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Court of Appeals
Division I
State of Washington

NO. 73461-0-I

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

STATE OF WASHINGTON

Respondent

v.

JACOB T. HARRISON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court abuse its discretion in denying the defendant's motion to withdraw his agreement to the admission of the 911 recording?

2. Alternatively, was the 911 recording properly admitted as a non-testimonial excited utterance?

3. Did the prosecutor commit flagrant and ill-intentioned error in closing argument by explaining that the jury instructions' explanation of circumstantial and direct evidence came from the judge?

4. Did the defendant receive ineffective assistance of counsel when his attorney did not object to the prosecutor's proper closing argument?

II. STATEMENT OF THE CASE

The defendant, Jacob T. Harrison, was charged with First Degree Robbery (While Armed With A Firearm), Possession of a Controlled Substance (Heroin) (While Armed With A Firearm), and Unlawful Possession of a Firearm in the First Degree. 1 CP 187. The charges arose from an incident occurring in a Motel 6 hotel room in Everett on October 12, 2014. 1 CP 189.

A jury trial proceeded over six court days. The jury returned verdicts of guilty on all charges and found in favor of both firearm enhancements. 7 RP 898-899; 1 CP 125-129. The court imposed a standard range sentence and the mandatory firearm enhancements, resulting in a 180 month prison sentence. 1 CP 87.

A. EVIDENCE AT TRIAL.

1. The Parties Agreed To Admit The 911 Recording.

As is often the case, this armed robbery first came to law enforcement's attention from a 911 call. The defendant initially wanted to make sure the call was admitted into evidence; his trial memorandum informed the court that the defense would seek to admit the recording if the State did not. 1 CP 171. Defense counsel indicated three times on the record that the admission of the 911 recording was agreed. 1 RP 104, 105, 106. The defendant also moved in limine to exclude the 911 caller, victim Brett Losey, from testifying in person. 1 CP 171, 179. This motion was later withdrawn. 1 RP 71.

The court listened to the 911 recording during motions in limine and granted the State's motion to admit it. 1 RP 108; Ex. 2A; Appendix A (Transcript of Exhibit 2A).

2. The State's Civilian Witnesses.

Victim Shana Morcom testified that she and her boyfriend Brett Losey occupied a room at the Motel 6 in Everett, Washington on October 12, 2014. 2 RP 180. On that day the couple left their hotel room around noon then returned to their room around 4:30 PM. 2 RP 183. Upon their return the couple was "robbed at gunpoint," which she described as two males demanding that they put their valuables on the bed, then being forced to go into the bathroom and shut the door. 2 RP 183, 185-186. She remembered that one of the assailants was sitting, and the one standing up had the gun. *Id.* At the time she recognized the gun-wielding male as an acquaintance she knew only as "J.T.", a fellow-Motel 6-resident whom she had met the day before. 2 RP 181, 187.¹ By the time of trial she was "not positive" that J.T. was involved. *Id.* Ms. Morcom's reduced confidence in J.T.'s involvement arose from the fact that she was a heavy drug user when the robbery occurred, but also because a mutual friend of Ms. Morcom and Jason T. Garcia had convinced her that Jason T. Garcia was "incapable of doing this." 2 RP 204-205.

¹ The fact that codefendants Jacob T. Harrison and Jason T. Garcia both have the initials "J.T." was a potentially confusing coincidence, but only Jason T. Garcia was known in the community as "J.T." . See 2 RP 193-194.

The two robbers stole Ms. Morcom's wallet, iPhone, keys, and a sparkly pink lanyard with more keys on it. 2 RP 191. They also stole Brett Losey's brown wallet, which contained two Fred Meyer debit cards (one in Ms. Morcom's name, one in Mr. Losey's name). 2 RP 272.

Ms. Morcom's description at trial of the second suspect was, at first, that it was a female. 2 RP 189. This conflicted with the description she and Brett Losey provided to Deputy Sadro shortly after the robbery that the second suspect was a white adult male, about 30 years old, bald, wearing a black T-shirt, with scruffy facial hair and a tattoo mark near his left eye. 4 RP 607. Shortly after testifying that the second suspect was a female, Ms. Morcom consistently identified the second suspect as "he." 2 RP 190, 267-268. Ms. Morcom also established that Brett Losey noticed a tattoo by the left eye of the second suspect. 2 RP 268. She acknowledged that she recognized the defendant in court because of his tattoos. 2 RP 359.

The State called a maintenance worker from Motel 6, Juan Escalante, who made observations at the time of the robbery. 2 RP 36-361. He saw two males running from a second-floor room towards two separate cars in the parking lot. One them, a white

male "with a Mohawk haircut" wearing a black shirt and camouflage pants, ran towards a green car and drove away by himself . 2 RP 364, 367. He described the second suspect as a black male who escaped by running to a white car with at least three other people inside of it. 3 RP 362, 366-367.

Ryan Kelley testified that he first met the defendant, Jacob Harrison, two days before the October 12, 2014, robbery. 3 RP 370. On the day of the robbery, the defendant showed up at Mr. Kelley's Everett home wearing camouflage shorts and carrying a cloth grocery bag. 3 RP 372-373. The defendant asked Mr. Kelley to borrow some pants, which Mr. Kelley provided, after which the defendant went into Mr. Kelley's garage to change. 3 RP 373-374. The defendant was only there for three or four minutes before they noticed police responding outside of Mr. Kelley's home. Mr. Kelley told the defendant that if the police were there for him, he needed to go outside and handle it. The defendant started to panic and said, "I'm screwed then." 3 RP 377. Mr. Kelley identified the camouflage shorts and the purple bag that the defendant left behind after changing in the garage. 3 RP 378-379, 389.

Mr. Kelley's girlfriend, Amber Mark, was friends with the defendant. 3 RP 404. Ms. Mark testified that the defendant showed

up unannounced at the Kelley/Mark household in the early evening on the day of the robbery. 3 RP 405-406. She could tell right away that something was wrong. 3 RP 408. The defendant was holding an iPhone which Ms. Mark had never seen him with before, and he was trying to turn it on. Ms. Mark asked him where he got the phone, but he didn't say. 3 RP 412-413, 440. He also arrived with a brown or black wallet; he and did not answer when asked if it belonged to him. 3 RP 413-414. Ms. Mark assumed the items were stolen and asked him to leave, so the defendant changed his clothes and left. 3 RP 415. Finally, Ms. Mark recalled that in the weeks leading up to the robbery the defendant had been trying to arrange the purchase of a .38 or .380 caliber handgun, and that he had successfully obtained a small handgun and showed it to Ms. Mark prior to the date of the robbery. 3 RP 418-420.

3. The State's Law Enforcement Witnesses.

Sgt. William Geoghagan of the Snohomish County Sheriff's Office responded to the reported robbery at the Motel 6 at about 4:26 PM on October 12, 2014. 3 RP 443. He contacted victims Brett Losey and Shana Marcom in the manager's office and soon learned that Ms. Morcom's stolen iPhone was capable of reporting real-time GPS location via an application called "Find My iPhone." 3

RP 444-446. He used the app to discover that her stolen iPhone was providing a GPS location in a parking lot of a nearby shopping complex. 3 RP 446-447. The iPhone's GPS location soon changed to a residential area, between two homes located at 12217 and 12218 4th Drive Southeast in Everett. 3 RP 450-452. The occupant of 12218 allowed a consensual search of his home, revealing nothing of interest, after which police focused on Ryan Kelley and Amber Mark's house at 12217. 3 RP 369, 454 . There was an old "oxidized blue" Mazda parked outside of 12218, which Sgt. Geoghagan testified "could be construed as a green color." 4 RP 483-484. The old Mazda's hood was still warm, indicating it had just recently been driven to that location. 4 RP 484-485.

Sgt. Geoghagan recalled the details of the two suspect descriptions collected by law enforcement to that point in the investigation: the first suspect was a white adult male with long brown hair, a red hat, jersey, jeans, and was known to both victims as J.T. 3 RP 449. The second suspect was described as a white male with a shaved head, teardrop tattoos, a black shirt, and camouflage shorts. 3 RP 448. Sgt. Geoghagan recalled the defendant exiting the home where Amber Mark and Ryan Kelley lived, and that he matched many of the features of the second

suspect: he had a shaved head, tattoos near his eyes, and he was wearing a black shirt. 3 RP 454-455. The defendant was placed under arrest.

Deputy Sadro drove Shana Morcom from the Motel 6 to the house where the defendant had just been arrested. She observed the defendant from about three car lengths away, but Ms. Morcom couldn't see clearly so Deputy Sadro drove forward by one or two car lengths. After that, Ms. Morcom provided an immediate identification that she was 95% certain the defendant was "the person" involved in the robbery. 4 RP 641-644.

Police obtained a search warrant for the home of Ryan Kelley and Amber Mark. In the garage they found a pair of camouflage shorts sitting on a wooden table. 4 RP 527. They also found a pink lanyard with keys on it and a purple bag. Inside the purple bag was a metal box, and inside the metal box was an iPhone, .38 Smith & Wesson revolver, and a plastic bag containing a brown substance later identified as heroin. 4 RP 428-430, 560. Shana Morcom identified the iPhone and the pink lanyard with keys as her own, and the small revolver as the one used in the robbery. 3 RP 284-285.

The defendant asked Deputy Sadro if Robbery was the only charge he was going to be booked on. He also listened to Deputy Sadro explain the basic events underlying the robbery, to which he denied participating but did admit to smoking meth in the victims' motel room that day. 4 RP 646-648.

Four days after the robbery, on October 16, 2014, Lynnwood Officer Olesen talked to co-defendant Jason T. Garcia outside the Extended Stay Hotel in Lynnwood. Upon learning Mr. Garcia's name, Officer Olesen checked with dispatch and learned of outstanding warrants for Mr. Garcia's arrest. Following the arrest a search of Mr. Garcia's person revealed two Fred Meyer debit cards, one in the name of each robbery victim. 4 RP 579-582. Ms. Morcom and Mr. Losey each identified the recovered debit cards as their own. 4 RP 585.

Nine days after the robbery, on October 21, 2014, Deputy Sadro met Ms. Morcom at Fred Meyer in order to show her a photo montage. She selected Jason T. Garcia's picture and declared that she was 100% certain that he was involved in the robbery. 4 RP 657-658.

The jury learned that multiple evidence items were collected from the Motel 6 room where the robbery occurred, including

cigarette butts and beverage bottles. DNA testing on one of those items established the presence of the DNA profile of Jason T. Garcia and an unknown female contributor, but none of the items contained the DNA profile of Mr. Harrison. The defense established on cross examination of Deputy Sadro that, in contrast to the items collected from the motel room, none of the evidence collected from the Kelley/Mark residence was submitted for DNA testing. 4 RP 671-672.

B. VICTIM BRET LOSEY'S AVAILABILITY TO TESTIFY WAS IN DOUBT THROUGHOUT THE TRIAL.

The State moved in limine prior to trial for permission to treat Brett Losey as a hostile witness. 2 CP__ (sub #44, State's Trial Memorandum and Motions in Limine). The motion was based on Mr. Losey's recent recantations in defense interviews, as well as his statements that he did not trust the criminal justice system and his view that his recent term in custody was due to the State mishandling the scheduling of the trial. *Id.* at 8-10; 1 RP 53-54. Mr. Losey was personally served to appear on the first day of trial, April 13, 2015. He appeared about 45 minutes late, and the court instructed him to appear in the prosecutor's office by noon the next

day. Mr. Losey was upset that he was required to appear on the first day of trial. 1 RP 64-67.

The next day, April 14, 2015, Mr. Losey did not appear in the prosecutor's office by noon as instructed. Instead he contacted the victim advocate and said he was having an asthma attack and didn't know if he could make it to court. The prosecutor said that efforts were underway to corroborate the medical excuse through medical professionals. 2 RP 161-162. By the morning of April 16, 2015, the prosecutor had advised the court that Providence Hospital medical personnel had confirmed Mr. Losey's admission to their facility with a chest infection and shortness of breath. 4 RP 471. In light of this development the prosecutor proposed two options: first, a trial recess until Monday, April 20, 2015; and second, proceeding without Brett Losey's testimony. Defense counsel agreed that "either one is fine," and further noted that "we have already agreed that the 911 tape comes in..." 4 RP 472-473.

On Friday, April 17, 2015, after the morning recess, the prosecutor provided additional information about Mr. Losey's availability: a doctor at Providence Hospital had discharged Mr. Losey in plenty of time for him to testify in court, but Mr. Losey then told a nurse that he didn't want to leave or wasn't well enough to

leave. 5 RP 747-748. The court issued a material witness warrant for Mr. Losey. The prosecutor announced his plan to have Deputy Sadro serve the arrest warrant at Providence Hospital as soon as it was signed; he would bring Mr. Losey directly to court to testify. 4 RP 749.

Deputy Sadro and the victim advocate did indeed pick up Mr. Losey from Providence Hospital later that day, but on their way back to the court house they were involved in a serious automobile collision. 5 RP 761-763. Deputy Sadro, Ms. Kollman, and Mr. Losey were all brought back to Providence Hospital for evaluation, and the State was left with no witnesses to present on that Friday afternoon. The State moved to recess the trial until Monday, April 20, 2015, and the defense did not object. The court agreed to recess the trial and appointed an attorney to represent Mr. Losey. 5 RP 763-765.

On Monday, April 20, 2015, Mr. Losey's attorney informed the court that he was released from Providence Hospital the previous Friday, that he was at home with his mother, in a lot of pain and probably incapable of getting into a car. The attorney reported that Mr. Losey was in and out of consciousness over the weekend, incoherent, and heavily medicated. 6 RP 771-772.

Further, he was mentally traumatized by the accident and felt that he "saw someone die that day." 6 RP 776.

The prosecutor elected to proceed without Mr. Losey's testimony and informed the court that he intended to rest after playing the 911 recording that had already been admitted by agreement. 6 RP 779. It was at this point that the defendant's attorney attempted to withdraw her agreement to the admissibility of the 911 recording, citing her reliance on an opportunity to cross-examine Mr. Losey about the recording. 6 RP 780-781. The court offered to issue a warrant for Mr. Losey's arrest, but defense counsel declined:

THE COURT: Well, but he could be here. Would you like me to authorize his arrest?

[DEFENSE COUNSEL]: No, your Honor, I don't, not given what he's gone through. I don't.

6 RP 787.

C. THE COURT DETERMINED THAT BRETT LOSEY'S 911 RECORDING WAS AN ADMISSIBLE EXCITED UTTERANCE DESPITE HIS POTENTIAL UNAVAILABILITY.

The court listened to the 911 recording yet again. 6 RP 783. It determined that Mr. Losey's voice exhibited a "heightened level of agitation" which progressively increased over the course of the recording, culminating in Mr. Losey's exclamation that he was

fearful of being shot. The court noted that the remark about being shot was spontaneous and not in response to a question, and that the fear of being shot for snitching actually increased the credibility of the statements because it provided a motive for Mr. Losey to “get off the phone and not identify himself.” The court considered the confrontation clause arguments of defense counsel, and rejected them. 6 RP 791-797.

The Court also declared a completely separate basis to play the 911 recording for the jury: it had already been admitted by unconditional agreement of the parties:

Trials and, for that matter, life being what they are, one never really knows what’s going to happen next. Nevertheless, the motion to admit the recording was made last week, and there was no objection, and it came in, and it did not come in subject to any condition, nor was any condition ever discussed. Not before the Court, anyway.

It is important that the actions of the Court have some meaning so that when people make motions to admit and there either is an agreement or argument upon which the Court can rule[,] that the ruling will be a decision both sides can rely on, and it will become the law of the case and that both sides will know the lay of the land in order to try their cases. I admitted this item last week. The item remains in evidence, and I will not revisit that decision simply because it turns out Mr. Losey will not be here.

6 RP 797-798.

Just prior to allowing the State to play the 911 recording, the court informed the jury that “Mr. Losey was involved in an accident

on Friday and is currently unavailable to testify.” 6 RP 804. The defense attorney agreed to this language for tactical reasons because it didn’t give the jury the impression that Mr. Losey was “too afraid to come in.” 6 RP 801. The 911 recording was the final piece of evidence introduced to the jury, after which the State rested. 6 RP 804.

D. THE DEFENSE CASE.

The defense case did not include the testimony of any witnesses. The defense did want to submit “additional DNA reports,” from the Washington State Patrol Crime Laboratory, presumably corroborating Deputy Sadro’s concession on cross that the defendant’s DNA was not found on any evidence items. 6 RP 809. Ultimately the prosecutor agreed to the admission of six Washington State Patrol Crime Laboratory reports. 6 RP 811; (sub #60, Exhibit List, Jury Trial, p. 11). The defense rested. 6 RP 813.

E. CLOSING ARGUMENTS.

1. Prosecutor’s Initial Closing Argument.

The prosecutor provided a summary of the State’s evidence, eventually turning to the contents of the 911 recording. He acknowledged that the 911 call only contained a description of one suspect – a male named J.T. with long brown hair, light-colored

jersey, jeans, and a red hat. 6 RP 825. The only clue on the 911 recording about a second suspect was Mr. Losey's use of the plural pronoun within the phrase "*they* told me to go into the bathroom." It was only through further witness interviews at the scene that a description of the second suspect emerged. 6 RP 826.

One of the themes used by the prosecutor in closing argument was his repeated reference to the jury instructions as coming directly from the judge. The first example of this arose in the context of the prosecutor explaining the concept of accomplice liability. If the jury found that J.T. Garcia used a firearm during the robbery, the defendant "is equally as liable [as] if he held the gun. It's not my words. It's instruction number 16. You will have it. The judge tells you, "[verbatim partial recitation of instruction 16]." 6 RP 840; 1 CP 149. This emphasis on the judge's instructions was in contrast to the prosecutor's reminder that the words of counsel have no evidentiary value, and that the jury should disregard anything he said in closing that was not supported by the evidence. 6 RP 823-824. The prosecutor concluded his summary of accomplice liability with a reference to the Court's instructions on that issue:

Did he display it? Yes, because his accomplice did. It's both of them. That is accomplice liability. That is what the Court is telling you about in its instructions. The judge wears the black robe. He gives you the law. I argue the facts to the law, but the law is given to you in the judge's packet to you.

6 RP 842-843.

The prosecutor returned to the primacy of the court's instructions when he reminded the jury about the parties' stipulation that the brown substance found within the purple bag was in fact heroin: "We have the stipulation that's been given to you by the judge... You must accept that as true." 6 RP 843; see 4 RP 674-675.

The prosecutor did not reserve his emphasis on the Court's instructions only for issues on which favored the State. In fact, the prosecutor's initial closing argument concluded by emphasizing the Court's admonition for the jury to hold the State to its high burden of proof: "If the evidence does not convince you beyond a reasonable doubt that the State has proven this case to you, the Court has told you it's your obligation to find the defendant not guilty." 6 RP 846.

2. Defense Closing Argument.

The defense closing argument referenced both the 911 recording and the lack of inculpatory DNA evidence. Counsel first referenced the 911 recording to argue that Brett Losey didn't sound

scared or panicked in the recording, despite the fact that he was “allegedly robbed at gunpoint.” The implication was that there was reason to doubt whether any robbery occurred at all. 6 RP 859-860. Counsel again referenced the 911 recording in an attempt to cast doubt on what kind of gun was used in the robbery, citing Brett Losey’s uncertainty about the weapon’s caliber. 6 RP 864-865.

Finally, defense counsel referenced the 911 call to bolster her own credibility by characterizing it as a promise fulfilled from her opening statement: “The facts that I told you that would come out at trial are what came out at trial. That there would be a 911 call. And we heard that 911 call.” 6RP 870.

The defense closing argument adopted the prosecutor’s technique of emphasizing the court’s jury instructions when she urged the jury to deem the State’s civilian witnesses incredible:

And now the judge instructed you that you 12 are the sole judges of these witnesses’ credibility, of Shana, of Amber, of Ryan, of Juan. And you may consider the quality of a witness’s memory while testifying. You all get to do that when you go back into that jury room to begin you deliberations.

6 RP 869.

Defense counsel cited the lack of the defendant’s DNA in the motel room, compared to the presence of DNA from J.T. Garcia

and an unidentified female, as yet another reason to doubt the State's evidence. She followed this observation with a list of evidence items the State could have subjected to DNA testing but did not. 6 RP 863.

3. Prosecutor's Rebuttal Closing Argument.

The prosecutor began his rebuttal by restating that the words of both counsel had no evidentiary value, and that the judge provides the legal framework for analyzing the evidence.

"One thing I want to let you know, and I want to again echo again, is the fact that neither my words nor [defense counsel's] words are evidence. Nothing I say to you is evidence. Neither is anything she says. And so take the evidence that has come to you from that witness stand and apply the law as given to you by the judge."

6 RP 874-875.

The prosecutor chose to address the defense argument about the lack of inculpatory DNA evidence by first conceding that no DNA evidence placed Mr. Harrison in the motel room. 6 RP 880. He then immediately contrasted that concession with the defendant's admission to being in the room, then offered the argument that has drawn a challenge on appeal: "But the truth about it is that you don't need the DNA. I'm not telling you that. The judge is telling you that." 6 RP 881.

What followed was a thorough discussion of jury instruction number 5, discussing both the definitions and relative weight of direct and circumstantial evidence. 6 RP 881-883; see 1 CP 138. He ended this discussion of abstract legal concepts by imploring the jury to read and rely on jury instruction number 5:

Read that so that when you go back there and you say, well, there's no DNA for this stuff, can I reasonably infer, using my common sense, what I know happened here based on the facts? Yes. The judge has told you that you can.

6 RP 882-883.

The prosecutor ended his remarks with a lengthy hypothetical to illustrate his point that circumstantial evidence can sometimes be more reliable than direct evidence. In the hypothetical, the jury is asked to imagine walking in fresh snow as a truck drives past and over a hill. Upon cresting the hill, the jury does not see the truck but does see fresh tire tracks in the snow which turn to the right at a T intersection. A man standing at the T intersection insists that the truck went to the left. The prosecutor encouraged the jury to rely on their common sense that in that situation, the circumstantial tire tracks were more reliable than the direct evidence offered by the man at the intersection. He

concluded the hypothetical by stating, "in this case, the tracks lead from the motel room to Ryan Kelley's house." 6 RP 883-885.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ENFORCED THE DEFENDANT'S UNCONDITIONAL STIPULATION TO THE ADMISSIBILITY OF THE 911 RECORDING.

A trial court's decision to admit or exclude evidence is generally reviewed for abuse of discretion. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). The 911 recording in this case was admitted by stipulation outside the presence of the jury after defense counsel stated, "We both stipulated that the 911 call comes in." 1 RP 104, 108. Stipulations are favored by courts and will be enforced unless good cause is shown to the contrary. State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231, 1238 (1993). The decision to admit evidence pursuant to a defendant's stipulation is within the discretion of the trial court. State v. Pirtle, 127 Wn.2d 628, 653, 904 P.2d 245 (1995). In general, a stipulation as to facts is deemed a tactical decision. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995).

Defense counsel's stipulation to admit the 911 recording was a tactical choice, and it was clearly not conditioned upon Brett Losey testifying in person. Counsel attached no conditions to any of

the three times she agreed to the recording's admissibility. 1RP 104, 105, 106. In fact, the defense trial memorandum signaled counsel's intention to admit the recording even while simultaneously moving to exclude the recording's declarant, Brett Losey, from testifying in person. 1 CP 171, 179.

If a defendant stipulates to the use of a statement against him as a matter of trial strategy, the defendant waives his Sixth Amendment right to confront the person making the statement. United States v. Gamba, 541 F.3d 895, 900 (9th Cir.2008) (citing Wilson v. Gray, 345 F.2d 282, 286 (9th Cir.1965)). Such a waiver need not be personally expressed by the defendant, but can be made by his attorney "where the decision is one of trial tactics or strategy that might be considered sound." United States v. Plitman, 194 F.3d 59, 64 (2d Cir. 1999).

In this case, it was eminently sound trial strategy for defense counsel to prefer admission of the 911 recording in which Mr. Losey described only one suspect in detail and those details did not match the defendant. Ex. 2A. The alternative, Mr. Losey's live testimony, risked the real possibility of Mr. Losey recognizing the defendant in open court, as Shana Morcom actually did. 2 RP 359.

Here defense counsel made a tactical decision to stipulate to the admissibility of the 911 recording despite knowledge that Mr. Losey was uncooperative with the State's efforts to present his testimony, and that his mid-trial health problems could have impacted his availability. The defendant has not addressed his trial counsel's tactical decision to stipulate to the admissibility of the 911 recording in this appeal, and has not challenged the decision as evidence of ineffective assistance. The defendant simply assumes that an objection and attempt to withdraw the unconditional stipulation is sufficient to guarantee appellate review. See Br. App. at 8, 16-17, 22-23.

The trial court offered defense counsel the opportunity to bring Mr. Losey into court courtesy of a material witness warrant, but she declined. 6 RP 787. The court raised the possibility that Mr. Losey's competency to testify could be assessed if and when he was brought to court. Id. After all, he had been medically released from the hospital three days prior. 6 RP 771-772. The court reiterated, "[I]f you want to confront Mr. Losey, I can arrange for that, possibly." 6 RP 787. Defense counsel's rejection of the court's offer should be viewed as a discretionary matter of trial tactics.

The record does not establish good cause showing why defense counsel's stipulation to admit the 911 recording should not be enforced, especially when the State relied upon the stipulation. See 6 RP 778-782. A trial court has discretion to relieve a party from a stipulation only when necessary to prevent injustice and the granting of the relief will not place the adverse party at a disadvantage by having acted in reliance upon the stipulation. State v. Fletcher, 30 Wn. App. 58, 61, 631 P.2d 1026 (1981) (citing Baird v. Baird, 6 Wn. App. 587, 590, 494 P.2d 1387 (1972)).

In this case one whole week elapsed between the stipulated admission of the 911 recording and the prosecutor's election to publish the exhibit to the jury. 1 RP 108; 6 RP 804. Had the prosecutor forecasted the defense change of position, he would have published the already-admitted exhibit much earlier in the trial. Enforcement of the parties' agreement was a sound exercise of the trial court's discretion.

B. ALTERNATIVELY, THE RECORDING WAS PROPERLY ADMITTED AS A NONTESTIMONIAL EXCITED UTTERANCE.

1. The Trial Court's Classification Of The 911 Recording As An Excited Utterance Is Undisputed.

The portion of the 911 call heard by the jury consisted of Brett Losey's statements to a 911 operator. Ex. 2A. All out of court

statements offered for the truth of the matter asserted are hearsay, unless an exception applies. ER 801(c), 802, 803. The excited utterance is one of the most firmly-rooted hearsay exceptions. ER 803(a)(2).

The defendant does not challenge the trial court's ruling that Mr. Losey's statements to the 911 operator satisfied the test for excited utterances, instead arguing that the situation did not rise to the level of an "ongoing emergency" under Confrontation Clause cases such as Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Br. App. 10-17.

The defendant therefore appears to concede that the excited utterance determination was not an abuse of discretion. The concession is important because in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Ohio v. Clark, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015).

2. The Primary Purpose Of The 911 Recording In This Case Was To Respond To An Ongoing Emergency.

Out of court statements do not implicate the Sixth Amendment's confrontation clause where those statements are made under conditions that, viewed objectively, considering all of

the relevant circumstances, indicate that the primary purpose of the declarant's encounter with the police was other than to create a substitute for trial testimony. Id. When "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." Id., citing Michigan v. Bryant, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). The "informality of the situation and the interrogation" is another relevant factor in the analysis. Ohio v. Clark, 135 S.Ct. at 2180. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." Michigan v. Bryant, 131 S.Ct. at 1158.

The Washington Supreme Court uses four factors to assess the testimonial nature of a statement: "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation." State v. Ohlson, 162 Wn.2d 1, 12, 168 P.3d 1273 (2007); accord State v. Koslowski, 166 Wn.2d 409, 418–19, 209 P.3d 479 (2009); State v. Reed, 168 Wn. App. 553, 563–64, 278 P.3d 203 (2012). None of these factors are dispositive or bright lines in and of themselves; instead, a more nuanced approach is required. For example, the first factor cannot be

reduced to whether the declarant used the past or present tense, and the second factor cannot be reduced to whether the perpetrator had already left the scene of the crime. Ohlson, 162 Wn.2d at 14-15.

Here, the 911 call was made within five minutes of the robbery – the general estimate provided by a robbery victim who surely had greater concerns than keeping track of each minute and second between the robbery and the 911 call. Ex. 2A. This brief delay necessarily incorporated the time the victims needed to wait in the bathroom, as demanded by the robbers, until the victims were reasonably certain the robbers were no longer in their room. Then the victims needed to gather themselves enough to determine that their wallet, keys, and iPhone had been stolen yet their car had not. Mr. Losey did not know whether the robbers fled on foot or in a car, so he really had no idea how close they might have been at the time of his call. His primary concern was the fact that he “stared down the barrel of a gun” and was afraid J.T. was going to shoot him, a thought he kept returning to despite the attempts of the 911 dispatcher to direct his attention to other details. Ex. 2A. The timing of the 911 call, even five minutes after the robbery, weighs in favor

of the statements being nontestimonial because it occurred in the moments immediately following a highly traumatizing violent crime.

Second, any reasonable listener would agree that Brett Losey faced significant personal danger by “snitching” on the men who had just held a gun to his head. But just as concerning was the substantial threat posed to the public at large and the responding law enforcement officers by the prospect of encountering armed robbers, including the defendant who had also been smoking methamphetamine that day. 4 RP 648. Deputy Sadro testified in detail about the dangers involved in “multiple deputies running code to a scene to not look for one but maybe two persons.” His testimony establishes that the primary concern in these initial stages was the apprehension of armed and dangerous individuals, not creating a substitute for live testimony in a potential future prosecution. 5 RP 699-701.

While defendant’s analysis of this second factor attempts to analogize the facts of this case with those in Koslowski, the analogy is misplaced. See Br. App. 13-14. The Koslowski court lamented that the “limited record” did not include “what questions, exactly, were asked and how they were answered,” or the timing of those statements. Koslowski, 166 Wn.2d at 422. The primary fact leading

the Koslowski court to conclude that the immediate danger had passed was the fact that police had already arrived before the statements were made. Id. at 423. In this case, it is undisputed that the entire 911 recording occurred before police had arrived. This makes a world of difference when evaluating the relative safety of the declarant. Also, the entire conversation was recorded and is available for review. Ex. 2A.

The third factor is whether the nature of the questions and answers establish the necessity of resolving the present emergency. Koslowski, 166 Wn.2d at 419. The Court recognized the need for officers to identify suspects to learn whether they might encounter a violent felon. Id. at 525. This is exactly what the dispatch operator was trying to do in this case, with not much success. Ex. 2A. The dispatch operator was able to obtain a description and initials for one of two suspects, which is not even enough to determine a suspect's criminal history. The dispatcher was also trying to learn whether the suspects fled on foot or in a vehicle. Ex. 2A. Deputy Sadro described this fact as critically important to how responding officers would conduct their search. 5 RP 699-701. The reasonable interpretation of these questions and answers is a dynamic and expedited response to a just-completed

violent crime. Even after the 911 call, the full names and general locations of the suspects remained unknown. This was an ongoing emergency.

Fourth, the 911 recording was not conducted in a formal setting. Mr. Losey was not in custody, nor in the physical presence of any law enforcement officers. He was in a motel lobby speaking on the phone. The recording shows that he was easily distracted from the dispatcher's questions, understandably so considering his recent trauma. There was no reasonable assurance that the suspects had permanently fled. When statements arise in a public place unfamiliar to the declarant, as opposed to a station house, this factor generally supports a finding that the statements were nontestimonial. See State v. Reed, 168 Wn. App. 553, 569, 278 P.3d 203 (2012).

C. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS BOTH IMPROPER AND PREJUDICIAL.

In a prosecutorial misconduct² claim, the burden rests on the appellant to establish that the prosecuting attorney's conduct was

² "Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937, 941 n. 1 (2009). Recognizing that words carry repercussions and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit

both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The burden to establish prejudice requires proof that “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” Thorgerson, 172 Wn.2d at 442-443. The “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, citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In this case, because the challenged argument drew no objection at trial, it must be analyzed under the “enduring and resulting prejudice” standard. Russell, 125 Wn.2d at 86. “Reversal

the use of the phrase “prosecutorial misconduct” for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved 4/10/10), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Dec. 23, 2015); American Bar Association Resolution 100B (Adopted 8/9-10/10), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited Dec. 23, 2015). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

is not required if the error could have been obviated by a curative instruction which the defense did not request.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); Russell, 125 Wn.2d at 85.

1. The Prosecutor Delivered A Correct Description Of Circumstantial And Direct Evidence. It Was A Proper Argument, Not Flagrant And Ill-Intentioned Error.

In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. State v. Emery, 174 Wn.2d 741, 762 n.13, 278 P.3d 653 (2012); State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, defendant did not object to the challenged statement during the prosecutor’s closing argument. Nor did defendant request a mistrial on this issue.³ “The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

³ The defendant did request a mistrial on another issue – whether the prosecutor’s description of the defendant’s admission to smoking meth in the motel room on the day of the robbery as “unrefuted” constituted an impermissible comment on the defendant’s right not to testify. The motion for mistrial was denied, and the defendant assigns no error to that decision on appeal. 6 RP 832-837.

The prosecutor's challenged remarks in this case were made during rebuttal argument, and followed the defense argument that a lack of any DNA evidence linking Mr. Harrison to the crime was sufficient to create reasonable doubt as to his guilt. 6 RP 863. This is an argument to which modern jurors are particularly susceptible, and a prosecutor ignores such arguments at his peril. See Caroline L. Kinsey, CSI: From the Television to the Courtroom, 11 Va. Sports & Ent. L.J. 313 (2012).

The prosecutor in this case addressed the lack of DNA evidence by observing that the defendant had already admitted to being inside the motel room where the robbery occurred, on the day of the robbery. 6 RP 880-881. He also connected the description of the second suspect to the defendant's actual appearance when Shana Morcom identified him with 95% confidence. 6 RP 881-882. The prosecutor's explanation of these conflicting sources of evidence was correct in three important respects:

- 1) Jury instructions do, indeed, come from the judge. 1CP 131.
- 2) The law does not distinguish between direct and circumstantial evidence, or necessarily assign more or less weight to one or the other. 1CP 138.

- 3) The law does not require the State to include DNA evidence in its proof of any crime or any element of any crime. 1CP 131-162.

The defendant attempts to characterize the prosecutor's argument as a misstatement of the law insofar as it may have implied the weight of DNA evidence must always be exactly equal to the weight of circumstantial evidence.⁴ Br. App. 20. But this characterization depends heavily on an incomplete recitation of the prosecutor's argument. See Br. App. 19-20. The prosecutor's very next sentence was, "One is not more – one is not necessarily more or less valuable than the other." 6 RP 882. The attempt to excise the prosecutor's complete comment on this issue represents a departure from the requirement that reviewing courts consider the argument's full context in light of all the evidence. In context, the prosecutor accurately described the law's treatment of direct and circumstantial evidence. The argument was proper.

2. Defendant Has Not Shown Any Prejudice Affecting The Verdict.

Even if this Court deems the prosecutor's argument improper, reversal is required only if a substantial likelihood exists

⁴ It is worth noting that DNA evidence is itself circumstantial evidence, if the ultimate fact at issue is whether a particular person touched a particular piece of evidence. Likewise, a defendant's confession to being inside a particular room is direct evidence that he was inside that room.

that the error affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 760. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); Swan, 114 Wn.2d at 661 (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). The reviewing court must consider what would likely have happened if defendant had timely objected. Emery, 174 Wn.2d at 762. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the conduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Emery, 174 Wn.2d at 760-761, citing Thorgerson, 172 Wn.2d at 455. The reviewing court's focus is on whether any resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762.

Here, defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury. First, as previously noted, the entire characterization as improper depends on excising the context of the prosecutor's very next sentence. Second, even if the jury took the prosecutor's comment out of context and followed it literally, it would have helped, not hurt, the defendant's chances. The defendant attempts to characterize the argument as attributing precisely equal weight to DNA evidence and circumstantial evidence. Br. App. 19-20. But the "weight" of the DNA evidence in this case was zero – there was no DNA evidence at all linking the defendant to the crime. If the jury

ignored the prosecutor's next sentence and followed his argument literally, the jury would have also attributed zero weight to the defendant's confession to being inside the room or the similarities between the description of the second suspect and the defendant's actual appearance.

The defense attorney clearly did not view the challenged argument as significant because she did not object, even though she objected twice to other aspects of the closing argument. 6RP 832-837, 877. The defense attorney was vigilant and undeterred in calling out arguments she deemed improper. Her decision to refrain from objecting to the challenged remarks strongly supports a conclusion that the prosecutor's argument, when delivered in open court, did not misstate the law or affect the jury's verdict.

3. Any Prejudicial Effect Could Have Been, And In Fact Was, Cured By The Court's Instructions.

In the present case the court's instructions cured any potential prejudice stemming from the prosecutor's remarks. The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). The court may mitigate potential prejudice by so instructing the jury. State v. Guizzotti, 60 Wn. App. 289, 296, 803

P.2d 808 (1991). In the present case, the court instructed the jury to ignore any comments made by the attorneys which were inconsistent with the law contained in the jury instructions:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

1 CP 133 (Jury Instruction 1, WPIC 1.02). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any potential prejudice from the prosecutor's statement was obviated by the court's instruction to the jury. The prosecuting attorney's conduct, even if deemed error, falls short of reversible error because of the curative measures contained in the jury instructions.

Even if this Court views the prosecutor's argument as so objectionable that reliance on correct written jury instructions is insufficient to cure any potential prejudice, a defense objection and immediate verbal curative instruction from the judge would have corrected the problem. For example, in the case of State v. Warren, "the prosecutor blatantly and repeatedly misstated the

State's burden of proof during closing argument. On three occasions, the prosecutor told the jury that "[r]easonable doubt does not mean give the defendant the benefit of the doubt." State v. Reed, 168 Wn. App. 553, 578-79, 278 P.3d 203 (2012) (quoting State v. Warren, 165 Wn.2d 17, 24-25, 195 P.3d 940 (2008)). Even though the argument "undermined the presumption of innocence", the trial court's decision to "interrupt[] the prosecutor's argument to give a correct and thorough curative instruction" cured the resulting prejudice. Warren, 165 Wn.2d at 28.

The alleged error in this case, if error at all, was less egregious than the improper argument in Warren. Any misstatement of the law's treatment of circumstantial and direct evidence was already corrected by the court's written instructions on that very topic, and the reminder to disregard any argument not supported by the law in the jury instructions. 1 CP 133, 138. Any error could have been further cured if the trial court had intervened in the moments immediately following the argument. The defendant has failed to demonstrate that a curative instruction could not have cured any prejudice resulting from the prosecutor's argument.

D. THERE WAS NO INEFFECTIVE ASSISTANCE BECAUSE THE PROSECUTOR'S ARGUMENT WAS PROPER, AND THE LACK OF DNA EVIDENCE WAS INCONSEQUENTIAL IN LIGHT OF THE OTHER EVIDENCE.

To prevail on a claim of ineffective assistance, the defendant must show that his trial counsel's representation was deficient, and that the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997) cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

In this case, defendant argues that he was denied effective assistance of counsel by counsel not objecting to the prosecutor's statement during closing argument. Br. App. 1, 22-23. To prove that failure to object rendered counsel ineffective, defendant must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the objection had been sustained. See In re Davis, 152 Wn.2d 647, 714, 101

P.3d 1 (2004); State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996);

Competency of counsel is determined upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption that counsel's representation was effective. Id. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Here, defendant has not shown that counsel's representation was deficient nor has he shown that he was prejudiced by counsel's performance.

1. Defendant Has Not Shown That There Was No Strategic Or Tactical Reason For Counsel's Conduct.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The court

employs a strong presumption that counsel's conduct constituted sound strategy. Reichenbach, 153 Wn.2d at 130. Here, the defendant does not offer any potential strategies or tactics in order to then dispel their presumed efficacy, as is his burden. See Br. App. at 22-23. The defendant offers only an overstated conclusion that the prosecutor "essentially placed out of bounds an entire area of possible reasonable doubt." Id. at 22. This argument fundamentally misconstrues the prosecutor's argument: the correct interpretation is that the law (as provided by the judge) does not require DNA evidence to sustain a conviction. The prosecutor's argument said nothing about what type or what quantity of evidence might be sufficient to create a reasonable doubt.

Defense counsel had legitimate strategic or tactical reasons for not objecting to the prosecutor's statement during closing argument in the present case. The determination of which arguments to advance in closing is a tactical decision susceptible to a wide range of acceptable strategies. State v. Israel, 113 Wn. App. 243, 271, 54 P.3d 1218 (2002). Not wanting to risk emphasis with an objection is a legitimate trial strategy or tactic. Davis, 152 Wn.2d at 714; State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object rather than calling added attention was

legitimate tactical decision) review denied, 134 Wn.2d 1003 (1998); State v. Donald, 86 Wn. App. 543, 551, 844 P.2d 447 (1993) (not asking for limiting instruction to not reemphasize evidence is a valid trial tactic).

Here, defense counsel's tactical and strategic decisions were well within the boundaries of reasonable performance. Defense counsel could have been concerned that an objection and curative instruction would have prompted the prosecutor to remind the jury that other sources of evidence directly contradicted her theory that the lack of DNA evidence was enough to doubt whether the defendant was ever in the motel room on the day of the robbery, or whether he ever handled the purple bag that contained both the gun and the victim's property. See 4 RP 647-648 (defendant's admission to being in the motel room that day); 3 RP 378-379 (Ryan Kelley identifies the bag found in the garage as originating in the defendant's hand when he arrived at the house); 3 RP 412-414 (Amber Mark identifies the defendant holding a phone, wallet, and a bag when he arrived at the house).

The defendant has not met his burden of rebutting the strong presumption that legitimate trial strategy or tactics recommended against objecting to the prosecutor's challenged statement during

closing argument. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness.

2. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.

Defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335. The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Here again, defendant does not demonstrate prejudice, but simply speculates that the lack of DNA evidence "could have" prompted the jury to consider Ryan Kelley or Amber Mark as the "other robber." Br. App. 23. This assertion is curious in that the defendant has not alleged ineffective assistance for trial counsel's failure to argue that either Ryan Kelley or Amber Mark were the actual second robber. The legal standard to allow "other suspect evidence" requires "some combination of facts or circumstances [pointing] to a nonspeculative link between the other suspect and the charged crime." State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). The facts in this case did not establish any such link, so trial counsel was wise

to avoid the argument. The current assertion that the jury might have so concluded without any argument to lead them to that conclusion is purely speculative. Since this court must assume that the jury followed its instructions, the allegedly-improper arguments advanced by the prosecutor were not prejudicial. Even if counsel's performance is considered deficient, the defendant has not met the burden of showing prejudice.

Defendant's ineffective assistance argument fails under both prongs. See Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Consequently, defendant has not established ineffective assistance of counsel in violation of the Sixth Amendment or Article 1, § 22.

IV. CONCLUSION

For the reasons stated above, the State asks this Court to affirm the convictions in this case.

Respectfully submitted on January 26, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



ANDREW E. ALSDORF, WSBA #35574
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A
TRANSCRIPT OF EXHIBIT 2A

Note:

The 911 recording was admitted as Exhibit 2, which was later withdrawn and replaced with Exhibit 2A, in order to redact a subsequent 911 call and the initial exchange between the 911 operator and the motel clerk before she handed the phone to Brett Losey. 6 RP 784, 814-820. Exhibit 2A has been designated and will be available for appellate review, but for the court's convenience a transcript is provided below. The text appearing in bold type at the beginning represents the excised portion which was removed from Exhibit 2 in order to create Exhibit 2A.

Dispatch: 911, what's your emergency?

Sara: Hi, um, this is Sara, I work at the Motel 6 on 128th and I have a guest that just got robbed at gunpoint in their room. They know who the person is but all their stuff got stolen.

Dispatch: OK what's the address?

Sara: Uh 224 128th St SW

Dispatch: OK, and what room number?

Sara: What? Uh, this is 227.

Dispatch: 227. How many minutes ago did this happen?

Sara: [To people in background] How long ago did this happen?

[Background female]: 5 minutes ago

Sara: 5 minutes ago. [To people in background] Did he run?

[Background female]: [Unintelligible]

[Background male]: They told us to go in the bathroom.

Sara: They told you to wait in the bathroom?

[Background male:] And then I just walked out. After he closed the door. And then they were gone.

Dispatch: Anybody injured?

Sara: [To persons in background] Anybody injured?

[Background male]: No

Sara: No

Dispatch: The suspect... Can I talk to that man?

Sara: Yes you can [sound of phone being handed off]

Losey: Hello?

Dispatch: Hi this is 911. She said you know the person?

Losey: Yep, JT, I don't know his last name, but he just got out of prison, I know who he is.

Dispatch: White male? Black male? Asian, Hispanic?

Losey: White male. White male.

Dispatch: What color hair?

Losey: Long hair, brown.

Dispatch: Long brown hair?

Losey: Yeah

Dispatch: What color shirt or pants was he wearing?

Losey: He's wearing a jersey, jeans...

Dispatch: What color's the jersey?

Losey: I don't know, I stared down the barrel of a gun.

Dispatch: You don't have any idea? Was it light colored, dark colored? I'm trying to get officers information...

Losey: Light colored. Red hat, long hair.

Dispatch: Which way did he go?

Losey: They told me to go in the bathroom, [unintelligible] with my girlfriend, and they left my phone, my keys, my car's locked. I have keys in the car.

Dispatch: What kind of gun was it?

Losey: Uhhh, .357

Dispatch: Any idea where he put it?

Losey: To my head.

Dispatch: And you said it was a .57?

Losey: What?

Dispatch: What kind of gun? I'm sorry, it's hard to hear you.

Losey: It was either a .38 or a .357...9 millimeter... or .380...or
3,3....357

Dispatch: OK, and I've just got to verify, you're not injured, correct?

Losey: Nope.

Dispatch: And you said... Did he take your car?

Losey: Huh?

Dispatch: You said he took your keys, did he take your car?

Losey: No

Dispatch: And did he take your wallet?

Losey: Yep.

Dispatch: What kind of car do you have?

Losey: A Nissan Altima

Dispatch: What color is it?

Losey: I have no money... I don't know how I'm going to get my car
open.

Dispatch: Yes. What color is it?

Losey: White

Dispatch: And it's still out there, correct?

Losey: Yep.

Dispatch: Do you know your plate number just in case, he's [unintelligible]?

Losey: I don't know the plate number.

Dispatch: OK... And you have no direction of travel for him, correct?

Losey: He's like white...What?

Dispatch: You didn't see which way the guy left at all? Anybody there at the office see which way he might have gone?

Losey: No, but I know he's had...He got a room here two times.

Dispatch: He had...what?

Losey: He got a room here twice, so.

Dispatch: OK

Losey: So he's, he's uh...definitely you can get him.

Dispatch: So you guys think that he left on foot then, correct? He didn't come there in a car?

Losey: Well he probably had a car, obviously.

Dispatch: OK. No idea what kind of car?

Losey: Nope. I'm afraid he's gonna shoot me now. I'm snitchin'. It's crazy.

Dispatch: OK. What's your name, sir?

Losey: I'm Brett.

Dispatch: Brett?

Losey: Losey

Dispatch: How do you spell your last name, sir?

Losey: L-O-S-E-Y

Dispatch: And the first name is B-R-E-T-T, or just one T?

Losey: Mmm-hmm, yep.

Dispatch: OK. Allrighty sir, I've already let an officer know you need some assistance there, OK? Watch for them, are you going to be in the office there?

Losey: Yeah

Dispatch: Allright, I'll let them know to contact you there, OK?

Losey: Allright, bye.

Dispatch: Allright, bye.

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

THE STATE OF WASHINGTON,

Respondent,

v.

JACOB T. HARRISON,

Appellant.

No. 73461-0-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of January, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer J. Sweigert, Nielsen, Broman & Koch, SweigertJ@nwattorney.net; and Sloanej@nwattorney.net.

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

Dated this 20th day of January, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office