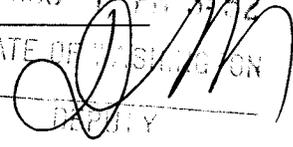


NO. 36562-6

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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

NATHANIEL ISH, APPELLANT

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

No. 05-1-01516-2

BRIEF OF RESPONDENT

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

1. Did the trial court error in admitting defendant's custodial statements after hearing sufficient testimony to determine that defendant's statements and waiver were voluntary? (Appellant's Assignments of Error 1-8)
2. Did the trial court abuse its discretion in limiting cross-examination about Mr. Otterson's plea agreement when defense counsel sought to question the witness about an inadmissible polygraph? (Appellant's Assignments of Error 9-12)
3. Has defendant failed to show prosecutorial misconduct when the prosecutor properly questioned a witness about admissible evidence and made appropriate arguments in closing? (Appellant's Assignments of Error 13-15)
4. Did the trial court abuse its discretion in admitting the Lifeline recording where there was no violation of the privacy act, the statements were not hearsay, the recording was properly authenticated, and there was no discovery violation? (Appellant's Assignments of Error 16-21)

5. Has defendant failed to prove ineffective assistance of counsel where defense counsel proposed a jury instruction consistent with the statute? (Appellant's Assignments of Error 22-25)

B. STATEMENT OF THE CASE.

1. Procedure

On March 30, 2005, the State charged defendant Nathaniel Ish with one count of murder in the first degree and one count of murder in the second degree. (3/30/05)RP 4¹, CP 1-4. Both counts dealt with the murder of defendant's girlfriend, Katy Hall. (3/30/05)RP 4, CP 1-4. Defendant was ordered to undergo an evaluation at Western State Hospital. (3/30/05)RP 5. On October 20, 2005, the court found defendant competent to proceed and defendant was arraigned on the charges. (10/20/05)RP 4-5.

The case was assigned to the Honorable Judge Thomas Felnagle on March 30, 2006. (3/30/06)RP 3. The charges were amended on August 25, 2006 to add one count of unlawful possession of controlled substance:

¹ The verbatim report of proceedings will be referred to as follows: Volumes 1-16 that start on April 16, 2007 are sequential in pagination and will be referred to as RP. Volume 17 starts over at page 1 and will be referred to as (7/6/07)RP. The preliminary proceedings will be referred to as: (3/30/05)RP, (10/20/05)RP, (3/30/06)RP, (7/10/06)RP, (8/25/06)RP.

cocaine. (8/25/06)RP 3-4, CP 50-52. Trial commenced on April 16, 2007 with the 3.5 hearing. RP 3, 9-165. The court ruled that defendant had made a knowing, voluntary and intelligent waiver of his *Miranda* rights and that his statements to the law enforcement officers were admissible. RP 158-165. The court entered findings of fact and conclusions of law that comported with its ruling. CP 10-14. The court also made rulings on several motions in limine including the introduction of a plea agreement involving a Mr. Otterson, one of the State's witnesses. RP 174-199. The court ruled the parties could not mention whether or not Mr. Otterson had taken a polygraph. RP 195-199, 1079-1082, CP 193-194.

On May 10, 2007, before defense counsel put on their case, the State let the court know that she had just found out Ms. Lynn had a Lifeline system set up in her house and that the incident on March 28, 2005 had been recorded. RP 1185. Both sides filed briefs as to the admissibility of the recording and argument was heard. RP 1236-1286, CP 69-75, CP 76-92. The court found the Lifeline recording to be admissible. RP 1285-6.

The jury did not reach a decision on the murder in the first degree charge, but instead found defendant guilty of the lesser offense of manslaughter in the first degree. RP 1510-1511, CP 188-191. The jury

also found defendant guilty of murder in the second degree and unlawful possession of a controlled substance: cocaine.² RP 1511, CP 192.

The court held sentencing on July 6, 2007. (7/6/07)RP 3. The conviction on manslaughter in the first degree was vacated under the theory of double jeopardy and the conviction for murder in the second degree was allowed to stand. (7/6/07)RP 4-12, CP 15-27. The court determined that defendant's offender score was three. (7/6/07)RP 26, CP 15-27. The court sentenced defendant to 254 months, the high end of his sentencing range, with 18 months on the unlawful possession charge to run concurrent. (7/6/07)RP 47-8, CP 15-27. Defendant filed this timely appeal. CP 28-41.

2. Facts

Victim Katy Hall, a mother of two, had struggled with drug problems for years. RP 248, 255. She decided to attend treatment at Seadrifter in January of 2004. RP 255-6. It was there that she met defendant, Nathaniel Ish. RP 258, 321-2, 609. She and defendant entered into a relationship. RP 258, 463.

Ms. Hall's mother, Ilona Lynn, broke her hip in May 2004 and her health deteriorated. RP 254. Ms. Lynn could not be alone anymore and

² Defendant is not appealing the conviction for unlawful possession of a controlled substance. Br. of Appellant, page 6.

needed care. RP 254. In August 2004, Ms. Hall decided to leave the treatment center to help take care of her ailing mother, and defendant left with her. RP 258-9, 323, 464. Ms. Hall moved into her mother's house and defendant moved in as well. RP 249, 259, 323, 464.

On March 28, 2005, Ms. Hall's daughter, Brittanee, received a message from Ms. Lynn at 8:50 p.m. RP 270. Brittanee could not understand what her grandmother was saying. RP 270. Ms. Lynn was screaming and crying into the phone. RP 271. Brittanee decided to go to her grandmother's house. RP 271. She called her brother Jack and her aunt, Rafaela "Illy" Smith. RP 271, 276, 330. Brittanee told her brother, "I think Nathan did something to mom." RP 329. When she pulled up to the house, defendant's truck was in the drive. RP 272. Her grandmother was hysterical. RP 273. Her grandmother said, "There's blood everywhere. Something happened to your mom." RP 273. When Brittanee yelled for her mom, defendant responded, "I killed her." RP 274, 297. Defendant then went on to say, "Look what you did. I killed her. Look what you made me do." RP 274, 308. "I murdered her, she's dead." RP 298. Defendant made some remark about Brittanee coming in to see. RP 274. Defendant also stated, "I touched her blood." RP 286.

Jack arrived and yelled "Nathan where is my mom?" RP 330, 347. Defendant replied, "I killed her." RP 331, 347. Jack then wheeled his grandmother out to the porch. RP 278, 330. Jack heard a banging noise in the bedroom and saw defendant hit the pantry door. RP 330, 333.

Defendant then walked onto the porch. RP 278. Defendant said, “I killed your mother. She was bothering me so I took care of business. Do you want some of this too Jack?” RP 279, 334. Defendant then started rubbing Ms. Lynn on the head. RP 335. Ms. Lynn was screaming for help. RP 471, 493.

Ms. Smith and her husband, Michael, arrived. RP 281. Ms. Smith had also received a call from Ms. Lynn. RP 468. Ms. Lynn told her, “Katy’s dead. I need help.” RP 468. Ms. Lynn was hysterical. RP 468-9. When they arrived, defendant said, “I will kill you guys too. Do you want some of this Mike? I will kill you Mike. I will kill you Illy.” RP 282, 336, 473, 476, 493, 496. Defendant also said that he killed Ms. Hall and that she was at peace and didn’t have to worry anymore. RP 472, 495. Defendant taunted them; called Mr. Smith names and tried to get Mr. Smith to come up on the porch. RP 472, 493. Defendant was clear, calm and connected to reality until officers arrived. RP 359-60, 472.

Officers arrived on scene. RP 282, 338. Officer Russell Martin was the first to arrive. RP 380. Officer Martin did not approach the house at first because he was alone. RP 383. However, when he identified himself as police, the defendant responded, “You better get up here and help or they will all die.” RP 383.

Once other officers arrived, they approached the house. RP 384. Officers and defendant engaged in a violent struggle for at least two minutes. RP 412, 416, 979. Defendant was resistant and non-complaint.

RP 384, 507, 525, 979. At least four officers were involved in the struggle. RP 413, 511. Defendant had to be tased several times. RP 384, 509, 526, 979. It also took multiple blows from law enforcement to get defendant under control. RP 444, 519, 987. Defendant stated, "If you touch me, you're all dead." RP 415, 510. Defendant had blood on his hands. RP 415, 525.

Once inside the house, the officers observed a female lying in the hallway. RP 386, 418, 641. The female, later identified as Ms. Hall, had no pants on, was covered in blood, bleeding from the head, not moving and not breathing. RP 387, 420, 603, 660, 904-5, 954, 1011. There were signs of extreme violence and trauma. RP 420. There were blood splatters on the walls. RP 423. There was a lot of blood on both the wall and the carpet. RP 387, 651. A doorframe was split. RP 653. Ms. Hall had visible head injuries. RP 661. Ms. Hall was pronounced dead at the scene. RP 285, 420, 426, 904.

Defendant continued to struggle with officers and medics who had been called to the scene. RP 429, 513. Defendant had to be hobbled. RP 513, 528. He also began spitting at officers and had to have a spit mask put on his head. RP 528. Defendant screamed, "God and Jesus killed them." RP 605. On the way to police station, defendant said, "Katy, look what I did. I am going to kill you. Katy, I am going to kill Jesus. Edie, see what I did? I am going to kill you, Edie, just like that. It feels good." RP 530. In his holding cell, defendant was screaming and yelling. RP

534-4, 556, 606. Defendant broke lose from one of his restraints on the way to the hospital. RP 557-8. At the hospital, it took another four officers to restrain him. RP 451, 606-7.

Defendant was given a sedative at the hospital. RP 562, 619. Defendant slept for several hours. RP 607. Officer Jeff Martin spoke to him when he woke up. RP 608. Defendant was read his rights. RP 608. Defendant said Katy was his girlfriend and asked if she was ok. RP 609. Defendant denied using street drugs but did say he had consumed alcohol. RP 609. A urinalysis later revealed defendant had marijuana, cocaine and amphetamines in his system. RP 1043, 1350.

Sergeant Lawler also spoke with defendant at the hospital and noted that he was calm and alert. RP 908. Defendant said there had been an argument. RP 909. Ms. Hall had said she wanted to leave and defendant did not want her to. RP 910, 959. Defendant denied any physical contact but then said Ms. Hall had gotten physical by trying to push past him and he slapped her to defend himself. RP 910, 960. Defendant claimed he did not remember what happened and that all he did was try to restrain her. RP 918. Defendant did tell the police that the victim hit her head on the bed and that there was a lot of blood. RP 918. Defendant claimed someone must have put the drugs in his food because he didn't take any; although, he said Ms. Hall did use drugs. RP 911, 919. Defendant stated, "I didn't mean to kill her. I am not a killer." RP 919-20, 962.

Testimony was presented about the blood in various parts of the house as well as the blood on the victim. RP 660-725. Pictures of the scene and the Ms. Hall's body were also shown to the jury. RP 660-725. Most of the "bloodletting" took place in the southeast bedroom. RP 786, 1020-4. Defendant's hand injury could not have caused the amount of blood found at the scene. RP 874.

There was evidence of blunt injury to Ms. Hall. RP 834. The force was enough to break Ms. Hall's blood vessels. RP 837. Rings, worn by defendant, caused the injury. RP 839, 964, 1029. Ms. Hall had a broken nose and well as multiple impacts to the face. RP 841. There were fifteen different areas or types of injury to her body. RP 842. Ms. Hall had signs of petechial hemorrhaging as a result of compression, injury to her legs and defensive wounds. RP 849, 854, 856-8. Ms. Hall also had internal injuries and fractured bones. RP 860-70. Her hair was pulled from her body forcibly and the hair was pulled through blood. RP 1220-1. Ms. Hall suffered a spinal cord injury that would have caused paralysis had she lived. RP 865. The spinal cord injury happened while she was still alive. RP 865. The injuries were very recent. RP 836.

The medical examiner concluded that Ms. Hall had suffered a minimum of 22 separate injuries. RP 870. Her death was caused by multiple blunt force injuries. RP 871. Ms. Hall has alcohol and cocaine in her system but they did not contribute to her death. RP 887, 890. The medical examiner ruled her death a homicide. RP 871.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERROR IN ADMITTING DEFENDANT'S CUSTODIAL STATEMENTS AFTER DETERMINING THAT THEY WERE MADE VOLUNTARILY.

The State has the burden of showing that a waiver of *Miranda* rights was made knowingly, voluntarily, and intelligently. *State v. Ellison*, 36 Wn. App. 564, 571, 676 P.2d 531 (1984). The voluntariness of such a waiver need not be shown beyond a reasonable doubt, but only by a preponderance of the evidence. *Ellison*, 36 Wn. App. at 571 (citing *State v. Davis*, 34 Wn. App. 546, 550, 662 P.2d 78 (1983); *State v. Gross*, 23 Wn. App. 319, 323, 597 P.2d 894 (1979)). Proof by a preponderance involves proof that a proposition is "more probably true than not." See e.g. *State v. Wilcox*, 92 Wn.2d 610, 613-14, 600 P.2d 561 (1979). The court must look at the totality of the circumstance to determine if the waiver was voluntary and made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *State v. Bradford*, 95 Wn. App. 935, 944, 978 P.2d 534 (1999) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

The influence of drugs is only relevant when it affects the defendant's ability to understand his rights, or to voluntarily waive those rights. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). The fact that the defendant is under the influence of drugs is relevant, but not

determinative. *Id.* Intoxication alone does not, as a matter of law, render a defendant's custodial statements involuntary and thus inadmissible.

State v. Turner, 31 Wn. App 843, 845-46, 644 P.2d 1224 (1982).

In intoxication cases, courts consider the normal and potential side effects of the drugs and whether those drugs affect decisional capacity or purposeful behavior. *See, e.g. Aten*, 130 Wn.2d at 664. Courts ask whether the defendant seemed intoxicated or confused, and if he seemed to understand who he was talking to and the consequences of his statements. *Aten*, 130 Wn.2d at 650, 664. Whether the defendant followed the conversation and was able to put words and sentences together is a good indicator of his understanding. *Id.* Also important is whether the police tried to exploit the defendant's potentially vulnerable circumstance in order to elicit a confession. *Id.* at 665. But the admissibility of statements made under the influence of intoxicants must be determined on the facts of each case. ***State v. Gregory***, 79 Wn.2d 637, 642, 488 P.2d 757 (1971) *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

In *Aten*, the defendant's confession took place when she was in a behavioral medicine unit at the hospital, taking both anti-depressants and anti-anxiety medication. *Aten*, 130 Wn.2d at 648-49. The defendant "had no trouble putting words together, her sentences were complete, and she showed no impairment caused by medicine." *Id.* at 650. The officers also testified that the defendant "appeared calm and alert, and she did not

appear to be under the influence of drugs or intoxicants.” *Id.* The court held that the defendant’s confession was properly admitted. *Id.* at 665. The defendant’s behavior is the best indicator of whether or not his statements were voluntary.

A defendant also waives his *Miranda* rights when he selectively responds to police questioning or volunteers information. *State v. Wheeler* 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). An appearance of understanding suggests a valid waiver. *State v. Davis* 34 Wn. App 546, 549, 662 P.2d 78, *review denied*, 100 Wn.2d 1005 (1983).

In the instant case, defendant was incoherent and “out of control” in his holding cell prior to being taken to the hospital, as well as in the ambulance. RP 13-14, 95-6. Defendant later admitted to drinking alcohol but denied using street drugs. RP 21, 57. A urinalysis revealed he had also consumed marijuana, cocaine, and amphetamines. RP 56-7, 63, 124-5. At the emergency room, the doctor gave defendant a sedative. RP 16, 35. Defendant then slept for several hours. RP 17. When defendant woke up, he was calm, alert, and coherent. RP 17, 19, 27, 99. The officers did not attempt to question defendant in his agitated state. RP 79, 113.

The police officers did question defendant when he woke up. Deputy Jeff Martin was the first officer to speak with defendant when he woke up. RP 17. Deputy Martin asked how defendant was feeling. RP 17. Defendant said he was sore and then thanked the deputy for watching over him. RP 17, 22, 38. It was at that point that Deputy Martin read

defendant his rights. RP 18, 38. Defendant stated that he understood his rights and wanted to talk to the deputy. RP 19, 100. Deputy Martin testified that defendant fully understood his rights. RP 24.

Additional investigating officers arrived and again advised defendant of his rights. RP 17, 23, 49. Defendant again stated he understood his rights, agreed to answer questions and acknowledged that he had previously been read his rights. RP 51, 116. Defendant appeared coherent, was talkative, alert, attentive, and his answers were appropriate to the questions asked. RP 24, 27, 47, 52, 57, 117. The officers also noted that defendant tracked with his eyes and head, and his attention was focused on the officers. RP 49, 51. Defendant did not express any confusion. RP 59. Sergeant Lawler testified that he had no doubt about defendant's cognitive abilities. RP 79.

Defendant's behavior shows that his waiver and statements were voluntary. Defendant was able to not only provide answers to the officers' questions, but also was able to refine his answers. When defendant was asked what happened, he at first said he didn't remember. RP 53. However, when asked if there had been an argument or a fight, defendant said that there was an argument because Ms. Hall wanted to leave and he didn't want her to. RP 53, 74-5. At first defendant said it wasn't physical, but then said he tried to restrain her. RP 53. Defendant also denied slapping Ms. Hall, but then said he slapped her once she got physical in order to defend himself. RP 53. Defendant told the officers that Ms. Hall

used drugs but he did not. RP 54, 57. Defendant couldn't explain the statements made by other witnesses and told the officers they were lying. RP 54, 56. The officers asked him if Ms. Hall had fallen and defendant clarified that she hit the right side of her head on the bed and that is where the blood came from. RP 55, 119, 131. Defendant was able to disagree with the officer's accounts of what happened and give his own explanation. RP 133. Defendant was not simply responding to questions but was engaging in cognitive processes. RP 134.

Defendant was cogent enough to refuse to provide a taped statement and to request an attorney. RP 58, 79-80, 120. Defensive action is evidence that the defendant was in full possession of his mental faculties during questioning and therefore capable of voluntarily, knowingly, and intelligently waiving his rights. *Gregory*, 79 Wn.2d at 642. The observations of the officers showed that defendant was capable of understanding his rights, of waiving his rights, of answering questions and then of invoking his rights to halt the questioning process. There was no evidence of a "truth serum" being administered to defendant and defendant's actions did not indicate that his response were anything but voluntary.³ There was no evidence of coercion.

³ In fact, testimony at trial confirmed that defendant was given Haloperidol or Haldol. RP 1346. The doctor who administered the sedative testified that it would make defendant sleepy, but he could still be coherent. RP 1361. The sedative was an anti-psychotic intended to make defendant sleep. RP 1347.

The court looked to the totality of the circumstance in determining that defendant's waiver and statements were voluntary. RP 159. The court took into account the drug use and the administration of a sedative. RP 158-165. However, the court also took into account that defendant had a period of time to sleep, that his answers were responsive and not just robotic in nature and that multiple officers made observations about his coherency and the appropriateness of his responses. RP 158-165. The court made the correct finding in determining that defendant made a knowing, voluntary, and intelligent waiver of his rights and that his statements were admissible. RP 165, CP 10-14.

2. THE TRIAL COURT DID NOT ERROR IN LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF MR. OTTERSON BY DISALLOWING MENTION OF AN INADMISSIBLE POLYGRAPH.

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v.*

Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Kilgore*, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

In Washington, polygraph evidence is inadmissible absent a written stipulation by both parties. *State v. Woo*, 84 Wn.2d 472, 473, 527 P.2d 271 (1974). Washington courts have limited the admissibility of polygraph evidence because the polygraph has not attained general acceptance by the scientific community. *State v. Bartholomew*, 98 Wn.2d 173, 203, 654 P.2d 1170 (1982) *judgment vacated in part on other grounds*, 463 U.S. 1203, 103 S. Ct 3530, 77 L. Ed. 2d 1383.

In the instant case, witness David Otterson entered into an agreement with the State to testify about his conversations with defendant while the two were incarcerated in the Pierce County Jail. RP 177-8. One of the clauses in the plea agreement informed Mr. Otterson that he would be subject to a polygraph should the State request he take one. RP 178. While neither party objected to exploring Mr. Otterson's plea agreement during trial, defense counsel sought to ask questions about whether or not Mr. Otterson had taken a polygraph. RP 179, 183.

The plea agreement between the State and Mr. Otterson only made the polygraph test a possibility, not a certainty. Regardless, even if the State had chosen to give Mr. Otterson a polygraph, the results would have been inadmissible under Washington law. There was no reason for either side to explore the inadmissible polygraph requirement. Whether or not Mr. Otterson has taken a polygraph was not relevant to show the guilt or

innocence of defendant or the truthfulness of Mr. Otterson. Defense counsel stated that he wanted to show that the State never enforced these agreements and that the State never does polygraphs because they believe these informants are lying. RP 183, 187. However, defense counsel's statements were only personal opinion and mention of other non-related plea agreements was not relevant to the instant case. The court correctly noted that this line of questioning was nothing more than putting the State and their policies on trial. RP 188, 198-9. There was no relevance to this line of questioning in terms of how it related to defendant or the witness and nothing that would tend to show bias or prejudice. Defense counsel's line of questioning was only argumentative in nature and designed to put the focus on the State rather than the evidence in the case. RP 188, 195. The court exercised appropriate discretion in limiting the scope of cross-examination about the terms of the plea agreement.

3. 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*, 132 Wn.2d 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*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

Defendant alleges two instances of prosecutorial misconduct. Defendant contends the State erred in asking a witness about the terms of the plea agreement, which had been deemed admissible and explored at length by both parties. Trial counsel did not object to this first allegation of misconduct. Defendant also contends that the alleged error was compounded when the State made a comment about truth in rebuttal closing. Trial counsel made a motion to strike the unrelated argument in closing and the court struck the statement.

a. The prosecutor’s questions to the witness concerned properly admitted evidence.

A prosecutor’s allegedly improper questioning is reviewed in “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

In the instant case, defense counsel did not object to introducing the terms of the plea agreement, in fact, he indicated he would use the plea agreement in cross-examination. RP 1079-80. However, the defense did not want the State to be able to point to the terms of the plea agreement that showed that Mr. Otterson was required to testify truthfully. RP 1079-81. The court ruled that the terms of the plea agreement could be pointed out so that defense could not dangle it in front of the jury that Mr. Otterson just had to provide testimony, it didn't have to be truthful. RP 1082. The State's questions to the witness were allowed under the court's ruling.

Mr. Otterson had violated multiple conditions of his plea agreement and also had multiple crimes of dishonesty in this past. RP 1086-7,1105-7. Defense counsel questioned Mr. Otterson at length about these violations. RP 1114-1121, 1126-33, 1139-45, 1148. On redirect, the State asked Mr. Otterson if the agreement required him to answer truthfully. RP 1153. Mr. Otterson said yes. RP 1153. The State asked if he had testified truthfully. RP 1153. Mr. Otterson said he had. RP 1153. Defense counsel did not object to these questions, so the error is waived unless the questions are flagrant and ill-intentioned.

The questions by the State were not flagrant or ill-intentioned. The questions were in line with the court's ruling and with the testimony in this case. The prosecutor was not vouching for Mr. Otterson. The

questions only related to the terms of the agreement. The jury had plenty of evidence before it of Mr. Otterson's wrongdoings. The jury is the sole judge of credibility and the questions by the prosecutor did not invade that role.

The instant case is distinguishable from *U.S. v. Roberts*, 618 F.2d 530, (9th Cir. 1980), *cert. denied*, 452 U.S. 942, 101 S. Ct. 3088, 69 L. Ed. 2d 957 (1981), which defendant relies on. In that case, the prosecutor told the jury that a detective was in the courtroom to make sure the witness did not lie and if the witness did lie, the plea agreement would have been called off. *Id.* at 533. The court found it to be improper when the state referred to evidence outside the record to imply that the witness was testifying truthfully. *Id.* at 533-4. That is not the case here. In the instant case, the State asked a question about the admissible plea agreement that was part of the record. Also contrary to *Roberts*, defense counsel did not object. There is no evidence of prosecutorial misconduct or that defendant was prejudiced by these questions.

- b. The prosecutor's statements in closing were in direct response to defense counsel's argument.

The State's argument in rebuttal closing was addressing the argument made by defense counsel in his 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.” *Russell*, 125 Wn.2d at 86, 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*, 125 Wn.2d 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). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

In the instant case defense counsel argued in his closing statement:

The reason is because that you are his shield. You stand between him and the State. It is the desire of the State to take away from him that which we as a society hold more precious than gold or silver. It is his freedom. And before that can be taken away from him, they have to convince you, they have to get through you and convince you beyond a reasonable doubt that he is guilty, not just of killing her, because that’s admitted.

RP 1437.

In response, the State made the following argument:

STATE: Counsel talked to you about making a statement; that what the goal of the State is to deprive the defendant of his freedom. And that's an interesting comment because is that in fact the goal of a prosecution. Isn't the goal of a prosecution to seek justice, to seek the truth? Does any —

DEFENSE : Your Honor, I am going to object at this time. That's not the goal of a trial. That's a mischaracterization of instructions and the purpose; I would at this time make a motion to exclude that.

THE COURT: I am going to sustain the objection.

DEFENSE: Thank you. Your Honor. Would ask to strike and instruct the jury to disregard.

STATE: Your Honor, this is in direct response to a statement made by the defendant's counsel.

DEFENSE: Your Honor, if we need to take this up outside the presence of the jury, I'd be happy to.

THE COURT: I am going to strike the last statement, the last sentence by counsel. The rest of it can stand. That's, "Isn't the goal of the prosecution to seek justice, to seek truth?" That part, the jury should disregard.

RP 1473-4. Contrary to defendant's claim, the argument made by the State had nothing to do with Mr. Otterson or his testimony. It is clear that the State was responding to the attack made by defense counsel in his closing argument. Defense counsel told the jury that the State was seeking to deprive his client of his freedom. His statement was clearly a

mischaracterization of the role of the State and the role of a trial. Defense counsel's inflammatory argument provoked the response by the State.

Further, the court then gave a curative instruction to the jury concerning the State's remark. 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, an instruction was immediately given to the jury to disregard the prosecutor's statement. Defense counsel requested that this instruction be given. The prosecutor's statement was essentially removed from the record. It is presumed that the jury followed this instruction. Any prejudice flowing from the prosecutor's argument was eliminated by this instruction.

- c. Any error found by the court should be deemed harmless.

Even if the court finds the prosecutors questions or statement to be error, the error was harmless. The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). "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.”).

Again, the instant case is contrary to *Roberts*. The prosecutor’s case in *Roberts* was not strong and relied on the credibility of the witness the prosecutor was found to have vouched for. *Roberts* at 535. In the instant case, Mr. Otterson was not the State’s chief witness. The State produced multiple witnesses and a large amount of forensic evidence. There was overwhelming evidence that defendant was the perpetrator of the crime. In fact, the evidence of guilt was so overwhelming that even defense counsel admitted in his closing that the case was not about whether or not defendant had killed Ms. Hall but to what degree. RP

1428, 1434. Even if the court finds that the prosecutor committed error, there was such overwhelming evidence of guilt that the error should be deemed harmless.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE LIFELINE RECORDING WHEN, THERE WAS NO VIOLATION OF THE PRIVACY ACT, THE STATEMENTS WERE NOT HEARSAY, THE RECORDING WAS PROPERLY AUTHENTICATED AND THE STATE DID NOT COMMIT A DISCOVERY VIOLATION.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (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. The trial court's decision 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. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the

evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). In the instant case, defendant objects to the admission of the Lifeline recording on four different grounds, all of which were argued at the trial level.

- a. As this was an emergency communication, there was no violation of the privacy act.

The Privacy Act is set out in RCW 9.73.030. RCW 9.73.030(1) provides as follows:

1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(2) provides an exception to the above statute.

Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,may be recorded with the consent of one party to the conversation.

A plain reading of the statute shows that the Lifeline call was of an emergency nature as the systems is designed for emergency reporting and as such was an exception to the privacy act. RP 1301-2, 1306. The court properly found this to be the case. RP 1265. Lifeline is a speaker system hooked up to the phone line but the customer does not have to pick up the phone and communications can be heard all through the house. RP 1302. Further, the court found that defendant was screaming things to other people outside the house showing that his statements were clearly not meant to be private. RP 1264. The court also found that the purpose of the Lifeline system is to alert to a medical emergency and since the Lifeline system recorded the conversation, it seems very reasonable that they consented to the recording. RP 1265. The court did not error in finding that the recording was not a violation of the privacy act.

- b. The court did not error in finding the Lifeline recording was not hearsay or in the alternate, admissible under a hearsay exception.

In the instant case, the court found that the recording was not hearsay. The court found that the recording was not being offered to prove the truth of the matter asserted but was being admitted to show the “mental or emotional state” of defendant. RP 1265. The court found that even if it was hearsay the recording could come in under the excited utterance exception. RP 1265. The court found the recording represented the res gestae, in that the recording had the actual events taking place and unfolding as they happened. RP 1265. The court found that even if it was hearsay the recording could come in under the excited utterance exception. RP 1265. Defendant only challenges the res gestae exception.

As the court found that the statements were not hearsay since they were not being used for the truth of the matter asserted, what exception applies becomes a moot point. RP 1283. Further the court ruled that the statements were the res gestae and that was a reason the statements *were not* hearsay. RP 1265. Clearly, the court was not talking about an exception but using the legal phrase to put the statements into context. “Res gestae means, literally, things or things happened.” *McCandless v. Inland Northwest Film Serv.*, 64 Wn.2d 523, 532-3, 392 P.2d 613 (1964).

The court's use of the phrase was to show that the recording represented the actual events taking place.

Even if the court determines that the court was ruling about a hearsay exception, the trial court's analysis is still correct. In order to be admissible under the res gestae exception "to the hearsay rule, words spoken, thoughts expressed, and gestures made, must all be so closely connected to the occurrence or event in both time and substance as to be a part of the happening." *McCandless*, 64 Wn.2d at 532-3. It is helpful to look at the context in which the court clarified the res gestae exception in *State v. Young*, 160 Wn.2d 799, 816, 161 P.3d 967 (2007).

"In *State v. Terry*, 10 Wn. App. 874, 880, 520 P.2d 1397 (1974), the court stated that it would not "expand the excited utterance exception" to include a statement that "not only fails to relate to the main event ... but also relates merely to an event which is not established except by the hearsay testimony itself." However, the *Terry* court made its pronouncement while this state's former common law res gestae hearsay exception was in effect. *Id.* This state subsequently adopted ER 803(a)(2), which does not include the requirement that the excited utterance relate to the "main event." *Chapin*, 118 Wn.2d at 688. The *Terry* court's statement is not relevant to the issue before us because it was made in relation to a requirement for a hearsay exception that no longer exists."

From a reading of the case, it clarifies that res gestate is no longer an exception because the concept was simplified. However, it is clear from the court's explanation of res gestae that the court's analysis falls

under the existing present sense impression exception. Evidence Rule 803(1) defines present sense impression as “a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” No where does the case law indicate that the trial court’s analysis is not relevant. The present sense impression exception still exists. The court did not error in finding that recording was not hearsay and even if it was, it was properly admissible.

- c. The court did not error in admitting the Lifeline recording after proper authentication.

ER 901 provides as follows:

(a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming to the requirements of this rule:

(1) Testimony of Witness with Knowledge.
Testimony that a matter is what it is claimed to be.

...

(4) Distinctive Characteristics and the Like.
Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording,

by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker.

A trial court's decision regarding the authenticity of an exhibit is reviewed using an abuse of discretion standard. *State v. Payne*, 117 Wn. App. 99, 110, 69 P.3d 889 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "Rule 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be." *United States v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989). "A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic." *State v. Williams*, 136 Wn. App. 486, 500, 50 P.3d 111 (2007).

In the instant case, the State brought forth a witness from the Lifeline company, Mark VanGemert. RP 1253. Mr. VanGemert explained that the recording identified the provider as Franciscan Lifeline and the operator started with "Do you need help?" which is how they open every call. RP 1296. The monitoring process was explained and a

document showing the existence of a contract between Ms. Lynn and Lifeline was introduced. RP 1301-1312, 1316, 1324-5, Ex. 131. There was no way the Lifeline system would have been activated and the operator able to call Ms. Lynn by her first name had a lifeline contract not been established. RP 1253, 1306. There was no dispute that Ms. Lynn had the Lifeline system in her house.

In addition, Ms. Hall's brother in law, Michael Smith, was called to identify the voices on the recording. RP 1252-3. He identified the one voice as Ms. Lynn and the other as defendant. RP 1253, 1298, 1339. He also indicated that Ms. Hall kept the Lifeline activation device around her neck. RP 1339.

The recording had been obtained from Lifeline and not from a family member. RP 1186. Further, since the recording was proprietary software, a second copy had to be obtained directly from Lifeline for defense counsel and was shipped overnight from Lifeline. RP 1194.

The court listened to the recording prior to it being played in front of the jury. The court indicated that it was clear Ms. Lynn was on the recording because she has a very distinctive speaking style. RP 1286. Further, indicated there was no other logical person that could be on the recording besides defendant. RP 1286. The court also listened and said the events sounded continuous and were consistent with the testimony

heard in court as to the timeline of events. RP 1253, 1286. The trial court is in the best position to determine authenticity. Here the court listened to the recording, listened to argument, looked at the rules of evidence and determined that the recording could be authenticated. The court found that there was plenty of evidence to find that a Lifeline system was in place at Ms. Lynn's house, and the recording happened at the time the events of that night occurred. RP 1266. The court did not abuse its discretion.

d. The court did not error in finding that the State did not violate the discovery rules.

CrR 4.7 governs the discovery process in criminal proceedings. CrR 4.7(a)(1) provides, "the prosecuting attorney shall disclose to the defendant the following material and information *within the prosecuting attorney's possession or control* no later than the omnibus hearing." (emphasis added). The rules then goes on to list such items as names and addresses of witnesses and any tangible objects or conversations made by defendant that the State intends to use at trial. CrR 4.7(a). The rules makes it clear that the "prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). The rule also provides for continuing discovery obligation, not just limited pre-trial. CrR 4.7(h)(2) deals with the continuing duty to disclose:

If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party *shall promptly notify* the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified. (emphasis added)

The trial court has broad discretion in imposing sanctions for a violation of a discovery rule. *State v. Oughton*, 26 Wn. App. 74, 79, 612 P.2d 812, *review denied*, 94 Wn.2d 1005 (1980). If there is not showing of actual prejudice, the reviewing court will not interfere with the trial court's exercise of discretion in imposing sanctions. *State v. Bradfield*, 29 Wn. App. 679, 682, 630 P.2d 494, *review denied*, 96 Wn.2d 1018 (1981).

In the instant case, the Lifeline recording was not in the State's control prior to the omnibus hearing. In fact, the State did not even know the recording existed until after trial commenced. RP 1185, 1194. It is undisputed that the State made defense counsel aware of the recording as soon as they became aware that it existed. RP 1188, 1250. The State brought it to the court's attention as soon as the existence of the recording was confirmed. RP 1185.

The rule is clear that it applies only to the prosecuting attorney and their staff. The Lakewood police department is not a member of the prosecuting attorney's staff so the State cannot be said to have mismanaged the case. The State complied fully with the discovery rule,

alerting defense counsel and the trial court promptly when it was learned that the Lifeline recording existed. The State exercised due diligence and complied with discovery rule 4.7. The court correctly found that the State did nothing wrong in the handling of this evidence. RP 1266.

The court then engaged in a balancing test as to how this evidence would affect defendant. RP 1266. The court acknowledged that defense counsel could not get an expert to do voice recognition but based on the testimony in the trial, found that the recording comported with the timeline and there was no reasonable basis to suggest it was not defendant's voice. RP 1270, 1275-6, 1285-6. In addition, Ms. Lynn has a very distinctive speaking style with a heavy German accent and it was clear her voice was on the recording. RP 254. There was absolutely no evidence that the recording was anything but a contemporaneous recording of the events taking place. RP 1286. Defense also had yet to put on its case and had the opportunity to cross examine the witnesses the State put on to authenticate the recording. The court determined that there was not a compelling basis for a delay in the trial. RP 1286. There is no evidence that the court abused its discretion.

5. THERE IS NO EVIDENCE THAT DEFENSE
COUNSEL CAN 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***, 466 U.S. 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*, 466 U.S. 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*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d 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*, 466 U.S. 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*, 466 U.S. at 689.

A trial court’s jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole,

properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

Case law is clear that the court did not error in instructing the jury as to the definition of recklessness. “The court not only may, but should, use the language of the statute in instructing the jury where the law governing the case is expressed in the statute.” *State v. Smith*, 31 Wn. App. 226, 229, 640 P.2d 25, (1982) (citing *State v. Hardwick* 74 Wn.2d 828, 830, 447 P.2d 80 (1968)). In *State v. Jones*, 95 Wn.2d 616, 621, 628 P.2d 472 (1981), the court resolved the problem of differing mental states as elements of a crime and found that the four mental states were ranked. The court ruled that “the drafter of the code contemplated that if intent were established in a criminal case, recklessness would be deemed also established. This approach resolves the trial court’s difficulty over whether recklessness or intent are inconsistent mental states.” *Id.* Further, the jury must be instructed on the statutory definition of mental states, including lesser included crimes, so that the jury uses the specific legal definitions and rather than one of their own making that may not align

with the legislative intent. *State v. Allen*, 101 Wn.2d 355, 361-2, 678 P.2d 798 (1984).

In a case on point, this court ruled that second degree assault “requires an intentional touching that *recklessly* inflicts substantial bodily harm. It does not require specific intent to inflict substantial bodily harm.” *State v. Esters*, 84 Wn. App. 180, 185, 927 P.2d 1140 (1996). The court found that the jury was properly instructed when given the statutory definitions of intent and reckless. *Id.*

In the instant case, defendant contends that his trial counsel should not have proposed WPIC 10.03 which is the definition of recklessness. It should be noted that both the State and defense proposed this instruction. As there was agreement, there were no exceptions taken to the instruction so no record was made specifically in regards to this instruction. *See* RP 1368-1371. In addition, a review of the entire record shows that defense counsel made motions, objections and presented evidence on behalf of the defendant.

RCW 9A.08.010 sets out the general requirements of culpability. The language in WPIC 10.03 is taken from this statute. The statute also provides that when “recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.” In the instant case, the word reckless appeared no less than five times in the packet of jury instructions. It appeared in the description and “to convict” instructions for the lesser included crime of manslaughter in the first

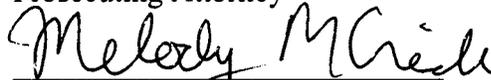
degree, in the instruction on voluntary intoxication, and in the description and “to convict” instructions for assault in the second degree. CP 143-187 (Instructions 18, 21, 25, 27, 30). Instruction 18 reads, “A person commits the crime of manslaughter in the first degree when he recklessly causes the death of another person.” WPIC 10.03, which defines recklessness, follows right behind as instruction 19. CP 143-187. The statutory definition of recklessness was essential for the instructions on manslaughter. In addition, per case law, the instruction was also appropriate for the charge of assault in the second degree which was part of the murder in the second degree charge in count II. As the jury was instructed with an appropriate statutory definition, counsel cannot be said to be ineffective.

D. CONCLUSION.

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

DATED: AUGUST 1, 2008

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Pierce County
Prosecuting Attorney


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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.

8/1/08 Johnson
Date Signature

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