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Court of Appeals
Division III
State of Washington

No. 34800-8-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

ROBERT J. GOODSON, Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On May 6, 2015 around 7:00 a.m. Jessica Ongstead¹ received a call from her mother, Nora Lorraine Goodson. Report of Proceedings, pages 91, 260 (*Hereinafter*. RP 91, 260). Nora Goodson was in a very emotional state, crying and very upset. *Id.* She told her daughter that she was upset because she and her husband, the Appellant, Robert J. Goodson, had been in an “altercation.” RP 92. Nora told her daughter that during the altercation Robert had “choked”² her. *Id.* Shortly after the phone call, Nora Goodson arrived at Jessica Ongstead’s residence in Lewiston, Idaho.³

Upon arrival Nora Goodson told her daughter that she had awakened to the Appellant “on top of her and he choked her.” RP 92. Ms Ongstead could see that her mother had marks “all over

¹ Jessica Ongstead testified at trial and according to the transcript spelled her last name “Ongstead.” RP 91. In other places in the record, including her written statement, her last name is spelled “Ongstad.” In deference to the record on appeal contained in her sworn testimony the Respondent will use “Ongstead” throughout.

² Throughout the proceedings various lay witnesses use the term “choke” “choking” and “choked.” As Detective Nichols so aptly explained during her trial testimony, this is a misnomer. “Choking is an internal blockage of the airway; strangulation is an external blockage of the airway” - “you choke on food; you are strangled by a manual [mechanism] or a ligature or object.” RP 342.

³ Lewiston Idaho and Clarkston Washington are “sister cities” and part of a single metropolitan area divided by the Snake river which forms the state boundary in this area. According to Google Maps the distance from Nora Goodson’s residence in Clarkston to Jessica Ongstead’s residence in Lewiston is 4.1 miles (a 12 minute drive).

her neck and face and ear.” *Id.* Nora told her daughter that she was in fear of the Appellant. RP 94. Concerned about her mother Ms Ongstead asked if she should call the police and Nora Goodson said “Yes.” RP 261. Medics were also called to the home in Lewiston. RP 79.

At approximately 8:00 a.m. Officer Mike D. Rigney of the Lewiston Police Department received a call from dispatch regarding a “domestic violence situation” in which the reported victim had been “beat up” and “attempted strangulation.” RP 78 - 79, 81. He responded to the Ms Ongstead’s residence in Lewiston, Idaho. When he arrived at the scene, he observed Ms Nora Goodson being attended by medics. RP 79. He could clearly see facial injuries and injuries to Ms Goodson’s neck area. *Id.* Based upon his fourteen years of experience as a police officer, basic training and specialized training in regards to domestic violence, and his significant experience with responding to domestic violence (RP 78), Officer Rigney noted that the injuries that he observed on Ms Goodson’s neck and face were consistent with an assault, specifically one involving strangulation. RP 80.

Officer Rigney spoke briefly with Ms Goodson and learned that the incident had actually occurred at Ms Goodson’s residence, outside of his jurisdiction, in Clarkston, Washington. RP 80. Based upon this information Officer Rigney had Washington law

enforcement contacted. *Id.* Detective Jackie Nichols of the Asotin County Sheriff's Office responded and arrived at the residence in Lewiston Idaho some 15 to 20 minutes later. RP 81. Once Detective Nichols arrived, Officer Rigney briefed her on the situation and then cleared the scene. RP 81 - 82.

Detective Nichols was at the time a 12-year veteran law enforcement officer, having successfully completed both the State Corrections Academy and the Washington State Basic Law Enforcement Academy. RP 289. Additionally, she has had specialized training various aspects of law enforcement and investigation including Domestic Violence, criminal investigation, crime scene investigation, child abuse investigation, conducting forensic child interviews, sex crime investigation, suspect interviewing and interrogations, and training from the Department of Justice Strangulation Institute. RP 290. She also serves as a Deputy Coroner for the County and investigates unattended deaths in that capacity. *Id.* She serves as the sole detective for Asotin County and since being so assigned has investigated in excess of 3,000 cases for the county. *Id.* She has also been called upon by other jurisdictions to assist in their investigations. RP 291.

Detective Nichols was advised that the incident had occurred in her jurisdiction, Asotin County Washington, but that the victim had fled to Lewiston, Idaho. RP 291. She was advised that

despite requests that Ms Goodson return to Asotin County, she was afraid to do so. RP 291 - 292. Upon her arrival on scene Detective Nichols spoke with Officer Rigney and he advised her of his observations especially regarding the strangulation marks on Ms Goodson's neck and her apparent black eye. RP 292. Detective Nichols took photographs of the obvious injuries.⁴ RP 293. The Detective noted that injuries to Ms Goodson's neck included were consistent with manual strangulation and described the injuries:

Ah, those are what I would typically see in a manual strangulation case, ah, with manual strangulation, where you can actually see the finger marks extending from a area - - a braised area where the skin was pinched together or abraded.

RP 293. Detective Nichols spoke with Ms Goodson and later took a written statement from Ms Ongstead and from Ms Goodson regarding the incident. RP 94, 262. When she was speaking with Ms Goodson Detective Nichols noted that she was "terrified," and that she was "shaking, crying, visibly very, very frightened." RP 294.

Detective Nichols asked Ms Goodson about her injuries and Nora told the Detective that the Appellant "had gotten up that morning in a bad mood and was talking angrily" and then "attacked

⁴ These photographs would be introduced at trial and shown to the jury. RP 92 - 93.

her.” RP 329. Detective Nichols was concerned about Ms Goodson’s well being and spoke with her about “safety planning.” RP 296.

Detective Nichols then attempted to contact the Appellant, Robert J. Goodson. RP 297. She went to the Goodson residence, where the assault had occurred, 1165 Eighteenth Avenue in Asotin County. *Id.* When she knocked on the door, she received no response. *Id.* She then phoned the Appellant and he told her that “nothing had happened and [he] didn’t wish to speak with [the detective].” *Id.* Later, Detective Nichols spoke with the Appellant again over the phone and advised him that she had probable cause to arrest him for Assault in the Second Degree. RP 298. The Appellant responded to this by stating that it was “bullshit” and that “it hadn’t been a second degree assault” because “there wasn’t a broken bone or weapon involved.” RP 298 - 299. Notably, he did not deny that he had strangled his wife. RP 299.

On May 7, 2015, Detective Nichols, having obtained an arrest warrant, contacted the Appellant and arrested him. RP 297 - 298, 337. Nora Goodson was present when the Appellant was arrested *Id.* Ms Goodson expressed concern that her husband was being charged with a felony. RP 338. Detective Nichols explained to her:

strangulation is a felony and the reason it's so serious is because strangulation is -- is so -- can lead so quickly to a fatality.

RP 343. As Detective Nichols would later testify at trial, based upon her extensive experience and specialized training she knew that:

strangulation is probably one of the most lethal forms of domestic violence. Ah, it can lead to unconsciousness in seconds; it can lead to death within minutes. Strangulation is one of the ultimate forms of power and control where the perpetrator, ah, exerts control over the victim's very next breath. Ah, this can lead to devastating psychological effects and, ah, it has a potentially fatal outcome.

And:

[I]n over 50 percent of -- or up to 50 percent of domestic violence homicides, there was a prior incidence of strangulation in the relationship.

And finally:

The victims of, ah, domestic violence strangulation are seven times more likely to be, ah, a victim of, ah, homicide or attempted homicide.

RP 295 - 296. Detective Nichols was also very concerned for Ms Goodson's safety at the time because she was aware of the couple's relative sizes. RP 295. Robert Goodson is over six feet tall and weighs 255 pounds, as compared to Nora Goodson at 5' 04" and weighs 120 pounds. *Id.* Detective Nichols was also aware of the long history of domestic violence between the two. *Id.*

Following his arrest the Appellant was incarcerated for a time at the Asotin County Jail. RP 300. While he was incarcerated he was prohibited from having any contact with Nora Goodson, the court having entered a pretrial domestic violence no contact order. RP 51. Despite this order the Appellant made a series of 13 calls to Nora Goodson from the jail. RP 279. These calls were recorded and played at trial. RP 95 - 258, 302 - 328.

The Appellant was originally charged with Assault in the Second Degree (Domestic Violence). Information, Clerk's Papers, page 1 (*hereinafter* CP 1. The charges were later amended to add thirteen counts of Domestic Violence Court Order Violation based upon the calls from the Jail. RP 17 - 20; *see also*: Amended Information, CP 21, *see also*: Second Amended Information, CP 59. As the matter proceeded toward trial, Nora Goodson vanished. RP 26. It appears from the record, that Ms Goodson went missing shortly after the State submitted a jury instruction indicating that were she to recant on her previous statements, the State would offer into evidence "records involving prior Domestic Violence incidents between the Defendant and Nora L. Goodson . . ." RP 283 - 284, 357, *see also*: Jury Instruction #5. The State cited to State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)

(evidence of prior domestic violence incidents admissible when a victim recants) in support of the instruction.

The State, in an effort to secure her attendance at trial requested a material witness warrant for Ms Goodson. RP 26. This request was granted and a material witness warrant was issued for her. RP 53; see also: Material Witness Warrant, CP 33. Despite the State's efforts Ms Goodson could not be located prior to trial. RP 31, 53, 94, 330 - 332. The State continued its efforts to locate Ms Goodson up to and even during the trial. RP 346, 349.

Despite the unavailability of Ms Goodson, the matter proceeded to jury trial on July 7, 2016. RP 38. The case concluded on July 8, 2016. RP 404. When the State rested and the Defense had also done so, counsel for the defense asked the trial court judge to quash the material witness warrant that had been issued for Nora Goodson. RP 355. The judge denied this request stating; "Unless and until a verdict is back, I'm not going to quash anything." RP 356. The parties made their closing arguments and the jury began its deliberations at 2:37 p.m. After less than an hour and a half, the jury announced that it had reached a verdict. RP 414. The jury found the Appellant guilty on all fourteen counts. RP 415 - 416.

After trial was completed, it was discovered that Ms Goodson had come out to the courthouse while the trial was in

progress. CP 43 - 50. She was contacted by the Appellant's trial counsel, and despite his representations to the court that the defense wanted Ms Goodson to testify, and despite his knowledge that the court had issued a material witness warrant for her, he "implored" Ms Goodson to leave and not testify. *Id.* Ms Goodson gave into his requests and left without having testified or making her presence known to the court of the prosecution. Defense counsel never informed the court or the prosecution. When this came to light, the court appointed alternate counsel for the Appellant pending sentencing. RP 425. This new attorney subsequently filed a motion for a new trial based upon the conduct of the original trial counsel. RP 436. In so doing the new defense counsel made it very clear that there was no allegation of "prosecutorial misconduct" in this matter. RP 443. Rather, he asserted that:

a material witness who did come to court and was willing to testify and who had first-hand knowledge of the case was turned away.

RP 443. The trial court judge succinctly framed the issue as follows:

But the big question in my mind is what is the effect of Defense Counsel - - active Defense Counsel at that time advising that witness to absent herself from the proceedings as part of a defense strategy to procure a more favorable outcome at trial.

RP 444. The prosecutor pointed out that this was “not a case that turned on Nora Goodson’s testimony.” RP 445. In fact, the prosecutor stated “the State’s case would have been even better, not worse” had Ms Goodson taken the stand. *Id.* Had she been available to testify the State could have played for the jury a taped statement that Ms Goodson made to the officers when they spoke with her on the day of the assault. RP 447. If she had taken the stand and recanted her statements regarding the assault, the State could have introduced “the horrible parade of Mr. Goodson’s prior domestic violence convictions, charges, and her prior recantations” RP 447 - 448. The trial court took the matter under advisement (RP 449) and on October 18, 2016 filed its written decision. Memorandum Decision Re: New Trial, CP 81. Therein the court held there was no indication of misconduct by the prosecution or by the jury, rather it was misconduct by the defense.

Id. page 2. The court noted:

The conduct complained of was, if true, unprofessional and unethical. Unprofessional conduct on the part of defense counsel is not necessarily ineffective representation, however.

Id. The court went on to find that in this case, the defense efforts to prevent Nora Goodson from testifying were clearly a strategic decision. *Id.* page 3. The court announced that it “strongly

condemns the manner in which the result was procured” but could not find any indication of ineffective assistance. *Id.*

Having denied the motion for new trial, the matter proceeded to sentencing. The court gave the Appellant an exceptional sentence downward, choosing to disregard all of the Domestic Violence Court Order Violation convictions for scoring purposes and sentencing the Appellant seventeen months on the Assault in the Second Degree (with a finding of Domestic Violence) charge. RP 466. He then added ten months to that sentence for the Violation of Court Order counts, for a total of 27 months. *Id.* It should be noted that a standard range sentence based upon all of the charges would have been 63 - 84 Months. Judgment and Sentence, page 2 of 9, CP 97.

The defense attorney prepared the written Judgment and Sentence after the sentencing hearing and submitted the matter to the court for approval. RP467. The Appellant has filed a timely appeal. The State did not appeal the exceptional sentence.

II. ISSUES

- A. DID THE TRIAL COURT ERR IN RULING THAT DEFENSE HAD "OPENED THE DOOR" FOR THE ADMISSION OF THE VICTIM'S WRITTEN STATEMENT?
- B. DID THE PROSECUTOR COMMIT MISCONDUCT SUCH AS WOULD JUSTIFY REVERSAL?
- C. WAS DEFENSE COUNSEL INEFFECTIVE SUCH AS WOULD JUSTIFY REVERSAL?
- D. DID THE APPELLANT PRESERVE THE ISSUE OF A CHALLENGE TO LEGAL FINANCIAL OBLIGATIONS?

III. ARGUMENT

- A. THE TRIAL COURT'S RULING THAT DEFENSE HAD "OPENED THE DOOR" TO THE ADMISSION OF THE VICTIM'S WRITTEN STATEMENT WAS NOT AN ABUSE OF DISCRETION.
- B. THE PROSECUTION DID NOT COMMIT MISCONDUCT WHICH WOULD JUSTIFY REVERSAL.
- C. THE DEFENSE COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE PURSUANT TO THE LEGAL STANDARD.
- D. THE APPELLANT FAILED TO PRESERVE THE ISSUE OF A CHALLENGE TO LEGAL FINANCIAL OBLIGATIONS

DISCUSSION

A. THE TRIAL COURT'S RULING THAT DEFENSE HAD "OPENED THE DOOR" TO THE ADMISSION OF THE VICTIM'S WRITTEN STATEMENT WAS NOT AN ABUSE OF DISCRETION.

The Appellant first assigns error to the trial court ruling that the Defense "opened the door" to allow the State to offer into evidence a written statement by the victim, Nora Goodson. Pursuant to the facts of this case and the well-established law in this arena, it is clear that the trial court did not err.

As a preliminary matter it must be noted that when the State offered Nora Goodson's written statement into evidence, defense counsel did not raise an objection based upon "hearsay" or based on the "confrontation clause." Rather, he admitted that he had opened the door to its admissibility, but argued that the prosecution needed to lay the "foundation" for its admission. RP 264 - 265. In response the trial court ruled that the document was admissible as a self authenticating document: "It was asked about, testified to, it is a sworn document. It's going to come in." RP 265.

Having failed to object to the admission of the statement as "hearsay" or as a violation of the confrontation clause at trial, the Appellant should not be allowed to do so here:

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a "manifest error affecting a constitutional right."

State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). It is not sufficient to raise “some” objection to preserve the issue for appeal:

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.

State v. Guloy, 104 Wn.2d 412,422, 705P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). As is set forth below, there was no error in admitting the statement, let alone a “manifest error.” The Appellant waived the very objection that he tries to raise here on appeal for the first time.

Moving to the issue of the “open door” doctrine, the rationale underlying the admission of evidence through this provision (found in Evidence Rule 404(a)(1)) is basic fairness. State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002). A defendant should not be allowed to “paint[] a false picture” by introducing evidence that the State is then not allowed to rebut. Gallagher, 112 Wn. App. at 610. When this situation arises, the State may introduce evidence on that the subject only “to clarify a false impression.” State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009).

The trial court has discretion to admit evidence that otherwise might be inadmissible if it finds that the defense has

opened the door to the evidence. State v. Bennett, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985). The trial court judge is granted great discretion with regard to the admission of evidence and an appellate court must find for manifest abuse of that discretion to overturn the trial court's determination. State v. Luvane, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). A trial court can only be said to have abused its discretion when it can be demonstrated that the discretion has been exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The defense has utterly failed to make such a showing.

In the present case, the trial court found that the defense had opened the door. During direct examination of Jessica Ongstead, the victim's daughter, the prosecutor asked about the verbal statements that her mother, Nora Goodson had made to her. The defense objected on the basis of hearsay. The prosecutor laid the foundation for the exception to the hearsay rule and the statements were admitted as "excited utterances." Evidence Rule 803(a)(2). The prosecutor asked if Ms Ongstead had observed injuries on her mother that were consistent with the statement that she had been strangled. Ms Ongstead testified that she had. The prosecutor asked if Ms Ongstead had filled out a written statement at the time of the incident and she said that she had. Ms

Ongstead's written statement was produced, identified and admitted into evidence without objection. The prosecutor **at no point** made any inquiry as to any written statement that Nora Goodson had filled out.

The prosecutor then began to play a number of recorded calls from the Asotin County Jail. Ms Ongstead identified the two voices in the calls as the Appellant and her mother, the victim of the strangulation, Nora Goodson. These calls were the corpus of the thirteen counts of Violation of a Court Order. During these calls the Appellant could be heard telling Nora Goodson: "You at least have to go and talk to them and tell them that nothing happened." RP 122. Nora Goodson could be heard to talk about her statement, and telling the Appellant "let me rewrite what really happened." RP 180. She also talked about "rewriting" the statement to reflect "what really happened" and taking it to the Sheriff's Office. RP 182 - 183. She told the Appellant that she "brought my statement in yesterday . . ." RP 192. The prosecution did not draw any attention to these statements and never broached the subject of any written statement by Nora Goodson.

Then, on cross examination the defense counsel, after asking a few questions to set the stage, went straight to the subject of the written statements:

- Q. Ah, you identified a written statement that you wrote –
- A. Yes
- Q. - for the officers. Did your Mom write one too?
- A. Yes
- Q. Were you there when she wrote it?
- A. Yes
- Q. Did you help her write it?
- A. No, she went away with the police officer and wrote it.

RP 262. This was not a single random inquiry, but a pointed inquiry into the existence of a statement that Nora Goodson had written at the time of the incident. It is clear from the context and the setting of this inquiry (made undeniable by the later revelations in this case) that the defense was endeavoring to create a “false impression.”

The State had produced and introduced Ms Ongstead’s written statement, and it supported the prosecutions’ case. Defense had now made it clear that there was a second statement, filled out by the victim herself, written at the time of the incident, collected by the police, and the State was withholding it from the finder of fact. This is exactly the unfair situation that the “open door” rule seeks to correct. As for the Appellant’s complaint that Ms Goodson was an “unavailable witness” for the purposes of

confrontation, this argument is spurious and should be given no consideration. Having “opened the door” by creating the false impression that the State was withholding evidence, the defense did just that, and worse. When Nora Goodson arrived at the courthouse to testify, defense counsel, with full knowledge that she was the subject of a subpoena, the subject of a material witness warrant, and was absolutely “available” to testify and be cross examined about her statement, he convinced her to leave.

Under the “forfeiture by wrongdoing” doctrine a defendant who is responsible for a witness’ unavailability at trial forfeits their right to confront the missing witness. State v. Mason, 160 Wn.2d 910, 924, 162 P.3d 396 (2007). The application is not limited to the defendant personally, or to his direct actions. It also applies to the cases when “an intermediary” is used. Giles v. California, 554 U.S. 353, 359-61, 128 S. Ct. 2678, 2684, 171 L. Ed. 2d 488 (2008). In the present case the Appellant’s trial attorney directly caused the unavailability of Nora Goodson. The Court should not allow the Appellant to now complain that he was denied access to the witness that he sent away. As the Hernandez Court so aptly stated: “To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause.” State v. De Jesus Hernandez, 192 Wn. App. 673, 681-682, 368 P.3d 500, (2016).

Finally, violations of the “confrontation clause” are subject to “harmless error” analysis. The Appellant misstates this process. The harmless error analysis as applied to alleged violations of the confrontation clause was laid out in Chapman v. California, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under the appropriate analysis, any error is harmless if it can be said that “beyond a reasonable doubt that **the error complained of** did not contribute to the verdict obtained.” Chapman, 386 U.S. at 24 (*emphasis added*). Simply stated, the rule would require that the admission of this single, brief, written statement “alter[ed] the outcome of the State’s case” against the Appellant. State v. Wilcoxon, 185 Wn.2d 324, 336, 373 P.3d 224 (2016). In light of all of the other evidence admitted in this matter, this cannot be said to be true. Therefore, any error as to the admission of this statement was harmless beyond a reasonable doubt.

B. THE PROSECUTION DID NOT COMMIT MISCONDUCT WHICH WOULD JUSTIFY REVERSAL.

The Appellant asserts that “Multiple instances of prosecutorial misconduct denied [the Appellant] a fair trial.” Brief of Appellant, at page 19. He then goes on to list these, beginning with “presenting irrelevant and prejudicial evidence about the lethality of strangulation.” Evidence about strangulation was not irrelevant. It was the heart and soul of the lead count of the

Information. The Appellant was charged in Count 1 with Assault in the Second Degree (Domestic Violence), specifically “the Defendant assaulted Nora L. Goodson by strangulation or suffocation.” Information, page 1, *see also*: RCW 9A.36.021(1)(g). To satisfy the burden of proof as to this crucial element of the charge the prosecution called Detective Jackie Nichols to the stand.

The Appellant provides an impressive recitation of the testimony given at trial by Detective Nichols concerning strangulation in the domestic violence setting. What he does not do is provide any evidence, concrete argument, or any citation to any statute, case law, or rule to support the position that this testimony was in any way improper. He characterizes Detective Nichols’ testimony about the lethality of domestic violence assaults by strangulation as “opinion,” but this is not the case. In fact, the testimony that Detective Nichols provided about the lethality of strangulation, especially in the domestic violence setting, is the law:

The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. While not limited to acts of assault against an intimate partner, assault by strangulation is often knowingly inflicted upon an intimate partner with the intent to commit physical injury, or substantial or great bodily harm. Strangulation is one of the most lethal forms of domestic violence. The particular cruelty of this

offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW

Laws of Washington 2007, Chapter 79, §1. The Appellant cannot offer any legal, factual, or reasonable support for the claim that the prosecutor committed misconduct by allowing a witness to testify as to established, relevant facts which are recognized in the law.

Additionally, Detective Nichols was qualified as an expert witness prior to testifying. This expertise was even recognized by the defense. As such she was allowed, by rule, to offer her opinion. Evidence Rule 702. Under this rule "expert testimony is admissible ... where (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact." In re Det. of Pouncy, 144 Wn. App. 609, 624, 184 P.3d 651 (2008), *aff'd*, 168 Wn.2d 382, 229 P.3d 678 (2010). Expert testimony is helpful to the trier of fact "if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). Even if Detective Nichols' testimony about the lethality of strangulation in the domestic violence setting could be seen as "opinion evidence" it would still be admissible.

Finally, it must be noted that the defense never raised any objection to the admission of the evidence, as fact, law, or the opinion of a qualified expert. As such, the Appellant has waived his

right to assert prosecutorial misconduct herein. The only exception is possible if the Appellant can demonstrate the prosecutor's remarks were so "flagrant and ill intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied." State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). The Appellant cites to no legal precedent for his assertion that a prosecutor's admission of relevant, fact-based, legally recognized evidence constitutes any type of misconduct. This is because no such legal support exists. It has been noted:

if a party does not provide a citation to support an asserted proposition, courts may assume that counsel, after diligent search, has found no supporting authority.

State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017) (*citations omitted*). There was no misconduct in regards to the references regarding the lethality of strangulation in domestic violence cases, such as this case.

The next area where the Appellant asserts prosecutorial misconduct revolves around the usage of the common term "choke" and the more precise legal term "strangulation." Again, the Appellant fails to offer any evidence, logical basis, or legal support for his assertion that Detective Nichols' testimony regarding the meanings of these two terms is error. Confusion of these two terms

is a common mistake made in conversation and usage.⁵ In fact, Wikipedia, perhaps the leading online source for many people, makes a point of expressing this in its opening paragraph on the entry for “strangulation”: “Not to be confused with Choking.” As discussed above, expert testimony in this regard is exactly what ER 702 is all about. The testimony in this regard was fact-based and helpful to the jury. It was not error for the prosecutor to elicit the testimony, or to refer to that testimony.

The Appellant’s next claim of misconduct lies in the prosecutor’s single comment during closing argument:

But more important, look at the facts of this case and consider how lucky we are to be trying a case of, ah, assault in the second degree and not one of those one in seven people having been the victim of strangulation assault in a domestic violence setting end up casualties.

RP 398. This comment was expressly based upon the “facts of this case,” it was supported by admissible testimony of a qualified expert witness. This very information is reflected in the law, and it was relevant to case at bar. Defense counsel recognized the relevance and propriety of the statement and did not object at trial. By no stretch of the imagination could this comment be seen as

⁵ For example: “This guide aims to help reporters, copywriters, headline writers, and editors understand the distinction between choking – an accidental internal obstruction of the airway, and strangulation – a tactic of control and abuse.” Allison Turkell, “And Then He Choked Me”: Understanding, Investigating, and Prosecuting Strangulation Cases.” Family and Intimate Partner Violence Quarterly, Volume 2, No. 4 (Spring 2010) 339-344.

dispositive of the verdict herein, nor could it be characterized as “flagrant” or “ill intentioned.”

There was no misconduct by the prosecutor in this case. None of the complaints have a basis in the law. Not a single one of the complaints that the Appellant tries to raise now on appeal was preserved by proper objection at the trial court level. The Appellate Court should not entertain them here.

C. THE DEFENSE COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE PURSUANT TO THE LEGAL STANDARD.

The Appellant next turns to his trial counsel and asserts that “Multiple instances of ineffective assistance of counsel deprived [the Appellant] of his right to a fair trial.” Brief of Appellant, page 28. He recycles his argument that Detective Nichols’ fact-based, legally supported testimony concerning the lethality of strangulation in a domestic violence setting was improper. He asserts that there was “no possible tactical reason for the trial counsel not to object” to this testimony. The Appellant is wrong. The reason that trial counsel did not object is that the testimony was not objectionable.

The same can be said for the trial counsel’s failure to object to testimony clarifying that the common term “choke” is often misused in the place of the medically accurate, legally defined term “strangulation.” No error, no objection, no basis for ineffective

assistance. Similarly, the prosecutor's comment in closing was not improper, no objection was raised, not because counsel was ineffective, but because no basis for the objection could be found.

At last, well into his argument, the Appellant addresses the conduct of trial counsel in regards to Ms Goodson's absence. Without dispute, it is all too clear that the Appellant's trial counsel was unprofessional, unethical, committed misconduct, and more than likely committed the felony of witness tampering⁶ when he "implored" Nora Goodson to leave the courthouse and not testify. What is utterly lacking from this argument is any indication what-so-ever that this constitutes "ineffective assistance of counsel." The Appellant does not argue that his trial counsel's malfeasance was brought to the attention of the finder of fact prior to the conclusion of the trial. The jury was not informed of the defense counsel's misconduct. The judge, and even the prosecution did not learn of it until after the trial had been completed, as such it cannot be said to have reflected badly on the process. As for the assertion that counsel's actions deprived the Appellant of a fair trial, the Appellant raised this issue below, and the trial court concluded, as this Court now must find, that the defense counsel's behavior was many

⁶ A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding ... to ... absent himself or herself from such proceedings. RCW 9A.72.120

things: unethical, immoral, improper, unprofessional, reprehensible, even criminal, **but not** ineffective.

The Appellant also tries to argue that trial counsel was ineffective for failing to object to the testimony of the first officer to respond in this case. Officer Michael Rigney testified that he responded to a call of a female that:

had been involved in a domestic violence situation and that she had possibly been, ah, beat up and some type of, ah, attempted strangulation were in the call comments.

RP 78 - 79. Later testimony would confirm that the "caller" who provided this information was Jessica Ongstead, who would testify to making this call. RP 261. The defense counsel did not object to Officer Rigney's testimony because he knew that Ms Ongstead was the caller and the information would be admitted. Moreover it is very reasonable that the defense counsel was aware that the statement would be admissible because it was not offered for the truth of the matter, but rather to explain why the officer went to the home to contact the people involved. None of the officer's statements would be inadmissible hearsay and so could not, and did not, draw an objection.

In a last gasp effort, having failed to carry the burden on any specific claim of error, the Appellant cites to "cumulative error." To meet his burden in this regard, the Appellant would have to prove

that the “the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). It takes many, demonstrable, errors to meet this burden: “multiple trial errors and that the accumulated prejudice affected the outcome of the trial” is the required standard. *Id.* Where, as in the present case, an appellant has failed to establish any errors, “cumulative error” is of no avail: “Here, there is no showing that [the appellant] was denied a fair trial by cumulative error because there were no errors. State v. Haq, 166 Wn. App. 221, 282, 268 P.3d 997 (2012).

D. THE APPELLANT FAILED TO PRESERVE THE ISSUE OF A CHALLENGE TO LEGAL FINANCIAL OBLIGATIONS

The Appellant next complains that the sentencing court improperly imposed legal financial obligations. The Appellant relies upon RCW 10.01.160 and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and claims that the sentencing court failed to adequately consider his ability to pay before imposing non-mandatory legal financial obligations that the defense proposed. Because the Appellant failed to object to the imposition of any of the fines, fees, costs or other assessments imposed, he has, yet again, failed to properly preserve the issue. As was well stated in a very recent unpublished decision out of Division III:

Although sentenced after Blazina was decided, Ms. Cannon made no objection to the finding that she had the present or future ability to pay. She thereby failed to preserve a claim of error. RAP 2.5(a); Blazina, 182 Wn.2d at 833 ("*[u]npreserved LFO errors do not command review as a matter of right*"). "[A] defendant has the obligation to properly preserve a claim of error" and "appellate courts normally decline to review issues raised for the first time on appeal." *Id.* at 830, 834. The rationale for refusing to review an issue raised for the first time on appeal is well settled-issue preservation helps promote judicial economy by ensuring "that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (citing State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

State v. Cannon, No. 34981-1-III (*Unpub.*) (Div. III, 08/29/2017).⁷

Considering the availability and notoriety of the Blazina decision, it would be difficult to imagine that trial counsel would not have been aware of that decision.

It must further be noted that most of the financial obligations assessed against the Appellant are either mandatory, or may be imposed without regard to ability to pay. Moreover, it was the Appellant's own attorney that produced the Judgment and Sentence, not the State or the trial court. The costs that the

⁷ GR 14.1(a) governs the citation to unpublished opinions and states in pertinent part, "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

See also: Karanjah v. Dep't of Soc. & Health Servs., 199 Wn. App. 903, 912, 401 P.3d 381, (2017).

defense proposed, were accepted by the State and ratified by the sentencing court. At no point did the Appellant or his attorney raise any objection to the discretionary costs or claim he would not be able to pay them. At no time did the defense request further inquiry into the Appellant's ability to pay the costs he proposed.

Considering the availability and notoriety of the Blazina decision, the Appellant's failure to object to the discretionary cost which the Defense proposed, and the relatively small fraction of the total legal financial assessments at issue, this Court should exercise the discretion granted under RAP 2.5 and decline to review this unpreserved issue for the first time on appeal.

IV. CONCLUSION

The Appellant has not demonstrated any defect in the process afforded him which resulted in his conviction, such as would justify reversal. The Appellant was convicted because the evidence produced at trial was overwhelming. The testimony of the victim's daughter, the admissible statements made by the victim, the photographs of the strangulation marks on her neck, and the testimony of the responding officers provided compelling evidence of the assault. The jury heard for themselves the numerous violations of the Domestic Violence Protective Order.

The trial court did not abuse its discretion when it ruled that the defense had “opened the door” to the admission of the victim’s written statement. The defense objection on the basis of “foundation” was properly rejected and current claims of “hearsay” or “confrontation clause” were not properly preserved for appeal.

The prosecutor did not commit misconduct. The testimony elicited from the detective regarding the lethality of strangulation in domestic violence assaults was relevant, fact-based, and recognized by the law. Her testimony regarding the terms “choke” and “strangulation” was both appropriate helpful. It was not misconduct for the prosecutor to elicit this testimony or to cite to it during closing.

The Appellant’s trial counsel was not ineffective when he failed to object to the admission of admissible evidence. The defense attorney’s actions which prevented the victim, Nora Goodson, from testifying at trial were indisputably improper, to say the least, but they were not ineffective. By tampering with this witness the defense was able to keep a taped statement made by the victim on the morning of the assault out. He was able to keep the jury from hearing about the extensive history of domestic violence he has wreaked upon his wife over the years. The attorney’s malfeasance was not known to the finder of fact and could not have any effect on the perception of the process. The

desperation claim of “cumulative error” fails where no error has been demonstrated. The Appellant was convicted, not due to the asserted errors, but based upon the admissible evidence produced at trial.

The Appellant failed to preserve a challenge to the imposition of the fees and costs which the defense proposed. This Court should exercise its discretion and foreclose the argument here on appeal.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 30th day of October, 2017.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

ROBERT J. GOODSON,

Appellant.

Court of Appeals No: 34800-8-III

DECLARATION OF SERVICE

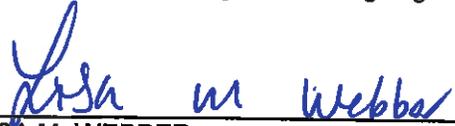
DECLARATION

On October 30, 2017 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

LISA E. TABBUT
LTABBUTLAW@GMAIL.COM

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on October 30, 2017.



LISA M. WEBBER
Office Manager

DECLARATION
OF SERVICE

ASOTIN COUNTY PROSECUTOR'S OFFICE

October 30, 2017 - 1:58 PM

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