

NO. 45541-2

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

STATE OF WASHINGTON, RESPONDENT

v.

RICKEY KITCHENS, APPELLANT

**Appeal from the Superior Court of Pierce County
The Honorable James Orlando**

No. 12-1-03902-1

BRIEF OF RESPONDENT

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WPIC 1.0215

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

1. Has defendant failed to show that his right to a public trial was violated when the written peremptory challenge list made in an open court exchange and sidebar discussions were both later made part of the public record?
2. Whether the trial court properly allowed the troopers to testify about conclusions from their investigations when such testimony did not contain hearsay or violate defendant's confrontation rights?
3. Has defendant failed to meet his burden of showing his counsel was ineffective for choosing not to object to testimony which was not objectionable?

B. STATEMENT OF THE CASE.

1. Procedure

On October 16, 2012, the Pierce County Prosecutor's Office charged RICKEY KITCHENS, hereinafter "defendant," with one count felony driving under the influence. CP 1-2. The case proceeded to trial on October 7, 2013, in front of the Honorable James Orlando. RP¹ 3. During

¹ The majority of the verbatim report of proceedings is paginated consecutively and will be referred to as "RP." The report of proceedings from October 8th, 2013, involving jury selection will be referred to as "IRP."

a CrR 3.6 hearing, the court granted defendant's motion to suppress the blood draw. CP 34-36; RP 126-128.

At the conclusion of the trial, the jury found defendant guilty. RP 382; CP 18. The court sentenced him to 22 months to be followed by 12 months of community custody. RP 391; CP 39-52. Defendant filed a timely notice of appeal². CP 56.

2. Facts

On September 1, 2012, around 1:30pm, Brenda Petersen was driving southbound on highway 167 in Pierce County when she observed an accident. RP 142-143. She was in the left hand lane of a two lane road just behind a Jeep Cherokee pulling a camper trailer that was driving in the right hand lane. RP 144. Just as she was getting ready to pass the vehicle, she observed the trailer go off on the side of the road and fishtail before the Jeep and the trailer flipped and came to a stop blocking both lanes. RP 144-145. Ms. Petersen stopped her vehicle and watched other witnesses pull the male driver and a female passenger out. RP 160. When the troopers asked her whether she was 100 percent sure the male was the driver, Ms. Petersen said yes. RP 160. She admitted on cross she could not recall from memory who the driver was, and only knew based upon her written statement at the scene. RP 167.

² The State initially filed a notice of cross appeal on this case. The State is no longer seeking review of those issues and has requested this court dismiss its cross-appeal. *See* Motion to Dismiss Cross Appeal.

Gary Hillin was traveling in the northbound lanes of 167 when he observed the Jeep and camper lose control and overturn. RP 218-219. He stopped to help and went to the driver's side door of the upside down Jeep. RP 220-221. Inside he saw a male driver sitting wedged under the steering wheel and a female passenger. RP 220-224. During trial, Mr. Hillin identified the male passenger as the defendant. RP 221. Mr. Hillin and several other witnesses pulled the defendant out of the driver's side door first, followed by the female passenger. RP 224-227. Mr. Hillin tried to calm the defendant and the female down while they sat on the side of the road and defendant kept saying he was not driving. RP 227. Mr. Hillin testified he could smell an odor of alcohol on defendant's breath. RP 228.

Tiffany Stewart was also traveling southbound on highway 167 around 1:30pm when she observed the Jeep and camper fishtail before flipping over and landing on their roofs. RP 237-238. She testified when everything stopped she ran to the vehicle to help. RP 240. There were two other men who had stopped to help and she watched as they helped the male driver out of the vehicle. RP 241-242.

During the trial, Ms. Stewart identified the male driver as the defendant. RP 242. She testified she knew he was the driver because right after the accident happened he came out of the driver's seat of the vehicle and the vehicle was upside down so there was no where else for

him to go. RP 243. Ms. Stewart said as soon as he got out, the defendant said he was not driving. RP 244. She testified during the trial that the statement seemed "completely odd" given that there were so many other things that were important at the time, like the safety of the passenger. RP 244-245. Ms. Stewart said the defendant appeared drunk, was swaying back and forth and his breath smelled like alcohol. RP 246. She also watched a female passenger be helped out of the vehicle and believed the driver's airbag had deployed. RP 245, 270.

Washington State Patrol Trooper Raymond Seaburg responded to the scene shortly after and began speaking with witnesses and the male and female involved in the accident. RP 179-180. The male admitted he had been drinking and said he was not driving. RP 182. During the trial, Trooper Seaburg identified the male as the defendant. RP 182. The female said she had been driving and agreed to perform voluntary field sobriety tests which showed she was not impaired. RP 182. After further investigation, Trooper Seaburg determined the defendant was the driver. RP 184. Based on his behavior, odor of intoxicants, slurred speech, bloodshot watery eyes and admission to drinking, Trooper Seaburg arrested the defendant for DUI. RP 184-185.

Trooper Kyle Burgess arrived to assist and said it was immediately obvious defendant was impaired based on his belligerent behavior, bloodshot watery eyes, flushed face and slurred speech. RP 279. Defendant was uncooperative and swore at Trooper Seaburg multiple

times while he was placed under arrest and identified by his license. RP 186-187, 196-198. After he was advised of his rights, he continued to swear and yell at Trooper Seaburg and the medics who were checking on him for injuries. RP 187-188. Based on everything he had observed, Trooper Seaburg testified he believed the defendant's level of intoxication was extreme. RP 194.

Trooper Burgess identified the female passenger as Marcia Howard³ and also learned she was the registered owner of the vehicle. RP 282-284. Both Trooper Burgess and Trooper Seaburg testified the conditions on the road that day were dry and there was no wind. RP 181, 277. Trooper Burgess observed the driver's seat was adjusted for someone who was 5'11" like defendant is, and the passenger seat was adjusted forward for someone shorter. RP 282. He did not observe seatbelt marks on either defendant or Ms. Howard and did not recall the airbags being deployed. RP 286, 289. Trooper Burgess testified that after conducting a collision investigation, he was able to determine that defendant was at fault for the accident, and the cause of the collision was speeding too fast for the conditions and allowing the trailer to oscillate. RP 285.

En route to the jail, Washington State Patrol informed Trooper Seaburg that defendant had four prior DUI convictions. RP 195. During

³ After the incident, Mr. Kitchens and Ms. Howard were married and her legal name is now Marcia Kay Kitchen. In accordance with appellant's brief to avoid confusion, the State will refer to her as Ms. Howard in this brief.

the trial, the court read the following stipulation to the jury "[p]rior to and on September 1, 2012, the defendant had previously incurred four or more prior offenses within 10 years as defined in RCW 46.61.5055(14)." RP 299; CP 14-15.

Marcia Howard testified that the Jeep was her vehicle and she was driving on September 1, 2012, while defendant slept in the passenger seat. RP 301-302. She testified that she was on highway 167 with her cruise control at 55 mph when the wind caught the side of the trailer, she slammed on the brakes, the vehicle and camper rolled. RP 304-305. She believed she had been pulled out the passenger side of the vehicle and told the officers she had been driving. RP 307-309. She admitted defendant had had some drinks earlier that morning and that after the incident, Ms. Howard and Mr. Kitchens were married. RP 301, 339. Defendant chose not to testify at the trial. RP 341.

C. ARGUMENT.

1. DEFENDANT FAILS TO SHOW HIS RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE WRITTEN PEREMPTORY CHALLENGE LIST MADE IN AN OPEN COURT EXCHANGE AND SIDEBAR DISCUSSIONS WERE BOTH LATER MADE PART OF THE PUBLIC RECORD.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right

to a “public trial by an impartial jury.” The state constitution also provides that “[j]ustice in all cases shall be administered openly,” which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the United States Constitution. Wash. Const. article I, section 10; *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Press–Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right “serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). “There is a strong presumption that courts are to be open at all trial stages.” *Lormor*, 172 Wn.2d at 90. The right to a public trial includes voir dire. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, *State v. Bone–Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), and *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while

codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, see *State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors).

However, before determining whether there is a public trial violation, the court must consider whether the proceeding at issue constituted a closure at all. *Sublett*, 176 Wn.2d at 71. In *Sublett*, our Supreme Court adopted a two-part "experience and logic" test to address this issue: (1) whether the place and process historically have been open to the press and general public (experience prong), and (2) whether the public access plays a significant positive role in the functioning of a particular process in question (logic prong). *Id.* at 72-73. Both questions must be answered affirmatively to implicate the public trial right. *Id.* at 73.

In cases where Washington courts found an improper closure during jury selection, the trial court conducted discussions with and/or dismissed potential jurors in a closed courtroom, chambers, or other private setting, outside the public eye. See, e.g., *State v. Wise*, 176 Wn.2d 1, 6-7, 288 P.3d 1113 (2012) (partial voir dire in chambers); *State v. Brightman*, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) (courtroom closed

to public during voir dire); *State v. Tinh Trinh Lam*, 161 Wn. App. 299, 301, 254 P.3d 891 (2011) (interview of juror in chambers), *review granted*, 176 Wn.2d 1031, 299 P.3d 20 (2013). In essence, a closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

Courtroom management decisions are reviewed for an abuse of discretion when the courtroom remains open because "[i]n addition to its inherent authority, the trial court, under RCW 2.28.010, has the power to ... provide for the orderly conduct of its proceedings." *Lormor*, 172 Wn.2d at 93, 95. "[W]ide discretion is committed to the [trial] courts in setting the procedure for the exercise of peremptory challenges...[yet] [t]he method chosen ... must not unduly restrict the defendant's use of his challenges, ... and ... the defendant must be given adequate notice of the system to be used." *United States v. Turner*, 558 F.2d 535, 538 (1977) (*citing Stilson v. United States*, 250 U.S. 583, 40 S. Ct. 28, 63 L. Ed. 1154 (1919)). Washington's trial courts must also exercise discretion in accordance with CrR 6.4(e). A defendant bears the burden of proving prejudice where the challenged procedure substantially complies with the rules governing jury selection. *See e.g., State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

In the present case, the questioning of jurors was done in an open courtroom before the entire panel. RP 130-131; 1RP 2. The court then

advised the panel that the remaining portion would be done in writing and they were free to move about the courtroom. 1RP 2. The record reflects the following:

(Attorneys doing their peremptory challenges.)

THE COURT: Counsel.

(Sidebar held, but not reported.)

1RP 3. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 58. After the attorneys had finished, the court seated the selected jurors. 1RP 3-4. Later that day, outside of the presence of the jury, the court made a public record about what occurred during the sidebar in jury selection and stated:

We did have a discussion at sidebar regarding challenges for cause. The defense asked to excuse No. 5 and No. 18. I indicated that I believed that both of those jurors had rehabilitated themselves sufficiently so that they could remain on this case, and I denied those challenges. There was also an agreed challenge to Juror No. -- an agreed excusal of Juror No. 29, and we excused her.

RP 138. When asked if there was anything else counsel wanted to make a record of, defense counsel said no and the prosecutor began discussing a separate issue related to defendant's prior convictions. RP 138.

Throughout the entirety of these proceedings, the courtroom remained open to the public.

Defendant now argues on appeal that although there was no exclusion of anyone from the courtroom, the use of written peremptories and sidebar conferences during jury selection deprived defendant of his right to a public trial as it equated to conducting jury selection in private. However, Division III of the Court of Appeals recently held in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), that the use of a side bar to conduct challenges for cause did not constitute a courtroom closure. This court followed suit and relied upon the *Love* analysis when it recently held in *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014), that the trial court did not violate defendant's right to a public trial by allowing the attorneys to exercise peremptory challenges during a side bar. In its analysis, the *Love* court discussed the experience prong in *Sublett* and concluded:

The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wn. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions in making a challenge for cause or a peremptory challenge at side bar as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." *Id.* The court held that the written record of those actions satisfies the

public's interest and "assures that all activities were conducted aboveboard, even if not within public earshot." *Id.* at 920.

In addition to the historical review conducted in *Love*, there is some additional authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" *Georgia v. McCollum*, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), *citing* Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

In the case now before the court, defendant argues that "the *Love* decision is poorly reasoned" and asks the court to reconsider this issue again urging the court to find that the use of written peremptories and sidebar conferences constitutes a courtroom closure. Brief of Appellant, at 21. Defendant argues that these practices amount to a closure because the practical impact is that the public is denied an opportunity to scrutinize the events. *See* Brief of Appellant, at 20. However, the written record of peremptories was filed with the clerk's office detailing which parties excused which jurors and in what order, thus made available for public scrutiny later. CP 58. Further, a record of what occurred during the

sidebar was made later that day outside the presence of the jury. RP 138. These procedures satisfied the court's obligation to ensure the open administration of justice.

The only thing that did not occur was the vocal announcement of each peremptory challenge as it was made. There is no indication that our constitution requires that everything and anything that is done in the course of a public trial be announced in open court. For example, seven years after statehood, the Washington Supreme Court issued its opinion in *State v. Holedger*, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger complained that he was prejudiced when the court asked his attorney in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of juror who might be upset if there was an objection. The decision in *Holedger* was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. See B. Rosenow, *The Journal of the Washington State Constitutional Convention*, at 468 (1889); B. Rosenow ed. (1962); C. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991*, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise

in the protections given under the state constitution, yet neither found certain trial functions being handled in a manner that precluded the entire courtroom from hearing what was being said to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in *Holedger*. See *State v. Stockhammer*, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench, out of the hearing of the defendant and the jury).

Essentially, the argument defendant advances in the present case would require courts to find courtroom closures whenever spectators are incapable of perceiving every aspect of a trial court's publicly-conducted business with their full array of senses at the specific time that it occurs during the trial. That requirement was rejected by the Ninth Circuit in *D'Aquino v. United States*, 192 F.2d 338, 365 (1951). In that case, the government introduced five audio records inaudible without the earphones provided to select participants and attendees such as the court, counsel and the media. *Id.* D'Aquino argued the procedure denied her a public trial because public spectators could not hear the exhibits. *Id.* The Ninth Circuit found that claim "wholly without merit" analogizing the argument to a claim that the public trial right was violated "because certain exhibits such as photographs, samples of handwriting, etc., although examined by

the parties and by the jury were not passed around to the spectators in the courtroom." *Id.* (citing *Gilliams v. United States*, 87 U.S.App.D.C. 16, 182 F.2d 962, 972-73 (1950)).

Similar courtroom practices are common in Washington. Exhibits may be properly admitted, but never published in a way that permits public inspection before the verdict is entered. *See e.g.*, ER 611(a)⁴; ER 901(a).⁵ They may even be properly withheld from the jury when used for limited purposes such as impeachment under ER 608(b)⁶ or refreshing witness recollection under ER 612⁷. *See also* WPIC 1.02 ("[e]xhibits may have been marked ... but they do not go ... to the jury room...."). The public quality of the proceeding is nevertheless preserved through the inclusion of those exhibits in a public record capable of subsequent review. *See e.g., Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, at 37, 640 P.2d 716 (1982). In other words, the public's right to open criminal trials does not impose upon trial courts a duty to tailor publicly conducted proceedings to the viewing preferences of its audiences.

⁴ ER 611(a) "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

⁵ ER 901(a) "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent says."

⁶ ER 608(b) "Specific instances of the conduct of a witness, for the purpose of attacking or supporting a witness credibility other than conviction of a crime as provided by ER 609, may not be proved by extrinsic evidence ..."

⁷ ER 612 "Writing Used to Refresh Memory."

Looking at the analysis undertaken in *Love*, the historical discussions of the issue in *Holedger* and *D'Aquino* and common courtroom practices under the evidence rules, it is apparent that defendant's urging that the court find the use of written peremptories and sidebars in jury selection amounts to a closure of the courtroom is an overly broad interpretation of what defendant's right to a public trial was meant to and currently does encompass in routine practice and procedure. Defendant's argument fails under the experience and logic test in *Sublett* and this Court should find defendant's right to a public trial was not violated.

2. THE TRIAL COURT PROPERLY ALLOWED THE TROOPERS TO TESTIFY ABOUT CONCLUSIONS FROM THIER INVESTIGATIONS WHEN SUCH TESTIMONY DID NOT CONTAIN HEARSAY OR VIOLATE DEFENDNAT'S CONFRONTATION RIGHTS.

An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001); *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) ("The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse."). A trial court abuses its discretion when its

decision is based on manifestly unreasonable or untenable grounds.

Powell, 126 Wn.2d at 258.

Hearsay is a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Absent an applicable exception, hearsay is generally inadmissible. ER 802.

In the present case, defendant contends that the trial court abused its discretion when it allowed in testimony from police officers that defendant believes is hearsay and violates his confrontation rights. The first instance, and defendant's initial objection, came during the direct examination of Trooper Seaburg when the following exchange took place:

Trooper Seaburg: ... [t]hen I assisted another trooper with passing out the witness statements to all who said that they witnessed what had happened.

Prosecutor: Did the information that you collected support your belief about who was driving and what happened?

Defense Attorney: Objection, calls for hearsay, Your Honor.

The Court: Overruled. He can answer that yes or no.

Trooper Seaburg: Yes.

RP 189. This is the only time defense counsel objected on hearsay grounds during the trial. In his brief, defendant does not point to any other specific statements or exchanges where he argues hearsay was elicited. The only other exchange the State can find where the troopers were questioned about their conclusions related to who was driving involved the following exchange during the re-direct of Trooper Burgess by the prosecutor:

Prosecutor: Now, counsel was asking you questions about witness statements and specifically whether Mr. Kitchens was seen behind the vehicle, correct?

Trooper Burgess: Yes, sir.

Prosecutor: Without saying the specific statements, did you learn information to help you determine that Mr. Kitchens was the driver of the vehicle?

Trooper Burgess: Yes, I did.

RP 295-296. Defendant argues on appeal that Trooper Seaburg's and Trooper Burgess' testimony was hearsay as it was the equivalent of saying the witness said the defendant was driving. However, a police officer's testimony concerning his investigation does not necessarily introduce hearsay simply because the officer testifies he spoke with witnesses. *State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005). An officer may appropriately describe

the context and background of a criminal investigation, so long as the testimony does not incorporate out of court statements. *Id.* at 437.

Trooper Seaburg's and Trooper Burgess' testimony in the present case never incorporated out of court statements. Their answers consisted of yes or no responses and were offered to prove that they had conducted further investigation which helped them come to a conclusion about who they believed the driver was. Their statements were not hearsay and did not implicate defendant's right of confrontation.

This is similar to what occurred in *State v. O'Hara*, 141 Wn. App. 900, 174 P.3d 114 (2007), *reversed on other grounds*, 167 Wn.2d 91, 217 P.3d 756 (2009). In that case, the court found that trooper's statements during trial which discussed speaking with witnesses about a crime as part of their investigation was not hearsay. Specifically, the court ruled:

the officers' testimony did not concern the substance of the statements of any of the witnesses at the scene. There was no discussion what these individuals said to the officers, and none of the officers' testimony recited or referred to any out-of-court statement, verbatim or in substance.

Id. at 910. Similarly, in the present case, the troopers' testimony did not discuss the substance of the statements that the witnesses made to them. Their testimony only elicited that they had spoken to the witnesses as part of their investigation and that investigation helped them in concluding who they believed the driver was. Again, and as in *O'Hara*, such statements were not hearsay and did not implicate defendant's right of

confrontation. The trial court did not abuse its discretion in allowing the troopers to testify about their conclusions when their testimony did not contain hearsay and did not violate defendant's confrontation rights.

3. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT FOR CHOOSING NOT TO OBJECT TO TESTIMONY WHICH WAS NOT OBJECTIONABLE.

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. Cronin*, 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 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).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v.*

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

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 (C.A. 9, 1995).

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). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

In the present case, defendant argues his counsel was ineffective for failing to continually object to the prosecutor's questions and trooper's responses conveying that the witnesses said defendant was the driver. However, a review of the record shows that the troopers never testified that witnesses had told them defendant was the driver. Rather, the troopers' testimony consisted of them stating that they had spoken with witnesses, and after speaking with those witnesses and conducting their investigations, they concluded that the defendant was the driver. *See* Issue 2 above. Defense counsel may have recognized that such testimony was not hearsay and thus not objectionable. In such a situation, their performance cannot be considered deficient when they do not object to something that is not objectionable.

Further, even if the court were to find that counsel erroneously failed to object where an objection was warranted, the lack of objection could also be considered legitimate trial strategy or tactics. After their initial objection was denied by the court, defense counsel may have chosen not to continue to object in an effort to not draw the jury's attention to such testimony. Defendant cannot show such actions were not legitimate trial strategy or tactics as described in *Lord, supra*. He is unable to show that defense counsel's performance was deficient under the first prong of *Strickland*.

However, even if the court were to find defense counsel's performance was deficient, defendant is also unable to show he was prejudiced by such a deficiency under the second prong of *Strickland*. There was ample testimony in the record for the jury to conclude defendant was the driver. Brenda Petersen testified that in her written statement she told the trooper she was 100 percent sure the male was the driver. RP 160, 167. Gary Hillin testified that he pulled the defendant out of the driver's seat where defendant was wedged under the steering wheel of the vehicle. RP 221-224. Tiffany Stewart testified that she observed two men pull the male driver out of the vehicle and thought it was completely odd for the first thing defendant to say when he got out of the vehicle was that he was not the driver. RP 242-245. Trooper Burgess also testified that the adjustment of the seats suggested the defendant was the driver. RP 282.

Essentially, three civilian witnesses who arrived at the vehicle moments after the crash all testified the defendant was the driver and there was circumstantial evidence involving the position of the seats which suggested defendant was the driver. While defendant may claim that the troopers' testimony improperly influenced the jury into concluding the defendant was the driver, there was such a significant amount of other testimony suggesting that defendant was the driver that defendant cannot

show that his counsel failing to object to the troopers' testimony prejudiced him. Defendant cannot satisfy either prong of the *Strickland* test, and therefore fails to meet his burden showing his counsel was ineffective.

D. CONCLUSION.

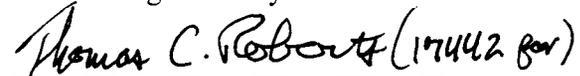
For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: August 25, 2014.

MARK LINDQUIST

Pierce County

Prosecuting Attorney

 (17442 for)

CHELSEY MILLER

Deputy Prosecuting Attorney

WSB # 42892

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.

8-25-14 
Date Signature

PIERCE COUNTY PROSECUTOR

August 25, 2014 - 1:35 PM

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