

NO. 35057-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY KELLY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle

No. 05-1-00889-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defense counsel effective when he made appropriate motions in limine, objections, and vigorously cross examined witnesses? Alternatively, if not effective, is reversal required when defendant cannot show he was prejudiced?
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4. Did the prosecutor comply with the court's ruling that the Ang burglary could only be used for impeachment purposes when the State offered that evidence in rebuttal to impeach defendant's credibility?
5. Did the prosecutor or the court violate the real facts doctrine when the only factors the court considered at sentencing were defendant's criminal history and the facts of this case?

B. STATEMENT OF THE CASE.

1. Procedure

On February 22, 2005, the State charged Timothy Kelly, hereinafter “defendant,” in Pierce County cause 05-1-00998-1 with the crimes of first degree burglary, two counts of second degree assault, first degree possession of stolen property, first degree attempted theft, and unlawful possession of a controlled substance, methamphetamine. CP 1-5¹

Trial counsel, C. Philip Bolland, filed a notice of appearance on January 30, 2006. CP 17. Mr. Bolland moved to continue the trial date several times for “continued investigation.” CP 18, 20; RP 1, 5, 18. The orders continuing trial entered on March 1 and March 28, 2006, both indicated that the court would grant no further continuances. CP 18, 20.

The parties appeared for trial before the Honorable Judge Thomas Felnagle on April 12, 2006, at which time defense counsel again moved to continue the trial. RP 1, 3. Defense counsel advised the court that he had not completed his investigation on the case and that the investigator initially hired had to be replaced. RP 4. Defense counsel further advised

¹ There are seven volumes of VRPs that are labeled as 1-8. Volume 8 includes proceedings from May 3, 2006 and the sentencing hearing on June 2, 2006. All citations reference VRP volumes 1-8 with the exception of the sentencing hearing, which is referenced as SRP.

the court he was not ready to go to trial and did not think he would be ready to go for a couple more months. RP 6. Defense counsel also had a trip to the Ukraine planned for April 20 – 30.

The State opposed defendant's motion to continue because the case was over one year old, it was neither factually nor legally complex, and discovery was not significant.² Discovery included both handwritten and taped statements by the victims and witnesses and police incident reports, which included summaries of the victims' and witnesses' statements. RP 350-51.

The court denied defendant's motion to continue because similar requests for additional time had been granted in the past, the case was fairly straightforward without a lot of sophisticated evidence, and accommodations would be made for defense counsel's trip to the Ukraine. RP 18. The court also considered that the case was over 400 days old and there have been at least six prior continuances. RP 18.

A 3.5 hearing was held and all of defendant's statements were deemed admissible. 1 RP 293-98. Findings of fact were filed on August 24, 2006. CP 112-116. On May 3, 2006, the jury found defendant guilty

² While there were 771 pages of discovery on this case, the vast majority of that discovery consisted of copies of pleas and judgment and sentences for crimes defendant committed between his 2002 head injury and the present case to rebut a potential mental defense raised by one of defendant's prior attorneys. 1 RP 16, 17.

as charged on all six counts. CP 86-87; 7 RP 833-835. On June 2, 2006, the court sentenced defendant to a high end standard range sentence on each of the six counts. CP 95-108; SRP 28-29.

This timely appeal followed.

2. Facts

a. Facts adduced in the State's case in chief.

On February 18, 2005, Ken Richard and his wife Sue Saltmarsh-Richard, left their residence at 10109 51st St. NW in Gig Harbor at approximately 11:00 – 11:30 a.m. to run some errands. RP 325, 403. They were gone approximately two hours. RP 397. When they returned to their residence, Ken Richard pressed the garage door opener in his vehicle as he drove up their driveway. RP 333, 387, 403. The garage door went partially up, but then went down again. RP 333, 387, 403. Ken Richard pressed the garage door opener a second time. RP 334, 336, 388, 394, 395, 399, 403. Again, the door partially opened and then closed. RP 334, 336, 338, 394, 395, 399, 403. As the door opened and closed, Ken Richard and Sue Saltmarsh-Richard observed a black Subaru that did not belong to them parked in their garage and a blur coming from inside the house into the garage. RP 334, 336, 388, 394, 395, 399, 403, 405. Ken Richard exited his vehicle and entered his garage where defendant

slammed Richard with a backpack. RP 337, 341, 395, 407. Defendant repeatedly struck Ken Richard, first with the backpack, then with his fist. RP 337, 338, 395. As he ran from Ken Richard, defendant struck Sue Saltmarsh-Richard in the face. RP 338, 406.

Ken Richard chased after defendant. 3 RP 339. Defendant again struck Sue Saltmarsh-Richard, then whipped the backpack at Ken Richard, jumped into the Richards' SUV, which was parked in the garage, and started the engine. RP 340, 341, 362, 396, 408, 409, 410. The Richards' SUV was valued at \$8,000.00. RP 378. Sue Saltmarsh-Richard grabbed the SUV's driver's side door to prevent defendant from closing it. RP 341, 396, 411. Ken Richard and Sue Saltmarsh-Richard pulled the SUV's door open, Ken Richard grabbed defendant's head and pulled him out of the vehicle. RP 341, 411. A fight ensued during which defendant pulled Sue Saltmarsh-Richard's hair and punched, kicked, and bit Ken Richard. RP 341, 342, 343, 412, 413. During the struggle, Ken Richard noted the defendant was wearing gloves. RP 342. Sue Saltmarsh-Richard reached between defendant's legs and squeezed his testicles as hard as she could several times. RP 343-44, 413. Ken Richard was able to subdue defendant after Sue Saltmarsh-Richard squeezed defendant's testicles. RP 344.

After defendant was subdued, Sue Saltmarsh-Richard extricated herself from the fight. RP 414, 415. When she did so, she heard something pop in her ankle – a ligament had snapped. RP 414, 415. Sue Saltmarsh-Richard ran into her house to call the police, but all of the telephones were missing. RP 415, 416. She then ran to a neighbor's house screaming for help. RP 344, 345, 396, 416, 417. Hearing Sue Saltmarsh-Richard's screams, Ron Abo grabbed a 2 x 2 piece of wood and went to the Richards' to help Ken Richard. RP 346, 396, 417, 473, 474-75.

When Abo entered the Richards' garage, he saw Ken Richard wrestling with the defendant. RP 475, 484. Within seconds, two other neighbors, Mark Frank and Brian Fleming, also came to help out. RP 347, 396, 475-76, 485-86. Abo grabbed defendant's wrists and held them to the ground. RP 476, 485. Ken Richard, Abo, and Frank tied defendant up with duct tape and co-ax cable. RP 346, 396, RP 476. They wrapped duct tape around defendant's wrists, knees and thighs. RP 346, 347, RP 476, 507.

Pierce County Sheriff deputies were dispatched to the Richards' house for an interrupted burglary. RP 522, 538. When Deputy Wulick arrived, defendant was inside the Richards' garage, lying on his side with duct tape around his wrists, ankles, and knees. RP 521, 527. Cable wire

was also wrapped around defendant's wrists and ankles. RP 521, 528. As Deputy Wulick removed the duct tape and wire, he advised defendant that he was under arrest for burglary. RP 522, 528. Defendant told Deputy Wulick "[t]he car's not mine; I was just walking by." RP 523. The black Subaru that the Richards's initially saw parked in their garage was later determined to be stolen. RP 464-65.

Deputy Wulick turned defendant over to Deputy Folden, who conducted a search incident to arrest. RP 539. Deputy Folden located a baggy of white powdery substance in defendant's right front pocket. RP 540. The substance was later determined to be methamphetamine. RP 587, 590. After being advised of his Miranda³ warnings, defendant told Deputies Folden and Myron that his name was Michael David Charvat. RP 522, 524. However, defendant was unable to provide the correct social security number associated with that name. RP 544. Deputy Folden found a photograph of the defendant and identified defendant as Timothy Kelly. RP 544-45.

Deputy Myron interviewed defendant regarding the incident. RP 555. Defendant told Deputy Myron that he (defendant) had not been in the victim's house, but that he had been cutting through the yard when

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966)

someone attacked him. RP 555. Defendant indicated that he had come through a pasture and another neighbor's property to end up in the victims' yard. RP 555, 556, 557. The victims' residence was in a fairly rural, residential neighborhood where there was no public transportation. RP 557. The nearest store or business was approximately 2 ½ miles away. RP 557-58.

Ken Richard took Deputy Myron through the Richards' residence. Many items had been moved around and many pieces of jewelry and several watches that had been stolen. RP 367- 72, 374-78, RP 560. The Richards' backpack that defendant had been carrying and then used to strike Ken Richard was located in the Richards' backyard. RP 561. Inside the backpack were numerous pieces of Sue Saltmarsh-Richard's jewelry, watches, and Ken Richard's passport. 3 RP 372; 4 RP 561.

Both Ken Richard and Sue Saltmarsh-Richard were injured during the incident. Ken Richard had a goose egg on his head, a back eye, and significant bruising on his face. RP 504, 507, 559. Ken Richard's face was black and blue for two weeks after the assault. RP 380, 381. Sue Saltmarsh-Richard had bruising on her face and a torn ligament in her ankle. RP 382, 383, 418. The only injury observed on defendant was a preexisting cut on defendant's wrist that was wrapped in an ace bandage. RP 522, 524, 546-47.

Becky Dawson testified that her black Subaru was stolen on February 17, 2005, and recovered from the garage of a residence in Gig Harbor the following day. RP 464- 65. At the time it was stolen, her Subaru was valued at approximately \$20,000.00. RP 465. Dawson testified that she did not know defendant nor did she give him permission to drive her car. RP 467.

Ken Richard and Sue Saltmarsh-Richard identified defendant as the man who assaulted them and burglarized their home on February 18, 2005. RP 384, 397, 399, 429-30. Ron Abo identified defendant as the man he assisted Ken Richard restrain with duct tape and co-ax cable on February 18, 2005. RP 476-77. Deputies Wulick, Myron, and Folden identified defendant as the man they arrested at the Richards' residence on February 18, 2005. RP 525, 545, 575-76. Brian Fleming testified that the black Subaru was driven up the hill approximately one hour before he went to assist the Richards subdue defendant. RP 516.

b. Facts adduced in defendant's case in chief

Defendant testified he went to his friend Lou's house at 1:00 a.m. on February 18, 2005, to get some methamphetamine. RP 645. Lou did not have any methamphetamine, but said his friend Ken might have some. RP 646. Defendant and Lou went to a motel 96th and Hosmer in

Lakewood, where Ken was staying. RP 646. Ken did not have any methamphetamine at that time, but expected to get some later that day. RP 646. Ken asked defendant to help him move some cars. RP 647. Ken had both a white Honda and a black Subaru. RP 647. Defendant agreed to help Ken. Defendant drove the white Honda and Ken drove the black Subaru to Gig Harbor. RP 647. They took the first Gig Harbor exit and stopped at a latte stand near the Albertson's. RP 647-48. Ken left for approximately 15 minutes and when he returned defendant and Ken smoked a gram of methamphetamine. RP 648. Defendant then drove the vehicles to the Richards' neighborhood where defendant parked the white Honda at the base of the residential neighborhood. RP 648-49. Defendant then joined Ken in the Subaru and they drove up the hill to the Richards' residence. RP 649. Ken entered the Richards' residence while defendant backed the Subaru into the Richards' garage, transferred bags in the Subaru to the Richards' SUV, started the engine, and rested while he waited for Ken to finish inside the house. RP 649-50. Defendant testified he was assaulted by the Richards as he rested in the SUV. RP 650-51. The Richards gouged defendant's eyes, punched defendant, and slammed his head into the concrete until defendant was knocked out. RP 651. Defendant woke up when he was in jail. RP 652.

Lyn Gordon testified that she lives near the Richards. RP 635. Gordon heard tires screeching and saw a sheriff's car drive up to the Richards' residence. RP 636. She saw a white oxidized car that looked out of place drive quickly up the cul-de-sac toward the Richards' house and then quickly drove back down. RP 636-37. There was a young man driving the white car. RP 637. Gordon advised police that she had seen the white car, but could give them no other information. RP 637-39.

c. Facts adduced in the State's rebuttal

Editha Ang testified that she lives at 4105 14th Avenue NW in Gig Harbor. RP 708. On February 18, 2005, her home security company contacted her office between 12:00 and 1:00 p.m. to advise her that her home alarm had been activated. RP 709. She immediately went to her residence and observed that her side door window had been broken and the door was open. RP 710. A jewelry box and some watches were stolen from her house during the burglary. RP 710, 717. These items were recovered from inside a vehicle at the Richards' house. RP 712, 729.

Deputy Wulick testified he had been dispatched to an audible house alarm call at the Ang's residence at 12:34 on February 18, 2005. RP 715, 728. Deputy Myron testified that the Ang residence is nine miles

away from the Richards residence and takes 25 minutes to drive from one house to the other. RP 730, 733.

C. ARGUMENT.

1. DEFENSE COUNSEL'S TRIAL PREPARATION, USE OF PEREMPTORY CHALLENGES, AND OBJECTIONS WERE LEGITIMATE TRIAL STRATEGIES AND, ALTERNATIVELY, DEFENDANT CANNOT SHOW HE WAS PREJUDICED BY DEFENSE COUNSEL'S ACTIONS.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second a defendant must show that defense counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687; State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. State v. Huddleston, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's

representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. State v. McFarland, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious but also that the verdict would have been different if the motion or objection had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. McFarland, 127 Wn.2d at 337; see also,

Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilty.”).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988). In the present case, defendant cannot satisfy either prong of the Strickland test. Defendant’s claim of ineffective assistance of counsel is without merit and must fail.

- a. Defense counsel’s preparation was not deficient, or if deficient, the defendant was not prejudiced by defense counsel’s performance.

Ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the State’s case. “When, ...the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do.” Eggleston v. United States, 798 F.2d 374, 376 (9th Cir.

1986) quoting United States v. Katz, 425 F.2d 928, 930 (2d Cir. 1970). A trial attorney's admissions of inadequate performance are not decisive in ineffective assistance of counsel claims. See, Walls v. Bowersox, 151 F.3d 827, 836 (8th Cir. 1998). An attorney's effectiveness is a question for the courts, not counsel, to decide. Id.

In the present case, defense counsel moved for a continuance on the day of trial. RP 1, 3. Defense counsel, who had represented defendant for more than two months, advised the court that he had not had adequate time to prepare, and believed he would not adequately represent his client if the trial went forward that day. RP 6. Because an attorney's own assertion that his performance is insufficient to establish deficient performance, this court must review defense counsel's actual performance at trial in light of the facts of the case. In the present case, as articulated in Cronic, defense counsel's representation met the testing envisioned by the Sixth Amendment of the United States Constitution.

The facts in the present case were not complicated. There were independent witnesses and photographs to corroborate the victims' testimony, and the defendant was caught and detained at the scene until police arrived. RP 475, 476, 507, 521, 540. Despite the overwhelming evidence of defendant's guilt, defense counsel made appropriate motions in limine, objections that were sustained during the course of the trial,

vigorously cross examined witnesses, and presented a defense. RP 299-303, 385-398, 431-39, 477-90, 498-500, 634-54, 694. Defense counsel's representation of defendant was not deficient.

Assuming *arguendo*, this court were to find defense counsel deficient, defendant sustained no prejudice as a result of counsel's deficiency. As noted above, the evidence against defendant was overwhelming on all counts. Because no amount of additional time or preparation would have changed the facts of the case, defendant was not prejudiced by defense counsel's performance.

- b. Defense counsel's decision to use two peremptory challenges during voir dire was a legitimate trial strategy and defense counsel was not deficient when he accepted a juror who advised the court that he could give both sides a fair trial.

The decisions on what jurors to accept or strike is an example of strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client. See, In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733-736, 16 P.3d 1 (2001), citing 1 ABA, STANDARDS FOR CRIMINAL JUSTICE std. 4-5.2 (part) (2d ed. Supp. 1986). An attorney's decision to use a peremptory challenge is strictly tactical. See, State v. Clark, 143 Wn.2d 731, 759-60, 24 P.3d 1006 (2001). While it is easy in retrospect to find fault with tactics and strategies that failed to gain

acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

Defendant claims that his attorney was deficient because he did not exercise all of his peremptory challenges and failed to question a juror who stated he had a vague memory of the incident from a news report. RP 81-82. Defendant's first argument fails because an attorney's decision to accept or strike a particular juror is solely a tactical or strategic decision. In the present case, to determine if anyone had a bias or prejudice that would negatively impact defendant, defense counsel asked the venire questions about controlled substances, how the use of controlled substances impacted an individual, and questioned jurors who indicated they or a family member had been the victim of a crime. RP 169 -71, 175, 177-81, 184-85, 187-90. Defendant has failed to show that counsel's decisions regarding the extent and content of voir dire were unreasonable and not strategic. Defendant has not carried his burden of showing counsel's actions and inactions on voir dire fell outside the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Defense counsel was not deficient when he exercised two peremptory

challenges⁴ during voir dire and defendant's claim of ineffective assistance of counsel must fail.

Defendant's second argument fails because the juror who indicated he had some recollection of the case did not recall any specific details and stated he did not have any lasting impressions from what he may have read or seen. RP 82. This juror advised the court that he could give both the State and the defense a fair trial. RP 82. Because the juror did not have any specific recollections of the news coverage, stating "[i]t just vaguely rings a bell," and the court questioned the juror extensively on what he may have read or heard, defense counsel was not deficient for choosing not to question the juror further. RP 81-83.

Assuming *arguendo*, this court were to find defense counsel deficient for his performance during voir dire, the defendant's claim of ineffective assistance of counsel fails because he cannot show that the trial's outcome would have been different. As argued above, the State provided overwhelming evidence of the defendant's guilt on all counts. The defendant was caught at the scene by the victims, he was caught carrying the victims' backpack in which defendant had placed the victims' jewelry and watches stolen in the burglary, both victims testified to the

⁴ Defense counsel exercised one when selecting the initial twelve jurors and a second one when selecting the two alternate jurors. 2 RP 227, 228.

significant injuries they sustained when defendant assaulted them, and an expert testified that the substance found in defendant's pocket was methamphetamine. RP 337, 338, 341, 372, 378, 395, 406, 407, 414, 587, 590. The jury clearly did not believe defendant's testimony that he was innocently resting in the victims' car when the Richards assaulted him without warning. RP 650, 673. Because the defendant cannot show the trial would have turned out differently, defendant's claim of ineffective assistance of counsel must fail.

- c. Defense counsel properly chose not to object to the missing witness instruction proposed by the State because the defendant's defense rested on two individuals that defendant chose not to call as witnesses.

When a party fails to call a witness within the control of that party to provide material testimony, the jury may draw an inference that the testimony would be unfavorable to that party. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). In terms of limitations, the testimony must not be privileged, necessarily self-incriminating, unimportant, or cumulative. Id. at 486-89; State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Further, no inference is permitted if the witness's absence can be satisfactorily explained. Blair, 117 Wn.2d at 489.

In the present case, defendant asserts his attorney was deficient for failing to object to the State's proposed missing witness instruction. Brief of Appellant at 30. However, defendant testified he and his friend Lou went to Ken's hotel early in the morning of February 18, 2005, to purchase methamphetamine. RP 645-46. Defendant testified that Ken asked him to assist in transferring vehicles at what turned out to be the Richards' residence. RP 647. Despite being in contact with Lou during the trial, defendant did not call either Lou or Ken as witnesses. RP 683-84.

Defendant asserts that these witnesses would not be available to testify because they would have had to admit to methamphetamine use. Brief of Appellant at 38. However, this argument fails because a defendant's own admission of criminal acts, without independent evidence to corroborate defendant's incriminating statement, is insufficient for the state to proceed with criminal charges. State v. Brokcob, 159 Wn.2d 311, 150 P.3d 59 (2006); State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

Because defendant failed to call Lou or Ken to provide material testimony, the trial court properly granted the State's request for a missing witness instruction. Because the instruction was properly given, defense counsel was not deficient for not objecting to it.

Assuming *arguendo*, that this court were to find defense counsel deficient for failing to object to the missing witness instruction, the defendant must still show that he was prejudiced by defense counsel's deficient performance. As argued above, the defendant cannot meet this burden. The evidence against defendant was overwhelming. There is no reasonable likelihood that the result of the trial would have been different had defense counsel objected to the missing witness instruction. Because defendant cannot show that he was prejudiced, defendant's claim of ineffective assistance of counsel must fail.

- d. Defense counsel objected to the State's use of the Ang burglary to impeach defendant's credibility and to an uncharged victim and two community board members who wanted to address the court at sentencing.

Defendant argues that defense counsel was deficient for failing to object to the State's use of the Ang burglary in rebuttal. Brief of Appellant at 31. Defendant's argument is without merit because defense counsel did object to the State's use of the Ang burglary in cross examination or rebuttal. RP 695. The court overruled defense counsel's objection. RP 696. Because defense counsel did object to the State's use of the Ang burglary during trial, defendant's argument is without merit and must fail.

Defendant also argues that defense counsel was deficient for failing to object to an uncharged victim and two community board members who wanted to address the court at sentencing. Brief of Appellant at 31-32, 43-44. However, defense counsel did object and those witnesses did not address the court. RP 8, 9, 10. Because defense counsel did object defendant's argument of ineffective assistance of counsel is without merit and must fail.

- e. Defense counsel did not intentionally elicit testimony that the defendant had been incarcerated since the burglary and made a tactical decision not to highlight that testimony by objecting and moving to strike the testimony.

In the present case, defendant testified in his own defense. RP 643-705. The defendant made the following responses to defense counsel's questions regarding Ken.

DEFENSE COUNSEL: Do you remember having any contact with anyone else?

DEFENDANT: No.

DEFENSE COUNSEL: Where, to your knowledge, did Ken end up going?

DEFENDANT: I have no idea.

DEFENSE COUNSEL: Have you seen Ken since [the day of the burglary]?

DEFENDANT: I've been incarcerated.

RP 652. Defendant's answer to defense counsel's question whether defendant had seen Ken since the incident was nonresponsive. Defense counsel clearly did not intend to elicit testimony regarding defendant's custody status. The defense attorney made a tactical decision to ignore defendant's nonresponsive answer so as not to emphasize the testimony by objecting to it and moving to strike. As argued above, legitimate trial tactics cannot be the basis for an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d at 77-78; State v. Madison, 53 Wn. App 754, 763. Because defense counsel made a legitimate tactical decision to ignore defendant's nonresponsive answer, defense counsel was not deficient. Defendant's claim of ineffective assistance of counsel must fail.

2. THE TRIAL COURT PROPERLY DENIED DEFENSE COUNSEL'S UNTIMELY MOTION TO CONTINUE WHEN THE TRIAL HAD ALREADY BEEN CONTINUED SEVERAL TIMES BEFORE AND DEFENSE COUNSEL HAD BEEN ADVISED THAT NO FURTHER CONTINUANCES WOULD BE GRANTED.

A trial court's decision to deny a motion for continuance is reviewed for a manifest abuse of discretion. State v. Williams, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001) (citing State v. Cannon, 130 Wn.2d

313, 326, 922 P.2d 1293 (1996)). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005). There is no precise formula for determining whether a trial court has abused its discretion in denying a request for a continuance, “the answer must be found in the circumstances present in the particular case.” Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). One factor a trial court may consider is whether the motion to continue is timely. A defense attorney’s “morning of trial” request for a continuance is generally untimely and places an undue burden on the nonmoving party and their witnesses. See, Odom v. Williams, 74 Wn.2d 714, 718, 446 P.2d 335 (1968). A trial court’s decision to deny a continuance will not be reversed unless the defendant can show that the trial’s result would likely have differed if the continuance had been granted. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (citing State v. Eller, 84 Wn.2d 90, 95-96, 524 P.2d 242 (1974)).

In the present case, the parties appeared for trial on April 12, 2006, at which time defendant’s trial counsel requested a continuance. RP 3-7. Defense counsel advised the court that while the case had been charged more than one year ago, he had been on the case since January 31, 2006, when defendant’s prior attorney had to withdraw due to a conflict. RP 3.

Defense counsel advised the court that, once he took over defendant's case, he hired an investigator, who did not work out. RP 4. In addition to the above, defense counsel advised the court that he was going to be on a trip to the Ukraine from April 20, 2006 through April 30, 2006. RP 7, 8.

The State opposed a continuance and advised the court that the issues in this case were not complex and the facts were simple and straightforward. RP 12. After a brief recess, the court denied defense counsel's motion to continue, noting that the case had been continued a couple of times in the past when requests for additional time were made. RP 17. The court would recess the trial to accommodate defense counsel's vacation schedule. RP 17. The court noted "the case does appear to me to be fairly straightforward" and does not include a lot of sophisticated evidence. RP 18-19.

The court did not abuse its discretion when it denied defendant's untimely motion to continue. As the court noted, the case was neither legally nor factually complicated, there had been prior motions to continue that had been granted, and the court agreed to work around the attorneys various scheduling issues. RP 17-19.

Assuming *arguendo*, this court were to find the trial court did abuse its discretion in denying defendant's motion to continue, defendant must show also that he was prejudiced in order for this court to reverse

defendant's convictions. In this case, defendant cannot show he was prejudiced by the court's ruling. Defendant was caught inside the Richards' attached garage holding a backpack of the Richards' stolen property. RP 337, 339, 340, 341, 395, 407. When confronted by the Richards, defendant assaulted both Mr. and Mrs. Richard, tearing a ligament in Ms. Richard's leg and blackening Mr. Richard's eye. RP 341-43, 380, 381, 382-83. Defendant attempted to flee with the stolen property in the Richards' car, but was detained by Mr. Richard and several neighbors who came to assist when they heard Ms. Richard screaming for help. RP 341, 345, 396, 411, 416, 417. When police arrived at the scene, Mr. Richard and his neighbors had hog-tied defendant using duct tape and electrical wiring. RP 346,347, 521, 527. Deputy Folden found methamphetamine in defendant's pocket. RP 541, 587, 590. Another continuance in this case, which was well over one year old, would not have changed the evidence, which overwhelmingly pointed to defendant's guilt on all counts.

3. DEFENDANT WAIVED ANY ERROR TO THE MISSING WITNESS INSTRUCTION WHEN HE FAILED TO OBJECT TO THAT INSTRUCTION AT TRIAL.

Under the "missing witness" doctrine, the prosecutor may comment on the defendant's failure to call a logical competent witness

whose production is peculiarly within control of the defense, whose testimony would corroborate a defendant's testimony, and whose testimony is not privileged, necessarily self-incriminating, unimportant, or cumulative. State v. Blair, 117 Wn.2d 479, 486-87; State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990).

Any claim of instructional error is deemed waived if defendant fails to object to the instruction at trial. See, State v. Hickman, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998). Because defendant did not object to the missing witness instruction at trial, he has waived that issue on appeal.

4. THE PROSECUTOR PROPERLY USED EVIDENCE OF THE ANG BURGLARY AS IMPEACHMENT EVIDENCE IN REBUTTAL AND PROPERLY ADVISED THE COURT THAT THERE WERE INDIVIDUALS IN THE COURTROOM WHO WANTED TO ADDRESS THE COURT AT SENTENCING.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remark or conduct was improper and that it prejudiced the defendant. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State

v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original].

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Binkin, 79 Wn. App 284, 293-94, 902 P.2d 673 (1995). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

In the present case, the defendant argues the State committed prosecutorial misconduct by 1) using Ms. Ang’s testimony as impermissible 404(b) evidence during trial; 2) asking the court to hear from a victim of one of defendant’s uncharged crimes and two community board members at sentencing; and 3) failing to provide Brady⁵ evidence. Defendant’s arguments fail because the State scrupulously followed the Court’s ruling that Ms. Ang’s testimony be used for impeachment purposes only and the trial court denied the State’s request for anyone to speak at sentencing who was not specifically authorized by RCW 9.94A.500. RP 9.

⁵ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (Violation of due process if prosecution suppresses evidence favorable to the defendant and the evidence is material to guilt or to defendant’s punishment.)

- a. The prosecutor properly used Ms. Ang's testimony for impeachment purposes only.

The credibility of a witness may be attacked by any party, including the party calling the witness. ER 607. A prosecutor is permitted to call a witness to impeach a previous witness' statements, so long as the prosecutor does not ask the witness to express an opinion as to his or her beliefs or opinions about the previous witness' credibility.

In the present case, defendant testified on direct examination that he went to his friend Lou's house to get some methamphetamine at approximately 12:30 – 1:00 a.m. RP 645. Lou didn't have any methamphetamine so they went to a hotel at 96th and South Tacoma Way to meet Lou's friend Ken, who Lou thought would have methamphetamine. RP 646. Ken did not have any methamphetamine at that time, but said he would get some later on that day. RP 646. Defendant testified that he agreed to help Ken drop off a car at Ken's family's house and pick up a different car. RP 647. Defendant drove a white Honda and Ken drove a black Subaru from the hotel to Gig Harbor. RP 647. Defendant stopped to purchase a latte at a coffee stand near the first Gig Harbor exit. RP 648. After drinking his latte, defendant said he used methamphetamine around 12:00 or 12:30. RP 648. He and Ken when drove the white Honda and black Subaru to the Richards' residence,

which defendant testified he believed was Ken's house. RP 648.

Defendant parked the white Honda at the base of a hill, got into the Subaru with Ken, and proceeded up the hill to the Richards' residence. RP 649.

Defendant testified that Ken went into the residence and asked defendant to transfer items in the Subaru to the SUV in the garage. RP 649.

Defendant testified that he did as Ken directed. RP 650. Defendant started the SUV's engine and was waiting for Ken to finish inside the house when he was assaulted by the Richards. RP 650-51. Defendant said he had been in the SUV for only about 5 minutes before he was assaulted. RP 651.

On cross examination the defendant stated he was with Lou until 7:30 a.m. on February 18, 2005. RP 659. He also testified that he and Ken left the Knight's Inn in the white Honda and black Subaru at 11:30. RP 660, 665. Defendant testified that 20 minutes later he and Ken stopped at a latte stand off of the first Gig Harbor exit. RP 664-65. Ken left for approximately 15 minutes and when he returned they smoked a gram of methamphetamine. RP 663-64. After smoking the methamphetamine, Ken and defendant drove to the Richards' house, which took 15 to 20 minutes. Defendant parked the white car at the bottom of a hill, got into the Subaru with Ken, and they drove up the hill to the Richards' residence. RP 666-67. Defendant testified that Ken went into the residence,

defendant moved the Subaru into the Richards' garage, defendant transferred items from the Subaru into the Richards' SUV, started the SUV and rested in the closed garage until he was assaulted by the Richards. RP 668-675.

The defendant testified to a time specific chronology of events that had him leaving Lakewood at 11:30 a.m., drinking a latte at a coffee stand in Gig Harbor around 12:00 -12:30 and then arriving at the Richards' property around 12:45. Items stolen in the Ang burglary were recovered when officers processed the evidence seized from the Richards' burglary. Because the Ang residence was located 25 minutes away from the Richards' residence, the State was allowed to offer evidence that items stolen during the Ang burglary were seized from the Richards' to impeach defendant's credibility. A jury instruction limiting evidence of the Ang burglary to impeachment purposes only was included in the jury instructions. CP 45.

Because the prosecutor properly used evidence of the Ang burglary for impeachment purposes only, there was no misconduct.

- b. The prosecutor did not commit misconduct at sentencing when he advised the court a victim from an uncharged crime and two community board members wanted to address the court.

RCW 9.94A.500(1) states in the relevant part

The Court shall consider the risk assessment report and the presentence reports, if any, including any victim impact statement, criminal history, and allow arguments from the prosecutor, the defense attorney, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative enforcement officer as to the sentence to be imposed.

At sentencing, the State advised the court that victim, Ken Richard, and the lead investigator, Alan Myron, were present and that Ken Richard wanted to address the court. SRP 7. The State also advised the court that a victim from an uncharged count, James Driscoll, and two community board members from the community in which the Richards' live were also present and wanted to address the court at sentencing. SRP 7-8. Defense counsel objected and the court ruled that only the victim, Ken Richard, could address the court. SRP 8- 11.

The state's request that the board members be allowed to address the court because the community was a victim of defendant's crime was not misconduct. The court denied the request and neither the James Driscoll nor the two board members spoke at sentencing. Assuming *arguendo*, this court were to find the state's request was improper, the

defendant's argument still fails because there was no resulting prejudice to the defendant. Defendant's argument that the court may have ordered a shorter sentence if the State had not requested the court hear from James Driscoll and the two community board members is without merit. Brief of Appellant at 42. Defendant's high end, standard range sentence was appropriate given 1) the facts of this case; 2) defendant's offender score of fourteen for the first degree burglary count and eleven on all other counts; and 3) the court ran defendant's sentence on this cause number concurrent with a separate case defendant pled guilty to the day before. SRP 27. Because defendant cannot show the prosecutor's conduct was improper, or alternatively, that he was prejudiced by the prosecutor's request, defendant's claim of prosecutorial misconduct must fail.

- c. There was no Brady violation because there is no evidence in the record that the state every had possession of defendant's medical records.

In Brady, the Supreme Court held the prosecutor's suppression of an accomplice's confession to the murder violated the due process clause of the Fourteenth Amendment. Brady v. Maryland, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The rule announced was that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt

or to punishment, irrespective of the good faith or bad faith of the prosecution.” Id. at 87.

Evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). In applying this “reasonable probability” standard, the question is whether the defendant received a fair trial without the evidence--that is, “a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Benn, 134 Wn.2d at 916. Accordingly, the reasonable probability of a different result is shown when the State’s suppression “undermines confidence in the outcome of the trial.” Bagley, 473 U.S. at 678. No Brady violation occurs if the defendant could have obtained the information himself through reasonable diligence. Benn, 134 Wn.2d at 916.

In the present case, at the outset of the trial, defense counsel advised the court that he was attempting to obtain defendant’s medical records from a 2002 incident in which defendant was a victim. RP 600. On May 1, 2002, defense counsel advised the court that he had obtained those medical records, but had not had the opportunity to make copies of

the medical documentation for the court and the state. RP 600-01. While defense counsel states he presumes the state had the medical records in it 2002 attempted murder case, there is no evidence in the record to support that presumption. Because there is no evidence in the record that the state had defendant's 2002 medical records and defendant was able to obtain the records using due diligence, there was no Brady violation.

5. NEITHER THE PROSECUTOR NOR THE COURT VIOLATED THE REAL FACTS DOCTRINE AT SENTENCING BECAUSE THE ONLY FACTORS THE COURT CONSIDERED WERE DEFENDANT'S CRIMINAL HISTORY AND THE FACTS OF THIS CASE.

The prosecutor did not violate the real facts doctrine at sentencing when he referred to the Ang burglary because the Ang burglary was part of the circumstances surrounds the charged offenses. The real facts doctrine as it relates to a standard range sentence is codified in Revised Code of Washington (RCW) 9.94A.530(2). “[T]he court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing...” RCW 9.94A.530(2). The real facts doctrine requires the sentencing court to base the defendant's sentence on the defendant's current conviction, criminal history, and the circumstances of the crime. State v. Coats, 84 Wn. App. 623, 626, 929 P.2d 507 (1997); State v. Tierney, 74 Wn. App. 346, 350,

872 P.2d 1145 (1994). An exceptional sentence may not be based on facts wholly unrelated to the current offense or facts that would elevate the degree of crime charged above that of the charged crime. Tierney, 74 Wn. App. at 352. However, the sentencing court may consider facts that establish elements of an additional uncharged crime when those facts are “part and parcel” of the current offense. Tierney, 74 Wn. App. at 352.

In the present case, the court sentenced defendant, who had an offender score of 14 for the first degree burglary and 11 points the other five counts, to the high end of the standard range on each count. SRP 27. The court based its sentencing decision on defendant’s “horrible criminal history and the events involved in this case.” SRP 27. Because there is no evidence that the court based its sentencing decision on any fact unrelated to the current offense, defendant’s claim that the court sentenced him in violation of the real facts doctrine must fail.

Defendant asserts the real facts doctrine was violated when the prosecutor urged the court to consider the Ang burglary at sentencing and when victim Ken Richard advised the court that property recovered from his SUV that defendant attempted to steal belonged to twenty-four different people. Brief of Appellant at 43. However, it is clear from the court’s oral ruling at sentencing that the court did not consider the Ang burglary or the stolen property found in the Richards’ SUV when

sentencing defendant within the standard range. The court sentenced defendant based upon his criminal history and the impact defendant's behavior had on the Richards. The court specifically noted:

I can't imagine what it's like to come home and find somebody has invaded your most personal space, your home, your garage, and unexpectedly you are forced into this confrontation and a physical confrontation with somebody that you've never seen before in your life. This is a significant impact.

It had to be a significant impact on the Richards, and quite candidly, the combination of his horrible criminal history and the events involved in this case leads me to the conclusion that I'll grant understanding but not leniency. I am going to impose the high end of the range...

SRP 27. While not relied upon by the trial court at sentencing, it would not have been improper for the court to do so because stolen property from the Ang burglary was not unrelated to the charged offenses. Similarly, it would not have been improper for the court to take into consideration Ken Richard's statement that, as a result of defendant's actions, Ken Richard returned property to twenty-five different people

Defendant's assertion that the court sentenced defendant based upon uncharged crimes is not supported by the record is without merit and must fail.

Contrary to defendant's assertion, the sentencing court's statement that defendant posed a significant risk to the community is not analogous

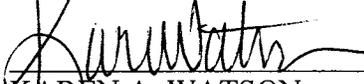
to a finding of "future dangerousness" in a sex offense case. Future dangerousness requires both a history of similar offenses and a lack of amenability to treatment because the civil commitment proceeding enhances a defendant's standard range sentence whereas, in the present case, the court was not enhancing a standard range sentence, but imposing one. See, State v. Pryor, 115 Wn.2d, 445, 454-55, 799 P.2d 244 (1990).

D. CONCLUSION.

For the reasons stated above, defendant's convictions should be affirmed.

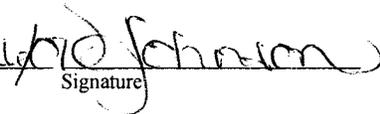
DATED: October 26, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant to his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/26/07 
Date Signature

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