

NO. 36392-5

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

STATE OF WASHINGTON, RESPONDENT

v.

STEPHEN P. SULLIVAN, APPELLANT

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DIVISION II
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BY STATE OF WASHINGTON
PROSECUTOR

Appeal from the Superior Court of Pierce County
The Honorable Linda C.J. Lee
The Honorable Katherine M. Stolz

No. 07-1-00402-7

BRIEF OF RESONDENT

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

1. Has defendant failed to show prosecutorial misconduct when the prosecutor properly questioned a witness about admissible evidence and made appropriate arguments in closing?
2. Did the trial court properly exercise its discretion in denying the defense motion for a mistrial when it could eliminate any prejudice by giving a curative instruction?
3. Did defendant receive constitutionally effective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

The State originally charged defendant on January 22, 2007 with one count of residential burglary, one count of obstructing a law enforcement officer and one count of making or having burglary tools. CP 1-2. Trial commenced on May 3, 2007 in front of the Honorable Linda Lee. RP 1. The court accepted an amended information on May 3. RP 35-39. The amended information added the aggravating factor on count I of the victim being present during the burglary, and changed count II to making a false or misleading statement to a public servant. CP 93-4, RP

35-39. On May 3, the court held the CrR 3.6 motion to suppress. RP 21-34. On May 7, the court ruled that the search of defendant's bicycle bag was improper and that the burglary tools were not admissible at trial. RP 48-50, CP 34-5. The court then heard the CrR 3.5 motion and ruled that the statements defendant made to Deputy LaTour would be admissible in the State's case in chief. RP 50-67, CP 95-6.

On May 11, 2007, the jury found defendant guilty of residential burglary, including the aggravator, and the false statement charge. RP 270. The court did not instruct the jury about the burglary tools charge. CP 65-92. Sentencing followed on June 1, 2007. RP 279. Defendant had an offender score of three which put him in the 13 to 17 months range on the burglary charge and the false statement was a gross misdemeanor. RP 280. The court sentenced defendant to 14 months on the felony count and imposed credit for time served on the misdemeanor count. RP 280-5. Defendant filed this timely appeal. CP 115, RP 285.

2. Facts

On January 19, 2007, Deputy Robert LaTour and his partner, Deputy Glenn Campbell, responded to a report of a burglary in process. RP 102-3, 145. The call was around midnight and the deputies were at the scene approximately five minutes after they received the call. RP 102-3, 145. Upon arriving at the residence, the deputies observed a mountain bike propped up against a fence adjacent to the victim's property. RP 103,

150-2. The bike was easy for the deputies to see from their patrol car. RP 113, 150. The lights were on in the house and on the porch. RP 103, 182. There was ambient lighting from the south due to nearby businesses, but otherwise the area was dark. RP 113, 152, 176-7, 207. Deputy LaTour initially checked to see if he saw the suspect who had been reported walking north. RP 104. When he didn't see anyone, he contacted the victim. RP 104. Deputy LaTour could hear dogs barking while he stood at the victim's front door while the door was opened. RP 121, 125-6.

The victim, Sharon Schafer, lives with her granddaughter in the house she has lived in for thirty-eight years. RP 160. The victim was in her kitchen standing at her stove. RP 164-5. The victim heard a noise and assumed it was her granddaughter getting home from work. RP 165. The victim ran to grab a bathrobe and saw something blue out the window. RP 165. As the victim came back down the hallway, her dogs were barking and she saw someone backing through her unlocked door. RP 166-7. The person backing in the door was crouched down, had a gray hood on and was moving very slowly, backwards through the door. RP 167. The suspect then closed the door and turned around very slowly. RP 167. The victim asked the suspect, "What the hell are you doing here?" RP 167. The suspect said he was looking for a couch. RP 167. The suspect had closed the front door and was approximately five feet down the hall. RP 173-4, 184. The victim did not know the suspect. RP 167.

The victim then ran into the kitchen and called 911. RP 168. As the victim was on the phone on her patio, she heard sirens. RP 169. She then saw the suspect walk down her driveway, look back at her and then gesture. RP 169. The suspect did not threaten the victim and appeared disoriented. RP 182, 187. The victim provided “a very accurate” description of the suspect. RP 158. The suspect was described as a white male, approximately six foot tall with curly hair. RP 147. The suspect was wearing a dark, hooded jacket with gray on the sleeves. RP 147. The victim positively identified defendant as the suspect both on the night of the incident and in open court. RP 171-2, 183.

Deputies located the suspect, later identified as defendant Stephen Sullivan, just north of the victim’s house. RP 106, 147. Defendant was walking toward the victim’s house. RP 147. Deputy La Tour assisted Deputy Carpenter in contacting defendant who matched the description of the suspect. RP 107. Deputy LaTour then asked defendant if he had entered the victim’s house and defendant said he had not. RP 108. Defendant stated he had not entered the house because there were a million dogs barking inside. RP 108. When the deputy asked how he knew there were a lot of dogs, defendant stammered and stuttered, appeared to be searching for an answer and then said he could hear them. RP 109. Defendant then told the deputy he was at the victim’s house because a friend told him he could get a couch there. RP 109. The deputy stated that defendant did not tell him who the friend was. RP 109.

Defendant stated to the deputy that he had the wrong house. RP 122.

Defendant stated that the bicycle was his. RP 122. Defendant then gave the deputy his name as Kevin Charles Sullivan with a date of birth of September 3, 1959. RP 110.

Pictures were taken of the scene by Deputy Carpenter. RP 118. It was dark on the date and time of the incident. RP 118. However, Deputy LaTour was able to identify the pictures and noted that one showed the victim's mailbox with her name and address on it. RP 119. Deputy Carpenter added that the mailbox had large, reflective letters that were easy to read. RP 152. The victim identified the picture that showed a separate sign with her address on it with numbers approximately a foot tall. RP 175-6. Deputy La Tour determined there was no evidence needing forensics so no expert was called to the scene. RP 115, 129.

Defendant's true name of Stephen Sullivan was learned during the booking process from his Washington State identification card. RP 99-100. Deputy LaTour had to correct his report to reflect defendant's true name. RP 116.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). 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)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson, supra*, at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). 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, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed 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.” *Stenson, supra*, at 719, citing *Gentry, supra*, at 593-594.

Defendant alleges two instance of prosecutorial misconduct. Defense contends the State erred in asking a witness about admissible statements and then erred again by bringing that testimony to the jury’s attention in the State’s initial closing. Defense did not object to this first allegation of misconduct. Defense also contends that the State commented on defendant’s right to silence in rebuttal closing. Defense made a motion for mistrial in regards to this second allegation.

- a. As defendant made a statement to police, it was not error for the State to question the deputy about the extent of that statement.

Defendant waived his *Miranda* rights and answered questions posed to him by the deputy. There is a distinction between a defendant who immediately invokes his right to silence and a defendant who does so at a later time. When a defendant invokes his right to silence after being given *Miranda* warnings, the silence is “insolubly ambiguous.” *Doyle v.*

Ohio, 426 U.S. 610, 617, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976).

Miranda warnings are an assurance to the defendant that his or her silence will carry no penalty. *Id.* at 618.

However, partial silence at the time of the initial statement is not insolubly ambiguous, but “strongly suggests a fabricated defense and the silence properly impeaches the later defense.” *State v. Cosden*, 18 Wn. App. 213, 221, 568 P.2d 802 (1977). Defendant waives the right to remain silent concerning the subject matter of his statement. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980).

When a defendant does not remain silent and instead talks to police, the State may comment on what the defendant does not say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) citing *State v. Young*, 89 Wn. 2d 613, 621, 574 P.2d 1171 (1978) (citing *State v. Osborne*, 50 Ohio St. 2d 211, 216, 364 N.E.2d 216 (1977), *vacated on other grounds by* 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1157 (1978)).

A *Doyle* inquiry does not apply when a defendant waives his rights and does not subsequently invoke the right to remain silent. *State v. McFarland*, 73 Wn. App. 57, 867 P.2d 660 (1994). In *McFarland*, the defendant made several statements to officers, initially agreed to take a primer residue test and then refused to take the test. *Id.* at 65. It was only after he refused the test that defendant invoked his *Miranda* rights. *Id.* The prosecutor elicited those statements made after *Miranda* from the detective who spoke with the defendant. *Id.* at 64. The prosecutor then

stated in his closing, “He had the opportunity to explain that to the police, but he couldn’t or wouldn’t.” *Id.* The court did not find any reversible error. *Id.* at 66.

In the instant case, the prosecutor asked the deputy about statements defendant made to him following a valid *Miranda* warning.

Deputy LaTour: He made mention of being there to – for a couch and that a friend of his had told him that he could get a couch at the victim’s residence.

Prosecutor: *Did he inform you who this friend was?*

Deputy LaTour: *No, he didn’t*

RP 109 (emphasis added). The prosecutor’s inquiry into the name or identity of the friend ends with that question. RP 109. The defense did not object to this question. RP 109.

The State then mentions this testimony in his initial closing statement.

Prosecutor: The defendant went on then to state that he had the wrong house, that a buddy gave him the wrong address, but in fact *he wouldn’t or couldn’t name the buddy that gave him the wrong address.*

RP 231(emphasis added). The prosecutor then went on to describe defendant’s actions in entering and exiting the house. RP 231-2.

Contrary to appellant’s brief, the prosecutor’s comment that a burglar would have done exactly what defendant would have done is made in the context of these actions and does not reference defendant’s statements.

Appellant's Brief 8, RP 232. Defense did not object to this argument in closing. RP 231.

At the 3.5 hearing, the court ruled the statement made by defendant were admissible. RP 67, CP 95-6. Deputy LaTour testified at the 3.5 hearing he read defendant his *Miranda* rights upon contact. RP 51. Defendant understood his rights and the waiver of rights and responded to questions posed by the deputy. RP 55. Defendant's statements were made voluntarily. RP 55. After defendant answered a few questions, defendant invoked his right to remain silent. RP 57. The deputy ceased questioning defendant once he invoked his rights. RP 58. The statements the court ruled admissible were presented to the jury. RP 108-10.

As defense did not object to the statements, the proper test is whether these statements were flagrant and ill-intentioned. The testimony elicited by the State was proper. Defendant was given his *Miranda* warnings and then agreed to answer the deputy's questions. RP 55. The court ruled that defendant's statement were admissible. RP 67. As defendant provided information to the deputy, he waived his right to remain silent about the subject of the questions he answered. It was proper for the State to ask if he had named the friend he spoke to the deputy about.

As the statement to the deputy was properly admitted, the State was permitted to reference that testimony in the State's closing argument. The prosecutor's statement was based on the testimony by Deputy LaTour

and was a proper inference from that testimony. RP 109, 231. As defendant did not remain silent, the State was entitled to address what defendant did not say, in this case, the identity of the friend. RP 231.

The statements at issue here were not improper and no prejudice to defendant can be shown. As defendant's statements had been deemed admissible there is nothing to suggest that addressing them was ill-intentioned. No objections were made to either the testimony or the prosecutor's statement in closing. The testimony and the prosecutor's initial closing remarks were appropriate in light of the facts of this case, the court's ruling and case law.

- b. The State's argument in rebuttal closing was in response to defense counsel's closing argument.

The State's argument in his rebuttal closing was addressing the argument made by defense counsel in her closing argument. "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Russell*, 125 Wn.2d 24, 86; 882 P.2d 747 (1994) citing *State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in

the argument and the instructions given to the jury. *Russell* at 85-6, citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

False information given to the police is considered admissible as evidence relevant to defendant's consciousness of guilt. *State v. Allen*, 57 Wn. App. 134, 143, 788 P.2d 1084 (1990).

In the instant case, defense counsel argued in her closing that the officers were not misled by defendant giving a false name.

Defense: There was a statement that these officers were somehow misled by or materially relied upon, when in fact they had all the information regarding his identity right from the start.... Well, here, the ID is in his pocket. The report changes aren't until after his identity is known. It suggests to me here you also have the opportunity to find that there is a reasonable doubt whether this was reasonably likely to be relied on in this circumstance.

RP 246. The prosecutor responded to this argument in his rebuttal closing.

State: "Now the final point I'd like to make is that the defendant had ample time, although there's nothing in the instructions about timing when giving a false statement. He is transported by other deputies. *There was no testimony at any time he did decide, "You know what? I better give them my real name and real date of birth."*

RP 250-1(emphasis added). Defense counsel immediately made a motion for a mistrial outside the presence of the jury. RP 251.

The State's argument as to the identification of defendant was in response to the defense assertion that the deputies shouldn't have relied on defendant's statement and instead ascertained his true identity themselves.

RP 246. During the motion for mistrial, the prosecutor indicated to the court that he was responding to the defense argument on the identification in the wallet and was not commenting on defendant's right not to incriminate himself. RP 252-3. The prosecutor's statement refutes the defense argument that the deputies were not misled. The deputies had no reason to believe the name was false because defendant did not give them any indication it was false. The deputies relied on that name up and to the booking process where his true identity was finally ascertained. RP 99-100. There was nothing to prevent the deputies from relying on defendant's assertion that he was Kevin Sullivan since they had no indication from defendant that it was a false name.

Not only is the State's argument in direct response to the arguments made by defense, but it also is an inference from admissible evidence. False information is admissible to show consciousness of guilt. Defendant was not the one who corrected the officers; the officer who booked defendant discovered his true identity. RP 99-100. The jury only heard that defendant gave a false name, that the booking officer discovered his true name, and that there was no testimony that defendant corrected the deputies. RP 110, 99-100. A logical inference is that defendant never took the time to correct the deputies about his name. The State's argument was not improper.

Further, the court has to review the context of the argument. The jury never heard that defendant invoked his right to be silent. The State

indicated in the 3.5 hearing that while he didn't feel the deputy should testify that defendant waived his rights, he did feel that he should be allowed to testify that the interview was terminated. RP 72. The court agreed as long as no one mentioned who terminated the interview or why. RP 72. However, the State never elicited this testimony. The jury never heard that the interview was terminated or that defendant ceased answering questions. The jury was only presented with evidence that defendant answered questions. RP 108-10. None of the statements admitted into evidence indicated that defendant ever wavered from the stance that his name was Kevin Sullivan. Thus, a jury would not understand the prosecutor's argument as a reference to his right to remain silent. There was no reason for the jury to think that defendant had invoked his rights, only that he had not told the officers his correct name.

- c. Even if the court finds State's argument in rebuttal closing was error, the court's curative instruction eliminated all prejudice that could have flowed from such statement.

Should the court determine that the State's argument in rebuttal closing was improper; the court must then look at the curative instruction given to the jury. When a court gives an instruction to the jury to disregard a prosecutor's remark, the jury is presumed to follow the instruction. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

In the instant case, a curative instruction was given to the jury to disregard the prosecutor's argument despite the court's ruling that the prosecutor's argument was not a comment on silence but a comment on what evidence or lack of evidence there was. RP 254-5, 257. The curative instruction stated:

The jury shall disregard the last statement made by the deputy prosecutor in rebuttal. The defendant has a constitutional right to remain silent. And no adverse inference may be drawn from the exercise of a constitutional right.

RP 257. This instruction was given at the request of the defense after their motion for a mistrial was denied. RP 254-6. The instruction was crafted by defense counsel and the prosecutor **while** the court was in chambers deliberating on the motion for mistrial. RP 255. Thus, the instruction was not in response to the court's ruling since it was prepared prior to the court's decision. RP 255. The curative instruction actually eliminated the prosecutor's final argument despite the court's finding that it was not a comment on defendant's silence. RP 257. The jury was instructed that they could not infer any guilt from defendant's silence. RP 257. It is presumed that the jury followed this instruction. Any prejudice flowing from the prosecutor's argument was eliminated by this instruction.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT THE DEFENSE REQUEST FOR A MISTRIAL.

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *See State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court's ruling when examining the conduct for prejudice because "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial. *State v. Luvone*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. *See State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991) superseded on other grounds by statute as stated in *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In reviewing the entire record, the State's comment in rebuttal closing was an isolated statement. Although the court ruled the State could adduce evidence that the interview terminated, the State did not adduce this evidence before the jury. RP 72. The jury heard what defendant did and did not say to the police including that defendant had given a name that was not his. RP 108-10, 250-1. The court, who had heard the entire trial and the closings in their entirety, found the statement was not a comment on defendant's exercise of his right to silence but was a comment on what evidence or lack of evidence there was. RP 254-5. The court denied the motion for a mistrial but did give a curative instruction at defense counsel's suggestion. RP 252, 257.

The trial court was in the best position to determine if there was any prejudice to defendant. Given the evidence presented, the fact that the jury had heard defendant's statements and had not heard that an interview

had been terminated, the prosecutor's remark did not rise to the level that warranted a mistrial. The trial court properly exercised its discretion in denying defense's motion.

3. WHEN REVIEWING THE ENTIRE RECORD,
DEFENSE COUNSEL CAN NOT BE
DEEMED INEFFECTIVE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Const. Article 1, Sec. 22 of the Constitution of the State of Washington. 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 has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "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 rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland*

v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also, *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their

conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing *Strickland*, at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland, supra*, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland, supra*, at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of

a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland, supra*, at 689.

The court must look to the entire record. There was substantial evidence for the jury to decide this case. In order to prove that defendant committed residential burglary, the State had to prove that defendant entered or remained unlawfully in a dwelling with the intent to commit a crime. CP 65-92 (Instruction 13). The victim testified that defendant had entered her house by backing through the door slowly and in a crouched position. RP 166-7. In addition, defendant had a hood over his head. RP 167. From this set of facts a jury could infer that the intent of defendant was at the house to commit a crime. If defendant had truly been at the house to get a couch there was no reason for him to back up into the house with a hood over his head instead of knocking on the door or walking right in. In addition, defendant told the officers he was looking for a couch, but then told officers that the bike against the fence was his. The jury could infer that a person looking for a couch would not go to pick it up on a bicycle. The fact that defendant looked confused or disoriented is attributable to the fact that he was confronted by the homeowner while he was trying to sneak into the house. RP 167. Threats to harm are not one of the elements the State has to prove for residential burglary. RP 249. From the evidence presented, the jury could convict defendant of the crime of residential burglary.

As to the false statement charge, the evidence showed that defendant gave the deputy a name of Kevin Charles Sullivan and date of birth. RP 110. Defendant's true name of Stephen Sullivan was found out during the booking process when defendant's identification was accessed. RP 99-100. The deputy relied on that information and wrote his report of the incident using the false name. RP 116.

Despite the overwhelming evidence of guilt, defense counsel was an advocate for her client. Defense counsel brought a successful pre-trial motion that succeeded in getting the burglary tools suppressed and eliminated a charge against her client. RP 48-50, CP 34-5, 65-92. As discussed above, there was no reason for defense counsel to object to the first alleged incident of prosecutorial misconduct. However, defense counsel did object on behalf of defendant several times throughout the course of the trial including during the State's closing argument. RP 232-3. Defense counsel presented evidence on behalf of defendant by calling an investigator. RP 205-9. Defense counsel made a half time motion for dismissal of the residential burglary charge. RP 198-200. Defense counsel made a motion for a mistrial and when that was denied, made a successful request for a curative instruction. RP 251-3, 255-6. The curative instruction the defense counsel requested the court give was more far-reaching than the court's ruling and succeeded in eliminating the prosecutor's final argument. RP 257. There is no evidence that counsel

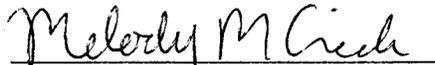
was deficient. Defense counsel was clearly an advocate for her client and the record does not support the claim of ineffective assistance of counsel.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the convictions below.

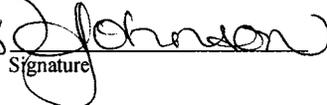
DATED: MARCH 14, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

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.

3/14/08 
Date Signature