. RP 297. Mr. Beiers fired a gun at Mr. O'Connor. RP 297.

After Mr. Beiers fired his gun, Mrs. Peterson watched Mr. O'Connor, Mrs. O'Connor and Mr. Easley (who were also nearby) run towards her house, through the yard and down to the alley. Mr. O'Connor and Mr. Easley ran in one direction, and Mrs. O'Connor ran around the backside of the house, and slipped and fell underneath Mrs. Peterson's bedroom window. RP 298. When Mrs. O'Connor fell, Mr. Beiers "was back around to that side of the house" and pointed the gun at her, saying, "I could kill you. I could kill you all." RP 299-30. Mrs. O'Connor hysterically begged Mr. Beiers not to shoot her. RP 299. Mr. Beiers pointed the gun at Mrs. O'Connor until the police arrived. RP 301.

Multiple law enforcement officers testified to responding to the indecent exposure and shots fired calls in the area of 106 East Rockwell on November 3, 2012. When Officer Arthur Dollard arrived, he saw Mr. Beiers in the yard to the northeast of the intersection walking south

toward the street.¹¹ RP 112. Officer Dollard testified that when he first saw Mr. Beiers, Mr. Beiers was holding a gun in his hand. RP 113. Mr. Beiers complied with Officer Dollard's commands to drop the gun. RP 115. Officer Dollard noted that Mr. Beiers had an injury behind his left ear.¹² RP 120. Mr. Beiers answered the officer's questions, telling him that he had fired his gun once, to the north,¹³ and that he had been injured when "they were kicking the shit out of me, and I was in fear for my life."¹⁴ Officer Dollard could smell the odor of alcohol coming from Mr. Beiers, but did not believe he was intoxicated. RP 122. The last statement Mr. Beiers made to Officer Dollard was, "I didn't do anything wrong. I was defending myself." RP 138.

Officer Christopher Johnson testified that when he arrived,¹⁵ he was focused on Mr. Beiers' Prius because he had been informed that the incident had happened near the car. RP 144. Although he saw no one near the car,

¹¹ On cross-examination, defense counsel established that Officer Dollard did not see any other people in Mr. Beiers' vicinity. RP 131.

¹² Officer Dollard testified that Mr. Beiers told him that his hearing aid "had been knocked off during the fight. And it would probably be near his car ... along with his glasses." RP 138.

¹³ Officer Dollard testified that Mr. Beiers stated he had fired his gun to the north, rather than into the ground. RP 121.

¹⁴ Officer Joe Dotson responded to the area and collected evidence located in the street, namely, a shell casing, a live round, a pair of glasses, and a piece of a hearing aid. RP 96, 99. The gun was secured by another officer. RP 330.

¹⁵ Officer Johnson testified that he and Officer Dollard arrived at the same time, and that Officer Johnson's vehicle was ahead of Officer Dollard's. RP 154.

he testified that he did see two people on the north side of Rockwell Street – a female on the ground and a man standing next to her. RP 145-46. The male was within an arm's reach of the female. RP 146. The male, who Officer Johnson identified as the defendant, started walking toward the officer, at which time Officer Johnson saw the gun in his right hand. RP 146. Officer Johnson testified that the female on the ground, identified as Callie O'Connor, was crying hysterically.¹⁶ RP 150.

B. SUBSTANTIVE FACTS – THE DEFENSE'S CASE

Officer Sandra McIntyre of the Spokane Police Department, was assigned to the Neva-Wood Cop Shop in 2010-2012. RP 422. Her duties included responding to neighborhood disputes, calls of drug houses, and landlord/tenant issues. RP 422. She became acquainted with Mr. Beiers when he contacted her at the Cop Shop and became involved with this neighborhood dispute. RP 425. She indicated:

There was an accusation of drugs, drugs being dealt, threats being made. Stolen cars being hidden and parts being taken off, that kind of stuff. It was kind of – was this particular neighborhood and these two neighbors, kind of what I felt as being ongoing. It was like a tit-for-tat thing, where he said this, he did this, he was watching me.

RP 425.

¹⁶ Officer Lance Fairbanks testified that he interviewed Mrs. O'Connor that evening; at the time, she was extremely emotional and was shaking and crying. RP 284-85.

Officer McIntyre made efforts to remedy the neighbors' dispute, which she characterized as a problem attributable to multiple individuals in the neighborhood, not just to Mr. Beiers. RP 426. In her opinion, she was dealing with some "really juvenile things." RP 426.

Mr. Beiers was active in providing information to Officer McIntyre. He provided license plates, and times that individuals would arrive and depart his neighbors' homes. RP 427. However, other individuals in the neighborhood also reported Mr. Beiers' actions to law enforcement. RP 428. Officer McIntyre explained that it was then her job to determine whether any of those reports involved criminal activity. RP 427. To her, some of the allegations seemed far-fetched. RP 429.

Based on Mr. Beiers' allegations against Bret Easley, Officer McIntyre visited Mr. Easley's home. RP 434. Mr. Easley invited her into his garage and carport, and allowed her to inventory all of the items she found there – she found nothing at that time; nor did she find any evidence to substantiate Mr. Beiers' claims that Mr. Easley was dealing drugs. RP 435. However, Officer McIntyre had a camera that recorded activity at Mr. Easley's house installed on a telephone pole. RP 437. To Officer McIntyre's knowledge, that camera never yielded any evidence of criminal activity. RP 438.

Based on Officer McIntyre's dealings with Mr. Beiers, she admitted on cross-examination that she would have been afraid of him. RP 439. However, she was clear her focus was not solely on Mr. Beiers; she indicated that everyone in the neighborhood contributed to the ongoing dispute. RP 439-40.

Mr. Beiers also testified. He lived in this particular neighborhood for 14 years. RP 459. He initially lived at 4206 North Mayfair, in the duplex adjoining 4204 North Mayfair. RP 459. He then moved to 107 East Rockwell. RP 460.

After Stacy Rudd and Bret Easley moved into 104 East Rich, Mr. Beiers began to experience troubles with his neighbors. RP 463-64. Mr. Beiers indicated that his neighbors would blow snow out of the street and into his driveway, would trespass on his property, and would make rude comments. RP 464. He constantly felt threatened. RP 465.

As a result, Mr. Beiers began to make out Block Watch reports, noting "all of the activity that was going on there ... at 4204, 06 and 104," the residences occupied by tenants with whom Mr. Beiers had conflicts. RP 465. Mr. Beiers noted that "everything [was] happening at midnight, one o'clock in the morning. They were moving furniture, they're – just lots of vehicle activity." RP 466. Mr. Beiers called crime check to report the presence of multiple cars at the residences, that they were moving furniture

into the basement, that they “seemed to work a lot in household furnishings, lawn mowers, things like that, before they started, it seemed by appearance, started doing drugs – drug dealing.” RP 467. Mr. Beiers’ had the most trouble with Bret Easley, who he believed, based on the constant vehicle traffic to and from his house, was “chopping cars at midnight.” RP 467-68. Mr. Beiers would make Block Watch reports of the makes, models, license plates, time and date of the vehicle traffic at his neighbors’ houses. RP 468. Mr. Beiers, like the O’Connors,¹⁷ was involved with Block Watch, although he disputed the O’Connors ever attended meetings.¹⁸ RP 469.

Mr. Beiers described in detail one incident with Mr. Easley, when Mr. Easley threatened him, saying, “Keith you have no idea what I’m capable of” and displaying an AK-47. RP 473. Mr. Beiers stated that after that incident, he began to carry his pistol with him in his car. RP 474. Before returning home, he would stop at a nearby park to load his gun, which he would then place on the seat before driving down his driveway. RP 475.

On the night of November 3, 2012, Mr. Beiers was returning home, but had forgotten to load his weapon at the park; he stopped next to the O’Connors’ residence to do so. RP 477, 479. Mr. Beiers placed a “utility

¹⁷ During their time in the neighborhood, the O’Connors became involved with their local Block Watch, hosted parties, and Mrs. O’Connor became a Block Watch captain and worked to be engaged with her neighbors. RP 233, 345.

¹⁸ Officer McIntyre testified that both Mr. Beiers and the O’Connors attended Block Watch meetings, but could not recall how often. RP 430.

towel” across his lap,¹⁹ opened the console, removed his gun and the “clip,” and proceeded to load his weapon. RP 480. At that point, according to Mr. Beiers, Mr. and Mrs. O’Connor “came rushing out of their house together,” “side-by-side and they were on the run.” RP 480. The two O’Connors then pushed on the side of his car, both looking through his windows. RP 480. Mrs. O’Connor saw his gun and said, “oh my.” RP 481. Both of the O’Connors then made telephone calls. RP 482. Shortly thereafter, Mr. Easley “came running down the street like he was in a track race ... he had a handgun; it’s called a 1911. I’m very familiar with it. He had a semi-automatic pistol in his hand, and he was pointing it right at me.” RP 483.

This scared Mr. Beiers, who immediately drove away; he then entered his driveway from Rich. RP 484. He parked outside his house for a few minutes, “trying to assess the situation,” and decided that because his girlfriend was not home, he would go somewhere else. RP 485. He was surprised to see the number of people who had gathered outside the front yard of 4204 North Mayfair. RP 485. As Mr. Beiers drove south on Mayfair, and turned onto Rockwell, Mr. O’Connor walked into the street in front of him. RP 486. Mr. O’Connor then put out his hand to stop

¹⁹ Defendant denied masturbating: “[t]hat is not accurate. I am 70 years old. I do not masturbate. And this is ridiculous.” RP 481.

Mr. Beiers. RP 486. Mr. O'Connor then "walked up really weird" and began putting his hands all over Mr. Beiers' car, placing his shins on the bumper. RP 487. Mr. Beiers alleged he attempted to drive away, but Mr. O'Connor ran beside his car, throwing himself on the hood of the car.²⁰ RP 488. Mr. Beiers indicated Mr. O'Connor did not have a cell phone in his hand. RP 488.

Because Mr. Beiers did not want to injure Mr. O'Connor who remained on his hood, he drove slowly, and then parked his car near the curb. RP 489. Mr. O'Connor slid off the hood, and began putting his hands all over the Prius again. RP 490. Mr. Beiers told Mr. O'Connor to leave him alone, but Mr. O'Connor ignored him; Mr. Beiers then pushed Mr. O'Connor's chest. RP 490. Mr. O'Connor stepped backwards, and his heels hit the curb, causing him to sit down. RP 490.

Mr. Beiers turned around to get back into his car, at which point Mr. O'Connor began hitting his head and neck from behind. RP 491. Mr. Beiers turned around to see Mr. O'Connor in a karate stance; Mr. Beiers then turned around and reached his car door, but Mr. O'Connor "body slammed" himself into Mr. Beiers. RP 491. Mr. Beiers could not get his car door open because he was overpowered by Mr. O'Connor. RP 491.

²⁰ Mr. O'Connor was "hanging onto [his] hood with both hands, and he's got his legs spread-eagled on [the] hood." RP 488.

Mr. O'Connor again hit Mr. Beiers on the head three or four times. RP 492. Mr. Beiers claimed that the brutal attack was meant to kill him. RP 494. While Mr. O'Connor's attack on Mr. Beiers continued, Mr. Beiers saw Mrs. O'Connor standing next to her husband, saying "don't push my husband." RP 495.

Mr. O'Connor "allowed [Mr. Beiers] to open the door" and Beiers fell into his car. RP 495. Mr. Beiers remembered he had his gun, and said to himself:

Keith these people are going to kill you. There were people all over the sidewalk. And at one point another person had come up and –

But anyway, I grabbed my weapon, took the safety off because I thought they were going to kill me. I come out of that car and I was about halfway up, I was standing out of the – of the door, and I fired a shoot [sic] right into the blacktop. And it would have been in the area of Callie O'Connor.

...

It was north. Down to the payment [sic].

RP 495-96.

At the time, Mr. O'Connor was five feet away from him, and Mrs. O'Connor was "kind of like right in front of [him]" approximately an arm length and a half away. RP 496. The gun shot startled everyone; Mr. Beiers stated: "it was like a covey of quail, they were gone." RP 497.

Dazed and stunned, Mr. Beiers walked to his house, and saw that his lights were on and "everything looked fine"; however, he turned around and

realized that his car was still running, so he decided to retrieve it and return home to call the police. RP 499. As he was returning to his car, the police arrived. RP 499. On cross-examination, he agreed with the prosecutor that, “rather than telling the police this terrifying story, [he] allowed them to arrest [him].” RP 512. However, he reiterated that he did tell police that he was scared for his life and had had “the shit beat out of [him].” RP 512.

The jury convicted the defendant of the assaults on the O’Connors, counts 1 and 2, respectively, and acquitted him of count three, the assault on Mr. Easley. CP 1-2, 50-52. Additionally, the jury found Mr. Beiers to be armed with a firearm during the commission of the first two assaults. CP 53-54. He was sentenced to a low-end standard range sentence of 111 months on Count one, with a 60-month enhancement for the use of a firearm, and 14 months on count two, with a 36-month enhancement for the use of a firearm. CP 60. The sentences for the assaults ran concurrently, with consecutive firearms enhancements, for a total sentence of 207 months. CP 60-61. The defendant timely appealed, and filed a personal restraint petition.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF PROSECUTORIAL MISCONDUCT FAILS BECAUSE IT WAS UNPRESERVED; FURTHER, THE STATE MERELY ATTEMPTED TO IMPEACH THE DEFENDANT AND DID NOT LINK HIS SILENCE TO GUILT.

Mr. Beiers argues that the prosecutor violated his right to silence by asking him about his failure to report to police all of the details of his allegedly harrowing ordeal. Specifically, the alleged violations include, during the State's cross-examination of the defendant:

Q. Mr. Beiers, that is a fairly intense and hair-raising story, isn't it?

A. It was a very intense situation.

Q. And it must have taken you some time to tell the police that story, didn't it?

A. I –

Q. You never told them that, did you?

A. I never told them that.

Q. So rather than tell the police just how dangerous that had been and how close to came you losing your life, you let them arrest you; correct?

A. That's correct.

RP 501.

Q. And Nick O'Connor went so far as to push this fight to a point to where you had to shoot the ground?

A. That's correct. Yes, ma'am.

Q. And rather than telling the police this terrifying story, you allowed them to arrest you?

A. Yes, ma'am. I was in –

MS. ERVIN: Nothing further.

RP 512.

And, during the State's closing:

Well, the defendant says he didn't intend to inflict bodily injury. As a matter fact, he denies doing certain things. But the defendant also testified to a hair-raising and frightening encounter with Nick O'Connor flinging himself on the defendant's Prius, all the while doing some sort of touching of his car. And then fearing for his life after being brutally beaten by Nick O'Connor. But, you know, he allowed himself to be arrested rather than tell the police about this brutal encounter with all these people in the yard, and everybody watching, and all these things happening.

RP 536.

And, during the State's rebuttal closing, responding to arguments made by defense counsel:

You want to talk about Nick's inconsistencies, and so on and so forth, and what he didn't bother to tell officer?

Officer Kester told you oftentimes people who experience a very dramatic event, they don't tell you everything. So look at that in light of the defendant who told you about what he thought was an equally traumatic event who didn't tell the police anything. He got arrested and went to jail rather than telling them what he told you in the courtroom today.

RP 563.

Defendant also assigns error to questions posed to other witnesses regarding the completeness of their statement to law enforcement, RP 73, 369, and the State's questioning to law enforcement regarding whether they felt as though they had adequate time to talk to the defendant about the events of that evening, RP 124.

1. Prosecutorial misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). When, as here, the defendant fails to object²¹ at trial to the challenged conduct, he or she waives the misconduct claim unless the argument was so "flagrant and ill[-]intentioned" that "no curative instruction would have obviated any prejudicial effect on the jury." *Id.*, quoting *Thorgerson*, 172 Wn.2d at 455. However, "reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. 'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'" *Id.* at 762.

²¹ "If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 4505, at 295 (3d ed. 2004). Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (were a party not required to object, a party "could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal").

Defendant concedes that defense counsel did not object to the alleged prosecutorial misconduct, Appellant's Br. at 17, but avers that the misconduct was flagrant and ill-intentioned. However, the defendant does not explain how the State's argument was so improper or inflammatory that a curative instruction would not have obviated any prejudicial effect on the jury. As such, the defendant's argument fails.

2. The State did not invite the jury to infer guilt from the defendant's pre-arrest silence.

The Fifth Amendment of the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution similarly reads: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts give the same interpretation to both clauses. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The State cannot portray the exercise of this right as substantive evidence of guilt. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).²² The primary concern is "whether the prosecutor

²² In *Lewis*, the Washington Supreme Court reviewed a prosecution for rape and assault of two different women. 130 Wn.2d at 701. There, an officer testified that he told the

manifestly intended the remarks to be a comment on that right.” *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

It is not improper to impeach a testifying defendant with his pre-arrest refusal to cooperate with a police investigation.

Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, the interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail and the balance of considerations determining the scope and limits of the privilege against self-incrimination.

Jenkins v. Anderson, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

Thus, it is not improper for the State to present evidence of the defendant’s silence if: (1) the defendant testifies at trial, (2) the evidence is limited to the defendant’s silence before arrest and before issuance of *Miranda* warnings, and (3) the evidence is limited to impeachment of the defendant’s trial testimony and not used to show guilt. *State v. Burke*, 163 Wn.2d 204, 217-218, 181 P.3d 1 (2008).

defendant “that if he was innocent he should just come in and talk to me about it.” *Id.* at 706. The officer did not refer to appointments the defendant made and broke. *Id.* at 704. The court held that the officer’s statement did not constitute an improper comment on the defendant’s silence. *Id.* at 705-06.

At no point did the State indicate explicitly or by implication that the defendant remained silent because he was guilty. To the contrary, the prosecutor's questions and argument involve classic impeachment.

Three years after the incident, Beiers testified at trial that he shot his gun in self-defense, after being brutally attacked by Mr. O'Connor while being watched by a yard-full of people, confronted with a gun by Mr. Easley, and rushed by the O'Connors while peacefully sitting in his vehicle. At the time of the incident, however, his statement to police was that he was in fear for his life, and did not do anything wrong. The State elicited the above testimony at trial to support an argument that Beiers had recently fabricated the details of his defense and that his trial testimony was, at a minimum, over-exaggerated. The implication of the State's argument was not that the defendant was guilty, but that his trial testimony was less credible because he had not mentioned the salient details of his claimed harrowing experience until after he was charged with three counts of felony assault with firearm enhancements. "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins*, 447 U.S. at 239.

Additionally, because it is the State's burden to disprove the claim of self-defense, a prosecutor must be given some leeway to cross examine

a testifying defendant on the consistency of his version of events. In this case, at no time did the prosecutor link the defendant's reticence to an inference of guilt, but rather, to an inference that his trial testimony was unreliable. No error occurred in this regard.

3. Manifest constitutional error.

Furthermore, as above, unobjected-to prosecutorial misconduct is waived in the absence of a showing that the misconduct was flagrant and ill-intentioned; however, defendant suggests that the proper test for determining whether the alleged error can be raised for the first time on appeal is analysis under RAP 2.5. Appellant's Br. at 18. It is not – the correct test is whether the conduct was flagrant and ill-intentioned. Even assuming that analysis under RAP 2.5 is proper here, defendant is not able to demonstrate manifest constitutional error.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Id.* at 749. This rule supports a basic sense of fairness, perhaps best expressed in *Strine*:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates

appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.²³ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Thus, to establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate

²³ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant's claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that the prosecutor's inquiry into the completeness of the defendant's pre-arrest statements to law enforcement was an improper comment on the defendant's right to remain silent, or that the State was inviting the jury to infer guilt from those questions and subsequent argument. The prosecutor's conduct was neither flagrant and ill-intentioned nor constituted a manifest constitutional error.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING SELF-DEFENSE AS APPLICABLE TO COUNT TWO FAILS BECAUSE ANY ERROR WAS INVITED AND SUCH AN INSTRUCTION WOULD HAVE CONFLICTED WITH HIS THEORY OF THE CASE.

The defendant claims that the trial court erred in not giving a self-defense instruction that was applicable to count two, the assault on Callie O'Connor. As a threshold matter, Mr. Beiers avers that his counsel did not

proffer jury instructions to the court. Appellant's Br. at 20 ("Mr. Cossey's file does not contain a copy of any proposed jury instructions that may have been submitted to the court. (Aff. Hueber ¶4)"). While the contents of Mr. Cossey's file are unknown to the State, it is clear from the *record itself* that defense counsel *did* proffer jury instructions, including the self-defense instructions at issue here.²⁴

In the joint pretrial management report, the defense proposed WPICs 17.02 and 17.06. CP 78-83.²⁵ WPIC 17.06 is the instruction regarding jury deliberations on self-defense reimbursement. WPIC 17.02 is the proper instruction to use in self-defense cases.

During the instructions conferences, defense counsel indicated that he drafted "the one specific to Count I since it does not apply to Count II or Count III,"²⁶ RP 443, and indicated he had prepared the proffered instruction, trying "to use the WPIC as much as [he] could." RP 450-51. The court made proposed changes to WPIC 17.02, and defense counsel

²⁴ The court stated: "And Mr. Cossey had three instructions. I placed those in together with your instruction as to self-defense on the aggressor side and stuck those all four together right before the instruction that tells the jury – the concluding instruction to the jury." RP 444.

²⁵ The State designated the pretrial management report to the Court of Appeals on May 4, 2017.

²⁶ The only instructions specifically discussing count one were the to-convict instruction, (No. 18, CP 38) and the self-defense instruction given as to count one (No. 19, CP 39.) Defendant's other proffered instructions were most likely Instruction 23 and 24, instructing on acting on appearances and standing one's ground, as those were written in typeface consistent with Instruction 19.

agreed with the court's edits. RP 452. This instruction was given to the jury as the Court's Instruction 19, as relating to count one. CP 39.

1. Error, if any, was invited by the defendant's agreement to the instructions.

Assuming without conceding any error, the invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). "The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create." *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207, 357 P.3d 1064 (2015).

Here, defendant's counsel *proposed and agreed* with the wording of the self-defense instruction, and indicated to the court that it was not applicable to counts two or three. The invited error doctrine applies in this situation. "Under the doctrine of invited error ... we are precluded from reviewing jury instructions when the defendant *has proposed an instruction or agreed to its wording*." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (emphasis added); *see also In re Detention of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998).

2. A self-defense instruction for count two would have been inappropriate in light of the defense's theory of the case.

A trial court determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). However, a defendant is not entitled to a self-defense instruction without first producing some evidence which tends to prove that the criminal act occurred under circumstances amounting to self-defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *State v. Walker*, 40 Wn. App. 658, 662, 700 P.2d 1168, *review denied*, 104 Wn.2d 1012 (1985). Furthermore, in order to be entitled to a self-defense instruction, a defendant must concede that an assault occurred. *State v. Gogolin*, 45 Wn. App. 640, 643-44, 727 P.2d 683 (1986). "One cannot deny that he struck someone and then claim that he struck them in self-defense." *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977).

Defense counsel was not ineffective for failing to propose a self-defense instruction regarding count two, and the trial court properly did not give such instructions. No evidence existed that would entitle Mr. Beiers to use force against Ms. O'Connor. The testimony was clear. The O'Connors

were not armed with any weapons. Only Mr. O'Connor and Mr. Beiers engaged in the fight, and while Mrs. O'Connor was nearby, the defendant testified that the only thing she did or said during the affray was, "don't push my husband." RP 495. There was certainly no evidence that was produced at trial that would justify an armed man holding a fallen, unarmed woman at gunpoint, while threatening to kill them all.

The defendant made no concession that he actually assaulted Mrs. O'Connor. Mr. Beiers did not testify to seeing Mrs. O'Connor after he had fired the shot to the north, and she and her husband ran away "like a covey of quail." His testimony was that he returned to his home, realized his car was running, and was returning to the car when police arrived. RP 497-99. Defense counsel argued that even some of the police officers who were the earliest to arrive on scene did not see Mr. Beiers holding Mrs. O'Connor at gunpoint. It is for this reason that counsel did not propose a self-defense instruction on count two – it was the defense theory that the assault on Mrs. O'Connor *never occurred*.

C. STANDARD OF REVIEW FOR PERSONAL RESTRAINT PETITIONS AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.²⁷

1. Standard of review for personal restraint petitions.

A personal restraint petition (PRP) is not a substitute for a direct appeal and the availability of collateral relief is limited. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 539, 309 P.3d 498 (2013). “Relief by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before [the] court will disturb an otherwise settled judgment.” *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). A petitioner who collaterally attacks his conviction must satisfy a higher burden than an appellant on direct review. *In Re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 596-597, 316 P.3d 1007 (2014).

An appellate court will grant substantive review of a personal restraint petition only when the petitioner is under restraint and makes a threshold showing of either constitutional error resulting in actual prejudice, or nonconstitutional error establishing a fundamental defect that inherently resulted in a complete miscarriage of justice. RAP 16.4(a); *In re Pers.*

²⁷ Mr. Beiers’ claims of ineffective assistance of counsel will be addressed in terms of his personal restraint petition, because his brief indicates, “The primary issue raised in the personal restraint petition is whether Mr. Beiers was denied his right to effective assistance of counsel.” Appellant’s Br. at 1. The defendant has filed a declaration of attorney Anna Tolin, who, in turn, relied on evidence outside the trial record to form her opinions in support of his claim of ineffective assistance of counsel, and, therefore, his claims must be addressed by personal restraint petition.

Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). Actual prejudice must be determined in light of the totality of circumstances. *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985). The ultimate question in determining whether actual prejudice exists is whether the error “so infected petitioner’s entire trial that the resulting conviction violates due process.” *Id.*

Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain the petitioner’s burden of proof. *Brune*, 45 Wn. App. at 363. In petitions based on matters outside the appellate record, a petitioner must demonstrate “competent, admissible evidence” to support his arguments. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992), *cert. denied*, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992); *see also In Re Pers. Restraint of Moncada*, 197 Wn. App. 601, 391 P.3d 493 (2017) (hearsay evidence included in affidavits was not competent evidence, and was inadmissible in the PRP proceeding). This court can disregard a defendant’s self-serving assertions included in a personal restraint petition. *See In re Pers. Restraint of Yates*, 180 Wn.2d 33, 43-44, 321 P.3d 1195 (2014) (Stephens, J., concurring) (“[W]e need not accept at face value Yates’ self-serving statement, made years after the fact”).

2. Standard of review in ineffective assistance of counsel claims.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" and to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

The first element of ineffectiveness is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re of Rice*, 118 Wn.2d at 888.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. In order to rebut the aforementioned presumption of effective assistance of counsel, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

3. The declaration of Anna Tolin does little than give one attorney’s opinion of Mr. Cossey’s trial tactics, and does not address prejudice, if any, the defendant sustained as a result of his attorney’s performance.

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Ms. Tolin’s opinion does nothing more than review Mr. Cossey’s performance with the distorting effects of hindsight. One attorney’s opinion on how a case should have been handled does not demonstrate that contrary trial tactics must, therefore, be ineffective – after all, “review of an

ineffective assistance of counsel claim begins with the strong presumption that counsel's conduct fell within the *wide range* of reasonable professional assistance." *Strickland*, 466 U.S. at 689 (emphasis added). As explained below, Mr. Cossey's decisions are attributable to sound trial tactics, none of which are addressed by Ms. Tolin.

Notably, Ms. Tolin never postulates that the outcome of Mr. Beiers' trial would have been different if Mr. Cossey had tried the case as she suggests. She expressly states, "My opinions address the first prong of *Strickland*; whether Keith Beiers' trial counsel rendered competent and effective representation." Dec. of Anna Tolin at 6, ¶ VI. Even assuming the validity of Ms. Tolin's opinions, this Court must still evaluate whether Mr. Cossey's decisions resulted in prejudice to the defendant. As discussed below, defendant has failed to demonstrate how the proceedings would have differed but-for counsel's alleged errors.

D. DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL LACK MERIT.

1. The defendant has failed to demonstrate an actual conflict of interest that adversely affected counsel's performance at trial.

This court reviews whether circumstances demonstrate a conflict of interest de novo. *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008). This court will not find an actual conflict unless petitioner can point to specific instances in the record to suggest an actual conflict or impairment

of their interest. *State v. James*, 48 Wn. App. 353, 366, 739 P.2d 1161 (1987); *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983).

Where, as here, the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An "actual conflict" is a term of art, requiring a "conflict that affected counsel's performance - as opposed to a mere theoretical division of loyalties." *Regan*, 143 Wn. App. at 427–28 (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). "Possible or theoretical conflicts of interest are 'insufficient to impugn a criminal conviction.'" *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 349, 325 P.3d 142 (2014) (quoting *Cuyler v. Sullivan*, 446 U.S. at 350). Until a petitioner shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

In *Mickens v. Taylor*, *supra*, Petitioner Mickens was convicted of the premeditated murder of Timothy Hall, and was sentenced to death. The petitioner's attorney, Bryan Saunders, had represented Hall on assault and concealed-weapons charges *at the time of the murder*. The same juvenile

court judge who dismissed the charges against Hall later appointed Saunders to represent petitioner. Saunders did not disclose to the court, his co-counsel, or petitioner that he had previously represented Hall. The Court found that since this was not a case in which counsel or defendant made the court aware of a potential conflict it was at least necessary, in order to void the conviction, for petitioner to establish that the conflict of interest *adversely affected his counsel's performance*. Because the lower court found no such adverse performance, the petitioner's conviction was affirmed. *Mickens v. Taylor*, 535 U.S. at 173-74.

In *State v. Dhaliwal*, Dhaliwal was charged with the murder of a fellow cab driver. Dhaliwal was represented at trial by attorney Salazar. On review, Dhaliwal argued that Salazar's performance was affected by his dual representation of Dhaliwal and Sohal²⁸ because Salazar failed to object to various hearsay statements and testimony about Dhaliwal's prior bad acts during Sohal's testimony. Our State Supreme Court found the failure to object to testimony did not indicate Salazar was operating under a conflict, because there are numerous tactical reasons for not objecting to testimony. 150 Wn.2d at 573. The Court noted that in its analysis of ineffective

²⁸ Salazar was also simultaneously representing several of the State and defense witnesses in civil litigation involving the cab company. He had also previously represented two of the witnesses on an assault charge in which Dhaliwal had been a codefendant. *State v. Dhaliwal*, 150 Wn.2d at 562.

assistance of counsel claims, it had been reluctant to find counsel's performance deficient solely on the basis of questionable trial tactics:

In *Sullivan*, the United States Supreme Court found that the trial attorney's tactical decision to rest Sullivan's defense was a reasonable response to the weakness of the prosecutor's case rather than evidence of a conflict of interest. 446 U.S. at 347-48, 100 S.Ct. 1708. Similarly, Salazar's failure to object to testimony is a tactical decision that, without more, does not indicate that he was acting under a conflict of interest. This is not a case where the defendant's attorney utterly failed to make any objections, to cross examine the State's witnesses, or to mount a defense.

Under *Mickens* and *Sullivan*, the defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance. *Mickens*, 535 U.S. at 174, 122 S.Ct. 1237; *Sullivan*, 446 U.S. at 350, 100 S.Ct. 1708. Holding that the *possibility* of a conflict was not enough to warrant reversal of a conviction, the *Sullivan* Court stated: "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350, 100 S.Ct. 1708. Here, Dhaliwal has demonstrated the possibility that his attorney was representing conflicting interests. However, he has failed to establish an actual conflict because he has not shown how Salazar's concurrent representation of the witnesses involved in the shareholder action and his prior representation of Grewal affected Salazar's performance at trial.

Dhaliwal, 150 Wn.2d at 573.

Here defendant claims that Mr. Cossey's loyalties were divided between Mr. Beiers and Officer McIntyre; Mr. Cossey had represented Officer McIntyre in an unrelated matter in which her credibility was at issue. Defendant claims "Mr. Cossey was simultaneously representing a key witness *in the case against* Mr. Beiers." Appellant's Br. at 24 (emphasis

added). This is simply inaccurate. Mr. Cossey was representing a key witness in the case *for* Mr. Beiers - Mr. Cossey called Officer McIntyre to testify on his client's behalf.

Officer McIntyre had nothing to do, whatsoever, with the investigation of Mr. Beiers relating to the counts of assault with which he was charged. Officer McIntyre served her limited purpose at trial, which was to testify that Mr. Beiers was not the cause of the problems in the neighborhood, but rather, that the squabbles were an on-going, "tit for tat" series of incidents and complaints lodged by multiple residents of the area.

Mr. Cossey indicated in his closing:

I brought in Officer McIntyre for one reason, one reason only: I brought her in to make it clear. She was an officer, a Spokane Police Department officer. She's the one that had been dealing with this neighborhood independently of Mr. Beiers, independently of the O'Connors, the Easleys, and those other -- Ms. Peterson -- independently. What did she tell you? She didn't tell you he's a terrorist in the neighborhood. She didn't tell you he's a predator. She said all these people that you heard testify have been at war.

...

I brought her in to have an independent neutral police officer tell you it was all of them, every one of them. Not just him. Not just them.

RP 549.

Defendant alleges that "cross-examination of an existing client is so likely to generate hesitancy on the part of a lawyer that it is likely to be a violation of the minimum standard of care for a minimally competent

Washington lawyers.” Appellant’s Br. at 25. However, “[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” *Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003) (alteration in original) (quoting *Cuylar*, 446 U.S. at 350). Even where counsel commits a technical violation of a rule of professional conduct, unless there is an indication that he actively represented conflicting interests that adversely affected the representation of the defendant, no constitutional violation occurs. *See State v. White*, 80 Wn. App. 406, 412-13, 907 P.2d 310, (1995) (“The RPC does not embody the constitutional standard for effective assistance of counsel on appeal”).

Despite defendant’s claims, Mr. Cossey was never put in the position of cross-examining Officer McIntyre because she was the defense’s witness; Mr. Cossey, even knowing of her placement on the *Brady* list for unrelated issues bearing on her credibility, would not have desired to impeach her, or otherwise attack her credibility, unless she gave testimony unfavorable to the defense. She did not. Her only unfavorable testimony was that, had she lived in the neighborhood, she would have been afraid of Mr. Beiers, as the other residents were. If anything, this testimony was cumulative with the testimony of the other witnesses. Additionally, despite this assertion, Officer McIntyre was clear, and repeatedly so, that

Mr. Beiers was not the only troublemaker who lived in the neighborhood. Mr. Cossey called Officer McIntyre to testify to that specific opinion; she did so, and Mr. Cossey had no reason to question her credibility in front of the jury.

Defendant relies on a hearsay statement attributed to Mr. Cossey during an interview with Mr. Beiers' current defense counsel and investigator that "Officer McIntyre had been more forthcoming in her interview than she was at trial." McCann Aff. at 2; Tolin Dec. at 9. This vague statement, even if it were not hearsay and inadmissible in this proceeding, means nothing, without a detailed description of what Officer McIntyre would have testified to, had she been "more forthcoming" at trial. As above, Mr. Cossey indicated he called her to testify only one reason, and "one reason only" – to demonstrate that Mr. Beiers was not the source of the problems in the neighborhood. Officer McIntyre served that purpose.

The claimed conflict between Mr. Cossey's loyalties to Officer McIntyre and Mr. Beiers is merely theoretical. Defendant has not demonstrated how the conflict adversely affected counsel's performance at

trial, but has presented only the *speculative opinion* of Ms. Tolin on this subject:

The difficulty with challenging, vigorously examining, or cross-examining a former client is so *likely* to generate hesitancy on the part of the lawyer that it is *likely* to violate the minimum standard of care.

Tolin Dec. at 9 (emphasis added). Mere likelihood is not enough to sustain a claim that counsel was ineffective due to a conflict of interest. Defendant must demonstrate an actual conflict that adversely affected counsel's performance. He has failed to do so; this claim therefore fails.

2. Counsel was not ineffective for declining to make an opening statement.

Defendant alleges that defense counsel should have made an opening statement in his self-defense case, and proffers an example of what counsel should have argued. Appellant's Br. at 32-34. However, as discussed above, in an ineffective assistance of counsel claim it is insufficient for defendant to merely argue what he believes counsel should have done, but he must also demonstrate why counsel's actions lack any conceivable tactical justification. Here, defense counsel specifically reserved making an opening statement prior to the State's case in chief. RP 55. After the State rested, defense counsel immediately called the defense's first witness, Officer McIntyre. RP 420.

It is not uncommon for defense attorneys to reserve the right to make an opening statement until after the State rests.²⁹ Doing so may prevent the State from effectively attacking and discrediting the defense's theory of the case during its case-in-chief. And, in this case, given that the defense called only two witnesses, the defendant and Officer McIntyre, the latter not a percipient witness, it was not unreasonable for counsel to proceed directly to questioning those two witnesses without giving an opening statement. Counsel's conduct did not fall below professional standards. *See In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 715, 101 P.3d 1 (2004) ("A defense counsel's decision to waive an opening statement does not constitute deficient performance under the *Strickland* test. Trial counsel has the option of making an opening statement... Competent counsel may waive an opening statement as a strategic trial tactic").

Furthermore, defendant cannot demonstrate prejudice. This was not a complicated case with numerous witnesses and complicated evidence. As argued by defense counsel in closing:

Trial hasn't been very long. I wouldn't consider it a very complicated trial in some ways. But it is kind of unique. It's not like what you see on TV. I'm sure Ms. Ervin and I have not been as entertaining as TV lawyers by any stretch. But it doesn't mean it is

²⁹ Defendant cites multiple secondary sources to support his contention that an opening statement was necessary in his case. Appellant's Br. at 34-36. However, he does not cite one case that so holds, and, speaks only in generalities regarding the effect that an opening statement might have on a jury.

less important because of the length of the trial, that there is not DNA, there's not exciting things.

In fact, this trial makes it kind of unique. It is a unique trial. Both Counsel and I have done a lot of trials. *This trial is unique a little bit in how the facts have been presented and the difference versions that have been presented of the same incident that you know occurred, and how they occurred is how you have to decide as jurors.*

RP 547 (emphasis added).

This case simply involved the credibility of the percipient witnesses. There is no indication that, but-for counsel's decision to not give an opening statement, the jury would have found any of the witnesses more or less credible. Defendant was not prejudiced in this regard.

3. Counsel's lack of objection to questioning and argument regarding the defendant's pre-arrest silence is attributable to trial tactics.

Defendant claims counsel was ineffective for failing to object to the State's questions and argument involving his pre-arrest silence. An attorney's decision to object or not object to testimony, questions or argument may be attributable to trial tactics.

Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct.

United States v. Necochea, 986 F.2d 1273, 1281 (9th Cir. 1993) (citing *Strickland*, 466 U.S. at 689).

Lawyers may choose to not object to questions, testimony or argument to avoid highlighting unfavorable testimony, or, to otherwise use

that testimony to the advantage of their client. In this case, counsel indicated at the outset of trial that he does not generally object during trial. RP 10. This is a trial tactic that the defense counsel has adopted in his practice. Furthermore, defense counsel addressed all of the State's arguments regarding the alleged "inconsistency" in his client's pre-arrest statements and his trial testimony:

Q. You heard the officer testify that you told him you were acting in self-defense?

A. Yes.

Q. Is that what you told him?

A. Yes. I told him the statements that they described. And they -- I just got the shit beat out of me, and I was scared for my life.

Q. That's what you told the officers that night?

A. That is what I told the officers that night.

RP 512.

The defendant's position on the effectiveness of the State's impeachment of Mr. Beiers was that the *State's* witnesses were not credible and, unlike Mr. Beiers, had given inconsistent statements:

Well, Counsel is absolutely right. *Credibility, consistency, that is how you have to evaluate this case and what happened.* You have to look at it and say that when you hear the story, *evaluate what makes sense and what doesn't*, and compare it to the other people's stories and their vantage places...

RP 550-51 (emphasis added).

Now, other issues with Mr. Easley. He told you and his wife told you that they called 911 on the car outside of Rockwell because they

saw Mr. O'Connor pounding on the window. *That is a direct contrast of the testimony of people there...*

RP 552 (emphasis added).

... Counsel is a hundred percent right. Listen to that 911 call. Not one time does he mention a gun being pointed at him when he's on 911 being chased allegedly by Mr. Beiers and says, he's pointing a gun at me. He talks about the gunshot... *At no time when he's on the phone with 911 -- wouldn't you say he's pointing the gun at me to the 911 operator?* ... That is his testimony for Count III.

Listen to his 911 tape. Counsel is 110 percent right. I hate to say that, but she is; a 110 percent. Listen to that. *That is not a man having a gun pointed at him or even mentioning it to 911.* Who would do that? That is Count III.

Now, Callie O'Connor. *There is a lot of different -- versions on where she was, where she wasn't, who was parked beside her home.* She calls -- she doesn't call 911. She calls Bret Easley to come down. Kinda strange.

RP 556 (emphasis added).

Listen to Nick O'Connor's 911 call. It's important. I'm asking you to pay special attention when listening to it. He says he's on it from the moment he approaches -- gets -- goes back to the car, he's on it, he's on it the whole time until he's thrown off the roof -- hood of the car. *The whole time he's on it. The cell phone. Listen to that cell phone. One thing that will jump out at you is, he wasn't asked for the license plate by the 911 operator until after he says he's hit by the car. He testified the reason he stepped in the road to stop Mr. Beiers is because 911 asked him to do that. That's not true.*

RP 556-57 (emphasis added).

... Mr. Beiers pulls off and [Mr. O'Connor is] scared for his life but does he walk away, step away? He confronts Mr. Beiers. He's scared for his life? Mr. Beiers is trying to get in the car. He's even using his door to slam into Mr. Beiers to keep him from leaving and

to daze him. Then he's saying he's in fear for his life. *How does that make sense?*

RP 558 (emphasis added).

Nick O'Connor told you that he saw the gun pointed at his wife when she was on the ground. *He gave an interview to Officer Kester. What he told you from that stand was not at all consistent with what he told the officer that night (indicating). At all. Chunks are left out. The aggression was left out that he talked about. Nothing about his wife being on the ground and a man holding a gun toward her head or close to her head.*

And you don't mention that in an interview? That doesn't even make sense.

The problem in this case is simple: When you have so many different versions of what happened and so many inconsistencies...

Keep it to simple things like Stacy Rudd talking about how she watched the whole thing from her porch and her kitchen window. *One thing you can get out of her testimony: That's impossible. Can't do it. I don't care if you are on the front porch or the kitchen window. You cannot have a line of sight to what she said she saw. She can't do it. Yet she swore on penalty of perjury...*

RP 560 (emphasis added).

You have got to step back and you have got to evaluate what they told the police. I was standing there, the cops showed up, they had the gun to my wife's head. The cops told you -- one cop didn't even see Mr. O'Connor there. No one saw him but Mr. O'Connor. None of them saw the gun pointed at Callie O'Connor. No officer. And she told you the gun was pointed at her head when they were there. He told you that's not true. He denied that. O'Connor tells you, by gosh, he wouldn't put the gun down. You know that is not true. They have had done everything as a group collective effort to put this story together. To put it the way they want you to believe it. How I can actually send you to determine what's fair -- I'm almost done -- what is fair and true is this: Look at the stories, look at the

inconsistencies, look at your notes, talk about the differences. They are super and extremely important in this very serious case.

RP 561 (emphasis added).

Defense counsel tactically did not object to the State's questioning of his client or its argument that the defendant did not tell law enforcement the whole story. It was the defendant's theory that Mr. Beiers was the *only* consistent witness who testified at trial. He told law enforcement that he was in fear for his life, that he was brutally beaten, and that he did not believe he had done anything wrong. He was, after all, the only person with discernable injuries. Counsel's objecting to the State's questioning would have made it appear that the defendant was not confident in his theory that it was actually the State's witnesses who were inconsistent and who fabricated their stories to serve the purpose of making sure the defendant was removed from their neighborhood by any means necessary. Defense counsel was not ineffective for failing to object.

4. Counsel did not fail to interview witnesses or thoroughly investigate the case.

Defendant avers that Mr. Cossey failed to interview witnesses and failed to investigate potential witnesses for him. Mr. Cossey's investigator, Ms. Shirley Vanning³⁰ interviewed Mr. Easley prior to trial. RP 77-78.

³⁰ Ms. Vanning's resume is included as Attachment A. Ms. Vanning spent a number of years as a police officer in both Alaska and Utah, has extensive law enforcement training, and has been a licensed private investigator in Washington State since 2012.

Ms. Vanning also interviewed Mrs. O'Connor before trial. RP 225. Defendant alleges that the absence of notes in Mr. Cossey's file from any other interviews proves that Mr. Cossey and his investigator did not interview the other witnesses. The absence of a record does not prove anything – perhaps Mr. Cossey and his investigator inadvertently did not retain their notes.³¹ Mr. Cossey has apparently neither personally confirmed nor denied Mr. Beiers' suspicions that he did not interview the other State's witnesses prior to trial in a declaration provided to this court. Defendant's speculation as to this issue is insufficient for this Court to grant a reference hearing by which he could engage in a fishing expedition for this information. *See Moncado*, 931 P.3d at 496. And, Mr. Cossey's use of a former police officer and private investigator to conduct his interviews is not deficient performance; Ms. Vanning has appropriate experience conducting criminal investigations dating back approximately 20 years.

Additionally, as to counsel's failure to investigate *other* potential defense witnesses, defendant's witness list and the pretrial management report indicate that counsel potentially would call Della James - defendant's girlfriend, Shirley Vanning - the investigator, a 911 supervisor,

³¹ As indicated above, Mr. Cossey's file apparently did not contain copies of the defense's proposed jury instructions, and yet, the record indicates that Mr. Cossey proposed instructions nonetheless. The absence of those documents did not prove that Mr. Cossey failed to take necessary steps in preparing the matter for trial. The same is true here.

Officer Sandy McIntyre, Detective Neil Gallion, and an individual by the name of Jack Alban who lived at 52 East Rich. CP 10-14. In fact, Mr. Cossey filed his first witness list on October 30, 2015, and then filed an amended witness list on November 12, 2015, which would indicate that he was actively pursuing potential witnesses for Mr. Beiers.

Defendant avers that Mr. Cossey never interviewed Ms. James regarding her knowledge of Mr. Beiers' conflict with Mr. Easley. Appellant's Br. at 41. However, Ms. James was not home on the night of the incident. She was not a percipient witness. She would have testified only to cumulative information regarding the ongoing dispute with Mr. Easley.

Ms. James was also a risky witness to call at trial because the defendant allegedly assaulted her on August 28, 2013, while this case was pending.³² CP 71-75. In that unrelated domestic violence case, Mr. Beiers was alleged to have pushed her, punched her three times and threatened to kill her. He claimed she was drunk and fell down. If in fact defense counsel did not interview Ms. James, he likely made the decision that Ms. James should not testify at trial after considering that if she testified to Mr. Beiers' gentle nature and victimization by Mr. Easley, it could open the door to cross-examination regarding his assault on her. For the merely cumulative

³² The State designated the motion and order for bench warrant and associated affidavit of probable cause for 4th Degree Assault against Della James on May 4, 2017.

testimony she would have to offer, calling her was not worth the risk. And, as below, the defense witness list is soundly a tactical decision to be made by defense counsel. *State v. Grier*, 171 Wn.2d 17, 30, 246 P.3d 1260 (2011). Counsel was not ineffective in this regard.

5. Counsel was not ineffective for not proffering the “polecam” security tape as evidence.

The defendant claims that Mr. Cossey was ineffective for failing to admit the “polecam” or “defense surveillance video” into evidence at his trial. Defense counsel actually withdrew this proposed exhibit and specifically requested that it not be viewed by the jury. RP 452. Whether to introduce evidence is a tactical decision that rests with trial counsel. *Grier*, 171 Wn.2d at 30 (citing ABA, *Standards for Criminal Justice: Prosecution Function and Defense Function* std. 4–5.2 cmt. (3d ed. 1993) (providing a non-exhaustive list of “strategic and tactical” decisions that should be made by defense counsel upon consultation with the defendant, to include introducing evidence)).

The surveillance video demonstrates a few shadowy figures outside the Easley residence before the incident. Def’s Proposed 102³³ (Track 1, 1:42-4:40). It demonstrates the defendant’s Prius drove by the Easleys’ house and then pulled into the defendant’s driveway and briefly remained

³³ “D-102” hereinafter.

there. D-102 (Track 1, 3:30-4:20). The video demonstrates the Prius returning to Mayfair and turning south. D-102 (Track 2, 00:39-00:46). Then, Mr. Easley may be seen walking out of his garage and down the street towards the O'Connors' residence. D-102 (Track 2, 4:06-4:21). Shortly thereafter, *three* individuals (and *only* three individuals) may be seen running to the north. D-102 (Track 2, 4:48-5:05). Two run past the Easley residence, and the other cuts behind 4206/4204 North Mayfair. *Id.*

If anything, the video corroborates the *O'Connors'* testimony that they fled north from the defendant and were separated. The video corroborates Mr. Easley and Ms. Peterson's testimony that Easley was nearby when the gun was fired and also fled to the north. And, the video does not demonstrate a large number of people amassing on the lawn of the 4204/4206 duplex, as indicated by the defendant, or, as the defendant put it, a "covey of quail" fleeing from the gunshot (at least to the north). Counsel made the sound tactical decision to not admit the video, which had very little independent probative value, other than to impeach Mr. Easley's recollection that he was alone in the garage that night, but otherwise corroborated the State's witnesses' testimony. To do so would have given more credence to the State's evidence, and could have harmed the defendant's credibility.

Furthermore, the defendant cannot demonstrate any prejudice by defense counsel's choice not to admit the video. As above, the *only* probative value to the video (other than bolstering the State's witnesses' testimony) was to impeach Mr. Easley's testimony that he was alone in the garage that night. RP 82-83. The jury clearly did not believe some or all of Mr. Easley's testimony, as it did not find Mr. Beiers guilty of the assault on Mr. Easley. Mr. Easley was the *only* witness who testified that Mr. Beiers pointed the gun in his direction. Defense counsel likely knew that he had sufficiently impeached Mr. Easley's credibility with his criminal history and bias against Mr. Beiers so as to render his testimony less than credible. It was not then necessary for defense counsel to impeach Mr. Easley on the collateral issue of whether he had company in his garage with him on the evening in question. Defendant has not established counsel was ineffective for deciding to not admit the video at trial.

6. Defense counsel inquired in depth into Mr. Easley's criminal history and argued that it affected his credibility. Furthermore, defendant has not demonstrated prejudice as the jury did not believe Mr. Easley's testimony.

Defendant claims that Mr. Cossey was unaware of all of Mr. Easley's criminal convictions and was ineffective for failing to introduce his prior record in its entirety at trial. The first assertion is incorrect, and the second cannot sustain a claim of prejudice.

Mr. Cossey told the court he was aware of Mr. Easley's criminal history. RP 16-17. He also recently told Mr. Beiers' defense counsel that "Easley's criminal history was provided in pretrial discovery and that his office had also run their own criminal history on Mr. Easley." McCann Aff. at 2, ¶ 4. The State included Mr. Easley's criminal history in its omnibus response, which, at the time included 11 felony convictions.³⁴ CP 76-77.

At trial, the following testimony was adduced regarding Mr. Easley's criminal history. Easley lived at a prison work release facility at the time of trial. RP 56. He was in the process of completing a sentence for burglary and theft. RP 56. He worked fighting fires while at a camp for one of his sentences. RP 57-58. He "caught" another sentence in 2013, after the incident with Mr. Beiers. RP 59. Easley was on DOSA (Drug Offender Sentencing Alternative) probation when he moved into the house at 104 East Rich, and asked Mr. Beiers not to make trouble for him as he would have to report it to his probation officer. RP 61-62. Mr. Easley relapsed on drugs after the incident with Mr. Beiers. RP 89.

Defense counsel used all of this information to his advantage in his closing argument:

What do we know about Mr. Easley... We know he was on SSOSA [sic] for a drug program... It was DOSA. DOSA. He was on DOSA, a drug program. Intensive Drug Program, ok?

³⁴ The State designated the Omnibus response to the Court of Appeals on May 4, 2017.

We know he moved in in 2010. We know there was harmony before 2010. He moves in the neighborhood in 2010. Things changed dramatically. The common denominator.

...

In 2012 he's out of the neighborhood; right? What happens within a few weeks? He picks up five charges for the exact thing that he's saying is happening (indicating). That is a coincidence, isn't it?

RP 551-52.

Defendant has failed to demonstrate how, if counsel had gone through each of Mr. Easley's convictions separately, it would have changed the outcome of the trial. Mr. Easley did not see the assault on Mr. O'Connor. He did not see the assault on Mrs. O'Connor. He only saw the defendant near the O'Connor's home prior to the incident, made a 911 call after seeing Mr. Beiers with his pants down, and then heard the gunshot, and saw the O'Connors running through a yard. The jury acquitted Mr. Beiers of the alleged assault on Mr. Easley, apparently not believing all or some of Easley's testimony. The defendant has not demonstrated how additional impeaching evidence of Mr. Easley would have discredited any of the other witnesses. This argument fails.

7. Defense counsel was not ineffective in telling the jury Mr. Beiers would not testify at trial.

The defendant testified at trial. The defendant baldly claims that his attorney's assertion to the contrary during voir dire somehow prejudiced him by forcing the jury to "sit through the State's opening statement and the

State's evidence with the understanding that Mr. Beiers was not going to testify." Bare assertions and speculation are insufficient to support a personal restraint petition. On this basis alone, the defendant's claim fails.

Additionally, defense counsel may have had valid reasons for indicating that his client would not testify. Perhaps he was unsure if Mr. Beiers would take the stand. And, perhaps he wanted to make sure that the jury understood the presumption of innocence is not dependent on whether or not his client testifies at trial.³⁵

After realizing that the prospective jurors were comfortable with the very valid reasons a defendant may choose not to testify, Mr. Cossey acknowledged that the constitutional right to remain silent was not something he needed to further discuss with the jury. The constitutional

³⁵ (During jury voir dire) MR. COSSEY: Yes. Does Mr. Beiers have to testify on his behalf?

JUROR NO. 3: No. He doesn't. In my mind that is tied to the presumption of innocence. It is similar fashion. You are not assuming anything negative by that. You can't assume anything negative by that. But you have to take that similar to presuming they are innocent.

MR. COSSEY: Very good. I have also been up here pounding the fact that I want everybody to keep an open mind until you hear all the evidence, right, how important that is.

If you remained silent, didn't testify, you would not hear all the evidence.

JUROR NO. 3: Right. However, people have different reactions speaking in front of people. Some people get extremely nervous, and what can be nervous can be interpreted as guilt. It is not fair if someone feels they can't do that.

MR. COSSEY: Very good....

What does that mean, because Mr. Beiers isn't going to testify, going to tell everybody that right now. Not an issue, not a constitutional right we need to spend time with.

right to remain silent is an issue that most defense attorneys attempt to address during voir dire, and perhaps Mr. Cossey, not being completely certain his client would testify, wanted to ensure a favorable jury panel which completely understood Mr. Beiers need not do so. Mr. Cossey was not ineffective in this regard. Additionally, as indicated above, because Mr. Beiers chose to testify at trial, he cannot now claim any prejudice.

8. Defense counsel's decision to not admit the Block Watch Reports and emails to Officer McIntyre was entirely tactical.

Defense counsel acknowledged that a significant portion of the emails and block watch reports would likely be inadmissible. RP 11-12. These statements belie defendant's assertion that his counsel stated he had not reviewed the documents prior to trial. Beiers Aff. at 7, ¶ 18 ("During the course of trial, Mr. Cossey made several statements to the court that he could not offer them because he had not yet reviewed them").

Even before counsel had an opportunity to present the court with a list of potentially admissible emails, the court had already indicated:

I can certainly look at [the emails]. It sounds like some of them are problematic on a relevancy basis, again two years out, what is the relevance to this issue that is before us. Secondly, it sounds like some of them have material that wouldn't be appropriate in front of a jury, again as to the issues here.

RP 17.

The Court later discussed the admissibility of the emails with the parties, indicating:

... But quite frankly, you know, again, your client can testify that there were problems in the neighborhood. I think the jury gets that already. So I'm not sure the fact that he can say, well, I sent this e-mail, therefore it sort of proves my point, really adds a lot to the case.

That is sort of an interesting tack to take, as we both may agree. The fact that I sent an e-mail doesn't mean it is that much more credible or doesn't make it true.

I suppose it is nice documentation for your client.

...

But again, I don't mean to beat a dead horse, but your client certainly can talk about these things, as the state witnesses have, and he can describe from his standpoint how he felt. Ultimately all of that is just background stuff because ultimately we have to get down to what are the elements of the crime and whether the state has proved them or not. And that's I'm sure what your arguments are going to center on.

RP 223-24.

Counsel's later comments indicate that he had determined he would not admit the emails. Counsel specifically indicated:

MR. COSSEY: Just for the court record, you asked me to go through the e-mails, and your initial ruling was we could talk about the e-mails but I could not provide those to the Court as exhibits unless I could go through and show you.

There are so many things in the e-mails one way or another that it would not make sense for me to try to go through them and black out *totally irrelevant, totally prejudicial, inflammatory things*. That is why I did not admit those.

RP 507 (emphasis added).

As acknowledged by the trial court, if one message or portion of a message was introduced at trial, it could have opened the door to all of the messages, citing the rule of completeness under ER 104, RP 506; defense counsel likely did not want this to occur as many of the assertions defendant made in his inflammatory messages to Officer McIntyre make him appear to be mentally unstable and paranoid, and confirmed the victims' testimony that he was the neighborhood "creeper." For example:

What is strange about this whole late night incident [in which Bret Easley allegedly pointed a gun at Mr. Beiers] is not 1 person from any other house came out. 4204?? etc. normal is 9 is a crowd. like a set up for a shooting???

Tim McCann Dec., Ex. A at 1.

They at the least should be taken in for questioning, him and his wife separately, get confessions.
this is just cause for search warrants etc.
If this is true, that means I can walk around with my 12ga. shot gun and point it at him and the rest of these drug dealers. Like my sons say, these drug dealers guard there drugs.
Please contact me and we'll set the rules...

Tim McCann Dec., Ex. A at 2.

[Illegible] at 4206 N. mayfair have been gone with guard dogs and everyone for a couple of months. They all loaded tents and left. I think they are @ a manufacturing plant (drugs) somewhere remote. Probably in Idaho, judging from the plates. The felon at 4204 N. Mayfair drives a Black 4WD Nissan truck now and comes back from his trips all dirty & mud. Should have them followed to see.

Tim McCann Dec., Ex. A at 7.

3-13-12, Drug transfer was probably made while we were gone. Again, I parked 1 block south and the felon & big guy at 4206 were going nuts hehe. It freaks them out I do block watch.

Tim McCann Dec., Ex. A at 17.

Just another day in the life of the drug dealers. OOOH, the 70yo woman is standing on the front porch of 4204 smoking, taking it all in I guess. Best front cover=up person I've seen. ... it is complete black out at 104 E. Rich. All blinds drawn. The felon wants nothing to do with this... REALLY QUIET AROUND HERE SATURDAY! Hehe I'm going to call 911, on the very first sign of trouble. WHEW! Have my camera at the ready.

Tim McCann Dec., Ex. A at 20.

I dropped my roommate off at our house and drove around the block and parked on mayfair st. in the block south of 4202 N. Mayfair St.... The people in the yard asked me what I was doing, I was freaking out his wife, hehe. I told him I was BLOCK WATCHING THE DRUG HOUSE. He left.

Tim McCann Dec., Ex. A at 24.

... [Easley] even admitted that he was the one who helped the people at 4204&4206 N. Mayfair street block my driveway with the snow in 2010 (That explains why his arrogant ass was standing on his back porch STARING AT ME while I had to break the ice and haul off solid ice, not snow with hand truck the large pieces) I should have did him then, but I didn't think he was involved.

...

They got the word about my reports, and do everything right in front of there house. So I can't see... Park cars across the street in front of there house etc. Unless I drive by I can't see... I think they do the basement activity @ 2-5 am when I'm asleep. They leave like a covey of quail when I see them. Real strange activity.

Tim McCann Dec., Ex. A at 25.

Big guy at N. 4206 is dressed in full military camo and wears a full black ski mask. Must be practicing for a murder hit.

Tim McCann Dec., Ex. A at 27.

Additionally, in order to sustain his claim of ineffective assistance of counsel, defendant must demonstrate that the emails were, in fact, admissible, and would have been admitted, if proffered at trial. He cannot (and has not attempted to) do so. As the trial court stated,

If you want to introduce the e-mails, we're going to get into the rule of completeness under 104, and the question is how much further down the line we go. I go back to my comment from the other day: The fact that someone sends an e-mail doesn't mean it's true on either side, nor does it really prove anything in this case. We have already established he sent e-mails. He was there, according to his testimony, frequently -- it doesn't matter -- but frequently and reporting things.

RP 506-07.

These minimally relevant emails, many of which were from years before the incident, many of which were inflammatory, derogatory or slanderous, and many of which were cumulative with defendant's own testimony in court, would not likely have been admitted because they did not, as the trial court indicated, prove anything other than the defendant frequently made reports to law enforcement. That fact was undisputed by the parties and cumulative with multiple witnesses' testimony. Defense counsel did not provide Mr. Beiers with ineffective assistance by his express decision to not admit the emails. If anything, Mr. Cossey's decision

was an effort to protect the defendant from the potential inflammatory effect the emails would have had on the jury.

9. Because each of counsel's actions has a legitimate, strategic explanation, no cumulative error occurred.

Mr. Beiers rests his claim of cumulative error based on ineffective assistance of counsel on Ms. Tolin's conclusions after reviewing the record:

Based upon my analysis of the materials provided to date, and in light of my experience combined with relevant laws, rules and standards, Mr. Cossey did not render effective assistance of counsel in Mr. Beier's self-defense assault case. Operating under an unwaived conflict of interest, counsel's multiple deficiencies in pretrial and trial representation failed to meet the standard of care for a minimally competent criminal defense lawyer in a serious felony assault case in Washington.

Tolin Dec. at 13.

As indicated above, the focus in ineffective assistance of counsel cases must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Strickland*, 466 U.S. at 696. In order to rebut the aforementioned presumption of effective assistance of counsel, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added). Ms. Tolin's opinion does not address the variety of potential strategic decisions Mr. Cossey would have made before and during trial. It also does not address how the defendant was prejudiced by any of the errors. The jury

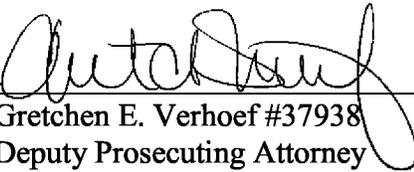
was clearly swayed by Mr. Cossey's questions of and argument about Mr. Easley's veracity, because it acquitted Mr. Beiers of the second degree assault on him. None of the alleged errors discussed above would have affected the jury's credibility determinations of Mr. O'Connor, Mrs. O'Connor, Mrs. Peterson or any of the law enforcement officers who testified at trial. Furthermore, there was a serious risk that Mr. Beiers' credibility would have been damaged had Mr. Cossey introduced the polecam video, Della James' testimony, or any of the emails authored by the defendant. Mr. Cossey gave Mr. Beiers effective assistance, even though his strategy on two of the three counts ultimately failed.

IV. CONCLUSION

The State respectfully requests this Court affirm the trial court and jury verdicts, and dismiss the defendant's personal restraint petition.

Dated this 7 day of June, 2017.

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Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH WILLIAM BEIERS,

Appellant,

In Re Personal Restraint of:

KEITH WILLIAM BEIERS,

Petitioner.

NO. 33962-9-III
Consol. w/35012-6-III

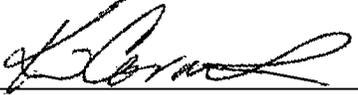
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on June 7, 2017, I e-mailed a copy of the Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Carl Hueber
ceh@winstoncashatt.com; crh@winstoncashatt.com

6/7/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

June 07, 2017 - 10:48 AM

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