

67377-7

67377-7

NO. 67377-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS GAUTHIER,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I  
THOMAS GAUTHIER

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

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**BRIEF OF RESPONDENT**

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deficient, and that he suffered resulting prejudice. Gauthier's counsel objected to the refusal evidence based on the Fifth Amendment right against self-incrimination and the right to counsel, but not on the Fourth Amendment. The law in Washington establishing that a cheek swab for DNA is a search under the Fourth Amendment is of recent vintage, and this conclusion remains controversial elsewhere. On cross-examination, Gauthier attributed his failure to agree to the cheek swab to the advice of an attorney; he had already testified on direct that, in light of the seriousness of the rape allegation, he had consulted an attorney. Has Gauthier failed to establish that trial counsel's representation was deficient, or that he was prejudiced thereby?

4. Legitimate tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. The prosecutor made a brief argument in rebuttal that linked Gauthier's refusal to submit to a cheek swab for DNA to consciousness of guilt. Was counsel's decision not to object and draw undue attention to the argument a reasonable tactical decision?

5. Failure to object to a prosecutor's improper remark waives a claim of error on appeal unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice

that could not have been neutralized by an admonition to the jury. The trial court had ruled that evidence of Gauthier's refusal to submit to a cheek swab was admissible. The case in which a court had found a prosecutor's argument that a defendant had provided a DNA cheek swab only after he was required to do so by court order to be improper was of relatively recent vintage at the time of Gauthier's trial, and the relevant language was in a part of the case that was *dicta*. Physical evidence corroborated the State's case, and was completely inconsistent with Gauthier's defense. Moreover, the trial court could have cured the problem with a simple jury instruction. Has Gauthier waived this claim of error by failing to object at trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Thomas Gauthier was charged by information filed on March 13, 2009, with Rape in the Second Degree. The State alleged that, on April 22, 2001, Gauthier engaged in sexual intercourse with T.A. by employing forcible compulsion. CP 1-5.

A jury found Gauthier guilty as charged. CP 40. The trial court sentenced him within the standard range. CP 43-52.

2. PRETRIAL MOTION TO PRECLUDE REFERENCE TO GAUTHIER'S REFUSAL TO VOLUNTARILY PROVIDE A DNA SAMPLE.

Gauthier moved pretrial to preclude the prosecutor from referring to the fact that, when Gauthier was contacted by a detective about the rape allegation, he refused to voluntarily submit to a cheek swab for DNA. Counsel indicated that Gauthier had initially agreed to provide the sample, but ultimately refused after speaking with a lawyer. 1RP<sup>1</sup> 137-38. Counsel relied on Gauthier's Fifth Amendment right not to incriminate himself, as well as on his right to consult with counsel. 1RP 138; CP 15-16.

The prosecutor responded that she did not plan to offer the refusal in her case-in-chief, but believed that the option should remain open to cross-examine Gauthier should he choose to testify:

I don't intend to offer evidence in my case in chief that he refused to provide a DNA sample when initially asked down in Arizona, but should he elect to testify, I certainly think it's fair grounds for me to cross-examine him on that fact. I mean, if his theory is true that this was just, you know, an act of prostitution gone bad he should be giving up DNA samples left and right. He didn't do anything wrong, and it's

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<sup>1</sup> The verbatim report of proceedings will be referred to in this brief in the manner set out in the Brief of Appellant at page 3, footnote 1: 1RP (May 5, 9, 10, 23 & 24, 2011); 2RP (May 25, 2011); 3RP (May 26, 2011); 4RP (May 31, 2011); 5RP (June 1 & 2 and July 8, 2011).

completely counterintuitive to the position in the defense theory.

1RP 138.

Finding that a DNA sample is not testimonial, the trial court rejected the Fifth Amendment argument. 1RP 139. The court was concerned about infringing on the right to counsel, but believed that the question could be asked without mentioning a lawyer.

1RP 142. When defense counsel responded that Gauthier would say that he refused the DNA sample on the advice of an attorney, the court said, "Well, if he chooses to answer it that way, then he is the one introducing it at that point. [The prosecutor] is not asking it in such a way that he has to do that. That's his choice at that point." 1RP 42.

The court ruled that the prosecutor could ask the question, so long as there was no mention of the involvement of counsel, and suggested the phrasing: "Isn't it true that you refused to provide a DNA sample when asked to do so in Arizona?" 1RP 144; CP 56.

### 3. TRIAL TESTIMONY.

In April of 2001, 35-year-old T.A. was living on Des Moines Memorial Drive in the South Park neighborhood of Seattle with the

two youngest (ages 10 and 11) of her three children.<sup>2</sup> 2RP 17; 4RP 7, 9, 10, 19. T.A. worked as a waitress at Rascals Casino, which was located about a ten-minute walk from her apartment. 4RP 13, 17. In addition to her job at Rascals, T.A. worked part-time as an in-home caregiver for the elderly. 4RP 9, 13-14.

Late on the night of April 21-22, 2001, T.A. was walking back from the casino.<sup>3</sup> 4RP 21-22. Suddenly she was tackled from behind and pushed over the guardrail into a grassy area, where her attacker wrestled her to the ground. 4RP 31-35. Unable to escape, T.A. told the assailant that she was having her period; when he challenged her on this, she removed her tampon and threw it on the ground. 4RP 36-37.

With one hand around her neck, the man forced T.A. to perform oral sex on him. 4RP 41-43. After he ejaculated in her mouth, T.A. rubbed her mouth on her coat. 4RP 43-44. After

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<sup>2</sup> T.A.'s children were not home on the night of the rape, as they were spending the night with their father. 4RP 47, 51-52.

<sup>3</sup> Testifying more than ten years after the fact, T.A. could not recall what shift she had worked on the night in question, and could only estimate that she was walking home sometime between 10:30 p.m. and 2:00 a.m. 4RP 21-22.

completing the rape, the man ran off, and T.A. grabbed her clothes and ran home down the middle of the street. 4RP 44-45.

After arriving home, T.A. began to feel anger ("I just wanted to kill him."). 4RP 46. Grabbing a knife from her kitchen, she walked back down the street looking for the man. 4RP 45-46. She went all the way back to the casino, but did not see him. 4RP 47. At some point, T.A. decided that the man wasn't worth going to prison over, and she returned home. 4RP 46-47.

T.A. was behind on her phone bill, and her phone service was limited to receiving incoming calls. 4RP 23-24, 48. After some time, T.A.'s sister's boyfriend, Don Brown, happened to call.<sup>4</sup> 4RP 48. T.A. told Brown what had happened, and he came right over. 4RP 48. Brown found T.A. very upset, shaking and crying; this frightened him, because he had never seen T.A. cry before. 2RP 98-100, 102-04. Brown noticed a scrape or scratch on T.A.'s neck. 2RP 112.

Brown and T.A. drove around in Brown's car looking for T.A.'s assailant. 4RP 50. They went all the way back to the casino,

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<sup>4</sup> Brown said that he and T.A.'s sister often called T.A. when they were up on a weekend night drinking, as they were on that Saturday night. 2RP 97-98; 3RP 140.

even going inside, but didn't find the man.<sup>5</sup> 4RP 50-51. Once again, T.A. returned to her apartment. 4RP 51.

T.A. called the police from her home shortly after 10:00 a.m., after it dawned on her that she could still call 911 from her old, nonworking cell phone. 2RP 16; 4RP 52. When the responding officer arrived, he found T.A. still upset and crying. 2RP 22-23. She had bruises on her left upper arm and on her right thigh. 2RP 47-48; 3RP 149.

T.A. described her attacker as a white male, 36-40 years old, about 5' 8" tall, about 150 pounds, with a skinny build and straight brown hair.<sup>6</sup> 2RP 27-28. She took the officer to the scene of the rape, which was not far from her apartment. 2RP 39. There was a guardrail, with tall grass on the other side. 2RP 40. The grass was flattened out in an area roughly two feet by three feet, and there was a tampon lying in the grass. 2RP 40; 3RP 63-64, 151.

The police took the clothing that T.A. wore on the night of the rape into evidence. 2RP 33-35; 3RP 153; 4RP 58. Her jeans were

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<sup>5</sup> A detective reviewed a security videotape from Rascals Casino, but could not recognize T.A. entering or leaving during the hours in question. 3RP 172-74, 196-98. The video was of relatively poor quality, however, and it was often difficult to make out faces. 3RP 173.

<sup>6</sup> This description generally matched Gauthier, a white male who was 36 years old at the time, 6 feet tall and 155 pounds, with brown hair. CP 63.

stained and dirty, and there was grass on the back of her pants and inside her nylons. 4RP 59-61.

T.A.'s jacket was sent to the Washington State Patrol Crime Lab for analysis. 3RP 93, 109. A forensic scientist detected sperm cells on both sleeves of the jacket. 3RP 93, 119-26. The male component of the DNA did not at that time match any DNA sample in the law enforcement database. 3RP 132-33.

Detectives went to the area of the rape on several nights following the incident, trying to locate witnesses or suspects. 3RP 68-71, 73-74. They came across Thomas Gauthier at around 5:00 a.m. on June 28<sup>th</sup>, within a mile and a half of the scene of the rape. 3RP 75-81. The detectives told Gauthier that they were investigating a rape; after identifying him and having a brief conversation, they let him go on his way. 3RP 81-87.

The police put together a composite sketch of the suspect with T.A.'s help. 3RP 23, 30-36. Working from tips they had received based on the composite, detectives put together several photo montages containing possible suspects. 3RP 176. T.A. selected a person by the name of Fatland at an 80% certainty level. 3RP 178-79. When contacted, Fatland voluntarily provided a DNA

sample, but it did not match the DNA from T.A.'s jacket sleeves.

3RP 135-36, 179-80.

Seven years later, in 2008, law enforcement finally got a "hit" by running the DNA profile obtained from the semen on T.A.'s jacket sleeves through the database; the match was with Thomas Gauthier.<sup>7</sup> 3RP 133-34. Detective Chris Knudsen picked up the investigation; he located Gauthier, who was by then living in Arizona, and called him on the telephone.<sup>8</sup> 2RP 76-83. After getting a signed order from the court, Knudsen obtained biological samples from Gauthier via cheek swabs and sent them to the Crime Lab for testing. 2RP 84-85; 3RP 111.

Gauthier testified at trial on his own behalf. He said that he was a drug user in 2001, working at a temporary labor service. 4RP 136-37. He was probably staying with his mother, who lived in North Burien not far from Rascals Casino. 4RP 137-38. By 2008, Gauthier had relocated to Bullhead City, Arizona. 4RP 140-41.

In January of 2009, Gauthier got a phone call from Detective Knudsen; Knudsen said that Gauthier's DNA had been found on the

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<sup>7</sup> The probability of selecting an unrelated person at random from the population of the United States was 1 in 81 quadrillion. 3RP 134.

<sup>8</sup> On direct examination, the prosecutor asked no questions about the substance of the telephone conversation.

jacket of a reported rape victim. 4RP 142-43. Gauthier said that this information led him to consult a lawyer: "After he told me the gravity of what he was talking to me about I -- I spoke with a lawyer." 4RP 142.

Gauthier then gave the jury a detailed version of his encounter with T.A. 4RP 143-44. Gauthier said that, while walking on Des Moines Way sometime after 2:00 a.m. on April 22, 2001, he noticed someone walking in front of him. 4RP 144. Gauthier was high, and looking for crack cocaine. 4RP 144. He got the attention of the woman, who was African-American, and asked her if she had any crack cocaine. 4RP 145. She said that she did not, but she could get some. 4RP 146.

Wary of giving the woman money without first seeing the drugs, Gauthier changed tack and asked her if she "dated." 4RP 146. By this, he meant would she perform oral sex in exchange for money. 4RP 146. The woman declined when Gauthier offered \$20, but accepted when he increased the offer to \$50. 4RP 146-47.

Gauthier and the woman stepped over the guardrail. 4RP 147. Gauthier put his coat down on the grass, and the woman got on her knees. 4RP 147. Gauthier pulled down his pants, and

they "got down to business." 4RP 148. After he ejaculated, she turned her head and spit. 4RP 148.

Believing that this same woman had previously cheated him in a drug deal, Gauthier refused to pay her. 4RP 148-49. The woman screamed and yelled at him to pay her, but he "told her she was burnt." 4RP 148, 149. Gauthier denied using force at any point in this encounter. 4RP 150.

On cross-examination, Gauthier acknowledged that the encounter was a memorable one, even a bad one. 4RP 170-71. He admitted that Detective Knudsen had been clear about the purpose of the phone call, and had given Gauthier a full opportunity to answer all of Knudsen's questions. 4RP 172-73. Gauthier agreed that Knudsen had asked him to provide a sample of his DNA, but adamantly denied that he had ever agreed to do so. 4RP 173-75. Instead, according to Gauthier, he told Knudsen that the severity of the crime that Knudsen was alleging led Gauthier to believe that he should seek legal advice. 4RP 173. Gauthier denied that a Bullhead City police officer had ever appeared at his residence in Arizona to collect the sample. 4RP 174-75.

Gauthier also denied on cross-examination that he had told Detective Knudsen that he had never had any bad experiences with

prostitutes. 5RP 14. He admitted, however, that he never told Knudsen the story he told the jury about encountering the woman, asking for drugs, negotiating for oral sex, laying his jacket on the grass, and refusing to pay. 5RP 17-18.

The State called Detective Knudsen in rebuttal. Knudsen said that, when he told Gauthier during the phone conversation that his semen had been found on a rape victim's jacket, Gauthier had no explanation, but denied that he had raped anyone. 5RP 41-43. Gauthier then said that he had hired prostitutes on Des Moines Memorial Drive. 5RP 45. He said the sex usually took place in his car, and that his standard transaction was \$20 for oral sex. 5RP 45. When Knudsen asked if he had ever had any bad experiences with prostitutes, Gauthier said that he had not. 5RP 45. Gauthier never gave Knudsen the detailed story that he gave the jury. 5RP 46-47.

When Detective Knudsen said that he would like to get a sample of Gauthier's DNA, Gauthier said that he had already given DNA samples several times pursuant to prior convictions, but that

he would be willing to do so again.<sup>9</sup> 5RP 51-52. He gave Knudsen his address in Bullhead City. 5RP 52.

Detective Knudsen contacted a Bullhead City detective, who agreed to go out and obtain a cheek swab from Gauthier. 5RP 55. When Knudsen called Gauthier a second time and said that he had arranged to have an Arizona officer take the DNA sample, Gauthier was still amenable. 5RP 54. But when the Arizona detective tried to obtain the sample, Gauthier refused. 5RP 55. Knudsen ultimately obtained a DNA sample from Gauthier in Seattle. 5RP 55-56.

#### 4. CLOSING ARGUMENTS.

The prosecutor, in her opening closing argument, made no reference to Gauthier's refusal to voluntarily provide a DNA sample. 5RP 66-85. Defense counsel, however, brought up the refusal in his own closing argument:

He may or may not agree to take a DNA test, but one thing is clear from all sides he spoke to a lawyer who said not to do it. I spoke to a lawyer and decided not to do it. What's unreasonable about that? He told you [sic] the detective how to contact him. Gave him a phone number that worked. He told him everything

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<sup>9</sup> Gauthier had already testified to several prior convictions based on crimes of dishonesty, which the court had ruled were admissible under ER 609. 4RP 136; CP 58.

because he had nothing to hide. He had nothing to hide.

5RP 101.

In rebuttal, the prosecutor contrasted Fatland's response to the request for his DNA sample to Gauthier's response to a similar request:

Remember Lee Fatland. And remember Detective Anderson coming up to him and saying hey buddy, I think you might be good for this rape. After [T.A.] identified him partially from that photomontage he said, hey, buddy, you might be good for this rape. What did Lee Fatland do? Sign me up. Here are my swabs. I didn't do this. And low [sic] and behold Lee Fatland was excluded. Excluded. Exonerated by DNA from that jacket. Lee Fatland's actions of sign me up, here's my DNA, I didn't do this are consistent with someone who is innocent. This guy's actions are consistent with someone who is not. You don't want to provide your DNA sample because, you know, it's going to be there. Because you're guilty.

5RP 112-13. There was no objection to these comments.

C. ARGUMENT

1. THE ADMISSION AT TRIAL OF GAUTHIER'S REFUSAL TO VOLUNTARILY PROVIDE A DNA SAMPLE WAS NOT MANIFEST CONSTITUTIONAL ERROR.

Gauthier challenges the admission of evidence that he refused to voluntarily provide a sample of his DNA when asked by a detective to do so. He relies on the Fourth Amendment and

article I, section 7 of the Washington Constitution. Because he did not object on this basis in the trial court, Gauthier must show that admission of the evidence was manifest constitutional error. His attempt to analogize to error in admitting evidence of silence where such is protected by the Fifth Amendment should be rejected. The error here, if any, was an evidentiary one, and should not be considered for the first time on appeal.

Moreover, such evidence is properly admitted where relevant for impeachment. Gauthier asserted a defense of consensual sex at trial, making identification irrelevant. Thus, his earlier refusal to provide a DNA sample, which was relevant *only* to identification, was admissible to impeach this defense.

Finally, even if there was constitutional error, Gauthier cannot show that it was manifest. He told the jury on direct examination that he had consulted with a lawyer as soon as he learned of the severity of the allegation. This helped to explain why he did not tell the detective the detailed story that he later related to the jury at trial. The additional information that an attorney had advised him not to provide a DNA sample added little, and thus did not have practical and identifiable consequences in this trial.

a. The Alleged Error Is Not Constitutional.

Swabbing a person's cheek to obtain a DNA sample is a search for purposes of the Fourth Amendment and article I, section 7 of the Washington Constitution. State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Consequently, a warrant is required before the sample may be taken. Id.

In arguing that the trial court's ruling admitting evidence of his refusal to voluntarily submit to a cheek swab was manifest constitutional error, such that he may raise it for the first time on appeal, Gauthier analogizes to the Fifth Amendment right to silence. He first cites United States v. Prescott, 581 F.2d 1343 (9<sup>th</sup> Cir. 1978). In holding that the defendant's refusal to allow a warrantless search of her apartment could not be used against her at trial, the court in Prescott explicitly analogized to the Fifth Amendment.<sup>10</sup> Id. at 1351. Gauthier also relies heavily on State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008), a case that treated a prosecutor's use of the defendant's prearrest silence as substantive evidence of guilt as constitutional error under the Fifth Amendment.

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<sup>10</sup> The decision in Prescott was 2-1. The dissent rejected the analogy. Prescott, 581 F.2d at 1353-58.

This reasoning is flawed. Analogizing to the Fifth Amendment to resolve the issue in this case ignores crucial differences between the Fourth Amendment right to refuse a warrantless search and the Fifth Amendment right to remain silent.

Federal courts, including the United States Supreme Court, have recognized these differences. In United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 110 S. Ct. 1056, 108 L. Ed.2d 222 (1990), the Court was asked to determine whether the Fourth Amendment applied to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country. Before reaching this issue, the Court contrasted the functions of the Fourth and Fifth Amendments:

Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. . . . Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs *only at trial*. . . . The Fourth Amendment functions differently. It prohibits “unreasonable searches and seizures” whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is “fully accomplished” *at the time of an unreasonable governmental intrusion*. . . .

Verdugo-Urquidez, 494 U.S. at 264 (italics added).

In United States v. McNatt, 931 F.2d 251, 256 (4<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 1035 (1992), the defendant, as Gauthier does here, claimed a violation of his due process rights when the prosecution introduced into evidence the fact that he had refused the police permission to search his pickup truck. The appellate court ultimately found that this evidence was properly admitted to rebut the defendant's claim that the police had planted drugs in his truck. Id. at 256-57. In arriving at that result, however, the court distinguished the Fifth Amendment cases on which McNatt relied:

Appellant claims that it is a violation of his due process rights for the government to argue that the assertion of a constitutional guarantee supports an inference of guilt. He relies upon *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed.2d 91 (1976), and *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed.2d 106 (1965), but these decisions do not support appellant's theory. *Doyle* and *Griffin* protect a criminal defendant from having his silence used against him and the use of silence as evidence of guilt. These cases involve fifth amendment rights which guarantee that one may not be forced to be a witness against himself in a criminal case, whether verbally or by his silence. The present case involves the fourth amendment right to be free from unreasonable searches, and the refusal to consent to a search could be upon privacy grounds, rather than fear of incrimination.

[The facts of this case are] not analogous to the facts in *Doyle*, where the defendant had been given the warnings required by *Miranda*, which included the assurance that his silence could not be used against

him and then impeaching his testimony at trial by means of his post-arrest silence. Under the fifth amendment, a suspect has the right to remain silent at all times and may not be required to say anything at the time of his arrest, during confinement or at trial. However, under the fourth amendment, a person may not prevent a search of his person or his property. By withholding permission to search, he merely puts the government to the procedural test of proving probable cause to obtain a search warrant.

McNatt, 931 F.2d at 256-57.

These cases make the point that the Fourth and Fifth Amendments function differently. Had pretrial silence been used against Gauthier at trial, his Fifth Amendment right not to be compelled to be a witness against himself would have been violated *at trial*, and admission of the evidence would have been a constitutional violation. Similarly, had Gauthier been given Miranda<sup>11</sup> warnings explicitly informing him of his right to remain silent, and had that silence then been used against him at trial, his constitutional right to due process of law would have been violated.

But Gauthier's Fourth Amendment rights were never violated. No warrantless search was conducted, and Gauthier's privacy was never invaded. Police obtained his DNA only after a showing of probable cause and pursuant to a court order. CP 54.

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<sup>11</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

Nor was there anything akin to Miranda warnings, explicitly assuring him that his refusal to allow a voluntary search could not be used against him.

Because there was no constitutional violation, any error in alluding to Gauthier's refusal to voluntarily submit to a cheek swab should be treated as ordinary evidentiary error. See Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901 (2002) (arguing that the analogy to the Fifth Amendment right to remain silent is inapt, and that use at trial of a defendant's refusal to consent to a search does not unduly burden the right protected by the Fourth Amendment, i.e., the right to privacy).

b. The Refusal Was Admissible For Impeachment.

Regardless of whether improper use of a defendant's refusal to submit voluntarily to a search is a constitutional violation or merely an evidentiary one, courts have allowed the introduction of this evidence for impeachment purposes. Thus, where relevant to a proper purpose, such evidence should be allowed.

For example, in United States v. Dozal, 173 F.3d 787, 790-91 (10<sup>th</sup> Cir. 1999), the defendant was charged with various offenses involving possession and distribution of cocaine. Dozal had refused to allow police to search the living room of the apartment he shared with his roommate, an area over which he claimed exclusive control. Id. at 791. After obtaining a search warrant, police found thirty packages of cocaine in a trash can in the living room. Id. at 792. The appellate court held that evidence of Dozal's refusal to consent to the search was properly admitted to establish his dominion and control over the area where the cocaine was found. Id. at 794.

Other courts have reached similar conclusions. In Leavitt v. Arave, 383 F.3d 809, 828 (9<sup>th</sup> Cir. 2004), cert. denied, 545 U.S. 1105 (2005), the court held that evidence of the defendant's refusal to voluntarily give a blood sample was properly admitted to rebut his claim, made at trial, that he had cooperated with police. In McNatt, supra, the court held that evidence of the defendant's refusal to voluntarily allow police to search his truck was properly admitted to rebut his claim that the police had planted the drugs (later found pursuant to an inventory search) in the truck. 931 F.2d at 256-57. And in People v. Chavez, 190 P.3d 760, 767 (Colo. Ct.

App. 2007), the court held that, where the defendant claimed that he had moved out of an apartment six days before drugs were found therein, evidence of his refusal to consent to a search of that same apartment was properly admitted to show dominion and control.

Here, as in the cases cited above, the prosecutor did not raise the defendant's refusal to consent to a search until after the defendant had testified. Gauthier took the witness stand and admitted sexual intercourse with T.A., but claimed that it was a consensual act of prostitution. Evidence of Gauthier's refusal to voluntarily provide a sample of his DNA was thus properly admitted to rebut that defense. If Gauthier had in truth had consensual sexual intercourse with T.A., it would have made no sense to withhold his DNA – identification would be irrelevant. As the prosecutor explained to the court, "if his theory is true that this was just . . . an act of prostitution gone bad he should be giving up DNA samples right and left. . . . it's completely counterintuitive to the position in the defense theory." 1RP 138.

The refusal evidence was in this case relevant to a proper purpose – to impeach Gauthier's defense as he related it at trial.

The trial court properly allowed the prosecutor to refer to the refusal in cross-examination of Gauthier.

c. Any Error Was Not Manifest.

In any event, even if admission of evidence of Gauthier's refusal to voluntarily provide a DNA sample was constitutional error, he never objected in the trial court on the basis of the Fourth Amendment. He cannot show that any error was manifest, and thus cannot raise this claim for the first time on appeal.

In general, appellate courts will not review a claim of error that was not raised in the trial court. RAP 2.5(a). Even where an objection to the admission of evidence is raised, the objection must state the specific ground upon which it is based. ER 103(a)(1). The courts of this state have long adhered to this rule, declining to review the admission or exclusion of evidence on grounds not raised in the trial court. See, e.g., State v. Mak, 105 Wn.2d 692, 718, 718 P.2d 407 (1986); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). This rule is not limited to objections based on the rules of evidence, but has been applied to constitutional arguments as well. See State v. Riley, 121 Wn.2d 22, 31, 31 n.2, 846 P.2d 1365 (1993) (declining to review Fourth Amendment

challenge to admission of evidence, where objection in trial court was based solely on Fifth Amendment).

An exception is made for manifest error affecting a constitutional right. RAP 2.5(a)(3). The exception, however, is a narrow one. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). To meet this standard and raise an error for the first time on appeal, the appellant must demonstrate that the error is manifest and that it is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "Manifest" in this context requires a showing of actual prejudice. Id. at 99. Actual prejudice, in turn, requires a plausible showing that the asserted error had "practical and identifiable consequences in the trial of the case." Id.

Gauthier cannot show that the admission of evidence that he refused to give a DNA swab voluntarily, on the advice of counsel, made any difference in the outcome of his trial. Gauthier was faced with the fact that, when he spoke with Detective Knudsen and learned that his semen had been found on a rape victim's jacket, he had no explanation. 5RP 41-43. Even though Gauthier then told Knudsen that he had patronized prostitutes in the area of the alleged rape, he denied that he had ever had a bad experience with

a prostitute. 5RP 45. Moreover, he gave none of the detail that he would ultimately provide at trial about his encounter with T.A.

Knowing that he would have to testify to explain his semen on T.A.'s clothing, Gauthier needed a convincing explanation for his previous reticence. To protect his credibility, he told jurors that, given the seriousness of the allegation, he had spoken with an attorney. 4RP 142. The implication, of course, and the logical inference that Gauthier likely hoped the jury would draw, was that his attorney had advised him to remain silent.

Thus Gauthier himself brought up, on direct examination in his own case-in-chief, the fact that he had consulted with an attorney as to the allegation against him. Informing the jurors that he had refused to voluntarily provide a sample of his DNA, also on the advice of an attorney, added little. Under these circumstances, Gauthier cannot show that any error in admission of this evidence was manifest. This Court should decline to review this claim.

## 2. GAUTHIER'S TRIAL ATTORNEYS WERE NOT INEFFECTIVE.

Recognizing that he failed to preserve a Fourth Amendment challenge to the admission of evidence of his refusal to provide a DNA sample, Gauthier claims that his attorneys were ineffective in

failing to base the objection in the trial court on the Fourth Amendment or article I, section 7 of the Washington Constitution. This claim fails. Gauthier's trial counsel reasonably challenged the refusal evidence on the basis of the Fifth Amendment and the right to counsel. Even if he could meet the performance prong of the test for ineffective assistance of counsel under these circumstances, Gauthier cannot show prejudice.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 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 has the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To prevail on this claim, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the

result of the proceeding would have been different (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, review 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. Competency of counsel is determined based on the entire record below. McFarland, 127 Wn.2d at 335.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. The United States Supreme Court has warned that "[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. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of 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).

Courts should recognize that, in any given case, effective assistance of counsel may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689. Counsel is not required to conduct an exhaustive investigation or to call all possible witnesses. In re Personal Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Rather, the defendant must establish a reasonable

probability that, but for counsel's error, the result of the proceeding would have been different. Id. at 694.

a. Objection To Refusal Evidence.

Gauthier's counsel moved to preclude the State from introducing evidence that Gauthier had refused to voluntarily provide a DNA sample. Counsel reasonably based the objection on the Fifth Amendment right not to provide incriminating evidence against oneself, and on the right to counsel. Gauthier cannot show that his trial attorney's representation fell below an objective standard of reasonableness under these circumstances.

Gauthier nevertheless faults trial counsel for not raising the objection under an additional basis – that a DNA swab is a search under the Fourth Amendment and article I, section 7 of the Washington Constitution. He relies on “the copious case law holding that evidence of denying consent to search violates the Fourth Amendment.” Brief of Appellant at 22. Most of the case law cited involves more typical searches of apartments, automobiles, etc. See Brief of Appellant at 13-15. Closer analogies are to blood tests, which are more intrusive than a cheek swab, and to urine samples. See Brief of Appellant at 12-13.

But the question here is not whether evidence of a refusal to consent to a warrantless search violates the Fourth Amendment. The question is whether a cheek swab for DNA is a Fourth Amendment search in the first place. Gauthier relies in his brief on State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007), arguing that the court in that case “assumed” that DNA sampling of convicted felons is a search under the Fourth Amendment. Brief of Appellant at 12. But the question in Surge was what was *not* prohibited under the Fourth Amendment and article I, section 7; the question was not, as it is here, what those sections of the state and federal constitutions *do* cover. Surge, 160 Wn.2d at 69 (holding that compelled collection of DNA from convicted felons *does not* invade a recognized private affair under the state constitution, nor is it *prohibited* by the Fourth Amendment).

It was not until October of 2010, only seven months before Gauthier’s trial, that the Washington Supreme Court explicitly held that “[s]wabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7.” Garcia-Salgado, 170 Wn.2d at 184. For support, the court cited a

case involving blood draws and breath tests.<sup>12</sup> Id. (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989)). The court concluded: "We find that the swabbing of a person's cheek for the purposes of collecting DNA evidence is a *similar intrusion* into the body and constitutes a search for the purposes of the Fourth Amendment and article I, section 7." Garcia-Salgado, 170 Wn.2d at 184 (italics added).

Thus, the principle that a cheek swab is a search under the Fourth Amendment had only recently been firmly established in Washington at the time of Gauthier's trial.<sup>13</sup> In addition to defense counsel, it appears from the discussion of this issue in the trial court that neither the judge nor the prosecutor was aware of this holding. In light of their overall performance in defending Gauthier, counsel cannot be deemed to have rendered substandard assistance in challenging the admission of the refusal evidence based on the Fifth Amendment and the right to counsel, rather than the Fourth Amendment.

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<sup>12</sup> Notably, the court did *not* cite Surge, supra.

<sup>13</sup> This continues to be a matter of some debate elsewhere. See, e.g., Garcia-Torres v. State, 949 N.E.2d 1229, 1232-37 (Ind. 2011) (analyzing arguments for and against the conclusion that a cheek swab is a search under the Fourth Amendment).

Nor can Gauthier show the requisite prejudice to prevail on this claim. As detailed above, it was helpful to his defense if the jury tied his failure to provide details to Detective Knudsen to his decision to seek the advice of an attorney. Attributing his refusal to provide a DNA sample to that same attorney's advice added little, if any, prejudice. The jury already could surmise that Gauthier did not cooperate fully with the police based on advice of counsel.

b. State's Rebuttal Argument.

Gauthier also complains that his attorneys were ineffective in failing to object to the prosecutor's comment in rebuttal closing argument tying Gauthier's refusal to voluntarily provide a DNA sample to consciousness of guilt. This was a reasonable tactical decision, and cannot form the basis of a successful claim of ineffective assistance of counsel.

There can be no claim for ineffective assistance of counsel where the challenged action goes to a legitimate trial strategy or tactic. Garrett, 124 Wn.2d at 520. "The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective

assistance of counsel.”<sup>14</sup> State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009).

Gauthier’s trial counsel could reasonably have calculated that objecting to the prosecutor’s brief remark would only serve to draw undue attention to the argument. It was not unreasonable to simply let the prosecutor move on, as she did, rather than to stop the proceedings with an objection, thus risking that the jury would pay inordinate attention to this argument.

Moreover, Gauthier cannot show prejudice. He argues on appeal that “[t]his case boiled down to credibility.” Brief of Appellant at 21. This assessment is only partially correct, and it discounts important physical evidence. Gauthier’s DNA on T.A.’s jacket was irrefutable evidence that a sexual act of some sort had occurred between them. While he attempted to explain this evidence, it could not be ignored.

What he could not explain, however, was the tampon found at the scene of the rape. The tampon was additional physical evidence corroborating T.A.’s version of events. More importantly, it was completely inconsistent with Gauthier’s version. There was

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<sup>14</sup> While most of the cases that state this principle do so in the context of objections to trial testimony, there is no reason to suppose that the same reasoning would not apply to objections to arguments of counsel.

simply no logical explanation for why a prostitute would remove her tampon before engaging in consensual oral sex with a client.

Gauthier did not even try to explain this. In light of physical evidence that corroborated T.A.'s version, and was completely inconsistent with Gauthier's, it cannot be said that the prosecutor's comment on Gauthier's refusal changed the outcome of his trial.

3. THE PROSECUTOR'S COMMENT IN REBUTTAL ARGUMENT ON GAUTHIER'S REFUSAL WAS NOT FLAGRANT AND ILL-INTENTIONED, AND IT COULD HAVE BEEN CURED BY AN ADMONITION TO THE JURY HAD ONE BEEN REQUESTED.

Gauthier finally argues that the prosecutor's brief comment in rebuttal closing argument, to which he did not object, was so flagrant and ill-intentioned that it could not have been cured by an instruction from the court. The facts do not support this argument.

A defendant who alleges prosecutorial misconduct bears the burden of establishing that the conduct complained of was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. The allegedly improper statement must be viewed in the context of the entire case. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

The defendant's "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 2012 WL 2146783 at \*8 (Wash. Supreme Court No. 86033-5, June 14, 2012). If any prejudice could have been cured by a jury instruction, but none was requested, reversal is not required. Russell, 125 Wn.2d at 85.

Gauthier cannot make this showing. First of all, the remark at issue was not flagrant and ill-intentioned. The trial court had ruled that the prosecutor could question Gauthier about his refusal to voluntarily provide a DNA sample, and had placed no specific limits on any argument based on the refusal.

Gauthier relies on State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), a case where the court found a prosecutor's argument to be

flagrant and ill-intentioned because previous cases had found it improper. In Fleming, the court noted that “[t]his court has *repeatedly held* that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” Id. at 213 (italics added). The court cited several cases in support of this statement, two of which were decided more than two years before the prosecutor made the argument. Id.

Fleming does not control the result here. The only authority that Gauthier can point to in support of his argument that the prosecutor should have known that her argument was improper is State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). The focus of that case was the proper application of the rape shield statute:

This case allows us to consider whether a trial court can bar a criminal defendant from testifying about sexual conduct contemporaneous with an alleged criminal act. The defendant argues that the trial court violated his Sixth Amendment right to present a defense when it effectively barred him from testifying about his version of the events during an alleged rape. We hold that the trial court erred by (1) preventing the defendant from testifying about the events in question and (2) improperly applying the rape shield statute (RCW 9A.44.020(2)). Since this error was not harmless beyond a reasonable doubt, we reverse and remand for a new trial.

Jones, at 717. This introductory paragraph makes no mention of a holding finding certain conduct of the prosecutor improper, nor even hints that such conduct is at issue in the case.

It is only at the very end of the opinion, after the court has reversed and remanded for a new trial, that the court, in *dicta*, points out that the prosecutor's comment that the defendant had provided a DNA swab only after he was required to do so by a court order, was improper and should not be repeated on retrial.<sup>15</sup> Id. at 725. This portion of the opinion is easily missed by readers focused on the holding of the case.

In any event, any error could easily have been cured by an admonition from the court, had one been requested. The trial court could have instructed jurors that they were not to consider Gauthier's refusal to voluntarily provide a DNA sample as evidence of his guilt, but only insofar as the refusal served to impeach the version of events that he related at trial. See Emery, 2012 WL 2146783 at \*8 -\*10 (holding that argument shifting burden of proof to defendant was improper, but could have been cured by a proper instruction from the court).

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<sup>15</sup> By pointing out that this discussion is *dicta*, the State does not mean to imply that prosecutors are not obligated to follow it, but only that it could easily escape the notice of readers of the opinion.

Finally, Gauthier cannot show that the prosecutor's comment resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. As argued above, the tampon on the ground at the scene of the rape was physical evidence that corroborated T.A.'s version of events, and was at the same time completely inconsistent with Gauthier's version. Given this, and given that Gauthier had attributed his refusal to the reasonable advice of counsel, any incremental harm to Gauthier's credibility from the prosecutor's comment in rebuttal did not have a substantial likelihood of affecting the verdict.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Gauthier's conviction for Rape in the Second Degree.

DATED this 15<sup>th</sup> day of June, 2012.

Respectfully submitted,

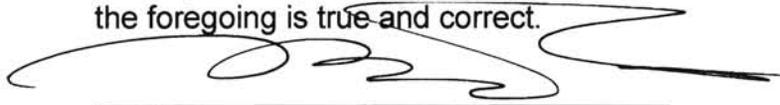
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

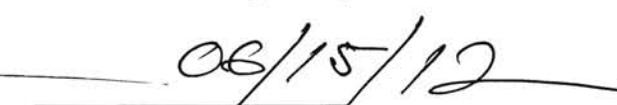
By:   
DEBORAH A. DWYER, WSBA #18887  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Jennifer J. Sweigert**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. THOMAS GAUTHIER**, Cause No. **67377-7-I**, in the Court of Appeals for the State of Washington, Division I.

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

  
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Name  
Done in Seattle, Washington

  
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