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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL CARGILL, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Did the trial court err when it denied the defendant's *Knapstad* motion, finding the 2001 Yamaha motorcycle was a "vehicle" under RCW 9A.56.068, the possession of a stolen vehicle statute?

2. Did the State present sufficient evidence to support the defendant's conviction for possession of a stolen vehicle under RCW 9A.56.068?

3. Is the Yamaha motorcycle (dirt bike) a "vehicle" under RCW 9A.56.068?

4. Has the defendant established his trial counsel was ineffective by not objecting to an officer's testimony that the defendant was "deceptive" during an interrogation, where not objecting to that statement was a reasonable trial tactic, the testimony was used to explain the interrogation, and where the testimony provided an explanation why the defendant offered two different versions concerning his knowledge of the stolen motorcycle?

5. Whether this Court should decline to impose appellate costs if defendant is unsuccessful on appeal?

## **II. STATEMENT OF THE CASE**

Michael Cargill was charged with possession of a stolen motor vehicle, possession of a controlled substance – methamphetamine, and

making or possessing motor vehicle theft tools. CP 74-75. A jury convicted the defendant of all counts and this appeal timely followed.<sup>1</sup> CP 135-37

In November 2017, Joe Gering lived at 6016 South Freya in Spokane; he had a shop on the property and stored a Yamaha YZF 426 motorcycle (a dirt bike) for Shawn Pichette. RP 73, 76, 152.<sup>2</sup> The motorcycle required a key to operate. RP 79. The shop was burglarized and Gering's pickup and the Yamaha motorcycle were stolen. RP 72. Both the pickup and the motorcycle were recovered within a day or two of the burglary. RP 74.

When the motorcycle was returned to Mr. Pichette, all protective coverings had been stripped from the motorcycle and identifiable stickers had been painted over with grey paint. RP 80, 152, 227-29; Ex. 1, 2 (photos of paint and motorcycle). An officer described the paint job as "certain parts of the frame looked [as if they] had been hastily spray painted due to the missed areas and overspray on other parts that are typically not spray painted." RP 152. In addition, the vehicle identification number was scraped off. RP 228-29; Ex. 8, 9 (photos of VIN scraped off on motorcycle

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<sup>1</sup> The defendant does not assign error to the possession of a controlled substance or the making or possessing motor vehicle theft tools convictions.

<sup>2</sup> The transcript of proceedings reported by Rebecca Weeks, unless otherwise stated.

and overspray in that area). Neither Mr. Gering or Mr. Pichette gave the defendant permission to possess the motorcycle. RP 73, 78.

During the time when the vehicles were stolen, Tamzen Briethaupt managed the property at 1723 East Mission. RP 106. When she was at the property, she observed a dirt bike which she did not recognize. RP 107. She saw an unknown man, identified by her in court as the defendant, working on the motorcycle and attempting to start it by jumping up and down on the pedal with his foot.<sup>3</sup> RP 107-08. The defendant was not a tenant at the property and Ms. Briethaupt had not previously seen him at the property. RP 109-10.

Officers received information regarding the location of Mr. Gering's stolen pickup and responded to the 1723 East Mission address. RP 222-223. On November 7, 2017, Corporal Jeff McCollough contacted the defendant at the East Mission address. RP 82-83. The defendant was asked about the Yamaha motorcycle at the residence. RP 86. The defendant stated the motorcycle had been at the residence for three or four days, he had moved it from one location to another at the residence, and had attempted to start it several times. RP 86. During the conversation, the defendant requested that he be allowed to get his cell phone which was

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<sup>3</sup> This was the same day the defendant was arrested. RP 108-09.

strapped to the front of the motorcycle. RP 86, 228-29; Ex. 3, 4, 5, 6 (photos of cell phone strapped to motorcycle and photos of defendant on the screensaver of that cell phone). When the defendant was questioned at the scene,<sup>4</sup> he claimed an unidentified person brought the motorcycle to the property and the defendant then tried to start it. RP 230-31. He admitted that he did not know who owned the motorcycle and he was subsequently placed under arrest. RP 86, 110.

During a search incident to arrest at the jail, the defendant had a white bag between his fingers, which contained a white crystalline substance, and which was later tested and determined by a Washington State Patrol forensic scientist to be methamphetamine. RP 116-17, 140, 187. A purple plastic glove was removed from the defendant's pant pocket which appeared to have grey paint on it. RP 132-33, 155, 157. In addition, a set of keys were removed from the defendant and collected by an officer. RP 137. The keys had grinder or file marks consistent with what is known as a "shaved key." RP 144. A "shaved key" is a key "that someone has taken and either used a grinder or a file in order to level out or make [it] flatter ...

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<sup>4</sup> The court had previously conducted a CrR 3.5 hearing and determined the defendant's statements to law enforcement were admissible at the time of trial. RP 50-69; CP 78-80.

so that ... it [can be used] to manipulate an ignition or door lock in order to have it rotate the cylinders to either start a car or unlock a door.” RP 142.

### III. ARGUMENT

#### A. SUFFICIENT EVIDENCE EXISTED FROM WHICH A RATIONAL JURY COULD FIND THE DEFENDANT GUILTY OF POSSESSION OF A STOLEN VEHICLE – A 2001 YAMAHA MOTORCYCLE (DIRT BIKE).

The defendant asserts that the Yamaha motorcycle that he possessed was not a “motor vehicle” under RCW 9A.56.068, the possession of stolen vehicle statute, arguing the trial court erred when it denied his *Knapstad*<sup>5</sup> motion and there was insufficient evidence for the jury to convict him of that charge.

##### Standard of review (*Knapstad* motion).

The defendant brought a *Knapstad* motion requesting the court dismiss the possession of a stolen vehicle charge, asserting the Yamaha motorcycle was not a “motor vehicle” under RCW 9A.56.068. CP 5-10 (motion and brief); 2/1/18 Hicks RP 3-6, 8-9. The trial court denied the motion finding that the motorcycle was a “motor vehicle” for purposes of the possession of a stolen vehicle statute, RCW 9A.56.068. 2/1/18 Hicks RP 10-17.

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<sup>5</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

An appellate court reviews de novo a trial court's decision following a *Knapstad* motion under CrR 8.3(c).<sup>6</sup> *State v. Bauer*, 180 Wn.2d 929, 935, 329 P.3d 67 (2014). During review, the appellate court views the facts and all reasonable inferences in the light most favorable to the State. *State v. O'Meara*, 143 Wn. App. 638, 642, 180 P.3d 196 (2008). A trial court may dismiss a criminal charge if the State's pleadings and evidence fail to establish prima facie proof of all elements of the charged crime. *State v. Sullivan*, 143 Wn.2d 162, 171 n. 32, 19 P.3d 1012 (2001).

Standard of review (sufficiency of the evidence).

In reviewing a challenge to the sufficiency of the evidence at trial, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.*

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<sup>6</sup> CrR 8.3(c) states, in pertinent part: “The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.”

Notwithstanding, the standard of review of each claim is the same. *State v. Athan*, 160 Wn.2d 354, 378 n. 5, 158 P.3d 27 (2007). The defendant’s argument regarding the trial court’s denial of his *Knapstad* motion and that there was insufficient evidence to support the charge of possession of a stolen vehicle turns on whether there was sufficient evidence that the Yamaha motorcycle is a “vehicle” within the meaning of RCW 9A.56.068.

A reviewing court’s primary duty when interpreting any statute is to identify and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The court’s starting point must always be the statute’s plain language and ordinary meaning. *State v. James-Buhl*, 190 Wn.2d 470, 474, 415 P.3d 234 (2018). “Plain meaning is ‘discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *Id.* If the statute is ambiguous, the court applies “principles of statutory construction, legislative history, and relevant case law to assist [the court] in discerning legislative intent.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). Legislative definitions provided by the statute are controlling, but in the absence of a statutory definition, the court will give a term its plain

and ordinary meaning using a standard dictionary. *Sullivan*, 143 Wn.2d at 175.

A person is guilty of possessing a stolen vehicle if he or she possesses a stolen vehicle. RCW 9A.56.068; CP 124, 130. The State must prove that the defendant acted with knowledge that the motor vehicle had been stolen. *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016). A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact exists. RCW 9A.08.010(1)(b). Both circumstantial evidence and direct evidence are equally reliable to establish knowledge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.” *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946). RCW 9A.56.140(1) defines what it means to “possess” stolen property:

“Possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

In *State v. Barnes*, 189 Wn.2d 492, 496, 403 P.3d 72, 74 (2017), the Supreme Court decided whether a riding lawn mower is a “motor vehicle” under RCW 9A.56.065, the theft of a motor vehicle statute. The Court found

that RCW 9A.56.065 does not explicitly define “motor vehicle.” The Court declined to use the term “vehicle” as defined in RCW 9A.04.110(29), or use the definition of “motor vehicle” under RCW 46.04.320 and RCW 46.04.670. Finding that the legislature chose not to define “motor vehicle” in the theft statutes and because the term “motor vehicle” is undefined, the Court determined its plain and ordinary meaning using a standard dictionary. 189 Wn.2d at 496. Finding that the legislature did not intend to combat rising lawn mower thefts with the theft of a motor vehicle statute and that a riding lawn mower could not be reasonably used to commit robbery or the like, the Court declined to find that a riding lawn mower is a “motor vehicle” under RCW 9A.56.065.

Resorting to either the legislature’s definition of “motor vehicle” in the traffic laws or to a dictionary, the Yamaha motorcycle is a “motor vehicle” under RCW 9A.56.068. The primary purpose of a lawn mower is to cut grass. The primary purpose of a motorcycle is to transport people as discussed below.

RCW 9A.04.110(26) provides that a vehicle is “a ‘motor vehicle’ as defined in the vehicle and traffic laws, ... equipped for propulsion by

mechanical means.”<sup>7</sup> Under the traffic laws, RCW 46.04.320 defines “motor vehicle”:

“Motor vehicle” means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.... An electric personal assistive mobility device is not considered a motor vehicle. A power wheelchair is not considered a motor vehicle. A golf cart is not considered a motor vehicle, except for the purposes of chapter 46.61 RCW.

“Vehicle” is further defined in RCW 46.04.670 to include “every device capable of being moved upon a public highway ... excepting devices moved by human or animal power.” Neither statute contains an exclusion for “dirt bike” or “motorcycle.”

The legislature has determined that motorcycles are motor vehicles under the traffic laws. RCW 46.04.330; *see State v. McGary*, 37 Wn. App. 856, 683 P.2d 1125, *review denied*, 102 Wn.2d 1024 (1984). “‘Motorcycle’ means a motor vehicle designed to travel on not more than three wheels..., on which the driver... [r]ides on a seat or saddle and the motor vehicle is designed to be steered with a handlebar.” RCW 46.04.330.

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<sup>7</sup> Corpus Juris Secundum (CJS) defines the term “motor vehicle” as “a vehicle which is self-propelled, a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials and generally includes all vehicles propelled by any power other than muscular power except traction engines and such motor vehicles as run only upon rails or tracks.” 60 C.J.S. Motor Vehicles § 1. Furthermore, the term “‘motor vehicle’ generally includes a motorcycle, dirt bike, or pocket bike.” 60 C.J.S. Motor Vehicles § 2 (citations omitted).

Similarly, WAC 352-32-010 defines a motorcycle as “every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a farm tractor and moped.”

These broad definitions encompass many variations of what can be considered a “motorcycle.” The Yamaha motorcycle, with a seat and steered by a handlebar, is self-propelled, not operated on rails, does not fall within any exclusion under the statutes and it is *capable* of being moved onto a public highway. The Yamaha motorcycle is a “vehicle” as defined by the legislature, found by the *McGary* court, and is within the confines of RCW 9A.56.068.

Likewise, a dictionary defines “vehicle” as “a means of carrying or transporting something.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1386 (11<sup>th</sup> Ed. 2003). “Motor vehicle” is defined as “an automotive vehicle not operated on rails; esp: one with rubber tires for use on highways.” *Id.* at 811. A “motorcycle” is defined as “a 2-wheeled automotive vehicle for one or two people.” *Id.* at 811. Similarly, “dirt bike” is defined as a “lightweight motorcycle designed for operation on unpaved surfaces.” *Id.* at 354.

An “off-road motorcycle” means a motorcycle, as defined in RCW 46.04.363, “labeled by the manufacturer’s statement or certificate of origin as intended for ‘off-road use only’ or a similar message stamped into

the frame of the motorcycle, contained in the owner's manual, or affixed to any part of the motorcycle." In this case, there was *no* evidence produced at the *Knapstad* motion or at trial that the Yamaha motorcycle had this information affixed to its frame or that it was contained in the owner's manual for that motorcycle. Furthermore, there was no evidence presented at the time of motion or at the time of trial as to the specific use of the motorcycle, other than it was referred to as a "dirt bike."

The fact that the Yamaha motorcycle may or may not be "street legal"<sup>8</sup> does not bear on whether it is a motor vehicle, and the defendant has not established otherwise, either by reference to the record or to caselaw. Notwithstanding, the motorcycle could be driven onto a public highway. To accept the defendant's argument, a car or pickup that is not "street legal," such as a vehicle with no working headlights or tail lights, a modified loud muffler, inadequate braking system, and the like, would not be considered a "motor vehicle" because such a vehicle is not "street legal." Such reasoning would lead to an absurd result in the interpretation of RCW 9A.56.068. *See J.P.*, 149 Wn.2d at 450 ("a reading [of a statute] that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results"). Viewed in the light most

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<sup>8</sup> The owner of an "off-road" motorcycle can apply for "on-road" use. *See* RCW 46.16A.425, 46.16A.435, 46.04.363.

favorable to the State, sufficient evidence supports the conclusion that the Yamaha motorcycle was a “motor vehicle.”

**B. DEFENSE COUNSEL’S LACK OF OBJECTION TO THE OFFICER’S TESTIMONY THAT THE DEFENDANT APPEARED “DECEPTIVE” DURING QUESTIONING AT THE SCENE WAS TACTICAL AND THE OFFICER’S TESTIMONY WAS PERMISSIBLE TO EXPLAIN THE REASON FOR THE DEFENDANT’S DIFFERENT VERSIONS REGARDING THE STOLEN MOTORCYCLE.**

The defendant asserts his trial counsel was ineffective for failing to object to Sgt. Vigesaa’s testimony that the defendant appeared deceptive at the scene regarding the defendant’s knowledge of the stolen motorcycle.

Standard of review

Ineffective assistance of counsel claims are reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance claim, a defendant must show that defense counsel’s performance was deficient and this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A defendant must make both showings of deficient performance and prejudice to prevail on an ineffective assistance claim. *Thomas*, 109 Wn.2d at 226. To avoid the biases of hindsight, an appellate court’s review of counsel’s performance is highly deferential, the court strongly presumes

reasonableness, *Matter of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017), and there is a strong presumption that defense counsel’s conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To overcome this presumption, a defendant must show the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *Id.* To establish prejudice, the defendant must show that there is a reasonable probability that the trial’s outcome would have differed absent counsel’s deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

1. Tactical decision.

Decisions on whether and when to object are “classic example[s] of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (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.*; *see also State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). It is a legitimate trial tactic to forego an objection in circumstances where counsel wishes to avoid highlighting certain evidence. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Accordingly, an appellate court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the burden is on the defendant to rebut this presumption. *Johnston*, 143 Wn. App. at 20.

Where a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object to evidence, a defendant must show: (1) his lawyer's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel had made it, and (3) the result of the trial would have differed if the trial court excluded the evidence. *State v. West*, 185 Wn. App. 625, 641, 344 P.3d 1233 (2015).

In the present case, the defendant was questioned by Sergeant Kurt Vigesaa at the scene regarding the stolen motorcycle. Initially, the defendant claimed an unidentified person brought the motorcycle to the property and the defendant then tried to start it. The following exchange occurred at trial:

[DEPUTY PROSECUTOR]: Do you recall Mr. Cargill's, you know, I guess his actions with respect to during the course of the information? Was he making eye contact with you?

[SGT. VIGESAA]: During that initial contact and questioning, I felt he was being deceptive based on no eye contact, long thought process on questions that I would ask him without immediate answers, like he was processing the questions and wanted to tell me what he wanted to tell me instead of answering the actual question I was asking him.

[DEPUTY PROSECUTOR]: Mr. Cargill stated the bike was just brought there, but he didn't know who transported it there, correct?

[SGT. VIGESAA]: Correct.

[DEPUTY PROSECUTOR]: Did you ask him any more questions after that?

[SGT. VIGESAA]: I made note to him and advised him that I didn't believe he was being honest with me. Eventually he began talking to me, opened up, eye contact, and had a cordial conversation. And the conversation evolved around the motorcycle and he did at that point confess that his brother, a subject by the name of Native, brought the motorcycle there.

[DEPUTY PROSECUTOR]: Okay. Did Mr. Cargill, did he make any other statements regarding the motorcycle and how his brother and Native came to acquire it?

[SGT. VIGESAA]: So I had him elaborate with more questions and he advised that Native and his brother, Josh, broke into the shop and stole the motorcycle and the truck, the tools, et cetera. Mr. Cargill initially just didn't really want to tell me that, he said, because he didn't want to tell on his brother, rat out his brother.

[DEPUTY PROSECUTOR]: Did you ask him any other questions?

[SGT. VIGESAA]: Just confirmed that he knew it was stolen and he advised that he did know it was stolen because his brother and Native stole the motorcycle.

RP 231-32.

During cross-examination, the defendant admitted he was purposefully deceptive with Sgt. Vigessaa:

[Defense Attorney]: And [Sgt. Vigessa] talked to you about the motorcycle. Were you aware that the motorcycle was stolen?

[Defendant]: Not until he told me.

[Defense Attorney]: Okay. And you talked -- they talked to you about stolen property?

[Defendant]: Yeah.

[Defense Attorney]: What did you talk about? What did you tell him about that?

[Defendant]: Well, I knew about stolen property. I heard my brother broke into a garage with that Native dude and they were trying to sell stolen property.

[Defense Attorney]: Let me stop you there. Now, you heard testimony from Sergeant Vigesaa about you being deceptive with him about the stolen property. Were you being deceptive about the stolen property?

[Defendant]: Yeah.

[Defense Attorney]: Why?

[Defendant]: Because my brother did it and I'm not trying to tell on anybody.

[Defense Attorney]: All right. When you say your brother did it, what did you believe your brother did?

[Defendant]: Broke into a garage.

[Defense Attorney]: And stole what?

[Defendant]: Tools.

[Defense Attorney]: Do you believe that he -- at that time, did you believe he stole anything else?

[Defendant]: No.

RP 273-74.

During closing argument, defense counsel emphasized the reason the defendant was not initially honest with Sgt. Vigessa, again attempting to bolster the defendant's later version that his brother stole the motorcycle:

He didn't want to turn his brother in or get his friend in trouble, so he initially was not honest about the tools that were there. And he didn't know anything about whether the motorcycle was stolen or not, so he told the officer he didn't know it was stolen, because he didn't know it was stolen, but he didn't go into any more details about it. He thought it was Keith's bike.

RP 311.

The questions and argument by defense counsel demonstrate a legitimate tactic and trial strategy for not objecting to Sgt. Vigessa's testimony. It is apparent the defendant made that admission to bolster his later story to Sgt. Vigessa at the scene and trial testimony that he did not know the motorcycle was stolen blaming his initial statements to the officer on family loyalty. It is clear he made the admission on the stand to reinforce his story that he felt beholden to his brother and did not want to "snitch" on his brother to the officer at the scene as the person who "actually" stole the property – in effect, he was trying to protect his brother and provide legitimacy to his later version blaming the theft of the motorcycle on his brother.

In addition, defense counsel did not object because she attempted to use the defendant's initial untruthfulness (he was only trying to protect his

brother) during closing argument to provide a plausible explanation and to give legitimacy to the defendant's later, changed story blaming the theft and possession of the motorcycle on his brother. The defendant has not rebutted the presumption that the lack of objection was tactical. Furthermore, the defendant has not discussed nor established how the brief comments of the officer impacted the jury's verdict.

Lastly, the defendant has not established the jury was improperly influenced or prejudiced by Sgt. Vigessa's statements, in that the officer's statements impacted the jury's verdict. In that regard, it is important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. *State v. Montgomery*, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008). Absent evidence that the jury was unfairly influenced, a reviewing court presumes that the jury followed the court's instructions. *Id.* at 596. Here, the jury was properly instructed that it was the sole judge of witness credibility and was not bound by witness opinions or the lawyer's statements. CP 110-11. The officer's unobjected-to statement does not establish sufficient prejudice to merit reversal. The defendant fails to establish ineffective assistance of counsel.

2. In the alternative, the officer's testimony was permissible.

Police officers are generally not permitted to testify about a defendant's veracity. *Matter of Lui*, 188 Wn.2d at 555. In *State v. Demery*,

144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion), our high court addressed the admissibility of portions of a videotaped interrogation where the officers suggested that the defendant was lying. For example, one of the officers in that case told the defendant: “[R]ight now nobody’s gonna believe your story. Now you need to start tellin’ the truth.” When the defendant said the officer was “talkin’ to me like I’m lying,” the officer replied, “Cause you are.” *Id.* at 771 n.1.

Demery claimed that when these statements were played at trial, they amounted to improper opinion evidence. The *Demery* court reaffirmed the rule that: no witness may offer opinion testimony regarding the guilt or veracity of the defendant; “such testimony is unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury].” *Id.* at 759 (alterations in original) (internal quotations omitted). However, an officer may repeat statements made during an interrogation accusing a defendant of “lying” if such testimony provides context for the interrogation. *Matter of Lui*, 188 Wn.2d at 555; *Demery*, 144 Wn.2d at 763-64.

Applying the above rule, in *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011), Division One held that the trial court properly allowed two detectives to testify at trial that they told Notaro during an interrogation that his story was not credible. *Id.* The trial court properly admitted this

evidence, the appellate court concluded, because the detectives' trial testimony, taken in context, "described the police interrogation strategy and helped explain to the jury why Notaro changed some parts of his story—but not others—halfway through the interview." *Id.* at 669.

Here, the officer simply relayed the course of his questioning of and answers given by the defendant, when confronting the defendant regarding his initial statements to the officer and why the defendant later changed his story during the same interview. This type of interrogation and later testimony is in line with what was found acceptable by the courts in *Liu*, *Demery*, and *Notaro*. There was no error.

**C. IF THE DEFENDANT REMAINS INDIGENT, THE STATE REQUESTS THIS COURT DEFER TO ITS COMMISSIONER OR CLERK FOR A DETERMINATION OF WHETHER APPELLATE COSTS SHOULD BE IMPOSED.**

The defendant requests that this Court deny the State appellate costs to the State in the event the State substantially prevails on appeal. Should the defendant not prevail on appeal, it is within the sound discretion of this Court to determine whether he has some future ability to pay toward any appellate costs.

At the time of sentencing, the defendant was 31 years old. CP 207; RP 207. Defendant's trial counsel advised the court that the defendant had

worked as a manager at a Wendy's restaurant. RP 350. The defendant was sentenced to a determinate sentence of 50 months. CP 213.

RAP 14.2 allows the clerk of the appellate court to award court costs to the prevailing party on review unless an adult offender lacks the likely current or future ability to pay such costs. An adult offender is presumed indigent if the trial court has entered an order of indigency for appeal purposes.

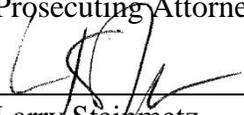
Here, the trial court determined the defendant to be indigent for purposes of his appeal on June 11, 2018, based on a declaration provided by the defendant. CP 205-06. The State is unaware of any change in the defendant's circumstances. Should the defendant's appeal be unsuccessful, this Court should only impose appellate costs in conformity with RAP 14.2 as amended.

#### **IV. CONCLUSION**

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 21 day of February, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CARGILL,

Appellant.

NO. 36140-3-III

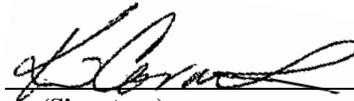
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I certify under penalty of perjury under the laws of the State of Washington, that on February 21, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

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**Superior Court Case Number:** 17-1-04506-4

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