

NO. 41632-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAKE CHRISTOPHER COHEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00430-9

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail, the recognized system of interoffice communications, *or, if an email address appears to the right, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 27, 2012, Port Orchard, WA

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TABLE OF CONTENTS

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

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

III. ARGUMENT.....10

A. THE DEFENDANT’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE HE CANNOT SHOW: (1) THAT AN OBJECTION TO THE EVIDENCE WOULD LIKELY HAVE BEEN SUSTAINED; (2) THAT THERE WAS AN ABSENCE OF LEGITIMATE STRATEGIC OR TACTICAL REASONS SUPPORTING THE CHALLENGED CONDUCT; OR, (3) THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD THE EVIDENCE NOT BEEN ADMITTED.10

B. THE DEFENDANT’S CLAIM OF PROSECUTORIAL MISCONDUCT MUST FAIL BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR’S CONDUCT AT TRIAL WAS IMPROPER.....16

IV. CONCLUSION.....22

TABLE OF AUTHORITIES
CASES

Alcorta v Texas,
355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957).....19

Hein v. Sullivan,
601 F.3d 897 (9th Cir.2010)17

In re Personal Restraint of Benn,
134 Wn. 2d 868, 952 P.2d 116 (1998).....19

Mooney v. Holohan,
294 U.S. 103, 55 S. Ct. 340 (1935).....19

Napue v. Illinois,
360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).....19

State v. Brett,
126 Wn. 2d 136, 892 P.2d 29 (1995).....11

State v. Fisher,
165 Wash. 2d 727, 202 P.3d 937 (2009).....17

State v. Hendrickson,
129 Wn. 2d 61, 917 P.2d 563 (1996).....12

State v. Johnson,
40 Wn. App. 371, 699 P.2d 221 (1985).....14

State v Lavaris,
106 Wn. 2d 340, 721 P.2d 5151 (1986).....21

State v. Mak,
105 Wn. 2d 692, 718 P.2d 407 (1986).....12

State v. Mason,
160 Wash. 2d 910, 162 P.3d 396 (2007).....20

<i>State v. McFarland</i> , 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	11, 12
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	12
<i>State v. Strauss</i> , 119 Wn. 2d 401, 832 P.2d 78 (1992).....	13
<i>State v. Thomas</i> , 46 Wn. App. 280, 730 P.2d 117 (1986).....	13
<i>State v. Thomas</i> , 150 Wn. 2d 821, 83 P.3d 970 (2004).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11, 12
<i>United States v. Agurs</i> , 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).....	19
<i>United States v. Aichele</i> , 941 F.2d 761 (9th Cir.1991)	17
<i>United States v. Polizzi</i> , 801 F.2d 1543 (9th Cir.1986)	17
<i>United States v. Zuno-Arce</i> , 339 F.3d 886 (9th Cir.2003)	17

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of ineffective assistance of counsel must fail when he cannot show: (1) that an objection to the evidence would likely have been sustained; (2) that there was an absence of legitimate strategic or tactical reasons supporting the challenged conduct; or, (3) that the result of the trial would have been different had the evidence not been admitted?

2. Whether the Defendant's claim of prosecutorial misconduct must fail when the Defendant has failed to show that the prosecutor's conduct at trial was improper?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Jake Cohen, was charged by amend information filed in Kitsap County Superior Court with assault in the second degree, unlawful imprisonment, and tampering with a witness. CP 10. A jury found the Defendant guilty of the charged offenses, and the trial court imposed a standard range sentence. CP 75. This appeal followed.

B. FACTS

The victim in the present case, Samatha Rivera, was the Defendant's girlfriend. RP 81-82. The allegations were that the Defendant strangled Ms. Rivera and held her against her will in her apartment and then later attempted

to tamper with a witness (Ms. Rivera) after he was charged with the assault. Ms. Rivera initially had identified the Defendant as her attacker, but shortly after the his arrest the Defendant began making phone calls from the jail suggesting or implying that a friend should contact Ms. Rivera in an effort to get the charges dropped. Shortly thereafter Ms. Rivera began contacting law enforcement in an effort to get the charges dropped, and by the time of trial, Ms. Rivera claimed to have limited memory of the actual assault and the surrounding circumstances.

Specifically, the evidence at trial showed that on Friday May 28th, Ms. Rivera went to a bar where she was planning to meet the Defendant. RP 81-82. Ms. Rivera first drank at the bar while she waited for the Defendant, and she then continued drinking and visiting with friends after the Defendant arrived at the bar. RP 83-84.

Later that night Ms. Rivera returned home and went to bed. RP 86, 96. RP 86, 96. Sometime later, however, Ms. Rivera was assaulted, and she explained that she was “choked” and that her neck was bruised as a result. RP 95-96. Ms. Rivera, however, did not identify her attacker in her testimony at trial; rather, she claimed to not remember much about the assault. She did, however, acknowledge that she had previously stated that the assault lasted approximately 45 seconds to a minute, and she was strangled long enough that she realized that she needed to start holding her

breath in order to gain some control. RP 99. In addition to the bruising to her neck, Ms. Rivera also later experienced difficulty talking and swallowing as a result of the assault. RP 95-96, 102.

After the assault she contacted a neighbor and begged her to call the police, and officers soon arrived at the scene. RP 89. Ms Rivera acknowledged at trial that she spoke with an officer at the scene and that she later went to the hospital for treatment for her injuries. RP 89, 91.¹

Officer Daniel Fatt of the Bremerton Police Department was the officer who spoke to Ms. Rivera at the scene immediately after the assault. RP 123-24, 128. When Officer Fatt contacted Ms. Rivera he found that she was crying, hysterical, and “emotionally distraught,” and it took him some time to get her to tell him what had happened due to her agitated state. RP 125, 137. Ms. Rivera eventually told Officer Fatt that she had been out drinking with the Defendant earlier in the night. RP 128. Later, she had woken up in her bed and found the Defendant standing over her and yelling at her. RP 128. An argument and altercation then took place in the bedroom and living room, and the Defendant strangled Ms. Rivera twice during this altercation: once on the couch in the living room; and once up against the inside of the front door. RP 129. The Defendant pinned Ms. Rivera to the

¹ Ms. Rivera also acknowledged that she spoke with Detective Vertefeuille the following Tuesday (which would have been June 1). RP 97.

couch using his right hand (which he held to her throat) and he held both hands against her throat when he pinned her up against the inside of the front door. RP 137. Ms. Rivera also indicated that she tried to leave, but that every time she tried to get to the front door the Defendant would intercept her and grab her by the throat and shove her back into the living room, causing her to fall down. RP 129.

Officer Fatt summoned an aid car after he observed that Ms. Rivera was coughing a lot and after Ms. Rivera said that her throat was sore and that she was having trouble breathing. RP 130. Officer Fatt also observed that Ms. Rivera had finger-shaped bruises on her neck. RP 130-31. Ms. Rivera also continued to be in a “very panicked mode” and asked Officer Fatt to try to contact her father, which he did. RP 132.²

The Defendant was later located at a different location and Officer Fatt observed that he had scratches on his face consistent with fingernail scratches. RP 139.

Ms. Rivera, meanwhile, went to Harrison Hospital for treatment for her injuries. Christine Ward, an emergency room nurse at Harrison, was

² Officer Fatt also briefly mentioned that he had contacted two males at the scene and that the two males had told him that the argument “ended out in the driveway.” RP 128-29. No further mention was made of any statements from these two unidentified male witnesses. The Defendant himself admitted at trial that the argument had extended outside the apartment to the parking area where an unidentified male had observed some of the argument. RP 239-40.

present when the ambulance brought Ms. Rivera to the hospital. RP 172-74. Ms. Ward observed that Ms. Rivera was “very upset” and that she was crying and yelling. RP 178-79. Ms. Rivera described to Ms. Ward that she had been out drinking at a bar and that she had later gone home and fell asleep. RP 175. When she woke up her boyfriend was on top of her choking her. RP 175. Nurse Ward observed that Ms. Rivera had abrasions on her neck and knees, and that there was soft tissue swelling (as well as red marks and scratches) on her neck. RP 180.

A few days later, on the morning of Tuesday June 1, Detective Jason Vertefeulle contacted Ms. Rivera at her mother’s house and asked her questions about the assault. RP 146-47. Ms. Rivera told him that nothing like this had ever happened before. RP 149. She explained that she awoke in her bed to find the Defendant over the bed, yelling at her. RP 149. She also described that the Defendant had strangled her and that when she had run for the door the Defendant had grabbed her by the neck and thrown her inside. RP 149-50. When asked to describe, on a scale of 1 to 10, how hard the Defendant’s grip was on her throat, Ms. Rivera said it was a “ten.” RP 151. She also described the pain she experienced while being strangled as a “ten.” RP 151. She again explained that while being strangled she held her breathe in an effort to maintain control. RP 151. She also might have knocked the Defendant’s glasses off while trying to get him to stop. RP 152.

When the Defendant later appeared in Court on the afternoon of June 1, Ms. Rivera went to court and was given the opportunity to speak with the judge. RP 103-04. Ms Rivera told the judge that “This has never happened before. He’s never hurt me before.” RP 104.

After his arrest, the Defendant made a number of phone calls from the jail and these calls were recorded. RP 205-06. A number of these calls were admitted at trial and played for the jury. RP 209-13, 221, 223, 314. The Defendant admitted that he had made the calls and that in the calls he spoken to a person named “Paul” about various ways in which Ms. Rivera could help him with his case. RP 245. Although the Defendant was somewhat cautious in attempting to not directly instruct Paul to tell Ms. Rivera what to say, his references were thinly veiled. For instance, in a June 1 phone call the Defendant mentions that, “I can’t tell you guys this – what to say to her, but you watched me go through it with Jenn and I explained bit by bit when I went through it with Jenn what has to happen for – for me to get out from under this.” RP 248. Later in that same call the Defendant tells Paul, “I cannot tell you to pick up the phone” and that “I cannot tell you what to do in this instance, but I think from prior experience you already know.” RP 249.³

³ In the June 1 call the Defendant also said, “Yeah, like I said, man I – I don’t know what to tell you to do or who to talk to, but I think you’re smart enough to figure it out.” RP 251-52.

The Defendant admitted at trial that he assumed Paul was speaking with Ms. Rivera, and in a June 2 phone call with Paul the Defendant stated, “I don’t want to her feel like she had to feel like a piece of crap. Tell her it’s, you know, I mean you can’t tell her anything, but, you know, she’s gotta treat it like it’s an acting job.” RP 249-50. When the Defendant was confronted with this particular call at trial (and asked what, specifically, Ms. Rivera had to treat as an “acting job”) the Defendant offered no explanation. RP 250.⁴

In a turn of events that was perhaps not entirely surprising, on June 2, Ms. Rivera called Detective Vertefeuille and asked him how she could get in touch with the Defendant’s attorney. RP 154. Detective Vertefeuille

⁴ In that conversation “Paul also mentioned that he could think of a couple of people to call, and the Defendant responded, “Okay. Well, I’m not being too World War II code-ex for you, you know what I mean?” “I’m, not being too windtalker for you, am I? You know, I mean, I – I know – I know – I know of one person in particular that could do more help than anybody but could also do more damage than anybody . . .” RP 250.

The Defendant also had a phone conversation with a person calling herself “Alabama.” Alabama works as a cleaning woman and is mentioned as having a child named “Elvis” and a friend named “Clarence.” RP 249, 254-56. Ms. Rivera, of course, also has a small child and works as a cleaning woman. RP 80-82, 121. In the call the Defendant tells “Alabama” how much he loves her. That he wants to spend the rest of his life with her, and that he hope’s that she’s the first thing that he will see in the morning and the last thing he sees at night. RP 253-54. In the same phone call, however, the Defendant also says how much he loves Ms. Rivera and that he wants to move in with her. RP 254. On cross examination at trial the Defendant admitted that he was a fan of the movie “True Romance,” in which the two main characters are “Clarence” and “Alabama,” and the character “Alabama” has a son named “Elvis.” RP 255. The Defendant also admitted that in the phone calls it appeared that “Alabama” knew a lot about Ms. Rivera, had the same friends, and had similar sounding voices. RP 254, 256-57. Ms. Rivera, however, testified that she did not know “Alabama.” RP 106. The Defendant also acknowledged that he wanted “Alabama” to call the police and prosecutor, yet there is no evidence that this person “Alabama” was present at the scene or otherwise had information about the charged crimes. RP 253. The clear implication, of course, was that “Alabama” was in fact Ms. Rivera; a conclusion that the State argued in closing argument. RP 335-40.

explained he did not know and referred her to the prosecutor's office. RP 154. She then called back a short time later and asked how she could drop the charges. RP 154. A week or two later Ms. Rivera called Detective Vertefeuille and again asked how to drop the charges. RP 155. This time she also claimed that she had made two false reports. RP 155. At no time in her conversation with Detective Vertefeuille, however, did Ms. Rivera ever describe any other person being the one who had strangled her. RP 158. Ms. Rivera also later contacted the prosecutor in an attempt to get the charges dropped. RP 121.

The Defendant testified at trial and acknowledged that he was present in Ms. Rivera's apartment on the night of the assault and that no one else (other than he and Ms. Rivera) was present. RP 234-36, 239, 247. The Defendant further acknowledged that he found Ms. Rivera in bed, and he leaned down to give her a kiss and turned around to leave. RP 236. Ms. Rivera woke up at that point and an argument ensued. RP 236. The Defendant, however, claimed that Ms. Rivera attacked him and refused to let him leave. RP 236-38. He further claimed that he never put his hands on Ms. Rivera. RP 238. The argument eventually spilled outside the apartment and the Defendant got in his truck to leave. RP 240. He eventually saw Ms. Rivera running to a neighbor's door and the Defendant saw the neighbor's door open before he left the scene. RP 240-41.

As outlined above, Ms. Rivera did not specifically identify the Defendant as her attacker at trial. Rather, Ms. Rivera testified that she remembered being in bed and throwing a candleholder at someone wearing a yellow shirt who was leaving her bedroom. RP 85-86. She also claimed that she remembered briefly seeing and making eye contact with the Defendant, but Ms. Rivera claimed she “disassociated” after that and didn’t remember what happened. RP 88-89. Ms. Rivera admitted that she talked to an officer at the scene, but at trial she claimed no to remember making particular statements to the police. RP 89-90. She also admitted that she went to the hospital, but also claimed that her memory of these events was poor and that she didn’t remember telling a nurse what had happened. RP 90-91.

As mentioned above, Ms. Rivera did not deny that she had been strangled by someone on the night in question. *See, e.g.*, RP 96. In her direct examination, Ms. Rivera was asked numerous times whether she remembered making statements to law enforcement that indicated the Defendant was the one who had strangled her. RP 90, 98, 100-01. Each time Ms. Rivera answered that she did not remember making statements to law enforcement implicating the Defendant, but she was often able to remember making other statements (not directly implicating the Defendant) to law enforcement. RP 90, 98-100. The State, however, never specifically asked Ms. Rivera during her direct examination whether the Defendant was the person who had

strangled her.

On cross-examination defense counsel got Ms. Rivera to state that although it was very obvious that she had been strangled that night, she did not actually remember being strangled or who had strangled her. RP 113-15. Ms. Rivera thus did not ever specifically claim that someone other than the Defendant had strangled her. Rather, she claimed to have no memory of this specific part of the event.

Following the presentation of evidence, the jury found the Defendant guilty of the charges crimes of assault in the second degree, unlawful imprisonment, and tampering with a witness. CP 10. This appeal followed.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE HE CANNOT SHOW: (1) THAT AN OBJECTION TO THE EVIDENCE WOULD LIKELY HAVE BEEN SUSTAINED; (2) THAT THERE WAS AN ABSENCE OF LEGITIMATE STRATEGIC OR TACTICAL REASONS SUPPORTING THE CHALLENGED CONDUCT; OR, (3) THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD THE EVIDENCE NOT BEEN ADMITTED.

The Defendant argues that he received ineffective of counsel at trial. App.'s Br. at 17. Specifically, the Defendant argues that his trial counsel should have objected to the admission of testimony from several witnesses

about the victim's out of court statements. App.'s Br. at 17. This claim, however, is without merit because the Defendant cannot show that an objection to the vast majority of the testimony at issue would have been sustained. Secondly, for those limited portions of the testimony at issue for which there was a potential objection, the Defendant cannot show that trial counsel did not had a legitimate trial strategy or tactical reason for withholding a possible objection. Thus, the Defendant cannot show either deficient performance or prejudice; both of which are required for a claim of ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Furthermore, if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland*, 466 U.S. at

687; *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 77-80, 917 P.2d 563 (1996); *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

The Defendant's claim in the present case must fail for several reasons. First, with respect to testimony of Officer Fatt and Nurse Ward, the record clearly shows that an objection to the evidence regarding Ms. Rivera's statements to these witnesses would have been overruled, as the statements would have qualified as excited utterances and/or statements made for purposes of medical diagnosis. Officer Fatt, for instance, arrived at the scene immediately after the assault and described that Ms. Rivera was extremely upset at the time he spoke to her. Furthermore, Ms. Rivera was still extremely upset by the time she was examined by Nurse Ward at the hospital. Thus, the Defendant cannot show that the statements made to Officer Fatt and

Nurse Ward would not have been admitted as excited utterances.⁵ Furthermore, the statements made to Nurse Ward would have been admissible as statements made for medical diagnosis or treatment.⁶ The Defendant, in fact, acknowledges that these statements were likely admissible. App.'s Br. at 17.

The Defendant, however, also argues that defense counsel should have objected to statements made to Detective Vertefeuille. App.'s Br. at 15. Even if defense counsel could have objected to the use of Ms. Rivera's statement to Detective Vertefeuille, the Defendant cannot show that trial counsel could not have had a legitimate strategic reason for not objecting. First, the statement made to Detective Vertefeuille was slightly different than the statement made to Officer Fatt, as Detective Vertefeuille testified that Ms. Rivera described once instance of strangulation, while Officer Fatt testified that Ms. Rivera described being strangled twice. RP 148-52. Thus, defense

⁵ ER 803(a)(2) provides an exception to the hearsay rule for "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Thus, there are three requirements: (1) a startling event or condition occurred, (2) about which a statement was made by a declarant (3) while the declarant is still under the stress or excitement caused by the event. *State v. Thomas*, 150 Wn.2d 821, 853, 83 P.3d 970 (2004). Washington courts have often held that statements made even hours after the assault can still qualify as excited utterances. *See, e.g., State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (where the statements of a victim, made three and a half hours after the crime, were admissible as excited utterances as the victim was plainly distressed); *State v. Thomas*, 46 Wn.App. 280, 284, 730 P.2d 117 (1986) (not abuse of discretion to admit statement as excited utterance where statement made six to seven hours after event).

⁶ *See* ER 803(a)(4).

counsel might have chosen not to object so that the jury could hear this inconsistency.

Secondly, even if defense counsel had objected, the trial court could have admitted the statement for impeachment purposes which would have lead to the jury being specifically directed that the evidence was being admitted for that purpose.⁷ Defense counsel could have reasonably concluded that it was better not to object than it was to have the jury specifically directed that the statement called could be used to assess the victim's credibility.⁸

⁷ See, e.g., *State v. Johnson*, 40 Wn.App. 371, 377, 699 P.2d 221 (1985) (Noting that impeachment evidence affects a witness's credibility and is not proof of the substantive facts encompassed in such evidence. Thus, where such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is proper); WPIC 5.30.

⁸ The Defendant also claims that defense counsel could have objected to the admission of a statement Ms. Rivera made to a defense investigator, Chris Mace. App.'s Br. at 15. Mr. Mace, however, was not called as a witness. Rather, the State simply asked Ms. Rivera if she had told Mr. Mace about the man in the yellow shirt and if she told described the man as a "black man" to Mr. Mace. RP 108. Ms. Rivera acknowledged that she made this statement, and no further evidence or testimony was made concerning this point. It is unclear, therefore, why this question to Ms. Rivera was objectionable or what possible prejudice occurred as a result. To the contrary, defense counsel likely concluded that, if anything, the brief mention of this statement was beneficial to the defense, as it was a previous statement acknowledging the presence of someone else at the scene that night.

Similarly, the Defendant claims that the prosecutor made himself an impeachment witness when he stated in opening statement that Ms. Rivera had told him that she now had no recollection of what had occurred. App.'s Br. at 16. Ms. Rivera, of course, testified that she no longer had any recollection of the assault and acknowledged that she had contacted the prosecutor in an effort to get the charges dropped. Thus, it was Ms. Rivera and not the prosecutor who provided the only evidence in this regard. While the prosecutor could have phrased his remarks in opening statement more clearly (by stating, for instance, that he "expected the evidence to show that Ms. Rivera now has no recollection of the assault and has in fact contacted law enforcement and the prosecutor's office in an effort to have the charges dropped"), no prejudice ensued. Rather, the prosecutor clearly was outlining what he expected the evidence to show and the evidence at trial mirrored the prosecutor's summary.

Finally, the testimony of Detective Vertefeuille regarding Ms. Rivera's statements largely mirrored the statements made to Officer Fatt and Nurse Ward, and thus offered no critical additional piece of evidence. The jury had already heard that Ms. Rivera had identified the Defendant as her attacker, so no specific unique prejudice followed from Detective Vertefeuille's testimony. Thus the Defendant cannot show that the result of the trial would have been different had the testimony of Detective Vertefeuille not been admitted.

The Defendant next claims that defense counsel should have objected to Officer Fatt's brief mention of a statement made by two "unnamed men" at the scene. App.'s Br. at 15. The statement at issue, however, was very brief and was essentially innocuous. Specifically, the only statement attributed to the "unnamed male" witnesses was the very brief mention that the witnesses had told Officer Fatt that the argument had spilled out into the driveway or parking lot. RP 129. This fact, of course, was of little relevance and was not contested. In fact, the Defendant himself testified that the argument spilled out into the parking lot. RP 240-41. Thus, defense counsel at trial could have reasonably concluded that an objection was unnecessary as the hearsay

The jury was never placed in a position of having to weigh the prosecutor's opening remarks against the trial testimony since Ms. Rivera testified as the prosecutor described that she would. Thus, there was no prejudice from the prosecutor's inartful comment in his opening statement.

only involved a very minor issue that was not even contested. In addition, the Defendant certainly cannot show any prejudice from this brief remark on an uncontested issue.

In sum, the Defendant has failed to show that his trial counsel was ineffective for failing to object to the admission of Ms. Rivera's prior statements because: (1) an objection to the statements made to Officer Fatt and Nurse Ward would have failed (as the Defendant appears to acknowledge); (2) the Defendant has failed to show an absence of legitimate strategic or tactical reasons supporting the lack of objection to the other statements at issue; and (3) the Defendant has failed to show that the result of the trial would have been different if the testimony of Detective Vertefeuille (the only material and potentially objectionable testimony) had not been admitted. Thus, the Defendant has failed to show either deficient performance or prejudice; both of which are required for a claim of ineffective assistance of counsel.

B. THE DEFENDANT'S CLAIM OF PROSECUTORIAL MISCONDUCT MUST FAIL BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR'S CONDUCT AT TRIAL WAS IMPROPER.

The Defendant next claims that the prosecutor bellowed committed prosecutorial misconduct. App.'s Br. at 17. This claim, however, is without

merit because the Defendant has failed to show that prosecutor's conduct at trial was improper.

A defendant claiming prosecutorial misconduct on appeal must demonstrate that the prosecutor's conduct at trial was both improper and prejudicial. *State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009).⁹

In the present case the Defendant boldly asserts that the prosecutor below presented perjured testimony. App.'s Br. at 17. The Defendant, however, never states what testimony exactly he believes was perjury. This fact alone should defeat the Defendant's claim as he has failed to identify the specific factual basis for his claim.

However, even if this Court were to fill in the blanks of the Defendant's claim (and assume that what the Defendant means is that the State knew that the victim was going to recant at trial and thus was precluded from calling her as a witness), the Defendant's argument would still be

⁹ The Ninth Circuit has specified that there are several components to establishing a claim for relief based on a claim that a prosecutor introduced perjured testimony at trial. First, the defendant must establish that the testimony was false. *United States v. Polizzi*, 801 F.2d 1543, 1549–50 (9th Cir.1986). Second, the defendant must demonstrate that the prosecution knowingly used the perjured testimony. *Id.* Finally, the defendant must show that the false testimony was material. *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir.2003). False evidence is material "if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." *Hein v. Sullivan*, 601 F.3d 897, 908 (9th Cir.2010). Mere speculation regarding these factors is insufficient to meet a defendant's burden. *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir.1991).

without merit. This is so because a close examination of the record and caselaw shows that the prosecutor did nothing improper.

First, Ms. Rivera was never asked specifically by the prosecutor if the Defendant had assaulted her. Thus the record does not contain any “perjured” statement from Ms. Rivera on this point. Rather, Ms. Rivera repeatedly stated that she could not remember the specific facts regarding the assault. In her direct examination Ms. Rivera did not deny that she had been strangled, but then on cross examination stated that she did not actually remember being strangled. Ms. Rivera then went on to state repeatedly that she did not remember the specifics of the assault and did not remember making statements to law enforcement that implicated the Defendant as her attacker.

Even if one is assume that Ms. Rivera’s specific claim that she did not *remember* making these various statements was the actual statement that constituted the “perjured” testimony, the Defendant fails to show that the State actually “used” this testimony in any way. To the contrary, the claimed lack of memory clearly benefitted the Defendant, not the State. Thus, this case in no way represents a case where a prosecutor dishonestly used perjured testimony to somehow secure a conviction or to otherwise interfere with the truth seeking purpose of a trial.

The facts of the present case, when viewed as a whole, clearly do not represent the type of perjury cases that the Defendant claims.¹⁰ Rather, in the present case the victim was assaulted and initially reported that the Defendant

¹⁰ The Defendant himself, however, acknowledges that the cases he cites regarding the presentation of perjured testimony are of limited relevance and have been “somewhat abrogated” by the modern evidence rule 607. App.’s Br. at 12. In truth, the actual cases cited by the Defendant, clearly do not apply to the present case. For instance, in *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340 (1935), the Court explained that due process is violated when “a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.” It cannot honestly be said that the State in the present case in any way deliberately deceived anyone or that the State contrived a conviction by *use* of the statements at issue. *See also, Alcorta v Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) (where the prosecutor advised a witness to withhold critical information which then created a false impression with a jury that seriously prejudiced the Defendant.). Obviously any “false impressions” in the present case favored the Defendant and were specifically disavowed by the prosecutor. Such a circumstance can hardly be seen as the sort of due process violation found by the Court in *Alcorta*. *See also, Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (noting that it is well established that “a conviction obtained *through use* of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment”) (emphasis added). In the present case it is clear that the conviction was obtained *despite* Ms. Rivera’s allegedly false statements, nor *through their use*. Stated another way, the allegedly false statements were exculpatory and thus not *material* to the State’s case and because the State specifically argued that statements were not credible and should be disregarded. *See also, In re Pers. Restraint of Benn*, 134 Wn.2d 868, 936-37, 952 P.2d 116 (1998) (quoting *US v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (“[A] conviction that is obtained *through the knowing use* of perjury is fundamentally unfair, and must be set aside if there is any reasonable likelihood the false testimony could have affected the judgment of the jury”; “The defendant must show that the State knowingly *used* perjured testimony”; and “There is no need to resolve those issues, however, unless there is a reasonable likelihood the allegedly false testimony could have affected the judgment of the jury”)(emphasis added).

In addition, although the Defendant claims that that the perjury cases are “somewhat abrogated” by ER 607, a careful analysis shows that ER 607 and the perjury cases are entirely consistent. This is so because if a party actually attempts to impeach some potentially false statement made by its own witness, then that party by definition is not *using* or relying on the potentially false statement. To the contrary; by impeaching the witness the party is clearly demonstrating that the potentially false statement should be disregarded. Thus ER 607 and the perjury cases cited by the Defendant are, in fact, entirely consistent. In short, a party may not knowingly use known perjury to prove its case, but a party is certainly free to impeach a witness, even its own witness, should that witness make a false statement on the stand. Such a process does nothing to subvert the truth seeking function of a trial. Rather, it supports and enhances the search for the truth.

was her attacker. The evidence further shows that the Defendant then began attempting to tamper with the witness, and the victim then recanted by claiming a lack of memory. At trial the State was completely upfront with the court and jury and explained that the victim had changed her story. The State, however, argued that the victim's selective memory (and the like) was simply not credible. The evidence clearly supported the State's position, and the Defendant has not claimed otherwise. To claim that these facts are somehow analogous to a case in which a prosecutor dishonestly uses known perjury to secure a conviction (by hiding the truth and thereby subverting the truth seeking function of a trial) is simply absurd.¹¹

Next, the Defendant asserts that defense counsel should have objected to the State calling the victim at all, since caselaw regarding ER 607 has held that a party may not call a witness for the "primary purpose" of impeaching that witness. In the present case, however, the State had numerous proper reasons for calling Ms. Rivera. Ms. Rivera, for instance was critical to

¹¹ The assertion that a Defendant who has tampered with a witness (and been convicted of that charge, raising no issues with that charge on appeal) may then cry foul and claim the moral high ground when the State calls the newly recanting witness to the stand is even more absurd. The equities in such a situation, as in a situation of "forfeiture by wrongdoing," clearly weigh in favor of the State. *See, e.g., State v. Mason*, 160 Wash.2d 910, 924, 162 P.3d 396 (2007) (The doctrine of forfeiture by wrongdoing holds that a criminal defendant waives his Sixth Amendment confrontation rights if the defendant is responsible for the witness's absence at trial). In either case the Defendant must not be allowed to either (1) prevent a witness from testifying or (2) tamper with the witness to the point where the witness recants, and then claim that he was entitled to claim that some sort of due process violation should have prevented the State from presenting the witness's statements.

establishing that she had in fact been strangled, that the Defendant was her boyfriend and had been present at the scene, as well as numerous facts that showed all of the similarities between herself and the alleged other person named “Alabama.” In addition, the State did very little if anything to actually “impeach” Ms. Rivera, as the core of her testimony on the critical issues was that she could not remember what had occurred. The State did not actually impeach this testimony. Rather, the State introduced other substantive evidence (including excited utterances and statements made for medical purposes) that showed that at a time when Ms. Rivera could recall what had occurred she had unequivocally stated that the Defendant had assaulted her.

In short, the Defendant has fallen far short of showing that the State called Ms. Rivera “as a mere subterfuge to place before the jury evidence not otherwise admissible.” *State v Lavaris*, 106 Wn. 2d 340, 721 P.2d 5151 (1986). To the contrary, even if Ms. Rivera had only been called only to establish the nature of her relationship to the Defendant and the fact that she was strangled, the statements made to Officer Fatt and nurse Ward would have still been admissible (as they were excited utterances or statements made the purpose of medical treatment). Thus even if defense counsel had raised an ER 607 objection, the Defendant has failed to show that such an objection would have been sustained. The Defendant’s claim of ineffective assistance, therefore, is without merit.

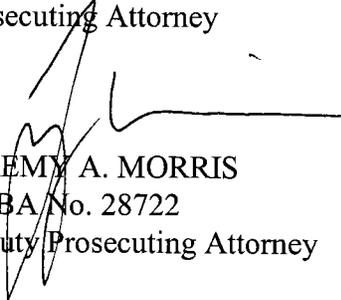
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED August 27, 2012.

Respectfully submitted,

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