

67844-2

67844-2

No. 67844-2 I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON,  
Appellant,**

**v.**

**ROBERTO SANCHEZ-RODRIGUEZ  
Respondent.**

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~~COURT OF APPEALS  
STATE OF WASHINGTON~~

**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the trial court abused its discretion in admitting limited evidence of defendant's prior threat to kill his ex-wife under ER 404(b) where it was admitted to show the ex-wife's state of mind at the time defendant threatened her with the pickaxe and where the State had to prove that the ex-wife feared bodily injury and that fear was reasonable.
2. Whether the defendant can raise an issue regarding impermissible opinion testimony for the first time on appeal where the deputy's testimony that the defendant appeared "surprisingly calm," given that he had just told the deputy that his ex-wife and her boyfriend had attacked him without any provocation a few minutes before the deputy arrived, was not an explicit comment on his guilt or credibility.
3. Whether the judge's reference to the witness as a "victim" in his verbal limiting instruction regarding her testimony was a comment on the evidence where the reference was an isolated remark before any testimony was taken, the judge had just instructed the jury to disregard any comment they might believe conveys his opinion regarding the value of the evidence, and such a reference has previously been held not to convey the judge's personal opinion regarding the case.
4. Whether the judge's rulings on objections made during closing argument were impermissible comments on the evidence where the judge's comments related directly to the basis for the objections and a judge's rulings on objections don't constitute comments on the evidence.

## **C. FACTS**

### **1. Procedural.**

On April 6, 2011 Appellant Roberto Sanchez-Rodriguez was charged with two counts on Assault in the Second Degree, in violation of RCW 9A.36.021, for his actions on or about April 2, 2011. CP 94-95. Sanchez-Rodriguez was tried by a jury and found guilty of both counts. CP 36. He was sentenced to a standard range sentence of 17 months. CP 19-20.

### **2. Substantive.**

About a week before April 2<sup>nd</sup>, 2011, Sanchez-Rodriguez contacted his ex-wife Jewell Jefferson to inform her that he was returning to Washington. RP 27, 220. Jefferson and Sanchez-Rodriguez had been married ten years, had three children together, and had gotten divorced six months before in September 2010. RP 22-23, 218. While English was not Sanchez-Rodriguez's first language, Jefferson didn't speak any Spanish and they communicated in English. RP 25, 218. When Sanchez-Rodriguez asked about seeing the children, Jefferson told him he could come stay at her house with the children and that she would stay somewhere else<sup>1</sup>. RP 27, 220. It had been Jefferson's idea to get the

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<sup>1</sup> Jefferson has two other children by another father, both of whom were adults and who lived at her house as well. RP 29.

divorce, and although Sanchez-Rodriguez had tried to reconcile with her a couple of times, she wasn't interested. RP 23-24, 235-36. Jefferson thought Sanchez-Rodriguez was a good father as long as he wasn't drinking and was making good choices. RP 24, 27. Before she left Jefferson told Sanchez-Rodriguez that he couldn't drink around the children and that he could drive her truck as long as he wasn't drinking. RP 27, 33-34.

Jefferson didn't tell Sanchez-Rodriguez until the day before she left where she would be staying, which was with her boyfriend Derrick Sampson's sister on Vancouver Island, B.C. RP 27-28, 81-82, 84, 221. When he found out, Sanchez-Rodriguez was upset, and over the course of the next week, he texted her and called her more than 10 times. RP 30, 86. Two times he texted her: "no boyfriends." RP 30.

On Friday, April 1<sup>st</sup> on the last ferry back to Bellingham Jefferson received a call from her daughter that made her think that Sanchez-Rodriguez had her truck. RP 30-31. On their way back, Jefferson told Sampson to drive through the Silver Reef Casino parking lot to look for her truck because she was concerned Sanchez-Rodriguez had been drinking. RP 32, 85. While they were in the parking lot, Sanchez-Rodriguez drove into the lot. RP 32, 86. When she told Sampson to stop, Sanchez-Rodriguez turned the truck around and parked right behind them.

RP 33. Jefferson got out and told Sanchez-Rodriguez that she wanted her truck back. When he asked why, Jefferson told him it was because he had been drinking. RP 33, 86. Jefferson could smell that he had been drinking and noticed he was intoxicated.<sup>2</sup> RP 40, 56. Sanchez-Rodriguez replied angrily, “Well, don’t you want your money?” (Jefferson had loaned Sanchez-Rodriguez some money). RP 34. After she said yes, Sanchez-Rodriguez said something about going to the casino to win the money, and Jefferson told him he could stay there and she would come back to get him, but that she wasn’t leaving the truck with him. RP 34.

Sanchez-Rodriguez yelled at her and told her he just wanted to go home. RP 35, 86-87. Jefferson told him she’d drop him off at the house, and when he asked about using the truck the next day, she said she’d bring it by when he wasn’t drinking. RP 35. Sanchez-Rodriguez got in the truck and slammed the door shut. Jefferson told him that if he had a problem, he’d better just stay at the casino because she didn’t want to deal with his angry attitude. RP 35, 88. Sanchez-Rodriguez apologized and told her to just take him to the house. RP 35.

However, after Jefferson followed Sampson out of the parking lot in the truck, Sanchez-Rodriguez started saying hurtful things to her, things about her relationship with Sampson, and she told him he should just get

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<sup>2</sup> Jefferson and Sampson hadn’t had any alcohol to drink that night. RP 53.

out of the truck if he had a problem. RP 36, 38, 88. Then as she was driving, Sanchez-Rodriguez slapped her really hard on her back. RP 37. Jefferson slammed on the brakes and told him he'd better get out, that he didn't have the right to hit her and that if he hit her again, she would call the police. RP 37. Jefferson believed Sanchez-Rodriguez was mad because he knew she was following Sampson. RP 37. Sanchez-Rodriguez apologized again and told her to just take him home. Id.

On the drive to her house, one mile away, however, Sanchez-Rodriguez continued to say hurtful things to her and it got worse as they neared the house. RP 38-39. Sampson arrived first and parked just beyond the end of the driveway. RP 89. When Jefferson pulled into the driveway soon thereafter, she and Sanchez-Rodriguez were still arguing. RP 39, 89. Sanchez-Rodriguez asked her why she wasn't going to stay at the house with the kids. RP 39. Jefferson responded she was letting him stay there. RP 39. Sanchez-Rodriguez repeatedly told her that she didn't need a boyfriend. RP 39. Sanchez-Rodriguez then told her that he had a job and wanted to know if he could stay at the house with her and the children. RP 39. Jefferson told him no, and all of a sudden Sanchez-Rodriguez hit her on the left side of her face with a closed fist. RP 39. Jefferson yelled at him that he didn't have the right to hit her, that he'd better not and she was going to call the cops. RP 40.

Scared, Jefferson jumped out of the truck and took her cell phone out. Sanchez-Rodriguez jumped out of the truck too, saying, “No, no, no, please.” RP 41, 89-90. When it appeared to Jefferson that Sanchez-Rodriguez was headed to the back door of the house, she decided not to call the police. RP 41. However, Sanchez-Rodriguez went around the truck instead, picked up a pickaxe that had been lying against a stump in the front yard, raised it up in the air above his shoulders with both hands and started walking towards her with it.<sup>3</sup> RP 42-44, 90. Jefferson thought he was going to kill her because he had threatened to do that before. RP 43. She told him, “No, don’t do this.” RP 92. Sanchez-Rodriguez repeated, “No, no boyfriends.” RP 93. It didn’t take very long for Sanchez-Rodriguez to reach her. Afraid he was going to hit her with the axe, Jefferson stuck her head inside the cab of the truck so that he wouldn’t be able to hit her head with the axe. RP 44, 91. Jefferson positioned herself such that if she got hit, it would be in her back or shoulders. RP 45. Sanchez-Rodriguez then shoved her really hard in the back into the truck with the pickaxe. RP 44-46, 90-91.

In the meantime, Sampson had pulled his truck into the driveway and got out when he saw Sanchez-Rodriguez threatening Jefferson with the pickaxe. RP 91-92, 97. Sampson told Sanchez-Rodriguez, “That’s

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<sup>3</sup> The head of the pickaxe was pointed up.

enough now,” and went to grab the pickaxe. RP 93. Sanchez-Rodriguez turned towards him and said, “This is what you want,” holding the axe raised with both hands. RP 93-94. Sampson was afraid that Sanchez-Rodriguez was going to take a swing at him with the axe. RP 93-94, 97-98.

When Jefferson felt Sanchez-Rodriguez pull the axe off her body, she turned around and saw Sanchez-Rodriguez walking fast towards Sampson with the axe raised. RP 47, 101. When Sanchez-Rodriguez made a downward movement with the axe, Sampson caught it and the two of them struggled over the axe. RP 47-48, 94. Once Sanchez-Rodriguez let go of the pickaxe, Sampson threw the axe out to the side. RP 94-95. Sanchez-Rodriguez then hit Sampson with his fist. RP 94. Sampson and Sanchez-Rodriguez started to fight and at one point, Sampson hit Sanchez-Rodriguez and Sanchez-Rodriguez fell down and under the truck. RP 95, 107. Sampson then grabbed Sanchez-Rodriguez and threw him into a mud puddle. RP 95-96, 107. Sanchez-Rodriguez got up from the ground on his own before the police arrived. RP 96. During the fight Sanchez-Rodriguez hit Sampson in the mouth, causing his lip to bleed. RP 95.

After Jefferson yelled at Sampson and Sanchez-Rodriguez to stop fighting, she called the police. RP 47, 53. Once she told them she had called the police, they stopped fighting and waited for the police to arrive,

which the police did within five minutes. RP 53, 96. Deputy Cadman arrived, along with a couple of tribal officers, and spoke with Jefferson and Sampson. RP 114, 116, 123. Jefferson appeared upset, shaking and was on the verge of tears. RP 124. She appeared frightened and Sampson appeared stunned. RP 124. Neither appeared to have been drinking. RP 127.

Sanchez-Rodriguez, on the other hand, had a strong odor of intoxicants about him and bloodshot, watery eyes when the deputy contacted him. RP 131. He also swayed back and forth while the deputy spoke with him. RP 131. After waiving his rights, Sanchez-Rodriguez told the deputy that he had borrowed Jefferson's truck to buy cigarettes at the casino, that when Jefferson found him at the casino, she was angry and wanted her truck back. RP 135. Sanchez-Rodriguez said that Jefferson got in the truck to drive him back to the house, and on the way back she was yelling at him for having driven the truck. RP 135-36. He said when they got back, she was still yelling at him and started hitting him. RP 136. He said when he got out of the truck Sampson ran over and started hitting him and kicking him while he was on the ground, so he got up and grabbed the pickaxe and started swinging it at them in self defense. RP 136. He told the deputy he didn't know why they started attacking him. RP 137. Sanchez-Rodriguez's clothing was dirty and wet and appeared like he had

been rolling around on the ground in a fight. RP 138. Sanchez-Rodriguez appeared surprisingly calm when he told the deputy what happened. RP 139.

At trial Sanchez-Rodriguez testified that he hadn't had anything to drink the night Jefferson returned, that he called Jefferson to tell her he was going to buy cigarettes at the casino. RP 222. When he got to the casino, he saw Jefferson and Sampson in Sampson's truck, so he waved at them. RP 222. He testified Jefferson came over to him and asked him if he had been drinking, and he told her no. RP 223. Jefferson then asked him for the truck, so he got out and got back in the passenger side. RP 223. He testified that when she drove back to the house, she started telling him that she was going to take the children away from him, so he could never see them again. RP 223. He testified they weren't yelling and that they didn't fight about the truck. RP 224. He testified when they got back to the house, Jefferson told him she was going to take the children to Canada and that she was going to call the cops on him. RP 224-25. He testified that he told her not to do that, and when he asked why she was going to call the cops, she said because she didn't want him to see the children. RP 225.

He testified that his memory wasn't completely clear as to what happened that night<sup>4</sup>, but that they got out of the truck and continued to argue about Jefferson calling the cops. RP 226. When she got close to him, she pushed him and then Sampson came from behind the truck and they started fighting. RP 226-27. He couldn't say who started the fight. RP 227. He did remember getting struck with something and trying to get up from the ground. RP 230. He testified he didn't remember if he hit Sampson, although he "straightened his arm," – he just remembered the guy coming at him and getting up off the ground. RP 231. Sanchez-Rodriguez denied punching or slapping Jefferson. RP 225.

On cross-examination he admitted he never said anything to the deputy about Jefferson calling the police in order to have the kids taken away. RP 137, 242. He also never told the deputy anything about having been unconscious. RP 146.

#### **D. ARGUMENT**

The jury didn't believe Sanchez-Rodriguez's self defense claim and found him guilty of assaulting both Jefferson and Sampson by wielding a pickaxe in a threatening manner. Sanchez-Rodriguez asserts

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<sup>4</sup> Sanchez-Rodriguez testified that he had suffered a head injury in 2006 which sometimes affected his memory. RP 219. Jefferson also testified on cross-examination that he had injured his head in a car accident and since then had some difficulty with his memory. RP 54

his convictions should be overturned claiming that the trial court erred in admitting evidence of his prior threat to kill his ex-wife Jefferson under ER 404(b), that the deputy's testimony that Sanchez-Rodriguez's behavior that night surprised him given Sanchez-Rodriguez's statements to him constituted impermissible opinion testimony and the court's reference to Jefferson as a "victim" and its rulings on objections during closing argument impermissibly commented on the evidence. Sanchez-Rodriguez only raised the ER 404(b) issue at trial.

The trial court did not abuse its discretion in admitting Sanchez-Rodriguez's prior threat to kill Jefferson in order to show Jefferson's state of mind and that her fear was reasonable when Sanchez-Rodriguez threatened her with the pickaxe. It was also alternatively admissible to refute his claim of self-defense and as evidence regarding Jefferson's credibility given the domestic violence that had occurred in their relationship.

Sanchez-Rodriguez may not raise an issue regarding the deputy's alleged opinion testimony for the first time on appeal because the deputy did not directly express an opinion regarding Sanchez-Rodriguez's guilt or credibility. The deputy's testimony was based on his personal observations of Sanchez-Rodriguez's behavior and demeanor, and to the extent that the deputy's "surprise" constituted an opinion, it was directly

and logically related to his observations and thus did not constitute impermissible opinion testimony.

Last, the reference the judge made to Jefferson as the “victim” while he was giving a verbal limiting instruction to the jury regarding the ER 404(b) evidence was not a comment on the evidence because it did not convey the judge’s personal opinion regarding the evidence and was certainly harmless as it was a single reference in the context of the entire case. The judge’s rulings on objections during closing argument also were not comments on the evidence because a judge is entitled to give reasons for his rulings and the nature of the objections called for the judge to make a ruling that referred to the evidence.

- 1. The trial court did not abuse its discretion in admitting Sanchez-Rodriguez’s prior threat to kill Jefferson under ER 404(b) because it was admissible for a non-propensity purpose to show Jefferson’s state of mind and that her fear was reasonable.**

Sanchez-Rodriguez specifically asserts that the trial court misinterpreted the State v. Magers<sup>5</sup> case in deciding to admit his prior threat to kill Jefferson under ER 404(b). The trial court did not misinterpret Magers and carefully considered whether to admit evidence of the prior threat and limited its admission for the non-propensity purpose

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<sup>5</sup> State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008).

of showing Jefferson's state of mind when Sanchez-Rodriguez threatened her with the axe. Evidence of the prior threat was also, alternatively, admissible to rebut Sanchez-Rodriguez's claim of self-defense and to permit the jury to assess the credibility of Jefferson given the prior domestic violence in their relationship.

Evidence of other bad acts or crimes is not generally admissible to prove character and action in conformity with that character. ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident.

In order to admit evidence under ER 404(b), the evidence of other wrongs or misconduct must be admissible for a purpose other than to prove character or actions in conformance therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1955). Under ER 404(b), the court applies a four factor test:

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). As long as the court correctly interprets the evidence rule, a trial court's decision to admit or exclude the evidence is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Sanchez-Rodriguez claims the court misread the case of State v. Magers in reaching its decision. In Magers, the ER 404(b) evidence consisted of the defendant's having been in trouble for fighting while in jail/prison and evidence that he had been arrested for domestic violence which resulted in a no-contact order regarding the victim, with which he was charged with violating. Magers, 164 Wn.2d at 177-78, 180. The majority in Magers found that the evidence of the defendant's fighting was admissible to prove the victim's state of mind in that case because the State had to prove that the victim reasonably feared that the defendant would cause her bodily injury. *Id.* at 182-83. It found the evidence of the domestic violence arrest was admissible because it was part of the *res gestae* for the violation of the no contact order charge. *Id.* at 181-82.

The concurrence agreed with the majority regarding the domestic violence arrest, but disagreed with the admissibility of the evidence of defendant's fighting, fighting that did not involve the victim, although she had been aware of it. *Id.* at 194-95. The concurrence believed that the State was not required to prove that the victim reasonably feared bodily

injury, but only that a reasonable person under the same circumstances would have a reasonable fear of bodily injury. *Id.* at 194. Moreover, it believed that the testimony was really offered for another purpose:

More importantly, it is clear that the State did not offer the evidence of Mager's fighting to demonstrate the reasonableness of Ms. Ray's fear. Rather, since Ms. Ray recanted and denied the assault, the State offered the evidence of fighting to explain why Ms. Ray changed her testimony, i.e., to impeach Ms. Ray's testimony.

*Id.* The concurrence then went on to say that while prior bad acts can be admissible to explain a domestic violence victim's recantation, that since the fighting did not involve the victim, it was not admissible for that purpose but found the error harmless nevertheless. *Id.* at 194-95.

The court here did not misread Magers and in fact based its decision largely on other ER 404(b) cases. PTRP 34-36. Here, the prosecutor sought to introduce evidence of Sanchez-Rodriguez's prior threat to kill Jefferson because it went to her state of mind at the time Sanchez-Rodriguez had raised the axe and explained why she reasonably feared that he intended to cause her bodily injury with the axe. PTRP 31-32; CP 97-98. The judge found that Magers wasn't directly on point because in that case the ER 404 (b) evidence was found admissible to explain the victim's credibility given her recantation. PTRP 35; CP 31-32. The judge opined that he believed the concurrence would find the prior

threat to kill admissible because the ER 404(b) evidence here did involve the victim. PTRP 34.

Magers doesn't directly the answer the question before the trial court due to factual distinctions and it's being a plurality opinion. *See, In re Isadore*, 151 Wn.2d 294, 303, 88 P.3d 390 (2004) ("A plurality opinion has limited precedential value and is not binding on the courts.") Clearly under the majority opinion in Magers, the evidence of Sanchez-Rodriguez's prior threat to kill Jefferson would be admissible. While the concurrence stated it did not think the victim's state of mind was relevant to prove the assault element that the victim reasonably feared bodily injury, the concurrence did not address the part of the assault definition that requires the State to prove that the victim did "in fact create in another a reasonable apprehension and imminent fear of bodily injury ..." Id at 183. A victim's state of mind therefore is clearly relevant to proof of the means of assaulting of another by creating reasonable fear of bodily injury. Moreover, even under the concurrence's rationale, the victim's state of mind would be relevant because the concurrence stated that the proof required was that of a "reasonable person *under the same circumstances*." Id. at 194. A jury would not be able to determine whether a reasonable person under the same circumstances would fear bodily

injury unless they knew the history of violence between the victim and the defendant, particularly in the context of domestic violence.

The judge here was not wrong in concluding that the Magers concurrence was mainly concerned with the evidence of fighting that did not involve the domestic violence victim. Nor was he wrong in concluding the victim's state of mind was relevant and that a prior threat to kill the victim was admissible in this case where the victim feared that the defendant would kill her with the axe because the defendant had threatened to kill her in the past. PTRP 34.

As was referenced by the majority opinion in Magers, both State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999) and State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), held that the defendants' prior violent acts were relevant and admissible in order to demonstrate that the victim reasonably feared the defendants' threats. Magers, 164 Wn.2d at 182 (*citing*, Ragin, 94 Wn. App. 407 and Barragan, 102 Wn. App. 754); *see also*, State v. Binkin, 79 Wn. App. 284, 291-93, 902 P.2d 673 (1995), *rev. denied*, 128 Wn.2d 1015 (1996), *overruled on other grounds*, State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002) (defendant's prior threat to kill estranged wife's child was relevant to prove whether victim's fear that defendant would kill her was objectively reasonable and therefore admissible under ER 404(b)).

As in Magers, under the State's theory of assault here, the State had to prove that Sanchez-Rodriguez intended to create

in another apprehension of and fear of bodily injury, and which in fact create[d] in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Magers, 164 Wn.2d at 183; CP 49. The only difference between the threats that were communicated in the harassment charges in the Ragin and Barragan cases and those here are that the ones in Ragin and Barragan were communicated verbally not by conduct. Otherwise, just as in Ragin and Barragan, as the State was required to prove the victim was placed in reasonable fear of bodily injury and was in fact placed in reasonable fear, Sanchez-Rodriguez's prior threat to kill Jefferson was relevant and admissible to prove that Jefferson was placed in reasonable fear of bodily injury. The court did not abuse its discretion in admitting Sanchez-Rodriguez's prior threat to kill under ER 404(b).<sup>6</sup>

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<sup>6</sup> The first ER 404(b) factor, whether the prior misconduct had been proven by a preponderance was not contested by defense because Sanchez-Rodriguez had been convicted of the offense. PTRP 29-30. The court also balanced the probativeness versus the prejudice of the evidence by limiting the evidence that was admissible from the prior conviction to the fact of the threat itself and no other testimony. PTRP 37; CP 31-32. The court also prefaced the testimony with a limiting instruction at defense request, limiting the jury's consideration of the evidence solely for evidence of the victim's state of mind. RP 3-4, 20.

- a. *The evidence was alternatively admissible to rebut the claim of self-defense.*

The evidence of Sanchez-Rodriguez's prior threat to kill Jefferson was also admissible to rebut his claim of self-defense. Admission of evidence may be upheld on grounds other than those relied upon by the trial court as long as there is a sufficient record for review. *See, Nast v. Michels*, 107 Wn. 2d 300, 308, 730 P.2d 54 (1986) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court"). Evidence of prior misconduct is admissible to prove the mens rea of intent where a defendant admits having committed the act, but asserts that he did not have the requisite state of mind for conviction. *State v. Hernandez*, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), *rev. den.*, 140 Wn.2d 1015 (2000). Prior acts of misconduct can be relevant and admissible under ER 404(b) if they rebut a defendant's claim of self-defense. *See, State v. Thompson*, 47 Wn. App. 1, 11, 733 P.2d 584, *rev. den.*, 108 Wn.2d 1014 (1987) (testimony of other threats defendant made earlier that evening admissible to rebut defendant's claim of self-defense by showing a continuing course of provocative conduct).

While the court based its decision to admit the evidence of the prior threat on the victim's state of mind, the evidence was also admissible

to rebut Sanchez-Rodriguez's self-defense claim, to show that he did intend to assault Jefferson and was not simply defending himself that night. Sanchez-Rodriguez gave notice that he might be asserting self-defense. Supp CP \_\_, Sub Nom 31. Through his statement to the deputy, Sanchez-Rodriguez asserted that it was Jefferson and her boyfriend who attacked him first and that he only picked up and swung the pick-axe at them in order to defend himself. RP 136-37. Prior to Sanchez-Rodriguez testifying, defense requested and tentatively was granted self-defense instructions. RP 188, 206-210; CP. At trial Sanchez-Rodriguez testified that while he didn't remember some things about that night, he did remember Jefferson pushing him when they were arguing and getting into a fight with her boyfriend, although he didn't remember who started the fight and didn't remember picking up the pickaxe. RP 225-31. The court granted the self defense instruction based on the deputy's testimony of what Sanchez-Rodriguez told him that night, and defense counsel then argued Sanchez-Rodriguez was acting in self defense. RP 244-46, 281-83. Sanchez-Rodriguez's prior threat to kill Jefferson was admissible to rebut his claim he did not intend to assault Jefferson when he wielded the axe, but was merely trying to defend himself. *Cf.*, Parrott-Horjes v. Rice, \_\_ P.3d \_\_ (2012), 2012 WL 1816189 (evidence of deceased's prior acts of domestic violence admissible under ER 404(b) to show alleged slayer's

reasonable fear of injury and state of mind at time she committed the alleged act of self-defense).

- b. Prior threat was alternatively admissible so jury could assess Jefferson's credibility as a domestic violence victim.*

Furthermore, under Magers, prior evidence of domestic violence is admissible regarding a victim's credibility, and under State v. Baker, 162 Wn. App. 468, 259 P.3d 270, *rev. den.*, 173 Wn.2d 1004 (2011), such evidence is not limited to those situations in which the victim recants. Magers, 164 Wn.2d at 185-86. In Baker, the court concluded that defendant's prior assaults on the victim were relevant to the victim's credibility so that the jury could assess that credibility with full knowledge of the dynamics of the domestic violence victim's relationship with the defendant. *Id.* at 475. Jefferson's credibility was very much at issue in this case, with defense counsel essentially accusing her of perjury in her written statement which contained some statements she didn't remember making to the deputy and which were inconsistent with some of her testimony. RP 60-65, 287-97.

- c. Any error in admitting the limited testimony regarding the prior threat was harmless.*

Erroneous admission of prior misconduct requires reversal only if there is a reasonable probability that the error materially affected the

outcome of the trial. State v. Halstein, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Even if it were erroneous to have admitted the limited testimony that Jefferson feared that Sanchez-Rodriguez would kill her with the raised pickaxe because he had threatened before to do that, that evidence was harmless in the context of the other evidence. As the judge noted at sentencing, “the previous incident came out only one small piece, one answer to one question in testimony.” SRP 14. The evidence that Sanchez-Rodriguez wielded the pickaxe, held up high over his shoulders, walked towards Jefferson, and then shoved her hard into the truck when she hid her head inside the cab so that he couldn’t hit her in the head with the axe, was sufficient evidence to demonstrate that Sanchez-Rodriguez intentionally assaulted her by causing her reasonable fear that he would cause her bodily injury with the pickaxe. *See, Magers*, 164 Wn.2d at 195 (J. Madsen concurring) (recanting domestic violence victim’s brief testimony that defendant had been in trouble for fighting was harmless where it was of minor significance in relation to evidence properly admitted that defendant had been previously arrested for domestic violence and that victim had told officer that defendant had held a sword to the back of her neck and threatened to cut off her head). Moreover, Sanchez-Rodriguez’s threat against Jefferson would not have affected the verdict regarding Sampson. Jefferson and Sampson testified that Sanchez-

Rodriguez had turned on Sampson with the axe raised in air, said “This is what you want,” walked fast towards Sampson, and then started to strike at Sampson with the axe when Sampson caught the axe. Any error in admitting evidence of Sanchez-Rodriguez’s prior threat to kill Jefferson was harmless.

Contrary to his assertion, Sanchez-Rodriguez did not have a plausible self defense claim. While he told the deputy at the scene that he only picked up the pick-axe after Jefferson and Sampson attacked him, his story at the scene was that they attacked him out of the blue and that he didn’t know why they attacked him. Moreover, his testimony at trial differed from his statements that night. While he claimed he didn’t remember much of what happened that night, he testified that on the ride back to the house that Jefferson told him that she was going to take the kids away from him and not let him see them and that she said she was going to call the cops so that he wouldn’t be able to see their children. RP 223-25. On cross examination he admitted he hadn’t told the deputy that Jefferson had threatened to call the cops and to take the kids away, but instead had told the deputy they had been arguing about his drinking. RP 238, 242. He testified that when he got out of the truck and got close to Jefferson she pushed him, not that she had hit him as he had told the deputy. RP 226, 229. He testified he didn’t remember who started the

fight and that he didn't remember having the pickaxe in his hand, contrary to what he had told the deputy. RP 227, 230. He denied drinking any alcohol that night, which was contrary to the symptoms of alcohol consumption that the deputy testified he observed in Sanchez-Rodriguez. Even if the jury believed Sanchez-Rodriguez's testimony that he only remembered certain parts of what happened that night, his testimony did not establish that he acted in self-defense and his testimony conflicted with the self-defense story he told the deputy.

2. **Sanchez-Rodriguez may not raise a claim of impermissible opinion testimony for the first time on appeal where the deputy's testimony that Sanchez-Rodriguez appeared "surprisingly calm" was not an explicit comment on his guilt or credibility.**

Sanchez-Rodriguez asserts that the deputy's testimony that he was "surprisingly calm" given the story he had just related was impermissible opinion testimony that he may raise on appeal even though he did not object below. He may not raise this issue for the first time on appeal because the deputy's testimony was not an explicit comment on his guilt or credibility and therefore doesn't constitute a manifest error of constitutional magnitude.

*a. RAP 2.5*

Sanchez-Rodriguez asserts that he may raise the issue of the deputy's alleged improper opinion testimony for the first time on appeal because it is a manifest error of constitutional magnitude. In general an appellant is limited on appeal to those specific grounds for evidentiary objections asserted at trial. State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004). Failure to challenge the admissibility of proffered evidence essentially amounts to waiver of any legal objection to its being considered by the jury. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Objecting below gives the trial court the opportunity to prevent or cure the error. State v. Kirkman, 159 Wn.2d 918, 923, 155 P.3d 125 (2007). Moreover, sometimes defense counsel's failure to object is a tactical decision. *Id.* at 935.

An appellant may raise an issue for the first time on appeal if he/she can demonstrate a manifest error that affected a constitutional right. RAP 2.5(a). Exceptions to RAP 2.5(a), however, are to be construed narrowly. Kirkman, 159 Wn.2d at 935. In order to show "manifest error," an appellant must show that the alleged error had practical and identifiable consequences in the trial. *Id.* It is the appellant's burden to demonstrate how the error actually affected his right to a fair trial such that the alleged constitutional error would fall within the narrow exception of RAP 2.5(a).

In the context of improper opinion testimony, a “manifest error” requires a nearly explicit statement by the witness regarding the defendant’s guilt or the witness’s belief in the victim’s version of events. *Id.* at 936.

*b. Deputy’s testimony was not improper opinion testimony*

The deputy’s testimony that he was surprised by Sanchez-Rodriguez’s demeanor given Sanchez-Rodriguez’s statements to him was not improper opinion testimony because it was not an explicit comment on Sanchez-Rodriguez’s guilt. Opinion testimony is testimony that is based on a witness’s belief rather than direct knowledge of facts. Saunders, 120 Wn. App. at 811. A witness may not testify as to their opinion regarding the defendant’s credibility because that determination falls exclusively within the province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). “Testimony regarding a defendant’s statements and demeanor is not opinion and thus is admissible if relevant.” State v. Day, 51 Wn. App. 54, 552, 754 P.2d 1021, *rev. den.*, 111 Wn.2d 1016 (1988). In determining whether testimony constitutes impermissible opinion testimony, courts generally consider five factors: 1) the type of witness involved; 2) specific nature of testimony; 3) nature of the charges; 4) type of defense; and 5) other evidence before the jury. Demery, 144 Wn.2d at 759. “[T]estimony that is not a direct comment on the defendant’s guilt or

on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.”

Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *rev. den.*, 123 Wn.2d 1011 (1994).

Testimony regarding a defendant’s demeanor is not impermissible opinion testimony if the testimony is based on the witness’s personal observations of the defendant’s conduct that are factually recounted and directly and logically support the opinion. State v. Stenson, 132 Wn.2d 668, 719-24, 940 P.1239 (1997); *see also*, State v. Day, 51 Wn. App. at 553 (detective’s testimony that defendant’s grief over her husband death did not appear to be sincere was not improper opinion testimony on defendant’s guilt because it was preceded by testimony of his observations of the defendant’s reactions which logically supported his opinion). Testimony describing a defendant’s statements as “inconsistent” that is based on the witness’s personal, direct knowledge is not improper opinion testimony. Saunders, 190 Wn. App. at 812.

In Saunders, the defendant challenged some of the detective’s testimony regarding statements he had made to the detective as improper opinion testimony. He challenged the detective’s testimony that there was “a lot of inconsistencies” among his statements to the detective that he made at three different interviews and challenged inferences by the

detective that he made conflicting statements when the detective testified about the four different stories he told the detective. Saunders, 120 Wn. App. at 811-12. The court found that the detective's testimony was not improper opinion testimony because the detective relied upon his personal knowledge of the defendant's statements when he referred to them as inconsistent and his observation that the defendant gave conflicting statements was rational and supported by the evidence as some of the statements the defendant made did conflict. *Id.* at 812. The court found that the detective's testimony that the defendant's answers to questions "weren't always truthful" was improper opinion testimony, but held it harmless under a constitutional harmless error analysis given the other evidence in the case. *Id.* at 813.

In Stenson, the defendant asserted the prosecutor had committed misconduct by purposefully trying to elicit improper opinion testimony regarding the defendant's demeanor and its effect. Stenson, 132 Wn.2d at 719-24. In that case, after the prosecutor had elicited testimony from a paramedic regarding the defendant's actions and appearance, including the defendant's lack of emotion, during his interaction with the defendant. The prosecutor asked the paramedic what his reaction was to learning that the defendant was the husband of the woman he had been treating. *Id.* at 719-22. The paramedic testified he was surprised. *Id.* at 719. The court

found that the paramedic's testimony was not improper opinion testimony because the paramedic was not testifying as an expert and his testimony was based on personal observations of the defendant's conduct. *Id.* at 724.

In State v. Allen, 50 Wn. App. 412, 749 P.2d 702, *rev. den.*, 110 Wn.2d 1024 (1988), the court held that the detective's testimony that the defendant's grief appeared insincere was not impermissible opinion testimony. In that case the detective testified that although the defendant "appeared to be sobbing ... her facial expression, the lack of tears, the lack of any redness in her face did not look genuine or sincere." *Id.* at 416. The court held that the testimony did not constitute an improper opinion as to the defendant's guilt but was a "summary of his admissible personal observations" of the defendant's reaction to her husband's death because the opinion was based on personal, factual observations that logically and directly supported his opinion. *Id.* at 418-19.

Similarly, the deputy's testimony here was based on his personal observations and he was not testifying as an expert. Prior to the challenged testimony, the deputy had testified that Sanchez-Rodriguez exhibited symptoms of having consumed alcohol – bloodshot, watery eyes, strong odor of alcohol on his breath and swaying while standing. RP 131. He also testified that Sanchez-Rodriguez told him that Jefferson had started hitting him when they arrived back at the house, that Sampson then

attacked him, knocking him to the ground and then kicking him while he was on the ground and that Sanchez-Rodriguez didn't know why they attacked him. RP 136-37. After testifying that Sanchez-Rodriguez's clothing was dirty and wet and he looked like he had been rolling around on the ground in a fight, the Deputy testified that Sanchez-Rodriguez's demeanor was "surprisingly calm." When asked why "surprisingly", the deputy explained he would have expected Sanchez-Rodriguez to be upset over what Sanchez-Rodriguez had just described had happened because Sanchez-Rodriguez had told him that Jefferson and Sampson had attacked him so much that Sanchez-Rodriguez felt that he had to arm himself with a pickaxe in self-defense. RP 138-39. The deputy then testified that Sanchez-Rodriguez was also calm as he was transported to jail.

The deputy's testimony didn't express an opinion about Sanchez-Rodriguez's guilt or even his credibility. Nothing in the deputy's "implied opinion" about Sanchez-Rodriguez's demeanor related to an element of the crime. Moreover, he did not, as Sanchez-Rodriguez contends, testify that he did not believe Sanchez-Rodriguez because Sanchez-Rodriguez wasn't acting consistently with his story. He only expressed his own reaction, surprise, at Sanchez-Rodriguez's demeanor given Sanchez-Rodriguez's statement about what had happened. Even if the deputy's statement constituted an opinion, it was based on his own personal

observations and was directly and logically related to those observations. Since the deputy's testimony was not an express opinion on Sanchez-Rodriguez's guilt or credibility, Sanchez-Rodriguez may not assert it for the first time on appeal.

Sanchez-Rodriguez compares his case to State v. Haga, 8 Wn. App. 481, 507 P.2d 159, *rev. den.*, 82 Wn.2d 1006 (1973). Haga, decided before Allen, is distinguishable for the same reasons the Stenson court distinguished it: the witness, a paramedic, didn't testify as an expert and didn't testify based on assumptions that were unsupported by his direct observation. Stenson, 132 Wn.2d at 724. In Haga, the State had attempted to qualify the ambulance driver as an expert regarding people's expressions of grief and elicited his expert opinion regarding the defendant's reactions as they related to the driver's expert experience regarding grief. *Id.* at 490-92. The court in Allen also distinguished the Haga case based on the fact that the witness testimony there was admitted as expert testimony regarding an area in which there was no such area of expertise. Allen, 50 Wn. App. at 417.

*c. Ineffective assistance of counsel.*

Sanchez-Rodriguez argues alternatively that his attorney was ineffective for failing to object to the testimony. However, as argued above, the deputy's testimony was not impermissible opinion testimony,

but permissible because it was based on his personal observations and any opinion he expressed was logically and directly related to those observations.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2w 112 (1992). "The defendant bears the burden of showing there were no 'legitimate strategic or tactical reasons' behind defense counsel's decision." State v. Rainey, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *rev. den.*, 145 Wn.2d 1028 (2002). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15. Defendant must meet both parts

of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46. A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In all likelihood, defense counsel did not object because she believed, as outlined above, the deputy's statement's about her client's demeanor and his reaction to them were proper testimony. In closing, she objected to the prosecutor's characterization of the deputy's testimony when the prosecutor argued that the deputy had said that Sanchez-Rodriguez's "behavior was not consistent with what he said had happened," but did not object when the prosecutor revised his argument to state that Sanchez-Rodriguez's story did not match his demeanor. RP 301-02. Moreover, even if she believed that there may have been some slight

impermissible opinion testimony therein, she reasonably may have decided not to object in order not to call attention to the testimony. This was not an attorney who was wary of objecting.

Ultimately, Sanchez-Rodriguez cannot show prejudice from the testimony for the same reasons that any alleged error was harmless. In addition, the “opinion” that Sanchez-Rodriguez’s calm demeanor was surprising given his story that Jefferson and Sampson had just attacked him was something the jury would have readily concluded themselves. The inconsistency between Sanchez-Rodriguez’s story and his physical demeanor would have been readily apparent to the jury from the statements themselves and the deputy’s legitimate testimony that Sanchez-Rodriguez appeared calm when he spoke to him and in the ride to jail. Defense counsel was not ineffective for failing to object to the deputy’s testimony.

3. **The trial court did not comment on the evidence because its single reference to “victim” during its oral limiting instruction did not convey its personal opinion of the evidence and its other alleged “comments” were made during its ruling on objections.**

Sanchez-Rodriguez next asserts that the judge commented on the evidence a number of times, specifically in verbally instructing the jury regarding the ER 404(b) evidence and during closing argument. The

judge's sole reference to Jefferson as a "victim" during its cautioning instruction before Jefferson's testimony did not convey the judge's personal opinion regarding the evidence and thus was not a comment on the evidence. Likewise, the judge's rulings on objections during closing argument did not convey his personal opinion, but rather addressed the specific objections made which related to witnesses' testimony and evidence presented.

Article IV, §16 of the Washington State Constitution prohibits a trial court from commenting on the evidence in order to avoid influencing the jury. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question. Swan, 114 Wn.2d at 657. "The prohibition prohibits only those words or actions having the effect of conveying to the jury the trial court's view of the credibility, weight, or sufficiency of the evidence." State v. Stearns, 61 Wn. App. 224, 231, 810 P.2d 41, *rev. den.*, 117 Wn.2d 1012 (1991). The "touchstone of error" is whether or not the "feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane,

125 Wn.2d 825, 838, 889 P.2d 929 (1995). The determination is dependent upon the facts and circumstances of each case. Stearns, 61 Wn. App. at 231.

If the statements constitute a comment on the evidence, the comments are presumed prejudicial, and the burden falls upon the state to show lack of prejudice unless the record affirmatively shows that no prejudice could have resulted from the comments.<sup>7</sup> Lane, 125 Wn.2d at 838-39. A comment on the evidence is not prejudicial if the jury could not have reached any other conclusion regarding the evidence. State v. Levy, 156 Wn.2d 709, 726, 132 P.3d 1076 (2006).

An explanation of an evidentiary ruling on an objection is not a prohibited judicial comment. State v. Dykstra, 127 Wn.App. 1, 8, 110 P.3d 758 (2005), *rev. den.*, 156 Wn.2d 1004 (2006). The jury is presumed to follow the instructions that the court has no opinion on the facts of the case and that the court's rulings on objections during the course of the trial must not be taken as any expression of the court's opinion of the case. State v. Cerny, 78 Wn.2d 845, 856, 480 P.2d 199 (1971); State v. Studebaker, 67 Wn.2d 908, 410 P.2d 913 (1966) (instruction to jury to

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<sup>7</sup> Overwhelming, untainted evidence supporting each element of the offense affirmatively shows that the comment had no effect on the jury. Lane, 125 Wn.2d at 840.

disregard any impression as to court's belief or disbelief of testimony cured unnecessary judicial comment).

Sanchez-Rodriguez asserts all that is necessary to constitute an improper comment on the evidence is an implied opinion from the court regarding the evidence, citing Levy. However, in that case the court's comment related directly to an element of the offense contained in the written jury instructions, and the court only held that implied opinions *regarding elements of the offense* were sufficient to constitute improper comments on the evidence. Therefore, the written to-convict jury instructions included "to-wits" that pre-supposed the State had met its burden to prove an element of the offense. For example, the to-convict instruction for first degree burglary stated that the defendant ... entered and remained unlawfully in a building, to wit: the building of [victim] ... and was armed with a deadly weapon, to-wit: a revolver or a crowbar. Levy, 156 Wn.2d at 716. The court concluded the references to "building" and "crowbar" were comments on the evidence. However, Levy is distinguishable because the court's alleged comments on the evidence here do not relate to the elements of the offense and were not contained in the written jury instructions.

- a. *Court's use of the term "victim" was not a comment on the evidence requiring reversal.*

Sanchez-Rodriguez first asserts that the judge's use of the term "victim" in his oral limiting instruction to the jury was an improper comment on the evidence. Sanchez-Rodriguez acknowledges the case of State v. Alger, 31 Wn. App. 244, 640 P.2d 44, *rev. den.*, 97 Wn.2d 1018 (1982), but discounts the language in the opinion because the use of the term "victim" appeared in a stipulation between the parties. In that case, however, without addressing whether such a reference constituted an impermissible comment on the evidence, the court held that a single reference to "victim" in the context of the entire trial was harmless beyond a reasonable doubt. *Id.* at 249. The court noted that the use of the term "victim" by a trial court generally has been found *not* to be an impermissible comment on the evidence because it does not convey to the jury the court's personal opinion of the case. *Id.* (emphasis added). The court also found that defense counsel's failure to object when the stipulation was read to the jury and waited until later to mention it to the court strongly indicated that the comment was insignificant. *Id.*

Although presumably the term "victim" did not appear in defense counsel's proposed oral instruction to the jury regarding the ER 404(b)

evidence,<sup>8</sup> the result here is no different from the Alger case. RP 3-4. The court proposed reading the following instruction to the jury before Jefferson's testimony and defense counsel agreed to it:

You may hear testimony regarding prior incidents between Miss Jefferson and the Defendant. I am allowing this evidence, but you may consider the evidence only for the purpose of evaluating this witness' state of mind.

RP 6. However, when the judge orally instructed the jury he changed the verbiage slightly.

You may hear testimony *from this witness* about prior incidents between her and the Defendant. I am allowing this evidence, but you may consider the evidence only for the purpose of evaluating *her* state of mind, *the victim's state of mind*.

RP 20. Obviously, the court did not intend to convey to the jury its opinion regarding the evidence when he added the reference to "victim" to the proposed instruction. Defense counsel did not object at the time the instruction was read, or request a curative instruction, and in fact never mentioned the court's use of the term during trial. Moreover, just prior to reading the instruction the judge advised the jurors that the law does not permit him to comment on the evidence and that they should disregard any comment they might believe expressed his opinion as to the value of the

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<sup>8</sup> It isn't clear from the record exactly what the instruction was that counsel wanted the court to read because she states that she modified the WPIC instruction. RP 3-4.

evidence. RP 17. This advisement was reiterated in the written instructions. CP 41. The judge's single reference to the term "victim," at the beginning of trial before any testimony, did not convey his personal opinion regarding the merits of the case or that Jefferson's testimony would be truthful. Even if this single reference to the term "victim" were an impermissible comment on the evidence, it clearly did not prejudice Sanchez-Rodriguez, just as the single comment in Alger did not. *See also, United States v. Washburn*, 444 F.3d 1007 (8<sup>th</sup> Cir. 2006) (court's use of term "victims" in written jury instructions did not constitute prejudicial comment on the evidence when the jury instructions as a whole conveyed government's burden to prove all elements of the crime).

*b. The judge's rulings on objections during closing argument were not comments on the evidence.*

Next, Sanchez-Rodriguez asserts that the judge's rulings on objections during closing argument constituted improper comments on the evidence. A court, however, does not comment on the evidence when it provides reasons for its evidentiary ruling on an objection. Cerny, 78 Wn.2d at 855. "A trial court, in passing on objections to testimony, has the right to give its reasons therefore and the same will not be treated as a comment on the evidence." *Id.* 78 Wn.2d at 855-56; *see, e.g., Cerny, supra* (court's ruling in response to objection that chain of evidence had been

established did not constitute comment on evidence); Swan, 114 Wn.2d at 657-58 (court's ruling that witness was an expert on subject matter was not comment on evidence); Studebaker, 67 Wn.2d at 984 (court's ruling limiting repetitious testimony was not comment on evidence); State v. Surry, 23 Wash. 655, 661-62, 63 P.557 (1900) (court's ruling that witness's testimony was not clear was not comment on evidence); Dykstra, 127 Wn. App. at 8-9 (court's ruling on objection to prosecutor's statement in closing was not comment on evidence); Seattle v. Arensmeyer, 6 Wn. App. 116, 491 P.2d 1305 (1971) (court's ruling striking testimony unrelated to issue at trial was not comment on evidence).

Sanchez-Rodriguez's assertions that the court commented on the evidence during closing argument relate to the judge's rulings on objections. First, Sanchez-Rodriguez asserts that the judge's ruling regarding defense counsel's objection that the prosecutor was mischaracterizing the testimony regarding the lack of evidence to support Sanchez-Rodriguez's claim of memory loss was a comment on the evidence. The judge responded to the objection by stating, "I don't believe so." RP 308. When defense counsel interjected that Jefferson had testified about Sanchez-Rodriguez's memory loss, the judge responded, "The jury has heard the testimony." Very clearly, the judge was ruling on

defense counsel's objection. While the judge's ruling might not have been correct, it did not indicate that he believed the state's version of the evidence over the defense, but only what the testimony was. Moreover, the court's follow-up statement made it clear the judge believed it was the jury's memory of the testimony that mattered.

Second, Sanchez-Rodriguez challenges the judge's ruling regarding the state's objection to defense counsel's use of the term "lies" when referring to some of Jefferson's testimony. In response to the objection, the judge stated, "Inconsistencies would be a better term." When defense counsel protested, claiming it was proper argument, the judge stated to the jury that it was to disregard defense counsel's comment that it was proper argument.<sup>9</sup> Whether the judge's ruling was correct or not<sup>10</sup>, the import of the judge's ruling was to endorse defense counsel's argument that Jefferson had been inconsistent in her testimony. The ruling

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<sup>9</sup> Sanchez-Rodriguez asserts that the judge's statement to the jury to "disregard that" referred to defense counsel's argument that Jefferson was a liar. However, the judge's statement came in response to defense counsel's statement that it was proper argument, not in response to the prosecutor's objection.

<sup>10</sup> Counsel may argue that a witness is lying if the argument is drawing an inference from the evidence presented and the witness's testimony is contradicted by other evidence. State v. Copeland, 130 Wn.2d 244, 291-92, 922 P.2d 1304 (1996). At the point that defense counsel asserted that Jefferson was lying, she had only argued that Jefferson's testimony had many inconsistencies and that her written statement wasn't true because it left out detail as to what happened to Sanchez-Rodriguez during the fight between Sampson and him. Arguably the judge's ruling was correct because defense counsel's assertion of Jefferson's "lies" was not tied to specific evidence that contradicted her testimony.

was clearly directed at counsel and not the jury until defense counsel's statement that it was proper argument drew the judge's response directing the jury to disregard defense counsel's statement. Moreover defense counsel was permitted to and did argue that the jury could decide whether Jefferson lied during her testimony. RP 297.

Third, Sanchez-Rodriguez asserts that the judge commented on the evidence when he stated "I think it's what the deputy said," in ruling on defense counsel's objection that the prosecutor was mischaracterizing the evidence when the deputy "said this man's behavior was not consistent with what he said had happened." RP 301. In response, defense counsel challenged the judge's ruling as to whether the judge was saying that was what the deputy said, and the judge clarified in response that he was ruling that it was argument that could be made based on the deputy's testimony. RP 302. Again, the judge was clearly ruling on an objection, the ruling was directed at counsel, and his follow-up statement explained his ruling.

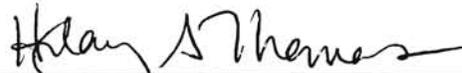
None of the judge's rulings conveyed his personal opinion as to the credibility of the witnesses or the evidence, but rather very clearly were rulings on objections. At most, in making his ruling the judge conveyed to counsel what he believed the testimony of the witnesses was where there was a dispute as to nature and scope of the testimony. That type of ruling was completely within the judge's prerogative and certainly what defense

called for when she objected that the argument mischaracterized the testimony. None of the judge's rulings during closing argument were impermissible comments on the evidence, and certainly Sanchez-Rodriguez was not prejudiced by them. *See, State v. Nesteby*, 17 Wn. App. 18, 560 P.2d 364 (1977), *rev. den.*, 90 Wn.2d 1017 (1978) (judge's ruling correcting counsel's recollection of the witness's testimony did not convey his opinion as to the evidence and therefore wasn't comment on the evidence.)

**E. CONCLUSION**

Based on the foregoing, the State requests that Sanchez-Rodriguez's appeal be denied and his convictions for two counts of Assault in the Second Degree be affirmed.

Respectfully submitted this 5<sup>th</sup> day of June 2012.



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**CERTIFICATE**

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, DAVID B. KOCH, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC  
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Sydney A. Kass  
NAME

06/05/2012  
DATE