

NO. 42901-2

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

STATE OF WASHINGTON, RESPONDENT

v.

DOANH NGUYEN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 09-1-02225-1

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**Response Brief**

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

1. Does defendant's claim that the affidavit of fraud constitutes improper opinion testimony amounting to manifest constitutional error fail on the merits when the challenged exhibit was admitted under the business records hearsay rule, does not constitute opinion testimony, and defendant's challenge is improperly before this Court?

2. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice and counsel was a strong advocate for his client?

B. STATEMENT OF THE CASE.

1. Procedure

On April 29, 2009, the Pierce County Prosecuting Attorney's Office (State) charged Doanh Nguyen, defendant, with one count of identity theft in the first degree, five counts of theft in the first degree, two counts of theft in the second degree, and seven counts of forgery. CP 1-7. Charges were later amended to one count of identity theft in the first degree, four counts of theft in the first degree, five counts of forgery, and one count of theft in the second degree. CP 18-23. Defendant was also charged with the following aggravating factors: vulnerable victim and using a position of trust to facilitate the commission of the offense. RP 4.

This case was assigned to the Honorable Frank Cuthbertson, and trial began on October 11, 2011. RP 17. On October 13, 2011, defendant was found guilty as charged and the jury unanimously answered “yes” to both special verdicts. CP 65-85.

On November 18, 2011, defendant was sentenced to the high end of the standard range for each count. CP 118-132. With time set to run concurrently, the court imposed a total of 75 months in custody with 41 days credit for time served. CP 118-132. Defendant was also sentenced to the mandatory 12 months of community custody for identity theft as well as restitution and other legal financial obligations. CP 118-132.

Defendant timely filed a Notice of Appeal on December 16, 2011. CP 133-145.

## 2. Facts

From the Spring of 2006 to January 2007, defendant worked as a home caregiver for the victims, Frances and Robert Griffin. RP 42, 51. The Griffins, an elderly couple who were in declining physical and mental health, entrusted defendant to care primarily for Robert Griffin.<sup>1</sup> RP 41. Robert Griffin suffered from many ailments including Parkinson’s disease and diabetes. RP 38, 40.

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<sup>1</sup> The State will refer to the Griffins by their respective first names to avoid confusion. The State does not intend any disrespect.

The Griffins hired defendant on privately, after initially finding him through a caregiver service, and increased his wages and hours despite their lack of income and struggles to make their mortgage payments. RP 42, 48. Defendant told the Griffins that he was a medical student at the University of Washington although he was not. RP 43, 199.

Defendant wrote himself five checks using the Griffins' checkbook after he found out where Frances kept it. RP 216. Over the course of a year, defendant forged, deposited, and cashed the following amounts from the Griffins' bank account: \$2,600 on December 11, 2006, \$4,000 on November 27, 2006, \$500.41 on January 7, 2007, and \$5,700 on January 3, 2007. RP 96-97. Defendant also forged and deposited \$9,300 on January 10, 2007, but was prevented from cashing the check. RP 96-97.

Defendant fled to Vietnam soon after forging and depositing the last two checks in January. RP 188. He told the Griffins he was going to visit family in Wyoming before he left. RP 52. Shortly after arriving in Vietnam, defendant cashed the \$5,700 check and attempted to cash the \$9,300 check. RP 199-189. The Griffins' bank, Columbia Bank, paid out all checks except the \$9,300 to defendant's bank account. RP 96-97.

Defendant was prevented from cashing the \$9,300 check because Frances noticed the forged checks and notified Columbia Bank. RP 51. The Griffins did not permit any one to access their bank accounts. RP 57. Frances contacted Kimberly Clanton, a Columbia Bank customer service employee, who froze the Griffins' accounts and told Frances to come in

immediately to fill out an affidavit of forgery. RP 148-151. Clanton helped Frances fill out the affidavit of forgery and write defendant's name into the preprinted line on the affidavit of forgery that says "I believe that \_\_\_ is responsible for the fraud." RP 151. The affidavit of forgery was admitted at trial as exhibit 11 during Clanton's testimony. RP 151.

Brett Bishop, a handwriting expert for the Washington State Patrol Crime Lab, and the Griffins' daughter, Annette Fender, testified that Frances did not write the disputed checks. RP 55, 116-117.

Defendant was arrested at SeaTac airport three years later when he attempted to return to the United States. RP 190. The Griffins both died before defendant was apprehended; defendant never once tried to contact them. RP 50, 63, 237. Defendant admitted to forging and cashing the \$9,300 and \$5,700 checks. RP 188.

C. ARGUMENT.

1. DEFENDANT'S CLAIM FAILS WHEN THE CHALLENGED EXHIBIT WAS PROPERLY ADMITTED UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, DOES NOT CONSTITUTE OPINION TESTIMONY, AND IS NOT PROPERLY BEFORE THE COURT.
  - a. As defendant did not object in the court below or raise an issue of manifest constitutional error, the case is not properly before the court.

Appellate courts will not consider an issue for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP

2.5(a). In *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), our Supreme Court considered whether a defendant may assign error to allegedly improper opinion testimony for the first time on appeal. The Court held: “[T]estimony of an investigating officer or examining doctor, if not objected to at trial, does not necessarily give rise to a manifest constitutional error.” *Kirkman*, 159 Wn.2d at 938. Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *Kirkman*, 159 Wn.2d at 927; *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

In the context of allegedly improper opinion testimony, manifest error “requires an explicit or almost explicit witness statement on an ultimate issue of fact.” *Kirkman*, 159 Wn.2d at 938. To establish manifest constitutional error, the defendant must establish actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. *O’Hara*, 167 Wn.2d at 99. In determining whether a claimed error is manifest, courts view the error in the context of the record as a whole, rather than in isolation. *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d (2008).

In determining whether the challenged testimony constituted manifest error, the *Kirkman* court emphasized that exceptions to RAP 2.5(a) must be narrowly construed, and that jurors are presumed to follow the court's instructions. *Kirkman*, 159 Wn.2d at 936-37. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *Id.* at 927.

It is the jury's responsibility to determine a defendant's guilt or innocence, and witnesses should not tell the jury what result to reach. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Thus, "[t]he general rule is that no witness, lay or expert, may 'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.'" *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987)).

In *State v. Montgomery*, a defendant was convicted of possessing pseudoephedrine with intent to manufacture methamphetamine. *Montgomery*, 163 Wn.2d at 583. At trial, three of the State's witnesses made the following statements without objection by the defendant: "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different, stores, going to different check out lanes. I'd seen those actions several times before;" "It's always

our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location;” and “these are all what lead me toward this pseudophedrine is possessed with intent.” *Montgomery*, 163 Wn.2d at 588.

The court determined that each statement was an impermissible opinion of the defendant’s guilt and found each statement particularly troubling because they were “quite direct” and “used explicit expressions” of personal belief. *Montgomery*, 163 Wn.2d at 594. Despite this finding, the court held that the defendant could not raise a challenge to the statements for the first time on appeal because the error did not cause actual prejudice or practical and identifiable consequences. *Montgomery*, 163 Wn.2d at 595. Because the record did not contain evidence that the improper opinions influenced the jury’s verdict and the jury was properly instructed that they were the sole judges of credibility, the error was not manifest. *Montgomery*, 163 Wn.2d at 596.

In *Jones*, the defendant sought review of two instances of allegedly improper opinion testimony of a CPS caseworker in a child abuse case; only one statement had been objected to in the trial court. *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993). The court examined the unobjected-to statement -“I believe you”- in the context it was made which was as a statement of reassurance to encourage the child victim to respond. The court found that as this comment was not an express

statement by the witness to the jury that she believed the victim, it did not constitute manifest constitutional error. *Jones*, 71 Wn. App. at 812-813.

Here, defendant challenges the court's admission of exhibit 11, an affidavit of fraud, for the first time on appeal. Because defendant made no objection when exhibit 11 was admitted at trial, defendant must show that any error is manifest as he failed to object to the exhibit below to warrant appellate review.

There is no reason for the court to have sustained objection by defense counsel regarding the admission of this exhibit. As discussed below, the exhibit did not constitute improper opinion testimony and was properly admitted under the business records exception to the hearsay rule.

Alternatively, even if the affidavit of forgery constituted improper opinion testimony, any error would not be manifest because similar to *Montgomery*, the jury was properly instructed that they were the sole judges of credibility. CP 27. "Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *Montgomery*, 163 Wn.2d at 595. Absent other evidence that the jury was fairly influenced, the court should presume the jury followed the court's instructions. *Montgomery*, 163 Wn.2d at 596.

As defendant fails to demonstrate that the trial court committed a manifest constitutional error, this issue is not properly before the court.

**i. The affidavit of forgery was properly admitted under the business records exception to the hearsay rule.**

Pursuant to ER 802, hearsay is not admissible except as provided by ER 803, other court rules, or by statute. The hearsay prohibition serves to prevent the jury from hearing statements without giving the opposing party a chance to challenge the declarants' assertions and to exclude evidence which may prejudice litigant's cause or defense. *Bundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 423, 191 P.3d 879 (2008); *State v. Picard*, 90 Wn. App. 890, 954 P.2d 336 (1998).

Business records may be admitted as evidence under certain conditions. Under ER 803(a)(6), such records are an exception to the hearsay rule. The admission of business records is governed by RCW 5.45.020:

“A record of an act, condition or event, *shall* in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”

(emphasis added)

The statute was adopted for the purpose of avoiding necessity of calling numerous witnesses who may have had a part in the creation of

such records. *Young v. Liddington*, 50 Wn.2d 78, 84, 309 P.2d 761 (1957). Such records are permitted in evidence to prove the truth and accuracy of the accounts presently and contemporaneously recorded. *Id.*

Testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation will be sufficient to properly introduce the record. *State v. Iverson*, 126 Wn. App. 329, 388, 108 P.3d 799 (2005); citing *Cantrill v. American Mail Line, Ltd.* 42 Wn.2d 590, 607-608, 257 P.2d 179 (1953). However, it is not necessary for the creator of the record or even the custodian of it to testify in order for the business record to be properly identified and authenticated.

*Iverson*, 126 Wn. App. at 338.

A trial court's decision to admit a document as a business record is reviewed for an abuse of discretion. *State v. Quincy*, 122 Wn. App. 395, 398-399, 95 P.3d 353 (2004). *State v. Garrett*, 76 Wn. App. 719, 722, 887 P.2d 488 (1995). "[W]here the trial court is satisfied that sufficient testimony has been adduced regarding the manner in which certain records have been kept and that their identity has been properly established in compliance with the act, no objection on the ground of hearsay can be entertained." *Iverson*, 126 Wn. App. at 338, quoting *Cantrill*, 42 Wn.2d 590, 607-608, 257 P.2d 179 (1953).

Here, Clanton's testimony established the proper foundation to admit exhibit 11, an affidavit of forgery. Clanton testified that after

Frances noticed the forged checks and contacted her, she told Frances to come to the bank as soon as possible and fill out an affidavit of forgery. RP 148. Clanton also testified that on January 30, 2007, she helped Frances fill out the affidavit of forgery and notarized it. RP 150-151. She also testified that affidavits of forgery are kept in Columbia Bank's possession for many years in the normal course of business. RP 151-152. The trial court admitted the affidavit of forgery without objection. RP 150-151.

Here, defendant claims that his right to a fair trial was compromised when the court admitted the affidavit of forgery. Defendant's claim fails because the affidavit of forgery was properly admitted under RCW 5.45.020, the business records exception to the hearsay rule. Clanton's testimony laid the proper foundation to admit the affidavit of forgery under RCW 5.45.020. Clanton testified to the identity of the record, that she helped make the record when Frances discovered the disputed checks, that the record was made in the regular course of business near the time of the event on January 30, 2007, and that Columbia Bank keeps the record for many years.

As Clanton's testimony establishes all of the elements necessary to admit exhibit 11 under the business records exception to the hearsay rule, the trial court did not abuse its discretion when it admitted exhibit 11.

ii. **Exhibit 11, an affidavit of forgery,  
was not opinion testimony.**

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant or on the credibility of a witness; such testimony is unfairly prejudicial to the defendant “because it invades the exclusive province of the jury.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Here, the challenged exhibit does not qualify as improper opinion testimony. Opinion evidence is testimony given during trial, while the witness is under oath, based on one’s beliefs or ideas rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59.

Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Demery*, 144 Wn.2d at 760, quoting *Heatley*, 70 Wn. App. at 579. Whether testimony constitutes an impermissible opinion on guilt will generally

depend on the specific circumstances surrounding each case. *Heatley*, 70 Wn. App. at 579. The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

In the instant case, defendant challenges for the first time on appeal, the trial court's decision to admit exhibit 11, an affidavit of forgery, under the business records exception to the hearsay rule. Defendant claims the preprinted line on the affidavit of forgery where defendant's name was filled in constitutes improper opinion testimony. The challenged exhibit does not qualify as opinion testimony. Opinion evidence is testimony given during trial, while witness is under oath, based on one's beliefs or ideas rather than direct knowledge of facts at issue. *Demery*, 144 Wn.2d at 759-760. The affidavit of forgery was filled out at Columbia Bank shortly after Frances noticed checks written to defendant in someone else's handwriting. Frances was not giving a sworn statement while under oath during trial when she wrote defendant's name

into the preprinted line. Defendant's claim that the exhibit constitutes improper opinion testimony fails because the affidavit of forgery does not even qualify as opinion testimony.

As the challenged exhibit does not constitute opinion testimony under well-established case law, this Court should dismiss defendant's claim.

**iii. Even if the statement was opinion testimony, it is admissible under ER 704.**

Generally, testimony given by lay and expert witnesses may not refer to defendant's guilt, but testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide. *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009). The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt. *Id.*

Pursuant to ER 704, testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." *State v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d

658 (1993); quoting *State v. Wilber*, 55, Wn. App. 294, 298, 777 P.2d. 36 (1989).

“The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony.” *Heatley*, 70 Wn. App. at 579. The court looks to the circumstances of each case to determine whether testimony constitutes a permissible opinion embracing an “ultimate issue.” *Id.* at 579. In doing this, courts should consider factors that “include the type of witness, the nature of the charges, the type of defense and the other evidence.” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *Heatley*, at 579).

To be “otherwise admissible,” within ER 704, danger of unfair prejudice must not substantially outweigh probative value, and the opinion or inference must satisfy evidence rules for admission of expert or lay opinion. *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999). To admit lay opinion testimony under ER 701, the non-expert opinions or inferences must be rationally based on the perception of the witness, helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

In this case, defendant claims that exhibit 11, an affidavit of forgery, constitutes improper opinion testimony. Defendant argues that the

preprinted line, in which his name was filled, that said, “I believe that \_\_\_ is responsible for the fraud” on the affidavit of forgery constitutes opinion testimony. RP 151. As discussed below, the affidavit of forgery did not constitute improper opinion and was properly admitted under the business records exception to the hearsay rule. Even if the court finds the singular statement to be an opinion statement, it is still admissible as it was part of a document properly admitted as a business record. “Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” *State v. We*, 138 Wn. App. 716, 158 P.3d 1238 (2007) (citing ER 704). Should the affidavit of forgery constitute witness testimony, it would be admissible as lay opinion testimony under ER 701 because it was filled out by Frances based on her rational perception, is helpful to the determination of a fact in issue, and her opinion was not based on any specialized knowledge within the scope of rule 702. Pursuant to ER 704, permissible opinion testimony is not objectionable. According to well-established case law, “[t]he fact that an opinion encompassing the ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony and improper opinion on guilt.” *Heatley*, 70 Wn. App. at 579.

As the affidavit of forgery constitutes permissible opinion testimony that is not objectionable, this Court should dismiss defendant's claim.

- b. Although the State does not concede that defendant raises an issue of manifest constitutional error, any error was harmless.

Even errors of constitutional magnitude may be considered harmless if "the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed.2d 321 (1986). To assess whether constitutional error is harmless, courts employ the "overwhelming untainted evidence" test. *Guloy*, 104 Wn.2d at 426. Under the overwhelming evidence test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985).

Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The trial court did not error in this case. However, should this Court find otherwise, any error was harmless. Here, there was overwhelming evidence to support the jury's guilty verdict. By defendant's own testimony, he knew where Frances kept the Griffins'

checkbook, forged and deposited their checks into his bank account knowing it was wrong, quickly fled to Vietnam to cash the checks, and never tried to contact the Griffins. RP 216, 210-211, 236. Defendant and Annette Fender both testified that he was not permitted access to the Griffins' bank accounts. RP 57, 208-209.

A handwriting expert, Brett Bishop, and Annette Fender testified that the disputed checks were not written by Frances. RP 55; 116-117. The officer assigned to the case, Andrew Hall, testified that he noticed the handwriting discrepancies of the disputed checks. RP 166-167.

Much of defendant's testimony was contradicted by bank statements and witness testimony, including his own. Although defendant testified that the \$4,000 check was a loan, by his own testimony, he never attempted to contact the Griffins after leaving to Vietnam. RP 195, 236. Contrary to defendant's testimony that the \$2,600 check was a reimbursement for purchases made at Best Buy, his bank statements did not show any purchases from Best Buy around that time. RP 231. Defendant's bank statements also conflicted with his testimony when he testified that he left for Vietnam on January 10, 2011, but statements showed purchases made at local retailers, numerous bank inquiries, and a \$6,700 cash withdrawal in the days following January 10, 2011. RP 218.

Witness testimony also shows that defendant lied to the Griffins about being a medical student and having to visit family in Wyoming. RP 52, 197-198.

The untainted evidence is overwhelming that defendant forged, deposited, and cashed the Griffins' checks. As the evidence is so overwhelming that it leads to a finding that defendant is guilty, any error was harmless.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronie*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must

demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "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, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on

the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

“What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.”

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel's unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990). It is improper for a witness to offer an opinion regarding the guilt or veracity of a defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

In the instant case, defendant alleges that his counsel was ineffective for failing to object to the State's motion to admit exhibit 11, an affidavit of forgery. As previously discussed, the affidavit of forgery was properly admitted under the business records hearsay rule and does not constitute improper opinion testimony. Therefore, there would be no reason for defense counsel to object to a properly admitted exhibit. Because the State laid the proper foundation to introduce the exhibit, there is no reason to assume that the court would have sustained the objections. The defendant's counsel appropriately chose not to object to the proper foundation to admit exhibit 11.

Further, a review of the entire record shows that defense counsel was an effective advocate for his client. Defense counsel cross-examined witnesses and made a closing argument. Counsel also objected at

appropriate times throughout the trial. Defendant received constitutionally effective assistance of counsel.

As defense counsel appropriately chose not to object to a properly admitted exhibit, counsel cannot be said to be ineffective.

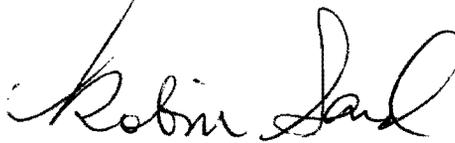
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: August 7, 2012.

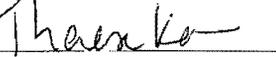
MARK LINDQUIST  
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Robin Sand  
Legal Intern

Certificate of Service:

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

8.7.12   
Date Signature

# PIERCE COUNTY PROSECUTOR

## August 07, 2012 - 3:15 PM

### Transmittal Letter

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Court of Appeals Case Number: 42901-2

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- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
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