

NO. 42266-2-II

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

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STATE OF WASHINGTON, Respondent

v.

ANDREW ALLEN WRIGHT, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 11-1-00176-8

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. This Court should find the evidence was sufficient to convict the defendant as an accomplice to Robbery in the First Degree and Assault in the First Degree.
- II. This Court should find the defendant was not denied effective assistance of counsel.
  - a. *Evidence that the defendant was arrested was relevant; therefore, defense counsel was not ineffective for failing to object to it.*
  - b. *Detective Schultz and Detective did not provide improper opinion testimony; therefore, defense counsel was not ineffective for failing to object to their testimony.*

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, “the defendant”) was charged by Amended Information with Count One: Robbery in the First Degree and Count Two: Assault in the First Degree. (CP 4-5). In both counts, the defendant was charged as an accomplice with Armando Castillo-Munoz and Nathan Gadberry. (CP 4-5). The State alleged a firearm enhancement for both counts. (CP 4-5).

The defendant was convicted of Count One and Count Two on June 9, 2011, following a four day trial by jury.<sup>1</sup> (CP 115, 117). The jury answered “no” in response to both special verdict forms regarding the firearm enhancement. (CP 116, 118).

The defendant was sentenced on June 13, 2011. (CP 124). The parties stipulated that the defendant had a prior offender score of 13 points. (RP 682). The trial court found there was no legal deficiency in the defendant’s conviction for Count One: Robbery in the First Degree; however, taking “a conservative approach,” it vacated the defendant’s sentence on Count One based on double jeopardy principles. (RP 697-98). The court sentenced the defendant to 276 months confinement on Count Two: Assault in the First Degree.<sup>2</sup> (CP 126; RP 699). This timely appeal followed. (CP 141).

## II. Summary of Facts

The defendant and David Jones (the named victim) had been friends for the past fifteen years. (RP 206). The two used to play little league together. (RP 258). The defendant was now a methamphetamine

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<sup>1</sup> Nathan Gadberry was tried separately prior to the defendant’s trial and Armando Castillo-Munoz entered a plea of guilty after the defendant’s trial.

<sup>2</sup> The State did not oppose the trial court’s decision because Count One and Count Two would run concurrently and vacation of the defendant’s sentence on Count One would have no impact on his sentencing range for Count Two. (RP 687).

user. (RP 157). He purchased his methamphetamine from a man named Armando Castillo-Munoz. (RP 157). The defendant was also friends with a man named Nathan Gadberry. (RP 495-496). The defendant previously loaned \$300.00 to Jones. (RP 254-255). The defendant's loan to Jones was still outstanding on January 21, 2011. (RP 254-255).

Jones was hanging out with Daniel Force on the night of January 21, 2011, at Force's apartment. (RP 200-201). Force's apartment was located at 1304 Northeast 88<sup>th</sup> Street, in Clark County, Washington. (RP 74, 409). Force's apartment complex was equipped with surveillance cameras that surveyed the apartment complex's parking lot, its courtyard, and its stairwells. (RP 314, 340). As the head of security for the apartment complex, Force had TV monitors inside his apartment that displayed the footage from the surveillance cameras. (RP 314, 340).

At approximately 11:30 p.m., Force observed the defendant drive into his apartment complex parking lot, via the surveillance monitors in his apartment. (RP 318). Force observed that the defendant was sitting in the driver's seat of the vehicle and Gadberry was sitting in the passenger seat. (RP 322, 342-43). Force observed the defendant park his vehicle at the base of the stairwell that led to Force's unit. (RP 320). Force observed the defendant, Gadberry, and Castillo-Munoz exit the vehicle. (RP 319). Jones also looked at the surveillance monitors, from which he

observed the defendant walk up the stairs to Force's apartment with two other men walking immediately behind him. (RP 204-205). Moments later, the defendant, Castillo-Munoz, and Gadberry knocked on Force's apartment door. (RP 322). Force let the men inside. (RP 322).

The front door to Force's apartment opened into the living area of his small one-bedroom unit. (RP 206, 314). The living area contained a futon couch, a TV, and the TV surveillance monitors. (RP 206, 312). Jones was sitting on the futon when the defendant, Castillo-Munoz, and Gadberry arrived. (RP 206). The defendant walked to the far-corner of the living area and sat on a chair, facing Jones. (RP 210, 279). Gadberry walked to the near-corner of the living area (nearest to the front door) and stood, facing Jones. (RP 210, 279). Castillo-Munoz walked towards Jones and stood approximately three feet away from Jones. (RP 210).

Castillo-Munoz said to Jones "so, what you think?" (RP 211). Jones responded, "I don't understand." (RP 211). Castillo-Munoz pulled out a gun and cocked it.<sup>3</sup> (RP 211).

Castillo-Munoz told Jones that he owed him money. (RP 211). Neither the defendant nor Gadberry said anything. (RP 270). Jones was confused because he had never borrowed money from Castillo-Munoz and

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<sup>3</sup> Jones believed the gun that Castillo-Munoz wielded was a Baretta or a Taurus handgun. (RP 270). Castillo-Munoz was found with an operable nine millimeter Taurus handgun on his person days after the crimes against Jones were committed. (RP 288, 298).

he had never bought drugs from Castillo-Munoz. (RP 211-212, 249).

However, Jones knew that he had borrowed money from the defendant and he knew he still owed this money to the defendant. (RP 211-212, 254-255). Jones told Castillo-Munoz that he did not have any money. (RP 211).

Castillo-Munoz struck Jones in the head with his hand. (RP 211). Castillo-Munoz demanded that Jones give him his watch and wedding ring. (RP 213). Jones' wedding ring was gold with a stone in it. (RP 213). Jones was afraid of Castillo-Munoz because he had a gun. (RP 247). Jones also felt threatened by the presence of the defendant and Gadberry. (RP 248). Consequently, Jones complied with Castillo-Munoz's demands and gave him his watch and his ring. (RP 247).

Castillo-Munoz then struck Jones in the head with the barrel of his gun. (RP 217). Castillo-Munoz demanded that Jones give him his car and "sign the papers" over to him. (RP 217). When Jones told Castillo-Munoz that the title to the car was not in his name, Castillo-Munoz started hitting him again. (RP 217). Jones tried to cover his head with his arms as Castillo-Munoz continued to hit him. (RP 217). Jones felt something warm dripping down his face. (RP 218). When he went to wipe-off his face, Jones saw that there was a "hole" in his thumb. (RP 218). Jones realized he had been shot. (RP 218). Seconds later, the defendant,

Castillo-Munoz, and Gadberry left the apartment. (RP 218). The defendant said nothing to Jones before Jones was shot; he said nothing to Jones after he was shot; and he said nothing to Jones before he left the apartment. (RP 222, 270, 328).

Jones sustained injuries to his skull and to his forearm that were consistent with blunt force trauma. (RP 88, 94-95). Jones had lacerations on his skull that had to be stapled shut. (RP 87). A bullet had gone through Jones' left thumb and middle finger. (RP 90). The bullet had impacted the nerves and joints in Jones' fingers and it had penetrated through to the bones. (RP 96-99). The orthopedic surgeon who treated Jones estimated that Jones' thumb and middle finger would never function normally again. (RP 96-99).

Immediately after the shooting, the defendant went to his friend, Shannon Tandberg's, home in Jantzen Beach, Oregon. (RP 373, 381). The defendant told Tandberg that he was present when Jones was shot. (RP 376). The defendant said he met up with Jones in order to collect on a debt that Jones owed. (RP 378). The defendant said he was accompanied by "a Mexican guy." (RP 397). The defendant had a key to Tandberg's residence and it was not uncommon for him to come and go as he pleased (RP 382). The defendant had previously dropped off a new safe at Tandberg's home, which was still in its original box. (RP 383-84, 394).

Tandberg went on a five-day road trip after she talked to the defendant. (RP 392). Tandberg invited the defendant to go with her, but he declined. (RP 393).

Tandberg returned to her home around January 30, 2011. (RP 393). Tandberg learned the defendant had been arrested while she was gone. (RP 393). Tandberg also observed that the defendant's safe was now out of its box and the safe's door was now locked. (RP 395). Consequently, Tandberg decided to drill open the safe. (RP 395). Inside the safe, she discovered a "Wii" gaming system, hypodermic needles, and a ring. (RP 384, 395).

The following day (January 31, 2011), Tandberg received a visit at her residence from a stranger named Gabriel Salisbury. (RP 374). Salisbury handed his phone to Tandberg when he arrived. (RP 374). The defendant was on the other end of the line. (RP 375). The defendant told Tandberg that Salisbury was his brother and she should let him in. (RP 375). Tandberg let Salisbury inside; after which, Salisbury went to the safe and cut up the ring that was inside it. (RP 386).

The defendant was arrested on January 27, 2011. (RP 142-43). Clark County Sheriff's Office Detective Lindsey Schultz and Detective Todd Barsness interviewed the defendant after his arrest. (RP 142-43). Detective Schultz testified that the defendant originally told them he had

no knowledge of an incident in which David Jones was shot; however, as the interview progressed, the defendant admitted that he was present when Jones was shot. (RP 59). The State attempted to clarify Detective Schultz's testimony by asking her "[a]re you indicating, initially, there [w]as a discussion about whether or not he was there and then, later on that seemed to develop into a little bit different information?" (RP 59). Detective Schultz responded "...it was a difficult interview in the sense that it was a lot of give and take that...[the defendant] would only respond as little as he could give me to see what information I knew...he was not forthcoming with his information while we were trying to interview him." (RP 59-60).

Detective Barsness testified that the defendant originally told them that he did not see any firearms on the night of the shooting; however, as the interview progressed, the defendant admitted that he saw Castillo-Munoz pull out a firearm and he admitted that he saw Castillo-Munoz strike Jones in the head with the firearm. (RP 143, 145, 148). Detective Barsness said the defendant told them that he arrived at Daniel Force's apartment complex by himself and he left by himself; however, the defendant was unable to describe the vehicle that he left in and he was unable to tell the detectives where he went after he left. (RP 143-44, 150). Detective Barsness said the defendant told them it was just a coincidence

that he, Castillo-Munoz, and Gadberry arrived at Force's apartment at the same time; however, as the interview progressed, Detective Barsness said he came believe "that the reason for the visit by [the defendant] and [Castillo-Munoz] was to reclaim a drug debt." (RP 145, 158). Detective Barsness said he arrived at this belief because the defendant said "Mr. Jones owed him a sum of... \$150.00" and he said there was "some mention" of Castillo-Munoz wanting Jones to sign-over his car to him because Jones did not have any money to repay the debt. (RP 146-47). The defendant told the officers that Castillo-Munoz "was a drug contact and that he would get drugs from him from time to time." (RP 157). The defendant told Detective Barsness and Detective Schultz that he had no idea whether a watch or a ring were exchanged between Jones and Castillo-Munoz. (RP 147-48).

Gabriel Salisbury testified that he received a call from the defendant on January 31, 2011, when the defendant was at the Clark County jail. (RP 164). During the call, the defendant told Salisbury that he needed Salisbury to go to Shannon Tandberg's home and "get rid of the ring." (RP 178-79, 180). The defendant's call to Salisbury was recorded, pursuant to standard call-monitoring procedure at the Clark County Jail. (RP 177). Excerpts from the call included the following:

Defendant: You've got to get rid of the ring.

...

Defendant: You are at the safe yet?

Salisbury: It's - - it's open.

...

Salisbury: I'm just - - I'm just chopping up the ring, dude.

...

Defendant: Okay. Cool.

- (RP 180-82).

Defense counsel objected to the admission of the recording of the jail call on foundational grounds. (RP 161). The State authenticated the recording through Salisbury and the recording was admitted into evidence. (RP 170-171).

Salisbury testified that, pursuant to the defendant's request, he went to Tandberg's home, he retrieved the ring out of the safe, and he chopped up the ring with electrical dikes.<sup>4</sup> (RP 184, 186). Salisbury said he put the cut-up ring in the driver's side door of his van. (RP 185). Salisbury said he was approached by detectives from the Clark County Sheriff's Office later that day and he voluntarily gave them the ring that he

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<sup>4</sup> Both Salisbury and Tandberg testified that the defendant was never married and the ring the defendant left in the safe did not belong to him. (RP 182, 400).

had cut up. (RP 187, 189). David Jones positively identified the cut-up ring that the detectives collected from Salisbury as the ring that was forcibly taken from him on the night of the shooting. (RP 215).

At trial, the defendant testified that Jones was his long-time friend. (RP 490). The defendant said he previously loaned money to Jones; however, he claimed, they were "squared" prior to the night of the shooting. (RP 492-493). The defendant agreed that he originally told the police he did not know Castillo-Munoz; however, at trial, he testified that Castillo-Munoz supplied him with drugs. (RP 491, 522). The defendant admitted that he was present on the night of January 21, 2011, when Castillo-Munoz threatened Jones; he admitted that he heard a gun go off; and he admitted that saw that Jones was injured after the gun went off. (RP 495, 499, 502-03). The defendant also admitted that he did not contact the police after he saw that his friend had been shot. (RP 505, 522).

The defendant testified that he bought David Jones' wedding ring from Daniel Force. (RP 507). The defendant said he gave the ring to Shannon Tandberg as a gift (RP 508). The defendant said he sent Salisbury to Tandberg's home to retrieve the ring when he was in jail because Tandberg was getting back together with her ex-boyfriend and the

defendant “didn’t want him to get [his] stuff or things like that.” (RP 509).

### C. ARGUMENT

#### I. The evidence was sufficient to convict the defendant as an accomplice to Robbery in the First Degree and Assault in the First Degree.

The defendant does not argue that the evidence was insufficient to prove Robbery in the First Degree and Assault in the First Degree.

However, the defendant argues the evidence was insufficient to find him guilty as an accomplice to these crimes because “there was no evidence that the defendant did anything at all” when they were committed. *See Br. of Appellant* at p. 16. The defendant’s argument is without merit.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. In order to determine whether the necessary quantum of proof exists, the reviewing court need only be satisfied that substantial evidence supports the State’s case. *State v. Galista*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The

reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 875-75, 83 P.3d 970 (2004).

Under RCW 9A.080.020(2)(c), “[a] person is legally accountable for the conduct of another person when ... [h]e or she is an accomplice of such other person in the commission of a crime.” A person is an accomplice of another if:

(a) [w]ith knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) [s]olicits, commands, encourages, or requests such other person to commit it; or

(ii) [a]ids or agrees to aid such other person in planning or committing it...

- RCW 9A.08.020(3)(a).<sup>5</sup>

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<sup>5</sup> Under RCW 9A.56.200, a person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon.

- RCW 9A.56.200

Under RCW 9A.36.011, a person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

In order to find a person guilty as an accomplice, it must be proven that the person “shared in the criminal intent of the principal.” *State v. Gladstone*, 76 Wn.2d 306, 313, 474 P.2d 274 (1970) (quoting *Johnson v. United States*, 195 F.2d 673 (8th Cir. 1952)). The term “aiding and abetting,” ...assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed.” *Gladstone*, 76 Wn.2d at 313 (quoting *Johnson*, 195 F.2d 673). Evidence is insufficient to prove complicity if a person is “merely present” at the scene of a crime; however, evidence is sufficient to prove complicity if that person is “present and ready to assist.” *State v. Collins*, 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995), *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995).

Here, evidence that the defendant was merely present at Daniel Force’s apartment at the time David Jones was robbed and assaulted would have been insufficient to prove that he acted as an accomplice to these crimes. However, the evidence presented at trial was much more than that.

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(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; ...

- RCW 9A.36.011.

First, the evidence showed that the defendant was the only person present who had a motive to take money or property from Jones by force or by threatened use of force. This was the case because Jones had borrowed a not insignificant amount of money from the defendant. Jones still owed this money to the defendant on the night of January 21, 2011, and Jones did not owe money to anyone else in the apartment on that night. Also, the evidence showed that the defendant was responsible for driving Castillo-Munoz and Gadberry to Force's apartment and the defendant positioned his vehicle for a quick getaway. Furthermore, the evidence showed that the defendant was the common link between all persons present at Force's apartment that night because he had loaned money to Jones, he bought drugs from Castillo-Munoz, and he was friends with Gadberry. From this evidence, it would have been reasonable for the jury to conclude that it was the defendant who was responsible for instigating the robbery and the assault of Jones. It would have also been reasonable for the jury to conclude that it was the defendant who was responsible for facilitating the commission of the crimes. In fact, it is not reasonable to believe that Castillo-Munoz would have been at Force's apartment on the night of January 21, 2011, to beat, shoot, and to extort property from Jones, but for Castillo-Munoz's relationship to the defendant and but for the money that Jones owed to the defendant.

Next, evidence of the defendant's actions while he was at Force's apartment showed he was complicit in the commission of the crimes. Jones and the defendant were long-time friends; however, the defendant did not attempt to come to his friend's aid when Castillo-Munoz threatened Jones, when Castillo-Munoz cocked a gun at Jones, when Castillo-Munoz demanded money and property from Jones, when Castillo-Munoz beat Jones, or when Castillo-Munoz shot Jones. Instead, the defendant positioned himself behind Castillo-Munoz and across from Gadberry while these incidents occurred. He then fled the apartment with Castillo-Munoz and Gadberry immediately after the crimes occurred. From this evidence, it would have been reasonable for the jury to conclude that the defendant was not at Force's apartment for a social call; rather, he shared in Castillo-Munoz's intent to rob and to assault Jones and, by his positioning in the apartment, he acted as an intimidating presence, who afforded Castillo-Munoz with the opportunity to rob and assault Jones.

In addition, evidence of the defendant's actions after the crimes were committed showed he was complicit in the commission of the crimes. Immediately after Jones was robbed and assaulted, the defendant was in possession of the ring that Castillo-Munoz had forcibly taken from Jones. The defendant hid Jones' ring in a safe at his friend's house. The defendant then recruited his brother to destroy the ring after he became a

suspect in the case. From this evidence, it would have been reasonable for the jury to conclude that the defendant shared in Castillo-Munoz's criminal intent because he had taken the spoils of the crime for his own personal gain. From this evidence, it would have also been reasonable for the jury to conclude that the defendant had a consciousness of guilt; otherwise, he would not have attempted to destroy the only physical evidence that linked him to the criminal episode immediately after he became a suspect in the case.

Given the defendant's motive to commit the crimes, given the defendant's facilitation of the crimes, given the defendant's actions during the commission of the crimes and after the crimes were committed, and given the defendant's conflicting and incredible statements to the officers during his interview and to the jury during his trial, the evidence was more than sufficient for any rational trier of fact to find that the defendant acted as an accomplice to Robbery in the First Degree and Assault in the First Degree.

II. The defendant was not denied effective assistance of counsel.

The defendant claims his trial counsel was ineffective because his attorney did not object (1) when evidence was presented that the defendant had been arrested and jailed on the instant offenses; (2) when Detective Schultz said the defendant was not "forthcoming" during his interview; or

(3) when Detective Barsness said, based on the defendant's statements during his interview, he came to believe that the defendant was at Force's apartment in order to reclaim a drug debt. *See* Br. of Appellant at p. 17. The defendant's claims are without merit.

A claim of ineffective assistance of counsel is reviewed de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A claim of ineffective assistance of counsel should not be used as a substitute for the requirement of issue preservation. *State v. Curtiss*, 161 Wn. App. 673, 702, 250 P.3d 496 (2011).

The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). It is the defendant's burden to show ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) counsel provided deficient representation (meaning, counsel's conduct fell below an objective standard of reasonableness), and (2) counsel's ineffective representation resulted in prejudice (meaning, there is a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different). *Strickland v. Washington*, 466 U.S. 668, 687-88.

694, 104 S. Ct. 2052 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial.

*Strickland*, 466 U.S. at 694. If defense counsel’s conduct can be characterized as legitimate strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel.

*State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

The decision of when, or whether, to object is an example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Consequently, when a defendant alleges ineffective assistance for counsel’s failure to object, the defendant must show the objection would have been sustained and the trial’s outcome would have been different. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Madison*, 53 Wn. App. at 763 (citing *Strickland*, at 668).

- a. *Evidence that the defendant was arrested was relevant; therefore, defense counsel was not ineffective for failing to object to it*

There is no rule that states evidence of the defendant’s arrest is, per se, prejudicial. *See State v. Woodring*, 37 Wn.2d 281, 285, 223 P.2d 459 (1950). Rather, the admissibility of evidence of a defendant’s arrest is

controlled by ER 401, 402, and 403. *Woodring*, 37 Wn.2d at 285 (finding, insofar as evidence of the defendant's arrest has probative value, it is admissible).

Under ER 402, evidence is admissible if it is relevant. Under ER 401, 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. Evidence is relevant if it tends to show a consciousness of guilt. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Evidence is also relevant as *res gestae* if it "completes the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981) (quoting E. Cleary, *McCormick on Evidence* § 190, at 448 (2d ed. 1972)).

Under ER 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." ER 403. However, the danger of unfair prejudice is slight when evidence of the defendant's arrest pertains to his or her arrest on the instant case. *Woodring*, at 285 (emphasis in original) (finding "evidence touching on the arrest of the

defendant on the instant charge neither pu[t] his reputation in issue nor show[ed] the commission of crimes *other than the one charged*).

Here, David Jones' wedding ring was forcibly taken from him during the course of a robbery and an assault, for which the defendant was present. The defendant was in possession of Jones' wedding ring days after the crimes were committed and he sent his brother to destroy the ring immediately after he was arrested as a suspect in the case. In order for the jury to understand the extent of the defendant's involvement in the crimes that were committed against Jones, it was essential for the jury to know that the defendant did not send his brother to destroy Jones' ring for no apparent reason; rather, he sent his brother to destroy Jones' ring because he had just been arrested as a suspect in the case. The fact that the defendant attempted to destroy the only physical evidence that linked him to the crimes against Jones, immediately after he was implicated as a suspect in the crimes, was relevant because it tended to show the defendant's consciousness of guilt.

In addition, evidence of the defendant's arrest and evidence of his subsequent incarceration was relevant for *res gestae* because it provided the immediate context for happenings in the case. For example, evidence of the defendant's arrest was relevant because it explained why Tandberg decided to drill open the defendant's safe, inside which she discovered

Jones' wedding ring. Also, evidence of the defendant's subsequent incarceration was relevant because it explained why the defendant sent his brother to destroy Jones' ring, instead of taking care of it himself.<sup>6</sup>

Furthermore, the jury did not hear evidence that the defendant was arrested on charges for unrelated crimes; rather, they only heard evidence that the defendant was arrested on the charges for which he was tried. Therefore, the potential for prejudice in this case was slight because the jury did not hear improper character or propensity evidence.

For each of these reasons, any objection by defense counsel to evidence of the defendant's arrest would not have been sustained. In fact, defense counsel would have only called unnecessary attention to the fact of the defendant's arrest, had she objected to this evidence. Therefore, the defendant cannot demonstrate ineffective assistance because it was legitimate trial strategy for defense counsel to waive any objection to evidence of the defendant's arrest.

Also, any ineffective assistance claim pertaining to the admission of the recording of the jail call between the defendant and Salisbury must

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<sup>6</sup> *Warren v. Hart*, the case to which the defendant cites, is wholly distinguishable from the case at bar. See Br. of Appellant at p. 24, citing *Warren*, 73 Wn 2d 512, 429 P.2d 873 (1967). First, *Warren* was a civil case in which the appellant sought damages following a two-car collision. Second, in *Warren*, evidence that the investigating officer did not issue traffic citations to either party was offered for no other purpose than to defeat the appellant's claim that the respondent had driven negligently.

fail. Defense counsel objected to the admission of the recording of the jail call on foundational grounds, stating “I’m asking that [the State] be required to lay the foundation for the admissibility of [the recording].” (RP 161). Consequently, the State was required to establish from where the call was made (the Clark County Jail), when the call was made, to whom the call was made, and from whom the call was made, in order to authenticate the recording. The State authenticated the recording through Salisbury, the recording was admitted into evidence, and Salisbury was available for cross-examination. Defense counsel could have stipulated to the admissibility of the recording and then attempted to limit its content; however, it was an equally legitimate trial strategy to attempt to exclude the recording all together.<sup>7</sup>

- b. *Detective Schultz and Detective Barsness did not provide improper opinion testimony; therefore, defense counsel was not ineffective for failing to object to their testimony.*

A witness provides improper opinion testimony when he or she comments on the guilt or veracity of the defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Such testimony is improper because

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<sup>7</sup> The cases to which the defendant cites are inapposite. Here, unlike in *State v. Yoakum*, the State did not fail to make the recording part of the record and then attempt to impeach the defendant with evidence of it. See Br. of Appellant at p. 20, citing *Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950). Also, unlike in *Hash v. State*, the State did not attempt to impeach the defendant with evidence to which only it had personal knowledge. See Br. of Appellant at p. 20-21, citing *Hash*, 48 Ariz. 43, 59 P.2d 305 (1936).

it invades the exclusive province of the jury. *Demery*, 144 Wn.2d at 759; *State v. Carlin*, 40 Wash. App. 698, 700, 700 P.2d 323 (1985)<sup>8</sup> (finding officer improperly commented on defendant's guilt when officer stated his tracking dog followed a "fresh guilt scent"); *State v. Alexander*, 64 Wash. App. 147, 154, 822 P.2d 1250 (1992) (finding expert witness improperly commented on witness's veracity when expert stated he believed child was "not lying" about sexual abuse). In contrast, a witness does not provide improper opinion testimony when his or her statement is based solely on inferences from the evidence. *Heatley*, 70 Wn. App. at 578. For example, in *Heatley*, the Court of Appeals found an officer in a DUI prosecution did not render improper opinion testimony when he stated the defendant was "obviously intoxicated" because the officer's opinion was based on his "detailed testimony about his observations" of the defendant. *Heatley*, 70 Wn. App. at 581-82 (finding jury was therefore "in a position to independently assess officer's opinion in light of the foundation evidence").

Here, Detective Schultz testified that the defendant was "not forthcoming" during the defendant's interview with her and Detective Barsness. (RP 59). Detective Schultz stated that she came to this belief because the defendant originally told them that he had no knowledge of an

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<sup>8</sup> *Overruled on other grounds in Seattle v. Heatley*, 70 Wn. App. 573, 584, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994).

incident in which David Jones was shot; however, as the interview progressed, the defendant admitted that he was present when Jones was shot. (RP 59). The word, "forthcoming," is defined as follows: (1) about to appear; (2)(a) readily available; and (2)(b) affable, approachable, sociable. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2237 (2002). Detective Schultz reasonably noted that the defendant was less than "approachable" during his interview. Detective Schultz never stated that she "did not believe the defendant's statements;" she never stated that she believed the defendant was guilty; and she never stated that she believed the defendant was not truthful. Consequently, her comment was not improper. Additionally, Detective Schultz's comment was not improper because it was based on her reasonable inferences from the evidence. Also, the jury heard the evidence on which Detective Schultz based her belief. Consequently, the jury was in a position to independently assess the merits of Detective Schultz's belief. Furthermore, the jury was properly instructed that they were the sole judges of credibility. (CP 71; Instr. No. 1).

Similarly, Detective Barsness's testimony was not improper. Detective Barsness testified that he came believe "that the reason for the visit by [the defendant] and [Castillo-Munoz] was to reclaim a drug debt." (RP 145, 158). Detective Barsness stated that he came to this belief because the defendant said "Mr. Jones owed him a sum of... \$150.00" and the

defendant said there was "some mention" of Castillo-Munoz wanting Jones to sign-over his car to him because Jones did not have any money to repay the debt. (RP 146-47). In addition, Detective Barsness testified that the defendant told them that Castillo-Munoz "was a drug contact and that he would get drugs from him from time to time." (RP 157). Detective Barsness's comment was not improper because it was not an opinion on the defendant's guilt; it was not an opinion on the defendant's veracity; and it was not based on speculation. Rather, Detective Barsness's comment was properly based on reasonable inferences from the evidence. The jury heard the evidence on which Detective Barsness based his belief; therefore, they were in a position to independently assess the merits of Detective Barsness's belief. Also, Barsness's testimony was cumulative of the testimony of the defendant, Tandberg, and Jones.<sup>9</sup>

Additionally, although both officers testified to the uncontroverted fact that the defendant was arrested, neither officer testified that he or she believed there was probable cause to arrest the defendant and neither officer testified that he or she believed the defendant "should be" arrested.

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<sup>9</sup> Both the defendant and Jones testified that the defendant had loaned money to Jones; the defendant testified that he bought drugs from Castillo-Munoz; and Tandberg testified that the defendant told her he was at Force's apartment on the night of January 21, 2011, to collect a debt that Jones owed.

Consequently, neither officer rendered an improper opinion on the defendant's guilt.

For each of these reasons, Detective Schultz and Detective Barsness did not render improper opinion testimony. Therefore, any objection by defense counsel to the officers' testimony would have failed and counsel's objection would have only called unnecessary attention to the evidence. Consequently, it was legitimate trial strategy for defense counsel to waive objection to these portions of the officers' testimony and the defendant cannot meet his burden of showing ineffective assistance of counsel.

Lastly, given the strength of the evidence in this case, it is simply not reasonable to believe that the jury's verdicts would have been different "but for" counsel's failure to object to the fact of the defendant's arrest or "but for" counsel's failure to object to the officers' summations of the defendant's statements to them. Consequently, the defendant cannot show that this testimony was central to the State's case and he cannot show that counsel's failure to object to it was "so egregious" as to justify reversal. Therefore, even if this Court finds defense counsel's objections would have been sustained, the Court should find the defendant's claim of

ineffective assistance must fail because the defendant cannot show resulting prejudice.

D. CONCLUSION

The defendant's convictions should be affirmed.

DATED this 26 day of April, 2012.

Respectfully submitted:

ANTHONY F. GOLIK  
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Clark County, Washington

By:

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# CLARK COUNTY PROSECUTOR

## April 27, 2012 - 1:30 PM

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