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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM VERN GADBERRY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Mr. Gadberry's conviction for second-degree assault was entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.

2. Deputy Johnston provided testimony that invaded the province of the jury and infringed Mr. Gadberry's right to an independent jury determination of the facts.

3. Deputy Johnston's testimony included a nearly explicit opinion on Mr. Gadberry's guilt.

4. Mr. Gadberry was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

5. Defense counsel provided ineffective assistance by failing to object to inadmissible testimony that prejudiced Mr. Gadberry.

6. Defense counsel should have objected to Deputy Johnston's impermissible opinion on Mr. Gadberry's guilt, Learn's prejudicial testimony regarding prior assaults, and Detective Rickett's inadmissible profile testimony linking Mr. Gadberry to the worst domestic violence perpetrators.

II. ISSUES PRESENTED

1. Did Deputy Johnston provide an improper opinion on guilt where he did not testify concerning Mr. Gadberry's guilt or the credibility of Mr. Gadberry or any witness, his testimony was based on the evidence and his training and experience. If so, was any alleged error harmless?

2. Was Mr. Gadberry denied effective assistance of counsel where the evidence he now challenges was not objectionable, the decision whether to object was a classic example of trial tactics, and he did not suffer any prejudice from the decision not to object?

III. STATEMENT OF THE CASE

Quinn Learn was a live-in caregiver to Jeanne Gadberry in Spokane Valley, Washington. RP[1] 118. Ms. Learn lived in the basement of the home, a living space that she shared with William Gadberry and his brother Stephen. RP 118-19.

Because of medical complications, some of Ms. Gadberry's other children came to town, took her to the hospital, and served eviction notices on the people living in the home, including Ms. Learn and Mr. Gadberry. RP 120-21. All parties needed to vacate by June 30, 2018. RP 121.

On June 17, 2018, Ms. Learn was in the basement living room when Mr. Gadberry confronted her. RP 122. Ms. Learn described him as acting angry, and she began to leave the room in order to enter her bedroom and lock the door. RP 122-23. As she reached her door, Mr. Gadberry attacked her, jumped on her, and started screaming. RP 124. Mr. Gadberry accused Ms. Learn of stealing items from Ms. Gadberry while she was in the process of moving out. RP 125. Mr. Gadberry knocked Ms. Learn to the floor; she was on her back with her head underneath her bed while Mr. Gadberry

[1] Only reference to the verbatim report of proceedings transcribed by court reporter Terri Cochran, consisting of two volumes for September 17 and 18, 2018, and are simply referred to as "RP."

straddled her and began to squeeze her neck very hard with his hands. RP 124-25.

As Mr. Gadberry applied pressure to Ms. Learn's neck, she could not breathe and began "fearing for her life." RP 125. At this point, Mr. Gadberry said, "I ought to kill you." RP 126. Ms. Learn felt the pressure of blood rushing to her head and began to scratch at Mr. Gadberry's face and eyes to get him off of her. RP 126. Several of her artificial fingernails popped off during her struggle to free herself. RP 126-27.

Mr. Gadberry grabbed one of Ms. Learn's belts, wrapped it around her neck, and then looped the belt through the buckle to begin tightening it. RP 127-28. Ms. Learn was able to get some of her fingers in between her neck and the belt so that he could not tighten it fully. RP 128. Ms. Learn was unable to breathe. RP 129.

Mr. Gadberry's brother called law enforcement, and Mr. Gadberry stopped strangling Ms. Learn. RP 128-29. During the 911 call, Mr. Gadberry is heard to be telling his brother, "you better not be calling the police." RP 208. He then dragged Ms. Learn across the floor with the belt still wrapped around her neck to show her some of the items he believed she had taken. RP 129-30. He next took her upstairs, and she convinced him to remove the belt so that any bystanders would not call the police.

RP 130. Thereafter, Deputy Tom Walker and Deputy Christopher Johnston arrived. RP 130.

Both deputies noticed bruising on Ms. Learns, and a small scratch on Mr. Gadberry's face. RP 106-08. Deputy Walker handcuffed Mr. Gadberry to get him to calm down because he was argumentative and confrontational. RP 93.

The next day, Detective Mike Ricketts contacted the parties to conduct a follow up investigation.[2] RP 165-66. Detective Ricketts was assigned to the domestic violence unit and had specialized and advanced training on domestic violence incidents and strangulation in particular. RP 164. Detective Ricketts noticed and photographed Ms. Learn's extensive injuries. RP 166-67; *see* Ex. 1-17. Some of the bruising was consistent with manual strangulation, and some consistent with the use of a ligature – an item other than the hands applied around the neck to strangle a person. RP 167-70. Several of the photographs showed that Mr. Gadberry had strangled Ms. Learn so forcefully with the belt that it left the imprint of its unique belt hole pattern on her neck. RP 173; Ex. 1, 16-17.

[2] Mr. Gadberry was released without being booked because the jail had been placed on lockdown the day of the incident. RP 165.

The State charged Mr. Gadberry with attempted second-degree murder, second-degree assault by strangulation, and harassment. CP 1. During pretrial motions, the State successfully moved in limine to exclude evidence of Ms. Learn's unrelated, but at that time pending, charge of second-degree assault. CP 3-4; RP 21. During discussion of this issue, counsel for Mr. Gadberry outlined his defense: that Ms. Learn was "assaulting Mr. Gadberry" and he acted in self-defense, and that she "had been physical with him prior to this event" by hitting him. RP 17.

Defense counsel elicited testimony from Deputy Walker that both Ms. Learn and Mr. Gadberry were yelling at each other and angry. RP 98. On re-direct, the State elicited testimony that Deputy Walker was trained and, as part of his duties, was expected to identify the aggressor in domestic violence situations. RP 102. Deputy Johnston also testified to this training. RP 112. He explained:

> Due to the nature of domestic violence calls, very frequently we have to make a determination using the facts, using what's presented to us, because the people that we contact don't always tell us what it is that we need to know. So because of the laws that govern the way we do our job and to protect people, we sometimes have to make those determinations based on training and experience.
>
> I have responded to countless domestic violence calls, I would say hundreds, if not thousands, that involve physical altercations. And Washington law instructs us to make an in-custody arrest if we believe that – upon arrival

> that – that – that there was a physical altercation in a domestic violence situation.

RP 112-13. Deputy Johnston further testified that part of his analysis included that the scratch on Mr. Gadberry's face appeared consistent with a defensive wound, which are frequently scratches to the face, neck or upper body as a person "struggles" to flee. RP 113.

When defense counsel cross-examined Ms. Learn at trial, she responded to one of his questions that this was not the first time he had assaulted her. RP 139. Defense counsel also tried to elicit testimony that she had originally told arresting officers that they had been in mutual combat. RP 136. Counsel asked for permission to go outside the scope of direct. RP 143-44. The State did not object and the court permitted him to do so. RP 144-145. Counsel questioned her further about prior fighting:

> [Counsel:] You and – isn't it true that you and Mr. Gadberry had a history of arguing with each other?
>
> [Ms. Learn:] Mr. Gadberry has a history of arguing with everybody. Um, he has a short temper, a short fuse. He's hit me a couple times. He's grabbed me around the neck once. He's hit me another time. I told him if he hit me again I was going to call the police.
>
> [Counsel:] Isn't it true that you hit him on several occasions before that?
>
> [Ms. Learn:] I've never hit him.

RP 144-45. Ms. Learn also testified that she attempted to inflict defensive wounds on or near Mr. Gadberry's eyes in accordance with self-defense

training. RP 145. A few moments later when asking Ms. Learn about Mr. Gadberry's mother, Mr. Gadberry successfully objected to an answer as non-responsive.[3] RP 146-47.

Detective Ricketts testified that, consistent with his training injuries, to this degree were consistent with the "more serious strangulations." RP 174. Detective Ricketts further explained that – according to his specialized training – strangulations in domestic violence incidents "indicate a higher level of lethality," and that he had investigated several homicides involving strangulation. RP 177. He testified that manual strangulation could render unconscious or kill a person quickly and using a ligature could do so easily. RP 179. He testified that the injuries, petechial symptom level, bruising level and bruising pattern were consistent with a "deep strangulation." RP 181.

At the conclusion of Mr. Gadberry's case-in-chief and outside the presence of the jury, the court questioned the propriety of instructing the

[3] When counsel asked Ms. Learn whether Ms. Gadberry exhibited symptoms of dementia, Ms. Learn answered no and then began to opine that Ms. Gadberry felt uncomfortable about the riff-raff that her sons were friends with.

jury on self-defense. RP 214. The court noted that Mr. Gadberry denied the allegations and did not testify he *acted* in self-defense:

> Mr. Gadberry denies he ever put his hands on her neck, and he denies that he put the belt around her head. So is there enough for self-defense? He was saying that he was trying to defend himself by closing his eyes and covering his face, but he doesn't ever say that he applied any pressure to her neck with anything.
>
> …
>
> He didn't admit to using any force.

RP 215-16. After a lengthy discussion on the issue, the State cautiously agreed with Mr. Gadberry that the court should instruct the jury on self-defense, despite the lack of support from Mr. Gadberry's testimony. RP 220.

The jury returned a verdict of guilty for the charge of second-degree assault, and verdicts of not guilty on the remaining charges. CP 45-49. The court sentenced Mr. Gadberry to 15 months confinement. CP 55. He timely appeals. CP 66.

IV. ARGUMENT

A. DEPUTY JOHNSTON'S TESTIMONY WAS PROPER

Mr. Gadberry's first claim is that Deputy Johnston offered an improper opinion on guilt in violation of his right to a jury trial. This alleged error was not preserved and is not manifest, so this Court should decline to

hear it. In addition, the testimony offered by Deputy Johnston was not an improper opinion on guilt and, if error, was harmless.

1. Preservation and reviewability.

Mr. Gadberry did not object to any of the purportedly improper opinion testimony at trial. A claim of improper opinion testimony may be raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). "Manifest error" requires a showing of actual prejudice to the defendant's constitutional rights at trial. *Id*. Such prejudice can only be shown with regard to opinion testimony when the statement was an "'explicit or almost explicit'" opinion on the defendant's guilt or the victim's veracity. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (quoting *Kirkman*, 159 Wn.2d at 936). "In general, testimony deemed to be an opinion as to a defendant's guilt must relate directly to the defendant." *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), *as corrected* (Aug. 17, 1992). Improper opinion testimony on guilt "does not establish actual prejudice" where the defense did not object and the court instructed the jury they are the sole judges of the credibility of witnesses. *State v. Montgomery*, 163 Wn.2d 577, 594-96, 183 P.3d 267 (2008).

Analogously, an expert who testifies that a victim's examination results are consistent with sexual assault, without opining that the defendant committed the assault, does not offer an explicit or almost explicit comment on the defendant's guilt. *See State v. Borsheim*, 140 Wn. App. 357, 375, 165 P.3d 417 (2007).

Here, Deputy Johnston never offered an opinion as to Mr. Gadberry's guilt, opined on his credibility, or opined he believed Ms. Learn. He testified that the wounds he observed on Mr. Gadberry when he arrived on scene were consistent with defensive wounds. He did not testify that no other possibility for Mr. Gadberry having the wounds existed. Like *Borsheim*, Deputy Johnston testified about his initial examination of Mr. Gadberry. Deputy Johnston never made an explicit or almost explicit comment about the guilt or credibility of any witness or party. The jury was instructed that it is the sole judge of credibility. CP 16-17. Mr. Gadberry never objected to the testimony. *See* RP 111-15. This alleged error is not manifest, and this Court should decline to review it.

2. <u>The challenged testimony was not improper.</u>

The Sixth Amendment to the United States Constitution and article I, section 21, of the Washington Constitution guarantee the right to a jury trial. *State v. Elmore*, 154 Wn. App. 885, 897, 228 P.3d 760 (2010). The right to a jury trial includes the right to have the jury make an

independent determination of the facts. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). "Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *Kirkman*, 159 Wn.2d at 927. To determine if a witness's testimony constitutes improper opinion testimony, this Court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. *State v. Stark*, 183 Wn. App. 893, 904, 334 P.3d 1196, 1202 (2014). When a police officer opines impermissibly, it "raises additional concerns because 'an officer's testimony often carries a special aura of reliability.'" *State v. Rafay*, 168 Wn. App. 734, 806, 285 P.3d 83 (2012) (quoting *Kirkman*, 159 Wn.2d at 928).

Testimony based on inferences from the evidence does not constitute impermissible opinion testimony when the witness "does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury." *Rafay*, 168 Wn. App. at 806. "The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). This Court reviews a decision to admit opinion

testimony for abuse of discretion. *Id*. "'[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.'" *Id*. (alteration in original) (quoting *State v. Wilber*, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989)).

The challenged testimony is not improper for many of the same reasons it is not reviewable. The witness did not state he believed Ms. Learn or disbelieved Mr. Gadberry. He testified that his observation was consistent with defensive wounds, based upon his training and experience. Ms. Learn also testified that she scratched at Mr. Gadberry's face and eyes with enough force that some of her artificial nails popped off. The nature of the wounds Mr. Gadberry sustained was helpful to the jury. Deputy Johnston's testimony is a classic example of an inference based on the evidence that does not constitute an improper opinion on guilt or credibility.

3. Harmless error.

An error of constitutional magnitude is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.3d 906 (2001), *as amended on denial of reh'g* (Dec. 13, 2001). A constitutional error is harmless only when the untainted evidence provides an overwhelming conclusion of guilt. *Id*.

Assuming Deputy Johnston never testified that Mr. Gadberry's wounds appeared to be inflicted defensively, the untainted evidence provides an overwhelming conclusion of guilt. Ms. Learn testified that Mr. Gadberry followed her to the threshold of her bedroom and attacked her, strangled her manually, and then used a ligature to further the assault. As Ms. Learn struggled to get free, she attempted to scratch him in the eyes and face and her fingernails popped off. Photographs of her bedroom were consistent with this story.

In addition, law enforcement observed and photographed extensive injuries to Ms. Learn, including the impression of the belt on her skin. These photographs were admitted and published to the jury. Mr. Gadberry's small wound near his eye socket was also consistent with Ms. Learn's testimony that she attempted to free herself from his assault by going for his eyes.

Mr. Gadberry asserted both that he was acting in self-defense and that he did not take any action against Ms. Learn, giving the jury reason to doubt his credibility. He was heard on the 911 call, exasperated and asking his brother why he called law enforcement. He also admitted on cross-examination that even though he claimed Ms. Learn attacked him, he did not want to involve the police because he was a "grown man" who could handle "his business." RP 208. In light of this conflicting story, the jury

was free to disbelieve his version of events. In sum, the evidence overwhelming pointed to guilt even without Deputy Johnston's one statement, meaning any alleged error was harmless beyond a reasonable doubt.

B. TRIAL COUNSEL WAS EFFECTIVE

Mr. Gadberry claims his trial counsel was ineffective for failing to object to: (1) Deputy Johnston's testimony concerning defensive wounds; (2) Ms. Learn's testimony about prior fighting; and (3) Detective Rickett's testimony that strangulation is highly lethal. All of this testimony was admissible, and counsel had legitimate strategic reasons not to object or seek limiting instructions. Consequently, Mr. Gadberry has not overcome the strong presumption that his counsel was effective.

1. Standard of review and applicable law.

To meaningfully protect the right to counsel, an accused is entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant, i.e., there is a reasonable probability the attorney's conduct affected the case's outcome. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). If a defendant fails to establish one prong of the test,

this Court need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). This is a mixed question of law and fact, reviewed de novo. *Strickland*, 466 U.S. at 698.

To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Id*. Prejudice exists if there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To prove prejudice, the defendant must show more than a "conceivable effect on the outcome" to prevail. *Strickland*, 466 U.S. at 693.

The burden is on the defendant to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Appellate courts strongly presume trial counsel was effective. *Id*. When this Court can characterize counsel's actions as legitimate trial tactics or strategy, it will not find ineffective assistance. *Id*. A decision not to object to evidence is a classic example of trial tactics; only in egregious circumstances will it constitute deficient performance. *State v. Madison*, 53 Wn. App. 754, 763,

770 P.2d 662 (1989). Courts also presume that the decision not to seek a limiting instruction is a legitimate trial tactic to avoid highlighting unfavorable evidence to a jury. *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014). What a claim can be disposed of on one ground, this Court need not consider both. *Strickland*, 466 U.S. at 697.

2. Deputy Johnston's testimony: defensive wounds.

As discussed earlier, Deputy Johnston's testimony was not an improper opinion on guilt, so it was not objectionable. Even if it were, counsel could have chosen not to object or seek a limiting instruction to avoid highlighting the testimony to the jury. Such a decision is only ineffective assistance in the most egregious of circumstances.

Equally important, the decision not to object – even if it met the deficient performance prong – would not have prejudiced Mr. Gadberry. The State elicited testimony and provided exhibits that detailed the vastly disproportionate wounds that each party suffered during the assault, including the imprint of the belt on Ms. Learn' neck. Testimony that the scratch on Mr. Gadberry's cheek appeared to be inflicted defensively in accordance with Deputy Johnston's training and experience, which was also

supported by the photographs, pales in comparison to the other evidence at trial.[4]

These are largely the same reasons that any error in admitting an allegedly improper opinion on guilt would have been constitutional harmless error. Under the facts of this case, the comment did not constitute actual and substantial prejudice; the lack of objection here did not affect the outcome of trial.

3. Ms. Learn's testimony: prior fights.

Mr. Gadberry also contends his counsel was ineffective for eliciting testimony from Ms. Learn on cross-examination that there had been prior fights between her and Mr. Gadberry. This also was a legitimate trial tactic, not ineffective assistance, because Mr. Gadberry's theory of the case was that Ms. Learn had fought him in prior incidents, that Ms. Learn was larger than he was, that he was disabled, and that he had to protect himself from her attack in this instance.

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[4] This is coupled with the indications in the record that Mr. Gadberry did not provide an adequate basis for self-defense. Mr. Gadberry claimed self-defense, but then adamantly testified that he did not take any affirmative action during the struggle: he had accidentally fallen on her when she pulled him into the room, he never put his hands on her, she was hitting him with the belt and then somehow the belt got around her neck and it seemed a good way to take control of the situation so he did not remove it. The trial court begrudgingly gave the instruction only after a lengthy discussion and when the State declined to object in order to avoid an appellate issue. *See* RP 214-21.

In considering a claim of self-defense, the jury must take into account all the facts and circumstances know to the defendant. *State v. Duarte Vela*, 200 Wn. App. 306, 319, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017). "Because the vital question is the reasonableness of the defendant's apprehension of danger, the jury must stand as nearly as practicable in the shoes of the defendant and from this point of view determine the character of the act." *Id*. (internal quotations omitted) (quoting *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972)).

Not to belabor the point, but Mr. Gadberry did little to support his own self-defense claim when he took the witness stand and testified. In order to effectively argue self-defense to the jury, counsel deliberately asked the court for permission to leave the scope of direct, and asked Ms. Learn about prior fighting. A deliberate request for permission is highly suggestive of a formulated trial strategy. Later, counsel elicited testimony from Mr. Gadberry that he was "physically disabled after [an] accident." RP 189. Mr. Gadberry also testified that Ms. Learn punched him first after he confronted her about the allegedly missing items, and counsel also elicited testimony that Ms. Learn was "bigger" and "taller" than he was. RP 194-95. The obvious theory of the case that counsel presented to the jury was that Mr. Gadberry had been battered by Ms. Learn

in the past, that he was smaller than her and physically disabled, and had to protect himself in this instance when she threw the first punch.

Counsel tactically decided not to object or seek a limiting instruction when Ms. Learn did not answer the question the way that counsel may have hoped she had answered it, to avoid highlighting the answer.[5] The jury would have needed to determine the credibility of Ms. Learn and Mr. Gadberry even without the answer; the suggestion that there had been prior fights was more important to the self-defense claim than Ms. Learn's suggestion that Mr. Gadberry had always been the aggressor.

Counsel tactically determined that under these circumstances, eliciting evidence of prior fighting between Ms. Learn and Mr. Gadberry would enhance the chances that the jury would agree Mr. Gadberry was acting in self-defense, particularly in a circumstance where he did not testify he took any affirmative action to defend himself. Consequently, counsel had every reason to elicit this testimony, and no reason to object.

This alleged error also fails the prejudice prong of the test, for the same reason that Deputy Johnston's testimony was not prejudicial. Ms. Learn's brief testimony about prior fighting, if improper, carried much

[5] Counsel did object just a few moments later to an answer that Ms. Learn gave as non-responsive. RP 146-47. This further suggests the decision was a legitimate trial tactic.

less significance than the evidence of the extent of the injuries sustained in this incident.

4. Detective Ricketts' testimony: lethality of strangulation.

Detective Ricketts testified in accordance with his training and experience that strangulation was dangerous, and especially dangerous when a perpetrator uses a ligature. In this case, Mr. Gadberry first manually strangled Ms. Learn, and then grabbed a belt to use as a ligature to continue the attack, which was relevant to establish his intent. Mr. Gadberry complains that this evidence was used as profile evidence with "virtually no probative value" because it sought to imply Mr. Gadberry's guilty based on "characteristics of known offenders." App. Br. at 12 (citing *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992), *as amended* (Jan. 4, 1993)).

In *Braham*, after the victim recanted, the State elicited testimony about grooming and argued to the jury that testimony was circumstantial evidence that a rape had occurred in that case. 67 Wn. App. at 931-32, 937. In pretrial motions, the State told the court that it could only elicit general information about grooming because the expert had no particular information about the victim in that case. *Id*. at 933. The State argued in closing that the defendant fit the profile created by the expert. *Id*. at 934. The reviewing court identified that evidence as used solely to convict based

on characteristics of known offenders was improper – and in that case, had virtually no probative value – but that a different result would follow when the evidence had probative value. *Id.* at 937-38.

Testimony that strangulation and strangulation via ligature were lethal was highly probative in this case. Mr. Gadberry was charged with attempted second-degree murder in additional to second-degree assault by strangulation. In order to convict on attempted second-degree murder, the State had to prove Mr. Gadberry took a substantial step toward the commission of second-degree murder, and that he did so with the intent to commit second-degree murder. CP 30. The incident of strangulation in this case lasted upwards of twenty minutes, and the State introduced direct evidence that Mr. Gadberry strangled Ms. Learns first with his hands and then with a ligature. The State also introduced evidence that strangulation is lethal; more so when a ligature is applied. The State did not elicit this testimony to convict based on a profile; *Braham* is distinguishable. Counsel was not ineffective for failing to object to Detective Ricketts' testimony because it was not objectionable.

Alternatively, Mr. Gadberry cannot demonstrate actual and substantial prejudice. Mr. Gadberry does not challenge the sufficiency of the evidence, and the State introduced evidence supporting each element of

second-degree assault independently from the testimony about lethality. Ms. Learn testified Mr. Gadberry attacked her, strangled her with his hands, and strangled her with his belt. Mr. Gadberry testified he had a belt around Ms. Learn's neck. Law enforcement photographed extensive bruising and belt loop marks on Ms. Learn's neck. Mr. Gadberry's theory of defense was both that he did nothing, but also that if he did strangle Ms. Learn it was because he had to do so in order to protect himself. This evidence could not have been used to improperly convict Mr. Gadberry on the count of second-degree assault when he had to admit to the crime in order to advance his theory of self-defense. The jury rejected Mr. Gadberry's claim of self-defense, but also acquitted Mr. Gadberry on the charge of attempted murder. Mr. Gadberry does not demonstrate actual and substantial prejudice in this case.

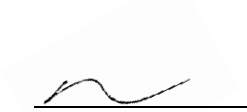
V. CONCLUSION

Mr. Gadberry's challenges to his conviction fail. He did not preserve his challenge to Deputy Johnston's testimony. Even if this Court chooses to review it, Deputy Johnston did not comment on credibility or guilt. Mr. Gadberry also does not meet his burden to show ineffective assistance of counsel. In all cases, counsel had deliberate strategic reasons

to perform as they did, and Mr. Gadberry cannot show prejudice. For these reasons, this Court should affirm.

Dated this 20 day of August, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brett Pearce, WSBA #51819
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. WILLIAM GADBERRY, Appellant.	NO. 36489-5-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 20, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jodi Backlund and Manek Mistry
backlundmistry@gmial.com

8/20/2019	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

August 20, 2019 - 1:03 PM

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