NO. 43247-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE STEWART,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00447-1

BRIEF OF RESPONDENT

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SERVICE

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court's jury instruction created a mandatory presumption or relieve the State of its burden of proving each element of the charged offense, and whether this issue can be raised for the first time on appeal when the Defendant did not object below and when he cannot show a "manifest" error?

2. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offense beyond a reasonable doubt?

3. Whether Deputy Keeler's "mere reference" to the fact that the Defendant had not returned several phone calls constituted a comment on the defendant's exercise of his right to remain silent when the brief comment was clearly not used to imply guilt, nor could it have caused any prejudice, as the Defendant confessed to the Deputy that he had assaulted the victim?

4. Whether the Defendant's claim of ineffective assistance of counsel must fail when the Defendant cannot show cannot show either deficient performance or prejudice; both of which are required for a claim of ineffective assistance of counsel?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Bruce Stewart, was charged by information filed in Kitsap County Superior Court with one count of assault in the second degree. CP 1. A jury found the Defendant guilty of the charged offense, and the trial court imposed a standard range sentence. CP 9. This appeal followed.

B. FACTS

The charge in the present case was based on an assault in which the Defendant punched the victim (Richard Yanac) three times, causing extensive injuries.

The Defendant and Mr. Yanac knew each other as the Defendant was employed at the Bethel Tavern and Mr. Yanac was a frequent patron of that establishment. RP 56-57. On June 14th, 2010, Mr. Yanac drove to a residence in Port Orchard to visit a friend (Judy Orr). RP 59. On his way the Defendant drove past the Bethel Tavern. RP 59.

Mr. Yanac testified that when he arrived at Ms. Orr's house he was talking on his cell phone and got out of his truck. RP 69. Mr. Yanac saw that the Defendant was walking towards Ms. Orr's house. RP 68-9, 75, 82. As Mr. Yanac went to close his truck door he described that "the lights went out" and that the next thing he knew he was sitting on the ground near the truck door, and he remembered looking down and seeing that saw that his cell

phone was lying in pieces on the ground. RP 69, 78, 82. Mr. Yanac testified that he might have seen the Defendant at that point and might have asked "What's going on?" RP 82. As Mr. Yanac started to pick up the pieces of his cell phone the "lights went out again" and the next thing he remembered was waking up on Ms. Orr's couch. RP 69.

Deputy Donald Meserve of the Kitsap County Sheriff's office responded to the scene, and when he arrived he saw that Mr. Yanac was being loaded into an ambulance. RP 104. Deputy Meserve asked Mr. Yanac what had happened, and Mr. Yanac explained that he had been "jumped." RP 104. Mr. Yanac, however, was unable at the time to provide any further information. RP 105. Deputy Meserve saw that Mr. Yanac had bruising around the area of his right eye and there was a large lump on the left side of his forehead. RP 105. Pictures of Mr. Yanac's injuries were taken at the scene, and those pictures were admitted at trial. RP 105-06.

After the assault, paramedics initially took Mr. Yanac to Harrison Hospital, but he was immediately transferred to Harborview Hospital. RP 61. Mr. Yanac remained in Harborview for three weeks, and while he was there Mr. Yanac had no balance whatsoever and thus was unable to walk without falling over. RP 61-62. He also had no feeling in his left leg and left arm and thus was essentially unable to use either limb. RP 62-63. His vision was also affected, as he could only see in "black and white" in his left eye. RP 63.

Mr. Yanac also had problems with his vision and balance, as things would "start spinning" if he tried to stand. RP 62-63.

Prior to the assault, Mr. Yanac did not have any trouble seeing in color, did not have any difficulty in walking or using his arms, and his memory was fairly good. RP 57-58, 63-64.

After his three week stay at Harborview, Mr. Yanac was transferred to the Forest Ridge nursing home where he stayed for almost a year. RP 64. Mr. Yanac underwent daily physical therapy and also took medications for his conditions. RP 64. Over the course of his stay at Forest Ridge, Mr. Yanac's vision and the use of his arm and leg eventually improved. RP 64-65. By the time of trial Mr. Yanac had regained color vision in both eyes and could use his arm and leg, although he still used a "cane/chair device" for his balance and equilibrium. RP 65. Mr. Yanac's memory also improved somewhat during his stay at Forest Ridge. RP 66.

With respect to the assault investigation, Deputy Timothy Keeler of the Kitsap County Sheriff's Office contacted the Defendant on February 15, 2011. RP 85, 88. Deputy Keeler arrested the Defendant at that time and took him to a conference room at the Sheriff's office where he was advised of his Miranda rights. RP 90-91. The Defendant initially denied being involved in the assault and told the officer that he was either with his girlfriend or was in

the process of getting a traffic citation at the time of the incident. RP 93-94.

Later, however, the Defendant changed his story and admitted that he had assaulted Mr. Yanac, but the Defendant added that he didn't intend to hurt him as much as he did. RP 96. The Defendant explained that on the day in question he saw the Defendant drive by the Bethel Tavern. RP 96. The Defendant then followed the Defendant to the residence where the assault occurred, walked up to Mr. Yanac, and hit him about three times. RP 96. When asked why he had assaulted Mr. Yanac, the Defendant explained that his girlfriend had told him that the Mr. Yanac had been to her residence and made her feel uncomfortable. RP 97. The Defendant added that when he hit Mr. Yanac he probably told him to stay away from his girlfriend. RP 98.

III. ARGUMENT

A. THE TRIAL COURT'S JURY INSTRUCTION DID NOT CREATE A MANDATORY PRESUMPTION OR RELIEVE THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF THE CHARGED OFFENSE. FURTHERMORE, AS THE DEFENDANT DID NOT OBJECT BELOW AND BECAUSE HE CANNOT SHOW A "MANIFEST" ERROR, THIS ISSUE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The Defendant argues that the trial court's "recklessness" instruction included a mandatory presumption and thereby relieved the State of its burden of proving an element of the charged offense. App.'s Br. at 6. This

claim is without merit because (1) the Defendant cannot show that the error was "manifest" as there was no prejudice, and this issue, therefore, cannot be raised for the first time on appeal; and (2) because the jury instructions below did not create a mandatory presumption or relieve the State of its burden of proving each element of the charged offense.

The Defendant's did not object to the trial court's "recklessness" instruction below. Rather, the Defendant specifically stated that he had no objection to the instruction. RP 111. An appellate court generally does not review issues raised for the first time on appeal unless they are manifest errors affecting a constitutional right. *State v. Holzknecht*, 157 Wn. App. 754, 759-60, 238 P.3d 1233 (2010), *citing* RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988). Part of this analysis requires that the error must also manifest, and in this context, "manifest" requires a showing of 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 [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* (q*uoting State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

In cases where an issue regarding a jury instruction is properly before the court on appeal, the issue is whether the instructions permitted "the parties to argue their theories of the case, did not mislead the jury, and

properly inform the jury of the applicable law." *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The appellate court is to analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Pirtle*, 127 Wn.2d at 656-57.

This court has previously addressed the exact issues raised by the Defendant in the present case. For instance, in *State v. Keend*, 140 Wn.App. 858, 166 P.3d 1268 (2007) the defendant was convicted of assault in the second degree and on appeal he argued that "recklessness" instruction created a mandatory presumption, mislead the jury regarding an essential element, and misstated the law. *Keend*, 140 Wn.App. at 862-63. As in the present case, the recklessness instruction used in *Keend* stated that "Recklessness also is established if a person acts intentionally or knowingly." *Keend*, 140 Wn.App. at 864. The defendant in *Keend* argued that this last sentence of the "recklessness" instruction created a mandatory presumption and allowed the jury to convict him if it found that he had acted intentionally. *Id.* at 865. More specifically, Keend argued that this instruction allowed the jury to presume that he recklessly inflicted substantial bodily harm on the victim if the jury found that he intentionally assaulted the victim. Id.

This Court, however, rejected this argument, noting first the crime of assault in the second degree is defined by an act (assault) and a result (substantial bodily harm). *Keend*, 140 Wn.App. at 866. In addition the trial court's "to-convict" instruction set forth the elements of the crime separately as follows:

> (1) That on or about the 31st day of March, 2006, the Defendant *intentionally assaulted* Daniel Reeves;
>
> (2) That the Defendant thereby *recklessly inflicted substantial bodily harm* on Daniel Reeves; and
>
> (3) That the acts occurred in the State of Washington.

Keend, 140 Wn.App. at 867 (emphasis in original). The *Keend* court further noted that the trial court also separately defined "intentionally" and "recklessly." *Id* at 868. In addition, the *Keend* court explained that a "jury is presumed to read the trial court's instructions as a whole, in light of all other instructions." *Id* at 868. Given these facts this Court concluded that,

> [T]here was no possibility that the jury was confused. There was no conflation of the mental states. As a whole, the jury instructions, including the "to convict" instruction and the definition instructions, were clear, accurate, and separately listed. And we presume that juries follow all instructions that the trial court gives to them. *State v. Stein*, 144 Wash.2d 236, 247, 27 P.3d 184 (2001). There is no possibility that, because the jury found that Keend intended to punch the victim, it necessarily found that Keend intended to break the victim's jaw. In other words, the second sentence of the "recklessness" instruction did not allow the jury to presume that Keend intended to inflict substantial bodily harm if it found that he intentionally assaulted Reeves. Thus, we find no error.

Keend, 140 Wn. App. at 868.

The jury instructions in the present case exactly mirrored the instructions used in *Keend*, as the "to-convict" instruction set forth the elements of the crime separately and the court gave several instruction that separately defined "intentionally" and "recklessly." CP 45, 46, 49. *Keend*, therefore is directly on point and, but for a subsequent opinion from this Court, would control.

Two years after *Keend*, this Court again addressed the recklessness instruction. In *State v. Hayward*, 152 Wn.App. 632, 217 P.3d 354 (2009), the Defendant was convicted of assault in the second degree after a trial in which the jury had been given instructions identical to the ones used in *Keend* and the present case. *Hayward*, 152 Wn.App. at 640. On appeal the defendant argued (as had the defendant in *Keend*) that the "recklessness" instruction created a mandatory presumption. This Court ultimately agreed and held that that the jury instruction impermissibly allowed the jury to find that the defendant recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted the victim. *Hayward*, 152 Wn.App. at 645. This Court noted that this decision was directly contrary to the previous decision in *Keend*, but the Court noted that WPIC 10.03 had been modified after *Keend*. *Hayward*, 152 Wn.App. at 644.[1] This Court then explained

[1] The Court noted that the revised WPIC 10.03 stated: "[When recklessness [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if

that it was not following the *Keend* opinion, since,

> *Keend*, decided in 2007, did not have the benefit of the 2008 amended WPIC 10.03. The revision to WPIC 10.03, carried out in order "to more closely follow the statutory language," shows that the previous version of WPIC 10.03 (1994) did not adequately follow RCW 9A.08.010. WPIC 10.3 at 211 (2008). Had this court considered *Keend* after the amendment, it may have reached a different result.

Hayward, 152 Wn.App. at 645.

After the *Hayward* decision, Division One weighed in on the issue, in the case of *State v. Holzknecht*, 157 Wn. App. 754, 238 P.3d 1233 (2010). In that case the trial court instructed the jury that to convict the defendant it must find an intentional assault and reckless infliction of substantial bodily harm. *Holzknecht*, 157 Wn.App. at 761. As in *Kneed*, *Hayward*, and the present case, the trial court in *Holzknecht* also gave a "recklessness" instruction that included the statement that, "Recklessness is also established if a person acts intentionally or knowingly." *Holzknecht*, 157 Wn.App. at 761– 62. The *Holzknecht* court addressed *Hayward* and noted that it "relied heavily on the 2008 amendment to WPIC 10.03." *Holzknecht*, 157 Wn.App. at 765. The *Holzknecht* court, however, pointed out that "Clarification of the

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a person acts [intentionally] [or] [knowingly] [as to that [result] [fact].]]" *Hayward*, 152 Wn.App. at 644, *citing* WPIC 10.03(3rd ed 2008). The *Hayward* court also cited the WPIC Comments and noted that the Committee had explained that the instruction was modified "to more closely follow the statutory language." *Hayward*, 152 Wn.App. at 644, *citing* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, cmt. at 211 (3d ed.2008).

standard instruction does not amount to an indictment of earlier versions." *Id* at 765. The court thus "respectfully disagree[d]" with *Hayward* and found no error. *Id* at 765-66. Specifically, the court held that,

> We are persuaded the instructions here followed the statute and correctly informed the jury of the applicable law, including the rule that a mental state is established by proof of a more serious mental state. The instructions made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm. The instructions thus clearly require two separate inquiries[.]

Holzknecht, 152 Wn.App. at 766. The court then ultimately concluded that the instructions did not create a mandatory presumption or relieve the State of its burden of proof. *Holzknecht*, 152 Wn.App. at 766.

The Washington Supreme Court Committee On Jury Instructions has also weighed in on the conflict between *Hayward* and *Holzknecht*. In the Introduction to Washington's Pattern Jury Instructions for Criminal Cases, found at 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (3d Ed), the Committee clearly explained that the fact that a modification has been made to a pattern instruction does not mean that the prior version was erroneous. The Committee then specifically discussed the *Holzknecht* and *Hayward* opinions as follows:

> **Evolution of pattern instructions—Earlier versions not necessarily erroneous**. The committee regularly updates the pattern instructions. Changes to an instruction do not

> necessarily mean that earlier versions of the instruction were erroneous. Sometimes the committee updates an instruction to incorporate a change in law; more often, updated language merely reflects an intent to improve the wording of what was already an accurate statement of the law.
>
> This latter point has been succinctly stated by the Court of Appeals: "Clarification of [a pattern jury] instruction does not amount to an indictment of earlier versions." *State v. Holzknecht*, 157 Wn.App. 754, 238 P.3d 1233, 1239 (2010). The *Holzknecht* court expressly disagreed with a contrary analysis from *State v. Hayward*, 152 Wn.App. 632, 217 P.3d 354 (2009). In *Hayward*, another division of the Court of Appeals had concluded, in part, that a former pattern instruction was erroneous because the committee had later revised it to more closely follow statutory language. *State v. Hayward*, 152 Wn.2d at 644–46 ("The revision to WPIC 10.03. shows that the previous version of WPIC 10.03 did not adequately follow [the governing statute]"). *Hayward* thus could be interpreted as holding that a change in instructional language is presumptive evidence of earlier error. The committee hopes that *Hayward* will not be interpreted in this manner, and that courts will consider whether an instructional change is mere clarification, as in *Holzknecht*.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (3d Ed),

The State respectfully asks that this Court issue an opinion in the present case that is consistent with *Keend*, *Holzknecht*, and the WPIC Committee's commentary.

Simply put, the "to-convict" instruction in the present case clearly informed the jury that it was required to engage in two separate inquires. First, the jury had to decide whether the State had proven that the Defendant had "intentionally assaulted" Mr. Yanac. CP 49. Secondly, the jury had to

decide whether the Defendant had "recklessly inflicted substantial bodily harm" on Mr. Yanac. CP 49. The concepts of "intentionally" and "recklessly" were separately defined. CP 45, 46. As in *Kneed* and *Holzknecht*, this Court should conclude as a whole, the jury instructions, including the "to convict" instruction and the definition instructions, were clear, accurate, and separately listed. *Keend*, 140 Wn. App. at 868. Furthermore, the instructions made clear that a different mental state must be determined for each element (intent as to assault, and recklessness as to infliction of substantial bodily harm) and thus the instructions clearly required two separate inquiries. *Holzknecht*, 152 Wn.App. at 766. The instructions, therefore, did not create a mandatory presumption or relieve the State of its burden of proof. *Keend*, 140 Wn. App. at 868; *Holzknecht*, 152 Wn.App. at 766. [2]

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[2] This Court should also reject *Hayward* because in that case the court failed to recognize (before it rejected *Kneed*) that stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (*quoting In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Furthermore, the *Hayward* opinion itself was wrongly decided based on the reasons articulated in the *Holzknecht* opinion, and this Court should also reject *Hayward* because it is harmful. As a noted Florida judge once explained,

> Language tends to be an imprecise tool. Sadly, a clear and unambiguous sentence in the English language is the exception rather than the rule. When several lawyers are involved in the drafting process, unambiguous clarity becomes an even rarer event. If subjected to the rigors of linguistic analysis by philosophers, virtually any sentence contains ambiguity. See generally Ludwig Wittgenstein, Preliminary Studies for Philosophical Investigation, generally known as The Blue and Brown Books (N.Y. Harper Press 1958).

State v. Veilleux, 859 So.2d 1224 (Fla. 2d DCA 2003)(dissent by the Hon, Chris W. Altenbernd, C.J.). In the present context, common sense (and Wittgenstein) tell us that all

In conclusion, pursuant to *Keend*, *Holzknecht* the jury instructions below did not create a mandatory presumption or relieve the State of its burden of proving each element of the charged offense. The Defendant, therefore, cannot show that there was a "manifest" error or prejudice and the Defendant's claim (which was not raised below) should be rejected.[3]

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pattern jury instructions could potentially be improved or clarified. The WPIC Committee, therefore, should be encouraged to make changes to the pattern instructions when a better use of language is found. A judicial holding that states or implies that modification of existing instructions amounts to an indictment of earlier versions is harmful and should be avoided, as such a holding could have a chilling effect on the Committee's willingness to continue to produce the best pattern instructions possible, lest their modifications be misconstrued as an acknowledgement that prior versions were legally insufficient.

[3] Even if the jury instructions could be said to have erroneously conflated two mental states, any error would have been harmless in the present case. An erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). A constitutional error is harmless if we are convinced beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. *Neder*, 527 U.S. at 15; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). An error in a jury instruction that either omits or misstates an element is harmless if uncontroverted evidence supports that element. *Neder*, 527 U.S. at 18. Such is the case here. The evidence showed that the Defendant hit Mr. Yanac three times causing significant injuries. Furthermore, Mr. Yanac's testimony showed that after being hit and going "lights out" he found himself sitting on the ground, apparently dazed. Shortly thereafter he went "lights out" again suggesting that the Defendant hit him again while he was on the ground and that this punch was made with enough force to cause Mr. Yanac to go "lights out" again. This uncontroverted evidence, along with the evidence regarding Mr. Yanac's substantial injuries, supports the mental-state element of the Defendant's conviction, namely that the Defendant "recklessly inflicted substantial bodily harm." Any error, therefore, was harmless.

B. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

The Defendant next claims that the evidence was insufficient to support a guilty verdict. App.'s Br. at 17. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offense beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794

P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

To convict the Defendant of assault in the second degree, the State had to prove beyond a reasonable doubt that the he (1) intentionally assaulted Mr. Yanac, and that he (2) thereby recklessly inflicted substantial bodily harm. CP 49; RCW 9A.36.021(1)(a).

The evidence below showed that the Defendant admitted that he hit Mr. Yanac three times (although he claimed that he didn't intend to hurt him as much as he did). RP 96. Although Mr. Yanac suffered memory loss, while he was being loaded into an ambulance Mr. Yanac told Deputy Meserve that he had been "jumped," and Deputy Meserve saw that Mr. Yanac had bruising around the area of his right eye and there was a large lump on the left side of his forehead RP 104-05.

Mr. Yanac also described at trial that when he arrived at Ms. Orr's house he saw the Defendant, and that as Mr. Yanac went to get out of his truck "the lights went out" and that the next thing he knew he was sitting on the ground near the truck door and he remembering looking down and seeing that saw that his cell phone was lying in pieces on the ground. RP 68-9, 75, 78, 82. Mr. Yanac testified that he might have seen the Defendant at that point and might have asked "What's going on?" RP 82. As Mr. Yanac started to pick up the pieces of his cell phone the "lights went out again" and at the time of trial the next thing he remembered was waking up on Ms. Orr's couch. RP 69.

The evidence also showed that prior to the assault Mr. Yanac did not have any trouble seeing in color, did not have any difficulty in walking or using his arms, and his memory was fairly good. RP 57-58, 63-64. After the assault, however, Mr. Yanac had problems with his vision and balance and was unable to use his left arm or leg. RP 61-63. These problems lasted months, and Mr. Yanac had a lengthy hospital stay followed by nearly a year long stay in a nursing hone. RP 61-64.

Viewing this evidence in a light most favorable to the State, the record shows that there was sufficient evidence from which any reasonable juror could infer that when Mr. Yanac got out of his truck he was hit by the Defendant, causing the "light to go out" and causing him to drop his cell

phone and fall to the ground. The jury could also find that the Defendant then hit Mr. Yanac again, causing the "lights to go out" again. The jury could also find that this assault was the clear cause of Mr. Yanac's extensive injuries (which were obviously sufficient to meet the standard of substantial bodily harm). The Defendant's claim that there was insufficient evidence is, therefore, without merit.

C. DEPUTY KEELER'S "MERE REFERENCE" TO THE FACT THAT THE DEFENDANT HAD NOT RETURNED SEVERAL PHONE CALLS DID NOT CONSTITUTE A COMMENT ON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT BECAUSE THE BRIEF COMMENT WAS CLEARLY NOT USED TO IMPLY GUILT, NOR COULD IT HAVE CAUSED ANY PREJUDICE, AS THE DEFENDANT CONFESSED TO THE DEPUTY THAT HE HAD ASSAULTED THE VICTIM.

The Defendant next claims that the State impermissibly commented on his exercise of his right to remain silent. This claim is without merit because the comment at issue was, at best, a "mere reference" to silence and such a reference is not reversible error absent a showing of prejudice. Furthermore, the comment was clearly not used to imply guilt, nor could it have caused any prejudice, as the Defendant confessed to the Deputy that he had assaulted the victim.

It is, of course, improper for the State to invite the jury to infer guilt from a defendant's exercise of the constitutional right to remain silent. In cases where the trial court admits evidence of pre-arrest silence, the question remains whether the State used it as evidence of the defendant's guilt. *See State v. Lewis*, 130 Wash.2d 700, 707, 927 P.2d 235 (1996).

Furthermore, a statement will not be considered a comment on a constitutional right to remain silent if "standing alone, it was 'so subtle and so brief that it did not 'naturally and necessarily' emphasize defendant's testimonial silence.'" *State v. Crane*, 116 Wash.2d 315, 331, 804 P.2d 10 (1991) (*quoting State v. Crawford*, 21 Wash.App. 146, 152, 584 P.2d 442 (1978)). A remark that does not amount to a comment is considered a "mere reference" to silence and is not reversible error absent a showing of prejudice. *Lewis*, 130 Wn.2d at 706–07, 927 P.2d 235. Thus, focusing largely on the purpose of the remarks, this court distinguishes between "comments" and "mere references" to an accused's prearrest right to silence. "Merely mentioning a suspect's prearrest silence generally is not a violation." *State v. Curtis*, 110 Wn.App. 6, 11, 37 P.3d 1274 (2002). A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *Tortolito*, 901 P.2d at 391. That did not occur in this case.

An indirect reference to the right to remain silent occurs when a witness refers to a comment or an action by the defendant that infers an attempt to exercise the right to remain silent. *Pottorff*, 138 Wn.App. 343, 347, 156 P.3d 955 (2007). Indirect references are so subtle and brief that they do not necessarily emphasize the defendant's testimonial silence. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008), *quoting State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). Review of an indirect reference requires use of a nonconstitutional harmless error standard to determine whether the error probably affected the outcome of the trial. *Pottorff*, 138 Wn.App. at 347. Finally, when examining an error to determine harmlessness, an appellate court

In the present case, Deputy Keeler's brief mention of the fact that the Defendant had not returned his calls was, at best, a 'mere reference" to silence. In addition, as the Defendant confessed to assaulting the Mr. Yanac, the brief mention of the unreturned calls was clearly not "used" to imply guilt and could not have caused any prejudice. To the contrary, the fact that the Defendant had not returned several phone calls could not have led the jury to any conclusions other than what was ultimately provided by the Defendant's confession.[4] Thus, (even assuming that there was error) any error was clearly

[4] In his closing argument defense counsel stated, "You haven't heard any evidence or argument from me that Mr. Stewart did not admit to hitting Mr. Yanac. I'm not making that

harmless.[5]

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argument. That's not what this case is about." RP 150.

[5] The Defendant also claims that in his closing argument the prosecutor "highlighted" the Defendant's failure to return the Deputy's calls. App.'s Br. at 23. The record, however, shows that the prosecutor in no way attempted to "use" the lack of returned calls to imply guilt. First, of course, the State obviously did not rely on the Defendant's silence to imply that the Defendant had assaulted Mr. Yanac; rather the State relied on the Defendant's own admission that he assaulted Mr. Yanac. Secondly, the brief comment in closing was merely a fair response to arguments raised by defense counsel. *See, e.g, State v. Russell,* 125 Wash.2d 24, 87, 882 P.2d 747 (1994) (a prosecutor is "entitled to make a fair response to the arguments of defense counsel."). In the present defense counsel in his closing argued that the Defendant's confession was less damning because the confession was made eight months after the assault. RP 150-51. Defense counsel also specifically argued that the confession would have carried more weight if Detective Keeler had had the conversation with the Defendant on the day of the assault. RP 150. These comments clearly implied that the police investigation was untimely and that the State's case was less persuasive due to the delay. In response to this argument the prosecutor merely made the following statement:

> Defense counsel made a point of describing how Mr. Stewart made his confession down the road, months had gone by. Well, it's true. Mr. Stewart didn't tell the police how he was involved with the injuries to Mr. Yanac until many months had gone by. Mr. Stewart's choice. But when he did, he admitted, I hit him; I hit him because I was angry because of what had happened with my girlfriend; I hit him multiple times.

RP 155. This comment from the prosecutor was a fair response to the defense argument and does not represent an argument where the State was arguing that the jury should somehow infer guilt based on the Defendant's silence. Rather, the prosecutor was merely arguing about the timing of the Defendant's statement and asking the jury to find guilt based on the Defendant's actual statement (not his silence). In short, there was nothing improper regarding this argument. Furthermore, even if one were to assume that the argument was somehow improper, any error was clearly harmless since the State's case was based on the Defendant's actual confession, and the mere fact that the Defendant's failure to return a few phone messages (even assuming he got those messages) could not have caused any prejudice since the Defendant actually confessed to the assault.

D. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE THE DEFENDANT CANNOT SHOW CANNOT SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE; BOTH OF WHICH ARE REQUIRED FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant next claims that he received ineffective assistance of counsel. App.'s Br. at 23. This claim is without merit because the Defendant cannot show either deficient performance or prejudice; both of which are required for a claim of ineffective assistance of counsel.

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

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

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

Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335; *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. *McFarland*, 127 Wn.2d at 335, *citing* See Washington State Bar Ass'n, Appellate Practice Desk Book § 32.2(3)(c), at 32-6 (2d ed. 1993)

(*citing State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981)). Because the Defendant has not filed a personal restraint petition, the issue in this case must be decided based on the trial records identified on appeal. *McFarland*, 127 Wn.2d at 335

The Defendant in the present case argues that his counsel was ineffective for failing to object to Deputy Meserve's testimony that Mr. Yanac (while being loaded in to the ambulance) stated that he had been "jumped." App.'s Br. at 26. The Defendant claims that he objection would have been sustained or admitted for a limited purpose (with an accompanying limiting instruction. App.'s Br. at 27.

The Defendant, however, cannot show that defense counsel's failure to object was not a legitimate strategic or tactical decision. For instance, if counsel had objected the State would have been required to ask additional details concerning Mr. Yanac's condition at the time of the statement in order to establish that the statement qualified as an excited utterance. This would have necessarily entailed the State producing more testimony regarding Mr. Yanac's condition, appearance, and mental state during the time he was being loaded into the ambulance. In addition, given the fact that the statement was made shortly after the assault and while Mr. Yanac was obviously still suffering the physical effects of the assault, Defense counsel could have reasonably concluded that the State would easily be able to establish that he

statement was an excited utterance and that forcing the State to develop further evidence on this point would be detrimental to the Defendant's case.

Furthermore, as the defense theory centered on an argument that the State's evidence of causation was thin, defense counsel could have legitimately concluded that objecting and thereby forcing the State to provide additional evidence regarding Mr. Yanac's condition as he was being loaded into the ambulance was not a good idea. In short, the Defendant cannot show that trial counsel's decision not to object was not a legitimate trial strategy.

Similarly, the Defendant cannot show, based on the record before this Court, whether the objection would have been sustained. Rather, as no objection was made below the record was simply not developed on this point. The facts here are similar to those in *McFarland* where trial counsel did not move to suppress evidence obtained as a result of a search. The Supreme Court held that "because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion." *McFarland*, 127 Wn.2d at 334. The Supreme Court further noted:

> Because no motion to suppress was made, there exists no record of the trial court's determination of the issue .... We recognize the predicament this causes for [defendants: each] must show the motion likely would have been granted based on the record in the trial court, yet the record has not been developed on this matter because the motion was not made.

McFarland, 127 Wn.2d at 334 n. 2.

As there is a strong presumption that counsel provided competent representation, the Defendant simply cannot show that his counsel was ineffective based on the limited record below. Rather, defense counsel could have simply concluded that (after reviewing the discovery, etc) that the statement would have been admitted as an excited utterance (or pursuant to some other exception).[6]

In short, the Defendant's claim of ineffective assistance must fail given the strong presumption of effective representation, the Defendant's failure to show the absence of a possible strategic reason for the decision not to object, and the Defendant's failure to show that an objection would have been sustained (given the limited record before this court).

The Defendant also claims that his counsel was ineffective for failing to raise a corpus delecti challenge. App.'s Br. at 25. Specifically, the Defendant claims that the independent evidence failed to establish evidence of a crime. The actual record, however, showed that Mr. Yanac was "jumped" and suffered numerous injuries. This evidence was sufficient to establish the corpus delecti of the crime.

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[6] *See, e.g*, ER 803(a)(2) provides an exception to the hearsay rule for "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Thus, there are three requirements: (1) a startling event or condition occurred, (2) about which a statement was made by a declarant (3) while the declarant is still under the stress or excitement caused by the event. *State v. Thomas*, 150 Wn.2d 821, 853, 83 P.3d 970 (2004).

The Defendant appears to argue that even if this evidence was sufficient to establish the corpus delecti of assault, the evidence would have been insufficient without the evidence that Mr. Yanac reported that he had been "jumped." App.'s Br. at 26. As outlined above, however, Mr. Yanac's statement was part of the evidence below, no objection was raised to this evidence, and the Defendant has failed to show that an objection to this evidence would have been sustained, even if such an objection had been raised below. The Defendant's corpus claim (which appears to be dependent on the suppression of Mr. Yanac's statement) is without merit based on the actual record below.

Finally, the Defendant argues that his counsel was ineffective for failing to object to the brief mention that the Defendant had not returned Deputy Keeler's phone calls. As outlined above, the mention of the phone calls was brief and there was no testimony that the Defendant had even received the messages. Furthermore, the Defendant simply cannot show any prejudice (a necessary element of any ineffective assistance claim), since the Defendant eventually spoke to the deputy and admitted that he had hit Mr. Yanac. In short, any potential for prejudice from the brief mention of the unreturned calls was obviated by the fact the Defendant himself admitted he had assaulted Mr. Yanac.

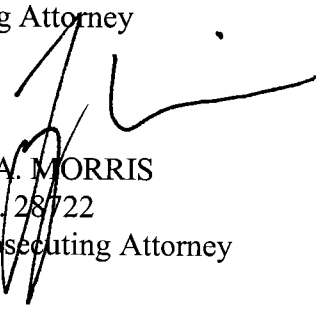
IV. CONCLUSION

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

DATED November 7, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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