

65127-7

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NO. 65127-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

PEPPER N. PRIGGER,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

1. Prigger brought a motion to continue on the day of trial so she could attempt to hire new counsel. The court found: Prigger was adequately represented by counsel who was prepared for trial; and resolved the balance between Prigger's right to counsel of choice with the fair and efficient administration of justice in light of the substantial prejudice the delay from the continuance would cause to the other parties, in favor of denying the motion. Was it an abuse of discretion for the trial court to deny Prigger's untimely motion to continue on the day of trial to attempt to hire new counsel?

2. Prigger also brought motion to continue sentencing on the day of the sentencing hearing. The court resolved the balance, between Prigger's right to counsel of choice with the public's interest in the timely administration of justice and the victim's right to be present at sentencing, in favor of denying the motion. Was it an abuse of discretion for the trial court to deny Prigger's untimely motion to continue sentencing on the day of the hearing?

3. Was there sufficient evidence to support the jury's findings of the essential elements beyond a reasonable doubt of the crimes of bribing a witness and three counts of perjury?

4. Has Prigger shown actual prejudice to establish a manifest error?

5. Whether Prigger was denied effective assistance of counsel (a) by trial counsel not impeaching a witness with her prior 3rd degree theft conviction; (b) by trial counsel not objecting to testimony that a witness would not be prosecuted if she testified truthfully, but she could be prosecuted if she testified falsely, that the witness had been granted immunity, and that a police officer told the witness it was important that she tell him the truth; or (c) by the prosecutor improperly vouching for the witness's credibility?

II. STATEMENT OF THE CASE

A. THE MARCH 9, 2009, EXCHANGE AT AM/PM.

Pepper Nicole Prigger and Kelly Gregerson have a child in common, Hunter, who was born May 7, 2007. Prigger and Kelly separated in September 2007 and a litigious custody battle ensued in Thurston County. After separating from Prigger, Kelly Gregerson married Christin.¹ In March of 2009, under the temporary parenting plan Kelly had primary custody of Hunter with visitation for Prigger. On March 9, 2009, Hunter was at the end of a two day visit with Prigger in Arlington. The exchange of Hunter usually took place at

¹ Kelly and Christin Gregerson will be referred to by first name for clarity.

an exchange center in Olympia. However, on March 9, 2009, there was an ice and snow storm in Snohomish County, and Prigger did not have a four-wheel-drive vehicle. The parties agreed the Gregersons would drive to Arlington to get Hunter. The agreed meeting place was the Smoky Point AM/PM in Arlington, at 6:00 p.m. 2RP 16-20, 153-155, 157-158, 168; 3RP 117-119; 4RP 192, 195-197, 199-201, 203, 206.

Kelly and Christin were at the AM/PM when Prigger arrived in her father's black pick-up truck. Kelly pulled up behind Prigger, got out of his vehicle and walked to the area between his vehicle and the tail gate of Prigger's truck. Prigger turned on a hand-held recorder she brought and Kelly informed her that she did not have his permission to record the conversation. 2RP 168, 171-172, 176-177; 3RP 123-126; 4RP 196-198, 206.

Prigger asked Kelly to look at a scratch on Hunter's arm and confirm that it was not infected. Kelly would only agree under duress to say the scratch was not infected. Prigger then took Hunter inside the AM/PM to have the clerk confirm the scratch was not infected. When Prigger returned from the store Christin took a picture of Prigger holding Hunter; the purpose was to show that Hunter was not wearing a coat in the cold weather. Kelly retrieved

Hunter from Prigger, put him in the car and the Gregersons drove away. 2RP 177-178, 181-184; 3RP 127, 130, 132, 136; 4RP 216-217, 222, 227-229.

B. KELLY'S DECLARATION FOR FAMILY COURT.

On March 10, 2009, Kelly wrote a declaration regarding the March 9, 2009, exchange and attached a copy of the photograph taken by Christin. The declaration was for a motion in the Thurston County family law action. The final parenting plan between Prigger and Kelly entered on April 10, 2009. EX 23; 2RP 29-30, 156.

C. RAMMAGE'S APRIL 9, 2009 STATEMENT REGARDING THE MARCH 9, 2009 EXCHANGE.

Riannah Rammage first met Prigger on March 11, 2009, at the Snohomish County courthouse. Prigger told Rammage about a March 9, 2009 incident at the Smokey Point AM/PM in Arlington, and told Rammage that she needed someone to say she was a witness to the incident. Prigger typed a statement for Rammage to sign and then drove Rammage to Kinko's to have the statement notarized. The statement claimed that Rammage observed a man grab an object from a woman's hand and smash it with his foot and when the woman bent down to pick it up the man shoved her down on her rear end. Rammage was not a witness to the events

described in the statement. Prigger gave the statement to Sergeant Cone on April 19, 2009. EX 3; 1RP 37; 3RP 13, 17-18, 20-23, 71, 89.

Exhibit 3 is the one page statement typed by Prigger and signed by Rammage dated April 9, 2009. The statement reads in pertinent parts:

Superior Court Of Washington State:
I Riannah Rammage residing at 5409 60th PL. NE
Marysville WA 98270. ...

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

Under Rammage's signature are the signature and seal of the notary and the following hand written language:

State of Washington
County of Snohomish
Commission Expires
7-19-12
On April 9th 2009
Paula Sue Ayers

EX 3.

D. PRIGGER'S APRIL 19, 2009 STATEMENT REGARDING THE MARCH 9, 2009 EXCHANGE.

Sergeant Cone also received a signed and dated statement from Prigger at the Arlington Police Department on April 19, 2009. In the statement Prigger claimed that Kelly Gregerson threw her

recorder on the ground and broke it with his foot and when she tried to pick up the recorder he knocked her over. EX 2; 1RP 31-32, 36-37; 5RP 83-84.

Exhibit 2 is the five page hand written statement of Prigger dated April 19, 2009. The first page of Exhibit 2 reads in pertinent parts:

STATEMENT OF: Pepper Nicole Prigger

STATEMENT TAKEN AT: Arlington DATE 4/19/09

TIME: 3 PM

The bottom of each page is signed by Prigger and dated 4/19/09, under the language "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct". Below the signature and date the location "110 East Third St., Arlington, WA 98223" is printed. EX 2.

E. RAMMAGE'S SECOND STATEMENT ON APRIL 30, 2009.

Rammage was residing with Heather Moseley and Heather's son Michael² during the period April, 15, 2009 through July 2, 2009. During that time period Prigger came to Heather's house often and Rammage and Heather talked frequently about Prigger. After Prigger lost the custody case Prigger again asked Rammage to

² Heather and Michael Moseley will be referred to by first name for clarity.

write a statement for the Arlington Police; Rammage was reluctant and crying. Prigger offered Heather \$20—\$25 to drive Rammage to the Arlington Police station because Prigger did not want the police to see her involved. Heather knew that Rammage did not want to write a statement and declined Prigger's offer. Prigger ended up driving Rammage to the Arlington Police station on April 30, 2009. Prigger told Rammage what to write in her statement. The statement claimed that Rammage was at the Smoky Point AM/PM on March 9, 2009; that Rammage observed a woman tell a man that she was recording him. The man grabbed the recorder out of the woman's hand, threw it to the ground and stomped it with his foot. The man then shoved the woman with both hands on her shoulders causing her to fall backward on to her rear end on the cement. EX 38; 3RP 8, 24-28, 72, 86.

Exhibit 38 is the one page hand written statement of Rammage dated April 30, 2009. EX 38; CP 58, 82-85. The statement reads in pertinent parts:

STATEMENT OF: Riannah E Rammage

STATEMENT TAKEN AT: Arlington P.D. DATE

4/30/09 TIME: 9:30 AM

At the bottom of the page, under the language "I certify (or

declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct”, the statement is signed by Rammage and dated 04/30/2009. Below the signature and date the location “110 East Third St., Arlington, WA 98223” is printed. EX 38.

F. POLICE INTERVIEWS WITH RAMMAGE AND PRIGGER IN MAY 2009 UNCOVER INCONSISTENCIES IN THEIR STATEMENTS.

On May 18, 2009, Detective Barrett contacted Rammage regarding the investigation of the incident at the AM/PM. When describing the incident Rammage put her red car next to Prigger's black truck, but in the wrong parking stalls. On May 20, 2009, Detectives Barrett and Rhodes interviewed Prigger regarding the investigation of the AM/PM incident. At the end of the interview Detective Barrett asked Prigger about a photograph she had given them. Prigger said that Christin Gregerson had taken the photograph on the date of the incident. Prigger identified her vehicle in the photograph. A white car was parked next to Prigger's vehicle where she said Rammage had been parked in a red car. The Detectives were able to get the license number of the white car and contacted Leslie Reeves. Reeves stated that she worked at the AM/PM, that she drove the white car to work on March 9, 2009,

and that the car was parked in the same stall all that day. 2RP 94, 97- 99, 100-101, 218-220; 3RP 30, 32-33, 76.

G. HEATHER AND MICHAEL MOSELEY'S CONTACT WITH PRIGGER ON MAY 21, 2009.

On May 21, 2009, Prigger came over to the Moseley's house and tried to get Heather and Michael to write a statement saying that Prigger had not really done anything wrong. The Moseleys understood that the statement was for the custody of Prigger's son and a criminal investigation. Prigger told Heather and Michael that they would be taken care of and given a check for \$2,500 monthly. Prigger told Michael that he should try to convince his mother to sign. Heather was aware that her roommate, Riannah Rammage, had written a statement for Prigger that had been given to the Arlington Police. Heather also knew that Rammage was upset about the statement she wrote for Prigger and that the whole thing was about Prigger trying to get custody of her son. 2RP 50-53, 69-70, 75, 77, 80-81, 86-87.

During cross-examination of Heather defense counsel asked about the statement Heather wrote on May 27, 2009, and Heather's interview with defense investigator Kathy Hewitt in January 2010. The focus of the questions was the differences between Heather's

prior statements and her testimony. 2RP 73-81.

H. RAMMAGE'S CONFESSION.

On May 26, 2009, Detectives Rhodes and Barrett contacted Rammage again. Rammage knew why the police came back; she knew that they knew she had not been telling the truth in her statements. Rammage thought she was going to be arrested and taken to jail. The Detectives told Rammage that they knew she had not been parked next to Prigger at the AM/PM and that they knew she was not telling the truth. No threats or promises were made to Rammage by the police. Rammage admitted that her prior statements were false and told the Detectives what happened because she did not want further involvement in something that was not right. Rammage wrote a statement the next day confessing that her prior statements were false. Detective Rhodes and Barrett did not make Rammage any promises about whether or not she would be prosecuted for her false statements. 2RP 111-112; 3RP 35-38, 96-97; 4RP 47-50.

I. TRIAL CONTINUANCES GRANTED BY THE COURT.

First continuance. On December 18, 2009, the trial was continued by agreement to February 5, 2010. CP 118-119.

On January 29, 2010, the court heard defendant's motion to

compel fingerprints from three State's witnesses, Kelly and Christin Gregerson and Riannah Rammage. Prigger wanted to have her expert compare the witnesses' fingerprints to latent prints on a document Prigger claimed she found on her porch in August 2009—Exhibit 19. The hearing was continued to Friday, February 5, 2010, the scheduled trial date. RP 1/29/10 11, 19-20, 51-52.

Exhibit 19, the document Prigger claimed she found on her porch in August 2009, was unsigned and did not state who it was from or who it was addressed to. The document purported to be from someone working for the State Patrol offering to pay the recipient \$100,000 to say that they were not there and that Pepper Prigger had blackmailed them in to saying they were. On February 26, 2010, the court ordered Prigger to provide the document to the State by 6:30 p.m. that day, however, when Prigger delivered it to the Arlington Police the document was wet, making it useless for forensic evaluation. Exhibit 19 was the focus of Prigger's motion on January 29, 2010, to compel fingerprints of Kelly and Christin Gregerson and Riannah Rammage; the focus of the State's motion to continue to allow time for the State's expert to examine the document on February 5, 2010; the focus of Prigger's motion to continue on the first day of trial, February 26, 2010; and the focus

of Prigger's motions during trial on March 3 and 4, 2010. EX 19; 4RP 2-29, 184-190.

Second continuance. At the February 5, 2010 hearing, the prosecuting attorney moved to continue the trial to allow time (1) to obtain fingerprints from Kelly and Christin Gregerson and Riannah Rammage, (2) for the defense expert to compare the fingerprints to latent prints on the document (Exhibit 19) defense wanted to use at trial, and (3) for the State's expert to examine the document and compare the fingerprints. RP 2/5/10 7-8.

The prosecutor had been given a copy of the document on January 26, 2010, however, the prosecutor had not seen the original nor been given an opportunity to have the original document examined. Defense objected to continuing the trial even though the original document was still in California with the defense expert who examined it and the expert was not available to testify until April. CP 116; RP 2/5/10 3, 7-8, 18-21.

In response to the motion to continue Prigger proposed the following: If Rammage's prints were obtained that day, the defense would hire a local expert, and if the local expert could examine the prints over the weekend, then the results could be given to the prosecutor at trial on Monday morning, February 8, 2010.

However, if Rammage's prints could not be examined by February 8, 2010, Prigger stated she would need to continue the trial. RP 2/5/10 8-9, 14.

Since it was defense that wanted the prints for trial and not the state; that defense did not have a witness available who could identify the prints on the document for trial; that defense had not clarified whether or not they intended to use the document at trial, whether or not they were adding an expert witness for trial, and whether or not they were offering an expert report at trial; the court found it was necessary in the administration of justice to continued the trial to February 19, 2010. CP 115-117; RP 2/5/10 25.

Third continuance. On February 19, 2010, the prosecutor declared ready for trial and requested a material witness warrant for Riannah Rammage; Prigger declared that she was ready for trial. Due to court congestion, the case was continued one week to February 26, 2010. Prigger declared that she would be ready for trial on February 26, 2010. RP 2/19/10 2-3.

J. DIFFICULTY CONTACTING RAMMAGE PRIOR TO TRIAL.

Rammage testified that Prigger's characterization that she was reluctant to cooperate was not a fair statement. Rammage explained that she had life happening; she's a mother, she moved

several times and just got housing, and she had food poisoning and was in the hospital on an I.V. 3RP 66-68, 88.

K. DEFENDANT'S MOTION TO CONTINUE ON THE DAY OF TRIAL AND CAUSE FOR DISSATISFACTION WITH COUNSEL.

On February 26, 2010, when the case was called for trial, Prigger requested a continuance so she could hire a new attorney. Defense Counsel, Marybeth Dingley, stated that she and Prigger were not seeing eye-to-eye and had a difference of opinion regarding aspects of the case. Defense requested the case be continued one week to see if Prigger could potentially hire Ms. Goykhman. The prosecutor objected to a continuance; Riannah Rammage had been arrested on the material witness warrant and was present for trial. Ms. Dingley informed the court that she was ready for trial if the court denied the motion to continue, but that she would not be available the following week. Defense requested an *in camera* hearing for Prigger to put something on the record. The matter was assigned to Judge Downes for trial. RP 2/26/10 (Nishimoto) 2-5; RP 2/26/10 (Meek) 3-4.

Defense provided a statement written by Prigger regarding her concerns for the court to consider. Judge Downes reviewed the document *in camera*. Prigger's primary concerns were regarding

the use of Exhibit 19 at trial. EX A; RP 2/26/10 (Meek) 10-11; RP 2/26/10 (Avery) 2-3.

Judge Downes found that the concerns raised by Prigger in the statement related to trial strategy issues; what question may or may not get asked and what arguments may or may not get made. Judge Downes found that the disagreement between Ms. Dingley and Prigger did not go to Ms. Dingley's fundamental preparedness or ability to proceed with the case and did not show a fundamental breakdown of the attorney-client relationship or the ability to communicate with each other. RP 2/26/10 (Meek) 5-6.

L. RAMMAGE GRANTED IMMUNITY.

On March 3, 2010, prior to Rammage testifying and outside the presence of the jury, the court granted her immunity from prosecution for bribery or accepting a bribe and perjury for her testimony regarding her acts encompassed in the investigation of the case. During direct and cross-examination both the prosecutor and defense counsel asked Rammage about her immunity. CrR 6.14. 3RP 3-5, 44, 68.

M. RAMMAGE WAS QUESTIONED ABOUT OFFERS TO CHANGE HER STATEMENTS, PERJURY AND PROMISES TO TELL THE TRUTH.

While questioning Rammage about whether anyone other

than Prigger had offered her anything to change her statement or to give any particular testimony, the prosecutor showed Rammage Exhibit 19 and asked Rammage if she had ever seen it before. Rammage replied that the defense investigator had show Exhibit 19 to her on February 5, 2010, but other than that she had not seen it before. 3RP 42-43.

Q O.K. And at that time, had you been made any promises in regards to whether or not you were going to be prosecuted?

A At that time, no.

Q O.K. At some point were you given a letter saying that if you testified truthfully, you wouldn't be prosecuted?

A Yes. Just - - that was just last week.

Q O.K. And the letter said that you wouldn't be prosecuted for what you testify if it was true?

A Correct.

Q But if you testified falsely, you could be prosecuted for that?

A Yes.

Q And you were present this morning when the Court granted you immunity for the two perjury charges that you committed?

A Yes.

Q But prior to that time, no promises had been made?

A No.

3RP 44.

During cross-examination defense counsel asked Rammage

about signing the statements under penalty of perjury and about perjuring herself for \$300. On re-direct examination the prosecutor asked about the \$300. 3RP 70-73, 85-86, 98-99.

N. PRIGGER'S REQUEST TO ADDRESS THE COURT *EX PARTE* DURING TRIAL.

At the end of the day on March 3, 2010, during the trial, Prigger indicated that she wanted to address the court *ex parte* regarding a matter that involved an attorney client privilege and indicated that she wanted to fire her counsel. The court said it would take the matter up the next morning to allow both parties time to research the issue. 3RP 238-245.

On March 4, 2010, Prigger stated that whether she asked to represent herself depended on how the court ruled on the admissibility of Exhibit 19. The court stated that it would be unfair to allow one side to use evidence that the other side did not have an opportunity to examine. At the end of the day the court said it would allow Prigger time to research the foundation issue and take up the matter the next day. 4RP 2-29, 184-190.

On March 5, 2010, before Prigger testified, the court ruled that Exhibit 19 was not admissible. 5RP 3-4.

O. DEFENDANT'S MOTION TO CONTINUE SENTENCING.

On March 8, 2010, the jury returned guilty verdicts on the four felony counts; Prigger was taken into custody. The prosecutor asked that sentencing be set within 40 judicial days. RCW 9.94A.500(1). Prigger requested a quick setting for sentencing. The trial court set the sentencing hearing for March 17, 2010. 6RP 17-19, 23-25.

At the sentencing hearing on March 17, 2010, Prigger requested to continue the sentencing so James Lobesenz could represent her at sentencing. Mr. Lobesenz had been paid a \$500 retainer. The trial court had not authorized a substitution of counsel, nor had a motion for substitution of counsel been filed. CrR 3.1(3); CR 71. Mr. Lobesenz was not present on March 17, 2010, and was not available for 2-3 weeks. The trial judge was not available on the new dates Prigger requested. RP 3/17/10 2-3, 7.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO CONTINUE ON THE DAY OF TRIAL TO POTENTIALLY HIRE NEW COUNSEL.

Prigger argues that when the trial court considered her motion for a continuance on the day of trial to potentially hire private counsel, the trial court failed to properly identify the

constitutional right at issue, applied the wrong test in determining whether to grant the motion, and thereby abused its discretion in denying her motion for a continuance to attempt to obtain counsel of her choice. Appellants Brief at 17-18.

“It is settled law that under the Sixth Amendment criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice.” State v. Roth, 75 Wn. App. 808, 824, 881 P. 2d 268 (1994), review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995) (*quoting United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir.1986)). “However, the right to retained counsel of choice is not a right of the same force as other aspects of the right to counsel.” Roth, 75 Wn. App. at 824. A criminal defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005), review denied, 155 Wn.2d 1018 (2005). In particular, a defendant may not insist upon representation by an attorney she cannot afford. State v. Roberts, 142 Wn.2d 471, 516, 14 P.3d 713 (2000). “[T]he essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice.” Price, 126 Wn. App. at 631 (*citing Wheat*

v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)).

The trial court has broad discretion in ruling on a motion for a continuance sought to obtain new counsel. Price, 126 Wn. App. at 632. Moreover, the request for counsel of choice must be timely asserted. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990) (holding it is within the trial court's discretion to refuse the defendant's untimely request to retain counsel of their choice). A request for a continuance to obtain new counsel made on the day of trial is untimely. Chase, 59 Wn. App. at 506. "A defendant's right to retained counsel of his choice doesn't include the right to unduly delay the proceedings." Roth, 75 Wn. App. at 824 (*quoting United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir.1993)). "[D]ay-of-trial continuances are not favored." Price, 126 Wn. App. at 633. "In the absence of substantial reasons a late request should generally be denied, especially if the granting of such a request may result in delay of the trial." Chase, 59 Wn. App. at 506 (*quoting State v. Garcia*, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979)).

A trial court's denial of a criminal defendant's motion for a continuance sought to preserve the right to counsel violates the

defendant's right only if it is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Price, 126 Wn. App. at 632. "The trial court must balance the defendant's interest in counsel of his or her choice against the public's interest in prompt and efficient administration of justice." Roth, 75 Wn. App. at 824-825. The factors to be considered include (1) whether the court had granted previous continuances at the defendant's request, (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation, (3) whether available counsel is prepared to go to trial, and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.³ Roth, 75 Wn. App. at 825.

The record amply demonstrates that the trial court applied the correct test in determining whether to grant Prigger's untimely motion for a continuance on the day of trial to see if she could hire new counsel. The trial court properly exercised its discretion when

³ It is arguable that the fourth Roth factor was disapproved in United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (holding that "[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an in-effectiveness or prejudice inquiry....").

it determined that granting Prigger's request for a continuance to see if she could hire new counsel would entail substantial delay and prejudice to the other parties involved. RP 1/26/10 (Avery) 4-7.

1. Previous Continuances Granted By The Court.

Prior to Prigger's motion to continue on the day of trial, the trial had been continued three times. See II, I, above. The first continuance was at the request of Prigger and the prosecutor. The second continuance was necessary in the administration of justice; however, the court found it was necessitated by Prigger. The third continuance was due to court congestion.

2. Defendant's Cause For Dissatisfaction With Counsel.

The reasons for Prigger's dissatisfaction with Ms. Dingley were set forth at the February 26, 2009 hearing, and in the documents reviewed by the court *in camera*. See II, K, above.

The breakdown of a relationship between attorney and defendant from irreconcilable differences can result in the complete denial of counsel. In re Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). Washington courts have adopted the Ninth Circuit's test to determine whether an irreconcilable conflict exists. Stenson, 142 Wn.2d at 723-24 (*citing* United States v. Moore, 159 F.3d 1154, 1158-1159 (9th Cir.1998)). Under this test, courts consider the

following factors: (1) the extent of the conflict, (2) the adequacy of the court's inquiry into the conflict, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724. While this test covers some of the same ground as the test for substitution of counsel, the courts have recognized that “the differences are substantial enough to constitute a new ground for relief.” Id. In the present case, Judge Downes’ inquiry properly focused on the extent of a breakdown and the effect on the representation. The court gave great weight to Prigger’s ability to have an adequate defense and a fair trial and balanced that with the timing of the request—made on the day of trial after having declaring ready the week before. RP 2/26/10 (Meek) 6-7.

3. Whether Available Counsel Was Prepared To Go To Trial.

The trial court properly denied Prigger’s request for new counsel when she failed to demonstrate that she could actually retain a new attorney. Price, 126 Wn. App. at 633 (the court properly denied the defendant’s request for new counsel on the second day of trial when he offered no evidence to support his claim that he could afford to hire a new attorney and no other competent counsel appeared who was prepared to go to trial). Prigger offered no evidence to support her claim that she could

afford to hire a new attorney and no other competent counsel appeared who was prepared to go to trial.

Rather, on the day of trial Prigger requested a one week continuance to see if she could potentially hire Ms. Goykhman. RP 2/26/10 (Nishimoto) 2-5; RP 2/26/10 (Meek) 3-4. The court properly found that the request made on the day of trial was untimely and that granting it would entail substantial delay and prejudice to the other parties involved. Price, 126 Wn. App. at 633; Chase, 59 Wn. App. at 506-507 (the court properly denied the defendant's request for new counsel on the day of trial when he claimed that he had retained another attorney, but that attorney had not appeared in the case). The trial court properly exercised its discretion when it denied Prigger's request on the day of trial for a continuance to potentially hire new counsel.⁴

4. Whether the Denial of the Motion was Likely to Result in Identifiable Prejudice of a Material or Substantial Nature to Defendant's Case.

While the existence of actual prejudice to the case "is not a

⁴ In ruling on Prigger's motion to continue, the court said that even if another attorney was present and ready the court might not grant a continuance on the day of trial when defense had previously declared ready for trial. RP 2/26/10 (Avery) 11-12. The court clarified that it was referring to the motion to continue and not whether it would allow a substitution of counsel if an attorney was present. 4RP 24-25.

prerequisite to a constitutional violation in this context” the inability of Prigger to establish likely prejudice at the motion for continuance weighs heavily in the trial court’s balance of the competing considerations. Roth, 75 Wn. App. at 826.

The record in the present case is sufficient to conclude that the trial court reasonably balanced the competing considerations and concluded that the fair and efficient administration of justice outweighed Prigger’s right to choice of counsel. Prigger’s request was made on the day of trial, after the court had already continued the trial three times; once at Prigger’s request and a second that was necessitated by her. Granting Prigger’s request would have required an undetermined delay in the proceedings; initially to determine whether Prigger could actually retain new counsel; then if counsel was retained, while new counsel prepared for trial. Prigger’s articulated dissatisfaction with her appointed counsel did not go to Ms. Dingley’s fundamental preparedness or ability to proceed with the case and did not show a fundamental breakdown of the attorney-client relationship or the ability to communicate with each other. The trial court did not abuse its discretion in denying Prigger’s request to continue the trial to attempt to obtain new counsel.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO CONTINUE SENTENCING AND SUBSTITUTE COUNSEL ON THE DAY OF THE HEARING.

Prigger also argues that the trial court violated her right to have counsel of her choice when it denied her request for a two-week continuance at the sentencing hearing.

The Sixth Amendment guarantees the right to select and be represented by one's preferred attorney. Wheat, 486 U.S. at 159. Generally, a criminal defendant who can afford to pay for her own attorney has a right to counsel of her choice. Roth, 75 Wn. App. at 824. However, “the right to retain counsel of one's own choice has limits.” Roth, 75 Wn. App. at 824; see State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (“A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate.”). “[A] defendant's right to retain counsel of his choice does not include the right to unduly delay the proceedings.” Roth, 75 Wn. App. at 824.

“The trial court must balance the defendant's interest in counsel of his or her choice against the public's interest in prompt and efficient administration of justice.” Roth, 75 Wn. App. at 824-825. The resolution of this balancing exercise falls squarely within

the discretion of the trial court. State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010); State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). A trial court's denial of a criminal defendant's motion to continue "sought to preserve the right to counsel" violates the defendant's right only if it is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Roth, 75 Wn. App. at 824. The trial court has broad discretion in ruling on a motion for a continuance sought to obtain new counsel. Price, 126 Wn. App. at 632.

After the jury returned guilty verdicts, the court set sentencing for March 17, 2009, at Prigger's request for a quick setting. At the March 17, 2009 hearing, Prigger requested a continuance so she could be represented by new counsel. See II, O, above.

In considering a motion to continue to obtain counsel of choice, the trial court must weigh the defendant's right to choose counsel against the public's interest in the prompt and efficient administration of justice. Aguirre, 168 Wn.2d at 365; Roth, 75 Wn. App. at 824-25. The resolution of this balancing exercise falls squarely within the discretion of the trial court. Aguirre, 168 Wn.2d at 365. The trial court in the present case carefully balanced

Prigger's interest in counsel of her choice against the public's interest in prompt and efficient administration of justice. Roth, 75 Wn. App. at 824-25.

1. Request For Continuances On The Day Of The Hearing.

Reminiscent of Prigger's motion to continue to hire a new attorney on the day of trial, Prigger again requested the court continue her sentencing on the day of the hearing so new counsel could represent her. The only notice given to the court and the prosecutor that Prigger might want to continue the sentencing was an email received on the evening of March 16, 2010. Four witnesses were present on March 17, 2010, including Kelly Gregerson, the victim of Prigger's actions in this case. Kelly and his wife had taken time off work and traveled from out of county to attend the sentencing. The court found that it was appropriate for Kelly as a victim to address the court at sentencing. RP 3/17/10 2, 4-7. Victims have a constitutional right to be present at sentencing. Aguirre, 168 Wn.2d at 365-366; See Washington Constitution art. I, § 35 (codifying the right of felony victims to attend sentencing).

Given these facts, the trial court acted well within its discretion when it resolved the balance between the victim's rights, Prigger's right to new counsel, and the public's interest in the timely

administration of justice, in favor of denying the requested continuance.

2. Defendant's Cause For Dissatisfaction With Counsel.

The only indication of dissatisfaction given by defense when requesting to continue sentencing was that Prigger had concerns about Ms. Dingley representing her. RP 3/17/10 3.

3. Unavailability Of Counsel Prepared To Go To Forward With Sentencing.

Mr. Lobesenz was not present on March 17, 2010. The trial court had not authorized a substitution of counsel nor had a motion for substitution of counsel had been filed. Additionally, the trial judge was not available on the new dates requested by Prigger. RP 3/17/10 2, 7.

Prigger's right to counsel of her choice does not include the right to unduly delay the proceedings. Roth, 75 Wn. App. at 824. Prigger's request for a continuance on the day of sentencing would have unduly delayed the proceedings. The trial court did not violate Prigger's right to choose counsel.

4. Whether The Denial Of The Motion Was Likely To Result In Identifiable Prejudice Of A Material Or Substantial Nature To Defendant.

Prigger argues that while her trial counsel had prepared a

sentencing brief, counsel did not have a plan to request a first-time offender waiver. Appellant's Brief at 25. While the sentencing brief did not address the first-time offender waiver, trial counsel did in fact request a first-time offender waiver for Prigger at sentencing. RP 3/17/10 17. The trial court considered the request and denied it, finding that a first-time offender waiver would be inappropriate in this case. RP 3/17/10 21-24.

While the existence of actual prejudice to the case "is not a prerequisite to a constitutional violation in this context" the inability of Prigger to establish likely prejudice at the time of the motion for continuance weighs heavily in the trial court's balance of the competing considerations. Roth, 75 Wn. App. at 826. Accordingly, the trial court did not abuse its discretion by denying Prigger's request for a continuance on the day of sentencing.

C. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS.

1. Legal Standards.

When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *citing* State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

2. The State Presented Sufficient Evidence That Defendant Bribed A Witness.

Prigger was charged and convicted of bribing a witness. CP

39, 82-85.

(1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:

(a) Influence the testimony of that person;

RCW 9A.72.090.

The jury was instructed on two alternative means of committing the crime of bribing a witness. CP 67. Under each alternative the State had to prove that: on or about May 21, 2009, Prigger offered, conferred, or agreed to confer a benefit upon Heather Moseley; that Prigger acted with the intent to influence the testimony of Heather Moseley; and the acts occurred in the State of Washington. Under the first alternative the State also had to prove that Prigger had reason to believe that Heather Moseley was about to be called as a witness in any official proceeding. Under the second alternative the State also had to prove that Prigger had reason to believe that Heather Moseley had information relevant to a criminal investigation. CP 67; RCW 9A.72.090(1).

Prigger argues that the State failed to present sufficient

evidence showing that: 1) Prigger had reason to believe that Heather Moseley was about to be called as a witness in any official proceeding; 2) Prigger had reason to believe that Heather Moseley had information relevant to a criminal investigation; and 3) Prigger acted to influence Heather Moseley's testimony. Appellant's Brief 30-33. The State presented sufficient evidence that Prigger bribed Heather Moseley on May 21, 2009. See II, G, above.

a. Prigger had reason to believe that Heather Moseley was about to be called as a witness in an official proceeding.

Prigger had persuaded Rammage to sign two perjured statements regarding the March 9, 2009 AM/PM incident. Heather and Rammage were roommates. Prigger came over to their house often and Heather and Rammage frequently talked about Prigger. Heather was aware that Rammage's statements had been given to the Arlington Police, that Rammage was upset about the statements, and that the whole thing was about Prigger trying to get custody of her son. Additionally, Prigger was aware that her concocted story was beginning to unravel and that Kelly Gregerson would soon find that out.

The jury was instructed on the definition of "official proceeding". CP 69. "Official proceeding" means a proceeding

heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions. RCW 9A.72.010(4). The custody hearings were official proceedings.

The evidence and the inferences that can reasonably drawn therefrom are sufficient to show that Prigger had reason to believe that Heather Moseley was about to be called as a witness in an official proceeding.

b. Prigger had reason to believe that Heather Moseley had information relevant to a criminal investigation.

Prigger had persuaded Rammage to sign two perjured statements regarding the March 9, 2009 AM/PM incident. Heather was aware that Rammage's statements had been given to the Arlington Police, and that Rammage was upset about the statements. Heather and Rammage were roommates and frequently talked about Prigger who came over to their house often. Prigger was aware that the Detectives knew that there were problems with both her and Rammage's statements and that the concocted story was beginning to unravel.

The evidence and the inferences that can reasonably drawn

therefrom are sufficient to show that Prigger had reason to believe that Heather Moseley had information relevant to a criminal investigation.

c. Prigger acted to influence Heather Moseley's testimony.

On March 21, 2009, Prigger was aware that the Detectives knew there was a problem with both her and Rammage's statements. Prigger also knew that the custody case was not going in her favor. Heather was aware of both the criminal investigation and the custody case. On March 21, 2009, Prigger offered Michael and Heather Moseley \$2,500 if they would write a statement saying that Prigger had not done anything wrong for the ongoing criminal investigation and the pending custody case.

The evidence and the inferences that can reasonably drawn therefrom are sufficient to show that Prigger acted with intent to influence the testimony of Heather Moseley.

3. The State Presented Sufficient Evidence That Defendant Committed Three Counts Of Perjury.

Prigger was charged and convicted of three counts of Perjury in the second degree, one count as principle and two counts as an accomplice to Rammage. CP 40-42, 58-60, 82-85.

(1) A person is guilty of perjury in the second degree if, in an examination under oath under the terms of a

contract of insurance, or with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law.

RCW 9A.72.030.

Prigger argues that the false statements, Exhibits 2, 3 and 38, do not state the place of execution, and therefore, were not signed under oath as required or authorized by law under RCW 9A.72.085. Appellant's Brief 37-38. However, an examination of the false statements shows that in fact each of the false statements was signed by the person, recited that it was certified or declared to be true under penalty of perjury under the laws of the State of Washington, and stated the date and place of its execution. EX 2, 3, 38. Additionally, the testimony at trial was that the statements were signed under penalty of perjury and stated the date and place of their execution. 1RP 31-32, 36-37, 3RP 20-21, 27-30. Any uncertainty regarding the place where the document was signed may be resolved by examining the rest of the document. Veranth v. Dept. of Licensing, 90 Wn. App. 1028, 91 Wn. App. 339, 342, 959 P.2d 128 (1998).

The evidence is sufficient to show that Exhibit 2—the hand written statement of Prigger—recited that it was certified or

declared to be true under penalty of perjury under the laws of the State of Washington, and that it was signed by Prigger on April 19, 2009, in Arlington, WA. EX 2; 1RP 31-32, 36-37; 5RP 83-84. See II, D, above.

The evidence is sufficient to show that Exhibit 3—the typed statement signed by Rammage—recited that it was certified or declared to be true under penalty of perjury under the laws of Washington, and that it was signed by Rammage on April 9, 2009, in Snohomish County, WA. EX 3; 1RP 37; 3RP 20, 22, 71, 89. See II, C, above.

The evidence is sufficient to show that Exhibit 38—the hand written statement of Rammage—recited that it was certified or declared to be true under penalty of perjury under the laws of the State of Washington, and that it was signed by Rammage on April 30, 2009, in Arlington, WA. EX 38; 3RP 24-28. See II, E, above.

D. DEFENDANT HAS NOT SHOWN ACTUAL PREJUDICE TO ESTABLISH MANIFEST ERROR.

In her Supplemental Brief Prigger raises several additional challenges for the first time on appeal. Prigger argues that she was denied a fair trial when trial counsel did not attempt to impeach a witness with a prior conviction and did not object to testimony that

Prigger claims vouched for the witness' credibility and amounted to prosecutorial misconduct.

“As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a ‘manifest error affecting a constitutional right’”. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); State v. Contreras, 92 Wn. App. 307, 311, 966 P.2d 915 (1998).

An appellant must show actual prejudice in order to establish that the error is “manifest.” Contreras, 92 Wn. App. at 311. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Scott, 110 Wn.2d at 685.

Prigger's challenges squarely confronts these procedural

barriers. At trial Prigger did not try to offer the 3rd degree theft conviction for impeachment of Heather Moseley. Additionally, Prigger did not object to the testimony she now claims vouched for Rammage's credibility.

1. Adequacy Of Record.

It is not enough for Prigger to allege prejudice; actual prejudice must appear in the record. McFarland, 127 Wn.2d at 334. To show that she was prejudiced Prigger must show that the trial court would likely have sustained an objection if it had been made. Id. Additionally, to be granted relief for prosecutorial misconduct Prigger must show that the misconduct was so flagrant and ill intentioned that no curative instruction could have obviated the prejudice. State v. Kendrick, 47 Wn. App. 620, 638, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987). See III, F, below.

Because Prigger did not object at trial and did not attempt to use the prior conviction for impeachment there is no record of the trial court's determination of these issues in this case. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3). McFarland, 127 Wn.2d at 334.

2. The Error Is Not Manifest; Actual Prejudice Has Not Been Shown; The Facts Necessary To Adjudicate The Claimed Error Are Not In The Record On Appeal.

Not surprisingly, Prigger seeks to avoid the consequences of her failure to comply with the settled procedural requirements by attempting to elevate her challenges into the constitutional realm. However, even a *de novo* review of the records (which relieves Prigger of her burden to show the alleged error was manifest) does not reveal actual prejudice accruing to Prigger from the asserted constitutional errors. McFarland, 127 Wn.2d at 334, fn 2.

E. INEFFECTIVE ASSISTANCE OF COUNSEL.

Prigger argues that she was denied effective assistance of counsel by trial counsel not impeaching Moseley with her prior 3rd degree theft conviction. Prigger also claims and that she was denied effective assistance of counsel by trial counsel not objecting to the following testimony: (1) that Rammage would not be prosecuted if she testified truthfully, but she could be prosecuted if she testified falsely⁵, (2) that Rammage had been granted immunity, and (3) that Officer Rhodes told Rammage it was

⁵ "Before testifying, every witness shall be required to declare that the witness will testify truthfully...." ER 603. Additionally, any witness testifying falsely can be prosecuted. RCW 9A .72.020.

important that she tell him the truth (2RP 11-12). Prigger argues that this testimony was improper vouching by the prosecutor for Rammage's credibility.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226.

1. Defendant Has Not Shown That Defense Counsel's Decision To Not Use The Prior Conviction To Impeach A Witness Fell Below An Objective Standard Of Reasonableness.

To prevail on her claim of ineffective assistance of counsel, Prigger must show that counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington,

466 U.S. at 687; McFarland, 127 Wn.2d at 334-35. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. The court gives exceptional deference when evaluating trial counsel's strategic decisions. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Prigger has not carried her burden to demonstrate that there was no legitimate strategic or tactical reason for her attorney's decision against raising Moseley's misdemeanor conviction.

In the present case, there was a legitimate tactical reason for trial counsel's approach to cross-examination and impeachment. Counsel was aware that Heather Moseley had a prior 3rd degree theft conviction. The prosecutor's trial brief listed Heather's criminal history, acknowledging that Heather's conviction for 3rd degree theft was admissible. State's Trial Brief at 7. The trial court concurred that the 3rd degree theft conviction was admissible. 1RP 11. During cross-examination, counsel questioned Heather about her prior inconsistent statements. Counsel could quite reasonably have made the tactical decision that focusing on Heather's prior inconsistent statements would serve as a more effective

impeachment tool with the jury than focusing on the misdemeanor crime, even though the latter involved a crime of dishonesty.

“The extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict. This, too, is a matter of judgment and strategy.” State v. Stockman, 70 Wn.2d 941, 945, 425 P.2d 898 (1967). Even if some other tactical approach to cross-examination and impeachment might have been more successful in retrospect, Prigger's counsel made a reasonable strategic decision. Counsel's representation did not fall below an objective standard of reasonableness. Prigger has not carried her burden of showing deficient performance; her ineffective assistance claim regarding counsel not using the prior conviction for impeachment fails.

2. Defendant Has Not Shown That Trial Counsel's Failure To Object Fell Below An Objective Standard Of Reasonableness And Prejudiced Her Trial.

To prevail on her claim of ineffective assistance of counsel, Prigger must show that counsel's performance both fell below an objective standard of reasonableness and that the deficient performance prejudiced her trial. Strickland v. Washington, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35. The reasonableness inquiry presumes effective representation and

requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336.

Because she bears the burden of rebutting the strong presumption that counsel's representation was not deficient, Prigger must show there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. The decision of when or whether to object is a classic example of trial tactics and only in "egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (failure to object deprives the trial court of an opportunity to prevent or cure the error). Prigger has not met her burden to show counsel's performance fell below an objective standard of reasonableness.

Additionally, Prigger bears the burden to show that counsel's performance caused her prejudice at trial. Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained to establish prejudice. State v. Brown, 2010 WL 5609731 at 7, ___ Wn. App. ___, ___P.3d ___, (2010); State v. Fortun-

Cebada, ___ Wn. App. ___, 241 P.3d 800, 807 (2010); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). “Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice.” McFarland, 127 Wn.2d at 337, fn 4. Prigger bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 225-26. To show prejudice, Prigger must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); In re Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992).

Prigger cannot demonstrate prejudice because there was substantial evidence to corroborate Rammage's testimony. The photograph taken during the exchange in the AM/PM parking showed that Rammage was not present. EX 23. Leslie Reeves testified that it was her car in the photograph that was parked next to Prigger's truck at the time of the exchange. 2RP 220. Prigger has not shown that counsel's failure to object was prejudicial because there is no reasonable probability that the outcome of the

trial would have been different if counsel had objected.

Moreover, Prigger cannot demonstrate prejudice because the jury was properly instructed that it was the sole arbiter of credibility. An important consideration in determining whether opinion testimony prejudices the defendant is whether the jury was properly instructed. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008); State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). In Montgomery and Kirkman the court determined that despite allegedly improper witness testimony on credibility, the defendant was not prejudiced because “the jury was properly instructed that jurors ‘are the sole judges of the credibility of witnesses’. Montgomery, 163 Wn.2d at 595 *quoting* Kirkman, 159 Wn.2d at 973. The Montgomery court also noted that “[t]here was no written jury inquiry or other evidence that the jury was unfairly influenced.” Montgomery, 163 Wn.2d at 596. Here, there was no inquiry, no evidence that the jury was unfairly influenced, and the jury was properly instructed that they were “the sole judges of the credibility of each witness.” Instruction 1. CP 46.

Additionally, the jury was specifically instructed regarding Rammage’s testimony as an accomplice:

Testimony of an accomplice, given on behalf of

the State should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

Instruction 9. CP 55. Prigger has not shown a reasonable probability that the outcome would have been different had counsel objected to the testimony that Rammage would not be prosecuted if she testified truthfully; that Rammage could be prosecuted if she testified falsely; that Rammage had been granted immunity; and that the police told Rammage it was important that she tell them the truth. Prigger has not carried her burden of showing counsel's performance was deficient or that she was prejudiced. Her ineffective assistance claim regarding counsel not objecting to the testimony fails.

F. PROSECUTORIAL MISCONDUCT.

Prigger argues the prosecutor committed misconduct by vouching for the truth of Rammage's testimony. Appellant's Supplemental Brief at 7. While it is improper for a prosecutor personally to vouch for the credibility of a witness, prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

In a prosecutorial misconduct claim, the appellant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996); State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). If an appellant establishes that a prosecutor's conduct was improper, it is prejudicial only if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). The absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Where the defense fails to object to alleged misconduct during trial, the error will not be reviewed "unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

1. The Prosecutor's Conduct Was Not Improper.

In the context of the record and circumstances at trial the prosecutor's conduct was neither improper nor prejudicial. Rammage testified that during the defense interview the investigator had shown her Exhibit 19. Exhibit 19 was the document Prigger claimed she found on her porch in August 2009; the document was unsigned and did not state who it was from or who it was addressed to; it purported to be from someone working for the State Patrol and offered to pay the recipient \$100,000 to say that they were not there and that Pepper Prigger had blackmailed them in to saying they were. Exhibit 19 was the focus of Prigger's motion to compel fingerprints of Kelly and Christin Gregerson and Riannah Rammage on January 29, 2010; the focus of the State's motion to continue to allow time for the State's expert to examine the document on February 5, 2010; the focus of Prigger's motion to continue on the first day of trial, February 26, 2010 (the court ordered Prigger to provide the document to the State by 6:30 p.m. that day, however, when she delivered it to the Arlington Police the document was wet); and the focus of Prigger's motion during trial on March 3 and 4, 2010. On March 5, 2010, just before Prigger testified, the court ruled that Exhibit 19 was not admissible. 4RP 2-

29, 184-190; 5RP 3-4.

The prosecutor asked Rammage on direct examination if at the time she was shown Exhibit 19 by the defense investigator any promises had been made to Rammage that she would not be prosecuted. Rammage replied, "At that time, no." To clarify Rammage's answer that no promises had been made prior to her being shown Exhibit 19, the prosecutor asked if at some point Rammage had received a letter saying that if she testified truthfully she would not be prosecuted. Rammage testified that she received a letter last week saying she would not be prosecuted if her testimony was truthful, but if her testimony was false she could be prosecuted, and that prior to the letter no promise had been made to her. Rammage also testified that she was present that morning when the court granted her immunity for the two perjury charges she had committed. Prigger did not object to the questions or the answers. 3RP 42-45.⁶ Because Prigger did not object to these statements or request a curative instruction, the "flagrant and ill-intentioned" standard applies. State v. Russell, 125 Wn.2d 24, 86,

⁶ At the end of the questioning about the letter the prosecutor asked Rammage why she changed her story on May 26 and 27 and when she talked to the defense investigator, saying that she had lied in her two written statements. Prigger's objection that the question had been asked and answered was sustained. See 3RP 37-38 for Rammage's prior answer.

882 P.2d 747 (1994).

Failure to object to an allegedly improper remark constitutes waiver of the error, unless the remark is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been cured by an instruction to the jury. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). The prosecutor's questioning of Rammage was not flagrant and ill-intentioned. The reference was fleeting, and the purpose of the questioning was to clarify that no promises had been made to Rammage prior to her telling the police and the defense investigator that she lied in her written statements and to counter Prigger's intention to use Exhibit 19 to imply that prior promises had been made to Rammage. The prosecutor's questioning of Rammage was not improper.

2. The Prosecutor's Conduct Did Not Cause Prejudice That Could Not Have Been Neutralized By A Curative Instruction To The Jury.

However, even if the prosecutor's questioning was improper, it could have been cured with an instruction to the jury to disregard the evidence or to limit the use of the evidence. Because jurors are presumed to follow the courts instructions, and because there was substantial other evidence on which the jury could reasonably be

expected to focus, there was no prejudice that could not have been cured by an instruction.

The record discloses no evidence whereby the jury could have been misled in any respect by the prosecutor's reference to immunity or that Rammage would not be prosecuted for testifying truthfully—the prosecutor clarified that Rammage could be prosecuted if she testified falsely. Additionally, unfair prejudice can be avoided by the opportunity for full cross examination. State v. Redden, 71 Wn.2d 147, 149-150, 426 P.2d 854 (1967); State v. Portnoy, 43 Wn. App. 455, 461, 718 P.2d 805, review denied, 106 Wn.2d 1013 (1986). Defense counsel was allowed to thoroughly cross-examine Rammage relative to her previous inconsistent statements, and any possible bias or interest in the case. In addition, the trial court carefully instructed the jury as to the care and caution it should exercise in evaluating the testimony of Rammage as an accomplice. Redden, 71 Wn.2d at 149-150. Considering these precautionary safeguards, the reference to Rammage's immunity and that she would not be prosecuted for testifying truthfully were not prejudicial to Prigger.

The prosecutor questions regarding immunity and testifying truthfully were not misconduct. The testimony was brief, and the

prosecutor did not emphasize it. The court instructed the jury that it should not find Prigger guilty based on Rammage's testimony alone unless, after carefully considering the testimony, the jurors were satisfied beyond a reasonable doubt that it was true. Instruction 9. CP 55. The defendant is not entitled to a new trial based on the fact that the jury was informed that Rammage had been granted immunity for her prior perjury, but that she could be prosecuted if she testified falsely.

3. The Cases Cited By Defendant Are Not Persuasive.

In support of her argument of improper prosecutorial vouching Prigger cites two cases from the Ninth Circuit; U.S. v. Brooks, 508 F.3d 1205 (9th Cir. 2007) and U.S. v. Rudberg, 122 F.3d 1199 (9th Cir.1997). In Rudberg, a prosecution for conspiracy to distribute drugs, the prosecutor in elicited testimony of the substance of Rule 35(b) motion, indicating that if a witness substantially assisted investigators and that the information he provided turned out to be accurate, the witness gets a reduced sentence. Rudberg, at 1201-02. Rule 35(b) of the Federal Rules of Criminal Procedure permits a reduction of sentence to reflect a defendant's substantial assistance rendered to the government subsequent to sentencing. Fed.R.Crim.P. 35(b). The prosecutor

compounded the problem by mentioning the already reduced sentences of some witnesses, the hope of others to follow suit, and distinguished another who once was refused a sentence reduction for failure to testify completely and truthfully. Rudberg, at 1202-03. Additionally, the prosecutor invoked the rule at the beginning of his closing argument as he reviewed the parade of witnesses who lined up to testify against the defendant in exchange for more lenient sentences. Rudberg, at 1203-04.

Brooks stands in stark contrast to Rudberg. In Brooks, a prosecution for multiple counts of possessing drugs and firearms, witnesses testified before the jury that they were speaking the truth and were living up to the terms of their plea agreements. One of the State's witnesses testified that his plea agreement required him "to say the truth about everything I know and make sure everything is the truth because if they find out I'm lying, they will rip up the agreement and I'll end up doing 25 to life. Another witness testified that under his plea agreement, any false testimony by him would greatly increase his sentence. A third witness testified that if he "gave truthful testimony against [the defendant] in this case," then he "may receive a downward departure for time off." Brooks, at 1211. The court found these statements were mild forms of

vouching because they suggested that the witnesses had been compelled to tell the truth by the prosecutor's threats and the government's promises. "Such references imply that 'the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of the plea agreement.'" Brooks, at 1210, *quoting U.S. v. Wallace*, 848 F.2d 1464, 1474 (9th Cir. 1988). The court instructed the jury to make careful credibility assessments of witnesses who had "pleaded guilty to crimes arising out of the same events for which the defendants are on trial," and to "consider those witnesses' testimony with great caution, giving it the weight that you feel it deserves." Id. Even though the plea agreement references were mild forms of vouching, the court found that there was no plain error in the prosecutor's direct examination, in view of the jury instruction and the strength of the State's case. Brooks, at 1212.

In Rudberg the persistent vouching and resulting implication that the government had already verified the accuracy of several key witnesses stands in stark contrast to the present case. Here, the state did not imply that Rammage had complied with an agreement or that the prosecutor had independently verified the truth of Rammage's testimony.

The mild vouching in Brooks, together with the jury

instructions and the strength of the State's case are more analogous to the present case. Here, the state made fleeting reference to Rammage testifying truthfully and being granted immunity; the prosecutor contrasted those statements to the fact that Rammage could be prosecuted for testifying falsely. Additionally, the jury was instructed that they were the sole judges of a witness' credibility and that they were to give special attention to the credibility of Rammage as an accomplice. Finally, there was substantial evidence to corroborate Rammage's testimony. See III, E, 2, above.

The cases Prigger cites for the proposition that the terms of a witness' immunity agreement are not admissible unless the witness' credibility is attacked are inapposite. See Appellant's Brief at 8, *citing* State v. Ish, ___ Wn.2d ___, 241 P.3d 389 (2010); State v. Green, 119 Wn. App. 15, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, 95 P.3d 758 (2004), cert. denied, 543 U.S. 1023 (2004); State v. Jessup, 31 Wn. App. 304, 641 P.2d 1185 (1982).

First, In Ish, Green and Jessup a plea agreement or immunity agreement were admitted at trial. In the present case the court granted Rammage immunity under CrR 6.14; no immunity agreement was offered or admitted at trial. Prigger acknowledges

such. Appellant's Brief at 3, fn 2. The immunity was for Rammage's prior acts of perjury, not her testimony at trial. The prosecutor clarified that Rammage could be prosecuted if she testified falsely, but not if she testified truthfully. This is the same standard that applied to the other witnesses. ER 603; RCW 9A.72.020. An error in the admission of evidence is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Green, 119 Wn. App. at 25 (*citing* State v. Bourgeois, 133 Wn.2d 389, 403, fn. 19, 945 P.2d 1120 (1997)).

Second, it is permissible for the prosecutor to ask questions of a witness in order to "pull the sting" out of an anticipated attack in cross examination. Bourgeois, 133 Wn.2d at 402; Green, 119 Wn. App at 23. In the present case, the prosecutor's questions regarding whether Rammage had been made any promise that she would not be prosecuted and her being granted immunity were in anticipation of Prigger expressed intention to use Exhibit 19 to attack Rammage's motivation and credibility.

4. The Prosecutor's Conduct Does Not Warrant Reversal.

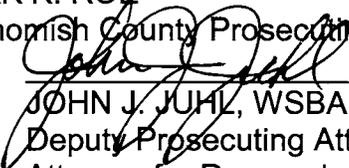
The questions the prosecutor asked Rammage about testifying truthfully were harmless; they merely probed whether

Rammage had been promised that she would not be prosecuted for her two acts of perjury and her understanding of the potential consequence if her testimony was false. The prosecutor did not express a personal opinion about Rammage's credibility; nor did the prosecutor imply that the State had verified the accuracy of Rammage's testimony. Likewise, the question about the court granting Rammage immunity was harmless; disclosing that Rammage would not be prosecuted for the two counts of perjury she had committed provided the jury relevant information to fairly consider whether Rammage had any personal interest in the outcome. The prosecutor's questions were not so flagrant and ill-intentioned to show an enduring prejudice. Any perceived prejudice could have been cured if Prigger had objected or requested an instruction to the jury.

IV. CONCLUSION

For the reasons above, Prigger's appeal should be denied.

Respectfully submitted on February 22, 2011.

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