

NO. 36172-8

FILED
COURT OF APPEALS
DIVISION II

09/13/22 PM 2:51

3/20/2019

BY

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

STATE OF WASHINGTON, RESPONDENT

v.

FAWN RAE BERGH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 06-1-03298-7

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Has defendant failed to preserve a challenge to the admission of Robert Bergh's statement when defendant did not make a timely, specific objection to the admission of that evidence? Alternatively, did the trial court properly admit Robert Bergh's statement under the *res gestae* exception when the statement sets the stage to the criminal charge? 1

 2. Was trial counsel effective when defendant cannot satisfy either prong of the *Strickland* test?..... 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 3

C. ARGUMENT..... 8

 1. DEFENDANT DID NOT MAKE A TIMELY, SPECIFIC OBJECTION TO THE ADMISSION OF ROBERT BERGH'S STATEMENT AND THEREFORE MAY NOT CHALLENGE THE COURT'S RULING FOR THE FIRST TIME ON APPEAL. ALTERNATIVELY, THE TRIAL COURT PROPERLY ADMITTED ROBERT BERGH'S STATEMENTS UNDER THE *RES GESTAE* EXCEPTION..... 8

 2. TRIAL COUNSEL WAS EFFECTIVE AND DEFENDANT CANNOT SATISFY EITHER PRONG OF THE *STRICKLAND* TEST. 16

D. CONCLUSION..... 22

Table of Authorities

State Cases

<i>State v. Bebb</i> , 44 Wn. App. 803, 723 P.2d 512 (1986), <i>aff'd</i> 108 Wn.2d 515, 740 P.2d 829 (1987).....	12
<i>State v. Boast</i> , 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).....	9, 11, 12
<i>State v. Bockman</i> , 37 Wn. App. 474, 682 P.2d 925, <i>review denied</i> , 102 Wn.2d 1002 (1984).....	13
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).....	19
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	19
<i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).....	9
<i>State v. Dent</i> , 123 Wn.2d 467, 484, 869 P.2d 392 (1994).....	21
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	8, 9, 11, 12
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77, 917 P.2d 563 (1996)	17, 18
<i>State v. Hoffman</i> , 116 Wn.2d 51, 74, 804 P.2d 577 (1991)	21
<i>State v. Howland</i> , 66 Wn. App. 586, 594, 832 P.2d 1339 (1992).....	17
<i>State v. Huddleston</i> , 80 Wn. App. 916, 912 P.2d 1068 (1996).....	18
<i>State v. Jordan</i> , 79 Wn.2d 480, 487 P.2d 617 (1971).....	13
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	14, 15
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662 (1989)	18
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)	17, 18
<i>State v. Moore</i> , 35 Wn.2d 106, 113, 211 P.2d 172 (1949).....	11
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, 834 P.2d 651 (1992).....	8, 9

<i>State v. Schaffer</i> , 63 Wn. App. 761, 822 P.2d 292 (1991), <i>affirmed</i> , 120 Wn.2d 616 (1993).....	15
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 790 P.2d 610 (1990)	8
<i>State v. Tharp</i> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981)	9
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	17
<i>State v. Thompson</i> , 47 Wn. App. 1, 733 P.2d 584, <i>review denied</i> , 108 Wn.2d 1014 (1987).....	13, 14
<i>White v. Fenner</i> , 16 Wn.2d 226, 246, 133 P.3d 270 (1943).....	10

Federal and Other Jurisdictions

<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).....	17, 19
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	1, 16, 17, 18, 22
<i>United States v. Cronin</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	16
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9th Cir. 1991)	19

Constitutional Provisions

Sixth Amendment, United States Constitution.....	16, 17
--	--------

Rules and Regulations

CrR 3.5.....	2, 3, 10
CrR 4.4(c)(2)	20, 21
ER 103	8, 11
ER 401	2, 10, 11, 12
ER 404(a).....	2, 10, 11, 12

Other Authorities

E. Clearly, *McCormick on Evidence*, §190 at 448 (2d ed. 1972).....13

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

1. Has defendant failed to preserve a challenge to the admission of Robert Bergh's statement when defendant did not make a timely, specific objection to the admission of that evidence? Alternatively, did the trial court properly admit Robert Bergh's statement under the res gestae exception when the statement sets the stage to the criminal charge?
2. Was trial counsel effective when defendant cannot satisfy either prong of the *Strickland* test?

B. STATEMENT OF THE CASE.

1. Procedure

On July 18, 2006, the State charged Fawn Rae Bergh, hereinafter "defendant," with third degree assault. CP 1. Defendant's father, Robert Bergh¹, was charged as a co-defendant with third degree assault and third degree theft under cause number 06-1-03299-5. RP 4, 8. On November 15, 2006, the State filed an amended information charging defendant with bail jumping in addition to the previously charged third degree assault. CP 2-3. On February 13, 2007, the State filed a second amended

¹ Co-defendant Robert Bergh is referred to by his first name throughout this brief avoid any confusion with defendant, Fawn Bergh. The State intends no disrespect by referring to Robert Bergh by his first name.

information removing the one count of bail jumping, but retaining the original count of third degree assault. CP 4; RP 4-5².

On February 13, 2007, defendant and Robert Bergh appeared before the Honorable John R. Hickman for a joint trial. RP 4. A Criminal Rule (CrR) 3.5 motion was held on February 13th. RP 10. The court found all of defendant's and Robert's statements admissible. RP 45-46. Robert Bergh made a motion in limine to exclude his statement "fucking Indian" pursuant to Evidence Rule (ER) 401 and ER 404(a). RP 41. The trial court denied the motion and found the statement was res gestae and set the stage for the incident that followed. RP 44-45. Findings of fact and Conclusions of Law on the CrR 3.5 hearing were filed on March 23, 2007. CP 43-46.

The jury found defendant guilty of third degree assault on February 22, 2007. CP 42; RP 523, 525-27. Robert was found not guilty of third degree assault, but guilty of third degree theft. RP 523-25. A sentencing hearing was held on March 23, 2007. RP 3-14. The court sentenced defendant as a first time offender to two days in jail with standard costs and fines. SRP 13. Robert was sentenced to 365 days in jail with 364 days suspended and standard costs and fines. SRP 8.

² The verbatim record of proceedings consists of six consecutively paginated volumes that shall be referred to as RP (PAGE #); the verbatim record of proceedings for the sentencing hearing shall be referred to as SRP (PAGE #).

Defendant filed a timely notice appeal on March 23, 2007. RP 60-61.

2. Facts

a. Facts adduced at CrR 3.5 hearing.

Deputy Carpenter testified that he was working on July 16, 2006, when he came in contact with Robert Bergh at Lake Tapps Park. RP 11-13. Deputy Carpenter told Robert that he needed to be out of the park by 8:00 p.m. RP 13. Robert laughed and told Deputy Carpenter he must be new because Deputy Carpenter didn't know who Robert was. RP 13. Robert told Deputy Carpenter he had a contract with the county to rent Seadoos at that park. RP 13. When Deputy Carpenter again told Robert he needed to be out of the park by 8:00 p.m., Robert replied something to the effect of "Well, I'll be out of the park just as soon as those fucking Indians get their Seadoos out of here and I can get mine loaded up." RP 14.

As Deputy Carpenter walked away, defendant ran up to her father, Robert, and told him that she had rented an inner tube to someone earlier in the day and it had not been returned. RP 15. Defendant then told Robert that the rope for the inner tube was tied onto one of the Seadoos that was being loaded onto the Yukon Denali. RP 15.

Robert told Deputy Carpenter that he had rented an inner tube to a 14 year old boy named Billy, who had not returned the inner tube. RP 16. There was no contract because the rental was for \$20.00 under the table. RP 16. Robert told Deputy Carpenter that he wanted someone arrested for the inner tube. RP 16.

Deputy Carpenter explained that it was a civil matter in which he could not get involved. RP 17. Deputy Carpenter advised Robert to talk to the people and try to work something out. RP 17. Robert demanded Deputy Carpenter get another deputy to come to the park, but Deputy Carpenter declined to do so. RP 17. Robert demanded Deputy Carpenter's supervisor's information, which Deputy Carpenter provided. RP 17. Robert stormed away. RP 17. Robert then went over to the Yukon Denali and began arguing with the driver of the Denali. RP 17. Deputy Carpenter observed Robert reach into the Denali and remove the truck keys. RP 18. The driver of the Denali, shouted over to Deputy Carpenter "Hey, Officer, that man just stole my ignition keys." RP 18.

Deputy Carpenter told Robert to stop or he would be arrested. RP 19. Robert turned to Deputy Carpenter and said, "What for? What are you going to arrest me for?" RP 19. Deputy Carpenter repeatedly warned Robert that he would be arrested for theft if he did not return the keys. RP 20. Deputy Carpenter sprayed Robert with pepper spray. RP 20. Robert

then took a swing at Deputy Carpenter. RP 20. At that time, defendant came up to Deputy Carpenter on his right side and punched him in the face. RP 20.

Deputy Carpenter placed both defendant and Robert Bergh under arrest and advised them of their *Miranda* rights. RP 21. Defendant told Deputy Carpenter she did not know what she was thinking when she assaulted him. RP 23.

b. Facts adduced at trial.

On July 16, 2006, Deputy Robert Carpenter was patrolling the Lake Tapps Park area. RP 195-96. One of his duties when patrolling Lake Tapps is to ensure that people leave the park by closing time, which is 8:00 p.m. RP 196. Deputy Carpenter contacted Robert Bergh because Robert was still in the park at closing time. RP 198, 232, 233.

When Deputy Carpenter told Robert that the park was closed and Robert needed to leave, Robert replied in a tone that was both sarcastic and jovial that Deputy Carpenter must be new because he did not know who Robert was. RP 198, 199, 232, 233. Robert told Deputy Carpenter that he had a contract with the county to rent Seadoos for people to use on the lake. RP 199. Robert then pointed out some people on the boat launch in a Yukon Denali truck who were loading their boats out of the water. RP 202. He told Deputy Carpenter "I'll get my boats out of the water just

as soon as those fucking Indians get their boats out.” RP 201. Robert continued to make racially disparaging comments about the people in the Denali and complained to the officer that those individuals had wrongly set up a competing business. RP 202. Deputy Carpenter reiterated to Robert that he needed to get his boats together and leave the park. RP 202, 244.

Deputy Carpenter had almost returned to his patrol car when defendant ran up and complained that earlier in the day she had rented a rope and inner tube to someone, who had not returned them. RP 203, 245. The inner tube was now missing and the rope was tied to the back of a Seadoo belonging to the individuals who were loading up the Denali. RP 203, 245.

Robert became furious and wanted Deputy Carpenter to do something about the situation, but the transaction was “under the table” and Robert had no documentation to show he had rented the inner tube and rope to anyone. RP 204, 205, 246, 250. When Deputy Carpenter explained that it was a civil matter and he could not arrest the people in the Denali, Robert directed his anger toward Deputy Carpenter. RP 205-06, 248, 276, 277. Robert called Deputy Carpenter a “useless fucker” and a “useless cop.” RP 206. He demanded that Deputy Carpenter call another deputy out to the scene. RP 206, 207. Deputy Carpenter again told Robert that it was a civil matter. RP 206. He told Robert that no other deputy would be called to the scene and that Robert could have his

supervisor's name and number if he wanted them. RP 206. Deputy Carpenter told Robert that he still needed to be out of the park. RP 205-06.

Instead of leaving the park as Deputy Carpenter had repeatedly directed, Robert stormed over to the Yukon Denali. RP 211. Deputy Carpenter could hear words being exchanged between Robert and the individual inside the Denali. RP 211. Then Robert reached in the Denali and grabbed the keys from the ignition. RP 211. The individual in the Denali told Deputy Carpenter that Robert had taken his keys. RP 211.

Deputy Carpenter ordered Robert to stop, but Robert did not stop. RP 211-12. Deputy Carpenter threatened to arrest Robert, who then stopped and squared off. RP 212-12, 253. Robert's demeanor was hostile and aggressive. RP 213. Deputy Carpenter repeatedly warned Robert that if he did not return the keys, Robert would be arrested for theft. RP 213, 214. Ultimately, Deputy Carpenter advised Robert he was under arrest. RP 215. Instead of complying, Robert took a fighting posture and clutched the keys tightly in his fist. RP 215, 255. In response, Deputy Carpenter sprayed Robert with pepper spray. RP 215, 216, 217, 257. Robert threw down the keys and swung at Deputy Carpenter. RP 216.

Throughout this time, Deputy Carpenter's attention was entirely focused on Robert. RP 216. Immediately after Robert swung at Deputy Carpenter, defendant sucker punched Deputy Carpenter in the right side of his jaw. RP 217, 255, 257, 263, 288, 290. Defendant then struck Deputy

Carpenter a second time. RP 218, 258. Defendant's blows were direct hits, not glancing blows. RP 218, 219, 262.

Deputy Carpenter eventually was able to take both defendant and Robert into custody and read them their *Miranda* rights. RP 218-19, 222-224, 258, 259, 261, 264. When defendant was asked why she assaulted Deputy Carpenter, replied that she did not know what she was thinking. RP 224.

C. ARGUMENT.

1. DEFENDANT DID NOT MAKE A TIMELY, SPECIFIC OBJECTION TO THE ADMISSION OF ROBERT BERGH'S STATEMENT AND THEREFORE MAY NOT CHALLENGE THE COURT'S RULING FOR THE FIRST TIME ON APPEAL. ALTERNATIVELY, THE TRIAL COURT PROPERLY ADMITTED ROBERT BERGH'S STATEMENTS UNDER THE *RES GESTAE* EXCEPTION.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. Even when an objection is made at trial, a party may only assign error in the appellate court on the

specific ground of the evidentiary objection made at trial. *Guloy*, 104 Wn.2d at 422; *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

The trial court's decision to admit or exclude evidence will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Evidentiary errors that are not of constitutional magnitude are reversible only when the error was prejudicial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). A nonconstitutional evidentiary error is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599; *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

- a. Defendant did not make a timely and specific objection and has not preserved this issue for appeal.

In the present case, defendant did not make a timely specific objection to the admission of Robert Bergh's statement that the people in the Denali were "fucking Indians." RP 41-47. In fact, in her brief defendant concedes that her objection was untimely. Brief of Appellant 31, 32. Additionally, the untimely objection defendant did make was a general and not a specific objection, which is insufficient to preserve an

issue for review. See *White v. Fenner*, 16 Wn.2d 226, 246, 133 P.3d 270 (1943).

Immediately after the CrR 3.5 hearing, co-defendant, Robert Bergh, made a motion in limine to exclude his statement “fucking Indians.” RP 41. Robert Bergh’s motion was based upon ER 401 and ER 404(a). In denying Robert’s motion, the court found that the statement was admissible under the res gestae exception because “it does set the stage for what was to occur later on.” RP 45. The court found the statement was both probative and relevant to the state of mind of Robert Bergh. RP 45.

Defendant did not object to Robert Bergh’s statement prior to the court issuing its ruling. It was only after the court ruled that defendant made the following objection:

Your Honor, if I may just state on the record, in regards to the admissibility of the statement regarding Indians, as a party who can be affected by the court allowing that in, we just want to raise an objection on the ground that because Fawn Bergh is the daughter of Mr. Bergh and that she was part of the scenario that occurred, I believe it will affect how she’s perceived in this case and because there’s no indication that – well, there’s no – there’s no direct – this case involves an assault – alleged assault on the officer.

There’s no indication that the officer himself is Indian or that any of the other parties were directly involved other than the fact a set of keys was taken and because the prosecution can prove its case without bringing that in we

are objecting on the record. We understand the court has ruled.

RP 46.

In response, the court noted that defendant's objection was untimely and that the court had already ruled. RP 47. In addition to being untimely, defendant's objection was not specific. Defendant's untimely, general objection was insufficient to direct the court's attention to any claimed error. *See State v. Moore*, 35 Wn.2d 106, 113, 211 P.2d 172 (1949). Because defendant did not make a timely and specific objection to Robert Bergh's statement prior to the court making its ruling, defendant has not preserved this issue for appeal and this court should so hold.

However, if this court were to find that defendant has preserved this issue for appeal, defendant may only challenge the trial court's ruling on the same bases on which the defendant objected to below. *See State v. Guloy*, 104 Wn.2d at 422; *State v. Boast*, 87 Wn.2d at 451.

Defendant's untimely objection below was a general objection contrary to ER 103. No legal basis was offered to the court when defendant made her untimely objection. RP 46. Under the rule articulated in *Guloy* and *Boast*, without a specific objection there is no basis on which defendant can challenge the admission of Robert's statement on appeal.

Co-defendant Robert Bergh made a motion in limine to exclude his "fucking Indians" statement pursuant to ER 401 and ER 404(a); however, a co-defendant's motion in limine is insufficient to preserve the issue on

appeal for defendant. If, in the unlikely event this court were to decide that Robert Bergh's motion in limine preserved the issue for defendant despite her failure to join in his motion or make her own timely, specific motion, defendant must still comply with *Guloy* and *Boast*. Under *Guloy* and *Boast*, defendant's appeal is limited to ER 401 and ER 404(a), which were the only bases on which Robert sought to exclude his statement. RP 41.

In defendant's brief, defendant does not limit her argument to ER 401 and ER 404(a). Instead, she asserts the court improperly admitted Robert Bergh's statement because it was not relevant under ER 401 and was improper character evidence under 404(b). Brief of Appellant at 22-23. Defendant's challenge based upon ER 404(b) is not properly before the court because there was no 404(b) objection to Robert Bergh's statement at the trial court. RP 41-46.

ER 401 states:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The rule requires only minimal logical relevance – any tendency to make the existence of a fact more or less probable. *State v. Bebb*, 44 Wn. App. 803, 723 P.2d 512 (1986), *aff'd* 108 Wn.2d 515, 740 P.2d 829 (1987).

Here Robert Bergh told Deputy Carpenter that he would get his boats out of the water when the "fucking Indians" got their boat out. RP

12. This response to the officer's request to leave the park by 8:00 p.m. in compliance with park regulations set the tone for the incident that followed. It was indicative of Robert Bergh's demeanor and his state of mind during contact with Deputy Carpenter. It was also the beginning of the incident that led to Robert stealing the keys from the individuals he had referred to as "fucking Indians" and, ultimately, resulted in Robert being arrested for third degree theft and third degree assault. The court properly found the statement relevant as to Robert Bergh.

b. Robert Bergh's statement was admissible under the res gestae exception.

Washington courts have recognized, as a basis for the admission of other crimes evidence, criminal acts which are part of the whole deed. *State v. Bockman*, 37 Wn. App. 474, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984)(citing *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971)). Under this "res gestae" or "same transaction" exception, evidence of other crimes is admissible to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *Bockman*, 37 Wn. App. at 490 (citing E. Clearly, *McCormick on Evidence*, §190 at 448 (2d ed. 1972)).

In *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987), recognized the res gestae exception. In

that case, the defendant was charged with second degree murder and first degree assault while armed with a deadly weapon. *Thompson*, 47 Wn. App. at 2. At trial, the court admitted the testimony of three witnesses, who described the defendant's behavior on the evening of the murder and assault. One witness described the defendant as brandishing a gun and yelling, "I'm going to kill the bastard." *Thompson*, 47 Wn. App. at 4. The other two witnesses testified that the defendant pointed a gun at them after they shouted at the defendant from their car. *Thompson*, 47 Wn. App. at 4. The appellate court rejected the defendant's claim that the witnesses' testimony was irrelevant and unduly prejudicial. *Thompson*, 47 Wn. App. at 10. The court found that the testimony was relevant under the res gestae exception because the conduct took place in the immediate time frame of the assault and murder. *Thompson*, 47 Wn. App. at 12.

Similarly, in *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the Supreme Court reaffirmed the admissibility of prior conduct under the res gestae theory. *Lane* involved multiple defendants charged with the abduction and murder of an 89-year-old woman. *Lane*, 125 Wn.2d at 828. At trial, the court admitted testimony about several events that occurred within the 2-3 day period surrounding the victim's abduction and death. *Lane*, 125 Wn.2d at 833. The testimony described the defendant's participation in an armed robbery of a gas station, an automobile accident,

display of a weapon in a grocery store, detonation of a smoke bomb in a bowling alley, and the firing of a weapon from an automobile. *Lane*, 125 Wn.2d at 833-34. The Supreme Court said that the trial court correctly “found the evidence relevant because of its proximity in time and place to the crimes charged and because it showed the degree of participation of the various defendants.” *Lane*, 125 Wn.2d at 835; *see also State v. Schaffer*, 63 Wn. App. 761, 822 P.2d 292 (1991), *affirmed*, 120 Wn.2d 616 (1993).

Similarly, in this case, evidence of Robert’s conduct prior to the assault and theft was necessary to complete the story of the crimes charged. Robert Bergh’s statement, which was made immediately prior to the theft and the assault, set the stage for the events that followed.

Even if this court were to find the trial court erred when it admitted Robert’s statement, this court should not reverse because there is no reasonable probability that the outcome of the trial was materially affected by the admission of Robert’s statement. Defendant argues that Robert’s statement was so prejudicial that defendant could not have received a fair trial. Brief of Appellant at 30. She further speculates “[t]here was bound to be at least one juror who would hold against the child the prejudices of its father, however wrong that may be.” Brief of Appellant at 30. Defendant’s argument fails completely because the jury didn’t hold

Robert's statements against him. RP 523-25. The jury acquitted Robert Bergh of the third degree assault count and only convicted him of the misdemeanor third degree theft count. RP 523-25. Defendant was convicted of third degree assault because there was overwhelming evidence that she struck Deputy Carpenter when he attempted to arrest her father, Robert Bergh. Defendant was not convicted because her Robert made a racist comment.

Defendant cannot show she was prejudiced by the admission of Robert Bergh's statement and there is no reasonable probability that the outcome of the trial would have been materially affected had the error not occurred.

2. TRIAL COUNSEL WAS EFFECTIVE AND DEFENDANT CANNOT SATISFY 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.

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).

Defendant argues that she was prejudiced by trial counsel's failure 1) to make a motion to exclude evidence of her co-defendant father's racist comments; and 2) to make a motion to sever defendant's case from her co-defendant father's case once the court ruled the racist statements were part of the *res gestae* of the case.

Trial counsel was not deficient for failing to litigate either the motion to exclude evidence or the motion to sever. 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). Here, defendant cannot show that either motion would have been granted. In fact, the trial court denied the motion to exclude Robert Bergh's statement that the people in the Denali were "fucking Indians" when it was made by her co-defendant father. RP 41-45. The court found that the statement was part of the *res gestae* of the

incident and set the stage for what would occur minutes later. RP 45. The court also found the statement was probative and was important to come in as state of mind evidence. RP 45. Because the court denied the motion to exclude when it was made by Robert, who was more likely to be prejudiced by his own statements than defendant, it is unlikely the court would have granted the same motion if it had been made by defendant. Because defendant cannot show the motion would have been granted, defendant's ineffective assistance of counsel argument for failing to move to exclude her Robert Bergh's racial statement is without merit.

Similarly, defendant's argument that trial counsel was ineffective for failing to move to sever her case pursuant to CrR 4.4(c)(2) also fails.

CrR 4.4(c)(2) states:

The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

- (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
- (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

In order to prevail, defendant would have to show the court would have granted defendant's motion to sever. This defendant cannot do so.

The trial court has broad discretion to sever a trial when "it is deemed appropriate to promote a fair determination of the guilt or

innocence of a defendant.” *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). However, a defendant who is seeking to sever his trial from his co-defendant’s has “the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Statements that are admissible under the rules of evidence do not interfere with a “fair determination of the guilt or innocence of a defendant” pursuant to CrR 4.4(c)(2). *State v. Dent*, 123 Wn.2d 467, 485.

In the present case, as argued above, the statements made by defendant’s father were admissible under the res gestae exception. As a result, the proper admission of Robert Bergh’s statements cannot be the basis for a successful severance motion. *See Dent* at 485.

Even if the court erred in admitting Robert Bergh’s statements, defendant cannot meet her burden to show the statements were so manifestly prejudicial such that it would override the concern for judicial economy. The underpinning of defendant’s ineffective assistance of counsel claims is that the jury would so despise Robert because of his racist comments, that they would take that dislike out on her. Defendant’s argument fails completely because the jury acquitted her father of the more serious crime, third degree assault, and only convicted him of the misdemeanor third degree theft. RP 523-25. Therefore, it is clear that not only did the jury not hold Robert Bergh’s racists comments against him, they certainly did not hold Robert’s statement against her. Defendant

cannot show prejudice. Without prejudice, her ineffective assistance of counsel claim fails.

Defendant cannot satisfy either prong of the *Strickland* test. First, her trial counsel was not deficient for failing to make motions that would not have been granted. Second, defendant cannot show she was prejudiced by counsel's performance.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: AUGUST 22, 2008

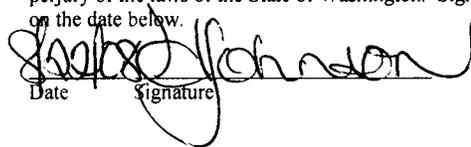
GERALD A. HORNE
Pierce County
Prosecuting Attorney

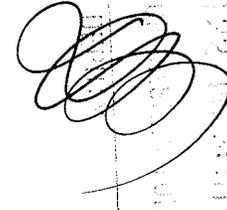


KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

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

BY:  DATE: AUG 22 2008
CLERK OF SUPERIOR COURT
PIERCE COUNTY WASHINGTON