

NO. 48081-6-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MATTHEW L. FERGUSON,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
I. STATE’S RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO THE STATE’S RESPONSE TO THE ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT	2
1. NO PROSECUTORIAL MISCONDUCT OCCURRED IN THIS CASE.....	2
2. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN THIS CASE.	6
A. COUNSEL PROVIDED EFFECTIVE ASSISTANCE	6
3. FAILURE TO OBJECT BY THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.....	12
4. THERE IS NOT SUFFICIENT CUMMULATIVE ERROR TO WARRANT REVERSAL OF THE CONVICTIONS.....	13
V. CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Cases	
<i>In re Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	7, 11
<i>In re Khan</i> , 184 Wn.2d 679, 363 P.3d 577 (2015).....	8
<i>In re Monschke</i> , 160 Wn. App. 479, 251 P.3d 884 (2010)	7
<i>In Re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	13
<i>In re Pers. Restraint of Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012). 4	
<i>Jones v. Hogan</i> , 56 Wn.2d 23, 351 P.2d 153 (1960).....	2
<i>State v. Bebb</i> , 44 Wn. App. 803, 723 P.2d 512 (1986).....	2
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)	3
<i>State v. Cissne</i> , 72 Wn.App 677, 865 P.2d 564 (1994).....	5, 6
<i>State v. Davis</i> , 174 Wn. App. 623, 300 P.3d 465 (2013).....	7, 8
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	4, 13
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980).....	12
<i>State v. Fredrick</i> , 45 Wn. App. 916, 729 P.2d 56 (1986)	7
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	2
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	14
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	7
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	6

<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978).....	8, 11, 12
<i>State v. Krause</i> , 82 Wn. App. 688, 919 P.2d 123 (1996).....	8
<i>State v. Kyllo</i> , 166 Wn. 2d 856, 215 P.3d 177 (2009)	7
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991)	12
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	3
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989)	12
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	3
<i>State v. Maurice</i> , 79 Wn. App. 544, 903 P.2d 514 (1995).....	8, 9, 10, 11
<i>State v. Nagel</i> , 30 Ohio App. 3d 80, 506 N.E.2d, 286 (1986)	5
<i>State v. Neidigh</i> , 78 Wn. App. 71, 895 P.2d 423, 429 (1995).....	11
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	11
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	4
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	2
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	4
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	6
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6, 7, 12

Rules

ER 401.....	5
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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. No prosecutorial misconduct occurred in this case.
2. Defense counsel was not ineffective for choosing to not hire an accident reconstructionist.
3. Defense counsel was not ineffective for failing to object to prosecutorial misconduct as there was no misconduct.
4. No cumulative error existed to deprive the defendant of a fair trial.

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

1. Whether the deputy prosecuting attorney for the State appealed to the jury's passion and prejudice during closing argument?
2. Whether defense counsel provided ineffective assistance of counsel when he chose not to hire an accident reconstructionist?
3. Whether defense counsel was ineffective for failing to object to prosecutorial misconduct?
4. Whether there were sufficient cumulative errors to support reversal of convictions?

III. STATEMENT OF THE CASE

The State concurs with Ferguson's rendition of the Statement of the Case with the exceptions and additions as contained within the brief below.

IV. ARGUMENT

1. NO PROSECUTORIAL MISCONDUCT OCCURRED IN THIS CASE.

Ferguson claims the prosecutor in his case made improper remarks during closing argument that inflamed the passions of the jury. However, all of Ferguson's claims of prosecutor misconduct should be considered waived because he did not object at trial. "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) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). 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.”).

All of Ferguson’s claims of prosecutor misconduct share a similar trait—in no instance was an objection raised. Further, in none of these instances was evidence elicited or argument made by the prosecutor improper. For these reasons, Ferguson’s claims of prosecutor misconduct should be considered waived.

However, should the court desire to analyze the remarks of the prosecutor, all claims of misconduct require, “the defendant bear...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)). Allegedly improper comments are reviewed 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 it is shown that 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*, 125 Wn.2d at 718-19.

“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); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). 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; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (“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) (citations omitted).

Here, the Ferguson is challenging the prosecutor's use of the phrase "hood rats" and alleged portrayal of Ferguson as a "rich kid." The challenged language is based in testimony provided by the earliest responding officer Tim Deisher. RP 83-84. The behavior of Ferguson is further testified to by other law enforcement officers who arrive on scene. RP 94, 101; 2RP 17-18. While this is characterized as inflaming passions of the jury by Ferguson, statements such as these are probative evidence of Ferguson's impairment. In *State v. Cissne*, a driving under the influence case, Mr. Cissne argued his statements about suing the officer and making sexual advances towards the officer should not have been admitted because they were irrelevant or prejudicial. 72 Wn.App 677, 865 P.2d 564 (1994). The court relied on ER 401 stating, "evidence is relevant if it tends to make any fact of consequence more of less probable." Further, the court relied upon *State v. Nagel* which states, "[o]bjective manifestations of insobriety, personally observed by the officer, are always relevant where...the defendant's physical condition is in issue." *Id. citing State v. Nagel*, 30 Ohio App. 3d 80, 506 N.E.2d, 286 (1986). The prosecutor in this case used the language witnesses testified about to demonstrate Ferguson's physical condition. The elements of a vehicular assault require the State to prove impairment of a driver's physical condition at the time of the collision. Here, the statements of Ferguson are similar to those made in *Cissne*. They

are not characterizations people want associated with them, but statements people make while impaired because their inhibitions are lowered. While the *Cissne* court focused on the relevance and prejudicial nature of the statements as evidence, it is instructive in the case at hand because relevant evidence should be discussed in closing arguments, even if it appears to appeal to the passions and prejudices of the jury. *See, for example, State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Therefore, the prosecutor using language Ferguson used at the time of the collision, when the statutory elements put Ferguson's physical condition at issue should not be considered as appealing to the passions and prejudice of the jury.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN THIS CASE.

a. Counsel provided effective assistance

In order to show counsel provided ineffective assistance, a defendant must be able to establish both (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Because both prongs must be met, a failure to show either prong

will end the inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

The first prong of the *Strickland* test requires a defendant to show defense counsel's performance was deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260, 1268 (2011). In order for a performance to be deficient, it must fall below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d at 33. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption counsel's performance was reasonable. *State v. Kyllö*, 166 Wn. 2d 856, 862, 215 P.3d 177, 181 (2009). Legitimate trial tactics or strategy cannot form the basis for an ineffective assistance of counsel claim. *In re Cross*, 180 Wn.2d 664, 694, 327 P.3d 660, 679-80 (2014).

An attorney's decision to call a witness to testify is a matter of legitimate trial tactics, and therefore will not support a claim of ineffective assistance of counsel. *In re Monschke*, 160 Wn. App. 479, 492, 251 P.3d 884, 892 (2010). The only way to overcome this presumption is to show counsel failed to adequately investigate or prepare for trial. *State v. Davis*, 174 Wn. App. 623, 639, 300 P.3d 465, 472 (2013). In *Davis*, it was unsuccessfully argued defense counsel was ineffective because counsel failed to call certain witnesses Davis believed would present helpful character evidence. *Davis*, 174 Wn. App. 639. The court held even though

further evidence of Davis's past conduct could have been helpful, trial counsel's decision to only call two witnesses was a legitimate trial tactic and no claim of ineffective assistance of counsel could be made. *Davis*, 174 Wn. App. 639. *See also, State v. Krause*, 82 Wn. App. 688, 697, 919 P.2d 123, 127 (1996) (in order to make a claim of ineffective assistance of counsel, a defendant must demonstrate the decision whether to call a witness is not part of counsel's legitimate trial strategy); *In re Khan*, 184 Wn.2d 679, 693-94, 363 P.3d 577, 584 (2015) (the decision not to put on a defense expert was a reasonable trial strategy because a clash of expert opinion would not have helped his client's defense).

Cases which illustrate where counsel fails to adequately investigate or prepare for trial differ vastly from the instant case. For example, in *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302, 1307 (1978), defense counsel made virtually no factual investigation and admitted he was unprepared for trial. The court held failure of defense counsel to acquaint himself with the facts of the case was behavior so substantially ineffective no reasonably competent attorney would have performed in such manner. *Jury*, 19 Wn. App. 263.

In support of his case, Ferguson points to *State v. Maurice*, 79 Wn. App. 544, 903 P.2d 514 (1995), where failure to call an expert witness was ineffective assistance of counsel. However, the facts in *Maurice* are

distinguishable from the facts before this court. In *Maurice*, the defendant believed a mechanical malfunction caused his accident. *Id.* The defense attorney failed to investigate Maurice's theory or hire an expert in accident reconstruction who could find evidence of mechanical failure. *Id.* After Maurice was convicted, he hired his own accident reconstructionist who was able to determine the vehicle did have mechanical failure. *Id.* at 550-51. The court held defense counsel's failure to investigate mechanical error constituted deficient performance. *Id.* at 552.

Unlike *Maurice*, this case does not involve the issue of a mechanical error in the vehicle. The issue in this case comes down to the positioning of the vehicles in the seconds prior to the collision. Defense counsel's theory of the case at hand is that there is no way to know the positions of the two vehicles in the few seconds before the accident. 8/20/2015 RP 117. This is supported by what defense counsel elicits during cross examination of several of the prosecution's witnesses. During the cross examination of Cowlitz County Deputy Danny O'Neill, defense counsel asked if he knew which lanes the vehicles were in five seconds prior to the accident. 8/18/2015 RP 110. Deputy O'Neill responded "definitively, I don't think anybody could prove that." 8/18/2015 RP 110. Similarly, during the cross examination of Washington State Patrol Trooper Evan Clark, defense counsel asked if the trooper knew when Ferguson's vehicle returned into its

own lane. 8/20/2015 RP 40. Trooper Clark answered “we didn’t have any post impact marks, so I couldn’t say one way or the other. If we had marks on the roadway, then, yeah, I could say one way or the other; but, because there’s no marks on the road, I can’t say right here or right here.” 8/20/2015 RP 40.

Ferguson contends defense counsel’s decision not to investigate the roadway, damaged vehicle, or sight lines along the curve in the highway was unreasonable. This contention is not supported by the proffered theory. Defense counsel’s theory, the inability to determine the positions of the vehicles, thereby casting doubt as to what each vehicle did or did not do, is a legitimate tactic does not support a claim of ineffective assistance of counsel. Defense counsel successfully elicited testimony from multiple witnesses there was no definitive way of knowing the vehicles positions prior to the accident supporting his theory of the case. Additionally, unlike *Maurice*, Ferguson makes no showing the testimony of an expert in accident reconstruction would provide any helpful information on his behalf, which is unlikely to happen because there were unknowns.

Even if Ferguson is able to overcome the strong presumption defense counsel’s performance was reasonable, he must also be able to show but for counsel’s purportedly deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130,

101 P.3d 80, 84 (2004). In *State v. Jury*, the court held failure to interview and subpoena witnesses who might have helped the defense is not indicative of actual prejudice. *Jury*, 19 Wn. App. 265. When there is only speculation whether testimony from excluded witnesses would have been helpful or offered testimony relevant to the defense, there cannot be a showing of actual prejudice. *Jury*, 19 Wn. App. 265. Even if the incompleteness of the record is due to counsel's ineffectiveness, a court cannot determine whether the incompleteness is actually prejudicial unless the court is credibly informed as to what the missing evidence is. *Jury*, 19 Wn. App. 265. Because the defendant was not able to definitively show what evidence the missing witnesses could have provided, his claim of prejudice failed. *See also In re Cross*, 180 Wn.2d 664, 701, 327 P.3d 660, 683 (2014) (speculation a witness might have been helpful or may possess important information does not meet the standard for showing actual prejudice); *State v. Neidigh*, 78 Wn. App. 71, 81, 895 P.2d 423, 429 (1995) (a claim of prejudice for failure to call a witness cannot survive if a defendant fails to demonstrate what the witness would have said).

In this case, Ferguson argues defense counsel's failure to have an expert in accident reconstruction testify prejudiced the outcome of this case. However, Ferguson made no showing of what an expert witness would have been able to say on his behalf. Unlike in *Maurice*, Ferguson did not actually

go on to hire an accident reconstructionist, and is therefore unable to demonstrate whether that testimony would be helpful. Furthermore, this claim contradicts Ferguson's defense counsel's theory that there is no way of knowing what happened in the seconds leading up to the accident. Following the reasoning in *Jury*, the claim of actual prejudice cannot survive in this case because there is only speculation as to whether an expert would have offered testimony relevant to Ferguson's defense.

Because Ferguson is unable to meet either of the prongs of the *Strickland* test, his claim of ineffective assistance of counsel should not survive.

3. FAILURE TO OBJECT BY THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

As outlined above the *Strickland* test controls whether or not counsel was ineffective. Courts have declined to find ineffective assistance of counsel when the actions of counsel go to the theory of the case or to trial tactics. *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). Differences of opinion regarding trial strategy or tactics are not sufficient to prove a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991). "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). This court presumes that the

failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut the presumption. *In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

In this case, it was a legitimate trial tactic to not object to the prosecutor's closing argument. A trial attorney may choose not to object to a statement so as not to draw more attention to it. Additionally, the argument of the prosecutor cited to by Ferguson occurs after the findings of guilt by the jury. The arguments taken umbrage with are from the closing argument over aggravating factors, which the jury found against imposing. 8/21/15 RP 172-173. If anything, it goes to show the jury was not swayed by an emotional argument. Thus, the defense attorney should not be found to be ineffective.

4. THERE IS NOT SUFFICIENT CUMMULATIVE ERROR TO WARRANT REVERSAL OF THE CONVICTIONS.

The cumulative error doctrine exists for situations where multiple errors occurred, however, each error standing alone would be considered harmless. *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006). The remedy for the cumulative error doctrine is reversal. *Id.* A defendant is only entitled to a new trial if the cumulative errors produced a trial that was fundamentally unfair. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). The doctrine does not apply where the errors are few and have little or no

effect on the outcome of the trial. *Id. citing State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The alleged errors set forth by Ferguson do not affect the outcome of his trial. Ferguson has not indicated how these combined errors affected the outcome of his trial other than to state they were “likely to materially affect the jury’s verdict and the integrity of the verdict cannot be assured”. *Br. of Appellant*, pg. 22. Therefore, a cumulative error doctrine claim should fail.

V. CONCLUSION

Based on the preceding argument, the State respectfully requests this Court to deny the instant appeal. The appellant failed to show any prosecutorial misconduct in this matter. Furthermore, defense counsel was not ineffective, rather the choices made were of a tactical nature. Finally, the cumulative error doctrine does not apply as there was no indication of how the alleged errors in conjunction with each other produced a fundamentally unfair trial.

The State asks this Court to affirm the convictions.

Respectfully submitted this 5th day of August, 2016.

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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 Aug 5th, 2016.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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