

NO. 35786-1

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

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY M. KELLY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 05-1-01173-6

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

On March 9, 2005, the State charged Timothy Michael Kelly, hereinafter "defendant," with one count of first degree burglary, one count

of theft of a firearm, two counts of first degree trafficking in stolen property, three counts of first degree theft, one count of residential burglary, and one count of first degree unlawful possession of a firearm. CP 1-7. A corrected information was filed on April 4, 2006, correcting defendant's name and date of birth only. CP 195-98.

An amended information was filed on June 7, 2006, which changed the charging date on several counts to a range of time and added two counts of theft of a firearm and one count of first degree unlawful possession of a firearm. CP 26-34. This amended information changed: 1) the charging date on count III to a range of time between September 5, 2003 – September 11, 2003; 2) the charging date on count VI to a range of time between September 5, 2003 – September 6, 2003; 3) the charging date on count V, to a range of time from August 28, 2003 – September 5, 2003; and 4) the charging dates on counts VII and VIII to a range of time from August 28, 2003 – September 4, 2003. CP 26-34.

On October 24, 2006, the parties appeared before the Honorable Ronald E. Culpepper for trial. The court heard motions in limine on October 24, 2006, and held a CrR 3.5 hearing on October 25, 2006. RP

42-90¹. The court found defendant's statements were admissible. RP 89-90. Findings of Fact and Conclusion of Law were entered for the 3.5 hearing on December 29, 2006. CP 183-187. The Court granted the State's motion to dismiss two counts of trafficking in stolen property (counts III and VI) from the amended information. RP 129-30.

On November 6, 2006, at the end of the State's case, the State filed a second amended information, which omitted counts III and VI (which had been dismissed on October 26th) and changed the charging dates on counts V, XIV, XV, and XVI to an range of time from August 28, 2003 – September 4, 2003. CP 26-34, 86-92.

On November 2, 2006, defendant stipulated that he had been incarcerated in the Pierce County Jail until August 28, 2003, at approximately 6:00 a.m. CP 199 -200.

On November 8, 2006, a jury convicted defendant as charged. CP 151, 153-55, 157-62. A sentencing hearing was held on December 14, 2006. SRP 3-29. The court sentenced defendant to a total of 327 months, which consisted of a 120 month exceptional sentence on Count I to run consecutive to the 87 months imposed on Count V, and consecutive to the

¹ The verbatim record of proceedings shall be referred to as follows:
The nine sequentially number volumes shall be referred to as RP
The 7/12/06, 10/30/06, 11/7/06, and 11/6/06 records of proceedings shall be referred
DATE RP
The sentencing record of proceedings shall be referred to as SRP

20 months flat time on the firearm enhancements on Counts I and V. On all other counts the court imposed standard range sentences to run concurrent with each other. CP 165-179; SRP 23-25. Findings of Fact and Conclusions of Law for the exceptional sentence were filed on December 29, 2006. CP 180-82.

The defendant filed a timely notice of appeal. CP 191.

2. Facts

Misty Saldana-Williams was working as a ranger at a recreational vehicle (RV) park owned by Leisure Time Resorts during the summer of 2003. RP 280, 281, 299, 357. As part of her job, Saldana-Williams had access to Leisure Time Resort's computer to make RV site reservations. RP 281, 299, 358. The computer's database contained personal information on all individuals who made reservations through Leisure Time Resorts. RP 281. This personal information included names, addresses, and vacation dates for each reservation. RP 289.

Saldana-Williams met defendant on August 28, 2003, at the Pierce County Drug Court, where each went to support a friend. RP 283, 304. Saldana-Williams and defendant spent that day running errands, which included obtaining and using methamphetamine. RP 283, 305-06, 335, 336. At some point, Saldana-Williams told defendant about her work at Leisure Time Resorts, including taking reservations for RV sites. RP 284, 288. Defendant asked Saldana-Williams to use the reservation

information to make him a list of customers' addresses and vacation dates. RP 288-289. Defendant specified areas, like Gig Harbor, where the houses are higher quality and the people wealthier. RP 288-89, 340. Defendant didn't tell Saldana-Williams what he was going to do with the list, but she had a strong suspicion. RP 291, 324.

When Saldana-Williams returned to work, she used the computer to compile the list defendant had requested. RP 288. She gave him the list sometime between the 3rd to 5th of September, 2003. RP 289, 295, 341, 344. Saldana-Williams didn't know the exact date, but knew it was one of her days off after she met defendant on August 28, 2003. RP 294. Saldana-Williams' memory is not very precise because the incidents took place a long time ago and she was very high on crystal methamphetamine at the time. RP 284-85. Saldana-Williams had not used methamphetamine for approximately one year before meeting defendant, but she started using it pretty continuously for the two weeks after she met him. RP 285, 303. During that two week period, Saldana-Williams didn't sleep. RP 286, 293, 294.

At some point, defendant asked Saldana-Williams to make another list. RP 296. She agreed, but delayed and didn't actually do it. RP 296. On September 11, 2003, the police raided defendant's aunt's house, where Saldana-Williams had been staying on her days off. RP 286, 325. Saldana-Williams spoke briefly with police at the scene, but didn't feel safe going into much detail until she was interviewed at the police station

later that day. RP 287-88, 290, 326. Saldana-Williams testified she was afraid of defendant. RP 342. During the interview at the police station, Saldana-Williams told Detective Busey that she made a list of vacationers from her work computer and had given it to defendant. RP 290.

After the police interview, Saldana-Williams returned to defendant's aunt's house where she saw Kevin Spaulding. RP 324. Saldana-Williams has known Spaulding since 1999. RP 281. Spaulding was angry with her for talking to the police. RP 328, 333, 343, 350.

Prior to defendant's trial, Saldana-Williams pled guilty to residential burglary for her role in the Eva and Lykken burglaries. RP 293. As part of her plea agreement with the State, Saldana-Williams' residential burglary conviction would be reduced to rendering criminal assistance if she testified truthfully at defendant's trial. RP 293.

On cross examination, trial counsel brought out that Saldana-Williams used drugs sporadically for several years before she met defendant. RP 301-04. That she generally snorted the methamphetamine, but when she was with defendant, he would inject it into her. RP 303, 310, 311, 323. Saldana-Williams met defendant on August 28, 2003 at drug court where she had gone to support a friend of hers. RP 304-05. Saldana-Williams and defendant left drug court to run errands. RP 305, 306. At some point they obtained some crystal methamphetamine. She and defendant each used some methamphetamine. RP 306, 307. After ingesting the methamphetamine, they went to a drug store where

defendant got some needles and then they went to a motel room. RP 307, 309. At the motel, Saldana-Williams decided to use the methamphetamine 'defendant's way,' which was by injecting it directly into the vein. RP 310.

The following day they went to defendant's aunt's house where she had defendant inject her with more drugs. RP 310, 311. Defendant left for a while, but Saldana-Williams stayed at defendant's aunt's house. RP 313. Defendant returned and again injected Saldana-Williams with meth. RP 314.

When Saldana-Williams returned work, she accessed the reservations information on her computers and created the list defendant had requested. RP 315-16. After working her shifts, Saldana-Williams returned to defendant's aunt's house, where she gave him the list of names, addresses, and vacation dates. RP 316, 324. Defendant would come and go from his aunt's house. RP 316. When he returned, he would inject Saldana-Williams with methamphetamine. RP 316-17, 322.

a. The Lykken Burglary

On September 3, 2003, Pierce County Sheriff's Deputy Myron responded to the Lykkens' residence in Gig Harbor for a security check. 10/30/06 RP 36, 38, 69. The power company had notified the police that the Lykkens' meter had been removed and their door broken. 10/30/06 RP 36. Deputy Myron noted the back door had been smashed in and there was glass all over the floor. 10/30/06 RP 40, 42. Things were strewn

about, the Lykkens' alarm panel was on the floor, and pair of scissors appeared to have been broken by jabbing them into the wallboard near the alarm panel. 10/30/06 RP 43, 47, 71.

Lykken testified that he and his wife belong to an RV club called Leisure Time, also known as Thousand Trails, through which they reserve RV vacation sites. 10/30/06 RP 80. The Lykkens had used Thousand Trails to reserve a site over Labor Day weekend. 10/30/06 RP 81. They left on August 27, 2003, but returned early from their vacation because their house had been burglarized. 10/30/06 RP 81, 82.

When the Lykkens arrived home on September 4, 2003, they noted the horns to their audible alarm system were now broken and hanging off the front of the house, the front doors were broken, and the house alarm pad was destroyed. 10/30/06 RP 83-85, 86, 104; RP 225-226. Mr. Lykken discovered that his wife's jewelry had been stolen along with his two guns: a rifle and a shotgun. 10/30/06 RP 85, 91. The shells for the guns were stolen along with the guns. 10/30/06 RP 92. Lykken had used the guns a couple of months before the burglary and they were in good working order. 10/30/06 RP 93, 109-11. Lykken's pickup truck and his Saturn were stolen from the detached garage. 10/30/06 RP 89. The pickup was valued at \$6,000 and the Saturn was valued at \$6,500, at the time of the burglary. 10/30/06 RP 90. The total value of the items stolen during the burglary was over \$20,000. 10/30/06 RP 95.

Mr. Lykken reported the burglary on September 4, 2003. 10/30/06 RP 69; RP 226. Ultimately, both vehicles stolen in the burglary were recovered. 10/30/06 RP 95. The Saturn was recovered a couple of days after it was stolen and the truck was recovered approximately three months later. 10/30/06 RP 95-96, 116. The Saturn was recovered in Ruston; Andretti Niccoli and Jennifer Forsch were arrested in the vehicle. RP 402. Inside the Saturn was a Toshiba laptop computer and a black leather jacket. 10/30/06 RP 96. Lykken called the police and told them about the items in the Saturn that were not his. 10/30/06 RP 43.

On September 22, 2003, Officer Myron went to Lykkens' house to look at these items. 10/30/06 RP 44, 48. They met in Lykkens' detached garage. 10/30/06 RP 65. Officer Myron noted what appeared to be blood on the driver's side visor of the Saturn and the steering column. 10/30/06 RP 45, 66, 67, 100. Lykken also showed Officer Myron the blood on the light switch in his garage and on a pair of scissors that had been in his kitchen prior to the burglary. 10/30/06 RP 45, 67, 70, 113. Lykken was fairly confident that he gave the scissors to the police when they came out after he reported the burglary, but he couldn't say for sure. 10/30/06 RP 107, 116.

Several months after the burglary, the Lykkens sold the Saturn to Wendell Brave. 10/30/06 RP 97; RP 377. After the purchase, Brave was cleaning the interior of the vehicle when the front panel underneath the driver's side dash fell off. RP 378. Inside the panel was Mr. Eva's .45

pistol. RP 379, 380. Brave called the police and the took custody of they gun. RP 381.

At trial, Lykken was shown the list Saldana-Williams had made and provided to defendant; he recognized his address and the dates he reserved the RV site through Thousand Trails on the list. 10/30/06 RP 117-18. This list was discovered in the Evas' bedroom after the Evas' house had been burglarized on September 5, 2003. 10/30/06 RP 14, 15, 16. Lykken did not know defendant and did not give him permission to be in his house. 10/30/06 RP 102.

b. The Eva Burglary

The Evas left for vacation on September 4, 2003. RP 200. Mr. Eva testified that he and his wife travel by motor home quite a bit. RP 198. The Evas made their motor home travel reservations for this vacation through Thousand Trails. RP 198-99.

Around midnight on September 4th, someone rang Jack Merritt's doorbell. RP 265. Merritt lives down the street from the Evas. RP 264. A short balding man, later identified as Kevin Spaulding, asked Merritt if his address was 7855 Grayhawk. RP 266. Merritt advised Spaulding that 7855 was farther down the street. RP 267. Merritt could see a second person standing in the street, but could not see him clearly. RP 264-266. The following morning Merritt called police to report the incident. RP 267-68.

Gig Harbor Police Officer Welch responded to a suspicious person call on September 5, 2003. RP 174. He met with Jack Merritt, who told him that two individuals had come to his door asking directions to 7855 Grayhawk Place. RP 174-75. This was later identified as the Evas' residence. RP 177, 197. When Officer Welch went to investigate, he noted that a screen had been pried off a window in the back of the Evas' house, the motion-activated exterior lights had been unscrewed, and the interior of the residence had been ransacked. RP 176-77, 201. Officer Welch dusted for prints at the point of entry, but was unable to lift any prints. RP 188. When Officer Welch was unable to lift prints off of the most likely surface, the point of entry, he suspected the burglars may have been wearing gloves. RP 192, 194.

The Evas' vacation was scheduled to last through the 7th, but they came home early when a neighbor called to tell them their house had been burglarized. RP 199, 200. When the Evas returned home, they compiled a list of stolen items and provided it to police. RP 209. The list included the Evas' minivan valued at \$15,000, a .45 caliber automatic pistol valued at \$1,400, personal checks, credit cards, a Toshiba lap top computer valued at \$1,500, a black leather coat, jewelry, birth certificates, and other items. RP 178, 183, 205-214. The minivan was recovered on September 11, 2003. RP 404. Eva estimated the value of the stolen property that was never recovered at \$8,000. 10/30/06 RP 5.

The stolen pistol had been owned by Eva since 1958. 10/30/06 RP 6, 18. The gun had no trigger locks and was loaded with a full clip at the time of the burglary. 10/30/06 RP 6, 7. The gun was operable; Eva had shot it hundreds of times. 10/30/06 RP 7, 20. Eva kept the pistol locked in a file cabinet in his garage. 10/30/06 RP 6. The pistol was recovered almost one year later in the Lykkens' Saturn. 10/30/06 RP 12; RP 379-80.

Officer Welch testified that the items stolen in the Eva burglary are items commonly stolen during burglaries. RP 183. He stated that credit cards are generally used almost immediately before the owners cancel or otherwise flag the stolen card. RP 184. Officer Welch received information that one of the Eva's credit cards was used very shortly after the burglary. RP 185. Defendant admitted he was the person in the photograph. RP 435.

Ron Conlin, Regional Loss Prevention Manager for 7-Eleven, testified that he viewed a still picture taken from the security tape for a 7-Eleven store. RP 388-90. The picture was taken on September 5, 2003, at approximately 9:40 a.m. RP 388. Detective Busey identified the still picture as one of a series of photographs which document the use of the Evas' stolen credit card. RP 402.

Mr. Eva and his wife were cleaning up after the burglary when he found a piece of paper on their bedroom floor. 10/30/06 RP 14. On the paper was a list of various names, addresses, and dates. 10/30/06 RP 14, 15, 16. The Evas' name, address, and dates they would be gone from their

house on vacation were on the list. RP 14-16. At trial, Saldana-Williams identified this list as the one she had created for defendant. RP 291. She identified the handwriting as her own and testified she had given the list to defendant. RP 292, 294.

On September 5, 2003, Gig Harbor Detective Busey was assigned to follow up on the Eva burglary. RP 394. Mr. Eva advised Detective Busey that one of his stolen credit cards had been used shortly after the burglary. RP 396. The stolen credit card was used at a 7-Eleven store in Tacoma. RP 396. Detective Busey reviewed the 7-Eleven surveillance video from that transaction with the store clerk and then printed still photos from the surveillance video. RP 397-98. He also interviewed Catherine Milton, who was the person in possession of the Eva's van when it was recovered. RP 405. Based upon that interview and other information gathered in his investigation, Detective Busey obtained a search warrant for defendant's aunt's house. RP 405-06. Detective Busey searched the room where defendant kept his belongings and found a handwritten note with the words "Leisure Time" and "Misty at work." RP 409.

C. ARGUMENT.

1. DEFENDANT CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CANNOT ESTABLISH EITHER PRONG OF THE **STRICKLAND** TEST.

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 guilt.").

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).

- a. Defendant's drug use and association with people involved in the drug culture was part of defendant's defense and defense counsel was not deficient for failing to object to evidence regarding the same.

Defendant claims his trial counsel was deficient because he “failed to object to the introduction of evidence regarding the defendant’s alleged use of methamphetamine.” Brief of Appellant (BOA) at 28. However, when and whether to object are examples of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763. Only in egregious circumstances will a failure to object constitute incompetence of counsel. *Madison*, 53 Wn. App. at 763. Trial counsel’s actions in this case were not deficient.

In the present case there was strong circumstantial evidence that the defendant planned and participated in the burglaries: (1) Misty Saldana-Williams gave defendant a list of residences and vacation dates; (2) both the Evas and the Lykkens were on this list; (3), the list was found in the Evas’ bedroom after their house was burglarized; (4) defendant admitted to using the Evas’ stolen credit card at a 7-Eleven store within hours after the Eva burglary; (5) a pair of scissors with defendant’s DNA on them was found at that Lykken residence; (5) Mr. Eva’s gun, Toshiba laptop, and black leather jacket was found inside the Lykken car; and (6) defendant admitted to police that he knew many of the people who ended up with the proceeds of the Eva and Lykken burglaries. RP 290, 379, 380, 435 -36, 526; 10/30/06 RP 14-16, 45, 67, 70, 96, 113, 117-18. Defense

counsel argued that the fact that defendant used drugs and was a member of the drug culture put him in contact with these people and the proceeds of the burglaries they committed, but that defendant was not involved in the burglaries themselves.

Defense counsel elicited on cross examination of Saldana-Williams much of the testimony regarding defendant's drug use and the drug culture in which defendant was involved. RP 301-23. Defense counsel elicited testimony from Detective Busey that he had investigated crimes with links to drugs or drug trafficking. RP 457-58. He asked Detective Busey:

DEFENSE COUNSEL: And in that drug subculture people often trade things for drugs?

BUSEY: Correct.

DEFENSE COUNSEL: So sometimes they trade stolen items for drugs or drugs for stolen items?

BUSEY: Yes.

DEFENSE COUNSEL: And there's a lot of bartering that goes on in that culture?

BUSEY: I've never been involved in one of the transactions.

DEFENSE COUNSEL: But you've seen the transactions and you've investigated the transactions?

BUSEY: Right, yes.

DEFENSE COUNSEL: And sometimes people trade vehicles for drugs?

BUSEY: Yes.

DEFENSE COUNSEL: In fact, there's a term for that: A smoker special or smoker ride?

RP 458. Later, in closing, defense argued:

So What? You can't convict on the basis of [Mr. Kelly knowing some bad people]. People know bad people. He was in drugs. He was hanging out with people that did drugs. Yeah, there are bad people there. That doesn't mean he committed a crime. There's no evidence that he committed a crime. A pair of scissors left in a garage and a note that was left in a home.

RP 707. And, at the end of defense counsel's closing he further argued:

You have to find reasonable doubt in this matter. Is Mr. Kelly up to something? He was using drugs with these people, sure. He knew what was going on. He didn't know about this stuff. He didn't contribute to this stuff. He's not an accomplice. There's no indication that he was there to help people.

There was no indication that he committed any crimes. Weigh the evidence. Refer to your notes if you have to, look at the jury instructions, and come back not guilty on these counts. Thank you.

RP 708. It is clear that defense counsel's decision to elicit testimony regarding defendant's association with the drug culture and defendant's drug use was a legitimate trial tactic. Similarly, defense counsel's decision not to seek a limiting instruction or to object to testimony regarding defendant's drug was part of this same trial strategy.

Additionally, defendant's drug use and association with the drug culture was part of the res gestae of this case. Misty Saldana-Williams meets defendant in person for the first time at drug court on August 28, 2008. RP 304. This is also the same day defendant is released from the Pierce County Jail. RP 534, 555-56. On August 28th, Saldana-Williams and defendant run some errands together, get a hotel room, and shoot up methamphetamine. RP 305, 306, 336, 412, 413. This begins a two week methamphetamine binge for Saldana-Williams during which she provides defendant with a list of Gig Harbor residents who will be out of town over Labor Day weekend. RP 285, 289, 291. The Evas and the Lykkens were on that list. 10/30/06 RP 14-15. It is impossible to explain this case without evidence of the drug culture and drug use. Being a member of drug culture would necessarily be part of this case, defense counsel made a strategic decision to use that evidence to his best advantage in his defense. The fact that this strategy was unsuccessful is not evidence that trial counsel was deficient. *See State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737, *cert. denied*, 459 U.S. 842, 103 S. Ct. 94, 74 L. Ed. 2d 86 (1982).

- b. Defense counsel was not deficient because the court would not have sustained an objection to the prosecutor's cross examination of King.

In the present case, defendant claims his trial attorney was deficient for failing to object during the prosecutor's cross examination of one of defendant's alibi witnesses, Gerry King. BOA at 31. However, as noted above, in order for this court to find trial counsel deficient for failing to make an objection, defendant must show that the objection was meritorious and that the verdict would have been different had such an objection been made. This defendant cannot do that.

Defendant presented two alibi witnesses in his case in chief: Gerald King and Gregory Capelli. On direct, King testified that he met defendant in a bar seven or eight years ago and that they became friends. RP 552-53. Defendant lived with King for the past five or six years. RP 553-54. King, who is a licensed nurse practitioner, testified he took care of defendant after defendant was seriously injured several years ago. RP 550. Since then, King said he checks in on defendant several times during the night while defendant sleeps. RP 563-66.

King testified that defendant appeared at King's house on August 29, 2003, one day after defendant was released from the Pierce County Jail. RP 555-56. From August 29th to about the middle of September, 2003, defendant rarely left King's house except when defendant was running errands with King or visiting relatives. RP 558, 559. King

recalled he and defendant had drinks, played cards, and had dinner on August 29th. RP 556-57. Defendant, according to King, never missed a dinner after he came home on August 29th. RP 558. Defendant was home every night and, as King routinely checked on defendant during the night, defendant did not leave the house after he went to bed. RP 561-62, 563, 565-66.

The credibility of any witness may be attacked by impeachment. ER 607. Here, the prosecutor's questions on cross-examination were designed to impeach King's credibility by showing that King was biased in favor of defendant. *See* RP 567-591. In so doing, the prosecutor highlighted the portions of King's direct testimony that tended to show King's bias toward defendant: (1) that King has known defendant for seven or eight years; (2) that King allowed defendant to live rent free in King's residence for five to six years; (3) that King was very fond of defendant; and (4) that King's memory for dates and times that provided an alibi for defendant was quite sharp whereas King's memory for other details around the same time period was quite poor. RP 572-78. Additionally, the prosecutor's cross-examination elicited testimony from King that he had paid for two attorneys to represent defendant. King, therefore, had both a financial and a personal interest in the outcome of defendant's trial. RP 581-82. The prosecutor's cross-examination of King in no way cast aspersions on King's relationship with defendant. The

questioning was proper under ER 607 to shed light on King's credibility and potential bias.

Because the prosecutor's impeachment of King was appropriate under ER 607, an objection by defense counsel would not have been sustained. Defendant can show neither deficient performance nor prejudice. His claim of ineffective assistance of counsel is without merit.

c. Defense counsel was effective.

Defendant alleges his trial counsel was deficient for failing to object to the prosecutor's questions on redirect regarding the factors that impact whether a burglar would leave a fingerprint during a burglary. BOA at 30. The prosecutor's questions were in response to defendant's cross-examination of Officer Welch, who was the initial responder to the Eva burglary. Officer Welch testified that he responded to a suspicious person call and spoke with Jack Merritt, the Evas' neighbor. Merritt told Officer Welch that two individuals had stopped by his house the night before asking where the Evas' residence was located. RP 175. When Officer Welch went to the Evas' residence to investigate, he found the back window screen had been pried off, the Evas' exterior motion lights had been unscrewed, and the interior of the residence had been ransacked. RP 176-77.

On cross-examination, trial counsel repeatedly asked Officer Welch if he had dusted for prints in various locations. RP 188, 189, 192-93. Officer Welch testified that he had only attempted to lift prints off of

the point of entry and was unsuccessful. RP 188-89, 192. Trial counsel's repeated questions implied that Officer Welch was either unskilled in lifting fingerprints, or was lazy and made no further effort to lift fingerprints after his lack of success at the point of entry. RP 188-193.

On redirect, the prosecutor's questions regarding why prints may not be found at a crime scene were designed to explain to the jury (1) that not all burglars leave prints at a crime scene; (2) why Officer Welch chose not to dust for prints after not finding them at the most likely spot – the point of entry; and (3) that the person who committed this carefully planned and executed burglary most likely wore gloves. RP 193-194. Of the eight questions the prosecutor asked on redirect, only once did he ask if the skill or experience of the burglar would influence what protective or precautions the burglar would take. RP 193.

Assuming, *arguendo*, that this court were to find that the prosecutor's questions on redirect were objectionable, the decision of when and whether to object, as argued above, is tactical. Defense counsel could easily have believed that it would be counterproductive to object to the prosecutor's one question about a skilled or experienced burglar because the defense theory was that defendant did not commit these burglaries. Therefore, the relative skill or experience of the burglar was immaterial to defendant. To have objected could only have created a question in the jurors' mind as to why defendant cared whether the Eva burglar was skilled or experienced. Trial counsel was not deficient for not

failing to object to the State's questions regarding the lack of fingerprints at a crime scene.

2. THE PROSECUTOR'S CONDUCT AND ARGUMENTS WERE PROPER WHEN HE IMPEACHED KING UNDER ER 607 AND MADE CLOSING ARGUMENTS USING REASONABLE INFERENCES BASED UPON EVIDENCE PRESENTED AT TRIAL.

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.*

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the

prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85; *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: 1) the seriousness of the irregularity; 2) whether the statement was cumulative of evidence properly admitted; and 3) whether the irregularity could have been cured by an instruction. *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See *State v. McNallie*, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993). It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. See *State v. Rivers*, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to

the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. *State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). As an advocate, the prosecuting attorney is entitled to make a fair response to the argument of defense counsel. *State v. Brown*, 132 Wn.2d 529, 567; quoting *State v. Russell*, 125 Wn.2d 24, 87.

- a. Prosecutor's cross examination of King was proper under ER 607.

As noted in section 1(b) above, ER 607 allows either party to impeach the credibility of a witness. In the present case, defendant offered Gerald King as an alibi witness. RP 550-93. On direct, King testified that defendant was in the Pierce County Jail until August 28, 2003. RP 555-56. King also testified that defendant showed up at King's house early on August 29, 2003, one day after his release from jail and stayed there until September 18th or 19th. RP 556, 587. Defense counsel asked King a series of questions regarding defendant's potential criminal behavior and drug use from August 29, 2003 through mid September 2003. RP 566.

DEFENSE COUNSEL: And did you see anything that you though indicated criminal behavior [in defendant]?

KING: No.

DEFENSE COUNSEL: I don't mean to be condescending, but did you ever see anything criminal, drug related, anything like that?

KING: I was beginning to wonder about the drug thing, but I saw no signs of criminal activity.

RP 566. On cross-examination, the prosecutor asked King

PROSECUTOR: You testified that there was nothing that gave you any reason to suspect that Mr. Kelly was involved in criminal behavior?

KING: Nothing.

PROSECUTOR: Did the fact that he was staying at the jail give you any idea that he might be involved in criminal behavior?

DEFENSE: Objection, Your Honor.

COURT: Overruled if you can answer that.

KING: Now, wait a minute. You're asking me about two different things. Of course I knew why he was in jail.

DEFENSE COUNSEL: It's a 404 issue, Your Honor.

COURT: Overruled. The question again, Mr. Leech, was?

PROSECUTOR: Whether the stay at the Pierce County Jail gave Mr. King information to believe that Mr. Kelly was involved in criminal behavior.

COURT: If you can answer that, Mr. King.

DEFENSE COUNSEL: That's speculation, Your Honor.

COURT: Don't speculate, if you can answer.

DEFENSE COUNSEL: He's innocent until proved guilty.

COURT: Why don't we listen carefully to the question and then answer the question carefully? So your question again, Mr. Leech?

PROSECUTOR: Did the fact that Mr. Kelly was in the jail give you any idea that he may be involved in criminal behavior?

KING: I didn't think he was there for jaywalking.

PROSECUTOR: So when you said earlier that you had no reason to believe he was involved in a criminal behavior, that was not accurate?

KING: Which time are we talking about, Mr. Leech?

PROSECUTOR: You made a statement during direct examination that you had no reason to believe Mr. Kelly was involved in crimes?

KING: At what time?

RP 585-86.

The State properly impeached King's credibility by highlighting the inconsistency in King's knowledge that defendant was recently incarcerated with his assertion that he saw no signs of criminal activity in defendant. ER 607.

Defendant's attempts to characterize the prosecutor's questioning of King as improper under either ER 609 or ER 404(b) are without merit. First, the objection at trial to the prosecutor's question was on ER 404(b) grounds, therefore, any issue under ER 609 is waived. *See State v. Branch*, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996) (a party's failure to raise an issue at the trial level waives his right to challenge the issue on appeal), citing *State v. Young*, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991). Second, ER 404(b) prohibits the use of evidence of other crimes,

wrongs, or acts to show propensity or character. However, the prosecutor did not offer this evidence for that purpose, instead, as argued above, he successfully impeached King's credibility under ER 607.

Even if the court were to find the prosecutor's question improper, the court will not reverse defendant's conviction unless there is a substantial likelihood the misconduct affected the jury verdict. *See State v. Mak*, at 726. Here, the jury was already aware defendant was incarcerated through August 28, 2003, because a stipulation to that effect was read to the jury before the end of the State's case. CP 199-200. Additionally, this was information defense brought out on its direct examination of King. There is no likelihood that the prosecutor's comments affected the jury's verdict. Defendant's argument of prosecutorial misconduct must fail.

b. The prosecutor's closing argument was proper.

The defendant asserts the prosecutor committed misconduct in his closing argument when he argued that the suspected blood in the Lykken's stolen Saturn was defendant's because there was evidence that defendant had cut himself on the Lykken's scissors during the burglary. BOA at 34. A prosecutor has wide latitude to argue reasonable inferences based upon the evidence presented at trial. *See State v. Hoffman*, 116 Wn.2d 51, 94-95. In the present case, there was evidence that the Lykkens' scissors were broken during the burglary and there was blood on the scissors.

10/30/06 RP 97-99. The blood on the Lykkens' scissors was identified as defendant's through DNA testing. RP 526. At trial, several witnesses testified that, after the Saturn was recovered, they observed a substance on the visor that appeared to be blood. RP 10/30/06 RP 45, 113. The prosecutor's argument that defendant, whose blood was found on the Lykken's scissors, had also left blood in the Lykken's Saturn was a reasonable inference based upon the evidence presented at trial. RP 641, 643.

Contrary to defendant's assertion, the Prosecutor did not misstate the evidence presented at trial. Instead, he correctly stated that several witnesses believed the substance on the visor was blood. RP 640-41, 643. It was reasonable to infer that because defendant had left blood at the scene of the Lykken burglary, he could also have left blood inside a vehicle stolen during the Lykken burglary.

While trial counsel objected to the first reference to suspected blood in the Lykken vehicle (RP 641) he failed to object to the second reference (RP 643). Because he failed to object to the second reference, defendant must show that the alleged misconduct was so flagrant or ill intentioned that an instruction would have not have cured the prejudice. *Binkin*, 79 Wn. App at 293-94. No curative instruction was requested, which creates a strong inference that trial counsel did not perceive any prejudice from the prosecutor's statements. Defendant cannot show the

statements were improper let alone flagrant or ill intentioned. Even if improper, an instruction would have cured any prejudice.

The defendant also argues the Prosecutor's argument invited urged the jury to convict based upon passion and improper appeals to emotions. BOA at 35.

In support of his argument, defendant relies upon *State v. Russell*, 125 Wn.2d 24, 89, 882 P.2d 747 (1994) and *State v. Belgrade*, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988). In *Russell*, the defendant convicted of multiple counts of murder. 125 Wn.2d 24, 30. On appeal, Russell alleged the prosecutor committed misconduct when she argued in closing that the jury should let defendant go if they had reasonable doubt. "There is no shortage of naieve [sic], trusting, foolish young people in the cities of this country. He will settle in. He will begin looking for work. You could say he will be hunting for a job and he will find it. If you have a reasonable doubt that he's the killer, let him go." *Russell*, at 89. The court found these comments egregious, but not sufficiently flagrant under the facts of the case to warrant a new trial. *Id.*

One factor the court looked at in reaching is decision was that the defendant used the challenged argument in his closing argument. *Id.* While Russell used the statement to show how the State was attempting to identify him as a serial killer, the count found "the incorporation of this statement into the defense argument weakens the contention that it denied Russell a fair trial." *Id.*

In the State's closing argument, the prosecutor in *Belgrade* compared defendant's affiliation with AIM (American Indian Movement) to Sean Finn of the Irish Republican Army and Kadafi. 110 Wn.2d 504, 506. Additionally, the prosecutor's argument invited the jury to discuss Wounded Knee. The *Belgrade* court found these statements so flagrant and ill intentioned that no instruction could have erased the prejudice. *Id.* at 507.

Here, in closing argument, the prosecutor described the various counts and the jury instructions pertaining to those counts, including the deadly weapon enhancement and firearm special verdict form. RP 643-656. In describing the deadly weapon enhancement, he stated:

“Now, ask yourselves: What does that mean? What does it mean to be armed with a deadly weapon? It means – imagine this scenario, for example; what if the homeowner came home in the middle of this burglary and walked in on Mr. Kelly holding the semi-automatic firearm. He can use that gun for offensive or defensive purposes. He can either allow himself to flee or to control, threaten, take out, whoever is interfering with the burglary. So clearly, under the context of this he's armed with a deadly weapon.”

RP 647. Trial counsel made no objection to this argument. RP 647.

However, later when the prosecutor was explaining the firearm special verdict form, a similar argument raised an objection from trial counsel.

RP 653-55.

PROSECUTOR: Now, there are a couple of different things that you have to understand to find a special verdict that's above and beyond what occurs in the other elements

of the other crimes. I have to show that there's a connection between the firearm and the defendant or an accomplice. Clearly, there is a connection that he or an accomplice possessed the firearm as they were stealing them from the residence. I have to show that there's a connection between the firearm and the crime.

Well, obviously there's a connection between the gun and the crime because the gun is one of the things that is stolen during the crime.

And then, finally, the instruction says, and this is for the special verdict only: A person is armed with a firearm if at the time of the commission of the crime the firearm is easily accessible and readily available for offensive or defense purposes. Again, if Mr. Eva came home at one in the morning and caught Mr. Kelly in the process of burglarizing his house and Mr. Kelly had that gun in his hand –

DEFENSE COUNSEL: Objection, Your Honor; now we're talking about robbery, and it just seems –

COURT: Well, overruled. We have to wind it up here, please, Mr. Leech.

PROSECUTOR: I'll be done in a minute. If Mr. Eva had walked in on this burglary Mr. Kelly would have had his firearm in his hand, and we can all imagine what could have happened in that context, which is why special verdicts like this exists.

So in short, ladies and gentlemen, you've seen lots of pictures. You've seen pictures of the Eva burglary. You saw their house ransacked. You've seen pictures of the Lykken burglary....

RP 654-55.

Like *Russell*, the State's comments do not warrant a new trial. The prosecutor was not attempting to inflame the passions and prejudices of the jury. Rather, he was attempting to explain the distinctions between first degree burglary with a deadly weapon enhancement and a firearm

special verdict form. The prosecutor's argument was proper. Alternatively, any prejudice that was caused by the prosecutor's arguments was mitigated when, like *Russell*, defense counsel used the statements in his own closing argument. RP 703.

3. THE TRIAL COURT PROPERLY GRANTED STATE'S MOTION TO AMEND THE INFORMATION PRIOR TO THE CLOSE OF THE STATE'S CASE WHEN THE AMENDMENT DID NOT IMPACT DEFENDANT'S ALIBI DEFENSE.

A trial court's ruling on a motion to amend an information is reviewed for abuse of discretion. *State v. James*, 108 Wn.2d 483, 490, 739 P.2d 699 (1987). Under the criminal court rules, a trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). The defendant bears the burden of showing prejudice. *State v. Gutierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998). When a defendant does not request a continuance, it suggests there is no prejudice. See *State v. Murbach*, 68 Wn. App. 509, 512, 843 P.2d 551 (1993) (absence of request for a continuance indicated amendment to information was not prejudicial); *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989) (failure to request continuance waived objection to amended information), *review denied*, 114 Wn.2d 1010, 790 P.2d 167; *State v. Brown*, 55 Wn. App. 738, 743, 780 P.2d 880 (1989) ("[T]he fact that the

defendant does not request a continuance is persuasive of lack of surprise and prejudice.”), *review denied*, 114 Wn.2d 1014, 791 P.2d 897 (1990).

In the present case, the State filed (1) an original information on March 9, 2005; (2) a corrected information on April 4, 2006; (3) an amended information on June 7, 2006; and (4) a second amended information on November 6, 2006. CP1-7, 26-37, 86-92, 195-98. None of the amended informations occurred on the day of trial as alleged by defendant. BOA at 37-38.

In the State’s original information filed on March 9, 2005, the State charged defendant with nine separate counts. CP 1-7. Counts I, II, III, IV, and XIII related to the Eva burglary and were alleged to have occurred on or about September 5, 2003. CP 1-7. Counts V, VI, VI, and VIII related to the Lykken burglary and were alleged to have occurred on or about August 27, 2003. CP 1-7. On April 4, 2006, the state filed a corrected information as to defendant’s true name and date of birth. CP 195-98.

On June 7, 2006, the State filed an amended information which, with respect to the Eva burglary, changed the charging date on count III to a range of time between September 5, 2003 – September 11, 2003; and changed the charging date on count VI to a range of time between September 5, 2003 – September 6, 2003. CP 24-36. With respect to the

Lykken burglary, the second amended information changed the charging date on count V, to a range of time from August 28, 2003 – September 5, 2003; and changed the charging dates on counts VII and VIII to a range of time from August 28, 2003 – September 4, 2003. *Id.* The State also added three additional counts relating to the Lykken burglary (counts XIV, XV, and XVI) each of which had a charging date consisting of a range of time between August 28, 2003 – September 5, 2003. *Id.*

On October 26, 2006, at the beginning of defendant's trial, the State orally moved to dismiss without prejudice counts III and VI. RP 129. The court granted the State's motion. RP 130. At the end of the State's case, on November 6, 2006, the State filed a second amended information, which omitted counts III and VI that had been dismissed on October 26th and changed the charging dates on counts V, XIV, XV, and XVI from 8/28/06 – 9/4/06. CP 26-34, 86-92. As a result, all counts relating to the Eva burglary had a charging date of September 5, 2003, and all counts relating to the Lykken burglary had a charging date consisting of a range of time from August 28, 2003 – September 4, 2003.

On appeal, defendant's sole challenge to the second amended information is that he was prejudiced because "the untimely amendment of the date of the alleged crime undermined the defendant's alibi defense." BOA at 37. Defendant asserts that the court abused its discretion by

allowing the State to amend the information on the day of trial. *Id.* at 37-38. Defendant's argument fails because the amended information that changed the charging date on the counts alleged to have occurred on or about August 27, 2003, (the date defendant was incarcerated in the Pierce County Jail) to a range of time beginning on August 28, 2003, was filed more than four months before the start of defendant's trial. CP 24-36.

Neither was defendant prejudiced by the November 6, 2006, filing of the second amended information. He did not move for a continuance when the State filed its second amended information and the failure to request a continuance is evidence that defendant did not believe he was prejudiced by the filing of the second amended information. In fact, at trial, defendant's only objection to the November 6, 2003, second amended information was that the State did not restrict the charging period enough. RP 544-45.

COURT: Well, [defense counsel] is there any objection to the filing of the second amended information?

DEFENSE: Well, except that I think the testimony that the Lykken burglary was discovered on September 3rd, and that's when Officer Myron or Welch ... testified that he was contacted by utilities employees who were concerned about a missing power meter and that when he showed up, he went through the house and saw what appeared to be evidence of a burglary, a broken window, a back door ajar, scissors that apparently were used to disable an alarm box...and he was absolutely adamant that that was on September 3rd.

COURT: I understood [the prosecutor's] amendment to narrow it excluding the 5th. My understanding is that's the only difference in that count.

DEFENSE: That's right. And my point is that the 4th should be excluded too, since the burglary was discovered apparently on the 3rd.

COURT: Well, the State has moved to narrow it from the 5th down to the 4th. You think it should be down to the 3rd, but isn't the 4th narrower than the 5th? Isn't that somewhat beneficial to the defense?

DEFENSE: Sure it is, Your Honor, but the facts are simply that the burglary happened on the 3rd. I think that narrowing it to the 4th is beneficial, but it's still not entirely accurate here. It needs to be narrowed to the 3rd.

RP 545-46.

Defendant's alibi defense was that he was in the Pierce County Jail until August 28, 2003, and under King's watchful eye from August 29th until the middle of September. The State's second amended information only changed the charging period to exclude September 5, 2003, which did not impact defendant's alibi defense. Defendant's claim that the court abused its discretion is without merit because he cannot show he was prejudiced by the filing of the second amended information.

4. DEFENDANT CANNOT CHALLENGE BUSEY'S TESTIMONY THAT DEFENDANT USED THE EVAS' CREDIT CARD SHORTLY AFTER THE BURGLARY BECAUSE HE FAILED TO MAKE A TIMELY, SPECIFIC 404(b) OBJECTION.

An appellate court should only review an assigned error on the specific grounds that the evidentiary objection was made below. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). The purpose of the timely objection rule is “to apprise the trial court of the claimed error at a time when the court has the opportunity to correct the error.” *State v. Moen*, 129 Wn.2d 536, 547, 919 P.2d 69 (1996). An objection on a different ground than that raised on appeal will not give the court an opportunity to address the alleged error. *See Guloy*, 104 Wn.2d at 422 (holding that defense counsel’s objection that testimony “was not proper impeachment nor was it within the scope of redirect” was not sufficient to preserve a hearsay claim on appeal).

In the present case, defendant failed to make a timely, specific objection to the prosecutor’s questions regarding defendant’s use of the Eva’s credit card at the 7-Eleven store. RP 434-37. Therefore, this issue has not be preserved for appeal.

However, if this court reaches the merits of the issue, defendant’s argument still fails because while evidence of other crimes, wrongs, or acts are generally inadmissible under ER 404(b), they can be admissible

for other purposes. Evidence of misconduct may be admissible as circumstantial evidence of the crime charged. See *State v. Cartwright*, 76 Wn.2d 259, 456 P.2d 340 (1969).

Gig Harbor Police Detective Kelly Busey testified that he received the Eva burglary case for follow up on September 6, 2003. RP 392, 394-95. During the course of that investigation, Mr. Eva advised Detective Busey that a credit card stolen during the burglary had been used at a 7-Eleven store in Tacoma. RP 396. Detective Busey contacted the store clerk and obtained the records of the transaction. RP 396-97.

Ron Conlin, regional loss prevention manager for 7-Eleven, Inc., testified that the still photograph in Plaintiff's Exhibit #28 was taken from a surveillance video in a 7-Eleven store. RP 383, 387-88. The photograph, which is date and time stamped as September 5, 2003, at 9:40 a.m., was taken within hours of the Evas' burglary. RP 387-88.

Defendant admitted to Detective Busey during an interview that he had used the Evas' credit card at the 7-Eleven store. RP 434, 436-37. Detective Busey showed defendant photos from the 7-Eleven surveillance video in which defendant uses the Evas' stolen credit card. RP 435. Defendant admitted he was the person in the photo. RP 435.

5. THE TRIAL COURT PROPERLY DENIED
DEFENDANT'S REQUEST FOR A MISSING
WITNESS INSTRUCTION.

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' absence can be satisfactorily explained. *Blair*, 117 Wn.2d at 489.

WPIC 5.20 states:

If a party does not produce the testimony of a witness who is [within the control of] [or] [peculiarly available to] that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

For a witness to be particularly available to a party,

there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness as in ordinary experience would have made it reasonable that the witness would have been called to testify for such a party except for the fact that his testimony would have been damaging.

State v. McGhee, 57 Wn. App 457, 463, 788 P.2d 603 (1990), citing *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968).

In *McGhee*, the defendant appealed his conviction for first degree robbery and first degree felony murder, in part, because the court denied his request for a “missing witness” instruction when the State failed to call McGhee’s co-defendant, Wick, as a witness at McGhee’s trial. *McGhee*, 57 Wn. App. 457, 458. Apparently prior to McGhee’s trial, Wick, had reached a plea agreement with the State and was otherwise available to testify. *See McGhee*, 57 Wn. App. 457. The court noted that the fact that the State had accepted Wick’s plea and had imprisoned him did not make Wick particularly available to the State. *Id.* at 463-64. “When both the defendant and the State have connections with the witness, the trial court is entitled to consider defendant’s failure to compel the witness’s testimony in determining whether the “missing witness” instruction should be given. *Id.* at 464.

Defendant asserts, without any authority, that Deborah Roberts was peculiarly available to the State because she had contacted police immediately after the Lykken burglary to report having heard a burglar alarm on the morning of August 28, 2003. BOA at 40. However, Deborah Roberts was equally available to the defense as to the State. Defendant had been given Deborah Robert’s name and contact

information at the beginning of the trial. Despite having this information, defense counsel did not talk to Ms. Roberts to determine what she recalled from August 2003, nor did he secure her testimony at trial. RP 615-17. There is nothing in the record that would support defendant's argument that Ms. Roberts was peculiarly available to the State.

The court properly denied defendant's request for a missing witness instruction.

6. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE FOR CRIMES COMMITTED IN 2003 BASED ON 2006 SENTENCING GUIDELINES.

A court can impose an exceptional sentence outside the standard range when there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Here, the court found substantial and compelling reasons to justify an exceptional sentence outside the standard range because the defendant's offender score would otherwise result in *some of his crimes going unpunished*. CP 180-82. (emphasis added). In doing so, the court sentenced defendant under the 2006 sentencing guidelines for crimes committed in 2003.

Because an offender must be sentenced pursuant to the law in effect at the time his offense was committed, the State concedes error. This court should vacate defendant's sentence and remand for

resentencing under RCW 9.94A.737 and RCW 9.94A.535. On remand, the State should be allowed to seek an exceptional sentence under the appropriate statutory authority.

7. DID THE STATE PRODUCE SUFFICIENT EVIDENCE THAT THE DEFENDANT COMMITTED BOTH THE EVA AND LYKKEN BURGLARIES AND THE RESPECTIVE CRIMES THAT FLOWED FROM THOSE BURGLARIES?

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact regarding a witness’ credibility or conflicting testimony.

Defendant alleges that there is insufficient evidence to convict defendant on the two counts of first degree burglary and, therefore, all charges must be dismissed because they flow from the two crimes. BOA at 37-45. However, the State produced sufficient evidence that defendant committed both the Lykken and the Eva burglary, when the evidence

viewed in the light most favorable to the state with all reasonable inference drawn therefrom.

To prove first degree burglary, the State must prove defendant entered or remained unlawfully in a building with the intent to commit a crime against person or property and that while in the building or in immediate flight from the building defendant, or an accomplice was armed with a deadly weapon.

As argued in section 1(a), the State produced substantial circumstantial evidence that defendant had committed both the Eva and the Lykken burglaries and all the crimes that flow from those burglaries. When the evidence is looked at in the light most favorable to the State, a reasonable jury could find the essential elements of the crimes beyond a reasonable doubt.

The State produced evidence that defendant asked Saldana-Williams to use her work computer to get him a list of people from Gig Harbor, their addresses, and the dates they were on vacation. Saldana-Williams testified she made such a list for defendant and gave it to him. Both the Lykkens and the Evas were on that list. The Lykkens were burglarized between August 28, 2003 and September 4, 2003. A pair of the Lykken's scissors were used to disable their audible alarm system. The scissors had blood on them. DNA testing revealed the blood was

defendant's. The Lykkens had two vehicles stolen. One of these vehicles had a substance that appeared to be blood on the visor and steering column. A rifle and a shotgun were stolen during the Lykken burglary. Shells for those guns were also stolen during the burglary. Mr. Lykken testified the guns were operable.

On September 5, 2003, the Evas' residence was burglarized by Kevin Spaulding and an accomplice. Spaulding is a friend of both Saldana-Williams and defendant. Mr. Eva's pistol was stolen during the burglary. It was operable and loaded with a full clip at the time it was stolen. Some of the items stolen during the burglary were credit cards, financial documents, a Toshiba Laptop, and a leather jacket. Inside the Evas bedroom was the list Saldana-Williams made for defendant with both the Eva's and the Lykken's information on the list.

When the Lykken's Saturn was recovered, inside the vehicle was Mr. Eva's jacket and Toshiba computer. Hidden in a panel underneath the dash of the Lykken's Saturn was Mr. Eva's stolen pistol.

Given the strong circumstantial evidence, the State produced sufficient evidence that a reasonable jury could find defendant committed both first degree burglaries and all the crimes that flowed from those burglaries beyond a reasonable doubt.

Defendant's challenge to the sufficiency of the evidence must fail.

8. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v.*

Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence

can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), *review denied*, 78 Wn.2d 992 (1970), (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), *review denied*, 112 Wn.2d 1008 (1989) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979), *review denied*, 92 Wn.2d 1002 (1979), (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant

because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.*

In the present case, as argued above, there was no error. Because there was no error, defendant's argument that he is entitled to a new trial based upon cumulative error must fail.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that this court affirm defendant's convictions below. This court should vacate defendant's sentence and remand for resentencing under the appropriate statutes.

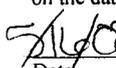
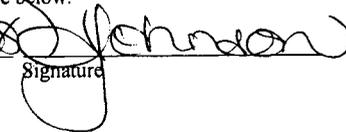
DATED: MAY 16, 2008

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 c/o 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.

 
Date Signature