

NO. 46775-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ANTHONY BROWN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 14-1-00648-7

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	1
A. PROCEDURAL HISTORY.....	1
III. ARGUMENT.....	11
A. BECAUSE A CURATIVE INSTRUCTION WOULD HAVE ELIMINATED ANY PREJUDICE TO BROWN, THE STATE'S CONDUCT WAS NOT FLAGERANT AND ILL- INTENTIONED, AND THE OBJECTION IS NOT PRESERVED.....	11
B. NO INQUIRY INTO THE ATTORNEY-CLIENT RELATIONSHIP WAS NECESSARY WHEN BROWN FAILED TO BRING A MOTION FOR NEW COUNSEL, AND WHEN THE DISAGREEMENT WAS A MERE LACK OF ACCORD OVER TRIAL STRATEGY. ....	14
C. BROWN WAS FULLY AFFORDED HIS RIGHT TO COUNSEL BASED ON COUNSEL'S TRIAL STRATEGY AND TACTICAL DECISIONS. ....	17
IV. CONCLUSION.....	24

## TABLE OF AUTHORITIES

### CASES

<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).....	23
<i>Griffin v. California</i> , 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).....	23
<i>In re Stenson</i> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	16
<i>Jenkins v. Anderson</i> , 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).....	23
<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	21
<i>State v. Adel</i> , 136 Wn.2d 629, 965 P.2d 1072 (1998).....	15
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	12, 13
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	11
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	23
<i>State v. Cross</i> , 156 Wn.2d 580, 132 P.3d 80 (2006).....	14, 15, 16
<i>State v. Edvalds</i> , 157 Wn. App. 517, 237 P.3d 368 (2010).....	13
<i>State v. Gerdts</i> , 136 Wash. App. 720, 150 P.3d 627 (2007).....	20, 22
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	17
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009).....	20
<i>State v. Hughes</i> , 106 Wn.2d. 176, 721 P.2d 902 (1986).....	11
<i>State v. Lewis</i> , 156 Wn. App. 230, 233 P.3d 891 (2010).....	17
<i>State v. Lopez</i> , 79 Wn. App. 755, 904 P.2d 1179 (1995).....	15
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	18
<i>State v. Neidigh</i> , 78 Wn. App. 71, 895 P.2d 423 (1995).....	18

<i>State v. Pinson</i> , 183 Wn. App. 411, 333 P.3d 528 (2014).....	12
<i>State v. Ramos</i> , 164 Wn. App. 327, 263 P.3d 1268 (2012).....	11
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	17
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	14
<i>State v. Schaller</i> , 143 Wn. App. 258, 177 P.3d 1139 (2007).....	15
<i>State v. Suarez-Bravo</i> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	12, 13
<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	12
<i>State v. Witherspoon</i> , 171 Wn. App. 271, 286 P.3d 996 (2012).....	16
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 1441 (1970).....	17

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the issue of prosecutorial misconduct was preserved for appeal when Brown made no objection and a curative instruction would have eliminated any prejudice?

2. Whether further inquiry by the court into the attorney-client relationship was necessary when Brown made no motion for new counsel and when the court allowed Brown to make a full record of his concerns?

3. Whether Brown received effective assistance of counsel when defense counsel's decision to not object was a matter of strategy and trial tactics?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

James Anthony Brown was charged by information filed in Kitsap County Superior Court with assault in the second degree with a deadly weapon and assault in the fourth degree (domestic violence).

On the first day of trial, Brown indicated that he had a witness to call, and that his attorney hadn't secured the witness. RP 12. The court instructed him to work the matter out with his attorney. RP 12. Counsel for the defense indicated that he was unable to find the witness, who Brown identified Brown by first name only. RP 13. The next day, prior to

jury selection, defense counsel made a record that his investigator had found the witness, that the defense would not be calling the witness, and that the reasons for that decision had been explained to Brown. RP 38.

At trial, the jury convicted Brown as charged. CP 102-114. At sentencing, Brown filed a letter with the court demanding an appeal, citing various grounds for the appeal, and complaining that his attorney's performance was ineffective. CP 99-101. No request or motion for new or substitute counsel was ever made to the court, either at trial or at sentencing. CP 1-119, RP 1-289, RP (10/10) 1-13<sup>1</sup>. The court sentenced Brown within the standard range. RP (10/10) 10.

## **B. FACTS**

Naomi Oligario, a lifelong resident of Kitsap County and a local Safeway employee for nearly 30 thirty years, was for a period of time romantically involved with the defendant, James Brown. RP 72-74. As a result, the couple have in common an eight year old daughter. RP 73, 152. On June 25, 2014, Brown visited Oligario's home to see his daughter. RP 76, 151. Oligario's son, RJ, also lived in the home. RP 76, 96. RJ was 17 years old. RP 75, 95.

Brown was out with their daughter, and when he came home

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<sup>1</sup> Sentencing occurred on October 10, 2014. The Verbatim Report of Proceedings for Sentencing was separately paginated, and will be cited to as "RP (10/10)."

Oligario could tell from Brown's behavior and mannerisms that Brown had been drinking. RP 76. Oligario made dinner for the two kids, who ate it inside, while she and Brown stepped outside to speak about Brown drinking. RP 76-77. Brown took with him a sandwich that Oligario had made for him. RP 76. Brown and Oligario stood about 20 feet from the house and conversed, first calmly and then escalating. RP 77.

They yelled at each other until Brown threw his sandwich at Oligario. RP 79. The sandwich hit her in the face, and she pushed Brown back. RP 79. She then took a step back, slipped, and fell. RP 79. Oligario called out to RJ. RP 80-81. RJ heard his mom scream his name, and came out of the house, at which point Brown shifted his anger to RJ. RP 81, 97. RJ said, "What are you doing to my mom? Why is my mom on the ground?" RP 82. RJ and Brown cursed at each other, and threatened to beat each other up, but RJ made no move to approach Brown, and remained 10-20 feet away from the two adults. RP 82, 111. As the argument got more heated, Brown picked up a pickaxe and charged at RJ, who was backing away. RP 83-84.

Oligario testified that she dove for Brown while he was in full swing. RP 86. RJ testified that Brown ran at him, was tackled by Oligario, and then Brown lunged forward toward RJ, trying to hit him, but

missing. RP 102. Oligario grabbed a tight hold of Brown's legs, and started biting at him. RP 86. Her concern at that point was not for her own safety, but for her son. RP 86. If RJ had been hit with the pickaxe it would have done major damage. RP 101.

The pickaxe got stuck in the ground and fell out of Brown's hands. RP 102. Once Brown no longer had the pickaxe he seemed to realize what he had done, and Oligario hoped that he was calming down. RP 87. But RJ and Brown still argued, despite Oligario's attempts to get RJ to stop, as she felt that he was making the situation worse. RP 88. Brown walked away, and then grabbed a wooden cross and charged at RJ again, saying that he was going to "beat his ass again." RP 90-91, 104-105. Oligario responded by putting Brown in a chokehold, yelling at him to stop, that enough was enough. RP 91. During the struggle, Oligario tripped and landed on top of Brown. RP 92. She stayed on top of him while a neighbor tried to calm him. RP 92. Eventually the situation calmed down and the police arrived at the house. RP 92-93.

The police did not immediately arrest anyone; instead, Deputy Cleere spoke with Brown, Deputy Cory Manchester spoke with Oligario, and Deputy Gundrum spoke with RJ. RP 132-133. Gundrum later also spoke with Brown. RP 145. Brown was not in custody and had not been

Mirandized at the time that either deputy spoke with him. RP 26, 30.

Cleere testified regarding his conversation with Brown:

- A. He seemed to be a little bit worked up. I was asking him what was going on. He was telling me that they had tussled, but he wouldn't be specific about what was happening. Basically I had to ask him numerous times, you know, what had happened, trying to get a chronological story of what was going on. And I wasn't really getting a straight story from him. The story was changing quite a bit.
- Q. What do you mean the story was changing?
- A. I asked him, you know: Did they fight? ... I asked what the fight was about. The story just kept moving around, it just wasn't...
- Q. Were you interested in getting his side of what happened?
- A. Yeah. I wanted to know from his side what had happened. You know, obviously there was some sort of dispute there, and I just wanted to get his story, which wasn't forthcoming.
- Q. [W]hat did he say about the pickaxe?
- A. [H]e said that [RJ] was coming after him and he picked it up to protect himself.
- Q. So at that point, did you want to know some of the details?
- A. Right, yeah. I wanted to know why would he want to protect himself from [RJ], why was [RJ] coming after him. There wasn't much to go on. The story obviously had a lot of holes in it. It didn't make a lot of sense to me.
- Q. Did you try to get details out of him?
- A. Yes, I did.
- Q. How long do you think you talked to him?
- A. Several minutes.

Q. How many times do you think you asked him specifically what happened?

A. At least 12 times.

Q. Did he seem to understand the questions?

A. Yes. He seemed to understand the questions. He was talking to me. He was talking about a lot of stuff. But, I mean, he was not getting specific about what happened between him and the female and her son, which is [RJ]. He just, basically he would minimize it, say that they tussled. That doesn't really specifically tell me what happened.

RP 133-135. Gundrum also testified regarding his conversation with

Brown:

I started asking him what happened and he kept – he was being really vague about what occurred there. I had some significant detail from the other people I talked to, and he just kept saying over and over again that he was in this argument with Ms. Oligario over [RJ] disrespecting him. ...

Well, when he kept repeating what was going on, I had to resort to going to specific things that I had been told.

And so one of the things that I asked him was, "Why was Ms. Oligario on the ground?" And one of the first answers he gave me was, "Well, she's clumsy." And I said, "Well, so she's clumsy, you're out there arguing with her and she just falls down?" And then he said, "No, it's from the tussle." And I said, "Well, what about the tussle?" "It was just a tussle." Very general, very ambiguous. Wouldn't elaborate on anything. That was pretty much where he left us. ...

I wanted his side of the story. We had two detailed accounts of what occurred that were corroborating, and I wanted to hear what he had to say about what his involvement was...

You know, Deputy Cleere had a much longer conversation with Mr. Brown than I did. But I just, you know, it can go

only so long when you're talking to somebody and they're giving you these ambiguous answers. You can't keep going round and round with them and not go anywhere. We got to the point where there was a tussle. "She's clumsy," and "[RJ] is disrespecting me." It was kind of circular after that.

RP 145-148.

Cleere and Gundrum also examined the pickaxe, which was had a wooden handle with a steel head, 12 to 14 inches long, pointed on one end, and sharp enough to penetrate the body. RP 136, 148. A picture of the pickaxe was admitted into evidence. RP 85.

Brown testified at trial. RP 151-211. On direct examination, Brown claimed that the argument began when Oligario wanted to talk to him about RJ. RP 154. He said that she told him to leave, he threw the sandwich at her, and she ducked and fell. RP 154-155. Brown testified that he was upset but not angry. RP 155. Brown agreed that Oligario yelled when she fell, and RJ came running out of the house. RP 156.

Brown then testified that he was in fear for his life, and grabbed a pitchfork. RP 156. He stated that he was scared of RJ because RJ is fast, quick and strong. RP 161. In Brown's version of events RJ came up on him "real fast." RP 162. He said that Oligario took the pitchfork out of his hands, threw it down, came around in front of him, grabbed him and

started shaking him. RP 156. Brown further testified that once Oligario let go he walked away and tried to get into a truck, but Oligario grabbed him, jerked him out of the truck, flipped him around, dropped him, and lay on top of him. RP 159-160.

On cross-examination, Brown agreed that his pickaxe was the type of tool that would kill a person if used to hit somebody. RP 185. Brown also testified:

I said, "Let me shut my truck door because I know I'm probably going to jail."

RP 189. Brown additionally agreed that RJ never grabbed a weapon. RP 190.

When asked about the situation when the police arrived, Brown testified that the police didn't immediately arrest anyone, but that they put a gun in RJ's face. RP 191. Brown offered the idea that RJ only spoke with the police because they had pulled a gun on him. RP 192.

The prosecutor asked Brown about his conversation with the deputies:

- Q. So when the deputies came to you, you knew all you had to do was tell the truth.
- A. You know, I'm a Southern guy, you know what I'm saying? I don't get in people's business. And I definitely don't tell on myself or talk to the cops. I

don't care how friendly they are because I know they got a job to do, and I don't want to give nobody no information.

RP 193-194.

Q. When you were speaking to the deputies, at that time did you think it was important to tell them the truth?

A. You know, what I wanted to tell the deputies, they didn't want to hear it. All I wanted to let them know, that me and Naomi could work our own problems out. I couldn't get it out like that because he was in a rush talking to me. "Just tell me why," was like, "Let me know what I want to know." I'm like, "Everything is all right," you know what I'm saying?

Q. Did you think it was important to let them know you were defending yourself?

A. At the time, after I talked to [RJ] and he agreed he wasn't going to do what he do, I didn't think none of it was necessary.

Q. Okay. So would you agree that you didn't make it very clear that you were defending yourself?

A. No. I didn't - ...

RP 199-200. The prosecutor also asked about the other accounts of the assault:

A. You know, like I said, Naomi, she is a very nice person and she truthful about what she do. She's trying to raise her kids like that. I wouldn't put it out that she wasn't going to come and speak up. That's the way she is. She was raised like that to tell the truth and have her kids tell the truth. That's what I admire about her.

Q. Knowing that that's what she does, she tries to tell the truth, you must be upset that she would make up a story and Rick would make up stories about what

happened that night.

A. You know something, I can look at something and you ask me how did it – how did it go? I couldn't tell you just exactly how – I can be looking at something, I can see you make a move, I couldn't even do the same way you do, you know what I'm saying? I know everybody's story is not going to meet up, but it's going to be close. I know they going to say what they want to say, and I'm going to say it the way I saw it.

Q. Right. So different people see a situation, everybody is going to describe it a little different. The sheriff's deputy, two show up, they're going to describe it different, that's human nature.

A. Of course.

Q. Would you agree with me your story of what happened that night is dramatically different from what everybody else described?

A. It's not dramatically different. It's related to what was going on, you know what I'm saying? They – they didn't put everything out there because they want to maybe shut out things. I put it out there what was all about. Maybe she didn't want to come up and say my son might be disrespecting me, this and that. She might not want to bring that up. There's certain things that people want to say something, you know what I'm saying, that they don't want nobody else to say. I put it out there, you know what I'm saying?

Q. Did you put it out there when you talked to the deputies that night?

A. You know, I didn't feel no reason because, like I said, me and Naomi, we run the place.

RP 200-202.

### III. ARGUMENT

**A. BECAUSE A CURATIVE INSTRUCTION WOULD HAVE ELIMINATED ANY PREJUDICE TO BROWN, THE STATE'S CONDUCT WAS NOT FLAGERANT AND ILL-INTENTIONED, AND THE OBJECTION IS NOT PRESERVED.**

Brown argues that the prosecutor committed flagrant and ill-intentioned misconduct that should now be taken up for the first time on appeal. Brown's claim is without merit because Brown made no objection to the misconduct at trial, a standard curative instruction would have remedied the situation, and the conduct was therefore not flagrant and ill-intentioned. The issue is not properly before the court.

Prosecutorial misconduct is reviewed under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29, 49 (1995), citing *State v. Hughes*, 106 Wn.2d. 176, 195, 721 P.2d 902 (1986). It is prosecutorial misconduct to ask a witness whether another witness is lying. *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2012). Requiring a defendant to testify about whether a witness is lying is prejudicial. *Id.* The State concedes that it was improper to ask Brown whether he was upset by stories made up by other witnesses.

However, where a defendant's fails to object at trial, the issue is not preserved for appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by

a curative instruction. *State v. Walker*, 164 Wn. App. 724, 730, 265 P.3d 191, 195 (2011). In determining whether the issue may be raised on appeal, the Court focuses on whether the resulting prejudice could have been cured. *State v. Pinson*, 183 Wn. App. 411, 333 P.3d 528 (2014). The defendant must show that no curative instruction would have eliminated the prejudicial effect. *Id.*

Rather than appropriately focusing on whether the prejudice could have been cured, Brown would have this Court adopt a rule that any time a question of this nature is asked the conduct instantly rises to the level of flagrant and ill-intentioned. Brief of Appellant, at 11. Brown's sole support for this proposition rests in *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). In that case, the prosecutor repeatedly emphasized multiple pieces of inadmissible evidence, including twice drawing attention to dismissed rape charges. The court held that improper cross-examination was cumulative, requiring reversal. *Id.* at 525. The court posited that asking one witness whether another witness is lying is flagrant misconduct. *Id.* There is no analysis for this part of the court's holding, only a cite to *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994). However, *Suarez-Bravo* does not stand for such a rule; namely, that any time a witness is asked to comment on credibility that question then automatically constitutes flagrant prosecutorial misconduct. On the

contrary, *Suarez-Bravo* specifically considered the cumulative effect of multiple improper questions from the State, and concluded that an entire line of irrelevant questioning regarding Brown's ethnicity and employment, *plus* the improper questions asking Brown to comment on credibility, together rose to the level of flagrant misconduct. *Suarez-Bravo* at 367. Neither *Boehning* nor *Suarez-Bravo* support a legal rule mandating that this court abandon its long-practiced method of analyzing allegations of prosecutorial misconduct.

The better approach is to follow the vast majority of legal precedent on this matter, and to inquire whether any prejudice could have been cured by an appropriate curative instruction. Brown did not object to the question at issue. RP 201. Had he objected the court could have given the jury a standard instruction, such as, "you will disregard the question and its answer," and any prejudice would have been eliminated.

The minimal impact of the question is demonstrated by Brown's answer, in which he refused to call the civilian witnesses liars, instead framing the conflicting testimony as nothing more than differences in perspective. RP 201. As aptly put by the court in *State v. Edvalds*, 157 Wn. App. 517, 525, 237 P.3d 368, 372 (2010), "the absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an

appellant in the context of the trial.” Had a curative instruction been given, the trial would likely have continued on without further attention to that single question. Given the readily curable nature of the exchange, Brown has not met his burden of showing that no curative instruction would have eliminated the prejudicial effect. The conduct below was not flagrant and ill-intentioned, and the matter is not preserved for appeal. The Court should therefore affirm the conviction.

**B. NO INQUIRY INTO THE ATTORNEY-CLIENT RELATIONSHIP WAS NECESSARY WHEN BROWN FAILED TO BRING A MOTION FOR NEW COUNSEL, AND WHEN THE DISAGREEMENT WAS A MERE LACK OF ACCORD OVER TRIAL STRATEGY.**

Brown next claims that the trial judge violated his right to appointed counsel. This claim is without merit because Brown never requested new counsel and because there was no information presented to the court that suggested a breakdown of the attorney-client relationship.

Issues related to appointment of new counsel are reviewed under an abuse of discretion standard. *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006). Discretion is abused only when no reasonable person would have decided the issue as the trial court did. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994).

A defendant may not discharge appointed counsel unless the

motion is timely and upon proper grounds. *Cross*, 156 Wn.2d at 606. In this case, Brown never made any motion for at all. Brown never made so much as an informal request that his defense attorney be removed, replaced or substituted for another attorney. Nor did Brown ever request to represent himself. The court made no inquiry because there was no motion.

Notwithstanding the first bar to claim, Brown's reliance on *State v. Lopez*, 79 Wn. App. 755, 904 P.2d 1179 (1995), *overruled on other grounds*, *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998), is misplaced. In *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139, 1146 (2007), the Court specifically considered *Lopez* and reiterated previous holdings that formal inquiry is not essential where the defendant otherwise states his reasons for dissatisfaction on the record. Here, the court let Brown fully express his concerns at trial about a potential defense witness not being called. RP 12. At sentencing, the court heard from Brown, referred to Brown's letter to the court, and then addressed Brown's concerns. RP (10/10) 7-8. The information presented was a sufficient basis for the judge to respond. There was adequate inquiry and the court exercised appropriate discretion.

Moreover, even had the court considered appointing new counsel, there was no legal basis to do so. As noted in *Cross*, there is a difference

between complete collapse of the attorney-client relationship and mere lack of accord. *Cross*, 156 Wn.2d at 606. Disagreement over trial strategy is not sufficient to find a conflict because counsel is in charge of the choice of trial tactics. *Cross*, 156 Wn.2d at 609 (citing *In re Stenson*, 142 Wn.2d 710, 729, 16 P.3d 1, 12 (2001)). That's all that occurred here during trial: a disagreement over whether to call a witness. Defense counsel made a clear record as to the reason for not calling the witness. RP 38. At sentencing, Brown was generally unhappy about the outcome of the trial, about defense counsel, and about various perceived legal issues. RP (10/10) 3, CP 99-101. There was no complete collapse of the attorney-client relationship at that point either, however.

Finally, reversal is not required when a trial court knows of a potential conflict but fails to inquire; the defendant must show the conflict adversely affected counsel's performance. *State v. Witherspoon*, 171 Wn. App. 271, 286 P.3d 996 (2012). Here, there is at most a potential conflict, and there are no facts on the record to indicate that disagreement between Brown and his attorney over the strategy of the case in any way affected Brown's legal representation. The court should affirm the conviction and the sentence.

**C. BROWN WAS FULLY AFFORDED HIS RIGHT TO COUNSEL BASED ON COUNSEL'S TRIAL STRATEGY AND TACTICAL DECISIONS.**

Brown lastly claims that he was denied the effective assistance of counsel. This claim is without merit because counsel's performance was not deficient; rather, counsel's decisions to act or to abstain were the direct result of a proper exercise of discretion as to trial strategy and tactics.

Appellate review begins its analysis with a strong presumption that counsel was effective. *State v. Lewis*, 156 Wn. App. 230, 233 P.3d 891 (2010). The court then applies the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 1441 (1970). Defendant must show that his counsel's performance was deficient, and that the deficiency prejudiced him. *Lewis*, 156 Wn. App. at 242. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Id.* Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Id.* Exceptional deference must be given when evaluating counsel's strategic decisions. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). "To rebut this presumption, defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 42, (*quoting State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004)).

Brown first alleges that his counsel was deficient for not objecting to the improper questioning by the State on cross-examination. Rather than abiding by the strong presumption that counsel was effective, Brown nakedly states that because defense counsel “should” have objected his performance was therefore deficient. Brief of Appellant, at 15-16. There is no analysis and no basis offered for this conclusion. Contrary to Brown’s position, only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Brown does not meet his burden of establishing the absence of any conceivable reason for defense counsel’s decision to refrain from objecting.

The case at bar is extremely similar to *State v. Neidigh*, 78 Wn. App. 71, 895 P.2d 423 (1995), where it was found that counsel’s failure to object was not ineffective. Neidigh’s counsel made no objection when the prosecutor questioned Neidigh as to whether the State’s witnesses were lying. There, Neidigh refused to agree that the State’s witnesses were lying or incorrect and his answers made sense. *Neidigh*, 78 Wn. App. at 77. The court pointed out that counsel may have concluded that it was preferable to let the jury hear Neidigh’s confident answers rather than to stop the questioning. *Id.*

Similarly, here, Brown answered:

I know everybody's story is not going to meet up, but it's going to be close. I know they [are] going to say what they want to say, and I'm going to say it the way I saw it.

RP 201. To which the prosecutor replied,

Right. So different people see a situation, everybody is going to describe it a little different.

RP 201. Brown responded, "Of course." RP 201. It is evident that Brown ably reframed the prosecutor's question. The prosecutor then followed with a distinctly permissible question,

Would you agree with me your story of what happened that night is dramatically different from what everybody else described?

RP 202. To which Brown answered:

It's not dramatically different. It's related to what was going on. They didn't put everything out there...Maybe she didn't want to come up and say my son might be disrespecting me, [s]he might not want to bring that up...I put it out there."

RP 202.

Given Brown's responses, defense counsel's silence was likely tactical, and in any case, Brown has failed to show that there was no possible strategic reason for his counsel to refrain from objecting. Defense counsel's performance was not deficient on this point. Further, for the reasons discussed above at Point A, Brown also fails to show prejudice.

Brown next avers that testimony offered by both deputies was

improper opinion. To establish deficient performance defendant must first show that if his counsel had objected the objection would likely have been successful. *State v. Gerds*, 136 Wash. App. 720, 727, 150 P.3d 627, 631 (2007). Here, there was no improper testimony by either deputy, so an objection would not have been sustained.

Brown cites *State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236 (2009), and asks the Court to engage in a five factor analysis. In *Hudson*, a nurse testified on behalf of the State that the alleged victim's injuries were caused by "non-consensual" sex. The sole reason for the nurse's belief was that the sex must have been extremely painful. The court held that by offering as an opinion a conclusion that linked the medical issue of pain to the legal issue of consent the nurse invaded the province of the jury. A *Hudson* analysis is both unnecessary and improper in this case. Unlike in *Hudson*, neither of the deputies who testified in this case offered such an opinion.

Instead, the deputies each gave observations of Brown. Some of the observations were as to Brown's specific responses, and some were as to Brown's demeanor. All of the observations reported on matters perceived by the deputies. Testimony that is not a direct comment on defendant's guilt or the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion

testimony. *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658, 660 (1993).

Brown states that the deputies suggested that he was evasive. Brief of Appellant, at 16. Not once did either deputy make such a statement. RP 130-150. Deputy Cleere related how Brown was worked up, would not be specific, and would not give a chronological story of the events, despite numerous attempts by the deputy to ascertain what had happened. RP 133-134. Cleere asked for specifics from Brown at least 12 times. RP 135. In response, Brown still offered no specifics, instead minimizing what occurred. RP 135. The inference that the deputy was not getting a straight story from Brown was based on the answers being given (and not given) by Brown, and was helpful to the jury in describing the overall scene of the interaction and the tenor of the conversation. The comment that Brown was not forthcoming was a comment on Brown's responses, not a comment on the veracity of Brown. RP 134.

Deputy Gundrum's testimony was even more of a direct report on Brown's behavior. Testimony that Brown gave general, ambiguous, unelaborated answers is not improper opinion: it is direct eyewitness testimony as to how Brown responded to law enforcement that evening. RP 146. Gundrum further testified that he went around and around in circular conversation with Brown, trying to figure out what had happened.

RP 147-148. Such testimony is not a suggestion that Brown was evasive. It is a report that speaks for itself.

Under this same category of alleged error, Brown also complains that the deputies unfairly characterized him as less credible than the other witnesses. In fact, neither deputy ever compared the truthfulness or credibility of either Oligario or RJ to that of Brown. RP 130-150. The deputies received two other accounts of what happened that night, those accounts were both detailed, and those accounts corroborated each other. RP 147. In contrast, Brown's account lacked any specificity, and did not line up with the version of events corroborated by the other two eyewitness accounts. A side by side comparison of the witness accounts from that evening is in no way improper "characterization" of Brown. Brief of Appellant, at 18. Brown was stuck with the realities of his interaction with law enforcement on that night. There was no improper testimony offered by either deputy, thus no grounds for objection or a subsequent claim of ineffective assistance.

Brown's final point of contention is that an improper comment was made regarding Brown's silence. Again, defendant must show that an objection would likely have been successful. *Gerds*, 136 Wash. App. at 727. Here, an objection would not have been sustained because Fifth Amendment protections do not apply to pre-arrest silence when defendant

testifies and the question is propounded as impeachment.<sup>2</sup> *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008). Brown was not under arrest at the time of his conversation with either deputy, and Brown's answers to the deputies were not given in response to a custodial interrogation. RP 26, 30, CP 7-9.

Perhaps if the State had made a blanket inquiry, asking generally whether Brown spoke with the police, that likely would have run afoul of the Fourteenth Amendment. Here, though, the State asked:

So they arrive, the deputies arrive. They start talking to people, you see one of them talking to Rick. One of them comes to talk to you... They don't put you in handcuffs when they're talking to you... So when the deputies came to you, you knew all you had to do was tell the truth.

RP 191-193.

From the record, the State only inquired about conversations that took place pre-arrest. The State went on to confirm with Brown that he knew that it would have been important to let the deputies know that he

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<sup>2</sup> As the Court explained in *Burke*, 163 Wn.2d at 217:

The Fifth Amendment prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial. *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Due process under the Fourteenth Amendment also prohibits impeachment based on silence after *Miranda* warnings are given, even if the accused testifies at trial. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). However, no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda* warnings. *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

acted to defend himself. RP 195. Throughout the cross-examination the State sought to establish that the self-defense claim evolved over time. RP 195,199, 206-207. These are clear efforts at impeachment based on pre-arrest silence. Therefore, no violation of Brown's Fifth or Fourteenth Amendment rights occurred, thus there was no ineffective assistance.

Further, even were the Court to find deficient performance, Brown fails to show prejudice. The unchallenged portions of Brown's testimony, including his admissions regarding the dangerous weapon he procured during a heated argument with someone who had no weapon, supplemented the already strong case put on by the State's five witnesses. RP 156, 185, 190. The verdict should remain.

#### **IV. CONCLUSION**

First, any prejudice resulting from prosecutorial misconduct could have been readily cured by a standard curative instruction. Brown did not object to the conduct at trial, and therefore waived any claim of error on those grounds. Second, though Brown never moved the court for new counsel, the court nevertheless allowed for a sufficient record to be made regarding Brown's concerns, satisfying any obligation to inquire. Furthermore, there was no legal basis for substitution of counsel given that there was no breakdown of the attorney-client relationship. Third, Brown received the effective assistance of counsel. Counsel in large part had no

grounds upon which to rest an objection, and to the extent that objection would have been appropriate, Brown has failed to rebut the strong presumption that counsel was effective, and that counsel's decisions at trial were a matter of strategy and trial tactics.

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

DATED May 18, 2015.

Respectfully submitted,  
TINA R. ROBINSON  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Benjamin S. Turner", written in a cursive style.

BENJAMIN S. TURNER  
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# KITSAP COUNTY PROSECUTOR

**May 19, 2015 - 7:46 AM**

## Transmittal Letter

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