

NO. 44285-0-II

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

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STATE OF WASHINGTON, Respondent

v.

ZACHARY HOLDEN CRAWFORD, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01628-3

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE STATE RELIED UPON ONE INCIDENT OF POSSESSION OF A CONTROLLED SUBSTANCE AND THERE WAS NO NEED FOR A UNANIMITY INSTRUCTION
- II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT
- III. THE COURT DID NOT IMPROPERLY ADMIT OPINION TESTIMONY
- IV. THE EVIDENCE WAS SUFFICIENT TO SUPPORT CRAWFORD'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE
- V. CRAWFORD RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

B. STATEMENT OF THE CASE

Zachary Crawford was charged with Possession of a Controlled Substance, Methamphetamine, contrary to RCW 69.50.4013(1). CP 1. Crawford asserted the defense of unwitting possession at trial. RP at 108. A jury convicted Crawford of Possession of a Controlled Substance, Methamphetamine. RP at 119.

At trial the evidence showed that Crawford was on supervision with the Department of Corrections in September 2012. RP 18-19. On September 5, 2012, DOC Officer Brian Ford conducted a home search of Crawford's residence. RP at 41-42. In Crawford's bedroom, Officer Ford

discovered a plastic baggie with a white crystal substance inside Crawford's bed. RP at 43. Police Officer Gerardo Gutierrez tested the substance found inside the plastic baggie and it field tested positive for methamphetamine. RP at 56. The substance was sent to the Washington State Patrol Crime lab where scientist Catherine Dunn tested the substance and it tested positive for methamphetamine. RP at 71 The amount of methamphetamine inside the plastic baggie was described as a "residue quantity." RP at 71.

Officer Gutierrez spoke to Crawford after advising Crawford of the *Miranda* warnings and Crawford said the baggie belonged to him and that it was originally \$20.00 worth of methamphetamine that he had gotten a day earlier. RP at 57.

Crawford testified that he had bought methamphetamine on September 4, 2012 and smoked it using a glass pipe. RP at 82-83. Crawford believed the bag was empty after he smoked the contents. RP at 83. It slipped his mind that the baggie was still in his bed. RP at 84.

After being convicted of possession of a controlled substance, methamphetamine, Crawford was sentenced to a standard range sentence of 30 days. CP 19. This appeal timely follows.

C. ARGUMENT

I. THE STATE RELIED UPON ONE INCIDENT OF POSSESSION OF A CONTROLLED SUBSTANCE AND THERE WAS NO NEED FOR A UNANIMITY INSTRUCTION

Crawford argues that the State argued to the jury that it could convict him for an uncharged incident of possession of a controlled substance. However, the State did not rely on a second incident of possession and a unanimity instruction was not needed under the facts. Further, even if the State's mention of the prior day gave the jury the impression it could convict for that incident, it was one continuing act of possession and not two separate incidents, so a unanimity instruction was not necessary. Crawford's arguments are without merit.

If evidence of more than one criminal act is presented, the jury must be unanimous in deciding that the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). If the State elects which act upon which it relies for a conviction and when that election is made, no unanimity instruction is required. *Id.* In Crawford's case, evidence of only one criminal act was relied upon and the State clearly elected the criminal act which it alleged formed the basis of the crime of Possession of a Controlled Substance.

Crawford argues that the prosecutor relied on two distinct instances of possession. However, this contention is not supported by the record. The evidence showed Crawford was on probation and an officer performed a search of his bedroom. RP at 41-42, 54. Within his bed, the officer discovered a small, plastic baggie which contained residue of methamphetamine. RP at 43-44, 56. The State argued this constituted possession of a controlled substance. In response to Crawford's argument that this possession was unwitting, the State referred in argument to the fact that Crawford admitted to buying and consuming methamphetamine that was packaged in that baggie. This argument and reference to a potential prior instance of possession was solely to address Crawford's knowledge of the methamphetamine in the baggie and not as the basis for the criminal act of possession.

During his closing argument, the prosecutor made it clear that the methamphetamine Crawford possessed was the very small amount found in the plastic baggie in his bed by the police officers who searched his room. 1 RP at 105. The prosecutor referenced the admitted exhibit, which was the baggie that contained methamphetamine, and told the jury,

And I know it's hard to see and I'll concede it's not a lot. But when you look in there, what you're seeing is methamphetamine. They're little tiny crystals of methamphetamine. And that's what was found in the Defendant's possession.

RP at 105. The prosecutor also argued,

I have to prove the elements to you beyond a reasonable doubt and that's—that's what I've done. On or about September 5, 2012 here in Clark County, Washington, the Defendant possessed a controlled substance. We know it was around September 5<sup>th</sup>. The officers came to his house on that date around midnight, September 5<sup>th</sup>/September 6<sup>th</sup>. We know it occurred here in Clark County. We know it was the Defendant. He was—he was there and the officers identified him. That's whose home it was, he admitted it was his home, he admitted what was found there was his... We know it was methamphetamine, that substance recovered from his—from his bed.

RP at 105-06. From the prosecutor's argument it is clear that the State relied upon the evidence of one incident and argued that one incident to the jury as the basis to convict for the charge.

Even if the court finds the prosecutor did rely upon the possession of the methamphetamine from September 4<sup>th</sup>, and from September 5 or 6<sup>th</sup>, it was one continuing course of conduct and not two separate acts. "Under appropriate facts, a continuing course of conduct may form the basis of one charge..." *Petrich*, 101 Wn.2d at 571. To determine whether the facts amount to one continuing offense or several distinct acts, the facts should be evaluated in a common sense manner. *Id.* In *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994), the court concluded that the defendant's possession of a controlled substance did not constitute a continuing course of conduct when his two instances of cocaine possession occurred at

different times, in different places and involved two different containers.  
*King*, 75 Wn. App. at 903.

However, in *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294 (1995) the Court found that two deliveries of controlled substances that occurred at different times and places did not require a unanimity instruction because they were both intended for the same ultimate purpose: the delivery of cocaine by the defendant to another individual. *Fiallo-Lopez*, 78 Wn. App. at 726.

[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts.

*Id.* at 724.

As in *Fiallo-Lopez*, *supra*, Crawford's actions were done with the same objective- to possess a controlled substance for personal use. This fact supports the characterization of the two acts that Crawford cites to as a continuing course of conduct. Not only did Crawford possess the methamphetamine on September 4th and 5th with the same objective, but the drugs were in the same baggie and it was from the same purchase, and the possession on the 5<sup>th</sup> was the residue from the possession on the 4<sup>th</sup>. All the evidence here would support that this was a continuing course of conduct and no unanimity instruction was necessary.

Even if one was needed, it was harmless error for the trial court to fail to give a unanimity instruction. When a court fails to give a unanimity instruction when one is necessary, the court on review applies constitutional harmless error analysis. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). If the error was harmless beyond a reasonable doubt, it is not reversible error. *Id.* (citing *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990)). The question to ask is whether a “rational trier of fact could find that each incident was proved beyond a reasonable doubt.” *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091. *review denied*, 105 Wn.2d 1003 (1985). In *Camarillo*, the court concluded that where evidence of two incidents had been presented and the jury believed one incident occurred, all the incidents must have occurred. *Camarillo*, 115 Wn.2d at 72. The same reasoning applies here. There was no dispute in the evidence: Crawford bought methamphetamine on September 4, 2012. He consumed the majority of the amount he purchased. He retained the baggie that the purchased methamphetamine came in; residue remained on the baggie. He continued to possess the baggie on September 5, 2012 when it was discovered in his bed by police. As there was no conflicting evidence, it is clear the jury believed the defendant possessed a substance which was methamphetamine. If there was any error, it was harmless.

For all the foregoing reasons a unanimity instruction was not necessary. The trial court did not err in failing to give a unanimity instruction. As there was either no error, or the error, if any, was harmless, the trial court should be affirmed.

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Crawford argues that the prosecutor committed misconduct by misstating the law of the defense of unwitting possession. The prosecutor did not misstate the law; even if the prosecutor did misstate the law, it was not so flagrant and ill-intentioned as to deny Crawford a fair trial and therefore he is not entitled to relief.

At trial, Crawford did not object to the prosecutor's closing argument. Crawford now assigns error to the prosecutor's argument regarding unwitting possession. A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681

(2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*,

150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the

remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

In Crawford's case, the prosecutor did not misstate the law, and any potential misstatement by the prosecutor did not affect the jury verdict. Though the prosecutor's argument regarding unwitting possession may not have been a model of clarity, he did accurately portray that it was not unwitting possession to claim to not realize that residue would be left in a baggie of methamphetamine or that drops would remain in an 'empty' can of soda. Crawford testified that the baggie found by the police had contained methamphetamine. RP at 82. The prosecutor's statements amounted to an argument that it was not reasonable for Crawford to believe there would be no trace amounts of the original substance still in the package and therefore he had knowledge that he possessed it. This statement, when the argument is taken in its entirety, does not amount to misconduct and would not have affected the jury's verdict.

Crawford also asserts that the prosecutor committed misconduct by telling the jury that they could "ignore the date and time element and convict Mr. Crawford based solely on his admission to previous unlawful conduct." Br. of Appellant at p. 15. First, the prosecutor made no such

statement. Crawford singles out one short statement amidst the prosecutor's argument that states, "he said 'yeah, that's mine. I bought it a day ago.' That's possession of a controlled substance." Br. of Appellant at p. 15. This statement came on the heels, in the same breath, as the prosecutor's summary of the evidence as follows:

It's not a discarded item. It's an item that he left in his bed after smoking and what did—what he testified to, after he purchased that bag, he had smoked some of it in his bedroom and then he left it there. It kind of boils down to this: he admitted he bought meth, he tells the police the location where it's found is—is his room. We—we have methamphetamine, again, not—a small amount, but we have visible, discernible methamphetamine that can be manipulated, adjusted, it's—that substance in there is methamphetamine. And when confronted by Officer Gutierrez, he didn't say, "I thought that was all gone. I didn't realize anything was left." He said, "yeah, that's mine. I bought it at—I bought it a day ago." That's possession of a controlled substance. That's possession of methamphetamine. It was in an area that he had dominion and control over. It was in his room and his bed and he knew exactly what he had.

RP at 110-11. The prosecutor's statement "that's possession of a controlled substance" was not, as Crawford argues, in reference to the defendant having said he bought it a day ago; it was in reference to the summary of the evidence the prosecutor had just recited to the jury. The facts in whole, the totality of the facts presented to the jury proved possession of a controlled substance. The prosecutor's argument was in no way improper.

Crawford cannot show that the prosecutor's statements amounted to misconduct and he cannot show that they were so flagrant and ill-intentioned that they affected the outcome of the trial. His claim of prosecutorial misconduct is without merit.

III. THE COURT DID NOT IMPROPERLY ADMIT OPINION TESTIMONY

Crawford argues that the trial court improperly admitted evidence of one witness' opinion on his guilt. The complained of testimony does not express an opinion of the defendant's guilt, it is a description of a "usable amount" of methamphetamine. But even if this Court finds it is improper opinion testimony, the evidence of Crawford's guilt is so overwhelming that any improper opinion was harmless beyond a reasonable doubt.

Generally, no witness may give an opinion on the defendant's guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). However, testimony that does not directly comment on the defendant's guilt, helps the jury, and is based on inferences from the evidence is not improper opinion evidence. *State v. Johnson*, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009).

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the

charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

*State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009) (citing *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001))).

Though the testimony complained of here involves a police officer, the actual testimony in no way offered an opinion on Crawford's guilt or his affirmative defense. The question that the officer was responding to, asked about a usable amount of methamphetamine. RP at 60. The officer's response, defined what, in his experience, a usable amount of methamphetamine was and he explained that the fact that someone keeps drugs around, to him, means it is a usable amount. This evidence was relevant to answer the defendant's theory of the case that it was unwitting possession. This officer was experienced in drug investigations, worked undercover, and his expertise was not questioned at trial, nor here on appeal. His knowledge of a usable amount of methamphetamine was relevant to show possession and to rebut the defense of unwitting possession. This statement in no way expressed to the jury that the officer believed the defendant was guilty or disbelieved his defense.

Even if this Court finds the officer offered an improper opinion on Crawford's guilt, it is not reversible error as the error was harmless. The

erroneous admission of opinion testimony as to the defendant's guilt is subject to harmless error analysis. *State v. We*, 138 Wn. App. 716, 727, 158 P.3d 1238 (2007). On analyzing whether a constitutional error was harmless, this court assumes that "the damaging potential of the [inadmissible testimony was] fully realized." *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (1985) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). The court must be satisfied that the error was harmless beyond a reasonable doubt, meaning that the obtained evidence is so overwhelming that it would necessarily lead to a guilty verdict. *We*, 138 Wn. App. at 727 (citing *Moses, supra* at 732 (quoting *Van Arsdall*, 475 U.S. at 684) and *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005), *aff'd*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

Any error of the court in admitting this testimony was harmless beyond a reasonable doubt. There is overwhelming evidence that Crawford committed the crime of possession of a controlled substance. To any extent that the officer's testimony could have been taken as an opinion on Crawford's guilt, that opinion was negligible, and the other evidence is so overwhelming that any trier of fact would have returned a guilty verdict.

IV. THE EVIDENCE WAS SUFFICIENT TO SUPPORT CRAWFORD'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE

Crawford argues this Court should assert its judicial authority to create an additional element for the crime of Possession of a Controlled Substance under RCW 69.50.4013. Crawford argues this Court has the common law authority to change crimes as it sees fit. Crawford bases this argument on a misreading of RCW 9A.04.060. Further, the legislature has been clear in its definition of the crime of possession of a controlled substance and there is no minimum amount of a controlled substance required to sustain a conviction. *See State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991), *review denied*, 118 Wn.2d 1019 (1992); *State v. Larkins*, 79 Wn.2d 392, 394, 486 P.2d 95 (1971).

RCW 9A.04.060 states,

The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.

RCW 9A.04.060. This statute recognizes that provisions of common law still exist and are valid law insofar as they do not conflict with statutes. This state does not, as Crawford asserts, give the judiciary the authority to create elements of crimes. Contrary to Crawford's contention that this

Court should change the elements of the crime of Possession of a Controlled substance under the authority granted by RCW 9A.04.060, this statute does not imbue the Court with the authority to change statutes; it simply allows the court to recognize common law elements which already exist, but which are not explicitly stated in the statute. Further, Washington courts adopt the common law *only* to the extent that it is consistent with Washington statutory law. *Id.* In order for this Court to recognize an element to drug possession statutes of a minimum amount, this Court would have to find at common law, such an element exists. Crawford has set forth no authority that such an element existed in common law, and the State has found none.

Further, the statute criminalizing possession of controlled substance is unambiguous. This Court reviews questions of statutory interpretation *de novo*. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). This Court should determine the statute's plain meaning and give effect to that meaning. *Id.* A statute's plain meaning is to be determined from the ordinary meaning of the language of the statute, the context of the statute, related provisions and the statutory scheme as a whole. *Id.* Words or meanings that the legislature has chosen not to include in a statute may not be added. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The statute under which Crawford was charged provides, It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1). It is unambiguous that from the plain language of RCW 69.50.4013, it does not contain an element requiring a “measurable amount” or a “usable amount” or any other such minimum amount requirement. This Court is constrained from creating one now. *J.P.*, 149 Wn.2d at 450.

Crawford argues that any visitor from the State of Florida would likely be guilty of possessing cocaine upon arrival because traces of cocaine are found on much of the currency in Florida. Br of Appellant, p. 20-21. However, Washington’s recognition of an unwitting possession defense alleviates any concern that a person would be convicted for possessing the cocaine that may be found on any dollar bills in his or her wallet. *See State v. Rowell*, 138 Wn. App. 780, 785, 158 P.3d 1248 (2007).

In *State v. Malone*, 72 Wn. App. 429, 864 P.2d 990 (1994) Division 1 of this Court addressed whether the Possession of a Controlled Substance statute requires proof of a certain amount of the unlawful substance to sustain a conviction. The Court found that the possession statute does not “require that a minimum amount of drug be possessed, but

that possession of *any* amount can support a conviction.” *Malone*, 72 Wn. App. at 439 (emphasis original). The Court further noted that “it is within the province of the Legislature to decide whether the possession of a minute quantity of a controlled substance should be punished under the statute.” *Id.* at fn 12 (citing to *State v. Cook*, 26 Wn. App. 683, 686, 614 P.2d 215 (1980)).

The legislature is presumed to be aware of case law and had it wished to create an element that required a measurable amount of a controlled substance, it could have done so. It is worth noting that the possession statute has been revised or amended many times over the course of the past 20 years. Had the legislature wished to create an element as Crawford suggests this court should, it would have done so.

Absent a measurable amount element in either the statutory provisions regarding unlawful possession of a controlled substance, or the common law, it was unlawful for Crawford to possess *any* amount of methamphetamine. Crawford possessed a plastic bag that tested positive for methamphetamine residue. There was sufficient evidence presented at trial that he possessed a controlled substance.

V. CRAWFORD RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Crawford argues his attorney was ineffective for failing to object to errors in testimony and the prosecutor's closing argument. As discussed above, there was no improper testimony offered, and the prosecutor did not commit misconduct, so there was no objection for the defense attorney to make. However, even if the court finds the defense attorney should have objected, Crawford cannot show any prejudice for the failure to object. Crawford's claim for ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires

showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel’s performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney’s performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel’s performance *Strickland*, 466 U.S. at 689-91

First, the police officer involved did not offer improper opinion testimony. A defense attorney need not object to unobjectionable questions and answers during a trial. Further, as discussed above, even if there was improper opinion evidence admitted, it was harmless. Crawford cannot show any prejudice by his attorney’s failure to object to this statement.

Secondly, there was nothing objectionable in the prosecutor’s closing arguments for the defense attorney to object to. As discussed above, Crawford takes the prosecutor’s statements out of context when assigning error. As the defense attorney listened to the entire closing

argument as a whole, she knew there was no improper argument offered by the prosecutor. Further, none of the statements that Crawford complains of were so flagrant and ill-intentioned as to affect the outcome of the trial; Crawford cannot show any prejudice for his attorney's failure to object to these statements.

Crawford's claims of ineffective assistance of counsel fail.

D. CONCLUSION

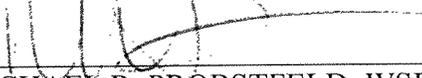
Crawford received a fair trial, with effective counsel. Crawford received a unanimous verdict for the one incident the State proceeded on at trial; there was no prosecutorial misconduct or improper opinion evidence offered, and the State offered sufficient evidence to support the jury's verdict of guilty. Crawford's claims of error are not supported by the record and are without merit. The State respectfully requests the trial court be affirmed in all respects.

DATED this 11<sup>th</sup> day of August, 2013.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
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# CLARK COUNTY PROSECUTOR

## August 19, 2013 - 2:31 PM

### Transmittal Letter

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