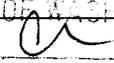


NO. 40675-6-II

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

STATE OF WASHINGTON, RESPONDENT

v.

SANDY SCHOEPFLIN, APPELLANT

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

No. 08-1-04855-3

Respondent's Brief

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

1. Has defendant failed to show prosecutorial misconduct, much less any resulting prejudice, where the State's argument mirrored the jury instructions given by the court?

2. Has defendant failed to meet the substantial burden of showing ineffective assistance of counsel where his counsel prevented the filing of additional charges against him, and subjected the State's case to adversarial testing?

B. STATEMENT OF THE CASE.

1. Procedure

On October 16, 2008, the State filed an information with the Pierce County Superior Court charging defendant, Sandy Schoepflin, with felony domestic violence court order violation. CP 1. After various continuances, a jury trial began before the Honorable Rosanne Buckner on April 13, 2010. RP 2.

At trial, after all testimony had been presented and copies of the orders prohibiting contact and defendant's previous convictions for violation of those orders had been admitted, the jury was instructed by the judge on the law, and its duty in the case, and then heard closing arguments. RP 78-87, 103, CP 26-44. During closing arguments, the prosecutor argued that despite all her efforts, the victim could not prevent

defendant from contacting her. RP 104. He went through the elements of the crime, and pointed the jury to the evidence the State had presented which proved that element. RP 106-09. Then the prosecutor talked about whether or not defendant had knowingly violated the order by contacting the victim. RP 109. He argued that while defendant had told the jury that he had learned his lesson, the evidence showed that was not the case. RP 104.

The prosecutor went through jury instruction number one with the jury, which outlines the jury's role in the trial. RP 110. He read from the instruction: "You are the sole judges of the credibility of each witness," and then noted the factors that the jury may use in making their credibility determination. *Id.* He highlighted specifically that the jury may consider the personal interest of the witness in their testimony. *Id.* The prosecutor then noted that the jury also heard the testimony of the two officers, and of the victim. RP 111. The jury was able to observe the demeanor of the victim, and heard what she had told the officers. RP 111. He then stated,

"If you believe Holly Williams, then you must find him guilty. That's it. That's the bottom line. If you believe Holly Williams, you must find him guilty.

Looking at all the evidence, looking at the context of this case, he just couldn't stay away. The court ordered him to have zero contact, but he couldn't do it. So ladies and gentlemen, do your duty. Go back into that jury room and find him guilty."

RP 111.

Defense counsel did not object during the trial, did not request a curative instruction, and did not move for a mistrial. RP 111, 117. Instead, defense counsel began her closing argument, arguing that while all other elements of the crime had been met, the jury had to decide if it believed defendant had contacted the victim or not. RP 111-114. She stated:

“The question you have to decide is whether you believe my client or Ms. Williams.... If you doubt Cassandra White[/]Holly Williams is telling the truth today or when she spoke to the police officers, then you must find my client not guilty.”

RP 113-14. CP 45, RP 121-22.

On April 16, 2010, after deliberations, the jury returned a unanimous guilty verdict and answered yes on the special interrogatory finding the domestic violence designation applicable. CP 45-46, RP 121-22. The court sentenced defendant to nine months in the Pierce County Jail and twelve months of community custody on April 23, 2010. CP 54-67, RP 133. The sentence is consistent with the standard range for defendant's offender score of zero. CP 54-67, RP 129. Defendant received credit for seven days time served. CP 54-67, RP 133. Defendant entered a timely notice of appeal on May 4, 2010. CP 72-84.

2. Facts

On September 17, 2007, at around 11 p.m., Officer Corina Curtis responded to a 911 call from Holly Williams. RP 30-31. When Officer

Curtis arrived at 4829 South J Street, she contacted Ms. Williams who reported a violation of a protection order. RP 31. Officer Curtis testified that the victim reported receiving phone calls from defendant, her former live-in boyfriend. RP 31, 51. The calls from defendant began on September 16, 2007, at approximately 8 am in the morning, and he called fifteen times that day. RP 31-32. On September 17, defendant called the victim seven more times. RP 32. Officer Curtis testified that the victim further reported that each time that she answered the phone she recognized defendant's voice, and told him to stop calling her. RP 32. After taking the victim's statement, Officer Curtis contacted the records division of the Tacoma Police Department and verified that Ms. Williams had a valid no contact order in effect against defendant. RP 33-34

On September 18, 2007, Officer Patrick Patterson responded to the same address after a second 911 call from the victim. RP 43. Officer Patterson testified that the victim reported that she had received several calls from defendant between 1:00 am on September 17, and 4:30 in the afternoon on September 18, when he arrived. RP 43-44. The officer then verified that there was a valid no contact order in place against defendant. RP 47. Both Officer Patterson and Officer Curtis testified that they were unable to find the defendant after speaking with the victim. RP 38, 46.

At trial, the victim testified that she had lived in the house at 4829 South J Street for ten years. RP 50. In October of 2004, the victim met defendant, who lived next door to her. RP 51. Defendant and the victim

became romantically involved, and after approximately six months together, defendant moved in with the victim. RP 51. The victim testified that after six months the relationship soured, and in early 2006 she “had to get a restraining order.” RP 52. At the victim’s request, a court order was issued in 2006 prohibiting defendant from contacting her. RP 52. The victim further testified that in May of 2006, defendant went to jail following a court case for fourteen violations of her restraining order against him; the court issued a second order without any request from her. RP 52-53, 56. The victim acknowledged that she had reported one incident of defendant contacting her under the name Cassandra Michelle Wright, and that she had used that name in the past. RP 59. She noted in her testimony that she had not traveled outside of the state of Washington during September of 2007, and that all contact defendant had made with her was while she was in Tacoma, Washington. RP 61.

Defendant took the stand in his own defense, and testified that he was aware of the protection order against him during 2006. RP 88. He testified that he had previously had a romantic relationship with, and had lived with, the victim. RP 89. He stated that after his “third time of being jailed and released,” he had not had any contact with the victim. RP 89. He also testified that he served jail time for violating that protection order on “two or three different occasions.” RP 88. Defendant testified that the first time he violated the no contact order, on May 6, 2006, he “was already incarcerated and in jail before [he] knew there was a no contact

order.” RP 92. Defendant also acknowledged pleading guilty to violating the no contact order on May 1, 2006, July 19 and July 25, 2006, as well as August 26, 2006. RP 93-95. Defendant further testified that he knew that the court had issued an order on September 14, 2006, prohibiting him from having any contact with the victim, and that he had signed that order. RP 96.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR’S CLOSING ARGUMENT WAS IMPROPER, MUCH LESS THAT SUCH ARGUMENT WAS PREJUDICIAL.

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. *Id.* at 747. 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 to show that the alleged misconduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

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).

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); *Stenson*, 132 Wn.2d at 718. “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).

Defendant must therefore show that the prosecutor’s statement was blatant, and intended to mislead the jury, and that it was incurable. *State v. Echevarria*, 71 Wn. App. 595, 597, 599, 860 P.2d 420 (1993).

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). A jury is presumed to follow the instructions given to it by the court. *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 the prosecutor's argument during closing improperly exhorted the jury to find the defendant guilty by stating, "[S]o ladies and gentlemen, do your duty. Go back into that jury room and find him guilty." Appellant's brief at 4-5.

- a. The prosecutor's argument was proper, and referred the jury to the instructions given by the court.

The prosecutor's argument was proper, and did not mislead the jury. The prosecutor's argument mirrored jury instruction number seven which read:

If you find from the evidence elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

CP 26-44, jury instruction 7. The prosecutor highlighted this instruction in his argument to the jury, stating:

“Jury instruction number 7 is what I like to call the road map... It’s like a checklist. You go down this checklist, and as you check the elements, as you say the state has proved that beyond a reasonable doubt, you check these elements off. And when you get to the end, if you have checked them all off, it is your duty to return a verdict of guilty.”

RP 106. The prosecutor then proceeded to walk the jury through the evidence which showed each element of the crime. RP 106-110. There is no indication from this argument that the prosecutor was not acting in good faith, or that he intended to mislead the jury in any way. On the contrary, the prosecutor’s focus on the jury instructions, and the repeated referral back to specific instructions show that his intention was to “help [the jury] understand the evidence and apply the law,” as closing arguments are intended to do according to jury instruction number 1. CP 26-44, RP 106-110, 117.

The remarks which defendant challenges were made in the context of arguments which told the jury members to “look at the all the evidence,” “think about these things, look at the evidence,” “go back [to the jury room] and talk about the evidence,” and to ask themselves, “What’s been proved? Who do I believe? Whose story, whose testimony is more reasonable in light of all this evidence?” RP 111, 116-17. When the challenged comments are placed in context, the argument is proper. The argument as a whole cannot be said to unduly pressure the jury to find

defendant guilty. The prosecutor's argument was that by following the instructions given by the court, and examining the evidence, the jury would conclude that defendant was guilty.

Even if the prosecutor's argument was poorly worded, it was neither flagrant nor ill-intentioned, and defense counsel did not object, move for mistrial, or request a separate curative instruction in response to those arguments. RP 111, 117. Defendant, therefore, waived the issue. *Barrow*, 60 Wn. App. at 876. In order to overcome such waiver, defendant must show that no curative instruction could have obviated any prejudicial result. *Id.* A jury is presumed to follow the instruction from the court that attorneys' arguments are not evidence, as well as any curative instructions issued by the court. *State v. Warran*, 165 Wn.2d 17, 29, 15 P.3d 940 (2008). Thus, an instruction from the judge following the prosecutor's argument reminding the jury to disregard any part of the argument which was inconsistent with the jury instructions would have cured any possible confusion resulting from the argument. Because a curative instruction would have solved any error, defendant has failed to show that the prosecutor committed flagrant and ill-intentioned misconduct requiring reversal.

To support his contention that the prosecutor's remarks were flagrant and ill-intentioned misconduct, defendant cites to *State v. Coleman*, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), and *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Appellant's brief at 5. In both cases, the courts ruled that while the comments made by the prosecutor were improper, the comments were not prejudicial. *Young*, 470 U.S. at 16-17, *Coleman*, 74 Wn. App. at 838, 841. In *Young*, the comments were invited by defense counsel, were in response to the defense argument. The court found that both attorneys had made arguments that were improper, but in the context of the case the prosecutor's statement were not prejudicial. 470 U.S. at 16-17.

In *Coleman*, the prosecutor argued that in order to find the defendant not guilty the jury must do two things, "one is to ignore the actual evidence in front of you, and the second is thereby to violate your [oath] as jurors." 74 Wn. App. at 838. Unlike the case at bar, the defense counsel in *Coleman* lodged an immediate objection. *Id.* The trial court overruled the objection, and denied the subsequent motion for mistrial. *Id.* There, the appellate court noted that it is not misconduct for the prosecutor to argue that in order to reach a particular result, the jury must ignore evidence, or that ignoring evidence would violate their oath. *Id.* The court stated that it would be improper for the prosecutor to suggest that ignoring the State's theory of the case would violate the jury's oath, and

treated the statement as improper because of the possibility of misinterpretation. *Id.* The court noted however, that there was no prejudice because the statements by the prosecutor were tempered by the statement that the jury's verdict would not be "second-guessed," the comments were not a part of a pattern of misconduct, and the entirety of the prosecutor's argument outweighed any possible prejudice. *Id.* at 841.

Defendant also cited to *Williams v. State*, 789 P.3d 365 (Alaska 1990), which was cited by the *Coleman* court. 74 Wn. App. at 840, Appellant's brief at 6. In *Williams*, the court held that "in so far as [the prosecutor's argument] implied that the jury's 'job' was to reach a guilty verdict, it was improper." 789 P.3d at 369. The court noted however, that any "impropriety was tempered by the simultaneous admonition to the jury to 'look at the evidence and talk about the testimony.'" *Id.* The court found that the potential for prejudice from that comment was "remote," and found no plain error. *Id.*

The prosecutor's statements in the case at hand can be differentiated from the statements in each of the cases cited by defendant. Here, the prosecutor did not tell the jury that they would violate their oath if they did not agree with the State as in *Coleman*. 74 Wn. App. at 838-39. The prosecutor made no reference to the jury's oath at all. *Passim*. Nor did the prosecutor infer that the jury's duty was to find defendant guilty as in *Williams*. 789 P.3d at 369. Instead, he argued that the jury

members should follow the “checklist” in jury instruction 7, and ask themselves if the State had proved each of the elements beyond a reasonable doubt. RP 106. He argued that they should ask themselves which witnesses they found credible as the sole judges of credibility according to jury instruction number 1. RP 110, CP 26-44. He argued that after looking at the evidence, deciding what had been proved in the case, and determining whether it believed that defendant’s testimony, or that of the victim, the jury would “see that this is about a guy who could not stay away,” and was therefore guilty of violating the protection order against him. RP 111, 116. The prosecutor’s argument was not improper under the cases cited by defendant. As such it is not *de-facto* flagrant and ill-intentioned misconduct under *State v. Fleming*, as defendant argues. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), Appellant’s brief at 7. Defendant has failed to show that the prosecutor committed misconduct.

b. Defendant has failed to demonstrate any prejudicial effect.

If the court finds that the State erred in the phrasing of his arguments in closing, there is still no indication of prejudice in the record. The court’s instructions to the jury properly explained the role of the jury, thereby mitigating any prejudice. CP 26-44, RP 103. The court instructed the jury in their role in the process:

You are the sole judges of credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness...

The lawyers' 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 lawyers' 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.*

CP 26-44, Jury instruction 1 (emphasis added). Even if the State had misstated the role of the jury, a jury is presumed to follow their instructions, including any curative instructions given by the court. *State v. Warran*, 165 Wn.2d at 29. Given the content of the jury instructions and the important role that they serve in the jury's deliberations, any error that the State may have committed during closing did not prejudice defendant's case.

Furthermore, defense counsel's argument took a similar form to that of the prosecutor. RP 111-114. She conceded all but one element of the crime, and stated that the remaining element, whether any contact had occurred or not, was going to be determined by whether the jury believed her client, or the victim. RP 113. Defense counsel then stated, "If you doubt that [the victim] is telling the truth today or when she spoke to the police officers, then you must find my client not guilty." RP 113-14. This statement clarified any possible confusion as to the meaning of the

prosecutor's argument, as the jury would not believe that their duty was to find the defendant both guilty and not guilty.

Moreover, defense counsel's argument to the jury was that defendant was contesting only that he had contacted the victim. RP 113. She explained to the jury that it came down to whether the jury believed the testimony of the defendant, or that of the victim. RP 112-14. In doing so, she left the jury with only a determination of credibility to be made, as all other elements of the crime were established if the jury believed defendant had contacted the victim. RP 113. Determinations of credibility are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Defendant has failed to show a reasonable probability that the jury's verdict would have been different but for the prosecutor's argument.

2. DEFENDANT WAS REPRESENTED EFFECTIVELY,
AND DEFENDANT DID NOT SUFFER PREJUDICE.

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

defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must demonstrate that: (1) his or her attorney's performance was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, matters that go to trial strategy or tactics do not show deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, defendant must show that a reasonable probability exists that the result of the trial would have been different, but for counsel's errors. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The standard of review for effective assistance of counsel is whether the court can conclude, after examining the record as a whole, that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988), *see also State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Judicial scrutiny of an attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. 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." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter* 562 U.S. _____, 131 S. Ct. 770, 788, 178 L. Ed. 2d. 624 (2011).

The reviewing court will defer to counsel's strategic decision when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot form a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The reviewing court must "strongly presume that counsel's conduct constituted sound trial strategy." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086, *cert. denied* 506 U.S. 958 (1992). In order to prevail on a claim of ineffective assistance of counsel for a

failure to object at trial, defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, defendant claims that his counsel was ineffective for failing to object to the prosecutor's statements at the end of his closing arguments. Appellant's brief at 9. Given that the argument properly referred the jury to their instructions, and was an accurate reflection of the duty jurors were given under instruction number 7, an objection by defense counsel is unlikely to have been sustained. *State v. Davenport*, 100 Wn.2d. 757, 760, 675 P.2d 1213(1984), CP 26-44, RP 104-111, 114-117.

Even if an objection to the prosecutor's statements may have been sustained, defendant must still show that there was no legitimate trial strategy behind defense counsel's lack of objection. *Lord*, 117 Wn.2d at 893. Whether or not to object is a classic example of trial strategy. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Defense counsel, knowing that the jury had been properly instructed by the court prior to the commencement of arguments, may have wished to avoid calling attention to the statement by lodging an objection. "Lawyers do not commonly object during closing argument 'absent egregious misstatements.'" A decision not to object during summation is within the

wide range of permissible professional legal conduct.” *In re Davis*, 152 Wn. 2d 647, 717, 101 P.3d 1 (2004), quoting *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993).

Defense counsel focused the jury on the question of credibility by stating to the jury that the only question was whether the jury believed her client, or the State’s complaining witness. RP 113-14. Defense counsel stated that if the jury doubted the victim, “then [it] must find [her] client not guilty.” RP 114. As discussed above, the jury was properly instructed, and there is no indication that the jury did not follow its instructions.

Defendant relies on a lack of physical evidence that defendant contacted the victim to show a reasonable probability the outcome of the trial would have been different but for defense counsel’s lack of objection. Appellant’s brief at 7. The arguments of counsel accurately focused on the question of whether defendant had contacted the victim or not, as defendant contested contacting the victim while admitting all other elements of the crime on the stand. RP 88-89, 93-95, 113. The jury heard conflicting answers to the question of whether defendant had contacted the victim or not. RP 54, 88-89. These conflicting answers came from the testimony of defendant and the victim, therefore the question was one of credibility. Determinations of credibility are for the jury, and are not reviewable on appeal. *Camarillo*, 115 Wn.2d at 71. Defendant has failed to show from the record that there is a substantial likelihood that the

outcome of the trial would have been different but for counsel's lack of objection. As such, defendant has failed to meet his burden in showing ineffective assistance of counsel.

Defendant's focus of these relatively minor actions by defense counsel distracts this court from the standard of review for claims of ineffective assistance of counsel. Such claims are evaluated based on the record as a whole. *State v. White*, 81 Wn.2d at 225. The record in this case indicated that defense counsel gave an opening statement and a closing argument, in which she developed defendant's theory of the case, and called the victim's truthfulness into question. RP 22, 111-14. She proposed jury instructions, and objected to instructions proposed by the state. RP 23, 100. Defense counsel also cross examined all State witnesses, eliciting information which supported defendant's theory of the case. RP 38, 47, 62. She made proper objections to questions asked by the prosecutor. RP 32, 46, 60. Moreover, defense counsel objected to the proposed filing of an amended information during the trial process, and successfully prevented additional charges from being brought against defendant. RP 67-71. Defense counsel was clearly not deficient when the record is examined in its entirety.

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA

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STATE OF WASHINGTON
BY _____
DEPUTY

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests the Court affirm the judgment below.

DATED: March 28, 2011.

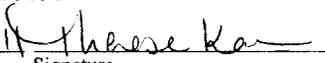
MARK LINDQUIST
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Margo Martin
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.

3.28.11 
Date Signature