

NO. 41986-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LAVALSIT,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 10-1-00707-3

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim that the trial court abused its discretion in admitting evidence that the defendant physically resisted his arrest and was angry and "belligerent" with the deputies (only minutes after he had assaulted and been verbally abusive with Ms. Vonberg) is without merit when: (1) the evidence was relevant to the Defendant's state of mind and demeanor; and (2) evidence of flight and resisting arrest is admissible to show consciousness of guilt?

2. Whether the Defendant's claim that the trial court abused its discretion in refusing to exclude evidence that the Defendant grabbed the door (and hit the rear window) of the victim's truck is without merit when these acts occurred essentially simultaneously with the assault and were evidence of the Defendant's motive and intent?

3. Whether the Defendant's claim of ineffective assistance of counsel is without merit when the Defendant has failed to show that trial counsel's representation was deficient or that the Defendant suffered any prejudice?

4. Whether the Defendant's claim that he was denied a fair trial due the trial judge's bias is without merit when the record does not contain any evidence that the trial judge was actually or potentially biased?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Matthew Lavalsit, was charged by information filed in Kitsap County Superior Court with one count of assault in the third degree. CP 1. After a jury trial, the Defendant was found guilty of the charged offense. CP 57. The trial court then imposed a standard range sentence of 3 months. CP 58. This appeal followed.

### **B. FACTS**

The charge in the present case arose out of an incident in which the Defendant assaulted Rosemary Dusty Vonberg (who was a nurse or health care provider who was performing her nursing or health care duties at the time).

Ms. Vonberg is a registered nurse that works for group health, and for the last ten years she has worked as “home care and hospice nurse.” RP 86, 89. Ms. Vonberg explained that when she gets a hospice referral she will usually work with a social worker and a number of other “team” members. RP 89-90. On Sunday July 25, 2010 Ms. Vonberg received a hospice referral in Hansville. RP 90-91. She then contacted the patient’s daughter, Debra Upsahl, and made arrangements to come to the patient’s house later that day. RP 91. Ms. Vonberg, however, got delayed and was running about an hour late, so she called Ms. Upsahl to let her know she would be late. RP 91.

When Ms. Vonberg arrived at the house, however, no one was home. RP 91-92. She waited for approximately half an hour, but then left. RP 92. Ms. Vonberg then informed the social worker involved in the case, Jan Kerman, that she had attempted to meet with the family but that no one was home. RP 92. Ms. Kerman said that she would go to the house the following day. RP 92.

The following day, July 26, Ms. Kerman attempted to call the Hansville residence but no one answered and the answering machine was full. RP 116. Ms. Kerman was working nearby on another matter, so she decided to go to the residence to see if anyone was home. RP 116. No one responded when Ms. Kerman knocked on the door, but when Ms. Kerman called out the patient's name from the side of the house she heard a faint "yes" from inside the home. RP 118. Ms. Kerman explained who she was and asked the patient if she was alone in the house and the patient said she was alone. RP 118. This caused Ms. Kerman some concern because she understood the patient had dementia (Ms. Vonberg was also aware that he patient had cancer). RP 118. Ms Kerman asked the patient if she would come to the front door and speak with her, and the patient agreed. RP 118.

Ms. Kerman then met the patient at a sliding glass door near the front door and the patient let her in. RP 119. Ms. Kerman saw that the patient was "disheveled" and appeared to be under some duress so she asked the patient if

she wanted to sit down, which she did. RP 119. Ms. Kerman also got her a glass of water. RP 119. She then called Ms. Vonberg and explained and explained that she had found the patient alone in the home, and Ms. Vonberg agreed to come to the house. RP 119.

Ms. Vonberg arrived and introduced herself to the patient and later began to assess her condition. RP 120. The patient's heartbeat was a little irregular and she appeared to be dehydrated so they gave her another glass of water. RP 120. Ms. Vonberg and Ms. Kerman were uncertain about what to do as the patient appeared to need 24-hour care yet she had been left alone and unsupervised. RP 95. Ms. Kerman further explained that they knew that the patient had cancer and severe pain and dementia and that a person in such a condition should not be left alone. RP 120.

Ms. Kerman then started making calls to DSHS and adult protective services to try to find out what they should do. RP 120. Ms. Vonberg then decided to call 911 to see if they could help them decide what to do and to ask if the medics could assist in further evaluating the patient. RP 95-96, 120.

Brandon Robichaux, an EMT from North Kitsap Fire and Rescue and his partner Steve Green responded to the scene. RP 31, 32. As the EMTs arrived the Defendant and a woman (later identified as Ms. Upsahl) also

arrived at the scene in a truck. RP 33. Mr. Robichaux went into the house and Ms. Vonberg then began explaining the situation to Mr. Robichaux. RP 33, 96-97. The conversation, however, did not go very far because they were interrupted by Ms. Upsahl and the Defendant. RP 34. Ms. Upsahl asked which of the women was “Dusty,” and after Ms. Vonberg introduced herself Ms. Upsahl responded by saying she was “fired.” RP 97-98.

Mr. Vonberg described that Ms. Upsahl then began yelling at her. RP 98. Mr. Robichaux explained that Ms. Upsahl was screaming things such as “Why are you here? You can’t be here, and get out of my house. We didn’t call you here. You broke into my house.” RP 35. Mr. Robichaux tried to calm Ms. Upsahl down because he wanted to talk to the nurses to figure out what was going on with the other woman, but he “couldn’t get anywhere” and Ms. Upsahl would not calm down for him. RP 35.

Mr. Robichaux continued to try to calm the situation for a few minutes but was unable to do so. RP 36. He then asked the Defendant and Ms. Upsahl to step out of the house. RP 36. The Defendant agreed and stepped outside, but Ms. Upsahl would not step outside. RP 36. As time went by Mr. Robichaux could hear that the conversation inside was getting louder and he then worried that the situation was getting out of control and that he and his partner weren’t able to talk to the patient or the nurse to see what was going on with the patient. RP 38-39. Mr. Robichaux then got on

his radio and asked law enforcement to respond to the scene. RP 38.

Inside the residence Ms. Vonberg packed her things and prepared to leave and the Defendant began cursing at her and said, "Leave, you fucking bitch." RP 98-100. Ms. Vonberg went to leave and the Defendant was standing by the glass door, obstructing it and she asked him to move. RP 100.

As Ms. Vonberg went to leave she described that the defendant "hit" her in the shoulder and that she responded by telling him not to touch her. RP 100-01. Ms. Vonberg, however, described that the Defendant then "hit" her a second time. RP 100.

Ms. Kerman explained that when Ms. Vonberg went to leave the house she decided to leave as well. RP 122. Ms. Vonberg exited first and left through the sliding glass door and Ms. Kerman saw that the Defendant "was actually pushing [Ms. Vonberg] out onto the deck and started to push [Ms. Vonberg]." RP 124. Ms. Kerman exited after Ms. Vonberg RP 124.

Mr. Robichaux also witnessed the assault and testified that as Ms. Vonberg was walking to her car the Defendant got in front of her and was "backpedaling" or walking in reverse in front of her. RP 41. The Defendant then stopped and put his shoulder into Ms. Vonberg's shoulder. RP 41. Ms. Vonberg then screamed "he touched me" and she then looked at the

Defendant and said “Don’t touch me.” RP 41-42. Mr. Robichaux then saw the Defendant take Ms. Vonberg’s forearm and pushed it back into her body. RP 42. Mr. Robichaux explained that with his job he is trained not to intervene, so he did not stop the Defendant but rather told the Defendant, “Hey, let’s knock it off.” RP 42. The Defendant, however, grabbed Ms. Vonberg’s forearm again and hit her body with it, knocking her “off kilter.” RP 42. Mr. Robichaux explained that Ms. Vonberg looked scared at that point and that she then sped up and got into her truck. RP 43.

Ms. Vonberg explained that when she got in her vehicle she thought she was safe but the Defendant opened the door to her truck, was yelling obscenities at her, and had his hands on the top of the door keeping it open. RP 101; *see also* RP 129.

Ms. Kerman had followed Ms. Vonberg as she walked to her truck and Ms. Kerman repeatedly asked the Defendant to move his truck. RP 128. Ms. Kerman also saw the Defendant open Ms. Vonberg’s car door, and Ms. Kerman that tried to call the police. RP 128.

Ms. Vonberg braced herself inside the car and closed the door once the Defendant released his fingers. RP 101-02. Ms. Vonberg then began to back her truck out of the driveway. RP 44. Although her path was largely blocked by other vehicles, Ms. Vonberg thought there was room for her to

back out. RP 44, 102-03. The Defendant then went behind her truck and hit the back canopy of the truck. RP 44. Mr. Robichaux saw this and described that the Defendant had hit the canopy with a “closed fist.” RP 44. Mr. Robichaux then told Ms. Vonberg to just stay in the truck with the door locked. RP 44-45. Ms. Kerman also told Ms. Vonberg to stop as she didn’t think was enough room for her to back out. RP 129.

Mr. Robichaux kept an eye on the Defendant while he waited for law enforcement to arrive, and at some point the Defendant asked him why law enforcement had been called. RP 46-47. Mr. Robichaux responded, “You shoved a hospice nurse. That is why they are coming.” RP 47. Mr. Robichaux then saw that the Defendant got in his truck and started to leave. RP 47. Mr. Robichaux screamed, “Hey, don’t leave,” but the Defendant did not stop. RP 47-48. The police arrived as the Defendant was leaving, so Mr. Robichaux went into the road and pointed the officers towards the Defendant’s truck. RP 48. Mr. Robichaux was also in contact with the officers on his radio. RP 48.

Deputy Jeff Menge of the Kitsap County Sheriff’s office arrived at the scene and was directed to the Defendant’s truck that was leaving the area. RP 56, 58. Deputy Menge then got behind the Defendant’s truck and activated his overhead lights and the truck stopped. RP 58-59. The Defendant immediately got out of the truck and this caused the Deputy some concern.

RP 59. Deputy Lee Wheeler also arrived at the scene and saw the Defendant get out of his truck and saw that the Defendant's fists were clenched as he did so. RP 79. Deputy Menge then ordered the Defendant to go to the back of the truck and to turn around. RP 59. The Defendant responded by saying that he "didn't do anything" and Deputy Menge again ordered the Defendant several times to go to the back of the truck and turn around. RP 59, 79. The Defendant did not follow Deputy Menge's command and again said that he "didn't do anything." RP 59, 79.

Deputy Menge described the Defendant's demeanor as "hostile," "angry," and "belligerent." RP 59. The Defendant then walked towards Deputy Menge, and Deputy Wheeler saw that the Defendant had something "small and shiny" in his hand so Deputy Wheeler responded by pulling out his "taser." RP 60, 79. At that point he Defendant raised his arms and said, "Come on guys," and the Defendant stopped walking towards Deputy Menge. RP 59-60. Deputy Wheeler then saw that the object in the Defendant's hand was a pen. RP 79. Deputy Menge then grabbed one of the Defendant's arms and Deputy Wheeler put his taser away and grabbed the Defendant's other arm. RP 60. The Defendant was "tense" and was "resisting and trying to twist and pull away." RP 60, 79.

Deputy Wheeler explained that the deputies were "struggling standing up and ended up breaking the pen that was in his hand, and then we ended up

having to take him to the ground.” RP 79; *see also* RP 60. Eventually the deputies were able to secure the Defendant in handcuffs. RP 60, 79. The deputies then stood the Defendant up and placed him in a patrol car. RP 60.

Deputy Wheeler later advised the Defendant of his rights and the Defendant agreed to speak with him. RP 81. The Defendant said that there were a couple of hospice nurses there, that he had been the one trying to calm everyone down, and that he didn’t do anything. RP 81. When Deputy Wheeler asked if he had touched or shoved anyone, the Defendant responded, “No. I touched one shoulder to calm her down, and I even shook the other one’s hand.” RP 82. The Defendant also claimed that the one of the nurses tried to ram his truck, and he gave a description of the nurse and her vehicle and explained that he wanted charges pressed against her. RP 82.

The Defendant also testified at trial. RP 161. He denied ever touching Ms. Vonberg. RP 175. He also denied ever even approaching her and denied pushing her. RP 167. He also claimed that he didn’t even see Ms. Vonberg get into her car and that he did not try to open her car door. RP 167. Rather, the Defendant claimed that,

I wasn’t near her. She was in her car when I turned around from the deck and noticed that she was starting the car like she wanted out. So then I go: “Oh, shoot, I have to move.” I didn’t jog. I walked fast to get down there because I can’t run.

RP 175.

The Defendant also denied resisting the deputies attempts to arrest him, and he denied telling Deputy Wheeler that he had touched one of the nurse's shoulders. RP 173-74, 178. Finally, he denied telling one of the deputies that he wanted to press charges against the nurse. RP 179.

### III. ARGUMENT

- A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE THAT THE DEFENDANT PHYSICALLY RESISTED HIS ARREST AND WAS ANGRY AND "BELLIGERENT" WITH THE DEPUTIES (ONLY MINUTES AFTER HE HAD ASSAULTED AND BEEN VERBALLY ABUSIVE WITH MS. VONBERG) IS WITHOUT MERIT BECAUSE: (1) THE EVIDENCE WAS RELEVANT TO THE DEFENDANT'S STATE OF MIND AND DEMEANOR; AND (2) EVIDENCE OF FLIGHT AND RESISTING ARREST IS ADMISSIBLE TO SHOW CONSCIOUSNESS OF GUILT.**

The Defendant argues that the trial court erred in denying the defense motion to exclude any evidence that the Defendant resisted arrest when the deputies arrested him near the scene of the assault. App.'s Br. at 8. This claim is without merit because the trial court's conclusion that the probative value of the evidence outweighed the danger of any unfair prejudice was well supported under Washington law and well within the trial court's considerable discretion.

**1. The Defendant waived any objection based on ER 404(b) by failing to raise that issue below.**

On appeal, the Defendant appears to argue that the trial court's ruling violated both ER 404(b) and 403. See Br. of App. At 12-13. In the trial court, however, the Defendant only argued that the evidence was irrelevant and prejudicial under ER 402 and 403. CP 32, RP 10-11. No argument regarding ER 404(b) was raised below.

Under Washington law, however, an objection that evidence is irrelevant or prejudicial is insufficient to preserve appellate review based on ER 404(b). *State v. Kendrick*, 47 Wn.App. 620, 634, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987) (relevancy objection insufficient to preserve appellate review based on ER 404(b)); *State v. Fredrick*, 45 Wn.App. 916, 922, 729 P.2d 56 (1986) (objection at trial that evidence is prejudicial does not preserve appellate review based on ER 404(b)). Thus, the Defendant waived any objection based on ER 404(b) and this court need not address that rule.

**2. The trial court did not abuse its discretion in finding that the probative value of the evidence outweighed any danger of unfair prejudice and that the evidence was thus admissible under ER 402 or 403.**

In the present case the Defendant moved to exclude any evidence that the Defendant resisted his apprehension by the deputies. CP 32, RP 10-11. The trial court denied the motion, finding that "its probative value outweighs

the potential prejudice.” RP 11.

A trial court's admission of evidence is reviewed for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). “A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.” *State v. Perrett*, 86 Wn.App. 312, 319, 936 P.2d 426 (1997) (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). The appellate court may affirm on any ground the record supports. *See, e.g., State v. Carter*, 127 Wn.2d 836, 841, 904 P.2d 290 (1995).

In the present case the evidence regarding the Defendant’s actions in resisting his arrest and his “belligerent” behavior with the deputies was closely connected to the assault. First, the Defendant was stopped very near the scene as he fled the scene of the crime. It also was connected by circumstances; Ms. Vonberg and the other witnesses described that the Defendant was verbally abusive with Ms. Vonberg and then assaulted her several times. The fact the Defendant acted in the same manner only minutes later when he was stopped by the deputies was clearly relevant to the Defendant’s state of mind and demeanor. As this evidence described an inseparable part of the circumstance of the crime, the trial court did not abuse its discretion by finding that the probative value of the evidence outweighed any danger of unfair prejudice.

Furthermore, under Washington law it is well settled that evidence of flight is admissible when it creates a reasonable inference that the defendant's reaction is the product of consciousness of guilt. *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965); *State v. Hebert*, 33 Wn.App. 512, 515, 656 P.2d 1106 (1982). But evidence of “actual flight is not the only evidence in this category.” *State v. Freeburg*, 105 Wn.App. 492, 497-98, 20 P.3d 984 (2001) (citing *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir.1977)). For example, evidence of “actual resistance to arrest is admissible if it allows a reasonable inference of consciousness of guilt of the charged crime.” *Freeburg*, 105 Wn.App. at 497-98; *Myers*, 550 F.2d at 1049.

In the present case the evidence showed that the Defendant was aware that law enforcement had been called and that he then reacted by fleeing the scene of the crime. This evidence of flight, therefore, demonstrated a consciousness of guilt and was thus admissible. In addition, when the Defendant was pulled over near the scene he resisted the deputies and acted belligerently with them. Again, the Defendant’s actions demonstrated a consciousness of guilt. The trial court, therefore, acted well within its broad discretion when it found that the evidence of flight and resistance was admissible.<sup>1</sup>

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<sup>1</sup> The Defendant cites several cases in support of his argument, but none of them are applicable to the present case. See App.’s Br. at 12, 14. For instance *State v Thrift*, 4

**B. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO EXCLUDE EVIDENCE THAT THE DEFENDANT GRABBED THE DOOR (AND HIT THE REAR WINDOW) OF THE VICTIM’S TRUCK IS WITHOUT MERIT BECAUSE THESE ACTS OCCURRED ESSENTIALLY SIMULTANEOUSLY WITH THE ASSAULT AND WERE EVIDENCE OF THE DEFENDANT’S MOTIVE AND INTENT.**

The Defendant next claims that the trial court abused its discretion in denying the defense request to exclude evidence that the Defendant tried to open the door of Ms. Vonberg’s car and that the Defendant struck the back window of her vehicle. App.’s Br. at 14. This claim is without merit because the trial court did not abuse its discretion in admitting the evidence of the Defendant’s hostile actions towards the victim that occurred at the scene of the crime as these actions were part of the Defendant’s continuing

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Wn.App. 192, 480 P.2d 222 (1971) dealt with an arrest for an “unrelated offense.” Similarly, *State v. Morgan*, 146 Wash 109, 261 P.777 (1927) dealt with the admission of prior acts of sexual abuse that occurred years before the charged offense. Finally, *State v. Jordan*, 39 Wn. App. 530, 694 P.2d 47 (1985) (which was the only case cited by the Defendant in the trial court – See RP 10) is not on point. It is true that Tegland’s Courtroom Handbook on Washington Evidence cites *Jordan* as standing for the proposition that “Arrests are usually excluded in subsequent proceedings arising out of the same incident.” *Tegland, Courtroom Handbook of Washington Evidence, 2010-11*, page 232. With all due respect, however, the State has read the *Jordan* case repeatedly and can find no such reference in *Jordan*. In addition, on appeal the Defendant’s summary of *Jordan* merely claims that the trial court in *Jordan* excluded evidence that the “witnesses had connected the defendant to two other robberies whose charges were dismissed.” App.’s Br. at 12. The present case, however, contains no such issue. Rather the evidence in the present case was that the Defendant resisted his arrest for the *charged offense* when he was arrested fleeing the scene immediately after the commission of the crime. *Jordan*, therefore, is clearly distinguishable.

course of provocative conduct and were clearly admissible to show the Defendant's anger towards the victim.

At trial, the Defendant sought to exclude any evidence that the Defendant had hit Ms. Vonberg's car or opened her car door. CP 33; RP 12-13. The State responded that this evidence was part of the ongoing course of conduct at the scene and was also evidence of the Defendant's intent and state of mind. RP 12. The trial court denied the Defendant's motion, finding that the actions were "part of the incident describing his conduct" and that the evidence was thus probative. RP 13.

As stated previously, a trial court's admission of evidence is reviewed for an abuse of discretion. *Pirtle*, 127 Wn.2d at 648. "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *Perrett*, 86 Wn.App. at 319. The appellate court may affirm on any ground the record supports. *Carter*, 127 Wn.2d at 841.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

In the present case the State had to prove that the Defendant intentionally assaulted Ms. Vonberg. CP 51, 54. The evidence at issue (that the Defendant grabbed the door of Ms. Vonberg's truck and then later hit the back of her vehicle) occurred nearly simultaneously with the physical assaults. These acts, therefore, were all part of the Defendant's continuing course of provocative conduct and were clearly admissible to show the Defendant's anger towards the victim, as well as his motive and intent in committing the crime. In short, the evidence was clearly relevant and the trial court did not abuse its discretion in admitting the evidence.

**C. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT TRIAL COUNSEL'S REPRESENTATION WAS DEFICIENT OR THAT THE DEFENDANT SUFFERED ANY PREJUDICE.**

The Defendant next claims that he received ineffective assistance of counsel when his trial attorney failed to cross examine witnesses regarding the exact location of Ms. Kerman or her vehicle at the time of the assault. App.'s Br. at 17. This claim is without merit because the location of Ms. Kerman's car was largely irrelevant and the Defendant, therefore, has failed to show that defense counsel's representation was deficient or that the Defendant suffered any prejudice.

To establish ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

In addition, courts engage in a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335, *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226, 743 P.2d 816. Because the defendant must prove both deficient representation and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

In the present case the Defendant argues that trial counsel was ineffective based on her failure to cross examine any of the witnesses regarding the exact location of Ms. Kerman's car. App.'s Br, at 18. Furthermore, the Defendant claims that this issue was "very important because Kerman testified that she observed the altercation between the alleged victim and Mr. Lavalsit from near her vehicle." App.'s Br. at 18.

The Defendant's claim, however, misstates the record as Ms. Kerman never testified that she witnessed the events while standing in or near her own car.

At trial Ms. Kerman explained that when she and Ms. Vonberg decided to leave the house Ms. Vonberg exited first and left through the sliding glass door, and at that point Ms. Kerman saw that the Defendant "was actually pushing [Ms. Vonberg] out onto the deck and started to push [Ms. Vonberg]." RP 124. Ms. Kerman then walked out of the house after Ms. Vonberg RP 124. Ms. Kerman also described that she then saw the Defendant "poking" at Ms. Vonberg, but Ms. Kerman never said she was near her car when she saw this. RP 124. To the contrary, Ms. Kerman described that while these events were taking place Ms. Upsahl was still being screamed at her and Ms. Kerman also explained that she was talking to the Defendant and asking him to move his truck as it was blocking Ms. Vonberg's exit. RP 124-25, 128-29. In fact, as Ms. Vonberg began to try to back out of the driveway Ms. Kerman was clearly right next to Ms. Vonberg's truck because Ms. Kerman described that she pounded on the door of Ms. Vonberg's truck and told her to "stop." RP 129-30. In short, there is nothing in the record to suggest that Ms. Kerman was near her own car at any relevant time, and thus the position of the car was largely irrelevant.<sup>2</sup>

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<sup>2</sup> Ms. Kerman later did get into her car and drive a few doors down to wait for the deputies, but Ms. Kerman never stated that saw anything once she got to her car. See RP 130.

Given these facts the Defendant has failed to show that his counsel's failure to cross examine the witnesses regarding the location of Ms. Kerman's car constituted deficient performance, nor can the Defendant show any prejudice. His claim of ineffective assistance of counsel, therefore, is without merit.

**D. THE DEFENDANT'S CLAIM THAT HE WAS DENIED A FAIR TRIAL DUE THE TRIAL JUDGE'S BIAS IS WITHOUT MERIT BECAUSE THE RECORD DOES NOT CONTAIN ANY EVIDENCE THAT THE TRIAL JUDGE WAS ACTUALLY OR POTENTIALLY BIASED.**

The Defendant next claims that he was denied a fair trial because the trial court was biased. App.'s Br. at 22. This claim is without merit because the Defendant has utterly failed to demonstrate any evidence that even remotely suggests that the trial judge was actually or potentially biased.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV. Impartial means the absence of actual or apparent bias. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). An appellate court is to presume that a judge acts without bias or prejudice. *Jones v. Halvorson-Berg*, 69 Wn.App. 117, 127, 847 P.2d 945 (1993).

The test for determining whether a judge's impartiality might reasonably be questioned is an objective one. *State v. Leon*, 133 Wn.App. 810, 812, 138 P.3d 159 (2006). A court must determine “whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [hearing].” *State v. Dominguez*, 81 Wn.App. 325, 330, 914 P.2d 141 (1996).

Finally, “To prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge's or decision-maker's actual or potential bias.” *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999) (citing *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992)).

In the present case the Defendant argues that the record shows that the trial court was biased because on five occasions the trial court interrupted a defense witness in order to remind the witness to not talk over the attorney (and to wait until a question was finished before answering), or to not give a narrative answer. *See App.’s Br.* at 23-25. None of the cited passages even remotely suggests judicial bias. To the contrary, these instances only demonstrate that the trial court was exercising its inherent authority to ensure that the proceedings occurred in an organized and logical fashion. Interrupting a defense witness to remind them to not talk over the attorney, for example, actually serves the Defendant’s interest as it ensures that the jury

will actually be able to hear the testimony of the defense witness. In short, the Defendant's claim that the trial court somehow entered the "fray of combat" is utterly without merit.

Furthermore, the Defendant's claim that these five instances somehow demonstrate that the trial court was somehow biased against the Defendant is patently absurd if one examines the record as a whole. For example, long before the trial court ever interrupted a defense witness the trial court had, on at least seven occasions, interrupted witnesses for the State and instructed them to: slow down; to wait for the attorney to finish the question before answering; to not talk over the attorney; to stop when an objection is made; or to not speak until a question was actually posed to the witness. *See, e.g.*, RP 40, 46, 99, 117, 122, 123, 128. The record as a whole, therefore, clearly shows that the trial court was not biased in any way. Rather, the trial court acted entirely appropriately and fairly in order to ensure that the trial proceeded in an orderly fashion.

In short, the Defendant has failed to demonstrate any evidence of the judge's actual or potential bias. His claim, therefore, is utterly without merit.

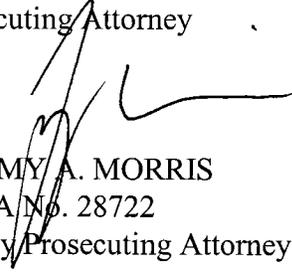
#### **IV. CONCLUSION**

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

DATED February 23, 2012.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

DOCUMENT1

# KITSAP COUNTY PROSECUTOR

## February 23, 2012 - 11:24 AM

### Transmittal Letter

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Case Name: State v. Matthew Lavalsit

Court of Appeals Case Number: 41986-6

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