

NO. 62909-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID MUIR,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In order to prevail on a claim of ineffective assistance of counsel, the defendant must establish both that counsel's performance was deficient and that prejudice resulted. In this case, Muir claims that counsel was ineffective for failing to propose a definitional instruction for unlawfully remaining on premises for purposes of burglary. But this definitional instruction adds little if anything to the average juror's understanding of the charge, and the evidence that Muir unlawfully remained in his ex-girlfriend's apartment while assaulting her for over an hour was overwhelming. Should this court reject Muir's claim?

2. A judicial comment on the evidence occurs when the trial court instructs the jury that a disputed fact has been established as a matter of law. In this case, Muir claims that using the term "domestic violence" in the "to convict" instructions was a comment on the evidence for purposes of the aggravating factor. But the two factual elements necessary for the aggravating factor were whether Muir and the victim were in a dating relationship, and whether the crime occurred in sight or sound of the victim's minor child. Neither of these elements is established as a matter of law by the words "domestic violence." Should this Court reject this claim as well?

B. STATEMENT OF THE CASE

The State charged the defendant, David Muir, with Burglary in the First Degree - Domestic Violence (count I) and two counts of Assault in the Fourth Degree - Domestic Violence (counts II and III) based on a series of events that took place in June 2008 between Muir and his ex-girlfriend, Kimberly Wolfstone. CP 1-5, 17-18. In addition, the State alleged an aggravating factor for count I, i.e., that the crime involved domestic violence as defined in RCW 10.99.020, and that the crime occurred within sight or sound of Wolfstone's minor child. CP 17.

Muir's jury trial took place in December 2008 before the Honorable Palmer Robinson. The evidence produced at trial established the following facts.

Kimberly Wolfstone is the single mother of a 5-year-old boy. She works as a stylist in a hair salon and lives in the Highland Village Apartments in Bellevue. 2RP 41-43.¹ Wolfstone met Muir in December 2006, and they began dating in January 2007. By June of 2007, they were living together in Wolfstone's apartment. 2RP 43. While they were living together, Muir shared household

¹ The verbatim report of proceedings consists of seven sequentially-paginated volumes, which will be referenced here by volume number.

expenses and had a key to the apartment. 2RP 44-45, 47. But the relationship was rocky, and Muir moved out in February 2008. The separation was a mutual decision. 2RP 49. When Muir moved out, he took all of his belongings with him, and Wolfstone changed the locks on her apartment door. 2RP 50.

Over time, however, Muir and Wolfstone started seeing each other again. They dated off and on from February through June 2008. 2RP 51-52. As Wolfstone described, they would date for a while, get into an argument, break up, and then get back together again. This pattern repeated itself several times over that period of months. 2RP 52. But although Wolfstone and Muir were dating off and on during this period, Wolfstone did not give Muir a key to her apartment. Rather, she would leave the door unlocked if she knew in advance that Muir was coming over when she wasn't going to be there. 2RP 52. At the beginning of June 2008, the relationship was going well and Muir and Wolfstone were considering living together again. Muir was staying at Wolfstone's apartment most of the time, and Wolfstone was leaving the door unlocked for him. 2RP 53-54.

June 4th was Wolfstone's birthday, and a group of her friends took her out as a surprise while Muir stayed at the apartment and watched Wolfstone's son. 2RP 55-56. Wolfstone

stayed out very late, which made Muir angry. They had an argument about it the next day, June 5th, and Wolfstone told Muir to get out of her apartment. 2RP 56-57. Nonetheless, Muir was in the apartment when Wolfstone got home from work. 2RP 57-58.

Wolfstone again told Muir to get his belongings and leave. Muir started yelling at Wolfstone, and called her a "slut" and a "whore." 2RP 59. As Wolfstone was walking towards her bedroom, Muir spit in her face and threw her down on the bed. Wolfstone tried to scream, but Muir covered her mouth with his hand. He pinned her down by straddling her torso and holding her arms above her head. 2RP 60. Wolfstone asked Muir to leave several times, to no avail. 2RP 67. Eventually, Muir got up and let her go. 2RP 64. Muir told her he didn't have to leave the apartment because he lived there. Wolfstone pointed out that he did not have a key, did not receive mail, and did not pay the bills. 2RP 68. Despite being very afraid of what Muir had done, Wolfstone did not call the police on June 5, 2008. 2RP 68.

The next day, on June 6th, Wolfstone made it clear to Muir that their relationship was over. 2RP 69. After dropping off her son at school, Wolfstone went to the apartment manager, Michelle Lamb, and asked to have the locks changed again. Wolfstone was

distraught, so Lamb asked her what had happened. 4RP 232.

After Wolfstone told Lamb about the assault, Lamb stated that they should call the police. Wolfstone did not want to call the police "because she didn't want any trouble." 4RP 234. But Lamb insisted, and called the police herself. 4RP 233-34.

Officer Paul Dill responded to the call and took a statement from Wolfstone about the assault. 3RP 190. Dill then tried to find Muir, but was not successful. 3RP 191. Wolfstone sent Muir a text message to inform him that she had made a police report and had changed the locks on the apartment. Later that day, Muir showed up at the salon and asked Wolfstone to talk to Lamb about letting him into the apartment to retrieve his belongings. 2RP 72.

Wolfstone told him that Lamb would call the police if he showed up there again. Wolfstone also told Muir that she couldn't see him anymore. 2RP 74-75.

Wolfstone told Muir that she would let him into the apartment when she got home from work so that he could get his things. 2RP 77. But when Wolfstone got home, her door frame was splintered, the lock was broken, and most of Muir's belongings were gone. Some of Wolfstone's property was missing as well. 2RP 78-82.

Wolfstone called the police, and also reported the damage to Michelle Lamb. 2RP 79.

Officer Jeffrey Borsheim responded to the call, noted the damage to the door, and took a report. 3RP 200-02. Borsheim also tried to locate Muir, but did not succeed. 3RP 205. Lamb arranged for some temporary repairs to Wolfstone's door frame so that the deadbolt lock would function, but full repairs would not be completed for about two weeks. 4RP 238-39.

The next time Wolfstone saw Muir was "[w]hen he came flying through [her] front door" at 3:00 a.m. on June 8, 2008. 2RP 84. Wolfstone was asleep on the couch in her living room, and her young son was in his bedroom with the door open when the doorbell rang. Wolfstone did not answer the door. 2RP 85-87. After Muir rang the doorbell for more than a minute with no response, Wolfstone heard him walk down the stairs. Then "he just came flying back through, back up the steps and through the door." 2RP 89. Wolfstone grabbed her cell phone to call the police, but Muir took it away from her. 2RP 90.

After crashing through the door, Muir said, "I forgot my blankey," and grabbed his blanket. 2RP 91. Muir was very intoxicated -- more so than Wolfstone had ever seen. 2RP 99.

Wolfstone repeatedly told Muir to leave. 2RP 91. But Muir refused to leave and insisted that he wanted to talk to her. Wolfstone told him she did not want to talk, and continued to ask him to leave. They went back and forth like this for about an hour. 2RP 93. During this time frame, Wolfstone went to the bedroom to check on her son; he was awake and "alarmed." 2RP 93-94.

When Wolfstone realized that pleading with Muir wasn't working, she began shouting at him and ordered him to leave. Wolfstone was hoping that her neighbors would hear her and call the police. 2RP 95. But after Wolfstone began yelling at Muir, Muir grabbed her, threw her down on the couch, and covered her mouth as she tried to scream. 2RP 96-97.

Muir held Wolfstone down on the couch for about another hour. At times, Wolfstone was having trouble breathing because Muir was smothering her. 2RP 98. When she was able to, Wolfstone continued to beg Muir to leave the apartment. 2RP 99. As Muir continued to hold her down, he said, "you like that, bitch," and "you're going to be grateful if all I do is hit you." 2RP 99-100. Muir told Wolfstone "[t]hat if [she] wouldn't shut up, he was going to have to hurt [her] in front of [her] kid." Wolfstone was very afraid. 2RP 101. Nonetheless, she tried to calm down because "the only

way [Muir] would stop suffocating [her] is if [she] would stop yelling for help." 2RP 101.

Finally, Muir got up and stopped holding her down. He was crying at this point, and admitted that he had "fucked up[.]" 2RP 101. Muir said he knew that Wolfstone was going to call the police, and asked if she would let him sleep for a while before going to jail. 2RP 101. Wolfstone then waited for Muir to fall asleep; when he did, she took her son and drove to her parents' apartment. 2RP 104-06.

Wolfstone pounded on the door and her mother let her in. 2RP 107. Wolfstone called the police from her parents' home. 2RP 106. Officer Miriam Molloy went to Wolfstone's parents' apartment to talk to Wolfstone and her parents, while other Bellevue officers went to Wolfstone's apartment to apprehend Muir. 3RP 205-06, 219-20; 4RP 279-81. The officers attempted to call Muir from outside Wolfstone's apartment, but to no avail. The officers then knocked loudly and identified themselves, but they received no response. 3RP 207. The door was damaged and unlocked, so the officers finally just went inside. They found Muir face-down, asleep on the couch. He appeared to be intoxicated. 3RP 208-10. They placed him under arrest. 3RP 209.

At the conclusion of the evidence, the parties and the trial court discussed jury instructions. 4RP 296-302. The trial court granted Muir's request for an instruction on the defense of voluntary intoxication. 4RP 296; CP 36, 59. The trial court rejected Muir's request for a lesser included offense instruction on "Assault in the Fourth Degree Domestic Violence" as a lesser of "Burglary in the First Degree domestic Violence" because fourth-degree assault had already been charged as a separate offense in count II. CP 37; 4RP 298-99. Neither party proposed WPIC 65.02, the definitional instruction for unlawfully entering or remaining; accordingly, the trial court did not give that instruction. CP 44-67. The trial court's "to convict" instructions for each crime charged included the "domestic violence" designation in the name of the offense. CP 54, 62, 63. Muir did not object.

At the conclusion of their deliberations, the jurors found Muir guilty of first-degree burglary as charged in count I, and of fourth-degree assault as charged in count II, for the incident that occurred in the early morning hours on June 8, 2008. CP 38-39. In addition, the jurors returned a special verdict finding that count I was an aggravated domestic violence offense because Muir and Wolfstone were in a dating relationship, and the crime occurred within sight or

sound of Wolfstone's young son. CP 41, 60. The jurors acquitted Muir of count III, the fourth-degree assault that occurred on June 5, 2008. CP 40.

At sentencing, the trial court imposed a sentence of 22 months on count I, which exceeds the high end of the standard range by two months. The trial court found that the jury's special verdict constituted substantial and compelling reasons to exceed the standard range. CP 71-79, 92-93. The court also imposed a year in jail on count II, to be served concurrently with count I. CP 69-70. Muir now appeals. CP 80-91.

C. **ARGUMENT**

1. **MUIR HAS NOT MET HIS BURDEN OF SHOWING THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Muir first claims that he received ineffective assistance of counsel due to counsel's failure to propose WPIC 65.02, the definitional instruction for entering or remaining unlawfully for purposes of burglary. Muir argues that counsel's failure to propose this instruction was a crucial error that relieved the State of its burden of proving beyond a reasonable doubt that Muir unlawfully remained in Wolfstone's apartment. Brief of Appellant, at 10-17. This claim should be rejected. Contrary to what Muir now claims,

the definition of entering or remaining unlawfully as set forth in WPIC 65.02 is a matter of common sense. In fact, the decision not to propose WPIC 65.02 may well have been tactical, as the instruction would have highlighted that Muir was "not then licensed, invited, or otherwise privileged" to be in the apartment. Moreover, given the facts as proved in this case, there is no reasonable probability that the outcome of the trial would have been different if the trial court had given this instruction to the jury. Accordingly, Muir has not met his burden of showing ineffective assistance of counsel, and this Court should affirm.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's

representation was deficient, meaning that it fell below an objective standard of reasonableness considering all of the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. As the Supreme Court has warned, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, 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." Strickland, 466 U.S. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight,"

and to judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that challenged actions were the result of a reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). In any given case, effective representation may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must also affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the trial. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694.

Jury instructions are sufficient if they are supported by the evidence, if they permit each party to argue its theory of the case, if they are not misleading, and, when read as a whole, they properly inform the jury of the applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1231 (2005). Although it is constitutional error to fail to properly instruct the jury on the essential elements of the crime, the failure to further define one of those elements is not an issue of constitutional magnitude. State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). Words and expressions of common understanding that are self-explanatory require no further definition. Id. Moreover, at least in the context of limiting instructions, Washington courts have consistently held that the failure to request an instruction is a legitimate tactical decision if it prevents the reemphasis of damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

In this case, Muir faults his trial attorney for failing to propose the definitional instruction for unlawfully entering or remaining, which provides as follows:

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

WPIC 65.02. Under the authorities set forth above, Muir cannot

meet his burden of showing both deficient performance and prejudice based on trial counsel's failure to propose this definitional instruction.

Because this is a definitional instruction, the failure to give it is not an issue of constitutional magnitude. Scott, 110 Wn.2d at 689. Moreover, despite Muir's claims to the contrary, unlawfully entering or remaining is a commonsense notion that should not require further definition. Indeed, at least in undersigned counsel's opinion, the definition contained in WPIC 65.02 is singularly unhelpful, and tells the jurors nothing more than they would already know based on their common experience, i.e., that entering or remaining "unlawfully" means entering or remaining without a lawful right to do so under all the facts and circumstances presented. See State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988) (whether a person remains unlawfully or exceeds the scope of an invitation to enter is a question of fact to be decided on a case-by-case basis).

Also, there were tactical reasons not to propose this instruction in this particular case. Specifically, because WPIC 65.02 states that "unlawfully" means without license, invitation or privilege, giving this instruction may well have had the effect of reemphasizing damaging evidence that Muir broke into Wolfstone's

apartment and remained for over an hour despite her repeated and increasingly desperate pleas for him to leave. For all of these reasons, Muir cannot establish that his attorney's performance fell below an objective standard of reasonableness for purposes of Strickland's performance prong.

But furthermore, Muir cannot establish a reasonable probability that the outcome of the trial would have been different if the jurors had been given this definitional instruction, as is his burden under the prejudice prong. As noted above, WPIC 65.02 gives the jurors no more information as to what it means to enter or remain unlawfully than that supplied by their collective common sense and common experience. Additionally, the lack of this instruction in no way hindered defense counsel in presenting Muir's theory of the case, i.e., that Muir lacked the intent to commit a crime in Wolfstone's apartment, and that he was there only to lawfully recover his property and to sleep off the alcohol he'd consumed. See 5RP 348-55.

Moreover, and perhaps most significantly for purposes of this appeal, the evidence that Muir was remaining in Wolfstone's apartment unlawfully was overwhelming. First, Muir came to the apartment at approximately 3:00 a.m. and broke the door down

when Wolfstone did not respond to the doorbell. 2RP 84-89. Although Muir was convicted of unlawful remaining rather than unlawful entry, these facts regarding the manner of entry are obviously probative evidence that Muir did not have a right to be there. In addition, Muir took Wolfstone's cell phone away to prevent her from calling the police, and did not heed Wolfstone as she spent about an hour pleading with him to leave. 2RP 90-93. When Wolfstone tried to grab her son and leave herself, Muir prevented her from doing so. 2RP 103. When Wolfstone became more forceful and yelled at Muir to leave, he responded by assaulting her and holding her hostage in her own home for another hour. 2RP 95-101. During the assault, Muir told Wolfstone "[t]hat if [she] wouldn't shut up, he was going to have to hurt [her] in front of [her] kid." 2RP 101. Wolfstone was finally able to escape with her child only after Muir finally passed out. 2RP 104-05.

Based on this evidence, there is no reasonable possibility that the jurors would have concluded that Muir was not guilty of burglary if they had been instructed that unlawful remaining means "not then licensed, invited, or otherwise privileged to so . . . remain." WPIC 65.02. Therefore, Muir has not satisfied his burden of showing prejudice.

In sum, Muir has not demonstrated that he received ineffective assistance of counsel under the Strickland test based on counsel's failure to propose WPIC 65.02. This Court should reject Muir's claim, and affirm.

2. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY INCLUDING THE WORDS "DOMESTIC VIOLENCE" IN SOME OF THE JURY INSTRUCTIONS.

Muir next argues that the trial court impermissibly commented on the evidence by including the words "domestic violence" in some of the jury instructions. More specifically, Muir claims that by putting the words "domestic violence" in the to-convict instructions and the special verdict instruction, the trial court essentially told the jury that the aggravating factor had already been proved, thus making the special verdict a foregone conclusion. Brief of Appellant, at 17-23. This claim should also be rejected. The words "domestic violence" in these instructions accurately stated the crimes with which Muir was charged, and did not establish as a matter of law the two, clearly-stated factual elements the jury was required to find unanimously and beyond a reasonable doubt in order to return the special verdict. The trial

court did not comment on the evidence, and this court should affirm.

As a preliminary matter, Muir proposed his own jury instructions at trial that repeatedly referred to the crimes at issue as "domestic violence" crimes. See CP 37 (identifying crime charged as "Burglary in the First Degree Domestic Violence" and proposing lesser crime of "Assault in the Fourth Degree Domestic Violence"); CP 29 (same); CP 30 (same). To the extent Muir argues that the mere usage of the term "domestic violence" in identifying the crimes charged is error, such error is invited because he proposed instructions including the very same language. Muir is thus barred from raising this issue on appeal under the doctrine of invited error. State v. Alphonse, 147 Wn. App. 891, 899, 197 P.3d 1211 (2008), rev. denied, 166 Wn.2d 1011 (2009) (citing State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)); State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); State v. Kincaid, 103 Wn.2d 304, 314, 692 P.2d 823 (1985).

But in any event, should this Court reach the merits of Muir's claim, it fails nonetheless because the trial court's instructions do not constitute a comment on the evidence.

The Washington Constitution expressly prohibits judicial comments on the evidence. Const. art. IV, § 16. In the context of jury instructions, a comment on the evidence occurs when the trial court instructs the jury "that matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Such an instruction is impermissible if it has the effect of "removing a disputed issue of fact from the jury's consideration[.]" Id. at 65. Examples of comments on the evidence in jury instructions include identifying a particular institution as a "school" for purposes of a school zone enhancement,² identifying a particular item ("to wit: a crowbar") as a deadly weapon for purposes of a deadly weapon enhancement,³ identifying the victim's apartment as a "building" for purposes of an element of burglary,⁴ and putting the child victim's date of birth in the "to convict" instruction in a child sexual abuse case where the victim's age is an element of the crime.⁵

² Becker, 132 Wn.2d at 64-65.

³ State v. Levy, 156 Wn.2d 709, 721-22, 132 P.3d 1076 (2006).

⁴ Levy, 156 Wn.2d at 721.

⁵ State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

In contrast to the examples above, identifying the crimes charged in this case as "domestic violence" offenses in the "to convict" instructions do not constitute comments on the evidence with respect to the special verdict. The special verdict instruction in this case correctly set forth the two factual elements that the jurors had to find unanimously and beyond a reasonable doubt in order to find the aggravating factor:

- (1) That the victim and the defendant were in a dating relationship; and
- (2) That the offense was committed within the sight or sound of the victim's child who was under the age of 18 years[.]

CP 60. Neither of these factual elements is established as a matter of law by virtue of other jury instructions that include the words "domestic violence" to identify the substantive crimes charged. More specifically, using the term "domestic violence" in the "to convict" instructions does not establish as a matter of law either that Muir and Wolfstone were in a dating relationship, or that Muir committed first-degree burglary within sight or sound of Wolfstone's minor child. To the contrary, these remained factual questions to be resolved by the jury, and thus, no error occurred.

Nonetheless, Muir argues that this Court's recent decision in State v. Hagler, 150 Wn. App. 196, 208 P.3d 32 (2009), supports his position in this case. In Hagler, this Court held that a domestic violence designation is "neither an element nor evidence relevant to an element" of the substantive crime, and that it is not desirable to put the domestic violence designation in the jury instructions. Hagler, 150 Wn. App. at 202. But Hagler is not a case regarding judicial comments on the evidence; rather, the issue in Hagler was whether the presence of the term "domestic violence" in numerous jury instructions was prejudicial in and of itself. Moreover, although this Court disapproved of the practice of putting the domestic violence designation in the jury instructions, the Court found it to be harmless in Hagler's case.⁶ Id. at 202-03. Lastly, in Hagler, the defendant objected to putting the term "domestic violence" in the jury instructions, thus preserving the issue for review. Id. at 200. Here, as noted above, Muir also proposed instructions including the

⁶ Notably, one basis for this Court's conclusion that any error was harmless was the fact that the jury acquitted Hagler of two of the crimes charged. Hagler, 150 Wn. App. at 203. Similarly, Muir was acquitted of one of the fourth-degree assault charges, which undercuts his claim of prejudicial error in this case. CP 40.

domestic violence designation, and therefore, the invited error doctrine bars review. CP 29-30, 37.

In sum, Muir cannot establish that a judicial comment on the evidence deprived him of due process and a fair trial. This Court should reject Muir's claim, and affirm.

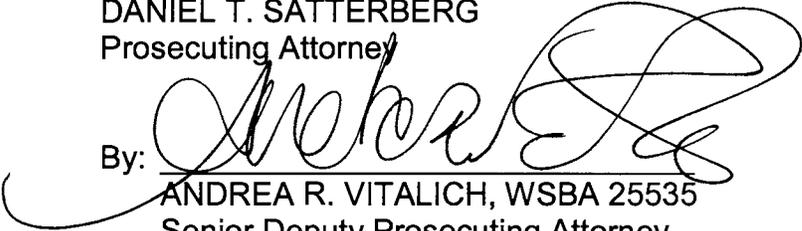
D. CONCLUSION

Muir cannot establish that he received ineffective assistance of counsel or that a judicial comment on the evidence deprived him of due process and a fair trial. For the reasons stated above, this Court should affirm Muir's convictions and sentence.

DATED this 21st day of September, 2009.

RESPECTFULLY submitted,

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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 David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAVID MUIR, Cause No. 62909-3-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.

W Brame

Name

Done in Seattle, Washington

9/21/09

Date