

**NO. 48060-3-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CLIFTON NEWLEN,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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**I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

Newlen's conviction should be affirmed because:

- (1) Newlen waived his claim of misconduct when he did not object;
- (2) Newlen's attorney provided effective representation; and
- (3) Because the State has not sought appellate costs, the appellate cost issue is not before this Court.

**II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

- A. **Did Newlen waive his claim of prosecutor misconduct when he did not object at trial?**
- B. **Was Newlen's attorney ineffective when he chose not to object to appropriate arguments by the prosecutor?**
- C. **Should the Court of Appeals rule on appellate costs when the State has not sought them?**

**III. STATEMENT OF THE CASE**

Tom Hug owned a property at 3120 Old Pacific Highway in Kelso. RP 6/11/15 at 112. Mr. Hug purchased a mobile home and placed it on the property so he could rent it out. RP 6/11/15 at 113. The property had a three-to-four-foot high chain link fence around its perimeter. RP 6/11/15 at 113. This fence had been in place for at least forty years, and had been in place when Mr. Hug purchased the property around 2001.<sup>1</sup> RP 6/11/15.

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<sup>1</sup> At trial on June 11, 2015. Mr. Hug testified to having purchased the property approximately fourteen years earlier. RP 6/11/15 at 112-13.

Sometime after Mr. Hug purchased the property, Clifton Newlen acquired the property neighboring Mr. Hug's. RP 6/11/15 at 113-14. Newlen believed that Mr. Hug's fence was in the wrong place. RP 6/11/15 at 114. Mr. Hug disagreed. RP 6/11/15 at 114. This disagreement resulted in issues that were "ongoing" and "came and went." RP 6/11/15 at 114.

In 2014, Mr. Hug entered into an agreement with Jeanie Brissett and her husband to sell them the property. RP 6/11/15 at 115. Under this agreement, the Brissetts paid a down payment and Mr. Hug carried the contract while they were working to pay it off. RP 6/11/15 at 115. Mr. Hug remodeled the mobile home for the Brissetts to move into in August of 2014. RP 6/11/15 at 116.

On August 6, 2014, Ms. Brissett, her three-year-old grandson, and her older adult son went to the property. RP 6/11/15 at 78. At this time, Brissett had not yet received the keys to the property. RP 6/11/15 at 78. The plan on this day was for Mr. Hug to come and install a toilet in the bathroom of the mobile home. RP 6/11/15 at 79. Prior to Mr. Hug's arrival, Brissett was unable to enter the mobile home. RP 6/11/15 at 79. While they waited for Mr. Hug, Brissett, her son, and grandson looked around the property. RP 6/11/15 at 79.

Newlen entered the fenced area around the back of the property. RP 6/11/15 at 79-80. Newlen asked Brissett if she was renting or buying the property. RP 6/11/15 at 81. Brissett told him they were in the process of buying the place. RP 6/11/15 at 81. Newlen then told Brissett: "Well I'm just gonna let you know that some of this property is my property and I'm gonna be taking that back." RP 6/11/15 at 81. Brissett looked to where he pointed and observed Newlen had cut the fence. RP 6/11/15 at 81.

Because she didn't know "anything of the situation," and Newlen was a "little intimidating," Brissett said, "Okay." RP 6/11/15 at 82. Brissett figured that when Mr. Hug arrived he would work things out. RP 6/11/15 at 82. Because Newlen had already started cutting down the fence, Brissett did not feel there was anything she could say. RP 6/11/15 at 82. Mr. Hug arrived a few minutes later and Brissett told him what had occurred with Newlen. RP 6/11/15 at 83. When Mr. Hug first looked for Newlen he was not there. RP 6/11/15 at 83. They went inside the mobile home where Mr. Hug explained to Brissett what he was doing to the bathroom. RP 6/11/15 at 83.

Brissett's grandson needed to urinate. RP 6/11/15 at 83. Brissett took her grandson to the backyard. RP 6/11/15 at 83. While outside, Brissett observed Newlen on the outside of the fence cutting it with a pair

of bolt-cutters. RP 6/11/5 at 83-84. Brissett sent her son to notify Mr. Hug. RP 6/11/15 at 84. Mr. Hug then went to where Newlen was cutting the fence. RP 6/11/15 at 84.

Mr. Hug asked Newlen what he was doing. RP at 6/11/15 at 117. Newlen was standing on the outside of the fence, while Mr. Hug stood on the inside of the fence about three feet away at a “normal talking distance.” RP 6/11/15 at 118. Newlen told Mr. Hug his adverse possession was no longer in effect due to new owners. RP 6/11/15 at 118. Mr. Hug told Newlen he was wrong, and Newlen began cussing at Mr. Hug and calling him names. RP 6/11/15 at 118. Newlen rested his bolt-cutter head on the top of the fence as he went to continue cutting it. RP 6/11/15 at 118-19. Mr. Hug pushed the bolt-cutters off the fence and told Newlen to get his tools off his fence. RP 6/11/15 at 119. Newlen told Mr. Hug to get his hands off his tools. RP 6/11/15 at 119. Newlen then reared back and swung the bolt cutters at Mr. Hug. RP at 119-120. Mr. Hug attempted to get out of the way, but Newlen struck him in the back. RP 6/11/15 at 120.

Mr. Hug called 911. RP 6/11/15 at 122. Mr. Hug felt severe pain in his rib cage. RP 6/11/15 at 124. As a result of being struck, Mr. Hug suffered three broken ribs on the lateral chest wall. RP 6/11/15 at 125; RP at 6/12/15 at 17. More than 10 months after his injury, Mr. Hug still had

difficulty taking deep breaths. RP 6/11/15 at 125. Mr. Hug's ribs failed to grow back together. RP 6/11/15 at 127; RP 6/12/15 at 19. As a result, he has discomfort and difficulty sleeping. RP 6/11/15 at 127-28.

Sergeant ("Sgt") Cory Huffine of the Cowlitz County Sheriff's Office responded to the Mr. Hug's 911 call.<sup>2</sup> RP 6/11/15 at 140. Sgt Huffine contacted Mr. Hug and observed his injury. RP at 141. Sgt Huffine spoke with Brissett. RP 6/11/15 at 142. Sgt Huffine took pictures of the property, including where Brissett was standing when she observed Newlen strike Mr. Hug and where the fence was cut. RP 6/11/15 at 143-44. Mr. Hug and Brissett provided Sgt Huffine with written statements. RP 6/11/15 at 143.

Sgt Huffine contacted Newlen at his house. RP 6/11/15 at 144. Sgt Huffine observed the bolt-cutters sitting on a barrel on the porch of Newlen's house. RP 6/11/15 at 145. Sgt Huffine took the bolt-cutters into evidence. RP 6/11/15 at 146. Newlen spoke with Sgt Huffine about what occurred and provided a sworn statement. RP 6/11/15 at 144-45.

During the trial Mr. Hug, Brissett, Sgt Huffine, the treating physician for Mr. Hug, Dr. Boucher all testified for the State. Pictures that

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<sup>2</sup> The record indicates Sgt Huffine was employed as a sheriff's deputy but omits the agency; however because he testified in uniform the jury was able to observe that he worked for the Cowlitz County Sheriff's Office. RP at 6/11/15 at 138.

were taken and the bolt-cutters were admitted into evidence. RP 6/11/15 at 142-46. After the State rested, Newlen testified.

Newlen testified that on August 6, 2014, he observed Brissett in the yard of Mr. Hug's property. RP 6/12/15 at 37. Newlen said he asked Brissett if Mr. Hug had ever mentioned their difference of opinion over the property line, and she indicated that he had never told her anything about it. RP 6/12/15 at 37. Newlen said he told Brissett where the property line "actually existed." RP 6/12/15 at 38. Newlen said he told Brissett he had "hoped for years" that he would have the opportunity to remove the fence. RP 6/12/15 at 39. Newlen said that Brissett suggested that if he would show her where the property lines were, she and her husband would put up a new fence on that property line. RP 6/12/15 at 39.

Newlen said he was excited and told his other neighbor, "Larry." RP 6/12/15 at 39. Newlen said Larry told him: "Well, you better take my bolt cutters and go down there and take it down before somebody changes their mind." RP 6/12/15 at 39. Newlen testified that he went over to the fence and began to cut it with the bolt-cutters. RP 6/12/15 at 40.

Newlen testified that because the bolt-cutters were so heavy the only way he could get them up to cut the fence was to bring them up by the middle, rest the head and then with the head rested on the fence back

his hands to the handles and squeeze at the wire. RP 6/12/15 at 40. Newlen testified that Mr. Hug approached him and asked, "Do you feel like going to jail today?" RP 6/12/15 at 40.

Newlen testified that he responded, "Sure, why not?" RP 6/12/15 at 41. Newlen testified that he had the jaws of the bolt cutters resting on the top of the fence. RP 6/12/15 at 41. Newlen said that Mr. Hug pushed the jaws of the bolt-cutters off of the fence and because they were so heavy he began to lose his balance. RP 6/12/15 at 42. Newlen claimed that in an effort to regain his balance he brought the bolt-cutters back up and unintentionally "clipped Hug." RP 6/12/15 at 42.

Newlen's testimony that he swung the bolt-cutters up toward the fence differed dramatically with what he told Sgt Huffine when interviewed on August 6, 2014. RP 6/12/15 at 51, 55-56. Rather than saying Mr. Hug had pushed the bolt-cutters off of the fence, Newlen told Sgt Huffine that Mr. Hug grabbed the bolt-cutters and pulled them toward him. RP 6/12/15 at 56. Newlen also told Sgt Huffine that he and Mr. Hug both pulled the bolt-cutters in opposite directions trying to gain control from each other. RP 6/12/15 at 56. Newlen told Sgt Huffine that Mr. Hug hit himself in the process of pulling the bolt-cutters. RP 6/12/15 at 57. Newlen provided a sworn statement to Sgt Huffine where he stated:

Tom Hug then became physically aggressive. He grabbed my bolt cutters; I pulled back and he lost his grip. The bolt cutters contacted his side.

RP 6/12/15 at 51. After hearing this testimony, the jury found Newlen guilty of assault in the second degree. RP 6/12/15 at 152.

At sentencing the parties agreed that Newlen had a prior larceny conviction that washed and a sodomy conviction that was comparable to the crime of child molestation in the second degree that counted in his offender score, making his range six to 12 months. RP 9/8/15 at 44-45. Newlen's attorney requested that he serve his sentence on electric home monitoring. RP 9/8/15 at 51. Newlen's attorney told the court that on his prior sex offense he did a year on a work farm and received a suspended sentence of 20 years. RP 9/8/15 at 50. Newlen's attorney told the court that Newlen had been a productive member of society his whole life. RP 9/8/15 at 50. Newlen did not object to his legal financial obligations. RP 9/8/15 at 60. The court imposed a sentence of three months in custody and nine months on electric home monitoring. RP 9/8/15 at 58.

#### **IV. ARGUMENT**

##### **A. BECAUSE NEWLEN DID NOT OBJECT HIS CLAIM OF MISCONDUCT WAS WAIVED.**

Newlen waived his claim of prosecutor misconduct when he did not object to the prosecutor's closing argument or rebuttal because the prosecutor's remarks were not improper, much less so flagrant and ill-intentioned that they resulted in enduring prejudice that could not have been cured by an admonition to the jury. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Although Newlen did not object to the prosecutor's closing or rebuttal arguments, he now claims prosecutor misconduct for the first time on appeal. His argument fails.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718 (citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvane*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not

in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if the conduct was improper “prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict.” *Stenson*, 132 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: “[F]ailure to object to an improper remark constitutes a waiver of 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). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not “remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.” *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)

(“If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”).

“Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted). Under this heightened standard, “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762; *Russell*, 125 Wn.2d at 85 (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, “[t]he absence of a motion for mistrial at the time of the argument 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.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Here, to prevail on his misconduct claims, Newlen must show that the prosecutor’s statements were improper. If he can do so, he then must show that these statements were both flagrant and ill-intentioned. He makes no such showing. Additionally, because Newlen did not object and allow the trial court the opportunity to address the issues, if he is able to show misconduct, he must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *Emery*, 174 Wn.2d at 760-61. Because the prosecutor’s statements were not improper, much less flagrant and ill-intentioned, no misconduct occurred. Further, even if the arguments were improper a curative instruction could have obviated any prejudicial effect, and the statements did not result in prejudice that had a substantial likelihood of affecting the jury verdict.

1. **After Newlen's attorney made a claim that was unsupported by the evidence during closing argument, the prosecutor did not commit misconduct by directing the jury to consider only the evidence presented.**

After Newlen's attorney made a claim that was not supported by the evidence during his closing argument, the prosecutor did not commit misconduct by directing the jury to consider the evidence presented on rebuttal. "[W]hile it is misconduct for the prosecutor to suggest that evidence not presented at trial provides additional grounds for the jury to return a guilty verdict, it is not misconduct for the prosecutor to argue that evidence does not support the defense theory or to fairly respond to defense counsel's argument." *State v. Thorgerson*, 172 Wn.2d 438, 449-450, 258 P.3d 43 (2011) (citing *Russell*, 125 Wn.2d at 87). Newlen maintains that the prosecutor suggested evidence that had not been presented would support the testimony of a witness. This argument inverts what actually occurred at trial. It was Newlen's attorney who claimed Brissett's conversation with Sgt Huffine was inconsistent with her testimony that she had been intimidated by Newlen, despite the fact that her conversation with Sgt Huffine was not admitted. On rebuttal, the prosecutor explained that because Brissett's conversation with Sgt Huffine was not in evidence, the evidence presented did not demonstrate the

inconsistency Newlen's attorney argued for. This was a proper response to Newlen's argument.

A prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they were "invited, provoked, or occasioned" by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). A prosecutor's rebuttal comment is not misconduct when an impartial jury might have reached the same conclusion as the prosecutor's comment had it not been made, when the comment was invited by defense counsel's argument. *See State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

In *Russell*, the defense advanced a theory that the police did an inadequate job of investigating and that they did not test every conceivable item of evidence. 125 Wn.2d at 87. The prosecutor responded by arguing:

You may have reason to guess that there is incriminating evidence that has not been developed. You really think that there is evidence of innocence there? The police are only human. They made mistakes, they did the best they could. They developed a lot of incriminating evidence. There may be some that remained undeveloped.

*Id.* The Court found that the prosecutor's statements were "aimed more at responding to defense criticisms than at finding additional reasons to convict Russell." *Id.* Because the prosecutor was responding to a constant defense theme, "the prosecutor's statement constituted a fair response to that theory." *Id.* Additionally, the court ameliorated any negative impact of the statement when it instructed the jury to base its decision solely on the evidence presented in court, and not to consider evidence that was not presented. *Id.* at 87-88. When the prosecutor later argued that the defense had access to its own experts who the jury had not heard from, the Supreme Court found an objection to this evidence combined with the trial court's instruction was sufficient to cure any prejudice. *Id.* at 88.

Here, the prosecutor never argued that the jury was to consider a fact that was not in evidence. Conversely, during his closing argument, Newlen's attorney argued:

Mr. Bentson talks about Jeannie Brissett being an independent witness. I'm not so sure that's accurate. Her testimony is inconsistent with what she tells Deputy Huffine. She tells Deputy Huffine Mr. Newlen talks to me

from the fence line, you know, he initiates this discussion about the fence line and *never tells Deputy Huffine...he comes inside the fence and in any way is intimidating* or anything else. Now she's in a position, comes in[]to testify later and says, you know, he kind of surprises her; he's in her yard; *he's intimidating*.

RP 6/12/15 at 130 (emphasis added). No testimony was ever admitted that Brissett had told Sgt Huffine she had not been intimidated, and only a few details of their conversation were introduced. RP 6/11/15 at 94, 103, 148. Yet despite the fact that no evidence of her conversation with Sgt Huffine—which would have been hearsay—had been presented contradicting Brissett's testimony that she was intimidated, Newlen's attorney argued that when Brissett testified to being intimidated by Newlen, this was inconsistent with what she told Sgt Huffine at the time.

During rebuttal, the prosecutor responded:

You didn't hear the entirety of her [Brissett's] conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that. She testified to what happened and Defense got a chance to cross-examine her, and there was no – you know, that she was intimidated by him, that's not inconsistent with what she told Sergeant Huffine, that's just not evidence that was presented.

RP 6/12/15 at 139. Newlen did not object. However, an objection would not have been sustained, as the prosecutor did not make any argument regarding the content of Brissett's conversation with Sgt Huffine, only noting that it was not evidence. Brissett testified she was intimidated by

Newlen and no evidence was presented that she had told Sgt Huffine otherwise. The prosecutor neither argued nor implied that she told Sgt Huffine she was intimidated, but merely pointed out that no evidence was presented that she told him she was not intimidated. This countered Newlen's attorney's argument, which went beyond the evidence that had been admitted. Thus, unlike Newlen's attorney's argument, the prosecutor's rebuttal was based only on evidence that had been presented and nothing more. For these reasons the prosecutor's statement was proper.

The fluid nature of rebutting arguments requires prosecutors to quickly respond to arguments made by defense. Wording in these situations is understandably less precise than prepared remarks and appellate briefs. It is surprising that Newlen's attorney chose to make a claim that was unsupported by the evidence presented. Obviously, the less an argument is anticipated the more difficult it would be to articulate a perfect response. However, even if the prosecutor's wording was imprecise, the thrust of the prosecutor's response was appropriate: the evidence presented did not contradict Brissett's claim. Because the prosecutor made a conscientious effort to rely on the evidence admitted, when responding to an argument based evidence that was not presented, the prosecutor's argument was neither flagrant nor ill-intentioned.

Additionally, even if misconduct had occurred, Newlen waived this issue when he did not object. By not objecting, Newlen did not give the court the opportunity to cure any resulting prejudice. As demonstrated by *Russell*, even if the prosecutor had argued based on a fact not in evidence, an objection would have been sufficient to obviate any prejudicial effect. Yet, despite not being given an opportunity to correct what Newlen now claims was improper, the court did instruct the jurors that their decisions “must be made solely upon the evidence presented during these proceedings.” RP 6/12/15 at 102. The court also instructed the jury “to remember that the lawyers’ statements are not evidence” and that it “must disregard any remarks, statements, or argument that is not supported by the evidence[.]” RP 6/12/15 at 103. Thus, even assuming the prosecutor’s argument mischaracterized the evidence, there was no prejudice, because the “jury is presumed to follow the trial court’s instructions.” *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Of course, whether or not the eyewitness to the assault had been intimidated earlier by Newlen was relatively inconsequential to the ultimate question of whether Newlen possessed intent when he struck Mr. Hug. The evidence at trial was that Newlen had an ongoing dispute with Mr. Hug over the fence, was angrily cussing at Mr. Hug, and was cutting the fence. RP 6/11/15 at 81, 114, 118. After Mr. Hug pushed the bolt-

cutter head off of the fence, Newlen struck him with the bolt-cutters. RP 6/11/15 at 119. Both Mr. Hug and Brissett, described Newlen as pulling or rearing back with bolt-cutters, swinging them at Mr. Hug, and striking him. RP 6/11/15 at 85, 101, 120. No inconsistency was ever demonstrated between what they originally told Sgt Huffine on this point and what they testified to at trial. RP 6/11/15 at 103-06, 147-48. On the other hand, Newlen originally described having been in a tug-of-war with Mr. Hug over the bolt-cutters, and claimed when Mr. Hug let go, he somehow pulled them into himself. RP 6/12/15 at 51, 56. Then at trial, Newlen claimed that when he attempted to set the bolt-cutters back on the fence he overcorrected and “clipped” Mr. Hug. RP 6/12/15 at 42. The stark contrast between Newlen’s testimony and what he told Sgt Huffine, made his testimony highly questionable. Therefore, it was not surprising the jury found Brissett and Mr. Hug more credible with regard to whether or not Newlen intentionally struck Mr. Hug with the bolt-cutters. Thus, there is not a substantial likelihood that the prosecutor’s statement caused resulting prejudice that had a substantial likelihood of affecting the jury verdict. For these reasons, Newlen’s claim of misconduct was waived.

**2. The State did not elicit opinion evidence from Sgt Huffine nor argue for guilt based on opinion evidence.**

Because the prosecutor did not ask a question designed to elicit opinion evidence and did not argue for guilt based on any opinion evidence, there was no misconduct. “When counsel does no more than argue facts in evidence and suggest reasonable inferences from that evidence there is no misconduct.” *State v. Clapp*, 67 Wn.App. 263, 274, 834 P.2d 1101 (1992), *review denied*, 121 Wn.2d 1020, 854 P.2d 42 (1993). Newlen claims the prosecutor elicited opinion testimony from Sgt Huffine and implied the jury should convict based on this opinion. This is incorrect. The prosecutor did not ask a question that called for Sgt Huffine’s opinion. And, during closing argument the prosecutor neither discussed Sgt Huffine’s opinion nor argued that the jury should find Newlen guilty based on an opinion.

“In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the

context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *Brown*, 132 Wn.2d at 561).

Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *Davenport*, 100 Wn.2d at 763). "Important to the determination of whether opinion testimony prejudices a defendant is whether the jury was properly instructed." *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). Even when improper opinion testimony is given, when jury instructions state that the jurors are the sole judges of witness credibility, are not bound by expert opinions, and there is no indication that the jury has been unfairly influenced, it is presumed that the jury follows the court's instructions. *Id.* at 595-96.

Here, the prosecutor did not ask Sgt Huffine to provide his opinion and never argued that the jury should base its decision or be influenced by any opinion of Sgt Huffine. Toward the end of direct examination of Sgt Huffine the following exchange occurred between the prosecutor and Sgt Huffine:

Q: And did he – did you get a statement from him?

A: Yes, I did.

Q: After this, what did you do?

A: After I took his statement?

Q: Yeah.

A: I arrested him for assault.

Q: And did you – well, you took the bolt cutters when you did that?

A: Yes.

RP 6/11/15 at 147. The prosecutor's question to Sgt Huffine, "what did you do?" did not call for his opinion. Thus, any part of Sgt Huffine's answer that went beyond what he did was not responsive to the prosecutor's question. The fact of arrest does not constitute opinion evidence. The prosecutor did not ask Sgt Huffine why he made the arrest. The prosecutor did not ask him to comment on Newlen's guilt. Rather the prosecutor simply asked an open-ended question about the next step Sgt Huffine took during his investigation. The prosecutor's question immediately after this answer suggests the prosecutor had been attempting to elicit from Sgt Huffine that he had taken the bolt-cutters into evidence, establishing a chain of custody.

During closing argument, the prosecutor correctly focused the jury on its proper function of examining the evidence. Going through the evidence that was a product of Sgt Huffine's investigation was an ordinary

part of a closing argument. The jurors were never told that their decision should be based on Sgt Huffine's opinion. At no point was Sgt Huffine's opinion discussed. At no time did the prosecutor refer to the arrest or provide any reason for the arrest during closing argument. Newlen's claim that the prosecutor referred to a conclusion of Sgt Huffine's is simply unsupported by the record. Because the prosecutor did not ask a question designed to elicit opinion evidence and did not argue for guilt on any basis other than the evidence presented, his closing argument was proper.

Additionally, there is no showing of flagrant or ill-intentioned conduct. As stated above, the open-ended question, asking Sgt Huffine what he did, was not designed to elicit an opinion. Further, the more focused question, regarding the bolt-cutters immediately after, strongly suggested the prosecutor had been attempting to elicit that the bolt-cutters had been taken into evidence. The prosecutor's closing argument, that when differing versions of an event are presented at trial the jury should consider all of the evidence, is exactly the argument a prosecutor should make.

Newlen attempts to impute an improper motive on the prosecutor by presenting a brief exchange at the end of Sgt Huffine's testimony to make it appear that this was the total of Sgt Huffine's investigation.

However, evidence that was presented as a result of Sgt Huffine's investigation was significantly more than this. Sgt Huffine's investigation included responding to the location on the date of the incident, interviewing and observing Mr. Hug, taking pictures, becoming familiar with the property, interviewing Brissett, interviewing Newlen, obtaining the bolt-cutters, and obtaining statements from Mr. Hug, Brissett, and Newlen. RP 6/11/15 at 137-47. The jury heard the substance of these interviews when Mr. Hug, Brissett, and Newlen all testified at trial. This included Newlen providing a version of what occurred with the bolt-cutters that directly contradicted his sworn statement to Sgt Huffine. RP 6/12/15 at 42, 51. Going through this evidence with the jury during closing argument—evidence that was discovered by Sgt Huffine immediately after the event occurred at the location where it occurred—was proper and did not implicate an improper opinion of Sgt Huffine. Accordingly, there is no showing of flagrant or ill-intentioned conduct by the prosecutor.

Of course, Newlen did not object to the Sgt Huffine's answer or to the prosecutor's benign statement during closing argument. This strongly suggests that the parties did not see this argument as improper at the time. However, if an objection had been made, the court could have instructed

the jury not to consider any improper opinion evidence. Because Newlen did not raise such an objection, he did not give the court this opportunity.

Yet despite not being provided the opportunity to address the issue, the court still instructed the jurors that they were “the sole judges of the credibility of each witness” and if a witness had “special training, education, or experience,” they were “not...required to accept his or her opinion.” RP 6/12/15 at 103, 107. The jurors were also instructed that if any evidence was ruled inadmissible not to “discuss that evidence during your deliberations or consider it in reaching your verdict.” RP 6/12/15 at 102. There is no evidence the jury failed to follow these instructions.

Further, it is difficult to see how any prejudice would not have been cured by an instruction. Asking the jury to examine evidence that was presented as result of Sgt Huffine’s investigation did not implicate his opinion. And even if it had, with an objection the court could have corrected any prejudice that arguably existed. Further, the evidence presented was that an additional witness strongly corroborated the assault Mr. Hug described, the circumstantial evidence supported Newlen striking Mr. Hug out of anger rather than by accident, and Newlen’s testimony was completely contradicted by his earlier statements to Sgt Huffine. Thus, there was not a substantial likelihood that the impact of this claimed

opinion evidence would have changed the outcome of the trial. Because Newlen did not object, the issue was waived.

**3. In rebuttal the prosecutor did not improperly shift Newlen’s burden or ask the jury to find who was telling the truth.**

During rebuttal the prosecutor did not improperly shift the burden of proof. “[T]here is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts it must necessarily reject the other.” *State v. Vassar*, 188 Wn.App. 251, 261, 352 P.3d 856, (2015) (quoting *State v. Wright*, 76 Wn.App. 811, 825, 888 P.2d 1214 (1995)). Newlen maintains the prosecutor shifted the burden of proof, alleging that the prosecutor suggested the jury had to decide which side was lying and by challenging Newlen’s lack of support for his claim regarding the property line. Both of these arguments fail. First, the prosecutor never argued that the jury was required to find a party was lying, but when responding to Newlen’s closing argument merely pointed out that the jury’s role was to evaluate the credibility of the witnesses’ testimony. Second, once Newlen testified regarding the property line and his attorney also referenced the lack of a survey in his argument, the prosecutor was entitled to respond that no survey had ever been admitted.

“[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 at 87 (citing

*United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir. 1978)). The State is entitled to comment on the quality and quantity of evidence presented by the defense and such an argument does not necessarily suggest the burden of proof rests with the defense. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.3d 757, 336 P.3d 1134 (2014) (citing as an example *People v. Boyette*, 29 Cal.4<sup>th</sup> 381, 127 Cal.Rptr.2d 544, 58 P.3d 391, 425 (2002) (holding in a capital case that argument commenting on the lack of corroboration for the defendant’s story did not shift the burden of proof)). Although a prosecutor may not shift the burden of proof to the defendant, *see, e.g., In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), “a prosecutor’s remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Gentry*, 125 Wn.2d at 643-44.

“While defendants are not obligated to produce any evidence, a prosecutor is allowed to comment on a defendant’s failure to support her own factual theories[.]” *Vassar*, 188 Wn.App. at 260. Arguing that facts indicate a witness is truthful is not misconduct. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 730, 899 P.2d 1294 (1995). The use of the word “lie” does

not by itself establish prosecutor misconduct. *State v. Millante*, 80 Wn.App. 237, 251, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1996). Even strong “editorial comments” by a prosecutor are not improper if they are in response to arguments made by the defendant. *Brown*, 132 Wn.2d at 566.

Here, in responding to Newlen’s attorney’s closing argument the prosecutor did not shift the burden of proof. During his closing argument, Newlen’s attorney attacked Brissett’s and Hug’s testimony as being the product of “bad blood between the parties.” RP 6/12/15 at 126. He argued that due to conflict they “perceive things about each other in a negative light.” RP 6/12/15 at 127. He argued their “bad blood affects their perception.” RP 6/12/15 at 128. He argued that neither Mr. Hug nor Newlen had obtained another survey or taken the property dispute to court. RP 6/12/15 at 129. He argued Brissett’s testimony was inconsistent with what she told Sgt Huffine with regard to Newlen entering the fence line or being intimidated. RP 6/12/15 at 130. He argued that Brissett had said she was okay with Newlen moving the fence, but that her ongoing financial relationship with Mr. Hug influenced her testimony. RP 6/12/15 at 130-31. He argued that because she had a contract with Mr. Hug, Brissett was not an “independent, unbiased witness.” RP 6/12/15 at 131. He argued that their interest in the property made Mr. Hug and Brissett

have bias. RP 6/12/15 at 131-32. He argued because Mr. Hug was frustrated his testimony regarding pushing the bolt-cutters was questionable. RP 6/12/15 at 132-33. He argued that Brissett's observations should be questioned because "she's got an interest in this." RP 6/12/15 at 135. And, he argued that Mr. Hug "just says: I know it was intentional because of our bad blood." RP 6/12/15 at 135.

In rebuttal, the prosecutor was tasked with responding to this sustained attack on the credibility of the State's witnesses. The prosecutor responded:

This was not an accident. No more than a batter wants to hit a baseball on purpose, the Defendant wanted to hit Mr. Hug on purpose. He was mad at him about the fence; ongoing dispute; the bad blood, that's all the more reason to believe it's not an accident. He got mad when he pushed his bolt cutters away and he hit him.

And you heard from Mr. Hug and you heard from Ms. Brissett and you can judge if they were up to something in the courtroom, or if the Defendant was, and that's – that's for you to decide.

RP at 136-37. Thus, in rebutting Newlen's attorney's claim that the bad blood between Newlen and Mr. Hug made it less likely the Newlen had acted intentionally—the prosecutor argued that bad blood made it more likely Newlen had acted with intent. Then prior to addressing the remainder of Newlen's attorney's argument the prosecutor pointed out that the jury was the sole judge of the credibility of the witnesses who

testified—Mr. Hug, Brissett, and Newlen. Nothing about this statement told the jury it was required to find a party was lying. It was not improper to allude to the obvious, Newlen’s version of what occurred was inconsistent with Mr. Hug’s and Brissett’s.

During his closing argument, Newlen’s attorney argued:

Both people believe they’re right about the boundary. Mr. Newlen made measurements based on the survey he believes is correct. Mr. Hug doesn’t respond by saying: Hey, maybe you’re right let’s work this out, he says adverse possession, you know. Even if this is your property, my fence has been there – you know, even if the survey is right, my fence has been there. I’ve got this legal theory that says the property is mine. Neither one of them goes to the next step of actually getting another survey or – taking the matter to court to resolve it. They are just firm in their convictions. Not really the most neighborly position on either side, but their positions.

RP 6/12/15 at 129-130. Thus, during his closing argument, Newlen’s attorney argued that the lack of a survey by Mr. Hug and Newlen, made both of them poor neighbors. Newlen’s attorney also argued Brissett gave Newlen permission to move the fence, and that her testimony to the contrary was the result of her financial interest. RP 6/12/15 at 130-31.

On rebuttal, the prosecutor argued:

If a fence is already there, before anyone is taking a fence down there ought to be some agreement between the people, or he ought to go and legally get some kind of authorization to do that. But to just take the fence down, that doesn’t make any sense. And by the way, there’s no real evidence that he’s even right about the property line,

that's his – what he's saying, but we don't have some survey or anything actually presented to tell us what the property line actually is.

... [T]his case is not about the property line or the fence or the law regarding who owns the property within their fence. When people have a fence up, it's more than just their line because that gives them privacy in their yard, and to just take someone's fence down, like I say, it's bound to cause conflict. And that's what makes it so difficult to believe that Ms. Brissett was like: Hey, go ahead and take my fence down on a place she's about to be buying and about to [be] moving in[ ]to. Why would she want her fence just taken down by someone she just met? That would be awful unusual.

RP at 138-39. The context of the prosecutor's argument was important.

The prosecutor was rebutting the claim that Brissett had given her permission to Newlen to remove the fence. In doing so, the prosecutor merely pointed out—as Newlen's attorney had—that the lack of a survey brought his claim over the property line into question. Yet, the thrust of the prosecutor's argument was not that Newlen was wrong about the property line or that he had failed to prove he was right about the property line. Rather, the prosecutor argued that cutting down a person's fence is not something a person living on a property would normally like or agree to. And thus, Brissett's testimony that she had not intended to grant Newlen permission made sense. This did not place the burden of proof on Newlen. As in *Russell*, the prosecutor's argument was “aimed more at responding to defense criticisms than at finding additional reasons to

convict,” and was a fair response to the defense theory. *See* 125 Wn.2d at 87. Consequently, the prosecutor’s rebuttal was not improper.

Additionally, there is no showing that the prosecutor’s argument was flagrant or ill-intentioned. The prosecutor’s argument was in response to a defense closing that was almost entirely devoted to attacking the credibility of the State’s witnesses. There is nothing in responding to these arguments that suggested an improper motive on the part of the prosecutor. Further, the prosecutor did not suggest Newlen had the burden to prove the State’s witnesses were lying or to produce evidence. The prosecutor was entitled to challenge Newlen’s testimony when it was unsupported by evidence and to challenge him when his testimony was contradicted both by the State’s witnesses and by his own sworn statement.

As with Newlen’s other claims of misconduct, he waived the issue when he did not object during trial. Had Newlen objected, the court would have had the opportunity to consider the objection and instruct the jury to avoid any prejudice. It is difficult to see what prejudice exists when a prosecutor merely points out that the jury is to judge the credibility of testifying witnesses or points out a lack of evidence supporting a testifying witness’s claim. However, had there been prejudice, there is no reason to believe that they jury could not have been properly instructed to

disregard an improper statement. Additionally, the jury was instructed “to remember that the lawyers’ statements are not evidence” and that it “must disregard any remarks, statements, or argument that is not supported by the evidence[.]” RP 6/12/15 at 103. Thus, even as given the instructions protected against any potential harm from the prosecutor’s statements. And, as previously discussed, the key evidence in the case overwhelmingly corroborated Mr. Hug and contradicted Newlen. Accordingly, based on what is argued here, there is not a substantial likelihood that the prosecutor’s statement caused resulting prejudice that had a substantial likelihood of affecting the jury verdict. Therefore, as with his other claims, when Newlen failed to object his claim of misconduct was waived.

**B. NEWLEN’S ATTORNEY WAS NOT INEFFECTIVE.**

Newlen’s attorney was not ineffective. “[W]here the defendant claims ineffective assistance based on counsel’s failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.” *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted). Because the prosecutor’s arguments were

proper, and an objection would have failed, Newlen's attorney was not ineffective. Further, there were legitimate tactical reasons not to object, and even if an objection had been sustained the outcome of the trial would have been the same.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* at 173.

“[T]here is no ineffectiveness if a challenge to the admissibility of evidence would have failed[.]” *State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (citing *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006)). “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). The appellate court should strongly presume that defense counsel’s conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)). Of course, if trial counsel would not have succeeded in a course of action a defendant claims should have been taken at trial, it cannot form the basis of an ineffective assistance claim. *See Nichols*, 161 Wn.2d at 14-15. With regard to the second prong of the *Strickland* test: “Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would

have been different.” *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

To show that a failure to object caused counsel to be ineffective the defendant has the burden of showing that “not objecting fell below prevailing professional norms, that the proposed objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). “The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). Courts presume that “the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption.” *State v. Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Madison*, 53 Wn.App. at 763.

Here, for many of the same reasons Newlen’s misconduct claims fail, so do his claims of ineffective assistance of counsel. First, there were legitimate tactical reasons for not objecting. What was at issue was whether Newlen intentionally struck Mr. Hug or whether he struck him on accident. Yet the issues Newlen complains of did not directly address the

evidence regarding this issue. Rather than interrupt the prosecutor's argument with objections to minor issues in the case, Newlen's attorney chose to trust the strength of his attacks on the credibility of the State's witnesses. Further, because the jury instructions adequately protected against the risk that the jury would consider facts or arguments that went beyond the evidence, there was minimal value in raising an objection to arguments that were relatively insignificant. Second, Newlen would need to show that objections would have been sustained. Because the prosecutor has wide latitude and is permitted to draw reasonable inferences during closing argument and is also permitted to provide a fair response to arguments made by defense counsel on rebuttal, an objection was unlikely to be sustained. Finally, the evidence Newlen puts at issue was inconsequential compared to the key evidence in the case: Newlen, who was angry at Mr. Hug, was observed by Mr. Hug and another eyewitness as pulling the bolt-cutters back and swinging them at Mr. Hug, striking him and causing him substantial injury. And, Newlen's in-court testimony was in direct contradiction to his statements to Sgt Huffine and his sworn, written statement. Thus, the outcome in the trial would not have been any different had the complained of evidence not been admitted. Therefore, Newlen did not suffer prejudice. Because Newlen

fails to establish either prong of the *Strickland* test, his claim of ineffective assistance of counsel fails.

**C. BECAUSE THE STATE HAS NOT SOUGHT APPELLATE COSTS, THE ISSUE IS NOT CURRENTLY BEFORE THIS COURT**

Because the State has not attempted to recoup appellate costs in this case, the appellate cost issue raised in Newlen's brief is not ripe for review at this time. "[A]ny constitutional issues that might be raised with regard to penalties imposed are not presently ripe for review. It is only when the State attempts to collect ... payment ordered by the trial court that such issues may arise." *State v. Phillips*, 65 Wn.App. 239, 244, 828 P.2d 42 (1992). RCW 10.73.160 permits the court to require a person convicted of a crime to bear the responsibility of paying his or her appellate costs. Prior to an award of appellate costs being ordered, two things must occur. First, because the statutory provision authorizing recoupment of appellate costs requires a conviction, a conviction must first be affirmed. *See* RCW 10.73.160(1). Second, the State must request the award of appellate costs according to the rules of appellate procedure. *See* RCW 10.73.160(3); RAP 14.

It is well-settled that the relevant time to address the issue of payment of costs is at "the point of collection and when sanctions are sought for nonpayment." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d

1213 (1997). In *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), the Supreme Court ruled that the trial court erred by imposing legal financial obligations without conducting an inquiry into the defendant's ability to pay. Subsequently, Division One of the Court of Appeals refused to award appellate costs that were sought by the State when the record caused the court to conclude the indigent appellant's financial condition was not likely to improve. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612 (2016).

Here, unlike *Sinclair*, the State has not sought appellate costs. There is no need to conduct an inquiry into Newlen's ability to pay unless the State attempts to recoup appellate costs. Should the State later seek an order for recoupment of appellate costs, then Newlen would be permitted to oppose them at that time. However, until such time as the award of these costs is sought, his argument regarding appellate costs should not be considered.

V. **CONCLUSION**

For the above stated reasons, Newlen's conviction and sentence should be affirmed.

Respectfully submitted this 3<sup>rd</sup> day of October, 2016.



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Representing Respondent

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 3<sup>rd</sup>, 2016.

  
\_\_\_\_\_  
Michelle Sasser

**COWLITZ COUNTY PROSECUTOR**

**October 03, 2016 - 4:22 PM**

**Transmittal Letter**

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**Comments:**

No Comments were entered.

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