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No. 36721-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

MIGUEL ANGEL SANCHEZ,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 18-1-01551-03

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BRIEF OF RESPONDENT

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The State disagrees that the defendant received ineffective assistance of counsel.
- B. The State disagrees that the trial court erred when it allowed evidence about the defendant's drug use.

## II. STATEMENT OF FACTS

On December 18, 2018, Valerie Candelaria ran from her house, flagged down a car, and asked the driver to call 911. RP<sup>1</sup> at 29-30. It was a chilly day and she was not wearing socks or shoes. RP at 29. She told the 911 dispatcher that her husband, the defendant, had hit her in front of their five-year-old son. RP at 38 and RP 12/18/2018 at 3-4. The defendant fled the house while Ms. Candelaria was on the 911 call. RP 12/18/2018 at 4.

Ms. Candelaria told police that he punched her in the face three times. RP at 51. Ms. Candelaria also told police that she had just had a procedure for throat cancer and that the defendant had grabbed her by the throat and pinched the area where she had the procedure. *Id.*

Officer Gilbert stated that Ms. Candelaria had several welts the size of a golf ball on her head. *Id.* He also observed that her face was red and the veins in her eyes were bloodshot, which is consistent with being

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<sup>1</sup> Unless otherwise indicated, "RP" refers to the verbatim report of proceedings from jury trial on 03/18/2018 to 03/20/2018.

strangled. RP at 51-52. Ms. Candelaria also told a nurse at a local emergency room that the defendant choked her. RP at 77.

The police were unable to locate the defendant that day but did find him two days later. RP at 64, 71. When Officer Baker told the defendant he was under arrest the defendant ran but the police were able to catch him. RP at 72-73.

A No Contact Order was entered the day after the defendant was arrested, on December 21, 2018, prohibiting the defendant from contacting Ms. Candelaria. RP at 90. Nevertheless, the defendant called her from the jail on January 19, 2019, January 27, 2019, February 5, 2019, and February 10, 2019. See RP 12/18/2018 at 7-64.

In the January 19, 2019 phone call, the defendant told Ms. Candelaria that he had beaten three assault charges before and that even if she testified, she does not have to say anything. RP 12/18/2018 at 16, 18.

In the next phone call, January 27, 2019, the defendant continued to play on Ms. Candelaria's emotions, asking if she will be there for him and telling her that he loves her and their son, admitting a "mistake" but saying that he cannot do four and a half years in prison and that he is willing to do drug rehabilitation. RP 12/18/2018 at 31, 35.

In the February 5, 2019 phone call, the defendant encouraged Ms. Candelaria to talk to his attorney and asked if she was coming to the trial.

RP 12/18/2018 at 42, 46. In the final call, on February 10, 2019, the defendant asked her “Do you want me to get out of jail?” RP 12/18/2018 at 54. “If you come to my trial and you plead the Fifth like you say you’re going to, I’ll beat it . . . . There’s no and - - if’s, ands or buts about it. It don’t matter what evidence they have; they need your statement . . . .” RP 12/18/2018 at 55.

At trial Ms. Candelaria did testify although she admitted that she told the defendant that she “would plead the Fifth.” RP at 117. However, she minimized the assault. He choked her but “it was quick” and he squeezed “a little.” RP at 110-12.

### **III. ARGUMENT**

#### **A. The defendant did not receive ineffective assistance from his attorney.**

##### **1. Standard on Review:**

Ineffective assistance is a two-pronged inquiry: First the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it

cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), quoting *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Performance is deficient if it falls “below an objective standard of reasonableness.” *Grier*, 171 Wn.2d at 33. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. The defendant must overcome a strong presumption that counsel’s performance was reasonable. *Id.* When counsel’s conduct can be characterized as a legitimate trial strategy or tactics, performance is not deficient. *Id.* It is immaterial if the strategy ultimately proved unsuccessful; hindsight has no place in an ineffective assistance analysis. *Id.* at 43.

To satisfy the prejudice prong, the defendant must establish that “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Id.* at 34.

- 2. The defendant cannot establish either prong.**
  - a. The defendant’s trial attorney did not fall below a standard of reasonableness.**
    - i) Failure to object regarding testimony that the defendant had “some warrants.”**

The context for the statement about the warrants was the following:

Prosecutor: Did you contact him (the defendant)?

Officer Baker: We did.

Prosecutor: Okay. Can you describe how you contacted him?

Officer Baker: At the time that myself and another officer contacted him he had his back to us. We approached him from the Walmart parking lot in our vehicles. We got out; started giving him commands. He turned around. He looked at us. We told him to get his hands up in the air, you know, that he was under arrest. *He had some warrants.*

RP at 71-72 (Emphasis added.)

An analogy can be made to cases holding a defense attorney was not ineffective for failing to request a limiting instruction out of fear that it would bring too much attention to the testimony in issue. See *State v. Embry*, 171 Wn. App. 714, 762, 287 P.3d 648 (2012). The defense attorney could have asked the judge to strike the last sentence and instruct the jury to ignore it. But this would have drawn more attention to the statement and made it seem like it was an important point. And it is very difficult for jurors to forget what they just heard. It was legitimate for the defense attorney not to make such a request to the Judge.

Also, the defense attorney may have wanted the jury to know that the defendant had outstanding warrants. The warrants, rather than his

assault of Ms. Candelaria, could explain why he ran from the police and fled the home.

**ii) Testimony regarding police officer's belief the defendant become involved in a foot chase.**

The defense attorney had the same predicament regarding testimony predicting that the defendant would run from the police. The testimony that the defendant's behavior "usually leads into a foot chase" was not in response to a question from the prosecutor and the defense attorney had to choose whether to object and ask to strike the comments, thereby bringing more attention to them, or let the comments go.

Here is the relevant portion of the transcript:

Prosecutor: After you advised him that he was under arrest, what did he do?

Officer Baker: He kept asking us questions which is a common tactic for somebody that doesn't want to be arrested. Usually leads into a foot chase is my experience. It's kind of a delay tactic and that's exactly what happened.

RP at 72.

The only information responsive to the question is that the defendant kept asking questions and then engaged in a foot chase. The defense attorney could have objected, but that would have put undue importance on Officer Baker's prediction and experience about foot pursuits. The defense attorney was correct in not objecting.

**iii) Testimony regarding “police photos.”**

The defense attorney’s effort to challenge the Detective Flohr’s identification of the defendant’s voice on jailhouse phone calls was unsuccessful. But the focus is on the attorney’s initial calculus, not whether a strategy is successful. *Grier*, 171 Wn.2d at 43.

The situation facing the defense attorney was that the State was about to admit and play damning jailhouse phone calls between the defendant and Ms. Candelaria. If the defendant made those phone calls, he almost certainly would be found guilty of Tampering with a Witness and three counts of Violation of a No Contact Order. Det. Flohr testified that he recognized the voices of the recorded phone calls as being Ms. Candelaria and the defendant. The defense attorney then requested to voir dire Detective Flohr on how he knew the defendant’s voice.

Mr. Moser: Detective, I am afraid you haven’t told us at all how you were able to identify the voices. Do you know Mr. Sanchez?

Det. Flohr: I know him through police photos is how I know him.

Mr. Moser: Photos? How did you identify his voice?

Det. Flohr: Because I listened to two video recorded jail phone calls that he had with Sonia, with Valerie’s (Ms. Candelaria’s) daughter.

Mr. Moser: How did you know that was him in those?

Det. Flohr: Because of how he looked in the tattoos on his face and his neck.

Mr. Moser: Oh, you are talking about the video?

Det. Flohr: Yes. The video recording, yes, the jail phone video recording.

Mr. Moser: Okay. So just from two videos you were able to identify his voice on the other phone calls with Ms.

Candelaria; is that right?

Det. Flohr: And comparing them with the photos, police photos, yes, that we have.

RP at 103.

A reasonable defense attorney would believe that Detective Flohr could be challenged on whether he positively knew the defendant was making the jailhouse calls to the victim. Detective Flohr had a good answer, saying that he compared the voice on the jailhouse calls to the defendant's voice on video phone calls between the defendant and his daughter. How did he know that the defendant was in those video phone calls? Again, Flohr had a good answer. He compared the person in the video phone calls with police photos of the defendant.

Was it worth a try for the defense attorney to try to challenge Detective Flohr on his identification of the defendant's voice? Yes. The jailhouse phone calls were damning. Whoever was calling Ms. Candelaria encouraged her not to testify. If it was established that the defendant was the caller, he would be found guilty of Tampering with a Witness and the No Contact Order Violations. There seemed to be little harm in challenging Flohr's testimony that the defendant called the victim. And, as

argued below, the testimony about “police photos” of the defendant would have had no impact on the jury’s decision.

Given the deference afforded to trial counsel and that a strategy does not have to be successful, it cannot be said that the defendant’s attorney fell below reasonable standards in pursuing the voir dire of Detective Flohr.

Further, the defense attorney was aggressive in objecting to various testimony. He objected to admission of the 911 call, admission of testimony of medical professionals, admission of the defendant’s flight, evidence of the defendant’s drug use, evidence from the lay witness who Ms. Candelaria flagged down, evidence from police officers about Ms. Candelaria’s statements, and evidence about a portion of a jailhouse call. RP at 8, 12, 15, 18, 30, 50, 93, 98.

**b. The defendant has not established that any of the defense attorney’s decisions impacted the verdict.**

The defendant was not convicted because Det. Flohr said he checked the defendant’s identity with police photos, or that Officer Baker predicted the defendant would flee, or that he told the defendant he was under arrest for some warrants. These are all collateral issues to whether the defendant assaulted Ms. Candelaria, whether that was in front of a minor child, whether he attempted to Tamper with a Witness and whether

he violated a No Contact Order three times. Those were all very easy decisions based on Ms. Candelaria's testimony, the 911 call, and the jailhouse phone calls.

**B. The trial court properly admitted evidence that the defendant fled the police. Officer Baker's prediction that the defendant would flee was not an improper comment on the defendant's guilt.**

**1. Standard on review:**

There are actually two issues raised by the defendant. First, should evidence of flight have been allowed? Second, was Officer Baker's testimony predicting the defendant would run from the police improper opinion testimony?

The trial court's admission of evidence of flight is reviewed for abuse of discretion. *State v. Price*, 126 Wn. App. 617, 645, 109 P.3d 27 (2005). Evidence of flight is admissible if it creates a "reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). The probative value of flight depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of

guilt concerning the crime charged; (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *Id.* at 498.

Regarding the defendant's second issue, if testimony is deemed to be an opinion as to the defendant's guilt it must relate directly to the defendant. *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). In determining whether testimony is an impermissible statement of opinion, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

**2. The Court did not abuse its discretion in allowing evidence of the defendant's flight.**

Here, not only did the defendant flee the scene of the crime immediately after he assaulted Ms. Candelaria, but he ran from the police two days later when they tried to arrest him. The defendant argues that because Officer Baker told the defendant he was arrested for outstanding warrants, the defendant may have fled because of those warrants.

That does not explain why the defendant fled immediately after the assault. He fled far enough to avoid detection by a police dog and was

outside a perimeter set by the police. RP at 64. The next day Ms. Candelaria encouraged the defendant to turn himself in. RP at 116. He continued to elude the police until the following day. RP at 71.

Based on this record the trial court did not abuse its discretion in allowing evidence of the defendant's flight.

**3. Officer Baker's prediction that the defendant would flee when the police tried to arrest him is not improper opinion testimony.**

First, the defendant did not raise this objection in the trial court and this Court should not consider it under RAP 2.5 (a). The defendant has argued that his defense attorney was ineffective for failing to object to Officer Baker's statement that he had warrants. That is the appropriate method to bring such an argument before the Court.

Second, on the merits, Officer Baker offered no opinion on the defendant's guilt; he did predict that the defendant would flee, but that is hardly a direct statement about the defendant's guilt.

In *Kirkman*, a prosecution for a sexual offense against children, a medical doctor testified that he found a child victim gave a "very clear history" with "lots of detail" and "a clear and consistent history of sexual touching . . . with appropriate affect" and that "the physical examination doesn't really lead us one way or the other, but I thought her history was

clear and consistent.” *Kirkman*, 159 Wn.2d at 929. The *Kirkman* court did not find this was improper opinion evidence. *Id.* at 930.

The *Kirkman* court also dealt with testimony from a detective who testified that the child victim was able to distinguish between the truth and a lie, and that she expressly promised to tell him the truth. *Kirkman* held that this was simply an account of the detective’s interview protocol and that the detective did not testify he believed the victim or that she was telling the truth. *Id.* at 931.

This is consistent with other cases. *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662 (1989) held that the testimony of the complaining witness exhibited behavior “typical of a sex abuse victim” is not an opinion of the guilt or innocence of the defendant. In *State v. Toennis*, 52 Wn. App. 176, 185, 758 P.2d 539 (1988) the court held that testimony that a particular injury or group of injuries to a child was not accidental and was inconsistent with the defendant’s explanation, was not an opinion usurping the jury’s function. In *State v. Simon*, 64 Wn. App. 948, 964, 831 P.2d 139 (1991) the Court held that a description of the coercive nature of the pimp/prostitute relationship was not a comment on the defendant’s guilt on the charge of promoting prostitution.

The cases cited by the defendant are not helpful. This is not a case where a detective mentioned that the defendant had been in prison, like

*State v. Lehman*, 8 Wn. App. 408, 506 P.2d 1316 (1973). In *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), the defendant was charged with Possession of a Controlled Substance with Intent to Deliver. The police found various quantities of packaged narcotics in the defendant's residence. A detective testified that the house was not a place where drugs were ingested. *Id.* at 384. Although it seems clear that the detective was suggesting that the house was used to store drugs for sale, the *Sanders* court held the detective's testimony did not amount to an opinion as to the defendant's guilt. *Id.* at 389.

Officer Baker's comment does not come close to these cases.

**C. The trial court did not abuse its discretion in allowing evidence that the defendant's assault of Ms. Candelaria was instigated by her confronting the defendant about his relapse and drug use.**

**1. Standard on Review:**

The admissibility of evidence, including under the res gestae exception, is reviewed for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 835, 889 P.2d 929 (1995).

**2. The trial court did not abuse its discretion in allowing this testimony.**

**a) Testimony about drug use.**

"Res Gestae" or the "same transaction" exception allows evidence of other crimes to be admissible "to complete the story of the crime on

trial by proving its immediate context of happenings near in time and place.” *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980). Courts have recognized that crimes which are part of the whole deed should be admitted. *State v. Jordan*, 79 Wn.2d 480, 483, 487 P.2d 617 (1971).

Here, the trial court allowed the evidence of the defendant’s drug use as part of a *res gestae* to allow the victim to explain what led to the defendant assaulting her. RP at 19. It was part of the transaction that led to Ms. Candelaria’s injuries. Further, Ms. Candelaria was a reluctant witness, who once told the defendant she would “plead the Fifth” to avoid testifying against him. RP at 117. The defendant’s drug use was important to fully explain the assault: what led up to it, the nature of the assault, and what happened after it.

Note that the prosecutor assured the court that she would not delve into the subject but would limit the testimony to an explanation of why the assault happened. RP at 19. The entire testimony about drug use amounted to less than half a page of the transcript. RP at 109, lines 16-22, and RP at 110, lines 7-8.

**b) Testimony about relapse**

The defendant has not cited any portions of the trial record relating to a drug relapse by the defendant. The State cannot find any testimony about the defendant relapsing. Nevertheless, this argument is the same as

above. The defendant's drug use was admissible as part of the res gestae to fully explain the defendant's assault on Ms. Candelaria.

**D. Harmless error analysis:**

The trial court was well within its discretion in allowing the testimony of the defendant's drug use and flight. The defense attorney did not object to the other challenged items at trial, probably because it would have brought more attention to that testimony. None of the evidence in question impacted the verdict. The defendant was convicted because Ms. Candelaria testified, rather than allowing the defendant to control her. The jailhouse phone calls sealed the defendant's fate on the No Contact Order Violations and the Tampering with a Witness charge. These facts were vastly more important than the defendant's flight, his drug use as a cause of the assault, and Officer Baker's prediction that he would run.

**IV. CONCLUSION**

The defendant's convictions should be affirmed.

**RESPECTFULLY SUBMITTED** on April 20, 2020.

**ANDY MILLER**  
Prosecutor



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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on April 20, 2020.

  
Demetra Murphy  
—Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

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