

NO. 63337-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MELISSA JOSLIN (AKA MELISSA FRENICK),

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

2011 JUN 13 PM 1:04

CLERK OF COURT
JIM ROGERS

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	10
1. JOSLIN'S COUNSEL PROVIDED EFFECTIVE REPRESENTATION AND LEGITIMATELY CHOSE NOT TO PURSUE A GOOD FAITH CLAIM OF TITLE DEFENSE	10
2. JOSLIN RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT	18
3. JOSLIN'S FINAL ARGUMENT SHOULD BE STRICKEN FOR FAILURE TO COMPLY WITH RAP 10.3(a)(6)	28
D. <u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 11, 18

Washington State:

Bruce v. Bruce, 48 Wn.2d 229,
292 P.2d 1060 (1956)..... 29

In re Pers. Restraint of Brett, 142 Wn.2d 868,
16 P.3d 601 (2001)..... 10

State v. Ager, 128 Wn.2d 85,
904 P.2d 715 (1995)..... 12, 13, 15, 16, 17

State v. Benn, 120 Wn.2d 631,
845 P.2d 289, cert. denied,
510 U.S. 944 (1993)..... 12

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 19, 27

State v. Casteneda-Perez, 61 Wn. App. 354,
810 P.2d 74 (1991)..... 19, 21, 25

State v. Chase, 134 Wn. App. 792,
142 P.3d 630 (2006), review denied,
160 Wn.2d 1022 (2007)..... 13, 16

State v. Cox, 109 Wn. App. 937,
38 P.3d 371 (2002)..... 29

State v. Crossen, 77 Wash. 438,
137 Pac. 1030 (1914)..... 12

State v. Gregory, 158 Wn.2d 759,
147 P.3d 1201 (2006)..... 19

<u>State v. Griffith</u> , 91 Wn.2d 572, 589 P.2d 799 (1979).....	12
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	11
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	12
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	12
<u>State v. Mills</u> , 80 Wn. App. 231, 907 P.2d 316 (1995).....	29
<u>State v. Padilla</u> , 69 Wn. App. 295, 846 P.2d 564 (1993).....	20, 26
<u>State v. Pestrin</u> , 43 Wn. App. 705, 719 P.2d 137 (1986).....	13
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	20, 25
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991)	19, 25, 28
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	11
<u>State v. Walden</u> , 69 Wn. App. 183, 847 P.2d 956 (1993).....	20
<u>State v. Wellington</u> , 34 Wn. App. 607, 663 P.2d 496 (1983).....	13
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214, <u>review denied</u> , 127 Wn.2d 1010 (1995).....	20, 26, 28

Statutes

Washington State:

RCW 9A.56.020 12

Rules and Regulations

Washington State:

RAP 10.3..... 2, 28, 29

A. ISSUES

1. To prevail on an ineffective assistance of counsel claim, the defendant must show deficient performance and resulting prejudice. Legitimate trial tactics and strategy cannot form the basis of an ineffective assistance of counsel claim. A defendant raising a good faith claim of title defense must present evidence that she took another's property openly and avowedly, and that a legal or factual basis existed from which a good faith claim of title could reasonably be inferred. At trial, the State produced evidence that all of the checks at issue, except one, was issued to someone other than the defendant and that the payee information on the checks had been inaccurately recorded in the ledger that Joslin maintained. Joslin presented no objective evidence to corroborate her asserted subjective belief that she was entitled to the money. Joslin's counsel did not request a good faith claim of title instruction. Given this record, does counsel's failure to request the instruction reflect a legitimate trial strategy?

2. To establish that a prosecutor committed misconduct during cross examination, the defendant must show that the prosecutor's questions were improper and prejudicial. Asking a witness to comment on whether another witness is lying is

misconduct, although asking if the other witness is mistaken may be relevant and probative. Absent an objection, improper questions require reversal only if the misconduct was so flagrant and ill intentioned that no curative instruction could have cured the resulting prejudice. At trial, the State cross examined Joslin about whether another witness's testimony had been "inaccurate" or "incorrect" regarding certain payroll practices. Joslin agreed with parts of the witness's testimony, but disagreed with other parts of the testimony. Has Joslin failed to show that the prosecutor committed misconduct by questioning her about the similarities and differences between her and the other witness's testimony? If the questions were error, has Joslin shown that the questions were so flagrant and ill intentioned that no curative instruction could have remedied the prejudice?

3. Under RAP 10.3(a)(6), parties presenting an issue for appellate review must cite legal authority and reference the relevant parts of the record in their argument. Joslin claims that the trial court erred by denying her motion to substitute counsel, but does not specify how the court erred, cite case authority, or reference relevant portions of the record. Has Joslin failed to properly present this issue for review?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Melissa Joslin with eleven counts of first-degree theft and nine counts of second-degree theft. CP 5-12. The jury convicted Joslin on every count except for one count of second-degree theft. CP 124-43. The trial court imposed concurrent, standard-range sentences: 48 months for each first-degree theft conviction and 29 months for each second-degree theft conviction. CP 324-34; 10RP 58-59.¹

2. SUBSTANTIVE FACTS

In September 2003, Joslin began working as a bookkeeper at Seven Seas Fishing Company. 2RP 15. Joslin paid bills, reconciled bank accounts, and processed payroll for Seven Seas and its fish-processing vessel, the Stellar Sea. 2RP 14, 20-22; 3RP 87. After starting her employment, Joslin encouraged the company to adopt a new payroll program called QuickBooks.

¹ The Verbatim Report of Proceedings consists of ten volumes, designated as follows: 1RP (12/8/08), 2RP (12/9/08), 3RP (12/10/08), 4RP (12/11/08 – Testimony of Kruger, Thompson, and Scudder), 5RP (12/11/08 – Joslin's Testimony), 6RP (12/12/08), 7RP (12/15/08), 8RP (2/5/09), 9RP (2/26/09), 10RP (3/16/09).

3RP 95-96. Although Joslin's boss, Linda Scott, did not know how to use the program, the company adopted it and Joslin trained the ship's purser, Jennie Wigner, on how to use it. 2RP 147; 3RP 95-96.

Wigner entered payroll information into the QuickBooks program and processed employees' checks while the ship was at sea. 2RP 142, 156-57. When the boat docked, Joslin downloaded the information Wigner had entered and collected the boat's pay stubs and petty cash slips for reconciling the account. 2RP 150-51; 3RP 14-15, 18-19. Joslin supplied Wigner with blank checks for payroll purposes, but withheld 10-15 checks from every check box for herself. 2RP 154-55. Joslin knew Wigner's QuickBooks password and had "full access" to Wigner's office when she was gone and the ship was docked. 2RP 118, 168; 3RP 21.

Wigner used the boat account to pay the ship's non-management employees. 2RP 147-48; 3RP 24-25. Although Wigner made child support payments on behalf of employees, she was not authorized to write third-party checks paying one employee for another employee's work. 2RP 147-48. Both Joslin and her husband, Zachary Frenick, a management employee on the boat, were paid from the company account, rather than from the boat

account. 2RP 89, 168; 3RP 24-26; 7RP 29-30. Frenick worked on the boat until late December 2004, when he left to work elsewhere. 2RP 17-18; 4RP 15-17.

In the fall of 2004 and in February 2005, Joslin called Wigner and asked her to send two \$2,000 checks to Kevin Scudder, a Seattle attorney, on behalf of Marlin Baker, a ship employee, who had allegedly failed to pay his child support. 2RP 160; 4RP 65. Unbeknownst to Wigner, Scudder represented Joslin, not Baker, and the checks were intended to satisfy her legal fees. 4RP 65-67. In all, Scudder received five checks from the boat account, all of which were used to satisfy Joslin's legal fees. 4RP 66.

On May 26, 2005, Karen Conrad, the company's human resources manager, came in early to work. 2RP 13, 23. Conrad discovered a pay stub dated May 31, 2005, in the copy machine for Edward Prettyman, a former ship employee who had left the boat at the same time as Joslin's husband. 2RP 24-25. Although the pay stub had Prettyman's name on it, the payroll information belonged to the company's president, Mark Weed. 2RP 24. Conrad suspected that Joslin issued the false pay stub based on her close friendship with Prettyman, and an earlier comment that she had made about trying to help him buy a house. 2RP 27,

77-78. When Conrad and Weed confronted Joslin about what they had found, Joslin admitted to falsifying the pay stub, but said that it had not actually been “sent” or “used.” 2RP 27-28, 75-76.

Weed terminated Joslin for falsifying the pay stub and hired Renata Xayavong to take her place. 2RP 29-30, 79; 3RP 36-38. When Xayavong began reconciling accounts, she immediately noticed that the boat account was missing four cancelled checks. 3RP 39-41, 110. Xayavong obtained copies of the checks from the bank and compared them to the QuickBooks ledger. 3RP 40-42, 110-11.

Although the check amounts matched those listed in the ledger, the payee information listed in the ledger was “way off.” 3RP 41-42. The cancelled checks revealed that the true payees were Joslin’s husband, Frenick, and friend, Edward Prettyman, even though both men had left working on the boat months before. 2RP 17-19; 3RP 111, 115-19. Scott emailed Joslin about the four checks and Joslin replied that they had been issued to various child support agencies. 3RP 112-13, 115-19. Given the discrepancy between the checks and Joslin's response, Scott began reviewing every check issued during Joslin's employment and requested copies of all missing cancelled checks. 3RP 120-23. Scott

discovered that one of the missing cancelled checks had been issued to Joslin, and the other 19 checks had been issued to her husband (Frenick), attorney (Scudder), friend (Prettyman), and friend's girlfriend (Glenda Montoya). 2RP 84-100, 135-36; 3RP 120-34. None of the payees on the checks were accurately recorded in the ledger and many of the checks were from the same number sequence. Ex. 3-26; 2RP 84-100, 135-36; 3RP 120-34. In all, the checks totaled over \$40,000. Ex. 3-26; 2RP 84-100.

At trial, Joslin testified that she earned \$28,000 per year as a salaried employee. 6RP 12. In 2004, she earned a little over \$1,000 in overtime. 6RP 13. Although she "couldn't be exact," Joslin testified that the checks issued to her husband and attorney were either for her "overtime pay," or "reimbursements" for boat parts, office supplies, or hotel stays that she had paid for. 5RP 22, 27; 6RP 35-37. Joslin requested that the checks issued to her husband for tax purposes. 5RP 22-23; 6RP 8-9. Joslin admitted that the checks issued to Scudder were for legal fees that she had incurred. 6RP 9. Joslin denied having any role in the checks issued to Prettyman or his girlfriend, and further denied trying to help Prettyman buy a house. 5RP 28-30.

According to Joslin, another company, Peter Pan, owned Seven Seas, and it did not allow Seven Seas to reimburse her for overtime through her "normal paycheck at Seven Seas." 5RP 22-25. Joslin maintained that she worked for both companies and had had daily contact with her Peter Pan supervisors, Mark Adams and Barry Collier. 5RP 7, 39; 6RP 24. Joslin suggested that Seven Seas terminated her for missing "too much" work in 2005, rather than for falsifying payroll documentation. 5RP 15-16; 6RP 19.

Following her termination, Joslin doubted whether she had emailed Scott about the missing cancelled checks because the "signature bar" on her email looked different. 5RP 20-22; 6RP 3-4. Joslin admitted, however, that she had deposited all of the checks issued to her husband. 6RP 8-9. Joslin also admitted that she had access to the boat account from her office. 6RP 9. Finally, Joslin admitted that she had previously been convicted of two counts of attempted unlawful issuance of bank checks. 6RP 29.

In rebuttal, the State called a number of witnesses to refute Joslin's testimony. Both Weed and Scott testified that any overtime earned by Joslin would have been paid from the Seven Seas account. 7RP 30, 44. Neither witness remembered Joslin working more than 15-20 hours per month in overtime. 7RP 28-29, 36-37,

44. According to Weed, Joslin was not responsible for buying boat parts and did not receive reimbursements for hotel stays. 7RP 31-32, 34. Although Joslin might have purchased incidental office supplies, Weed doubted that she had spent more than \$100 on them because the company had vendor accounts and other means to pay for the supplies. 7RP 32-33.

Both Peter Pan's president, Barry Collier, and its treasurer, Mark Adams, testified that Joslin did not work for Peter Pan or have daily contact with them. 7RP 10-12, 14-16. Adams did not even recognize Joslin. 7RP 14-16. Although Peter Pan contracted with Seven Seas to perform custom fish processing, Peter Pan did not own the company or its boat. 7RP 11-12.

The jury convicted Joslin on every count charged, except for the count involving the check issued to Prettyman's girlfriend. CP 124-43. Following her conviction, Joslin sought new counsel to represent her. 8RP 3. The trial court denied the motion, observing that the proposed substitution counsel had originally represented her, and would be the eighth lawyer on the case. 8RP 13-15. The court noted that Joslin's trial counsel and proposed counsel were "highly qualified," but denied the motion to avoid further delay. 8RP 13-15.

C. ARGUMENT

1. JOSLIN'S COUNSEL PROVIDED EFFECTIVE REPRESENTATION AND LEGITIMATELY CHOSE NOT TO PURSUE A GOOD FAITH CLAIM OF TITLE DEFENSE.

Joslin argues that she received ineffective assistance of counsel at trial because her lawyer failed to raise a good faith claim of title defense. Joslin's claim fails given the dearth of objective, corroborative evidence to support such a defense. Joslin failed to produce any evidence that she openly and avowedly took money from the boat account. Joslin further failed to present objective evidence from which a jury could reasonably infer that she had a good faith claim of title. Without evidence to support either element of a good faith claim of title defense, Joslin's counsel reasonably and legitimately chose not to pursue such a defense. Joslin cannot show that she was prejudiced by counsel's failure to request an instruction that was legally and factually unsupported.

Ineffective assistance of counsel claims present a mixed question of law and fact that are reviewed *de novo*. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) her attorney's conduct fell below an objective

standard of reasonableness and (2) this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id.

There is a strong presumption that counsel has provided effective representation. Strickland, 466 U.S. at 689. Courts are "highly deferential" when scrutinizing counsel's performance because it "is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. There is a "wide range" of reasonable performance and courts recognize that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If

counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

In general, a defendant is entitled to a jury instruction on her theory of the case provided that it is supported by the evidence and legally accurate. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). The defendant's theory must be supported by "substantial evidence" in the record. State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). If the defendant is lacking evidence on one element of the defense, then the instruction should not be given. Id. at 575. It is error for the trial court to give an instruction that is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Good faith claim of title is a statutory defense to theft that is designed to protect defendants who have taken another's property openly and avowedly under a mistaken, but good faith, belief that they had title to the property. RCW 9A.56.020(2)(a); see State v. Crossen, 77 Wash. 438, 439, 137 Pac. 1030 (1914) (holding

defendant could raise the defense because he had a good faith belief that the calf he took was the calf he had previously purchased). The defense is not available to defendants who engage in theft by deception. State v. Pestrin, 43 Wn. App. 705, 710, 719 P.2d 137 (1986); State v. Wellington, 34 Wn. App. 607, 612, 663 P.2d 496 (1983).

To obtain a jury instruction in an embezzlement case on the good faith claim of title defense, "the defendant must present evidence (1) that the property was taken openly and avowedly and (2) that there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken." Ager, 128 Wn.2d at 97. The defendant must produce "objective corroborative evidence" to support an inference that the defendant had a good faith claim of title to the property beyond the "defendant's subjective beliefs." State v. Chase, 134 Wn. App. 792, 805-06, 142 P.3d 630 (2006), review denied, 160 Wn.2d 1022 (2007).

In Ager, the Washington Supreme Court upheld the trial court's refusal to give a good faith claim of title instruction where the defendants, charged with embezzlement, produced "no evidence" that the company had authorized their "advances" under the

insurance code. 128 Wn.2d at 96 (emphasis in original). Although the defendants presented evidence that they appropriated the money openly and avowedly, they failed to produce any evidence from which a jury could infer that they had a good faith claim of title to the money. Id. The court noted that evidence supporting such an inference could include past practices with the company authorizing such advances, or statements by the board acknowledging or approving the advances. Id. at 97.

Here, Joslin argues that "[t]here was no tactical reason" for counsel to not seek a good faith claim of title instruction based entirely on her *own testimony*. Appellant's Br. at 14. Joslin's argument misses the point. Joslin failed to produce any evidence that she took the money openly and avowedly. Further, Joslin failed to produce any objective evidence corroborating her claim that she was entitled to overtime pay from the boat account. Given the lack of evidence to support either element of the good faith claim of title defense, Joslin's counsel reasonably chose not to request the instruction. Joslin cannot show that she was prejudiced by her counsel's failure to request an instruction that was unsupported by the evidence, and therefore would not have been given.

Joslin employed multiple deceptive means to take money from the boat account, negating both the "openly and avowedly" elements of a good faith claim of title defense. Ager, 128 Wn.2d at 97. All but one of the 20 checks was issued to someone other than Joslin. Ex. 3-26. None of the payee information on the checks was accurately recorded in the QuickBooks ledger that Joslin maintained. Ex. 2-26; 2RP 84-100, 135-36; 3RP 41-42, 120-34.

Although she denied it at trial, Joslin specifically misled Scott in an email about the four missing cancelled checks, suggesting that they had been issued to child support collection agencies when in reality they had been issued to her husband and friend. 3RP 115-19. Joslin lied to Wigner about the true purpose of the two \$2,000 checks that she issued to Kevin Scudder. 2RP 160; 4RP 65-67.

Moreover, Joslin admitted to Weed and Conrad that she had falsified the pay stub that Conrad found in the copy machine. 2RP 27-28, 75-76. Although Joslin later denied this at trial and suggested that she was fired instead for missing too much work, her testimony was ultimately inconsistent. Joslin never explained how she could be fired for missing too much work, but still earn

over \$35,000² in overtime when her annual salary was only \$28,000. 5RP 15-16; 6RP 12, 19.

Joslin's actions, admissions, and inconsistent statements confirm that she did not take the money from the boat account "openly and avowedly," but rather through deception and fraud. Joslin's failure to produce any evidence on the first element of the defense prevented her counsel from obtaining such an instruction. See Ager, 128 Wn.2d at 93 (recognizing that it is error for the trial court to give an instruction that is unsupported by the evidence).

Similarly, Joslin failed to present evidence to support the second element of the defense, a legal or factual basis from which a jury could reasonably infer that she had a good faith claim of title to the money. Ager, 128 Wn.2d at 97. At trial and on appeal, Joslin has failed to present any "objective corroborative evidence" to support her claim. Chase, 134 Wn. App. at 806.

Akin to the defendants in Ager, Joslin continues to rely solely on her own assertions, allegedly showing her subjective belief that she was entitled to a good faith claim of title defense. See Appellant's Br. at 3-4 ("In short, *under Ms. Frenick's testimony . . .*)

² This is the total amount of money issued in checks to Joslin's husband and attorney, which Joslin claimed she was entitled to based on reimbursements and working overtime.

(emphasis added). Joslin presented no evidence at trial to corroborate her claim of good faith, such as evidence that the company had previously paid her overtime using the boat account, authorized legal payments to her attorney, or approved checks to her husband, who no longer worked at the company, on her behalf.

Unlike the defendants in Ager, Joslin's subjective beliefs were flat out disputed by other witnesses at trial. For example, Joslin testified that the checks to her husband and attorney were authorized overtime payments and reimbursements from the boat account. 5RP 22; 6RP 8-9. Weed testified in rebuttal, however, that none of the checks were authorized overtime payments, and that any overtime payment would have been part of Joslin's regular paycheck from the company account. 7RP 26-30. Weed also disputed Joslin's claim that the checks were reimbursements for boat parts and overnight hotel stays. 6RP 35-37; 7RP 31, 34.

Joslin's asserted belief that Peter Pan owned Seven Seas, and testimony that she worked for both places, was contradicted by Peter Pan's president and treasurer who testified that Peter Pan did not own Seven Seas, or employ Joslin. 5RP 5-7, 39; 7RP 11-12, 16-17. The executives further disputed Joslin's claim that she had daily contact with them. 6RP 24; 7RP 12, 16.

Without evidence to support either element of a good faith claim of title defense, Joslin's counsel legitimately chose not to pursue such a defense. Joslin cannot show that counsel's performance fell below an objective standard of reasonableness, or that she was prejudiced, when counsel failed to request an instruction that would not have been given. Counsel's failure to secure Joslin's acquittal should not be used to second guess his performance. Strickland, 466 U.S. at 689. Given the lack of evidence to support a good faith claim of title defense and the strong presumption in favor of counsel's performance, the Court should find that Joslin has failed to carry her burden of demonstrating ineffective assistance of counsel.

2. JOSLIN RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT.

Joslin contends that the State committed prosecutorial misconduct three times while cross examining her at trial. Joslin argues that the State improperly asked her to comment on Wigner's credibility by asking whether Wigner's testimony was "inaccurate" or "incorrect." Joslin's claim fails. The prosecutor's questions were relevant and probative given Joslin's and Wigner's testimony, which

overlapped in parts and conflicted in others. Even if improper, Joslin cannot show that the prosecutor's questions were "so flagrant and ill-intentioned" that they created a lasting prejudice that could not be remedied by a curative instruction to the jury.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's questions were improper and prejudicial.

State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006).

Once proven, improper comments require reversal only if "there is a substantial likelihood the misconduct affected the jury's verdict."

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Failing to properly object, request a curative instruction, or move for a mistrial constitutes waiver on appeal, unless the misconduct is so "flagrant and ill-intentioned" that no curative instruction could have cured the resulting prejudice. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). A defendant's objection is inadequate to preserve the error for review unless the objection provides the trial court with a specific ground to review. See State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991) (holding that the defendant's objection to the prosecutor calling for "a comment on the evidence" was "too general" to meet the specific-ground requirement).

A prosecutor commits misconduct by asking a witness to comment on whether another witness is lying. Id. at 362; State v. Suarez-Bravo, 72 Wn. App. 359, 366-67, 864 P.2d 426 (1994); State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). Courts prohibit this type of questioning because what one witness thinks of another witness's credibility is "simply irrelevant," and requiring a defendant to say that another witness is lying "puts the defendant in a bad light before the jury." State v. Wright, 76 Wn. App. 811, 821-22, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Contrary to Joslin's argument, cross examining a witness about whether another witness was mistaken or "got it wrong" is not *per se* misconduct.³ Id. at 822. To the extent that such questions are irrelevant and unhelpful to the jury, they are objectionable. Id. To the extent that such questions help the jury "sort through" conflicting testimony where there are "conflicts between part but not

³ Joslin's prosecutorial misconduct claim rests entirely on this Court's decision in State v. Walden, and the cases cited therein. 69 Wn. App. 183, 187, 847 P.2d 956 (1993). Joslin's argument, however, overlooks this Court's limitation of Walden two years later in Wright. 76 Wn. App. at 822 ("We further disagree with the conclusion in Walden that cross examination about whether another witness was mistaken or 'got it wrong' constitutes misconduct."). Joslin's reliance on Walden is thereby misplaced.

all of various witnesses' versions of the events," the questions are relevant and probative. Id.

If the prosecutor's questions amount to misconduct, then courts consider a variety of factors to determine whether the misconduct likely affected the verdict, such as whether the prosecutor provoked the witness to say that another witness was lying, and whether the witness and other witness's testimony was "believable and/or corroborated." See id. at 823 (holding that the likely prejudice was "minimal" because the prosecutor did not provoke the defendant into saying that the officers were lying, and the defendant's testimony was not corroborated by anyone else's testimony); Casteneda-Perez, 61 Wn. App. at 364.

Here, the prosecutor properly cross examined Joslin on her payroll practices, asking her to clarify whether she collected employees' pay stubs, what happened to petty cash on the boat, and which employees were paid using the boat account. 5RP 50-52; 6RP 15-17. In the first instance, the exchange proceeded as follows:

STATE: [W]hen a boat would come in from a contract you would go down to the boat?
JOSLIN: Yes.

STATE: You would take all of Jenny Wigner, now Jenny Franks, pay stubs, is that correct?

JOSLIN: You need to be more specific. Pay stubs?

STATE: The pay stubs for the checks that -- the payroll checks she had written while the boat was out at sea?

JOSLIN: The employees have their pay stubs.

STATE: So there is no record that Ms. Wigner kept what she paid the employees?

JOSLIN: It was on the computer.

STATE: So she wouldn't give you - oh, sorry - Petty cash?

JOSLIN: Petty cash?

STATE: I'm going to get to that. So Ms. Wigner testified she gave you copies of pay stubs. Are you saying her testimony is inaccurate?

JOSLIN: Yes.

5RP 50.

The prosecutor followed this exchange by asking about the petty cash onboard the ship:

STATE: [Wigner] gave you petty cash slips?

JOSLIN: Yes.

STATE: And she gave you the leftover petty cash that was on the boat?

JOSLIN: No.

STATE: She didn't show - did not give you the petty cash?

JOSLIN: No, she did not. It goes in the safe. That's where the money always stays for the boat is in the safe.

STATE: So your testimony is that there's cash left on the boat when the boat is in port?

JOSLIN: Absolutely.

STATE: Okay. So Ms. Franks' testimony about that is inaccurate?

JOSLIN: I don't recall her testifying to that.
STATE: Okay if she had testified to that, you're saying that testimony would be inaccurate?
DEFENSE: Your Honor, I will object to that question.
COURT: Overruled.
JOSLIN: The petty cash stays on the boat in the safe. That's why it's petty cash. It doesn't leave the boat.
STATE: Okay. My question is if Ms. Franks had testified that she gave you or anybody else, Mark Weed, the petty cash that was on the boat when they came back into port my question is if she had testified to that would that testimony be inaccurate?
JOSLIN: Yes, I brought the cash to the boat if we needed more, but I never removed cash from the boat.
STATE: That wasn't my question, Ms. Joslin. My question is whether or not that testimony would be inaccurate?
JOSLIN: Yes, it would.

5RP 50-52.

In the final exchange, the prosecutor asked about which employees were paid using the boat account:

STATE: And this Stellar account was only used to pay employees that were actually physically on the boat; isn't that correct?
JOSLIN: No.
STATE: Those were the only employees that were paid of that account; is that correct?
JOSLIN: No. Absolutely not.

STATE: So if Ms. Wigner had testified that those were the only employees that were paid off this account as part of payroll that would have been incorrect?

JOSLIN: That's correct.

STATE: Wasn't that just your testimony that the only employees that were paid off this account were the hourly employees who work on the boat?

JOSLIN: You asked if there was just Stellar employees, and there was more than Stellar employees paid out of that account.

STATE: Was your testimony just a couple minutes ago that only hourly employees on the boat were - were paid out of this account?

JOSLIN: For that particular question, yes.

STATE: Okay. And you're saying that there are other employees that you - that were being paid?

JOSLIN: Yes.

STATE: But regarding the - but they were being paid as hourly employees off of this account; is that what your testimony was?

JOSLIN: Yes. Yes. Yes, it is.

STATE: And you are maintaining that those are Peter Pan employees, correct?

JOSLIN: Yes. I can show you.

STATE: Are you saying that was your responsibility to pay those employees?

JOSLIN: Yes. You can look on your accounts. They were right on there.

STATE: So you were writing checks in the office on the boat account to Peter Pan employees?

JOSLIN: Yes, I did.

STATE: And Ms. Wigner was not?

JOSLIN: No. There's - it's in your -

STATE: My question is your testimony is
Ms. Wigner was not?
JOSLIN: Was not what?
STATE: Was not writing those checks to those
employees?
JOSLIN: The particular ones? No. That was my
job.
STATE: Her only job was to pay the Stellar
employees?
JOSLIN: Yeah, and whatever else she had to pay
while the boat was out.

6RP 15-17.

During all of the exchanges, Joslin's counsel objected only once to the prosecutor's questions, and did not state the ground for the objection. 5RP 51 ("Your Honor, I will object to that question"). Having failed to provide a specific reason for the objection and failed to object to the rest of the questions, Joslin has failed to preserve the issue for appeal unless the claimed misconduct was "so flagrant and ill-intentioned" that no curative instruction could have cured the resulting prejudice. Swan, 114 Wn.2d at 661.

Given the case law and Joslin's conflicting testimony, Joslin cannot carry this heavy burden. Indeed, unlike prosecutors who have committed misconduct by asking a defendant whether an officer was "lying" or "telling the truth," the prosecutor never asked Joslin whether Wigner was "lying" or "telling the truth." See Casteneda-Perez, 61 Wn. App. at 357-59, 363; Suarez-Bravo, 72

Wn. App. at 363, 366; Padilla, 69 Wn. App. at 299. Rather, as Joslin concedes, the prosecutor only asked if Wigner's "*testimony*" was "inaccurate" or "incorrect." 5RP 50-52; 6RP 15-17 (emphasis added).

The prosecutor properly attempted to clarify through cross examination the parts of Wigner's testimony with which Joslin agreed and disagreed:

STATE: . . . So Ms. Wigner testified she gave you copies of pay stubs. Are you saying *her testimony is inaccurate*?

JOSLIN: Yes.

STATE: She gave you petty cash slips?

JOSLIN: Yes.

STATE: And she gave you the leftover petty cash that was on the boat?

JOSLIN: No.

5RP 50 (emphasis added). The prosecutor's questions were relevant and probative because Joslin agreed with "part but not all" of Wigner's testimony. Wright, 76 Wn. App. at 822. By focusing on the similarities and discrepancies in Joslin's and Wigner's testimony about payroll practices, the prosecutor steered clear of impermissibly goading Joslin into calling Wigner a liar, and properly aimed her questions at helping the jury "sort through" the overlapping and conflicting testimony. Id.

The prosecutor's questions about which employees were paid using the boat account was critical to weighing the credibility of Joslin's claim that she was entitled to the money from the boat account because it was used to pay employees like her, who worked for Peter Pan. 6RP 16. Even if the prosecutor's questions were objectionable, a curative instruction would have remedied any potential prejudice.

Moreover, Joslin cannot show, nor has she even attempted to show, that there is a "substantial likelihood" that she would have been acquitted but for the prosecutor's questions. Brown, 132 Wn.2d at 561. The prosecutor never provoked Joslin into saying that Wigner was lying. Indeed, all of Joslin's responses were limited to "Yes," "I don't recall her testifying to that," and "That's correct." 5RP 50-52; 6RP 15-17. Joslin's testimony that the boat account was used to pay Peter Pan employees like herself was neither believable, nor corroborated. Multiple witnesses, including Peter Pan's president and treasurer, testified that Peter Pan did not employ Joslin. 7RP 11, 16-17. Given these circumstances, Joslin cannot show that the alleged misconduct affected the jury's verdict.

See Wright, 76 Wn. App. at 823 ("minimal" prejudice where prosecutor did not provoke the defendant into saying that the officers were lying, and the defendant's testimony was not corroborated by anyone else's testimony).

Finally, defense counsel's failure to object, move for a mistrial, or request a curative instruction, "strongly suggests" that the prosecutor's questions did not appear "critically prejudicial" in the context of trial. Swan, 114 Wn.2d at 661. The Court should reject Joslin's claim of prosecutorial misconduct and find that none of the prosecutor's questions warrant reversal.

3. JOSLIN'S FINAL ARGUMENT SHOULD BE STRICKEN FOR FAILURE TO COMPLY WITH RAP 10.3(a)(6).

Joslin argues that the trial court erred by denying her motion to substitute counsel following her conviction. Devoting only four sentences to the argument, Joslin fails to cite a single case or reference a relevant part of the record to support her claim. Joslin does not even specify how the court erred in denying her motion.

RAP 10.3(a)(6) requires parties to cite legal authority and reference relevant parts of the record when making an argument in support of the issues presented for review. Washington courts have long refused to consider inadequately briefed issues that are unsupported by citations to the record, or legal authority. E.g., Bruce v. Bruce, 48 Wn.2d 229, 230, 292 P.2d 1060 (1956) (disregarding appellant's claim based on her failure to reference the record or legal authority); State v. Mills, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) ("We will not consider contentions unsupported by argument or citation to authority in the appellate brief"); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (recognizing the purpose of RAP 10.3(a)(6) is to enable the court and opposing counsel to "efficiently and expeditiously" review the accuracy of factual statements and relevant legal authority).

Having failed to explain how the trial court erred, and failed to cite case authority and relevant portions of the record, Joslin has failed to pursue this claim on review. The Court should refuse to consider Joslin's vague and undeveloped argument.

D. CONCLUSION

For the reasons stated above, the Court should affirm
Joslin's convictions.

DATED this 13th day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John R. Muenster, the attorney for the appellant, at 14940 Sunrise Drive NE, Bainbridge Island, WA 98110, containing a copy of the Respondent's Brief, in STATE V. MELISSA JOSLIN (AKA MELISSA FRENICK), Cause No. 63337-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

06/13/11
Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JUN 13 PM 1:05