

33983-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD KLEPACKI, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State's offer of leniency for the witness's brother was prosecutorial misconduct.

2. The court's admission of hearsay statements attributed to a forensic expert violated the confrontation clause.

3. Defense counsel's failure to challenge Ms. McGillivar's hearsay testimony about the finding of the gun violated Mr. Klepacki's right to the effective assistance of counsel.

4. Defense counsel's failure to challenge Detective Dresback's hearsay testimony about Mr. Wright's nonverbal statements violated Mr. Klepacki's right to the effective assistance of counsel and to confront witnesses.

II. ISSUES PRESENTED

1. Whether a deputy prosecutor's encouragement to a prospective witness to be truthful in exchange for consideration of potential leniency to the witness's brother constitutes prosecutorial misconduct?

2. If a detective offers his own opinion regarding what type of weapon would fit into a holster found near Mr. Klepacki upon his apprehension, and asserts his opinion was corroborated by a firearms expert, and if both opinions could have been independently corroborated by the jury

during deliberations, does the detective's opinion and confirmation constitute inadmissible hearsay?

3. If it was error for the detective to testify that his opinion was corroborated by a firearms expert, was the error harmless because it was cumulative of the detective's own opinion?

4. Was an adult witness's testimony hearsay regarding a child's verbal disclosure to her of the murder weapon's location, if that testimony was only offered to show the effect on the adult and the actions she took regarding the weapon?

5. Has Mr. Klepacki met his burden to establish his lawyer was ineffective for not objecting to the testimony regarding the discovery of the murder weapon where the decision not to object was tactical in nature?

6. Has Mr. Klepacki waived his confrontation claim on appeal where his lawyer did not object to Detective Dresback's explanation of how the shooting occurred?

7. Has Mr. Klepacki met his burden to show his lawyer was ineffective by not objecting to the detective's testimony of how the shooting was described to him by an eyewitness?

III. STATEMENT OF THE CASE

Procedural history.

The defendant, Richard Klepacki, was charged by second amended information in the Spokane County Superior Court with one count of first degree murder, by alternative means of premeditated murder and felony murder in the course of a first degree burglary, with an accompanying firearm enhancement for the slaying of Harry “Ed” Giesbrecht. CP 8.

On June 1, 2015, the trial court heard pretrial motions, including a CrR 3.5 hearing on the admissibility of the Mr. Klepacki’s statements to law enforcement. RP 19-58. The trial court ruled the statements admissible at the time of trial. RP 62-64.¹

The matter proceeded to a jury trial before the Honorable Harold Clarke and the defendant was convicted as charged. CP 142-43.

This appeal timely followed.

Substantive facts.

On January 4, 2014, at approximately 8:30 p.m., Terri Smilari was with her boyfriend, Mr. Giesbrecht, at his apartment in Deer Park. RP 189-90, 216. Also present was Mr. Giesbrecht’s friend, Gary Wright. RP 216. Around 9:15 p.m., there was a loud knock at the door, which was

¹ No written findings of fact and conclusions of law were formally entered by the court. Mr. Klepacki does not assign error to the court’s ruling.

subsequently kicked open and off its hinges.² RP 218. Mr. Giesbrecht was shot in the head.³ RP 218. The shooter was a stocky male, wearing a dark blue hoodie, baseball cap, with a blue bandana covering a part of his face. RP 218-19, 222. The shooter appeared to be in his early twenties. RP 226.

During the same evening, Bernhard Dedicos was inside his uncle's apartment at the apartment complex when he heard what sounded like loud fireworks. RP 203. Several minutes passed by, and Mr. Dedicos went outside his apartment where he observed what seemed to be two males run by him. RP 203-04, 207. One of the individuals appeared to have a pistol in his hand. RP 207-08. One person was wearing a solid dark-colored jacket and the other had on a plaid jacket. RP 210.

Canine Deputy Steven Stipe responded to the shooting in Deer Park. RP 116.⁴ Eventually, the deputy observed a suspect laying on the ground near the entrance to the Deer Park Middle School.⁵ He was hiding behind

² The door was ultimately collected by the Sheriff's Office. RP 315-16. A footprint was visible on the door. RP 316.

³ Mr. Giesbrecht was subsequently transported to the hospital where he died. RP 194. The medical examiner attributed Mr. Giesbrecht's death to a perforating gunshot wound to the head. RP 336. The bullet entered through the front of Mr. Giesbrecht's skull and exited through the rear. RP 325-26.

⁴ The call to 911 was received at 9:19 p.m. RP 254.

⁵ The temperature was bellowing freezing and snow had accumulated on the ground. RP 120.

several bushes at that location. RP 126. The suspect was wearing brown shoes, a dark thermal jacket, a blue bandanna around his neck, and jeans. RP 129, 260. The suspect was identified as Mr. Klepacki. RP 130, 259. A nylon pistol holster was found by the canine in some bushes near the entrance to the school, within approximately ten feet of Mr. Klepacki's location. RP 161-64, 292.⁶ The middle school was two-tenths of a mile from Mr. Klepacki's residence, and approximately one block from the victim's residence. RP 725-26.

1. Investigation.

The door frame of the front door to Mr. Giesbrecht's apartment was shattered during the incident showing forced entry, and had one observable shoe impression left upon it. RP 437-38, 442. A bullet strike was observed and a spent bullet was recovered in the drywall in the living room crosswise to the front door. RP 441, 444-49. Forensics personnel processed the door for blood spatter, fingerprints and latent shoe prints. RP 453-55, 584, 592.

At the time of the shooting, Tracy Tudor lived at 306 "C" Street, approximately one block from the crime scene. RP 242. She resided at that address with Mr. Klepacki and Anthony Tudor. RP 242-43. On January 5, 2014, the Tudor residence was searched by law enforcement pursuant to a

⁶ The holster was freshly placed based upon the canine's reaction to it. RP 178.

search warrant. RP 471-72. A blue bandana was observed on a chair in the living room, and several dark baseball caps were observed in several rooms of the house. RP 473-74. A pair of tennis shoes was also collected. RP 477-78, 482. The shoe tread pattern was consistent with the pattern observed on the front door to the victim's residence. RP 477. A Carhartt jacket was found in the attic to the residence. RP 485. No firearm was recovered. RP 491.

During the investigation, it was discovered that a Deer Park Yoke's store had a surveillance video which captured Mr. Klepacki and co-defendant, Anthony Tudor, in the store prior to the murder at 7:59 p.m. RP 380-82, 717-18, 724. Mr. Klepacki was wearing a green Carhartt jacket and Mr. Tudor had on a black hoodie. RP 383, 721. At that time, Mr. Klepacki was not wearing the blue bandana. RP 722.

A few days after the murder, a family member of the victim found a shell casing in the snow near the victim's apartment; law enforcement ultimately recovered the shell casing. RP 275-76, 278, 502-03, 505-06. Thereafter, on January 23, 2014, a firearm was recovered in an alleyway between "B" and "C" streets in Deer Park. RP 386. The pistol was found by a child who reported seeing it to an adult. RP 387. The area in which the weapon was found was covered in slush. RP 389. After the weapon was recovered by law enforcement, it was forensically processed, including removal of the cartridges. RP 509-10.

2. Forensic examination of the evidence.

The shoe impression from the door was photographed for a later comparison with the tennis shoes collected from the Tudor residence. RP 602-03, 621, 793-74. A forensic scientist determined the right shoe was approximately the same size and exhibited the same tread pattern as the shoe impression from the front door, and there was an association of class characteristics between the right shoe and the impression on the door. RP 619, 621.

The .45 auto caliber firearm was provided to the Washington State Patrol crime laboratory for testing. RP 548, 640, 681-82. Mr. Tudor, Mr. Klepacki, and Mr. Giesbrecht were excluded as DNA contributors from the swabs taken from the handgun. RP 661. Likewise, no latent fingerprints were obtained from the handgun. RP 646. The shell casing recovered from outside the Giesbrecht residence and the bullet recovered from within the residence were fired from the .45 auto caliber firearm collected from the alleyway. RP 503-06, 691-93.

The holster recovered near Mr. Klepacki at the middle school was an Uncle Mike's holster number 5 which was designed to hold a firearm that is a large frame semi-automatic with a four-and-a-half to five-inch barrel, which would include the size and type of the weapon recovered in the alleyway. RP 801.

On January 5, 2014, Detective James Dresback spoke with Mr. Klepacki at a SCOPE substation in Deer Park. CP 40-73.⁷ Mr. Klepacki advised that he was outside walking around at the time of the incident. CP 51. He had been drinking alcohol. CP 53, 63.

[DETECTIVE DRESBACK]: Did you run from the police?

[DEFENDANT]: Not really. I just was trying to ... I didn't ... you know when I saw all these cars and lights and shit ... I thought fuck ... I'm just going to duck ... you know I don't want to get involved ... I don't...

[DETECTIVE DRESBACK]: So you were hiding from them?

[DEFENDANT]: yeah

[DETECTIVE DRESBACK]: why?

[DEFENDANT]: Well, it's just something that's you know ... from being involved ... you know ... and shit when I was younger ... it's just instinct ... you just ... you know try to get away ... you don't want to be involved ... you don't want to talk to anyone...

[DETECTIVE DRESBACK]: And with the blood that's on you [sic] face that you've [sic] have on your face ... since the ... four or five days now ... that doesn't look good right, so you kind of ... you don't want to be seen like that.

[DEFENDANT]: Well, yeah... I I I mean I don't ... you know I'm ... I'm trying. You know stay out of the public as

⁷ The interview was visually and audibly recorded. Pursuant to an agreement by the parties with regard to certain redactions, a copy of the video interview was played for the jury. RP 808. A transcript of the interview was prepared by the sheriff's office.

much as I can ... You know but you you can't avoid it. I mean to a point.⁸

CP 51-52.

Mr. Klepacki denied ownership of a pistol. CP 54. When asked about the holster found near him upon apprehension, the following exchange took place:

[DETECTIVE DRESBACK]: Well this is a holster, it's not a rifle holster ... it's a pistol holster, or a handgun holster.

[DEFENDANT]: Uh huh.

[DETECTIVE DRESBACK] and you don't have a handgun?

[DEFENDANT]: No I don't.

[DETECTIVE]: OK so how would we ... how would we explain that?

[DEFENDANT]: That's a good question ... um I don't know.

CP 55.

Mr. Klepacki was confronted with being involved in the murder, and remarked:

I don't know who it could possibly be and this is the honest to god fucking truth. I have no idea who if ... there was I ... I if I got into an altercation with someone. I couldn't even tell you who that was ... or where it was ... I honestly don't

⁸ Mr. Klepacki claimed at the beginning of the interview that he had blood on his face because he fell on New Year's Day and "did a nose plant," notwithstanding that he had showered since New Year's Day. RP 43-44.

know ... because I have issues when I drink whiskey ... when I black out ... major issues ... that's why I don't drive when I drink ... um which I mean that's ... a good thing ... in that respect ... um I can tell you ... I can be honest with you right now ... there's times of this past evening that I have no recollection of to be perfectly honest with you.

CP 64.

Mr. Klepacki also claimed he was alone from the time he left the Tudor residence on the day of the murder until he was contacted by deputies, including when he went to the Yoke's store to purchase alcohol.

CP 65-66.

The detective observed that Mr. Klepacki's clothing generally matched the description given by witnesses to the event. RP 786.

Cheyenne Woods testified that Tracy Tudor is her mother and co-defendant, Tony Tudor, is her brother. RP 392. Mr. Klepacki was dating Ms. Tudor at the time of the incident and living with her at the residence. RP 393. At the time of the incident, Ms. Woods was at the LaQuinta motel in Spokane Valley. RP 393-94. Ms. Woods had several conversations with Mr. Tudor the night of the incident. During the second telephone call, Mr. Tudor's tone of voice sounded scared, "maybe shocked." RP 395. The phone call took place around 9:30 p.m. RP 401. Mr. Tudor stated that he was scared and did not know what to do. RP Ms. Woods asked what

happened, and Mr. Tudor stated: “Rick just shot someone.”⁹ RP 398. Ms. Woods testified that she had not mentioned Mr. Tudor’s statements to anyone involved in the investigation, the defense attorneys or investigators, or at the time of Mr. Tudor’s trial. RP 407-08.¹⁰ She further stated that she had previously viewed the Yoke’s video of Mr. Klepacki and Mr. Tudor together in the store. RP 410. Ms. Woods also testified about her previous discussions with the deputy prosecutor and that she had discussed the January 4, 2014, incident with her brother after he was convicted and incarcerated. RP 409-12.

During cross-examination, Ms. Woods was asked about her previous statements and her cell phone calls to various individuals the night of the murder, including Mr. Tudor. RP 402-06, 408-09. She admitted that she had not told anyone (including during her prior testimony in her brother’s case) about the statement made by her brother the night of the murder that the defendant shot someone in the head. RP 407. Ms. Woods admitted she had not mentioned the statement to anyone until close to the

⁹ “Rick” was a nickname known by Ms. Woods for Mr. Klepacki. RP 398. The statement was admitted over objection as an excited utterance. RP 397.

¹⁰ Mr. Tudor’s appeal is currently before this court under cause number 33769-3-III.

eve of Mr. Klepacki's trial. RP 409. She was also asked about her meeting with the deputy prosecutor.

[DEFENSE ATTORNEY]: Did [the deputy prosecutor] show you any exhibits?

[MS. WOODS]: She showed me the video of Rick and my brother at the grocery store.

[DEFENSE ATTORNEY]: Okay. Did she ask you how you felt [a]bout the fact that your brother had been convicted?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: Did she indicate to you that it was probable or likely that Mr. Klepacki would not be convicted?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: And you didn't like that, did you?

[MS. WOODS]: No.

[DEFENSE ATTORNEY]: In fact, she asked you how you felt about that?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: And you told her you didn't like that?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: Did she tell you in that meeting that she had to have more information?

[MS. WOODS]: No.

[DEFENSE ATTORNEY]: She didn't?

[MS. WOODS]: I might be confused. More information from --

[DEFENSE ATTORNEY]: About the case, in order to convince the jury about Mr. Klepacki?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: And it was after that meeting that you then came forward and introduced this testimony that nobody has heard before?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: You did something else, though, between that meeting and you coming forward with this new information, didn't you: You talked to your brother Tony?

[MS. WOODS]: Oh. yeah. Yeah. I talk to him on a regular basis.

[DEFENSE ATTORNEY]: And you talked to him about coming forward with this new information (indicating) -

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: -- in this case, didn't you?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: Do you recall in that meeting on October 15th with the prosecutor when she was urging you about needing some more information, did you and your mother have any more information, do you recall telling her in that meeting, reiterating essentially what you had said before, what you had testified to?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: That at that point, as far as you knew, everything your brother had previously said was true?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: And we're not talking about what he had said in this information that Rick shot somebody?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: So on October 15th you were indicating that I still have nothing new?

[MS. WOODS]: Yes.

[DEFENSE ATTORNEY]: And then you talked to Tony and after that -

[MS. WOODS]: Well, during the meeting on October 15th I -- reached out to Chanci Lopez,¹¹ asking for another interview.

[DEFENSE ATTORNEY]: Did you do it there in that meeting or did you do it sometime later?

[MS. WOODS]: It was during the meeting, but I didn't want my mom to know. So I kind of whispered it, mouthed it to her.

RP 410-13.

On redirect, Ms. Woods admitted that her testimony in the present case would not benefit her brother's circumstance. RP 420. She also

¹¹ Ms. Lopez was a victim witness advocate in the prosecutor's office.

remarked that her meeting with the deputy prosecutor was to determine whether she had any information which could benefit her brother. RP 420.

IV. ARGUMENT

A. THE STATE DID NOT VIOLATE ANY COMMON LAW PRACTICE OR FEDERAL STATUTE BY ADVISING A WITNESS THAT THE DEPUTY PROSECUTOR WOULD CONSIDER SOME FORM OF LENIENCY FOR HER BROTHER, AND CONVICTED CO-DEFENDANT, ANTHONY TUDOR, IF MS. WOODS WAS, IN ESSENCE, TRUTHFUL.

The defendant argued during a post-trial motion that the deputy prosecutor committed misconduct during the pretrial interview of Ms. Woods. CP 158-167. In support of his motion, defense counsel filed a certificate with a summation of his review of the recorded interview with Ms. Woods. *Id.* Present for that interview was Ms. Woods, a deputy prosecutor, and a victim advocate. Although the defense did not provide any authority for his motion, he argued the prosecutor “manipulated” or “colluded” with Ms. Woods.

After reviewing the recorded interview at the request of defense counsel and hearing argument, the trial court denied the motion, and orally ruled:

Ultimately, first of all as to the interview itself, I know Mr. Phelps clarified this for me quite well, but I will start out and say, as far as the interview goes, seems to be pretty straightforward when you watch the DVD. There isn't -- there is certainly some direction conversation, but it didn't appear to me there was anything the prosecutor did in that

interview that would necessarily rise to something that we would label or consider to be misconduct. It is the prosecutor looking for information and asking some direct questions. And making some suggestions about what she thought the evidence might show.

As Mr. Phelps points out to me, she did show them -- "them" being Ms. Woods an[d] Ms. Tudor -- the DVD of the surveillance footage from the Yoke's at Deer Park on the night on which the crime is alleged to have occurred.

I haven't seen any law or I can't think of any suggestion necessarily that that in and of itself is improper, showing a potential witness a piece of evidence that doesn't pertain to them directly. In other words it wasn't, I want you to look at this then alter this; I just want to show you this and ask you what you think of this relationship. And that is the question that was asked, the relationship between Mr. Klepacki and Anthony Tudor. I didn't see how that rose to a level of some sort of improper behavior.

Bottom line is, that interview in my mind didn't create anything that I would consider to be a problem.

...

So at the very eve of trial Ms. Woods apparently from what I have been told said, I have a different story.

My sense of it was that she changed her story, even though she was told she was locked in. I didn't see where necessarily -- I didn't see that the prosecutor's comments or suggestions or words to her would cause that result or coerced her in any way or caused her to do something that she ultimately did, which is to change her testimony. We all know that people do that all the time for various reasons. But the question is here, did she do it for a reason which the state improperly interject themselves into her thought process and into her decision making and in some way coerced her either overtly, or leave a suggestion here in more of an indirect pressure way.

I just can't find that in the record. So based upon that issue, based upon prosecutorial misconduct, I am denying the motions either to arrest judgment or for a new trial.

RP 1002-05.

Standard of review.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Similarly, an appellate court reviews a trial court's CrR 8.3¹² ruling for abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion occurs only when there is no tenable basis for the view adopted by the trial court. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

Mr. Klepacki's argument on appeal fails to identify what leniency the State offered to Ms. Woods prior to trial or how such alleged conduct constitutes prosecutorial misconduct. Moreover, the argument fails to establish the trial court erred when it denied the motion for a new trial under CrR 8.3(b). Ms. Woods was never subject to a criminal investigation or prosecution. Mr. Klepacki argues that Ms. Woods was "offered the

¹² CrR 8.3(b) states: "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order."

possibility for leniency *for her brother* in exchange for her securing or providing testimony that would corroborate his alleged claim that Mr. Klepacki was holding the gun.” Appellant’s Br. at 13 (emphasis added). Ms. Woods’s brother, Tony Tudor, was a co-defendant and was convicted during a separate trial. According to the defense counsel’s post-trial affidavit, the deputy prosecutor told Ms. Woods during an interview that Mr. Tudor’s lawyer was inquiring as to what benefit Mr. Tudor could receive if he came forward with information about the murder. CP 163. There was no benefit offered to Ms. Woods.

Even if this Court finds Ms. Woods was surreptitiously offered “leniency” by the deputy prosecutor in an unidentified form, Mr. Klepacki’s claim still fails. Mr. Klepacki relies on language in *United States v. Singleton*, 165 F.3d 1297, 1302 (10th Cir. 1999), providing that prosecutors may not offer something “other than a concession normally granted by the government in exchange for testimony...”).

In *Singleton*, the defendant moved to suppress the testimony of a witness on the ground that the government violated the federal “anti-gratuity” statute¹³ by promising a witness leniency in exchange for his

¹³ 18 U.S.C. § 201(c)(2) provides:

Whoever ... directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the

testimony. Essentially, the witness would have received a benefit for testifying and implicating Singleton in the charged offenses. *Id.* at 1299. The defendant argued on appeal that when the witness testified after receiving the government’s promise of lenient treatment in exchange for his truthful testimony, he became a “paid witness” in violation of the “anti-gratuity” statute. *Id.* at 1299. As summarized by the Tenth Circuit,

The defendant implies Congress must have intended to subject the United States to the provisions of section 201(c)(2), and, consequently, like any other violator, to criminal prosecution. Reduced to this logical conclusion, the basic argument of the defendant is patently absurd.

Id. at 1300.

The court held that the longstanding practice of exchanging leniency for testimony is not prohibited under the “anti-gratuity” statute. *Id.* at 1302.

However, the court remarked:

Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle

testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court ... authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person’s absence therefrom ... shall be fined under this title or imprisoned for not more than two years, or both.

of the government. Thus, fears our decision would permit improper use or abuse of prosecutorial authority simply have no foundation

Id. at 1302.

It is clear the court was addressing the circumstance in which a prosecutor monetarily “pays” for the testimony of a witness. *See Id.* at 1302 n. 2. Such an act would not be recognized by common law as permissible. *Id.* Nothing in the opinion forbids a prosecutor from discussing a case with a witness or discussing the implication of being a truthful witness.

The Ninth Circuit has similarly rejected a claim that the government’s grant of immunity or leniency to a cooperating witness violated the “anti-gratuity” statute. *See United States v. Feng*, 277 F.3d 1151, 1154 (9th Cir. 2002) (immigration benefits); *United States v. Smith*, 196 F.3d 1034, 1038-40 (9th Cir. 1999) (immunity); *see also United States v. Mattarolo*, 209 F.3d 1153, 1160 (9th Cir. 2000) (leniency).

Here, there is nothing to suggest that anything was “offered” to Ms. Woods during the meeting with the deputy prosecutor other than some form of potential consideration for Mr. Tudor if Ms. Woods testified truthfully. Moreover, Mr. Klepacki misreads the application and holding of *Singleton, supra*. His contention is wholly without merit and should be rejected by this Court.

B. DETECTIVE DRESBACK OFFERED HIS OWN OPINION REGARDING THE HOLSTER FOUND NEAR MR. KLEPACKI, AND IT WAS NOT HEARSAY. IF THERE WAS ERROR, IT WAS HARMLESS.

The defendant next argues that Detective Dresback's testimony regarding information about the size and type of holster, and the weapon it would accommodate constituted hearsay. Appellant's Br. 14-21.

Standard of review.

An appellate court reviews decisions to admit evidence using an abuse of discretion standard. *State v. Quaaale*, 182 Wn.2d 191, 196-97, 340 P.3d 213 (2014). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* at 196. "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." *Id.* However, the trial court has abused its discretion on an evidentiary ruling if it is contrary to the law. *Id.* at 197. A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds or reasons." *Id.* at 196.

During the investigation, Detective Dresback conducted his own independent research regarding the holster found at the middle school to determine what type of weapon the holster would accommodate. RP 800. This research occurred close in time to when Detective Dresback spoke with the firearms examiner. RP 800. At the time of trial, Detective Dresback had

31 years' experience as a police officer, with 18 years in the major crimes unit of the sheriff's office. RP 777.

During trial, the following exchange occurred regarding the holster.

[DEPUTY PROSECUTOR]: Okay. Now, as a result of that investigation were you able to confer with Mr. Davis [the firearms examiner] regarding whether the holster found by Mr. Klepacki could hold or would hold -

[DEFENSE ATTORNEY]: I'm going to object. I'm sorry. I'll strike that; wait until the question is finished.

THE COURT: Go ahead.

[DEPUTY PROSECUTOR]: Thank you.

[DEPUTY PROSECUTOR]: At the time that you were doing your research into what type of firearms the holster that was found by Mr. Klepacki would accommodate or hold, what did you find?

[DETECTIVE DRESBACK]: I -- Well, the research included the fact that it is an Uncle Mike's -- it is a nylon holster. It's -- it's an Uncle Mike's holster, and it had a tag on it that said No. 5. An Uncle Mike's holster No. 5 was designed to hold a firearm that is a large frame semi-automatic with a four-and-a-half to five-inch barrel, which was the kind of gun that was the murder weapon.

[DEPUTY PROSECUTOR]: So on the 27th of February, 2014 was that the nature of your discussion with Mr. Davis?

[DETECTIVE DRESBACK]: Yes. I was asking him if there was a comparison he could do to the gun that we had recovered in Deer Park and the holster to see if they were in any way a match.

[DEPUTY PROSECUTOR]: Okay. And what was the response or what was the result of that?

[DEFENSE ATTORNEY]: That -- that objection is -- I'm going to make, Judge, that is hearsay. We heard from Mr. Davis.

[DEPUTY PROSECUTOR]: Correct, we have heard from Mr. Davis.

[DEFENSE ATTORNEY]: I believe the state is asking Mr. Dresback to tell him what Mr. Davis told him.

[DEPUTY PROSECUTOR]: Which has already been the subject of testimony, Your Honor.

THE COURT: Well, to the extent Mr. Davis has testified to this, and he has been cross-examined, then the confrontation issue has been satisfied, so you can ask this question.

...

[DEPUTY PROSECUTOR]: As a result of your discussion with Mr. Davis about the holster, was it confirmed that the weapon that he tested and was the murder weapon would fit in that holster?

[DETECTIVE DRESBACK]: Yes. That part was. An exact match could not be made.

[DEPUTY PROSECUTOR]: But it would fit?

[DETECTIVE DRESBACK]: It would be a holster that a person with that kind of weapon would be able to use with that weapon, yes.

1. Failure to object.

The failure to raise an evidentiary objection to the trial court waives the objection. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985);

See RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court”).

As explained in *Guloy*:

A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

Id. at 422.

In the first instance, the defense attorney withdrew his objection. The detective was asked, without objection, about his own research regarding the weapon and answered that the holster was the size and type which would accommodate the weapon found in the alleyway. The defense did not present a hearsay objection previous to the detective’s first statement regarding the holster and no relief is available on appeal.

2. Lay testimony in the form of an opinion.

ER 701 permits lay testimony “in the form of opinions or inferences” that are “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness’[s] testimony or the determination of a fact in issue.” ER 701. Opinion testimony is not improper or objectionable because it “embraces an ultimate issue to be decided by the trier of fact.” ER 704. Moreover, testimony based on inferences from the evidence is not improper. *State v. Blake*, 172 Wn. App. 515, 523,

298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013). “Practical experience is sufficient to qualify a witness as an expert.” *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992).

Here, the detective stated that based upon his research it was an “Uncle Mike’s Holster No. 5,” which was designed to hold a large framed semi-automatic with a four-and-a-half to five-inch barrel, and would accommodate the kind of pistol as the recovered weapon. The firearm and holster were introduced into evidence for the jury’s consideration and review. There was no error.

3. A confrontation clause argument cannot be raised for the first time on appeal.

Mr. Klepacki argues for the first time on appeal there was a violation of the confrontation clause regarding the detective’s statement regarding how the shooting occurred. Appellant’s Br. at 17-20.

Under the Sixth Amendment’s confrontation clause, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. Under the Washington Constitution, article 1, section 22, an accused holds the right “to meet the witnesses against him face to face.” In general, the confrontation clause prohibits the admission of an unavailable declarant’s out-of-court statement that might otherwise meet one of the exceptions to

the general prohibition against hearsay, if the hearsay qualifies as testimonial. *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); ER 801(c).

Here, there was no objection made on hearsay or confrontation grounds to the admission of information Mr. Klepacki now claims violated his right of confrontation. In *State v. O’Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012), citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the court held that a defendant must raise a confrontation clause claim at or before trial or lose the benefit of the right both under the United States and Washington Constitutions. The court held that because the defendant did not assert his confrontation clause objection at or before trial, he could not obtain appellate relief on that claim, despite RAP 2.5(a)(3). The obligation of the defendant to assert the right at trial is “part and parcel of the very right itself.” *Id.* at 238. The court reasoned:

Requiring the defendant to assert the confrontation right at trial is also consistent with other Sixth Amendment jurisprudence. Indeed, were this not the defendant’s burden, the trial judge would be placed in the position of sua sponte interposing confrontation objections on the defendant’s behalf—or risk knowingly presiding over a trial headed for

apparent reversal on appeal. Such a state of affairs is obviously untenable.

Id. at 243;¹⁴ *see also State v. Schroeder*, 164 Wn. App. 164, 168, 262 P.3d 1237 (2011) (defendant waived right to confrontation on disputed piece of evidence by failing to object to its admission at trial).

Mr. Klepacki has waived his confrontation clause argument on appeal.

4. Harmless error.

To the extent this Court determines that the detective's testimony about confirming his own opinion with the firearms examiner was hearsay, it was harmless error. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d. 674 (1986). Error in admitting hearsay evidence may be harmless if there is a reasonable probability that the error did not materially affect the verdict. *State v. Owens*, 128 Wn.2d 908, 914, 913 P.2d 366 (1996). Moreover, an error is not prejudicial if similar

¹⁴ Division One of this court reached the same conclusion in *State v. Fraser*, 170 Wn. App. 13, 26-27, 282 P.3d 152 (2012), *review denied*, 176 Wn.2d 1022 (2013), where the defendant objected to evidence at trial on the ground that it was more prejudicial than probative. *Id.* at 25. For the first time on appeal, he argued that the evidence violated his right to confrontation. *Id.* The court reaffirmed its decision in *O'Cain*, holding that Fraser waived his confrontation argument by not objecting on that basis at trial. *Id.* at 26. The court then added an alternative analysis that "[i]f" RAP 2.5(a)(3) is read as a state procedural exception to the objection requirement for confrontation clause errors, Fraser would still not be entitled to review because he failed to make a showing of manifest constitutional error. *Id.* at 26-27.

testimony was admitted without objection. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 293, 263 P.3d 1257 (2011); *State v. Dixon*, 37 Wn. App. 867, 874-75, 684 P.2d 725 (1984) (erroneous admission of evidence as excited utterance was harmless error because the court heard essentially the same details in the victim's testimony).

The claimed "hearsay" testimony did not likely affect the verdict for several reasons. It was cumulative to the detective's properly admitted testimony regarding his opinion that the holster was the type and size which could hold the pistol. Moreover, the holster was found within a close distance of Mr. Klepacki, it was freshly placed at the time of its discovery, and Mr. Klepacki had no explanation for its presence.

Moreover, the detective's statement regarding the firearms examiner's confirmation of his own opinion was not hearsay because the jury could have drawn the same conclusion or rejected it, based upon a comparison of the holster and the firearm. For instance, in *United States v. Oaxaca*, 569 F.2d 518 (9th Cir. 1978), several bank surveillance photographs which showed a bank robbery in progress were introduced at trial. One of the robbers was wearing a checkered shirt. Later, a checkered shirt was found in the getaway car. The bank surveillance photographs were introduced to show that the checkered shirt found in the getaway car was the same shirt used in the bank robbery and thereby circumstantially linked

the defendant with the crime. The Ninth Circuit rejected the defendant's claim that the photographs were inadmissible hearsay. *Id.* at 525. If there was error, it was harmless.

C. THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE BY NOT OBJECTING TO CHAIN OF CUSTODY EVIDENCE REGARDING FINDING THE PISTOL BELIEVED TO HAVE BEEN USED IN THE MURDER.

Mr. Klepacki next argues that his lawyer's failure to object to the testimony of Ms. McGillivary, regarding the discovery of the handgun, constituted ineffective assistance of counsel. Appellant's Br. at 21-24.

Standard of review.

The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

To prevail on an ineffective assistance of counsel claim, Mr. Klepacki must show that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A lawyer's performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a presumption of reasonableness, meaning the reviewing court must “give the attorneys the benefit of the doubt,” and must also “affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did.” *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (citations omitted). In conjunction, a fair assessment of a lawyer’s performance 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. *Strickland*, 466 U.S. at 689.

With regard to the second prong, prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337.

As such, an appellate court strongly presumes that counsel is effective and the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel’s actions. *McFarland*, 127 Wn.2d at 337. To rebut this presumption, the defendant bears the heavy burden of “establishing the absence of any conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

1. The child's statement to an adult that he found a gun and left it at a bus stop was not hearsay because it was offered to show the effect on the listener, and the actions she took with respect to the information provided by the child and the pistol.

Hearsay is an out-of-court statement offered “to prove the truth of the matter asserted.” ER 801(c). “Whether a statement is hearsay depends upon the purpose for which the statement is offered.” *State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

On January 23, 2014, a child advised Ms. McGillivary that he found a gun and moved it to a bus stop, near an alleyway, across the street from her home. RP 387-88. Ms. McGillivary walked to the bus stop, placed the pistol into a plastic bag, and then called the police. RP 387. It was later collected by Detective Dresback. RP 388.

Ms. McGillivary did not want to leave the gun at the bus stop because of its potential danger to children. RP 387-88. She stated from the “spot” the gun¹⁵ was found to the middle school was approximately three blocks away, or five minutes away. RP She did remark that the child had

¹⁵ It is unclear from the record whether the witness was referring to the bus stop or its original location. There is no evidence in the record that the child who recovered the weapon advised anyone of its original location.

moved the weapon one block, without indicating the address of that location. RP 388.

Although not expressly stated, it is clear from the testimony that the child's remarks regarding finding a weapon were introduced not for the truth, but for its effect on Ms. McGillivary and the steps she took to secure it, remove it from the bus stop area, and to dispose of it by way of having law enforcement collect it. There was no error.

2. If the court determines the child's statement to Ms. McGillivary was hearsay, the defense lawyer's decision to not object to the testimony was tactical in nature.

To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The decision of when or whether to object is a classic example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* at 763.

Here, the defense attorney investigated the matter, and presumably knew what the child could testify to. It is conceivable that defense counsel chose not to object to avoid emphasizing the testimony to the jury. Requiring the child to testify would have placed more emphasis on the fact that a child found the weapon, and the potential risk it posed to the child, and others, after he found it and moved it. Such a course of action would not have benefited Mr. Klapacki's presentation of his case. *See State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) (“[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence”); *see also State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014) (“The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective”). Because a legitimate tactical reason supported defense counsel's decision not to object to Ms. McGillivary's testimony, Mr. Klepacki cannot demonstrate ineffective assistance of counsel on this ground.

Finally, Mr. Klepacki cannot show the result of the trial would have differed if the evidence had not been admitted. If there had been an objection and it was granted as to Ms. McGillivary's statements regarding how the weapon was initially found, the State certainly would have

subsequently called the child witness to testify to the same information. It otherwise would have been admitted at trial and before the jury for its consideration. This claim also fails.

D. THERE WAS NO CONFRONTATION VIOLATION, NOR WAS THERE AN OBJECTION MADE ON A CONFRONTATION OR HEARSAY BASIS TO PRESERVE THE ISSUE FOR APPEAL REGARDING DETECTIVE DRESBACK'S DEMONSTRATION OF HOW A WITNESS DESCRIBED THE SHOOTING. MOREOVER, ANY FAILURE TO OBJECT ON CONFRONTATIONAL GROUNDS WAS A MATTER OF TRIAL TACTICS.

The defendant next argues that Detective Dresback's testimony regarding how Mr. Wright demonstrated the shooting at the apartment constitutes a violation of his right to confrontation and ineffective assistance of counsel. Appellant's Br. at 24-28. Mr. Wright had previously testified that the shooter had reached in and shot the victim. RP 218.

At the time of trial, the following exchange occurred between the deputy prosecutor and the lead detective.

[DEPUTY PROSECUTOR]: Detective, with respect to your interview with Mr. Wright, [did] Mr. Wright during that interview demonstrate for you how the shooter was holding the gun?

[DETECTIVE]: Yes, he did.

[DEPUTY PROSECUTOR]: And how that demonstration -
- I mean, what was the demonstration?

[DETECTIVE]: He held his finger up like a gun in a fashion that he recalls seeing the shooter, he believed the shooter held the gun.

[DEPUTY PROSECUTOR]: How did he demonstrate; what was it that you saw?

Left hand, right hand?

[DETECTIVE]: It was the right hand up over his shoulder, like this (indicating).

RP 846.

1. Mr. Klepacki failed to object and preserve the issue regarding his belatedly raised complaint alleging a confrontation violation.

As with other testimony discussed above, defense counsel did not object to the detective's description of how the shooting was relayed to him. Specifically, there was no objection made on hearsay or confrontation grounds to the admission of information Mr. Klepacki now claims violated his right of confrontation and which were hearsay. Mr. Klepacki has waived his right to claim a confrontation violation on appeal. *See O'Cain, supra*, and *Melendez-Diaz, supra*. This claim has no merit.

2. Mr. Klepacki has also waived the right to appeal the detective's statement as hearsay because he did not object at the time of trial.

A defendant who fails to raise a hearsay objection in the trial court waives it on appeal. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482-83, 6 P.3d 1160 (2000) (failure to object to hearsay testimony at trial waives appellate

review); *State v. Robinson*, 120 Wn. App 294, 300, 85 P.3d 376 (2004), *review denied*, 152 Wn.2d 1031 (2004) (defendant waived a due process claim by failing to object to the use of hearsay at his special sex offenders sentencing alternative revocation hearing); *State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995) (a conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver).

Here, Mr. Klepacki has waived his claim that the detective's testimony was hearsay because he did not object in the trial court.

With regard to Mr. Klepacki's *Crawford*¹⁶ claim, prior statements must be excluded under *Crawford only if* a witness is unavailable at trial. *State v. Price*, 158 Wn.2d 630, 639, 146 P.3d 1183 (2006). "The purposes of the confrontation clause are to ensure that the witness's statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness's demeanor." *Id.* at 640. In this case, Mr. Wright testified and was subject to cross-examination. RP 215-229.

¹⁶ *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

3. Mr. Klepacki also fails to establish a claim under RAP 2.5(a).

Mr. Klepacki also fails to show that he can raise this confrontation claim for the first time on appeal under RAP 2.5(a)(3).¹⁷ Under that rule, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. In general, an error raised for the first time on appeal will not be reviewed. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Accordingly, RAP 2.5(a) was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). RAP 2.5(a)(3) requires a *manifest error* of constitutional magnitude, not simply the “[identification of] a constitutional issue not litigated below.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Mr. Klepacki does not discuss the applicability of RAP 2.5 in his opening brief.

To raise an error for the first time on appeal, an appellant must demonstrate (1) the error is truly of constitutional dimension,¹⁸ and (2) the

¹⁷ RAP 2.5(a), in relevant part, reads: “**(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.”

¹⁸ The use of hearsay may impinge on a defendant’s constitutional right to confront and cross-examine witnesses. *State v. Neal*,

error is manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “Manifest in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* at 99. “To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case,” it “is so obvious on the record that the error warrants appellate review.” *Id.* at 99-100. A “manifest” error is an error that is “unmistakable, evident or indisputable.” *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

Mr. Klepacki does not make this showing. He cross-examined Mr. Wright regarding his rendition of the shooting. He does not establish how he was limited in his cross-examination.

Mr. Klepacki asserts that the detective’s testimony regarding how Mr. Wright described the shooting was essential to the conviction, to establish that more than one person participated in the shooting. Appellant’s Br. at 27. This reasoning is unfounded for several reasons. His argument presupposes that if only one person participated in the shooting, it could not have been Mr. Klepacki. There is nothing to suggest Mr. Klepacki was not

144 Wn.2d 600, 607, 30 P.3d 1255 (2001). The confrontation clause applies when assertive conduct is offered against a criminal defendant to prove the truth of the matter asserted. *Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).

the shooter, if the shooter acted alone. Second, other witnesses observed two people fleeing the area of the victim's apartment shortly after the shooting, which is contrary to Mr. Klepacki's argument that the detective's description of the shooting was the only evidence to suggest that more than one person participated in the shooting.

In addition, Mr. Wright testified on direct examination that he observed one person involved in the shooting. The State certainly could have called the detective to impeach this statement. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay evidence is, generally, inadmissible. ER 802. Evidence that would otherwise constitute inadmissible hearsay, however, may be admissible when offered for impeachment purposes to undermine a witness's credibility. *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). Mr. Wright's memory and statement at the time of trial were certainly contrary to other witnesses, and to the statement he originally provided to law enforcement shortly after the murder. The State properly impeached Mr. Wright by his previous statement to law enforcement made close in time to the murder.

Lastly, Mr. Klepacki does establish that the detective's testimony should have been excluded under *Crawford, supra*, because this rule is only

applicable if a witness is unavailable at trial. *Price*, 158 Wn.2d at 639. As stated above, Mr. Wright testified at trial and was subject to cross-examination on how the shooting occurred. There was no error.

4. Defense counsel's failure to object to statements made by the detective describing Mr. Wright's description of the shooting was not ineffective assistance of counsel.

A lawyer's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions, and, therefore, cannot form the basis of an ineffective assistance claim. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). An appellate court presumes that defense counsel's failure to object was a legitimate trial strategy or tactic. *Id.* at 21. "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* at 19.

Mr. Klepacki has not met his burden of demonstrating an absence of legitimate strategy or tactics in failing to object because "[d]eficient performance is not shown by matters that go to trial strategy or tactics," *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001). Moreover, he has not established there is a reasonable probability that, except for his lawyer's alleged error, the result of the trial would have been different. As discussed above, his claim that the detective's testimony regarding how the shooting occurred is the only evidence that several individuals were

involved and this caused him prejudice is simply not accurate. Mr. Klepacki fails to establish ineffective assistance of counsel.

V. CONCLUSION

For the reasons stated herein, the State requests the Court affirm Mr. Klepacki's conviction for murder in the first degree.

Respectfully submitted this 9 day of March, 2017.

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD F. KLEPACKI,

Appellant,

NO. 33983-1-III

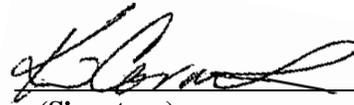
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington,
that on March 9, 2017, I e-mailed a copy of the Brief of Respondent in this matter,
pursuant to the parties' agreement, to:

Janet Gemberling
jan@gemberlaw.com & admin@gemberlaw.com

3/9/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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