

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

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STATE OF WASHINGTON,

Respondent,

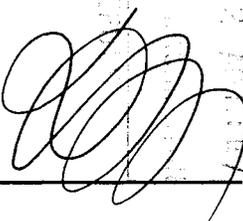
v.

TANYA ANDERSON,

Appellant.

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STATE OF WASHINGTON  
COURT APPEALS  
CLERK



ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard Hicks, Judge  
Cause No. 08-1-01541-0

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

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

C. ARGUMENT ..... 1

1. Defense counsel’s declination to make a ER 404(b) motion *in limine* and belated service of notice of intent to call an expert witness did not amount to ineffective assistance of counsel ..... 3

a. Anderson was not deprived effective assistance of counsel when her attorney did not make a ER 404(b) motion *in limine* ..... 7

b. Anderson was not deprived effective assistance of counsel when her attorney did not timely file a notice of intent to call an expert witness..... 21

D. CONCLUSION..... 25

## TABLE OF AUTHORITIES

### **U.S. Supreme Court Decisions**

<u>Powell v. Alabama,</u> 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).....	5
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	4-6, 17-19, 21-22, 24-25

### **Washington Supreme Court Decisions**

<u>In re Personal Restraint Petition of Pirtle,</u> 136 Wn.2d 467, 965 P.2d 593 (1996) .....	6, 18
<u>State v. Adams,</u> 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) .....	5
<u>State v. Camarillo,</u> 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	18
<u>State v. Cheatam,</u> 150 Wn.2d 626, 644, 81 P.3d 830 (2003) .....	22
<u>State v. DeVincentis,</u> 150 Wn.2d 11, 17, 74 P.3d 119 (2003) .....	10
<u>State v. Foxhoven,</u> 161 Wn.2d 168, 176, 163 P.3d 786 (2007) .....	10
<u>State v. Hendrickson,</u> 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) .....	4
<u>State v. Kjorsvik,</u> 117 Wn.2d 93, 812 P.2d 86 (1991) .....	22
<u>State v. Lord,</u> 117 Wn.2d 829, 822 P.2d 177 (1991) .....	21

<u>State v. Lough,</u> 125 Wn.2d 847, 889 P.2d 487 (1995) .....	10-11
<u>State v. McFarland,</u> 127 Wn.2d 332, 899 P.2d 1251 (1995) .....	4
<u>State v. Renfro,</u> 96 Wn.2d 902, 639 P.2d 737 (1982). .....	4
<u>State v. Stenson,</u> 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998) .....	3
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987) .....	3, 22
<u>State v. Thomas,</u> 71 Wn.2d 470, 429 P.2d 231 (1967) .....	5, 24
<u>State v. White,</u> 81 Wn.2d 223, 500 P.2d 1242 (1972) .....	5
<u>State v. Yates,</u> 161 Wn.2d 714, 168 P.3d 359 (2007); .....	10

### **Decisions Of The Court Of Appeals**

<u>State v. Anene,</u> 149 Wn. App. 944, 205 P.3d 992 (2009) .....	8
<u>State v. Batten,</u> 17 Wn. App. 428, 563 P.2d 1287, review denied, 89 Wn.2d 1001 (1977) .....	21
<u>State v. Bradbury,</u> 38 Wn. App. 367, 685 P.2d 623 (1984) .....	5
<u>State v. Fredrick,</u> 45 Wn. App. 916, 729 P.2d 56 (1989) .....	6

<u>State v. Hernandez</u> , 58 Wn. App. 793, 794 P.2d 1327 (1990), review denied, 117 Wn.2d 1011, 816 P.2d 1223 (1991) .....	22
<u>State v. King</u> , 24 Wn. App. 495, 601 P.2d 982 (1979).....	24
<u>State v. Lewis</u> , 141 Wn. App. 367, 166 P.3d 786 (2007).....	22
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	9
<u>State v. Neidigh</u> , 78 Wn. App. 71, 895 P.2d 423 (1995).....	4, 8
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	18
<u>State v. Warren</u> , 134 Wn. App. 44, 138 P.3d 1081 (2006).....	8
<u>State v. White</u> , 43 Wn. App. 580, 718 P.2d 841 (1986).....	8

**Statutes and Rules**

ER 401 .....	9
ER 402 .....	9
ER 403 .....	10
ER 404(b).....	1, 3, 7-12, 14-15, 18
ER 404(c).....	7
ER 702 .....	21

ER 703 ..... 21  
RAP 2.5(a)(3) ..... 8

**Other Authorities**

Sixth Amendment..... 5, 19, 24 ,25

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether Anderson's trial counsel was ineffective for failing to move to exclude ER 404(b) evidence or for making an untimely motion to present expert testimony.

B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the case, while noting the following clarifications, corrections, and additions:

In each instance of fraud at Grocery Outlet and Sofa Gallery, a woman presented a flat-faced (i.e. unraised numbers) VISA gift card which did not work when swiped. [2-9-2009 RP 72, 82, 87, 103, 108-09]. When the card would not swipe, the woman would ask the cashier to type the numbers in manually, at which point the number would be approved (since it was stolen from a legitimate card). [2-9-2009 RP 72, 82, 87, 103, 108-09, 123-25]. Christopher Noski testified he recognized Anderson when she entered the store on January 10, 2008 and he positively identified her on that day by comparing her to the driver's license she presented to him. [2-9-2009 RP 72, 74]. He also definitively picked her out in a photo montage on March 12, 2008 and noted the woman in line was much younger looking in her ID, but unquestionably the same person. [2-9-2009 RP 76, 79].

Kaitlynn Mitera also testified to seeing Anderson in the store previously and personally experiencing the VISA scam. [2-9-2009 RP 81]. She testified to the same sequence of events as Noski did previously. [2-9-2009 RP 82-84]. Mitera then testified that the woman took the VISA gift card with her when she left, contrary to Anderson's Statement of Facts. [2-9-2009 RP 84]. Mitera conceded on cross-examination that, based on the video images, the suspect appeared taller than Mitera in the photographs. [2-10-2009 RP 160].

Charlisse Starr testified to the same series of events as Mitera and Noski. [2-9-2009 RP 87-88]. She also testified to her previous experiences with the defendant as well as the proliferation of cashier alerts posted around the store which she testified made everyone at Grocery Outlet hyper-vigilant to the scam. [2-9-2009 RP 87-88]. Additionally, she testified to chasing the suspect as she fled the store, coming within 20 feet of her, and clearly seeing her, even though she did not speak with her. [2-9-2009 RP 87-88, 91-92; 2-10-2009 RP 154, 156-57]. Starr testified the defendant's hair color was slightly different in person and she appeared to have lost weight; specifically, she described the defendant as not looking healthy when in the store, and looking "run down as if using meth."

[2-9-2009 RP 92]. Starr positively identified Anderson in the photo montage and in court. [2-9-2009 RP 90, 92]. Starr testified she “had no doubt” Anderson was the person she chased from the store on January 10, 2008. [2-9-2009 RP 91].

Tanya Anderson testified her license was lost and she never reported it lost or got it replaced. [2-10-2009 RP 135-136]. She then testified she was a victim of identity theft, but provided no documentation to support these claims, specifically in reference to a fraudulent check written in her name at the Money Tree or unauthorized charges on her account at Kohl’s. [2-10-2009 RP 136-38].

### C. ARGUMENT

1. Defense counsel’s declination to make a ER 404(b) motion *in limine* and belated service of notice of intent to call an expert witness did not amount to ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). 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 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

a. Anderson was not deprived of effective assistance of counsel when her attorney did not make a ER 404(b) motion *in limine*.

In order for Anderson's ER 404(b) argument to succeed, she must show that a) the court would have approved the motion had it been made, b) if approved, the complained of testimony would have then been excluded under ER 404(b), and (c) had the testimony been excluded under ER 404(b), the outcome of the trial would have been different as a result. Anderson's argument fails on all counts.

First, Anderson fails to offer any evidence to support her claim that had her counsel made an ER 404(b) motion to exclude, the trial court would have granted the motion. Since the record lacks any discussion on the topic, there is no way for the State to evaluate the weight of any argument now. The State is, therefore, unable to know and unwilling to guess as to what the trial court's ultimate determination would have been. Almost inarguably, this is an issue which Anderson cannot prove the outcome of either way.

Second, Anderson fails to prove the testimony she complains of is inadmissible under ER 404(b). In her argument, she accurately states the rule and directs the court's attention to the testimonies of Mitera and Wenschhof but then fails to properly

analyze those testimonies under the rule.<sup>1</sup> Before beginning the ER 404(b) analysis, however, it is important to start with the basic rule that only in egregious circumstances and where the testimony is central to the case does failure to object rise to the level of reversible error. Neidigh, 78 Wn. App. at 77. That test is not satisfied here. Where there is no objection as to the admissibility of evidence, the argument is waived on appeal unless it is manifest error arising to the level of a constitutional violation. RAP 2.5(a)(3); State v. Anene, 149 Wn. App. 944, 956; 205 P.3d 992 (2009). The State was unable to locate any case law and was not provided any by Anderson indicating that ER 404(b) is treated differently than any other rule of evidence. Anene, 149 Wn. App. at 956; State v. White, 43 Wn. App. 580, 587, 718 P.2d 841 (1986) (“An error under ER 404(b) is nonconstitutional in nature.”). As noted in State v. Warren,

Appellate courts are and should be reluctant to conclude that questioning, to which no objection

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<sup>1</sup> The appellant’s Statement of Facts also mentions the testimony of other witnesses, but only Mitera and Wenschhof’s are specifically complained of, or even referred to, in the argument itself. For example, Noski testified to believing he recognized the defendant immediately and his belief that she was the person whom store alerts warned about. His testimony explained why he was watching her prior to her attempt to use the fraudulent card on this occasion—he believed she possessed and was going to use someone else’s credit card to buy groceries. [2-9-09 RP 72]. Neither this testimony nor Starr’s is addressed in the argument, however, thus the State will only address the two argued testimonies—Mitera’s and Wenschhof’s.

was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant consequences. Even worse, . . . it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

134 Wn. App. 44, 56, 138 P.3d 1081 (2006) (quoting State v. Madison, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989)). As a result, Anderson waives any issues regarding evidence admissibility. An ER 404(b) inadmissibility and failure to object claim cannot and should not now be bootstrapped in on appeal under the guise of ineffective assistance of counsel. However, even had the objection been made, the State maintains the evidence would have been admissible.

As a basic rule, all relevant evidence is admissible. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Because all relevant evidence is prejudicial by

definition and evidence of prior bad acts is presumptively so, Rule 404(b) states that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b); State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); See State v. Yates, 161 Wn.2d 714, 750, 168 P.3d 359 (2007); State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007).

Prejudicial evidence is admissible when the probative value substantially outweighs any unfair prejudice. ER 403. Thus, evidence does not have to be dispositive of an issue to be relevant or admissible. Moreover, evidence of prior bad acts is admissible if offered for, among other things, proof of motive, common scheme or plan, or identity as occurred here.

The testimony Anderson complains of is squarely within the definition of admissible purpose for establishing identity through a unique modus operandi. It was relevant evidence which went to the weight of making more or less likely the existence of the fact of the suspect's identity due to the specific method employed in each of

the crimes and the consistent employment of that specific pattern. “The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case.” Lough, 125 Wn.2d at 859. Identity is an essential element of any case. Where the evidence tends to make it more likely than not that the same person is committing a string of specific crimes, and the identity of the person is in question for the charged crime, testimony of eyewitnesses’ previous interactions with the defendant and the prior bad acts is admissible for the purpose of establishing identity. That is exactly what occurred here. The State introduced evidence of prior bad acts for the purpose of establishing Anderson’s identity in the charged incident, not to establish guilt based on actions in conformity with the prior bad acts.

In this case, Grocery Outlet both personally experienced and received a cashier alert warning of a female running the VISA scam on their chain. [2-29-09 RP 72, 87]. Mitera testified that she remembered the woman the cashier alert described since she had waited on her previously and personally experienced the VISA scam. [2-9-09 RP 81-82]. Her testimony regarding the prior bad

acts was not offered for an inadmissible purpose, but rather to make more or less likely the fact of identity. In fact, to the defense's favor, she stated she did not specifically remember the woman in her line on January 10, 2008 being the same as the one whom she thought of as the "scam lady," even though she recognized the woman in her line that day as having been in the store before. Id. Thus, Mitera's use of the term "scam lady" was not focused directly at Anderson, but rather the woman in the cashier's alert and with whom she had had previous contact. Regardless, under the State's theory of the case, her testimony went directly to the issue of identity which is admissible under ER 404(b). Mitera's rudimentary choice of descriptive terms, which appears to be what most bothers Anderson, does not make it inadmissible under this rule of evidence. Moreover, even if it does constitute error, the State submits it is harmless at best. Taking the reference out would not substantively change Mitera's testimony.

Next, Anderson complains of Officer Wenschhof's testimony. He testified he received information about Grocery Outlet's cashier alert, the fact of which was never put into dispute by the defendant, and which even now Anderson makes no claim regarding the

notification's accuracy.<sup>2</sup> [2-9-09 RP 65-67]. Additionally, Anderson misstates his testimony in her brief stating, "Officer Wenschhof testified that Ms. Anderson had attempted to commit a similar crime in December 2007." [Appellant's brief at 8]. That was not his testimony, though. Wenschhof testified that, immediately following the event, store clerks identified to him that the female in the warning was the same as the one who attempted to run a fake VISA at their store both that day and nearly a year prior. [2-9-09 RP 65-67]. He never testified that Anderson was the person who committed the previous crimes, nor that the store clerks told him that Anderson committed the crimes. Instead, he testified that the driver's license he received was that of Tanya Anderson, it was the license given by the suspect to the store clerks, and the same female who committed this crime on that day was the one they had alerts posted about as having committed the same crime previously. This was relevant evidence which went to the weight of

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<sup>2</sup> The State does not address the lack of a specific 404(b) offering of proof or a finding on the record by the trial court regarding the admissibility of the testimony because that issue is not before this court. However, case law does exist which notes that while an on-the-record finding is usually required, it is not mandatory if the record, as a whole, is sufficient to allow the appellate court to make its own admissibility and harmless error determinations. See State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986); State v. McGhee, 57 Wn. App. 457, 460, 788 P.2d 603 (1990); State v. Stein, 140 Wn. App. 43, 66, 165 P.3d 16 (2007).

making more or less likely the existence of the fact of the suspect's identity, not actions in conformity with.

Further, the State maintains Wenschhof's testimony was not hearsay because it was not offered to prove the truth of the matter asserted, but rather, given to show the focus and direction of the Officer's investigation upon arrival. The information from the clerks put the store's acquisition of Anderson's driver's license into context and gave him direction for further investigation. Moreover, even if it was hearsay, Anderson's assignment of error is for improper ER 404(b) evidence, not hearsay. It appears to the State that Anderson is simply using this forum to object to testimony that she believes should have been objected to at trial but was not and realizes that those objections are now waived.

Despite this, the State maintains this small part of Wenschhof's testimony was not hearsay and it did not violate ER 404(b). Striking the reference to "this same female," the only part of Wenschhof's testimony that could inferably be construed to identify Anderson as the female from the cashier's alert would not substantively affect the remainder of his testimony or the strength of the State's case. In sum, the testimonies of both Mitera and Wenschhof were admissible because they were relevant and

constituted evidence admissible to show identity, the probative value was not substantially outweighed by unfair prejudice, and in the case of Wenschhof, was not hearsay.

As a practical matter, the lack of colloquy in the record and the single specific reference to it in closing and on rebuttal indicates to the State that neither counsel seemed to believe any strong ER 404(b) issues existed. [2-9-2009 RP 195]. This would explain the lack of any objection by defense counsel. Instead, the case appears to have primarily focused on the credibility of the eyewitnesses' testimony and identification of the defendant through the photo montages. Both the State and the defense were especially focused on the witnesses' identification of Anderson based on their personal interactions with her during the charged crimes in January and February of 2008, not based on previous fraudulent VISA card incidences as Anderson claims. The record simply does not support Anderson's interpretation that the entirety of the State's case hinged on evidence of the prior bad acts. While that evidence may have been helpful to the State in assisting with the identification of Anderson, it was neither the sole nor the primary basis for identification. The State offered the testimony of at least four separate clerks and managers at two separate stores,

who, on separate occasions and without knowledge of each other, individually confirmed their interactions with both the defendant and this specific VISA scam.

For example, although Mitera mentioned her previous experiences with the scam and the cashier's notice, she testified that she based her identification of Anderson on her interactions with her in January of 2008. [2-9-2009 RP 81]. While Noski also referenced his previous interactions with the woman he believed was involved in the scam, he definitively identified Anderson as the woman at Grocery Outlet in January 2008 based on his personal interaction with her. [2-9-2009 RP 72, 77, 80]. This included his contemporaneous comparison of the suspect to the driver's license given to him at the time. [2-9-2009 RP 74]. At no point did he testify to being confused as to identifying the suspect as Anderson. Starr also referenced previous interactions with Anderson, but she too, testified that she saw Anderson on the day of the charged incident, and, in fact, came within 20 feet of her as she was chasing her out of the store. [2-9-2009 RP 87-88, 91-92; 2-10-2009 RP 154, 156-57]. Starr's familiarity with Anderson from previous store interactions does not somehow invalidate her interaction with her on the day of the incident. In the case of Sofa Gallery, Ennor

testified the defendant, whom she identified from a photo montage, was the same as the woman who had presented her with a fraudulent VISA card and a matching picture ID on the day she purchased a leather sofa. [2-29-09 RP 103, 105]. The identification given to Sofa Gallery was that of Tanya Anderson. Id. at 105.

As a result, even if the objectionable testimony were stricken or limited, it would not affect the positive identification of Anderson by Noski, the consistent identifications by Mitera, Starr, and Ennor, nor their personal interactions with her in January and February 2008.

Third, and most importantly, even if some (or all) of the testimony complained of were inadmissible, which the State maintains is not the case, Anderson has not and cannot establish prejudice sufficient to satisfy either prong of Strickland. This is the threshold issue for Anderson's argument. She has not demonstrated that were Mitera's single use of the term "scam lady" and the small part of Wenschhof's testimony stricken from the

record<sup>3</sup>, the outcome would almost certainly—not possibly—have been different. The threshold standard on the second prong of the Strickland test is a “but for” causation. Strickland, 466 U.S. at 687 (“a trial whose result is reliable.”); Pirtle, 136 Wn.2d at 487. A self-serving prediction of a potentially different outcome that does not take the entire record into account, as Anderson has done in this case, does not satisfy that standard.

As Anderson’s brief notes, defense counsel’s cross examination of all of the witnesses brought out testimony which put the issue of identity into question. Issues of credibility are for the jury to determine, however, not the court or counsel. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The State submits that Anderson’s conviction is not attributable in whole or part to the lack of either filing an ER 404(b) motion or failing to object when that information arose during testimony. Anderson’s assignments of error are simply not dispositive of the issue because the complained of testimony does not carry the magnitude of weight

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<sup>3</sup> Even if Anderson had addressed the testimony of each eyewitness in the argument of her brief, the State’s position would not change for the reasons stated in the text. Anderson’s assessment of the State’s case is exactly that, her assessment, which stems from an overly simplified view of the facts in the light most favorable to her, not the State. The jury was well within in its purview to view the facts the same way as the State did.

Anderson claims it does. Based on a review of the entire record, the credibility of the witnesses, the consistent identification of the defendant by the witnesses, the existence of Anderson's identification at each scene, the weakness of her testimony, and the strength of each attorney's arguments, it is the State's position the jury would have reached the same verdict regardless. There is simply no authority or case law offered that demonstrates that had Anderson gotten everything she now claims to have wanted at trial but was denied through ineffective counsel, the final judgment would have been any different from that received. As a result, Anderson received the fair and impartial trial the Sixth Amendment guarantees her, was not manifestly prejudiced, fails the second prong of the Strickland test, and thus fails to prove ineffective assistance of counsel as whole.

Lastly, Anderson has also not provided any evidence to show that defense counsel's performance fell below an objective standard of reasonableness. In fact, any number of strategic reasons could exist to explain defense counsel's actions. For instance, he could have declined to object to the testimony, preferring instead to bring out on cross examination what he believed to be inconsistencies and challenges to the credibility of

witness testimony—inconsistencies from which Anderson benefited and expressly used to support her argument on the issue of identity in her brief. [Appellant’s brief at 9]. It seems logical to the State this is likely a reason that lacking egregious circumstances, failure to object does not constitute deficient performance, even where the issue is one central to the case. The defense is simply not required to object to every piece of evidence offered by the State, even if it relates to a central element to their case. Additionally, defense counsel could have also determined that it was more efficient to have the trial court rule on any potential ER 404(b) issues as they arose during trial, if he deemed it such that required objection. Here, it seems reasonable that neither counsel deemed evidence of the existence of the prior VISA card incidents to be of overwhelming evidentiary value since significant identity evidence existed outside of those prior incidents. In reality, there exist any number of legitimate strategic reasons defense counsel could have had for proceeding as he did. Anderson’s personal interpretation of those actions in hindsight does not overcome the strong presumption of effective counsel.

b. Anderson was not deprived effective assistance of counsel when her attorney did not timely file a notice of intent to call an expert witness.

Again, Anderson fails to demonstrate: 1) failing to file notice to call an expert witness to testify on eyewitness testimony constitutes deficient performance, and 2) the lack of expert witness testimony on the topic resulted in prejudice to Anderson sufficient to satisfy Strickland. Beginning with the latter point first, as the trial court noted, an expert witness is not a fact witness. [2-10-09 RP 121]; ER 702; ER 703. “An expert gives opinions and a jury can give whatever weight they want to those opinions.” [2-10-09 RP 121]. Because an expert gives only opinion evidence, that evidence, may be helpful to a jury in making a fact determination, but by definition it is not dispositive of an issue. As the trial court noted at Anderson’s sentencing, juries are wholly capable of picking up on the inherent unreliability of eyewitness identification through in-court testimony and cross examination. [3-16-09 RP 7]. See State v. Lord, 117 Wn.2d 829, 854; 822 P.2d 177 (1991)(“The weight to be given the expert’s conclusion is generally left to the jury.”); State v. Batten, 17 Wn. App. 428, 563 P.2d 1287, *review denied*, 89 Wn.2d 1001 (1977).

Even if expert testimony may have been helpful to Anderson's case (which is debatable), any such possibility does not inherently result in a successful case as Anderson appears to argue. She fails to note any authority to support her proposition that failure to retain and present expert testimony on this issue would have (or has ever) resulted in a finding of prejudice under Strickland. The State assumes this is because no such authority exists. Indeed, a review of Washington case law appears to demonstrate that expert testimony on eyewitness identification is rarely, if ever, considered crucial to a defendant's case such that it supports a reversal. See State v. Lewis, 141 Wn. App. 367, 166 P.3d 786 (2007) citing to State v. Cheatam, 150 Wn.2d 626, 644, 81 P.3d 830 (2003) (trial court's exclusion of a defense's expert testimony discussing the unreliability of eyewitness identification was not improper); State v. Hernandez, 58 Wn. App. 793, 802-03, 794 P.2d 1327 (1990), *review denied*, 117 Wn.2d 1011, 816 P.2d 1223 (1991), *disapproved on other grounds*, State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) (admissibility of expert testimony on eyewitness credibility is a matter within the discretion of the trial court); *cf.* State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) (decision to call a witness generally will not support a claim of

ineffective assistance of counsel except in exceptional circumstances).

The presentation of Dr. Loftus's testimony would not have changed the testimony of the four eyewitnesses presented by the State. Instead, the State submits the expert witness likely would have attempted to explain factors contributing to identification which the trial court indirectly noted were in the realm of a juror's common knowledge and which could be brought to light through cross-examination. [3-16-09 RP 7]. Examples of some of these factors would likely include the observer's emotions at the time (e.g. fear or excitement), the length of observation, the number of observations, the observed party's clothing, hair, and ethnicity, the lighting, the observer's eyesight, the existence or lack of obstructions, and the existence or lack of any drugs or alcohol. This, in fact, appears to be what occurred during the course of Mitera's cross-examination when she testified in-court she was no longer certain Anderson was the person she waited on January 10, 2008, based on the defendant's relative height in the courtroom. [2-10-09 RP 160-61]. As a result, the lack of retention and presentation of Dr. Loftus as an expert witness, through failure to properly serve notice of intent

to call an expert witness, did not prejudice Anderson under the Strickland standard.

Second, Anderson fails to overcome the presumption of effective assistance. The decision whether or not to call a witness is a tactical one and belongs to the attorney, not the defendant. State v. Thomas, 71 Wn.2d 470, 429 P.2d 231 (1967); State v. King, 24 Wn. App. 495, 499, 601 P.2d 982 (1979). This seems especially true where the potential witness is one who will testify to his or her opinion and not fact. There are numerous reasons why an attorney, even a great one, might not retain or present an expert in a case, none of which indicate deficient performance. Likewise, defense counsel was not deficient in declining to do so in the instant case.

While the State acknowledges defense counsel's request here was untimely and resulted in denial of the motion, it maintains that this error does not rise to the level of deficient performance such that Anderson was denied her Sixth Amendment right to counsel. Since Dr. Loftus' testimony was not necessary to Anderson's defense, defense counsel had nothing to lose by making the request, even if late. It follows then that if deficient performance would not exist if no motion were ever made, then it is

illogical for it to exist where the same motion is made belatedly.  
Thus, Anderson fails to satisfy either prong of Strickland.

D. CONCLUSION

Anderson was denied neither counsel for Sixth Amendment purposes, nor a fair and impartial trial under the same. For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 8<sup>th</sup> of January, 2010.

for Carol LaVerne 19229  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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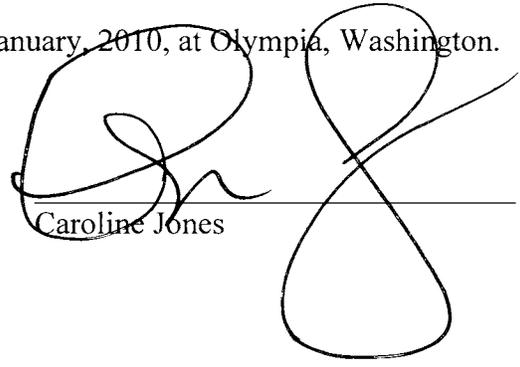
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10 JAN 12 AM 11:17  
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 11 day of January, 2010, at Olympia, Washington.

  
\_\_\_\_\_  
Caroline Jones