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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON
BY E
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH G. COLEMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 06-1-03867-5

BRIEF OF RESPONDENT

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

1. Did the trial court properly instruct the jury to continue deliberations when the jury had not reached a unanimous verdict on one of three aggravating factors and the presiding juror advised the court she had a reasonable belief that the jury could reach a unanimous verdict within a reasonable amount of time?
2. Did the trial court properly impose an exceptional sentence after the jury found beyond a reasonable doubt that (1) the victim was present in the residence with the burglary was committed; (2) the defendant invaded the victim's privacy; and (3) the defendant committed the crime with sexual motivation?
3. Was the prosecutor's reasonable doubt argument proper when he accurately stated the law on reasonable doubt, directed the jury to the court's instruction on reasonable doubt, and used analogies to explain reasonable doubt and abiding belief?
4. Has defendant failed to show ineffective assistance of counsel when defendant cannot satisfy either prong of the *Strickland* test?

B. STATEMENT OF THE CASE.

1. Procedure

On August 18, 2006, the State charged Joseph George Coleman, hereinafter “defendant,” with one count of first degree burglary with a sexual motivation aggravating factor. CP 1. An amended information was filed on February 26, 2007, adding two additional aggravating factors, victim was present in the residence when the burglary was committed and invasion of the victim’s privacy to the original charges. CP 6.

The parties appeared for trial before the Honorable Kitty-Ann Van Doornick on July 5, 2007. 7/5/07 RP 3¹. A jury convicted defendant of first degree burglary on July 10, 2007, and found each of the three aggravating factors beyond a reasonable doubt. 7/10/07 VRP 119-21, 132-33. A sentencing hearing was held on 9/5/07 and 9/6/07. The court sentenced defendant to an indeterminate sentence based upon the jury’s finding that the defendant committed the crime with sexual motivation. 9/6/07 SRP 10-13; CP 162-68. The court imposed a minimum sentence of 20 months and a maximum sentence of life. *Id.* The court entered findings of fact and conclusions of law on November 9, 2007. CP 162-68.

¹ The verbatim report of proceedings in this case consists of 16 volumes, which will be referred to as follows: DATE RP Page #, except the record of the verdict shall be referred to as DATE VRP Page # and the two sentencing volumes shall be referred to as DATE SRP Page #.

2. Facts

On the evening of June 4, 2006, EM² went to bed with her window cracked open three to four inches and a fan leaning against the open window. 7/9/07 RP 44-45. She had numerous knick knacks on her window sill, including a picture frame and music box. 7/9/07 RP 45.

On June 5, 2006, at approximately 4:00 am EM was sleeping in her bed when woke up to the feel of something touching her face. 7/9/07 RP 39, 40. EM has a vanity mirror across from her bed. 7/9/07 RP 40. In the reflection of the mirror EM saw something and then heard heavy breathing. 7/9/07 RP 40, 41, 52. The breathing was different than someone panting after they had run; instead, it was “a heavy, intense, like, all-the-way-in breathing.” 7/9/07 RP 52. Again, EM felt something come down on her face and go around the rim of her ear. 7/9/07 RP 41, 52. EM testified she freaked out, turned around and saw a person, later identified as defendant, leaning part way into her room through her bedroom window. 7/9/07 RP 41, 63.

When EM turned toward defendant, he jumped back a little bit. 7/9/07 RP 41, 53. EM testified that her television was on and she could see defendant’s face. 7/9/07 RP 41. EM yelled at defendant and demanded to know what he was doing. 7/9/07 RP 41. Defendant apologized and said he was at the wrong window – that he was looking for

² EM was born on June 5, 1990. 7/9/07 RP 38.

a Tina Johnson. 7/9/07 RP 41, 56, 64- 65. EM testified she had lived in her house for several years and there was no Tina Johnson in her neighborhood. 7/9/07 RP 38, 41, 56.

EM repeatedly told defendant he needed to leave. 7/9/07 RP 42. Instead of leaving, defendant moved toward EM and asked her how old she was and whether she was going to tell anyone. 7/9/07 RP 42, 57, 58. EM told defendant she would not tell if he left. 7/9/07 RP 42. Defendant put the hood to his hoodie on and walked away. 7/9/07 RP 42. At no point did defendant tell EM that he was looking for her mother. 7/9/07 RP 64-65.

EM testified that after defendant walked away, she wrapped herself in her blanket and laid down for a minute until it sunk in that she was alone in her room and a person had just touched her. 7/9/07 RP 42. EM ran into her mother's room and told her that there had been a guy at EM's window. 7/9/07 RP 42-43. EM testified that she started freaking out and crying as she told her mother what had happened. 7/9/07 RP 43.

EM testified that when defendant woke her up on June 5th, the knick knacks on her window sill had been pushed to the side. 7/9/07 RP 45, 49. The fan that had been leaning against her partially opened window had also been moved aside. 7/9/07 RP 46.

EM had been sleeping in "boy shorts" that covered only half of her bottom and a tank top. 7/9/07 RP 50-51.

EM's mother called the police. 7/9/07 RP 59. EM was crying and upset about the incident when she talked to the police. 7/9/07 RP 60. Within a week after this incident, EM saw defendant on the street near her house. 7/9/07 RP 60. EM called the police that day. 7/9/07 RP 62. The police showed EM a six person photomontage that included defendant's picture. 7/9/07 RP 63. EM identified defendant as the person who leaned in through her bedroom window and stroked her on June 5, 2006. 7/9/07 RP 63.

During trial, EM made an in court identification of defendant as the person who reached in through her window and touched her. 7/9/07 RP 64.

Hollie Mitchell testified that she and her daughter, EM, had lived at 8122 109th Street East for the past five years. 7/9/07 RP 67. On the morning of June 5, 2006, Ms. Mitchell was awakened when EM screamed "Mom, Mom, Mom." 7/9/07 RP 68. EM told her mother that a man was rubbing her hair and breathing into her ear. 7/9/07 RP 68. Ms. Mitchell said EM eventually just slid down the wall, sat on the floor, and cried. 7/9/07 RP 68-69. Ms. Mitchell called the police. 7/9/07 RP 69. While they waited for the police, EM told her mother that the man asked her age and whether EM was going to tell anyone. 7/9/07 RP 69-70. EM said she tried to scream, but she couldn't. 7/9/07 RP 69.

During trial, Ms. Mitchell testified that she had not known defendant before this incident nor had defendant ever tried to introduce himself to her. 7/9/07 RP 72.

Deputy Mark Fry testified that he was on duty on June 5, 2006, when he responded to the Mitchell's residence regarding a burglary. 7/9/07 RP 83, 84-85. Deputy Fry spoke with EM that evening and then again ten to twelve days later when she gave him additional suspect information. 7/9/07 RP 86.

Pierce County Sheriff Detective Brian Lund testified that he was assigned this case for follow up investigation on July 17, 2006. 7/10/06 RP 14. In the course of his investigation, Detective Lund prepared a photographic lineup for EM to look at. 7/10/06 RP 15. Prior to giving her the photo montage, Detective Lund reviewed the photo lineup admonishment with her. 7/10/06 RP 16. EM picked the photograph of defendant out of the photo montage. 7/10/06 RP 16.

Detective Sergeant Teresa Berg testified that she, Detective Brian Lund, and Deputy Eric Clarkson contacted defendant at his residence regarding the Mitchell burglary. 7/9/07 RP 91, 93. Defendant's residence was within two to three blocks of the Mitchell's residence. 7/10/06 RP 17. Defendant invited the officers inside. 7/9/07 RP 93. Detective Lund advised defendant of his *Miranda* rights. 7/9/07 RP 93.

Initially, defendant denied any involvement in the Mitchell burglary. RP 94; 7/10/06 RP 18-19. He continued to deny involvement even after he was told that EM identified him in a photo montage. RP 95. However, after Deputy Lund placed defendant under arrest, defendant's demeanor changed. RP 95. Once he was placed under arrest, defendant began to cry. RP 95; 7/10/95 RP 20. Defendant confessed that he had reached into the Mitchell's bedroom window and touched EM. RP 96 He admitted he had asked EM how old she was, but said he was not going to hurt her. RP 96; 7/10/07 RP 20.

Deputy Clarkson transported defendant to the Sheriff's office downtown where Detective Lund and Detective Sergeant Berg interviewed defendant for a second time. 7/9/07 RP 97. Defendant agreed to give a taped statement. 7/10/07 RP 20. Defendant told the detectives that he had been watching EM's mother for two and one half years before this incident and that he wanted to meet her. 7/9/07 RP 101, 102. He admitted that he was walked to the Mitchell's residence, touched EM, asked her how old she was, told her he was looking for Tina Johnson, and then apologized to EM. 7/9/07 RP 99, 101.

A redacted copy of that taped statement was admitted into evidence and played for the jury. Plaintiff's Exhibit No. 12.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY TO CONTINUE DELIBERATIONS WHEN THE JURY HAD NOT REACHED A UNANIMOUS VERDICT ON ONE OF THREE AGGRAVATING FACTORS AND THE PRESIDING JUROR ADVISED THE COURT SHE HAD A REASONABLE BELIEF THAT THE JURY COULD REACH A UNANIMOUS VERDICT WITHIN A REASONABLE AMOUNT OF TIME.

The right to a fair and impartial jury trial requires that a judge not bring coercive pressure to bear upon jury deliberations. *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). To this end, CrR 6.15(f)(2) provides:

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

In challenging conduct of the trial court, a defendant must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention. *State v. Watkins*, 99 Wn.2d 166, 177-78, 660 P.2d 1117 (1983). Reviewing courts must consider all the circumstances of the court's communications with the jury. *Watkins*, 99 Wn.2d at 177.

Here, there is no reasonably substantial possibility that the court's instruction in this case improperly influenced the jury's verdict. The court

did not suggest that the jury must reach agreement or direct pressure toward the hold-out juror, nor did the court suggest consequences of failing to agree or the length of time they should deliberate. Instead, the court merely instructed them to continue deliberations, which was a proper response. *Watkins*, 99 Wn.2d at 175 (quoting with approval ABA Standards allowing the court to require continued deliberations if the jury appears unable to agree).

- a. The court properly instructed the jury to continue its deliberations when the jury had not reached a unanimous verdict on one of the three aggravating factors when RCW 9.94A.537 requires unanimous jury verdicts on aggravating factors.

Defendant argues the court erred when it instructed the jury to continue its deliberations in an effort to reach a unanimous verdict. To support his argument, defendant relies upon *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). However, defendant's reliance on *Goldberg* is misplaced because the *Goldberg* decision predated RCW 9.94A.537³, the statute under which the aggravating factors in this case were submitted to the jury. RCW 9.94A.537(3) requires the jury's verdict on aggravating factor's to be unanimous and by special interrogatory.

³ The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts. RCW 9.94A.537(3).

Morris Goldberg was charged with premeditated first degree murder with the sole aggravating circumstance being that the victim was a prospective witness in an adjudicative proceeding. **Goldberg**, 149 Wn.2d 888, 890-91. The jury returned a verdict of guilty to the charge of first degree murder, but answered “no” on the special verdict form asking whether the crime was committed because of the victim’s role as a witness in an adjudicative proceeding. **Goldberg**, at 891. When the court polled the jury as to the aggravating factor, only one juror indicated that he had voted “no” on the aggravating factor. **Goldberg** at 891.

The trial court asked the presiding juror if a unanimous decision could be reached on the aggravating circumstances. **Goldberg**, at 891. The presiding juror informed the court there was *no reasonable probability* of the jury reaching a unanimous agreement on the special verdict within a reasonable time. **Goldberg**, at 891 (emphasis added). Despite the presiding juror’s response, the trial court ordered the jurors to resume deliberations in the morning to see if unanimity could be reached. After an additional three hours of deliberation, the jury returned a unanimous finding that the State had proved the aggravating factor. **Goldberg**, at 891-92.

The Supreme Court held that it was error for the trial court to send the jury back to continue deliberations as though they were deadlocked on the aggravating factor. **Goldberg**, at 894. The court noted that the jury performed as it was instructed in this case – it returned a verdict of guilty

as to the crime for which unanimity was required, and it answered “no” to the special verdict form, where under [the special verdict form], unanimity is not required in order for the verdict to be final. *Goldberg*, at 894.

The present case is distinguishable from *Goldberg* both legally and factually. *Goldberg* was an aggravated first degree murder case, which implicated RCW 9A.32.030, and RCW 10.95.020. The jury was first asked to determine whether defendant was guilty of the substantive crime of first degree murder under RCW 9A.32.030. If the jury found Goldberg guilty of first degree murder, then jury was then asked to determine whether the State had proved the aggravating factor under RCW 10.95.020. Neither RCW 9A.32.030 nor RCW 10.95.020 required the jury’s verdict on the aggravating factor to be unanimous. In contrast, the jury in the present case was given the verdict and special verdict forms pursuant to RCW 9.94A.535 and RCW 9.94A.537. These statutes were approved by the legislature after the *Goldberg* case was decided. The legislature is presumed to be aware of the court’s decisions and their effects. See *Roberts v. Dudley* 140 Wn.2d 58, 85, 993 P.2d 901 (2000). The governing statutory authority did not require the jury’s verdict on the aggravating *Goldberg* factor to be unanimous; whereas here RCW 9.94A.537(3) specifically requires a unanimous verdict on the aggravating factor. RCW 9.94A.537(3) does not say that a “yes” verdict must be unanimous, but a “no” verdict does not. Instead, it requires all verdicts, both “yes” and “no” to be unanimous and by special verdict. Because the

legislature specifically required unanimity on special verdicts after this court decision in *Goldberg*, implies that the legislature intended special verdicts, like general verdicts, to be unanimous.

The present case is also distinguishable from *Goldberg* on its facts. In *Goldberg*, the jury had been deliberating for more than half the day and when asked whether they could reach a unanimous verdict, the presiding juror expressly told the court that they could not reach a unanimous verdict within a reasonable amount of time. *Goldberg* at 891. Despite this response, the trial court ordered the jurors to continue to deliberate to see if unanimity could be reached. *Goldberg*, at 891.

In contrast, the jurors in the present case had only deliberated for two hours and when asked whether the jury could reach a unanimous verdict within a reasonable amount of time, the presiding juror responded affirmatively. 7/10/07 VRP 130-31. After five to ten additional minutes of deliberation, the jury returned with a unanimous verdict. 7/10/07 VRP 132-133; 9/6/07 SRP 10; CP 162-68.

In *State v. Bashaw*, 144 Wn. App. 196, 198, 182 P.3d 451 (2008), a jury convicted Bashaw of three counts of delivery of a controlled substance, and unanimously found that the offenses occurred within 1,000 feet of a school bus stop. On appeal, Bashaw challenged the special verdict instruction because it required the jury to be unanimous to answer the special interrogatory. *Bashaw*, at 200. Bashaw cited *State v. Goldberg* to support her argument that a jury must be unanimous to

answer “yes” to the special interrogatory, but need not be unanimous to answer “no.” *Bashaw*, at 201-202.

Division Three of the Court of Appeals disagreed holding that *Bashaw* was reading *State v. Goldberg* too expansively. *Bashaw*, at 202. *Goldberg* did not establish a rule where special verdicts need only be unanimous when the answer is “yes.” Instead, the *Goldberg* court reiterated the well settled principle that in this State jury verdicts in criminal cases must be unanimous. 149 Wn.2d 888, 892-93. The holding in *Goldberg* focused on the court’s jury instruction that advised the jury to answer “yes” if the jury unanimously found the aggravating factor beyond a reasonable doubt, but directed the jury to answer no if the jury had a reasonable doubt. Because the instruction in *Bashaw* advised the jurors that they must be unanimous to answer the special interrogatory, the court found no error. *Bashaw*, at 202.

While the jury instruction in the present case mirrors the one used in *Goldberg*, the cases are distinguishable because, as argued above, in *Goldberg* there was no statutory requirement for jury unanimity on an aggravating factor, whereas there was such a statutory requirement in the present case.

Because RCW 9.94A.537 mandates a unanimous verdict, the court properly instructed the jury to continue its deliberations in an effort to

reach a unanimous verdict. In fact, because RCW 9.94A.537 mandates a unanimous verdict, it would have been error for the court to accept a verdict knowing it was not unanimous.

- b. The court properly directed the jury to continue deliberating when the presiding juror advised the court that she reasonably believed the jury could reach a unanimous verdict within a reasonable period of time.

A criminal conviction requires a unanimous jury verdict, *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). RCW 9.94A.537(3) requires a unanimous jury verdict on aggravating factors. A criminal defendant has the right to poll the jury in order to confirm the unanimity of a verdict. CrR 6.16(a)(3). The purpose of polling the jury is to ensure that the verdict entered is that of the jurors, both individually and collectively, and that it was not coerced or caused by mistake. *State v. Agtuca*, 12 Wn. App. 402, 406, 529 P.2d 1159 (1974). If, after polling the jury, the court determines that all of the jurors do not agree on the general verdict, the court may either direct the jury to retire for further deliberations or discharge the jury. CrR 6.16(a)(3); *See State v. Goldberg*, 149 Wn.2d 888, 894.

In the present case, the jury advised the court it had reached a verdict. 7/10/07 VRP 119. However, when the jury was polled, it became clear that the jurors were not unanimous in their answer to special interrogatory number one – whether the defendant had acted with sexual motivation.

RP 7/10/07 VRP 121. The presiding juror had written “no” as the answer for that special interrogatory, but when polled only a couple of jurors raised their hands to indicate that “no” was their verdict. 7/10/07 VRP 120-21, 130; CP 106. After discussion with counsel outside the presence of the jury, the court called the jurors back into the courtroom and, using the language from WPIC 4.70, asked the presiding juror if there was a reasonable probability of the jury reaching a verdict within a reasonable time. 7/10/07 VRP 130-31. After the presiding juror advised the court that she believed a unanimous verdict could be reached within a reasonable time, the court directed the jury to continue their deliberations. 7/10/07 VRP 132-33. As argued above, because RCW 9.94A.537 mandates a unanimous verdict for aggravating factors, the court properly instructed the jury to continue its deliberations once the presiding juror advised the court that a unanimous verdict could be reached within a reasonable time.

Defendant argues that the court’s instruction to the jury to continue deliberations was coercive. Brief of Appellant at 21. To support his argument, defendant relies upon *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978), and *Iverson v. Pacific Am. Fisheries*, 73 Wn.2d 973, 442 P.2d 243 (1968). These cases are factually distinguishable from the present case.

In *Boogaard*, defendant was charged with second degree theft. *State v. Boogaard*, 90 Wn.2d 733. After two days of trial with conflicting testimony, the case went to the jury in mid-afternoon. *Boogaard*, at 735. At 9:30 pm, no verdict had been returned and the judge sent the bailiff in to inquire how the jury stood numerically and was advised the vote was 10 to 2 (without specifying with respect to guilt or innocence). *Boogaard*, at 735. The court called the jury in and asked the presiding juror what the history of the vote had been and how long the vote had stood at each division. *Id.*, at 735. The court then asked the presiding juror if he believed a verdict could be reached within one half hour. *Boogaard* at 735. When the presiding juror responded affirmatively, the court then asked each juror individually his opinion on whether a verdict could be reached within one half hour. *Id.*, at 735. The judge then instructed the jury to return to the jury room for further deliberations. *Id.* The jury returned a unanimous verdict of guilty within one half hour. *Id.* On appeal, the Supreme Court found the court's questioning of individual jurors and one half hour time limit was coercive. *Id.*, at 739.

Similarly, in *Iverson v. Pacific Am. Fisheries*, 73 W.2d 973, 442 P.2d 243 (1968), after 8 hours of deliberation, the presiding juror sent a note advising the court that the jury was deadlocked 9 to 3 for the defendant. The note further explained to the court the number of different votes the jurors had taken, the split on each vote, and included how many voted for

the defendant and how many voted for the plaintiff. *Iverson*, at 975. After receiving the note, the court instructed the jury that in this civil case ten jurors must agree for the jury to reach a verdict and that the jurors should attempt to harmonize their views if possible to reach a verdict. *Iverson*, at 975. Within ten minutes of receiving the court's instruction to harmonize their views to reach a verdict, the jurors returned with a verdict of 11 to 1 for the defendant. *Id.* After the verdict, the plaintiff successfully moved for a new trial. In granting the motion for a new trial, the trial court stated that he believed that the jury felt that they were being ordered by the court to reach a verdict without regard to what their honest conviction might be. *Id.* Under these facts, the Supreme Court agreed. *Id.*, at 975.

The present case is distinguishable from both *Boogaard* and *Iverson*. Unlike those cases where the jury had deliberated for 8 hours or more, the jury in the present case had only deliberated for two hours when they advised the court they had reached a verdict. Unlike *Boogaard*, the court did not give the jury a one half hour time frame in which they should return a verdict, nor did the court tell the jury it needed to harmonize its views to return a verdict as was done in *Iverson*⁴.

⁴ It is important to note in *Iverson*, that the trial court stated that, upon reflection, he believed his actions were coercive. In contrast, after reviewing WPIC 160.00, and *State v. Goldberg*, the trial court in the present case made a specific finding that her actions were not coercive. 9/7/07 SRP 11; CP 162-86.

Here, the court believed the jury had reached a unanimous verdict until it polled the jurors and discovered that the jurors were not unanimous as to special interrogatory number one – whether the defendant had acted with sexual motivation. Then the court intentionally chose the most neutral and noncoercive manner in which to determine whether a unanimous verdict could be reached within a reasonable time.

The court's use of WPIC 4.70 to determine if additional deliberations would result in an unanimous verdict cannot be perceived as coercive. The language of WPIC 4.70 does not suggest a particular response, does not suggest a particular result, nor does it place a time constraint on the deliberating jurors. Because the presiding juror believed the jurors could be unanimous within a reasonable period of time, the Court properly directed the jury to continue its deliberations. Within 5-10 minutes, the jurors had reached a unanimous verdict. 9/6/07 SRP 11.

- c If this court were to vacate defendant's sentence and remand for resentencing, the State should be allowed to decide whether it will empanel a jury pursuant to RCW 9.94A.537(2) or whether it will proceed to sentencing on the two remaining aggravating factors the jury found beyond a reasonable doubt.

In April 2007, the legislature amended RCW 9.94A.537 to expressly empower the superior courts with the authority to impanel juries to find aggravating circumstances in all cases that come before the court

“for trial or sentencing regardless of the date of the original trial or sentencing.” Laws of 2007, ch. 205, §1 (statement of legislative intent).

When an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). The 2007 amendment to RCW 9.94A.537 applies to exceptional sentence cases where resentencing is required. *State v. Mann*, 146 Wn. App 349, 360, 189 P.3d 843 (2008).

In the present case, the all three of the aggravating factors submitted to the jury are listed in RCW 9.94A.535(3). Therefore, under RCW 9.94A.537(2) if this court were to vacate defendant’s exceptional sentence and remand for resentencing, the Superior Court may impanel a jury to determine whether the defendant acted with sexual motivation. At the resentencing hearing, the jury can be properly instructed with the current WPIC 160.00 , which clearly instructs the jury that in order to answer either “yes” or “no” on the special verdict form the jury must be unanimously satisfied beyond a reasonable doubt. WPIC 160.00 states in the relevant part:

If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes,” you must

unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

2. THE COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE AFTER THE JURY FOUND BEYOND A REASONABLE DOUBT THAT (1) THE VICTIM WAS PRESENT IN THE RESIDENCE WHEN THE BURGLARY WAS COMMITTED; (2) DEFENDANT INVADED THE VICTIM’S PRIVACY; AND (3) DEFENDANT COMMITTED THE CRIME WITH SEXUAL MOTIVATION.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Blakely*, 542 U.S. 296, 303-04.

Consistent with the requirements of *Blakely*, RCW 9.94A.537(1)⁵ allows the prosecution to give notice that it is intending to seek an exceptional sentence “any time prior to trial or entry of the guilty plea if

⁵ RCW 9.94A.537 was enacted in 2005 to bring Washington State’s sentencing statutes in line with the United State Supreme Court’s decision in *Blakely v. Washington*.

the substantial rights of the defendant are not prejudiced.” Except for some exceptions that may be determined by the court, all aggravating circumstances are to be proved to a jury. RCW 9.94A.537.

On February 26, 2007, the State charged defendant by amended information with first degree burglary with three aggravating circumstances: (1) the current offense included a finding of sexual motivation;⁶(2) the offense involved an invasion of the victim’s privacy⁷; (3) victim was present in the residence during the burglary⁸. CP 6. Defendant’s trial commenced on July 5, 2007. 6/27/07 RP 20; 7/5/07 RP 3. The defendant was on notice more than three months before his trial that the State would be seeking an exceptional sentence based upon the three aggravating factors listed in the February 26, 2007, amended information.

At trial, a special verdict form with each of these same three aggravating circumstances was submitted to the jury along with the court’s instructions. CP 68-102, 106. The jury found defendant guilty beyond a reasonable doubt of first degree burglary and found each of the three aggravating circumstances beyond a reasonable doubt. 7/10/07 VRP 119-21; 131-133; CP 105, 106.

⁶ RCW 9.94A.535(f)

⁷ RCW 9.94A.535(p)

⁸ RCW 9.94A.535(u)

At the sentencing hearing, the State asked court to impose an exceptional sentence of 60 months based upon the aggravating factors found by the jury. CP 117-21. The defendant asked the court to impose a low end standard range sentence, to find that the invasion of privacy aggravating factor was subsumed within the crime itself, and to vacate the jury's finding of sexual motivation because defendant alleged that finding was coerced by the court. 9/5/07 SRP 1-15; 9/6/07 SRP 3-10; CP 108-116. The court found that the jury's finding of sexual motivation was not coerced, that the jury found beyond a reasonable doubt that defendant committed the crime of first degree burglary and that all three aggravating factors were proved beyond a reasonable doubt. 9/6/07 SRP 10-13; CP 162-68. The court entered findings of fact and conclusions of law that reflected these findings. CP 162-68.

The court sentenced defendant to a maximum and minimum term based upon the jury's finding that defendant had committed the offense with sexual motivation. RCW 9.94A.712(1)(a)(ii) and (3)(a). The maximum penalty for first degree burglary, a class A felony, is life in prison. RCW 9A.20.021(a). The court imposed a minimum sentence of 20 months and a maximum sentence of life in prison. CP 122-136; 9/6/07 SRP 13-15. *Blakely* does not apply to an exceptional minimum sentence imposed under RCW 9.49A.712 that does not exceed the maximum

sentence imposed. *State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006). By setting a maximum and minimum sentence, the court imposed an indeterminate sentence. *State v. Clarke*, 156 Wn.2d 880, 887; RCW 9.94A.712(1)(a)(ii). The court imposed an exceptional sentence of life on community custody and specifically noted that any one of the three aggravating factors formed an independent basis for the exceptional sentence the court imposed. 9/6/07 SRP 13; CP 162-68.

- a. The jury properly found the invasion of privacy aggravating factor.

The defendant argues that “there [was no] authority for the trial court to make up its own aggravating factor that reaching through the window and touching E.M.’s face was not “required” to commit the crimes charged.” Brief of Appellant at 31. However, defendant misperceives the court’s statement. The court was not creating a new aggravating factor, rather the court was explaining why the invasion of privacy aggravating factor was a proper basis for an exceptional sentence in this case.

At sentencing defense counsel argued that despite the jury’s verdicts, which included the finding of three aggravating factors, the court should impose a low end, standard range sentence. 9/6/07 SRP 5. Specifically, defense counsel argued that the court should ignore the jury’s affirmative response on the special verdict form in which they found beyond a reasonable doubt that defendant’s crime was an invasion of the

victim's privacy because that aggravating factor was inherent in the crime of first degree burglary. 9/5/07 SRP 12-13. Defense counsel also argued that the jury did not find sexual motivation beyond a reasonable doubt because the jury need not be unanimous when responding 'no' on a special verdict form. 9/5/07 SRP 7-9. Finally, defense counsel argued that the only victim in this case was EM because her mother, who was sleeping in her own bedroom when defendant assaulted EM, was not listed on the information. 9/6/0-7 SRP 10.

The court responded to defense counsel's arguments by examining each of the three aggravating factors found by the jury: (1) sexual motivation; (2) invasion of privacy; (3) victim present in the residence when the burglary was committed. 9/6/07 SRP 10-13; CP 162-68. The court noted that the jury unanimously found each aggravating factor beyond a reasonable doubt. 9/5/07 SRP 12; CP 162-68. The court also found each of the three aggravating factors existed. 9/5/07 SRP 12; CP 122-36, 162-68. In responding to defense counsel's arguments, the court stated

...I'm going to find that the sexual motivation aggravating factor exists, that the jury found that unanimously. [The jury] also clearly found that there was an invasion of the victim's privacy. And while I appreciate the case law that you've indicated Mr. DeCosta, this is a little bit different in terms of the exact acts that Mr. Coleman did, in terms of leaning into the window and then touching this child's face. That's an invasion of privacy just where he was touching

her. That's not required for the assault. That's not required for the burglary, so I'll find that that's an aggravating factor as well. [The jury] also found the victim was present.

9/6/07 SRP 12; CP 162-68.

It is clear when the court's statement that reaching through the window and touching E.M's face as not "required" to commit the crimes charged, the court is not creating a new aggravating factor, but explaining why invasion of privacy was appropriate in this case.

Defendant argues that invasion of privacy is inherent within the crime of burglary. However, this argument has been rejected previously. In *State v. Collicott*, 118 Wn.2d 649, 827 P.3d 263 (1992), victim was a temporary resident in a treatment facility. The court found that raping the victim in her temporary bedroom at that facility was within her zone of privacy. *Collicott*, 118 Wn.2d 649, 661. Here, defendant reached in through EM's bedroom window and touched her face and ear while she slept. Because defendant committed the assault in EM's bedroom, the jury properly found an invasion of the victim's privacy. There was substantial and compelling evidence to support the jury's finding that defendant invaded EM's privacy.

- b. Both EM and her mother were present in the residence when defendant burglarized their home and both were victims of the burglary.

Defendant also argues that only EM can be a victim in this case because she is the only victim listed on the information. Brief of Appellant at 36-37. Defendant cites *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008), in support of his argument that defendant was not given notice and an opportunity to defend. Brief of Appellant at 35. However, *Recuenco* is distinguishable on its facts.

Arturo Recuenco was charged with second degree assault while armed with a deadly weapon: to wit: a handgun. *Recuenco*, 163 Wn.2d 428, 431. The jury convicted him of second degree assault and, by special verdict, found that he was armed with a deadly weapon at the time of the assault. *Recuenco*, at 432. At sentencing, the court imposed a standard range sentence plus a 36-month firearm enhancement. *Id.*, at 432. Recuenco appealed arguing that he was deprived of his due process rights because a firearm enhancement was imposed even though the jury found he was armed with a deadly weapon. *Id.* at 432. In vacating his sentence, the State Supreme Court held that the sentencing court exceeded its sentencing authority by sentencing Recuenco on an enhancement with which he had not been charged and of which the jury had not found beyond a reasonable doubt. *Id.*, at 442. The error in *Recuenco* occurred

when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. *Id* at 442.

The present case is distinguishable from *Recuenco* because here the State charged defendant with first degree burglary with three sentencing enhancements; the jury convicted defendant of first degree burglary and found all three of the aggravators beyond a reasonable doubt; and the judge properly sentenced defendant on the charge of first degree burglary and the same three sentencing enhancements. CP 6, 105, 107, 122-136, 162-68;

Defendant's argument also fails because it is well settled that there can be more than one victim to a burglary. *See State v. Lessley*, 118 Wn.2d 773; 827 P.2d 996 (1992). In *Lessley*, the defendant broke down the door to his former girlfriend's parent's house and brandished a .22 caliber revolver. *Lessley* 118 Wn.2d 773, 775. Defendant kidnapped his ex-girlfriend and her mother and later assaulted the ex-girlfriend. On appeal, the Supreme Court rejected defendant's central victim argument because the burglary victimized the parents as well as the ex-girlfriend. *Id.*, at 779.

Because both EM and her mother were present in the house when defendant reached through EM's bedroom window and petted EM on her face and ear, under *Lessley* both EM and her mother were victims of the burglary.

- c. The trial court properly entered findings of fact and conclusions of law based upon the jury's answers to the special interrogatories, alternatively, any error in entering such findings was harmless.

Defendant argues that the court erred when it entered findings of fact and conclusions of law that mirrored the three aggravating factors found by the jury at trial. *Blakely v. Washington* held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 542 U.S. 296, 301.

In the present case, the State alleged and the jury found beyond a reasonable doubt, three aggravating factors: (1) sexual motivation; (2) invasion of privacy; (3) the victim was present in the residence when the burglary was committed. At sentencing, the defendant challenged the jury's finding of each of those three aggravating factors. 9/5/07 SRP 1-15; 9/6/07 SRP 2-10; CP 108-13, 114-16. In response to defendant's argument, the trial court went through each of the three aggravating factors that the jury found beyond a reasonable doubt and made a finding that the court also finds those three aggravating factors. 9/6/07 SRP 11-12.

While defendant argues on appeal that is ‘extremely troubling’ that the court entered findings that mirrored the jury's findings, defendant invited the court to do just that when he challenged the appropriateness of the jury's findings at sentencing. Brief of Appellant at 32. If the court's

findings were error, then they were invited error. Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003).

Assuming *arguendo*, this court finds it was error for the court to entered findings of fact and conclusions of law regarding the aggravating factors found both by the jury and then later by the court, any error would be harmless. See *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)(holding that *Blakely* errors can be subject to harmless error analysis). Because the court only found the same aggravating factors that had previously found by the jury, defendant cannot show he was prejudiced by the court's findings.

3. THE PROSECUTOR'S REASONABLE DOUBT ARGUMENTS WERE PROPER.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remark or conduct was improper and that it prejudiced the defendant. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original].

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

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith, and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952).

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

the best position to assess the impact of irregularities. See *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

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

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

For the first time on appeal, defendant asserts the prosecutor committed misconduct when he argued reasonable doubt to the jury in his closing argument. Brief of Appellant at 40. Defendant argues that the prosecutor's argument that jurors employ the reasonable doubt standard in their everyday lives effectively relieved the State of its burden of proof beyond a reasonable doubt. Because defendant failed to object at trial, any

error is waived unless he can show the argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction. *See State v. Binkin*, 79 Wn. App 284, 293-94. Defendant's argument fails because the State's reasonable doubt argument was proper.

The prosecutor's reasonable doubt argument must be viewed in the context of his entire closing argument. Here, after reviewing the elements of the crime, the prosecutor reminded the jury that the State bears the burden of proof beyond a reasonable doubt.

...let me say this before I go on: The State has the burden to prove the existence of every element beyond a reasonable doubt, and it's a burden the State welcomes, and it's the burden the State carries because it's the only way this criminal justice system works.

7/10/07 RP 43. The prosecutor later referred the jurors to Instruction No. 2, the court's instruction on reasonable doubt. 7/10/07 RP 45-46; CP 72.

And the Court tells you, 'Beyond a reasonable doubt is a doubt for which a reason exists. If such a doubt – if it's such a doubt as what exists in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence, if after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.'

7/10/07 RP 45-46. From Instruction No.2., the prosecutor focused on the terms "abiding belief" and "reasonable doubt." 7/10/07 RP 46-49; CP 72.

He argued that an abiding belief "is one that you're confident in today.

You're confident that you'll be satisfied with that verdict tomorrow.

You're confident that a year from now or ten years from now, you're

going to wake up and you're going to look at yourself in the mirror and you're going to say 'I remember that case. I was a juror. That guy did it.'" 7/10/07 RP 46-47.

To explain reasonable doubt, the prosecutor used two analogies – the decision to cross the street with a walk signal and a partially completed jigsaw puzzle. 7/10/07 RP 47-48. He used these examples not to reduce the State's burden, but to emphasize that a juror can be convinced beyond a reasonable doubt and still have some unanswered questions; that proof beyond a reasonable doubt is not proof beyond any and all doubt.

The prosecutor's arguments were designed to explain abiding belief and reasonable doubt . 7/10/07 RP 43-49. As such, the prosecutor's arguments were proper and did not prejudice the defendant.

Even if this court were to find the prosecutor's arguments improper, defendant's claim of prosecutorial misconduct still fails because he cannot show "there is a *substantial likelihood* the misconduct affected the jury's verdict." *State v. McKenzie*, 157 Wn.2d 44, 52. (italics in original). This is especially true in this case where a curative instruction would have cured any error. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-94, 902 P.2d 673 (1995). Here the defendant did not object or request a curative instruction, and therefore the error is considered waived unless the court finds that the remark was "so

flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

When the deputy prosecuting attorney’s argument is looked at in the context of the whole argument, it is clear his argument was entirely proper. The prosecutor properly asked the jury to look at the evidence presented at trial to determine if the State had met its burden of proof beyond a reasonable doubt. 7/10/07 RP 37-51. He referred the jury to the court’s instructions on reasonable doubt and applied the law to the facts of this case. 7/10/07 RP 37-51.

Finally, if the court were to find the prosecutor’s argument improper, any impropriety was cured by the instructions to the jury. Jurors are presumed to follow the court’s instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Here, the trial court instructed the jury as follows:

The attorney’s remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

CP 70. The court also instructed the jury:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 72.

Defendant's prosecutorial misconduct argument is without merit. It fails because the prosecutor's argument was proper and was designed to explain reasonable doubt and abiding belief, and did not lessen the State's burden of proof. However, even if this court were to find the prosecutor's argument improper, defendant cannot bear the heavy burden of showing the argument was so flagrant or ill-intentioned that a curative instruction would not have neutralized any resulting prejudices.

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

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was

rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L.Ed.2d 305 (1986).

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

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

P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

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

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

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

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant asserts that his trial counsel was ineffective for failing to object to the State’s closing argument on reasonable doubt. Brief of Appellant at 48. The decision of whether or not to object is a matter of trial strategy and only in egregious circumstances will a failure to object constitute deficient performance. *See State v. Madison*, 53 Wn. App. 754, 763.

Here the prosecutor’s reasonable doubt argument was proper. As argued above, the prosecutor’s argument in no way lessened the State’s burden of proof. Instead, the prosecutor correctly told the jury that the State must prove its case beyond a reasonable doubt and specifically referred the jurors to the court’s instructions on reasonable doubt. 7/10/07 RP 43, 45-46. Jurors are presumed to follow the court’s instructions on the law. *State v. Kirkman*, 159 Wn.2d 918, 937. Because the

prosecutor's argument was proper, any objection defense counsel would have made would have been overruled. Trial counsel cannot be deficient for failing to make an objection that would not have been sustained.

Even if this court were to find trial counsel's trial strategy deficient, defendant still cannot meet his burden of showing prejudice. Defendant would have to show that the result of the trial would have been different had trial counsel objected to the prosecutor's argument and the court would have sustained defense counsel's objection. However, in this case there was overwhelming evidence of defendant's guilt, and there is no reasonable probability that the outcome of the trial would have been any different had trial counsel objected to the State's proper reasonable doubt argument.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests this court to affirm the defendant's convictions and sentence. Alternatively, if this court vacates defendant's sentence and remands for resentencing, the

State should be permitted to ask the trial court to impanel a jury to consider the aggravating factors pursuant to RCW 9.94A.537(2).

DATED: December 3, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



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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.

12/30/08 
Date Signature

COURT OF APPEALS
CLERK OF COURT
COUNTY OF PIERCE
COMM - 3 PM 12/14
STATE OF WASHINGTON
BY  CLERK