

NO. 38128-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIFFANY DOLL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01719-2

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

III. ARGUMENT.....8

 A. DOLL’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE DOLL HAS FAILED TO SHOW THAT COUNSEL’S PERFORMANCE WAS DEFICIENT OR THAT THE DEFICIENT PERFORMANCE PREJUDICED DOLL.....8

 1. Defense counsel’s failure to object to the officers’ testimony regarding statements made by the informant was not ineffective assistance because Doll cannot show that the objections would have been sustained and because Doll cannot show prejudice since the informant testified concerning these same statements at trial10

 2. Defense counsel’s failure to give timely notice of a proposed defense witness did not constitute ineffective assistance because the trial court properly excluded the witness on relevance grounds; the timeliness of the disclosure, therefore, was irrelevant and Doll also cannot show prejudice since the proposed evidence was inadmissible.14

 3. Doll’s claim of ineffective assistance regarding counsel’s failure to object to evidence that Doll was arrested on a warrant and for driving with a suspended license must fail because Doll cannot show that such an objection would have been sustained since the evidence was necessary and admissible to

demonstrate why Deputy Manchester stopped and arrested Doll and was evidence of Doll's motive to hide the drugs in the informant's purse.....16

4. Doll's claim of ineffective assistance based on her mere allegation that her attorney prevented her from testifying must fail because Washington Court's have specifically held that mere allegations from a defendant that an attorney prevented him or her from testifying are insufficient.....18

5. Doll's claim of ineffective assistance based on her counsel's failure to call certain defense witnesses must fail because a decision not to call a witness is considered a matter of trial tactics that generally will not support a claim of ineffective assistance of counsel and because Doll has failed to overcome the strong presumption that counsel provided effective representation.23

6. Doll's claim that she received ineffective assistance because her trial counsel failed to object Detective Dobbins testimony regarding the witness tampering charge, the theft charge, and the informant's lack of criminal history must fail because Doll cannot show that counsel acted unreasonably or that she was prejudiced.27

B. DOLL'S CLAIM THAT DETECTIVE DOBBINS GAVE IMPERMISSIBLE OPINION TESTIMONY MUST FAILS BECAUSE: (1) THE ISSUE WAS NOT PROPERLY PRESERVED FOR REVIEW; AND (2) EVEN IF THE ISSUE HAD BEEN PRESERVED FOR REVIEW, THE TESTIMONY WAS NOT IMPROPER OPINION EVIDENCE.31

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DOLL'S MOTION FOR A NEW TRIAL BASED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE, AS DISCUSSED PREVIOUSLY, DOLL FAILED TO DEMONSTRATE THAT SHE RECEIVED INEFFECTIVE ASSISTANCE OF

	COUNSEL.....	35
IV.	CONCLUSION.....	37

TABLE OF AUTHORITIES
CASES

In re Pers. Restraint of Davis,
152 Wn. 2d 647, 101 P.3d 1 (2004).....9, 27

In re Pers. Restraint Petition of Pirtle,
136 Wn. 2d 467, 965 P.2d 593 (1998).....8

State v. Barr,
123 Wn. App. 373, 98 P.3d 518 (2004).....32

State v. Bourgeois,
133 Wn. 2d 389, 945 P.2d 1120 (1997).....35

State v. Burkins,
94 Wn. App. 677, 973 P.2d 15 (1999).....16

State v. Byrd,
30 Wn. App. 794, 638 P.2d 601 (1981).....23

State v. Cochran,
102 Wn. App. 480, 8 P.3d 313 (2000).....26

State v. Darden,
145 Wn. 2d 612, 41 P.3d 1189 (2002).....16

State v. Ellison,
36 Wn. App. 564, 676 P.2d 531 (1984).....13

State v. Floreck,
111 Wn. App. 135, 43 P.3d 1264 (2002).....12

State v. Fredrick,
123 Wn. App. 347, 97 P.3d 47 (2004).....15

State v. Hancock,
46 Wn. App. 672, 731 P.2d 1133 (1987).....13

<i>State v. Hayes,</i> 81 Wn. App. 425, 914 P.2d 788 (1996).....	23
<i>State v. Iverson,</i> 126 Wn. App. 329, 108 P.3d 799 (2005).....	10
<i>State v. Johnson,</i> 35 Wn. App. 380, 666 P.2d 950 (1983).....	13
<i>State v. Kirkman,</i> 159 Wn. 2d 918, 155 P.3d 125 (2007).....	30
<i>State v. Krause,</i> 82 Wn. App. 688, 919 P.2d 123 (1996).....	23
<i>State v. Kruger,</i> 116 Wn. App. 685, 67 P.3d 1147 (2003).....	9
<i>State v. Leavitt,</i> 111 Wn. 2d 66, 758 P.2d 982 (1988).....	12
<i>State v. Lillard,</i> 122 Wn. App. 422, 93 P.3d 969 (2004).....	11, 17
<i>State v. Lord,</i> 117 Wn. 2d 829, 822 P.2d 177 (1991).....	24
<i>State v. Lynn,</i> 67 Wn. App. 339, 835 P.2d 251 (1992).....	32
<i>State v. Madison,</i> 53 Wn. App. 754, 770 P.2d 662 (1989).....	9, 27
<i>State v. McDonald,</i> 138 Wn. 2d 680, 981 P.2d 443 (1999).....	32
<i>State v. McFarland,</i> 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	9, 23
<i>State v. McKenzie,</i> 157 Wn. 2d 44, 134 P.3d 221 (2006).....	35

<i>State v. Piche,</i> 71 Wn. 2d 583, 430 P.2d 522 (1967).....	23
<i>State v. Post,</i> 59 Wn. App. 389, 797 P.2d 1160 (1990).....	11
<i>State v. Robinson,</i> 79 Wn. App. 386, 902 P.2d 652 (1995).....	23
<i>State v. Robinson,</i> 138 Wn. 2d 753, 982 P.2d 590 (1999).....	18-21, 36-37
<i>State v. Saunders,</i> 91 Wn. App. 575, 958 P.2d 364 (1998).....	9, 27
<i>State v. Sherwood,</i> 71 Wn. App. 481, 860 P.2d 407 (1993).....	24
<i>State v. Stenson,</i> 132 Wn. 2d 668, 940 P.2d 1239 (1997).....	8
<i>State v. Sutherby,</i> 138 Wn. App. 609, 158 P.3d 91 (2007).....	28, 29, 33, 34
<i>State v. Thomas,</i> 109 Wn. 2d at 225-26, 743 P.2d 816 (1987).....	8
<i>State v. Todd,</i> 78 Wn. 2d 362, 474 P.2d 542 (1970).....	13
<i>Strickland v. Washington,</i> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	9, 23

STATUTES

RCW 9A.76.010(4).....	15
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Doll's claim of ineffective assistance of counsel must fail when Doll has failed to show that counsel's performance was deficient or that the deficient performance prejudiced Doll?

2. Whether Doll's claim that Detective Dobbins gave impermissible opinion testimony must fail when: (1) the issue was not properly preserved for review; and, (2) even if the issue had been preserved for review, the testimony was not improper opinion evidence?

3. Whether the trial court abused its discretion in denying Doll's motion for a new trial based on a claim of ineffective assistance of counsel when Doll failed to demonstrate that she received ineffective assistance of counsel?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tiffany Doll was charged by a third amended information filed in Kitsap County Superior Court with possession of a controlled substance, delivery of methamphetamine, theft in the first degree, possession of methamphetamine with intent to manufacture or deliver, and two counts of bail jumping. CP 35. Following a jury trial, Doll was found guilty on all the charged offenses. CP 172. After denying Doll's motion for a new trial, the

trial court imposed a standard range sentence. CP 172. This appeal followed.

B. FACTS

On November 24, 2007, Kitsap County Sheriff's Deputy Cory Manchester was on patrol when he saw a car that he recognized as belonging to Doll. RP 31-32. Deputy Manchester knew Doll had a warrant and believed her driver's license was suspended. RP 32. After confirming these facts on his computer, he initiated a traffic stop of Doll's car. RP 32. When he approached the car he saw that Doll was the driver and that there was a female passenger. RP 32-33. Doll was arrested. RP 33. The female passenger (Candace Brasch) falsely identified herself to Deputy Manchester and used the name of her twin sister. RP 33-34. Ms. Brasch was also arrested and in the subsequent search of her purse Deputy Manchester found approximately an ounce of methamphetamine. RP 34-35. Ms. Brasch was Mirandized and Deputy Manchester then asked her about the items found in her purse. RP 40-41. Ms. Brasch claimed that the Doll had placed the items in her purse just prior to the traffic stop. RP 41, 218-19.

Brasch and Doll were placed in a patrol car together, and Doll told Brasch not to say or do anything and that all she would get was 30 days. RP 224. Doll also told Brasch that she would "make it worth her while" and take care of Brasch (which Brasch testified meant that Doll would give her money or methamphetamine). RP 224-25.

Detective Duane Dobbins of the Kitsap County Sheriff's Office also testified and explained that he was assigned as a narcotics detective with the West Sound Narcotics Enforcement Team (WESTNET). RP 60-61. Detective Dobbins explained that as a narcotics detective he sometimes works with police operatives or confidential informants, and he explained this procedure to the jury. RP 68-76.

Shortly after her arrest, Ms. Brasch sent notice from the jail that she wanted to cooperate with WESTNET. RP 77. Detective Dobbins then contacted Ms. Brasch at the jail and spoke with her about working as an informant. RP 77-78. Eventually Ms. Brasch entered into a contract where she would cooperate with law enforcement in exchange for the State agreeing to reduce the charge in her pending case stemming from the methamphetamine found in her purse. RP 79, 228. Ms. Brasch was then released from the jail and began working with Detective Dobbins on an investigation involving someone other than Doll. RP 80. Detective Dobbins then instructed Ms. Brasch to begin setting up a controlled buy of narcotics from Doll. RP 81.

On December 6, Brasch met with Doll in order to retrieve a bag that she had left in Doll's car when she was arrested. RP 229. At this time Doll gave Brasch some methamphetamine. RP 81, 187-88, 229. Brasch explained that Doll gave her the drugs as payment because Doll thought Brasch was

going to take the blame for the drugs found on November 24th. RP 230. Brasch had not expected to obtain drugs from Doll at this time, so law enforcement was not actively surveiling this contact. RP 81-82, 230. When Ms. Brasch contacted Detective Dobbins and told him that she had obtained the drugs and another officer then contacted Ms. Brasch and obtained the drugs. RP 82, 188, 231, 263. Ms. Brasch also arranged to make a future purchase of drugs from Doll on December 10. RP 81-82, 85, 232-33.

On December 10, Detective Dobbins and another officer met with Ms. Brasch and provided her with \$2500 of WESTNET funds that Brasch was to give to Doll in exchange for three ounces of methamphetamine. RP 85-86. The plan was for Brasch to meet with Doll at a gas station in Port Orchard where the exchange would take place. RP 86, 233-35. Other officers were watching Doll and had followed her when she left her apartment. RP 86-87. These surveillance officers then reported that Doll was in a car heading towards the gas station and that a male was driving this car. RP 87-88. Officers then saw that Doll had been dropped off near the gas station and was walking up to the station. RP 88. Doll met Brasch in front of the store and the two then went into a bathroom for approximately ten minutes. RP 88, 93, 236. When they came out, the two left the store and walked across the street to where the male subject and the car that Doll had arrived in was located. RP 93.

Brasch gave the WESTNET money to Doll, as Doll had told Brasch to give her the money. RP 94, 236-37, 268. Doll also explained that the male she was with nervous about Brasch, so Doll would have to go by herself into the car and get the drugs. RP 237. Doll said she would go with the male and drive around the block and would then be right back with the drugs. RP 94, 237-39. Doll then got into the car with the male and left the scene. RP 93.

Officers initially followed the car and saw that it took a number of turns and went around the block. RP 94. Rather than returning to the gas station, however, the car got onto a highway and left the area. RP 94. Detective Dobbins and Brasch remained at the gas station waiting for Doll and the car to return. RP 94-95. Detective Dobbins had Brasch send Doll approximately a dozen text messages, but there was no response from Doll. RP 104-05, 237. After waiting at the gas station for approximately an hour, Detective Dobbins and Brasch finally gave up and left. RP 95, 103. Officers then began to stake out Doll's apartment where they waited for Doll to return. RP 104-05.

Approximately another hour later, Doll and a male drove up to Doll's apartment, and officers arrested Doll and the male at this time. RP 106. Officers found \$1620 of the \$2500 in WESTNET funds on Doll. RP 106-

07.¹ Officers also found 3.8 grams of methamphetamine hidden in the engine compartment of the car. RP 108. Doll's cell phone was also found and, after obtaining a search warrant, officers found the text messages that Brasch had sent to Doll. RP 112-15.

After charges were filed, but prior to trial, Brasch and Doll saw each other at an auto parts store and Doll asked Brasch not to show up for trial and to not testify against her, stating that if she didn't show up the State would not have a case. RP 127, 243-44. When Detective Dobbins was informed of this, he had several deputies go to Doll's apartment and arrest her for witness tampering. RP 127-28.

Defense counsel throughout the trial focused on the fact that for many of the crimes the only actual witness was Brasch and that Brasch had a motive to lie since she was herself facing charges. For instance, defense counsel cross examined Detective Dobbins regarding the contract that Brasch entered into with the State whereby she would receive a reduced sentence and was able to get out of jail almost immediately. RP 131-34. In addition, defense counsel repeatedly pointed out during the cross examination of several witnesses that the only witness regarding the December 6 delivery

¹ After her arrest, Doll claimed that Brasch was going to give her \$5000 for her car and that the \$2500 was a partial payment for the car. RP 107. Other evidence, however, showed that the car was in poor condition and was worth far less than \$5000. RP 158. In addition, Brasch denied that she was interested in purchasing the car and also disputed that it was worth

was Brasch. RP 137-40.² Similarly, Defense counsel's cross-examination also demonstrated that the officers had to rely solely on Brasch regarding the December 10th conversation that took place at the gas station between Brasch and Doll. See, RP 154, 165.³ Despite this defense theory, the jury convicted Doll on all counts. CP 118-20.

anywhere near \$5000. RP 242.

² See for instance, RP 138:

Q. Well, did anyone from law enforcement supervise or give any surveillance to that exchange?

A. No sir, it was unsupervised.

Q. Do you have any third parties that have come forward to corroborate that Ms. Brasch received that 1.1 grams of meth from Ms. Doll?

A. Third party, you mean a witness?

Q. Yes.

A. No sir.

And, RP 140:

Q. Let me ask you, do you know where that 1.1 grams of methamphetamine came from that was handed to you by Ms. Brasch?

A. That came from Tiffany Doll.

Q. Again, how do you know that?

A. Per Candace Brasch.

Q. And there's no other evidence to confirm that, is there?

A. No sir.

See also, RP 164 (pointing out that was no other "evidence or confirmation" of the December 6 delivery and that there was "no other independent evidence that the event occurred other than Ms. Brasch's own words"); and RP 194-95 (Again, counsel was able to get an officer to concede that the only evidence that Doll gave meth to Brasch on December 6th was the word of Ms. Brasch).

³ For instance, at RP 165 counsel pointed out that with respect to the December 10th transaction at the gas station and the conversation there, "You have no independent evidence of that other than Ms. Brasch and her word."

III. ARGUMENT

A. DOLL'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE DOLL HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT OR THAT THE DEFICIENT PERFORMANCE PREJUDICED DOLL.

Doll argues that that defense counsel was ineffective for failing to object to certain evidence at trial. App.'s Br. at 13-32. This claim is without merit because Doll has failed to show that counsel's failure to object fell below prevailing professional norms; that the proposed objection likely would have been sustained; and that the result of the trial would have been different had the evidence not been admitted.

To establish that counsel was ineffective, the Defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his or her representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A

defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, *review denied*, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case, will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

1. ***Defense counsel's failure to object to the officers' testimony regarding statements made by the informant was not ineffective assistance because Doll cannot show that the objections would have been sustained and because Doll cannot show prejudice since the informant testified concerning these same statements at trial***

Doll first argues that her trial counsel was ineffective for failing to object to testimony from several officers concerning statements made by the informant, Candace Brasch. App.'s Br. at 14. This argument is without merit because Doll fails to show that the objections would have been sustained and because Doll cannot show prejudice since Brasch testified concerning these same statements at trial.

Doll's arguments all revolve around portions of the testimony of Deputy Manchester, Detective Dobbins, and Special Agent Salazar in which the officers at times described statements made to them by Brasch. *See*, App.'s Br. at 14-18. Doll then concludes that these statements were hearsay and that an objection to the hearsay would have been sustained. App.'s Br. at 19.

Under Washington law, however, a statement "offered to show why an officer conducted an investigation is not hearsay" and does not violate the right to confrontation. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Furthermore, when a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an

investigation, it is not hearsay and is admissible. *Iverson*, 126 Wn. App. at 337, citing *State v. Williams*, 85 Wn. App. 271, 280, 932 P.2d 665 (1997) (holding that officer's statement to another that he smelled alcohol on the breath of the defendant was not offered to prove the truth of the matter, but to show why the officer then requested the defendant to perform a Breathalyzer test, and was not inadmissible hearsay).

Thus, in the present case, had an objection been raised, the State could have argued that out-of-court statements were offered for a purpose other than to show the truth of the matter asserted and did not, therefore, qualify as hearsay. See *State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005). The trial court, therefore, could have found that the officer's testimony describing the context and background of a criminal investigation was admissible. See, e.g., *Lillard*, 122 Wn. App. at 437 ('the State did not offer Thomas' statements to prove what the cardholders had said, but to show how he conducted his investigation.');

State v. Post, 59 Wn. App. 389, 392, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596 (1992) (officer's testimony about a phone call to police was admissible to explain why the police investigation had focused on the defendant).

When the statements at issue in the present case are viewed in their proper context, the record shows that the officer's testimony demonstrated why and how the officers conducted their investigation. For instance,

Detective Dobbins and Special Agent Salazar worked with Brasch as an informant, and their limited testimony concerning Brasch's statements was necessary and admissible to explain their conduct and their investigation. Doll, therefore, cannot demonstrate that an objection to the testimony at issue would have been sustained.⁴

Furthermore, even if defense counsel could have objected to the testimony of the officers, Doll has failed to show any prejudice since Brasch herself testified about the statements at issue. *See*, RP 214-83.

Doll's failure to demonstrate prejudice in the present case is similar to other cases in which courts have held that the improper admission of hearsay was harmless error when the declarant actually testified at trial.⁵ For instance, Washington courts have held that the improper admission of hearsay

⁴ In addition, as defense counsel's theory at trial was that Brasch was not credible, counsel may have actually preferred that Doll's statements come in initially through the testimony of the officer's, as this would reinforce to the jury that Brasch's statements were made when she herself was facing a felony charge and had a reason to fabricate. Furthermore, allowing the statement's to come in through the officer's also increased the chances that the defense would be able to catch Brasch in an inconsistency when she later testified. All of these choices would have been reasonable, especially since there was no prejudice since Brasch herself would be testifying at the trial.

⁵ An error in admitting evidence is nonconstitutional if the hearsay declarant and recipient testify and are cross-examined. *State v. Floreck*, 111 Wn.App. 135, 140, 43 P.3d 1264 (2002); *see also State v. Leavitt*, 111 Wn.2d 66, 71, 758 P.2d 982 (1988) (concluding that failure to comply with child victim hearsay statute was not an error of constitutional magnitude that defendant could raise for first time on appeal because both child declarant and hearsay recipients had testified at trial and were available for cross examination). Furthermore, nonconstitutional error in admitting a hearsay statement is "harmless unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Hancock*, 46 Wn.App. 672, 678-79, 731 P.2d 1133 (1987) (*quoting State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

testimony was not reversible error when the hearsay was “essentially a repetition of the declarant's own testimony, and added little or nothing.” *State v. Hancock*, 46 Wn. App. 672, 679, 731 P.2d 1133 (1987); *see also State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970) (“The admission of evidence which is merely cumulative is not prejudicial error.”). Similarly, in *State v. Johnson*, 35 Wn. App. 380, 386, 666 P.2d 950 (1983), the court determined that the declarant's written statement, if improperly admitted, was “merely repetitive” of other properly admitted evidence, and therefore harmless error. *See also, State v. Ellison*, 36 Wn. App. 564, 569-70, 676 P.2d 531 (1984)(admission of hearsay statements could not have materially affected the trial outcome when declarant testified at trial and was subject to cross examination).

Given these holdings, Doll has failed to show prejudice in the present case because she cannot show that the result of the trial would have differed if the testimony at issue had not been admitted. Rather, since Brasch testified at trial regarding all of the charges and events at issue, Doll simply cannot show prejudice.

2. ***Defense counsel's failure to give timely notice of a proposed defense witness did not constitute ineffective assistance because the trial court properly excluded the witness on relevance grounds; the timeliness of the disclosure, therefore, was irrelevant and Doll also cannot show prejudice since the proposed evidence was inadmissible.***

Doll next claims that she received ineffective assistance of counsel because her counsel's failure to disclose a witness in a timely fashion caused the trial court to exclude the witness. App.'s Br. at 26. This claim is without merit because the trial court excluded the witness on relevance grounds. Thus, the timeliness of the disclosure was irrelevant and Doll also cannot show prejudice since the proposed evidence was inadmissible.

At trial, defense sought to introduce the testimony of Christine Heany. RP 345. Defense counsel explained that Heany would testify that Doll was scheduled to be at a local "clinic" on the 23rd, that there was an error, and that Doll then appeared there the next day (the 24th: the date of one of the bail jump charges). RP 345-46. Defense counsel was quite clear, however, that Heany was "not going to testify to anyone's medical condition or history." RP 345. The State objected to this testimony. RP 345.

The trial then stated that the proposed testimony, as a matter of law, did not provide a defense and that having two appointments, one at court and one at a clinic, was not an "uncontrollable circumstance" under the law without some further evidence such as a medical condition that prevent Doll

form appearing at court. RP 345. Defense counsel indicated he could not offer any further evidence regarding health conditions or the like. RP 347. The court then held that the evidence would not be allowed both because the witness was not disclosed in a timely fashion and because the evidence did not show an “uncontrollable condition” under the law. RP 347.

RCW 9A.76.010(4) provides the following definition for “uncontrollable circumstances:”

“Uncontrollable circumstances” means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

This court has previously held that mere evidence that a defendant was sick on his or her court date did not meet the statutory definition of “[u]ncontrollable circumstances” when there was no evidence that the defendant was in the hospital or any other similar bar to her attendance at court. *State v. Fredrick*, 123 Wn. App. 347, 352-53, 97 P.3d 47 (2004).

In the present case the trial court properly excluded the proposed testimony because the testimony did not even demonstrate an illness of any kind. Rather, the proposed testimony was only going to be that Doll initially had an appointment scheduled at a “clinic” on the 23rd and then actually went

to the clinic on the 24th. The trial court properly found that this evidence was insufficient to demonstrate an uncontrollable circumstance under RCW 9A.76.010(4), and thus was not relevant. Any issue regarding the timeliness of the defense disclosure of the witness is irrelevant since the proposed testimony was properly excluded on relevance grounds. Doll, therefore, has failed to show that counsel was ineffective or that she was prejudiced.

3. ***Doll's claim of ineffective assistance regarding counsel's failure to object to evidence that Doll was arrested on a warrant and for driving with a suspended license must fail because Doll cannot show that such an objection would have been sustained since the evidence was necessary and admissible to demonstrate why Deputy Manchester stopped and arrested Doll and was evidence of Doll's motive to hide the drugs in the informant's purse.***

Doll next claims that she received ineffective assistance because her counsel failed to object to testimony that Deputy Manchester pulled her over and arrested her because she had a suspended license and an active arrest warrant. App.'s Br. at 27. This argument is without merit because Doll cannot show that, if trial counsel had objected, such an objection would have been sustained since the evidence was necessary and admissible to demonstrate why Deputy Manchester stopped and arrested Doll.

ER 402 prohibits the admission of evidence that is not relevant. And ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence.” “The threshold to admit relevant evidence is very low and even minimally relevant evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). “Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.” *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). In addition, even under ER 404(b) evidence of prior acts is admissible if the evidence shows motive. Furthermore, the *res gestae* or “same transaction” exception to ER 404(b) allows the admission of evidence of other crimes or bad acts to “complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

In the present case defense counsel’s failure to object to evidence of the reasons for Doll’s arrest (the warrant and the suspended license) did not fall below prevailing professional norms. In addition, Doll cannot show that the proposed objection likely would have been sustained.

The evidence that Deputy Manchester was aware of the warrant and the suspended license were necessary to explain why he pulled Doll over and arrested her. Without this evidence the jury could have concluded that Deputy Manchester acted unreasonably and could have held this against the State. Furthermore, the fact that Doll had a warrant and was driving on a

suspended license was evidence of her motive. Thus, the existence of the outstanding warrant was relevant to show Doll's motive to hide the drugs in Brasch's purse. This created a logical nexus between the outstanding warrant (and the suspended license) and the evidence that Doll placed the drugs in Brasch's purse in anticipation of the stop and Doll's arrest. Without this evidence the jury would not have understood why Doll believed that Brasch's purse was a better place to hide the drugs.

Finally, any prejudice was minimized by the fact that the State never sought to introduce the crime underlying the arrest warrant. Rather, the only evidence that was introduced was the relevant evidence regarding the existence of the warrant and the suspended license.

Given these facts, a reasonable defense counsel would have known that the objection would not have been sustained, and Doll's claim of ineffective assistance, therefore, must fail.

4. ***Doll's claim of ineffective assistance based on her mere allegation that her attorney prevented her from testifying must fail because Washington Court's have specifically held that mere allegations from a defendant that an attorney prevented him or her from testifying are insufficient.***

In Washington, the state constitution explicitly protects a criminal defendant's right to testify. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). A defendant, however, may waive the right to testify, and the

trial court does not need to obtain that waiver on the record. *Robinson*, 138 Wn.2d at 758-59.

Although the Washington Supreme Court has stated that a defendant who remains silent at trial may be entitled to an evidentiary hearing if he or she alleges that defense counsel actually prevented the defendant from testifying, the Court has specifically stated that mere allegations from a defendant that the attorney prevented him or her from testifying are insufficient. As Doll has offered nothing more than a mere allegation that her attorney would not let her testify, her claim is insufficient.

In *Robinson*, the Court stated that a claim of ineffective assistance can be premised on a claim that defense counsel “actually prevented” the defendant from testifying. *Robinson*, 138 Wn.2d at 770. The Court, however, noted that there are several steps that a defendant must go through in order to prevail on such a claim. First, the defendant must present substantial factual evidence that his attorney actually prevented him from testifying. *Robinson*, 138 Wn.2d at 770. If a defendant has made such a showing, then and only then is the defendant entitled to an evidentiary hearing on the matter. *Robinson*, 138 Wn.2d at 759-60, 770. At the evidentiary hearing the defendant then has the burden of proving by a preponderance of the evidence that his or her attorney actually prevented him or her from testifying. *Robinson*, 138 Wn.2d at 770. Assuming the defendant

can meet this burden, the court must next consider whether the defendant was prejudiced by the attorney's deficient performance. *Robinson*, 138 Wn.2d at 770.

The *Robinson* Court also provided specific guidelines concerning the amount of evidence that a defendant must produce before he or she is entitled to an evidentiary hearing. In particular, the *Robinson* Court noted that it had discussed this same issue in a prior opinion and stated,

In *Thomas*, a defendant challenged his conviction in post-trial motions, asserting, without any factual support, that his attorney had prevented him from testifying. [*Thomas*] at 561, 910 P.2d 475. We held that no evidentiary hearing was required. "The defendant must ... produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." *Id.* Once a defendant meets this burden, he is entitled to an evidentiary hearing on the issue of whether he voluntarily waived the right to testify. [*Thomas*] at 557, 910 P.2d 475.

Robinson, 138 Wn.2d. at 759-60, citing *State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996).

Finally, the *Robinson* Court stated unequivocally that, "Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify." *Robinson*, 138 Wn.2d at 760. Rather, "Defendants must show some 'particularity' to give their claims sufficient credibility to warrant further

investigation.” *Robinson*, 138 Wn.2d at 760, citing *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir.1991). The defendant must “allege specific facts” and must be able to “demonstrate, from the record, that those ‘specific factual allegations would be credible.’” *Robinson*, 138 Wn.2d at 760, citing *Passos-Paternina v. United States*, 12 F.Supp.2d 231, 239 (D.P.R.1998).

Ultimately the *Robinson* court held that an evidentiary hearing was required in that case as the defendant had provided substantial factual evidence to support his claim that he was actually prevented from testifying. *Robinson*, 138 Wn.2d at 760. Specifically, Robinson submitted affidavits from several different people indicating that he unequivocally demanded that he testify before closing arguments began,⁶ and Robinson’s trial counsel even conceded that Robinson “pleaded” with him to be allowed to testify and personal reasons prevented him from moving to reopen the testimony. *Robinson*, 138 Wn.2d at 757, 760.

The Supreme Court also noted that Federal cases have held that affidavits from lawyers who allegedly interfered with the defendant's right to testify may give the defendant's claims enough credibility to warrant an investigation into whether the attorneys prevented the defendants from testifying. *Robinson*, 138 Wn.2d at 761, citing *Underwood*, 939 F.2d at 476,

⁶ One of the affidavits, for instance, was from a courtroom guard who heard the Defendant complaining about not being able to testify, and another was from an attorney whom the

and *Passos-Paternina*, 12 F.Supp.2d at 239. Ultimately the Supreme Court held that Robinson had made a sufficient showing that his attorney actually prevented him from testifying, and Robinson, therefore, was entitled to an evidentiary hearing. *Robinson*, 138 Wn.2d at 761, 770.

The facts of the present case, however, are easily distinguishable from *Robinson*, and Doll has failed to make a sufficient showing that she was actually prevented from testifying. The only evidence produced by Doll that she was prevented from testifying is her own self-serving claim that her attorney “would not let [her] testify at trial.” CP 154. As the Supreme Court has stated, however, “Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify.” *Robinson*, 138 Wn.2d at 760. Doll has failed to show any “particularity” that would give her claim sufficient credibility to warrant further investigation, and Doll has also failed “allege specific facts” and has failed to “demonstrate, from the record, that those specific factual allegations would be credible.” *Robinson*, 138 Wn.2d at 760. As Doll’s brief and unsupported allegation is insufficient under the specific requirements outlined by the Supreme Court, her claim of ineffective assistance based on her claim that her attorney prevented her from testifying must fail.

defendant told that he wanted to testify. *Robinson*, 138 Wn.2d at 760.

5. ***Doll's claim of ineffective assistance based on her counsel's failure to call certain defense witnesses must fail because a decision not to call a witness is considered a matter of trial tactics that generally will not support a claim of ineffective assistance of counsel and because Doll has failed to overcome the strong presumption that counsel provided effective representation.***

Doll next claims that her trial counsel provided ineffective assistance by failing to call certain defense witnesses. App.'s Br. at 30. This argument is without merit because a decision not to call a witness is considered a matter of trial tactics that generally will not support a claim of ineffective assistance of counsel and because Doll has failed to overcome the strong presumption that counsel provided effective representation.

It is well settled that an appellate court is to give great judicial deference to trial counsel's performance and is to begin the analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A decision not to call a witness is considered a matter of trial tactics that generally will not support a claim of ineffective assistance of counsel. *State v. Krause*, 82 Wn. App. 688, 697-98, 919 P.2d 123 (1996) (citing *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981)); *State v. Hayes*, 81 Wn. App. 425, 442-43, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996). Furthermore, the trial attorney is in a far better position than a reviewing court to determine whether a witness will

help the defendant's case. *See, State v. Robinson*, 79 Wn. App. 386, 396, 902 P.2d 652 (1995) (citing *State v. Piche*, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967)).

In addition, the failure to call the witnesses must have been unreasonable and must result in prejudice, or create a reasonable probability that, had the lawyer presented the witnesses, the outcome of the trial would be different. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993), *review denied*, 123 Wn.2d 1022 (1994). Finally, to establish prejudice from counsel's failure to call a witness, the defendant must show what beneficial information the witness would have provided had he been called. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993), *review denied*, 123 Wn.2d 1022 (1994). *See also State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

In the present case, Doll claims that defense counsel was ineffective for failing to call several witnesses. App.'s Br. at 30. Doll further claims that these witnesses would have been able to testify that she was trying to sell her car to Brasch. App.'s Br at 30. Doll alleges that other witnesses could have testified about Brasch's "buying and selling habits," and that one witness could have testified that Brasch purchased drugs in April 2008. Doll's claims, however, fail to overcome the strong presumption that counsel provided effective representation.

First, the record does contain any representations from Doll's trial counsel concerning why these witnesses were not called. This is not a case where trial counsel submitted an affidavit admitting his ineffective assistance or negligence.

Second, there are any number of reasons why defense counsel might have legitimately chosen not to call the witnesses. For example, two of the witnesses were Doll's son and his girlfriend, Sheena Andrada. CP 150, 165. Counsel could have concluded that the jury would have viewed these witnesses as biased and not have given their testimony any weight. Counsel could have also concluded that these witnesses were not credible. Absent evidence to the contrary, it is entirely possible that counsel could have believed that the proposed witnesses was simply untrue.

Furthermore, counsel could have concluded that the claim that Brasch gave \$2500 as a down payment for a car would not have been looked upon favorably by the jury, and thus chose not to pursue this theory. Such a conclusion would have been reasonable, since the uncontested testimony concerning the transfer of money was that it occurred in a gas station bathroom after Doll had walked to the gas station while the male who drove her never actually came to the station, but rather, remained parked and waiting her at a different location. Defense counsel could have determined that a jury would have been highly skeptical that these facts supported a claim

that the transaction that occurred in the bathroom was a transfer of a down payment on a car. Such a conclusion was further supported by the text messages entered in evidence that did not mention the sale of an automobile. See, RP 150-51.

The other issue that would have allegedly been covered by Doll's witnesses was evidence regarding Brasch's "buying and selling habits" and that Brasch purchased drugs in April 2008. App.'s Br at 30-31. Evidence of a witness's prior misconduct is admissible only if probative of the witness's character for truthfulness under ER 608. *State v. Cochran*, 102 Wn. App. 480, 486-87, 8 P.3d 313 (2000), *review denied*, 143 Wn.2d 1004 (2001). Drug use is not probative of truthfulness because it has little to do with a witness's credibility. *Cochran*, 102 Wn. App. at 487. Thus, counsel could have concluded that Brasch's prior drug activity would not have been admissible. In addition, the fact that Brasch might have purchased drugs in April 2008 is not at all surprising since Brasch was working with WESTNET as a confidential informant. See, RP 80-81. Counsel, therefore, could have reasonably concluded that the proposed defense witnesses were of little to no value.

In short, Doll has failed to show the absence of a legitimate or tactical reason for not calling the witnesses. As is typically the case, defense counsel was in a far better position than a reviewing court to determine whether a

witness will help the defendant's case. Moreover, it is reasonable to assume that defense evaluated these potential witnesses' proposed testimony and found it (1) not credible; (2) irrelevant; or (3) inadmissible. The general rule that a decision not to call a witness is considered a matter of trial tactics should apply in this case, and Doll's claim of ineffective assistance should be rejected in the absence of clear evidence that her counsel's performance fell below an objective standard of reasonableness. Finally, in light of all the evidence presented at trial, Doll has not shown that the witnesses would have had any impact on the outcome of the trial.

6. ***Doll's claim that she received ineffective assistance because her trial counsel failed to object Detective Dobbins testimony regarding the witness tampering charge, the theft charge, and the informant's lack of criminal history must fail because Doll cannot show that counsel acted unreasonably or that she was prejudiced.***

As outlined above, a trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the

result of the trial would have differed if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Doll's claim is that counsel should have objected when Detective Dobbins testified about the witness tampering charge. App.'s Br. at 23. Detective Dobbins testimony was brief and included a brief description of the report of the incident he had received from Brasch. RP 127. Detective Dobbins was then asked what he did after receiving Brasch's report of these events. RP 127. Detective Dobbins then stated that he then had other deputies arrest Doll because he had probable cause to believe she had committed witness tampering. RP 127.

This court has previously noted that, "In some instances, a witness ... is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense." *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007), *affirmed on other grounds*, --- P.3d ----, 2009 WL 943858 (April 9, 2009), *citing State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007).

In the present case, it would have come as no surprise to anyone that the State, or the investigating detective, determined that there was probable cause to arrest or charge the defendant. This fact goes without saying, and

defense counsel may have legitimately determined that an objection on this issue was pointless. The key issue for the defense, of course, was that the probable cause was based entirely on the word of Brasch, and defense counsel addressed this point in cross examination when he had Deputy Dobbins confirm that there was no other independent evidence or witness to confirm the allegation of witness tampering and that Deputy Dobbins relied solely on Brasch's description of these events. RP 163-64. Counsel's failure to object, even if he could have, could have been a legitimate strategic or tactical decision given the pointlessness of the objection and the obvious fact that the State felt that there was a basis for the arrest and the charge. Doll also cannot show prejudice from the fact that jury heard that the State felt there was a basis for the arrest given the obviousness of this fact.

The same analysis applies to Detective Dobbins statements about the theft charge. Doll's claim is that Detective Dobbins gave improper opinion testimony when he testified that he determined that Doll had stole the \$2500 after she failed to return with the \$2500 in buy money. App.'s Br. at 25. This testimony again only stated the obvious: that Detective Dobbins determined that he had a reason to arrest Doll. *See, Sutherby*, 138 Wn. App. at 617. In addition, this testimony came in redirect after defense counsel had questioned why the officers had not arrested Doll immediately when she left the gas station and also questioned why the officers had not obtained a search

warrant for Doll's residence. RP 156. Detective Dobbins testimony, therefore, was in response to the implied assertion raised in cross examination that the police had some doubt about whether they had evidence that was sufficient to arrest or seek a search warrant. Furthermore, the testimony explained why Detective Dobbins and the other officers arrested Doll later that night when she returned to her apartment.

It must also be noted that the defense theory of the case was that the officers jumped to conclusions and took the words of Brasch at face value. In closing arguments, for instance, Defense counsel repeated over and over that the police relied heavily on the things that Brasch was telling them and pointed out effectively that Brasch's credibility was suspect since she was attempting to curry favor with the police and prosecutor given her own felony charge.⁷ Given this theory, it is no surprise that defense counsel did not object when Detective Dobbins mentioned his conclusions, since the defense was not shying away from the existence of those conclusions, but rather, was challenging the very basis for those conclusions and arguing that the police improperly relied on the words of the informant.⁸

⁷ See, e.g., RP 394 ("We just never hear anything other than Candice Brasch's story, and again, this is the remarkably reliable Ms. Brasch, the one whom Detective Dobbins, all of WESTNET are willing just to believe anything she says"). See also, RP 391 ("She [Brasch] had been out [of jail] for less than 48 hours, and all of a sudden she goes from being convict to saint").

⁸ Doll also argues that counsel should have objected when Detective Dobbins stated that Brasch had established some reliability in reference to her credibility. App.'s Br. at 23. This

For all of the reasons outlined above, Doll's claim of ineffective assistance of counsel must fail because Doll has failed to show: (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been admitted.

B. DOLL'S CLAIM THAT DETECTIVE DOBBINS GAVE IMPERMISSIBLE OPINION TESTIMONY MUST FAILS BECAUSE: (1) THE ISSUE WAS NOT PROPERLY PRESERVED FOR REVIEW; AND (2) EVEN IF THE ISSUE HAD BEEN PRESERVED FOR REVIEW, THE TESTIMONY WAS NOT IMPROPER OPINION EVIDENCE.

Doll next claims that Detective Dobbins impermissibly commented

testimony, however, came out during cross-examination and was in direct response to counsel's question, "What was your reasons for believing her on that day." RP 164. An objection would have been pointless since the answer was in direct response to defense counsel's own question. Doll also argues that Detective Dobbins improperly bolstered the credibility of Brasch when he testified that they checked her criminal history as part of the procedure he used with informants and found that she had a misdemeanor conviction but no felony convictions. App.'s Br. at 22-23, RP 78-79. Detective Dobbins did not state that he believed Brasch and did not directly comment on her credibility; rather, he merely described the procedure used with informants and the procedure he went through with Brasch. This process and testimony was essentially the same as the testimony allowed by the Supreme Court in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), where the court found no error in a detective's description of a competency protocol used that related to a witnesses ability to tell the truth. The court noted that "the challenged portion of [the detective's] testimony is simply an account of the interview protocol he used to obtain A.D.'s statement. [The detective] did not testify that he believed A.D. or that she was telling the truth." *Kirkman*, 159 Wn.2d at 931. Similarly, in the present case, defense counsel was not ineffective for failing to object when the officer merely described that before using an informant he checked her criminal history and found misdemeanor offenses but no felonies. This evidence, of course, went to the propriety of the officer's use of an informant, which was the essential theme of the defense theory, and the testimony explained the police action and put their actions in their proper context.

on Doll's guilt when he testified that he had determined that (based on Brasch's allegations) Doll's actions constituted witness tampering and theft. App.'s Br. at 32. This claim is without merit because it was not properly preserved for review and because, even if it had been, the testimony was not improper and even if there was error any error was harmless.

Doll did not object at trial to the evidence at issue. An error, however, may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). To determine whether an error is a manifest constitutional error, this court is to apply a four-step process: (1) the court must first determine whether the alleged error is in fact a constitutional issue; (2) next, the court is to determine whether the error is manifest, that is, whether it had "practical and identifiable consequences"; (3) the court then is to address the merits of the constitutional issue; and (4) finally, the court is to pass upon whether the error was harmless. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *See also, State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005). An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." *Lynn*, 67 Wn. App. at 345, 835 P.2d 251.

In the present case, Doll cannot show a manifest constitutional error because the alleged error had no “practical and identifiable consequences” and because, even if there was error, it was harmless. The actual testimony that Doll complains of essentially consists of Detective Dobbins asserting that he had Doll arrested for witness tampering because he felt there was a basis for the charge and because he felt there was a basis for the theft charge. In addition, Detective Dobbins conceded that he relied on the word of Brasch for the basis for both of these charges. See, RP 163-65. As the jury was aware that Dobbins arrested Doll for both counts and that the State charged both counts, the testimony at issue had no “practical and identifiable consequences.” Rather, as this Court noted in *Sutherby*, the testimony merely “stated the obvious.” *Sutherby*, 138 Wn. App. at 617. For these same reasons, even if there was error, the error was harmless. Doll, therefore, has failed to demonstrate a manifest constitutional error.

As Doll did not object to the testimony below, the issue was not properly preserved and cannot be raised for the first time on appeal. Even if the issue had been preserved, however, Doll’s claim would still fail.

The testimony at issue was not improper opinion evidence and even if there was error, any error was harmless. When Detective Dobbins’ testimony is viewed in its proper context the testimony explains why he arrested Doll on the tampering charge. Detective Dobbins explained that he took the report

regarding the witness tampering and then determined that the report fell under the witness tampering, and thus, he arrested Doll for the crime. See RP 127-28. This testimony merely explained the Detectives actions and involvement with the investigation and explained why Doll was arrested, and was not an improper comment on Doll's guilt. In addition, Doll's claim that "the verdict on the charge of witness tampering would have been different but for the improper evidence" is not supported by the record or caselaw, and is therefore without merit.

The same analysis applies to Detective Dobbins statements about the theft charge. This testimony again only stated the obvious: that Detective Dobbins determined that he had a reason to arrest Doll. *See, Sutherby*, 138 Wn. App. at 617. In addition, this testimony came in redirect after defense counsel had questioned why the officers had not arrested Doll immediately when she left the gas station and also questioned why the officers had not obtained a search warrant for Doll's residence. RP 156. This questioning implied that the detective felt he had no basis to arrest Doll (or to apply for a search warrant) when she first left the scene and opened the door for the State to counter this assertion with Detective Dobbins testimony that he did feel there was a basis for an arrest at that time. Furthermore, the testimony explained why Detective Dobbins and the other officers arrested Doll later that night when she returned to her apartment.

For all of the above mentioned reasons, Doll's allegations of improper opinion evidence must fail.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DOLL'S MOTION FOR A NEW TRIAL BASED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE, AS DISCUSSED PREVIOUSLY, DOLL FAILED TO DEMONSTRATE THAT SHE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Doll next claims that the trial court abused its discretion in denying Doll's motion for a new trial. This claim is without merit because Doll failed to show that she received ineffective assistance of counsel and because Doll's mere allegation that her trial counsel prevented her from testifying was insufficient to warrant an evidentiary hearing under Washington law.

The granting or denial of a new trial is a matter primarily within the discretion of the trial court and the reviewing court will not disturb its ruling unless there is a clear abuse of discretion. *State v. McKenzie*, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006), citing *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967); *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). An abuse of discretion will be found only when no reasonable judge would have reached the same conclusion. *McKenzie*, 157 Wn.2d at 52, citing *Bourgeois*, 133 Wn.2d at 406.

In the present case Doll claims that a new trial was warranted based on her claims of ineffective assistance of counsel. App.'s Br. at 37. As outlined above, however, Doll failed to demonstrate that she received ineffective assistance of counsel, thus, the trial court did not err in denying the motion for anew trial.

Doll also argues that the trial court should have ordered an evidentiary hearing on the issue of whether or not her trial counsel prevented her from testifying. As noted previously, the Washington Supreme Court has held that a defendant is only entitled to an evidentiary hearing on this issue if the defendant presents substantial factual evidence that his attorney actually prevented him from testifying. *Robinson*, 138 Wn.2d at 770. The *Robinson* Court also explained that it had previously outlined what a defendant must show in order to be entitled to an evidentiary hearing and stated,

In *Thomas*, a defendant challenged his conviction in post-trial motions, asserted, without any factual support, that his attorney had prevented him from testifying. [*Thomas*] at 561, 910 P.2d 475. We held that no evidentiary hearing was required. "The defendant must ... produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." *Id.* Once a defendant meets this burden, he is entitled to an evidentiary hearing on the issue of whether he voluntarily waived the right to testify. [*Thomas*] at 557, 910 P.2d 475.

Robinson, 138 Wn.2d. at 759-60, citing *State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996).

As mentioned previously, the only evidence produced by Doll that she was prevented from testifying is her claim that her attorney “would not let [her] testify at trial.” CP 154. “Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify.” *Robinson*, 138 Wn.2d at 760. In addition, Doll failed to show any “particularity” that would give her claim sufficient credibility to warrant further investigation, and Doll also failed “allege specific facts” and has failed to “demonstrate, from the record, that those specific factual allegations would be credible.” *Robinson*, 138 Wn.2d at 760. As Doll’s brief and unsupported allegation was insufficient under the specific requirements outlined by the Supreme Court, the trial court did not err in failing to order an evidentiary hearing.

For all of these reasons the trial court did not abuse its discretion in denying Doll’s motion for a new trial.

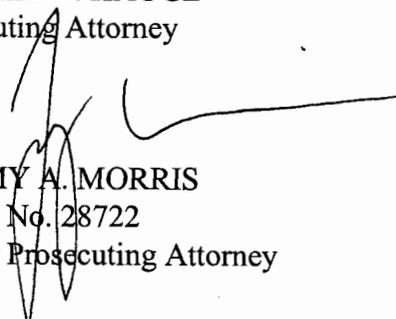
IV. CONCLUSION

For the foregoing reasons, Doll’s conviction and sentence should be affirmed.

DATED April 16, 2009.

Respectfully submitted,

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