

NO. 40626-8-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SAMANTHA MASSEY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckner

No. 09-1-02853-4

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**Brief of Respondent**

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

1. Was defendant granted a fair trial when argument made by the State in closing and on cross-examination did not represent flagrant and ill-intentioned behavior on the part of the prosecutor and did not prejudice the defendant?
2. Did defendant receive adequate and effective representation from defense counsel?
3. Did the court properly operate within its authority when it directed defendant to drug-related rehabilitation under supervision of the Department of Corrections?

B. STATEMENT OF THE CASE.

1. Procedure

On June 9, 2009, the State charged defendant with one count of attempting to obtain a controlled substance by fraud, deceit, or misrepresentation. CP 1.

After multiple continuances, trial commenced on March 30, 2010, when the court held a CrR 3.5 hearing to determine the admissibility of

statements made by defendant to law enforcement personnel. CP 79; 1RP<sup>1</sup>

1. The court made a verbal ruling, finding that the statements would be admitted. CP 79.

The jury trial commenced March 31, 2010. RP 1. The State presented its case-in-chief on March 31, 2010. RP 1-129. Defendant presented her case on April 1, 2010. RP 130-266.

The State and defendant presented closing arguments on April 5, 2010. RP 273-84; 284-293. The State also presented a rebuttal closing argument. RP 293-95.

By unanimous verdict, the jury found defendant guilty of obtaining or attempting to obtain a controlled substance by fraud, deceit, misrepresentation, or substitute. RP 299-300; CP 50.

## 2. Facts

On January 29, 2009, defendant came to the Safeway pharmacy on 56<sup>th</sup> street in Tacoma at approximately 6:00 pm. RP 15-16; 12. She presented two prescriptions and a medical coupon to Starlyn Hedges, the pharmacy technician working that day. RP 16. Ms. Hedges testified at trial that the state-issued medical coupon had Isaiah Hill's name on it. RP 17-18.

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<sup>1</sup> Consistent with defendant's brief, the transcript from March 30, 2010 (incorrectly labeled as March 30, 2009) will be referred to as 1RP, while the remaining transcript volumes will be referred to as RP.

Ms. Hedges testified that the prescriptions had been issued by the Odessa Brown Clinic and listed Isaiah Hill as the recipient. RP 19. She observed that one prescription authorized Rhinocort, an allergy spray, while the other prescription authorized an unusual strength and amount of Percocet, a narcotic. RP 20-22. At trial, she testified that Rhinocort and Percocet would normally not be prescribed to a child together, which she found suspicious. RP 22. She also observed that the prescription had been written in cursive, which was unusual. *Id.*

After consulting with the pharmacy manager on duty, Ms. Hedges attempted to contact the prescribing clinic. RP 23. Unable to reach the clinic, Ms. Hedges decided to inform defendant that she would have to return the next day to pick up the medication. *Id.*

Ms. Hedges testified that she ended her work shift shortly thereafter and walked out of the store with defendant. RP 23-24. She asked about the unusual prescription to which defendant replied that her son had cancer; Ms. Hedges felt very sympathetic and remembered defendant's story when she came in to work the next day. RP 24-25. When she arrived, another pharmacist explained that they discovered the prescriptions to be forgeries. RP 25. Ms. Hedges then contacted the police. RP 26. Later that day, an unidentified man came in to pick up the falsified prescription. RP 30.

Tacoma Police Detective Randi Goetz contacted defendant and asked her to come in on April 21, 2009, to discuss the incident. RP 44.

Detective Goetz advised defendant of her rights and had her sign an advisement of rights form. RP 48. She asked defendant if she had gone to the Safeway pharmacy and attempted to fill a forged prescription. RP 50. Defendant denied any involvement and Detective Goetz let her go. *Id.*

Detective Goetz created a photomontage containing defendant and showed it to Ms. Hedges on May 5, 2009. RP 52-53. Ms. Hedges selected the picture of defendant. RP 34; 56.

Detective Goetz spoke to defendant again on May 6, 2009, this time at her home. RP 58. She advised defendant again of her rights and her initial the advisement of rights form. *Id.* Comparing defendant's signature on the advisement of rights form to the similar signature on the medical coupon used in the incident, Detective Goetz asked defendant to explain the similarity. RP 59-60. Defendant denied signing the medical coupon and denied any similarity between the two signatures. RP 60. Detective Goetz then coordinated with the Prosecutor's Office to charge defendant. RP 62.

Cynthia Brown, a pediatric nurse practitioner, testified that she saw defendant's son, Isaiah Hill, on the afternoon of January 29, 2009. RP 82-84. She saw him for a headache and foot pain. RP 84. She issued a prescription for Rhinocort and a prescription for Toradol. RP 85. She clarified that she did not write a prescription for Percocet for defendant or defendant's son. RP 86. Mrs. Brown also testified as to how the prescription pads had, at the time of the incident, been stored in an area

that the public could access. RP 89. Further, the patient identification stickers found on the forged prescriptions could have been found and taken from a patient's chart. RP 91.

Defendant presented a case that was contrary to the case presented by the State. Fred D. Braggs, a close friend of defendant, testified that he drove defendant to the medical appointment on January 29, 2009, and that after the appointment they stopped for dinner in Seattle. RP 150-52. He further testified that they stayed in Seattle until approximately 7:00pm at which point they returned to Tacoma, arriving after 8:20pm. RP 153-54. Defendant testified to the same sequence of events. RP 183-85.

C. ARGUMENT.

1. THE STATE'S COMMENTS ON CROSS-EXAMINATION AND CLOSING ARGUMENT, ALTHOUGH ARGUABLY INARTFUL, WERE NOT ILL-INTENTIONED AND FLAGRANT AND DID NOT RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT.

The United States Constitution guarantees defendants a fair, but not necessarily error free, trial. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). To demonstrate prosecutorial misconduct, a defendant must show that comments made by the prosecutor were both prejudicial and improper. *See Fisher*, 165 Wn.2d at 747, 202 P.3d 937. "Trial court rulings based on allegations of prosecutorial misconduct are reviewed

under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). A defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper to prove prosecutorial misconduct. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952). The burden rests on the defendant in showing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718.

The court defines prejudice as “a substantial likelihood [that] the misconduct affected the jury's verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would

be ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor may respond to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

The court has repeatedly held that when a defendant fails to object to improper argument during closing, he waives appeal on the issue. *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009); *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). “Unless a defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice.” *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209 (1991), citing *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). Thus, defendant must show that the prosecutor’s behavior could not have been cured by a jury instruction in order to demonstrate flagrant and ill-intentioned behavior.

- a. The State’s questions on cross-examination of defendant were neither flagrant nor ill-intentioned and did not constitute prosecutorial misconduct.

The Washington Supreme Court has held that asking a defendant to agree that the State’s witnesses must be mistaken or lying is “argumentative, impertinent, and uncalled for.” *State v. Green*, 71 Wn.2d

372, 381, 428 P.2d 540 (1967). In *Green*, the prosecutor asked defendant on cross-examination whether police officers who testified were mistaken or lying when they gave contradictory testimony. *Id.* However, although the court found the behavior improper, “[t]he error was not so deliberate, flagrant, persistent, or genuinely inflammatory as to warrant a new trial.” *Green*, 71 Wn.2d at 381. This type of error “is harmless unless there is substantial likelihood that it influenced the outcome of the trial.” *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991). *See State v. Wright*, 76 Wn. App. 811, 822, 888 P.2d 1214 (1995) (holding that asking a witness in cross-exam as to whether or not a different witness is mistaken does not constitute misconduct).

Here, the State asked defendant questions during cross-examination in which defendant concurred that the State’s witness “is either lying or mistaken.” RP 236-37; 254. Defense counsel did not object to these questions. *Id.*

In *Green*, the court stated that, when considering the prosecutor’s remarks, “consideration must be given to whether they were inadvertent or deliberate, designed to inflame and prejudice the jury, or whether they unintentionally may have done so.” *Id.* In the instant case, during cross-examination, defendant provided testimony that directly contradicted testimony from the State’s witnesses. RP 236; 254. The record suggests

that the State intended to contrast the defendant's conflicting testimony with that of the State's witnesses. The State's questions were not designed to inflame the jury or prejudice the defendant. Therefore, given the nature of the questions and apparent intent of the State, the questions did not constitute flagrant and ill-intentioned behavior.

As with *Green* and *Casteneda-Perez*, nothing in the trial record suggests that the inartful question asked by the State influenced the outcome of the trial. The State presented an overwhelming amount of evidence demonstrating defendant's guilt. Ms. Hedges testified as to her personal contact with defendant on the evening of the crime. RP 16-17. Mrs. Brown explained the prescription process and testified as to what medications she actually prescribed to defendant's son. RP 85-86. Further, Detective Goetz explained her contact with defendant. RP 47-62. Finally, defendant herself had difficulty explaining how one of her known signatures matched the signature on the fraudulent prescription. RP 197-233. Applying the standard in *Green* and *Casteneda-Perez*, the questioning performed by the State was neither ill-intentioned nor flagrant and, thus, did not constitute prosecutorial misconduct.

- b. The State did not commit misconduct in stating that accepting defendant's explanation would require the jury to believe the State's witnesses were lying or mistaken.

A prosecutor who personally vouches for the credibility of witnesses commits misconduct. *State v. Swan*, 114 Wn.2d 613, 653, 790 P.2d 610 (1990). “However, prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion.” *Id.* at 664. Regarding witness credibility, the court held that “[c]ounsel is given reasonable latitude to draw and express inferences and deductions from the evidence, including inferences as to the credibility of witnesses.” *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558 (1969). A prosecutor may argue, based on the evidence presented in trial, that the jury should consider certain testimony over others. *Id.* In *State v. Copeland*, the court held that prosecutor’s statements during closing argument that defendant was a liar “were related to the evidence and drew inferences that [the defendant] lied because his testimony conflicted with that of other witnesses.” 130 Wn.2d 244, 922 P.2d 1304 (1996).

When a prosecutor states in closing argument that the defendant is calling the State's witnesses liars, the court has held such behavior as misconduct but not serious enough to be flagrant and ill-intentioned. *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209 (1991). "[D]efense counsel did not object, request that the arguments be stricken, or ask for a curative instruction. Counsel clearly could have minimized the impact of this argument if he had taken any of these steps." *Id.* Specifically, the court stated that "[a] curative instruction particularly could have obviated any prejudice engendered by these remarks." *Id.* These kinds of arguments, although improper, are not flagrant and ill-intentioned such to warrant reversal. *See State v. Wright*, 76 Wn. App. 811, 823, 888 P.2d 1214 (1995) (holding that closing argument which states that jury, to believe defendant, must believe that State's witnesses are mistaken is acceptable).

Applying *Copeland* and *Adams* to the case at bar, the prosecutor had sufficient latitude in suggesting that defendant, by presenting contrary testimony, purports that the State's witnesses are lying or mistaken. Defendant, by providing testimony that directly contradicts testimony given by the State's witnesses, gives the State an opportunity to compare the credibility of the accounts. Further, the State may respond to argument or comment presented at trial by defense counsel. *Russell*, 125 Wn.2d at

87. When considering this case in light of *Barrow*, the comments made by the State may have been inappropriate but they were not ill-intentioned and flagrant.

In *State v. Fleming*, the Court of Appeals stated “that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Both defendants at trial in *Fleming* did not testify in their own defense. *Id.* at 214. They presented nothing to counter the testimony of the State’s witnesses. The court determined “[the argument] to be a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial.” *Id.* at 214. However, when defendant presents an alibi in testimony, “the prosecutor is entitled to attack the adequacy of the proof, pointing out the weaknesses and inconsistencies[.]” *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Here, unlike in *Fleming*, defendant presented multiple witnesses and testimony completely inconsistent with the State’s witnesses and testimony. RP 135-260. “[W]hen a defendant advances a theory exculpating him, the theory is not immunized from attack.” *Contreras*, 57 Wn. App. at 476. The State, responding to defendant’s case, emphasized the incompatibility of the State’s and defendant’s sequences of events.

Thus, as with *Barrow*, the State's comments did not constitute flagrant and ill-intentioned behavior warranting reversal.

When the prosecutor presents the jury with a false choice, the argument that they must choose between accepting one set of testimony or another, it is considered prosecutorial misconduct. *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). In *Miles*, the prosecutor specifically told the jury that they must either believe the defendant's testimony or the testimony of the State's witnesses. *Id.* The prosecutor in *Miles* presented a false dichotomy. However, as with *Copeland*, "[w]hen the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable". *Id.* Here, unlike in *Miles*, the State did not insist that the jury must choose exclusively between believing the State's witness or defendant's witnesses; the State said that by accepting defendant's explanation of events, one must assume that the State's witnesses were lying or grossly mistaken. RP 281. This argument was the logical conclusion from the evidence presented since the State and defendant presented two entirely different versions of events.

Although the State's comments in closing may not be the best or most appealing argument possible, when evaluated under the guiding case law, it did not constitute prosecutorial misconduct.

- c. Any error made by the State did not prejudice the defense since the jury instructions properly stated the proper elements of law.

A prosecutor's comments must be examined in context of the whole trial, including jury instructions. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). When the court gives instructions to the jury, "[a] jury is presumed to follow instructions." *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010), citing *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008).

Defendant argues that prosecutor's comments during cross-examination and closing improperly misstated the responsibility and duties of the jury. App. Br. At 16. However, the court instructed the jury with jury instructions that properly explained the role of the jury, thereby mitigating any possible prejudice. RP 261-64. The court instructed the jury in the law regarding the presumption of innocence and the burden of proof:

The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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

CP 39. The instruction made clear the jury's role in the process. Even if the State had misstated the role of the jury, the presence of a correct jury instruction mitigates any prejudice.

Jury instruction 1 explained that remarks and statements made by lawyers should not be considered evidence when deliberating. CP 37.

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyer's statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

*Id.* Although the court may find that the State erred in making certain comments in closing or during cross-examination, the jury had been instructed as to the appropriate standard for disregarding inappropriate comments. *Id.* Specifically, the jury had been instructed to only consider the evidence and testimony provided during the trial and to disregard any unfounded comments or arguments. *Id.* If the State made arguments which had no basis in evidence, the jury had the appropriate instruction as

to disregard such argument and is presumed to follow such an instruction, mitigating any possible prejudice.

Defense counsel did not request a separate curative instruction in response to comments made by the State. RP 261-64; 274-304. Since the court's jury instructions already contained statements about the burden of proof and the presumption of innocence; any additional instruction was redundant and unnecessary. Given the content of the jury instructions and the important role that they serve in the jury's duty, any error that the State may have committed during cross-examination or closing would not prejudice defendant's case.

2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court

has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

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

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

*Id.* See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v.*

*McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

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

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing *Strickland*, 466 U.S. at 689-90.

Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice or that counsel's performance was deficient; both need not be demonstrated to counter the claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d. at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690;

*State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S., at 689.

- a. Defense counsel’s failure to object to the State’s comments did not constitute deficient performance.

The court remains wary of finding that defense counsel’s failure to object constitutes ineffective assistance of counsel. “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). The Court of Appeals cautioned against such a posture, viewing that:

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.

*State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

Defendant cites defense counsel's failure to object to the prosecutor's comments that the jury must find the State's witnesses as liars to accept defendant's story as sufficient to show ineffective assistance of counsel. App. Br. at 13. These kinds of "liar" arguments have generally been held as improper but not a flagrant and ill-intentioned error on the part of the prosecutor. *Barrow*, 60 Wn. App. at 875; *see supra* 5-14. However, as stated by the court in *Madison*, defense counsel could have viable tactical reasons as to when or whether to object. 53 Wn. App. at 763. "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.*

At the time of the State's alleged misconduct, the jury had already heard testimony from the State's witnesses. The jury already knew the State's case. For defense counsel to object to statements made by the State would merely emphasize the disparity between the two cases. Defense counsel had legitimate, tactical reasons not to object to the State's comments during both cross-examination and closing arguments. Thus, defense counsel's failure to object did not constitute ineffective assistance of counsel.

- b. Defendant has not demonstrated that any alleged failure of defense counsel prejudiced her defense.

“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Had defense counsel objected to the State’s comments in closing or during cross-examination, nothing suggests that the result would have been different. In *State v. Thach*, defense counsel failed to object to comments made in closing by the prosecution. 126 Wn. App. 297, 319, 106 P.3d 782 (2005). The Court of Appeals held the comments made by the prosecution were not “ill-intentioned and flagrant” and, thus, defense counsel’s failure to object did not prejudice the defendant. *Id.* at 320. Here, although the court may view the State’s comments as error, it did not rise to the level of “ill-intentioned and flagrant.” As with *Thach*, nothing suggests that defense counsel’s actions prejudiced defendant.

Furthermore, the jury received jury instructions from the court. RP 261-64; 272. The instructions properly stated the burden of proof, the role of the jury, and the obligation of the jury to only consider argument and comment supported by evidence and testimony presented in trial. CP 35-49. A jury is presumed to follow the court’s instructions. *Gamble*, 168 Wn.2d at 178.

- c. Defense counsel represented defendant zealously and effectively throughout the course of the trial.

Claims of ineffective assistance of counsel must examine the entire record below. *McFarland*, 127 Wn.2d. at 335. Contrary to defendant's claim on appeal, defense counsel did much to aid defendant in her case. Prior to trial, he argued during the CrR 3.5 hearing to suppress statements made by defendant. 1RP 4-62. He presented her case by calling two witnesses and the defendant herself to present a viable explanation of events to the jury. RP 135-260. He also objected to inappropriate statements made by the State on several occasions. RP 197-98; RP 199; RP 227. Defense counsel also presented persuasive closing argument in support of defendant. RP 284-293. In considering the entirety of the trial record, counsel provided effective representation to defendant.

The *Strickland* rule requires that a defendant show that counsel provided ineffective performance based on the entire record below and that the ineffectiveness prejudiced the outcome of the trial. 466 U.S. at 687. Here, defendant has not shown either.

- d. Defense counsel's failure to object during sentencing did not constitute deficient assistance since the court made no error.

At sentencing, the court imposed a drug treatment program pursuant to RCW 9.94A.703 and RCW 9.94A.704. This imposition did not exceed the statutory authority of the court. *See infra* 22-25.

Therefore, defense counsel's failure to object did not constitute ineffective assistance of counsel.

3. THE DEPARTMENT OF CORRECTIONS HAS THE AUTHORITY TO ENFORCE A REHABILITATIVE PROGRAM UPON DEFENDANT.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1). RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose. Further discretionary elements appear in RCW 9.94A.703(3). Here, defendant challenges that the court did not correctly impose the sentence pursuant to the statutes.

When a court imposes a sentence that falls outside of its statutory authority, defendant can raise the issue for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

The authority for the court to sentence a convicted person to community custody comes from RCW 9.94A.703. Amongst the mandatory conditions, the court will “[r]equire the offender to comply

with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). The Department of Corrections “may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4).

The court “shall order an offender” to act in accordance with the conditions of RCW 9.94A.703(2) unless the court chooses to waive them. RCW 9.94A.703(2)(c) specifically requires that defendant “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions[.]”

RCW 9.94A.703(3) provides discretionary conditions that the court may impose. Specifically, the court may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b). Thus, the court may restrict an offender from interacting with specific or general groups of people.

Here, the Court directed defendant with the language: “no use or possession of nonprescribed controlled substances; no association with drug users or sellers; other terms including drug treatment per CCO; forfeit property seized by law enforcement.” CP 91. Defendant argues that the requirement that “other terms including drug treatment per CCO” placed in the judgment and sentence improperly delegates the court’s power to the Department of Corrections. App. Br. at 28-29.

- a. The court may require defendant to participate in a crime-related treatment.

“As part of any term of community custody, the court may order an offender to: ... (c) Participate in crime-related treatment or counseling; (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community[.]” RCW 9.94A.703(3). Defendant, convicted of a drug-related offense (obtaining or attempting to obtain a controlled substance by fraud, deceit, misrepresentation, or substitute), can be lawfully required per statute to participate in a drug-treatment program. *State v. Powell*, 139 Wn. App. 808, 819, 162 P.3d 1180 (2007), *reversed on other grounds*.

- b. The Department of Corrections has statutory authority to require defendant to participate in a rehabilitative program.

RCW 9.94A.704(4) grants the department the authority to make an offender participate in a rehabilitative program. Specifically, “[t]he department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4). Although RCW 9.94A.030 does not define “rehabilitative program,” this Court has previously considered substance abuse programs as viable rehabilitative programs. *See State v. Motter*, 139 Wn. App. 797, 162 P.3d 1190 (2007). Thus, independent of the

Court's direction, the Department of Corrections may require defendant to comply with a drug treatment program.

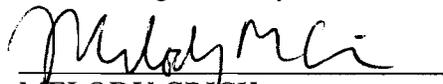
In requiring defendant to conform to "other terms including drug treatment per CCO," the court simply directed the Department of Corrections to carry out actions already allowed by RCW 9.94A.704(4). Thus, the Court did not improperly delegate authority to the Department of Corrections.

D. CONCLUSION.

A jury convicted defendant of attempting to obtain a controlled substance by fraud, deceit, or misrepresentation. Although inartful, the State did not engage in ill-intentioned or flagrant behavior during cross-examination and closing argument. Further, defense counsel's representation was constitutionally effective. For the reasons argued, the State respectfully requests that the defendant's sentence be affirmed.

DATED: December 23, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

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Andrew Asplund  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/22/10 Theresa Kar  
Date Signature

