

NO. 48309-2

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

STATE OF WASHINGTON, RESPONDENT

v.

DALE FARRELL, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Michael Schwartz, Judge

No. 14-1-03953-2

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**BRIEF OF RESPONDENT**

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

1. Did the trial court properly exercise its discretion by admitting no contact order evidence under ER 404(b) when the evidence showed the victims' reasonable fear and any prejudice was neutralized sufficiently with a limiting instruction?
2. Was defense counsel ineffective for failing to move for a mistrial after the court dismissed the two no contact order charges, defense counsel's representation did not fall below an objective standard of reasonableness, and defendant was not prejudiced by the decision to allow a limiting jury instruction regarding the evidence?
3. Was the evidence sufficient for a jury to find defendant guilty beyond a reasonable doubt when defendant assaulted victims and threatened them with a knife with a blade that exceeded three inches in length and was capable of producing substantial bodily harm?

B. STATEMENT OF THE CASE.

1. Procedure

On August 25, 2015, the Pierce County Prosecutor's Office filed a second amended information charging Dale Farrell ("defendant") with Count I (Assault in the Second Degree), Count II (Felony Harassment), Count III (Violation of a Protection Order), Count IV (Assault in the Second Degree), Count V (Felony Harassment), Count VI (Violation of a Protection Order), Count VII (Obstructing a Law Enforcement Officer), and Count VIII (Resisting Arrest). CP 24-28.

The Honorable Judge Michael E. Schwartz presided over the trial. RP 1. Defense counsel filed a halftime motion to dismiss Counts I and IV on the basis of insufficient evidence. CP 35. Defense counsel did not specify which element was lacking, and the court raised the issue as to whether the State had presented sufficient evidence of an “assault” under Counts I and IV. *Id.* The court allowed counsel the opportunity to provide briefing on whether there was sufficient evidence of an “assault” to go to the jury. *Id.* The court ruled the issue of whether Mrs. LeBoeuf and Ms. Hardy’s fear was reasonable was a question for the jury, and denied defendant’s motion to dismiss. RP 313.

The State brought a motion in limine to allow the admission of evidence of defendant’s violation of two no contact orders with the victims. RP 35. Specifically, the State requested permission to admit certified copies of each protection order. *Id.* Defense counsel did not object. *Id.* The State also addressed that in the 911 calls placed by both victims, the victims referenced the existence of no contact orders between them and defendant. RP 55. The State indicated it intended to bring up the calls during the witness’ testimonies for the purpose of corroborating the testimonies. RP 56. The parties agreed the recordings were admissible and agreed to submit limiting instructions the following day. RP 58-59.

The parties differed about what specific language should be used in the limiting instruction. RP 376. The defense argued that the instruction should order the jury to disregard any and all evidence regarding any protection orders issued with respect to Lisa Hardy or Dori LeBoeuf. *Id.* That contention was based on the fact that Count III (Violation of a Protection Order) had been dismissed, and, therefore, evidence of the no contact orders would be prejudicial. *Id.* Defense contended the evidence would be unduly prejudicial and was inadmissible under ER 404(b). RP 403. The State argued that the evidence should still be admissible to show that the victims had knowledge of the no contact orders at the time they feared the threats defendant made, and that their knowledge of a protection order would go toward the belief that defendant could make good on the threats and the reasonableness of the threat. RP 377.

The court ruled there was a lawful reason for the jury to consider the evidence pursuant to 404(b), and that the instruction served to properly guide their deliberation without commenting on the evidence. RP 404.

The court gave the instruction as follows:

Certain evidence has been admitted in this case consisting of two protection orders issued by a court naming Dori LeBoeuf and Lisa Hardy as the protected parties. The charges alleging that defendant violated those orders have been dismissed. Therefore, you may only consider this evidence, if at all, for the limited purpose of motive and/or the alleged victims' state of mind, and for no other purpose.

RP 390.

The jury returned guilty verdicts of Counts I, II, IV, V, and VII. CP 142. With respect to Counts III and VI, the court dismissed them for being charged under an incorrect statute. RP 363-365. Defendant was sentenced to 43 months. *Id.* Additionally, defendant received 36 months. The court imposed mandatory legal financial obligations (LFOs) of \$800. *Id.* Defendant filed timely appeal. CP 169.

## 2. Facts

Officers responded to reports of a man wielding a knife and threatening to kill his neighbors from his front yard in a Tacoma residential neighborhood on October 3, 2014. RP 183. Dori LeBoeuf was working in her garden that morning when she heard someone on the other side of her wooden fence call her by name and say, “Dori, yah, I’m talking to you. You are going to get it. I’m going to get you Dori.” RP 70-71. The fence was situated between Mrs. LeBoeuf and defendant’s properties. RP 71. Mrs. LeBoeuf called the police to report the incident at approximately 10:00 a.m. RP 72.

Mrs. LeBoeuf reported “excessive” music and drumming being emitted from defendant’s residence. *Id.* She described “excessive” as being extremely loud and that she was able to hear it with her windows

and door shut, as well as when defendant's house was entirely closed up. RP 73. The music had been incessant since 9:00 p.m. the night before. *Id.* Mrs. LeBoeuf reported that, in addition to the music, other noises continued coming from defendant's house throughout the course of the day, including the sound of doors slamming repeatedly and cackling. RP 74.

Later that afternoon, Mrs. LeBoeuf called the police a second time to report defendant's continuous, concerning behavior. RP 75. Mrs. LeBoeuf's phone call was spurred by defendant hollering, "Oh, baby, oh, baby, yeah, yeah, you run, baby, you run, baby," at several Wilson High School girls walking by. *Id.* Mrs. LeBoeuf was concerned defendant would still be behaving in that manner when her nephews walked home from school. *Id.*

Mrs. LeBoeuf briefly left the house to go to the store, and she and her husband sat on the couch in the living room after she returned. RP 77. Shortly after she had sat down, she saw a sudden movement out of her peripheral vision and saw defendant running to a grassy area out in front of both parties' properties with a hose spraying full blast. RP 77-78. There are no obstructions between defendant and Mrs. LeBoeuf's front yards, which are situated next to each other, and defendant was between 25 and 50 feet from Mrs. LeBoeuf's house. RP 111; 125. Mrs. LeBoeuf

could hear defendant yelling, “Dori, you fucking cunt. I’m going to kill you. Yes, you. You fucking cunt, I’m going to kill you.” RP 79. Mrs. LeBoeuf saw that, in addition to the garden hose, defendant was also holding a skinny, pointed knife in his other hand. *Id.* Mrs. LeBoeuf testified that the knife had a “good size” blade on it, and it was between three and four inches long. RP 95.

Immediately after seeing defendant was armed with a knife as he continued to loudly and aggressively yell threats at her, Mrs. LeBoeuf called the police for the third time that day to report that defendant was brandishing a knife and threatening her. RP 80, 112, 163. Mrs. LeBoeuf instructed her husband, Mike LeBoeuf, to lock and deadbolt all the doors on the house out of fear defendant would come crashing through the door after her. RP 82. At that point, defendant stood at the border of his property adjacent to the front of Mrs. LeBoeuf’s yard, which was not fenced. RP 87-88. In the 911 tape recording between Mrs. LeBoeuf and the police operator, Mrs. LeBoeuf described the knife defendant was wielding as being “like a steak knife” and was three or four inches long. RP 93-94.

Mrs. LeBoeuf was particularly concerned about the incident because it escalated so quickly and defendant’s behavior seemed very unpredictable. RP 96. One moment, Mrs. LeBoeuf and her husband were

sitting on their couch, talking, and the next, defendant was rushing the sidewalk, holding a knife, and threatening to kill her. *Id.* Mrs. LeBoeuf can be heard on the 911 tapes thanking the operator for staying on the line with her because she was so terrified of defendant. RP 97. Despite the fact that Mrs. LeBoeuf was inside her home, she felt the need to remain on the phone with the operator in the event that defendant's behavior persisted. *Id.* Mrs. LeBoeuf's husband was also fearful and subsequently obtained his firearm for protection in case defendant's behavior continued to escalate. RP 164. Mr. LeBoeuf described the knife as being thin and pointed like a dagger, and that it appeared to be between three and four inches long. RP 164-165.

Lisa Hardy, another neighbor, returned home after leaving work at 4:00 p.m., and went outside to get her mail. RP 237. Ms. Hardy's residence is located immediately to the left of Mrs. LeBoeuf's house. RP 234. As Ms. Hardy was retrieving her mail, defendant directed his attention to her and yelled, "Hey, you mother fucking cunt, dyke bitch, whore, I will kill all of you motherfuckers," as he continued watering his lawn and holding the knife. RP 237. As defendant continued to yell, he jabbed the knife up in the air and challenged, "You want a piece of this?" *Id.* Ms. Hardy felt threatened, so she retreated to her house, called 911,

locked the door, and monitored the front of her residence to make sure defendant was not going toward her house. *Id.*

Officer Jahner and his partner, Officer Birge, responded to Mrs. LeBoeuf and Ms. Hardy's reports of defendant wielding a knife in his front yard and threatening to kill them. RP 180-183. When the officers arrived at defendant's residence, they observed him from a distance holding what appeared to be a garden hose in one hand and a shiny object in his other, addressing somebody and yelling, "Fuck you," over and over again. RP 185-186.

The officers approached defendant and addressed him by name several times in an attempt to get his attention, however, defendant did not hear them because he was repeatedly shouting "Fuck you" toward Mrs. LeBoeuf's residence. RP 186-187. The officers were able to discern the object in defendant's hand as a steak knife when defendant turned to face the officers. RP 187-189. The officers stopped, keeping a good distance, and attempted to calm defendant down because he was clearly agitated. RP 187. As defendant began back peddling toward his house, he continued to yell, "Fuck you, fuck you," while pointing the knife at the officers and using it like an extension of his hand. RP 190-191. Officer Jahner described the knife as a standard steak knife with a dark handle and a five-inch blade. RP 192.

The officers spoke with Mrs. LeBoeuf and described her as “hysterical,” and, “really scared.” RP 193. The officers approached defendant’s door and could see him holding the knife to his front window, screaming and cussing over his loud music. RP 191. Defendant could be heard yelling, “Fuck you. Stay back. Get out of here.” *Id.*

Officer Jagodinski arrived at defendant’s residence to join the other officers between 5:00 and 6:00 p.m. RP 267. He asked defendant to come outside to speak with him and the other officers, and defendant responded, “Fuck off,” would not go outside of his home, and proceeded to turn his music up even louder. RP 269-270. Officer Jagodinski remained in the area for one to two hours and set up in an alley around the corner from defendant’s residence to monitor defendant while staying out of sight. RP 270.

It became dark outside and Officer Jagodinski moved toward defendant’s residence to observe him. RP 272. During that time he heard loud noises, crashing, loud music, yelling, and glass being broken inside defendant’s residence. *Id.* Officer Jagodinski heard a voice say, “I will kill you now, cunt,” followed by additional noise, and again, “I will kill you.” RP 273.

Officer Jagodinski coordinated with Officers Birge, Jahner, Harris, and Hofner to respond to the house with signed search and arrest warrants

to place defendant under arrest. RP 275. The officers knocked and rang the doorbell, and defendant approached the door. *Id.* Officer Jagodinski noticed defendant's hand outside the door frame, so he grabbed a hold of defendant's arm and said, "Police, you're under arrest." *Id.* At that point, defendant pulled back into the house, so Officer Jagodinski lowered his weight to pull him out of the house. *Id.* He and Officer Birge placed defendant on the grass and placed him under arrest. *Id.*

C. ARGUMENT.

1. TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ADMITTING THE NO CONTACT ORDER EVIDENCE UNDER ER 404(b) BECAUSE IT SHOWED VICTIMS' REASONABLE FEAR; ANY PREJUDICE WAS NEUTRALIZED SUFFICIENTLY WITH A LIMITING INSTRUCTION.

The decision to admit evidence of other misconduct made under ER 404(b) lies within the sound discretion of the trial court; it will not be disturbed absent an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571–72, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds. *Id.*; *State v. Johnson*, 172 Wn. App. 112, 124-26, 297 P.3d 710 (2013) (citing *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008), *review*

*granted*, 178 Wn.2d 1001, 308 P.3d 642 (2013); ***State v. Johnson***, 159 Wn. App. 766, 773, 247 P. 3d 11 (2011) (citing ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Evidence of other misconduct is admissible under ER 404(b) to prove premeditation, motive, intent, opportunity, and to explain the circumstances surrounding an alleged offense. ***State v. Brown***, 132 Wn.2d 529, 570-70, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998); ***State v. Cook***, 131 Wn. App. 845, 849-50, 129 P.3d 834 (2006). "ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but ... to prevent the State from suggesting ... a defendant is guilty because he... is a criminal-type person who would likely commit the crime charged." ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)(quoting ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

A trial court applying ER 404(b) is to: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, i.e., whether the purpose for which the evidence is offered is of consequence to the outcome of the action and tends to make the existence of an identifiable fact more probable; and (3) balance the probative value of the evidence against its prejudicial effect on the record. ***State v.***

*Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995); *State v. Dennison*, 155 Wn.2d 609, 628, 801 P.2d 193 (1990). Although balancing should always be articulated on the record, a trial court's ER 404(b) ruling may be affirmed in the absence of explicit balancing if the appellate court can determine the evidence was properly admitted from its review of the entire record. See *State v. Powell*, 126 Wn.2d at 264-65; *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996); *State v. Gomez*, 75 Wn. App. 648, 651-52, 880 P.2d 65 (1994).

Defendant is incapable of showing the trial court's decision to admit evidence of the no contact orders the victims previously obtained against defendant was based on untenable grounds. Defense counsel argues that once the no contact orders were dismissed, their existence was unrelated to the present charges. RP 387. Defendant also argued that it was impermissible propensity evidence that did not tend to prove an element of the crimes charged. *Id.* The defendant's claim is without merit. As argued below, the evidence was admissible because it showed defendant's motive and explained why defendant's previous conduct would cause the victims to be reasonably fearful of defendant.

- a. The evidence was admitted for the proper purpose of showing victims' reasonable fear under ER 404(b), and the decision to admit the no contact order evidence did not prejudice defendant because of its probative value in showing victims' reasonable fear.

The evidence serves to explain that the victims' fear of defendant was reasonable. The victims' fear was exacerbated by the fact that defendant had maliciously targeted them in the past, and that his previous actions were substantially disturbing enough to require a no contact order be instated. The evidence was not used as an attempt to show that because defendant committed a crime back in May, he must have committed a crime in October. RP 385. Rather, the evidence was used to show why the victims were fearful of defendant, and why they acted the way they did. *Id.* Because defendant had acted menacingly toward the victims in the past, the victims had reason to believe he would act similarly again. Further, it explains their heightened level of fear based on the fact that defendant was willing to violate a court order.

The admission of evidence of the no contact orders did not prejudice the jury in reaching a fair verdict against defendant and, therefore, did not materially affect the outcome of the case. A materially affected outcome has not been shown even if one assumes the no contact order evidence was improperly admitted, for defendant's guilt was well

proved. Both victims gave detailed accounts of their interactions with defendant, and witness testimony by police officers and Mrs. LeBoeuf's husband corroborated those accounts.

The court properly balanced the potential prejudice against the probative value of admitting the no contact order evidence. Defense contends that even when the State's proposed evidence is relevant to show motive, a trial court must evaluate ER 404(b) evidence under ER 403, which requires the trial court to exercise its discretion in excluding relevant evidence if its undue prejudice substantially outweighs its probative value. Appellant's brief at 16. Under *Powell*, a court's ruling may be affirmed in the absence of explicit balancing if the appellate court can determine the evidence was properly admitted from its review of the entire record. *State v. Powell*, 126 Wn.2d 264, 265.

The record shows that, although the evidence was not formally evaluated under ER 403, the court did in fact weigh the prejudice of the evidence admitted against its probative value in its decision to admit the evidence. The Court and counsel for both the defense and the State engaged in extensive deliberation regarding whether to admit the evidence. RP 376-391. The judge heard each party's arguments and advised he was going to reserve on the issue and conduct some research to determine how to properly proceed. RP 378. During that same time, the

judge instructed the parties to work together in finalizing the order. *Id.* The State advanced the theory that the evidence showed motive and the reasonableness of the victims' actions. RP 387. The defense did not object to the evidence being admitted for the purpose of showing motive, however, it did oppose it being admitted to show the reasonableness of the victims' actions. RP 389. The defense argued that using the evidence to show reasonableness was more prejudicial than probative. *Id.*

The judge issued a limiting instruction to limit the application of the no contact order evidence. RP 390. It was determined the evidence admitted was highly probative for motive and for explaining the victims' reasonable fear. The trial court carefully considered the potential for prejudice, then abated it issuing a limiting instruction to the jury that confined the purpose for which the jury could consider the no contact order evidence in reaching its decision. RP 397.

b. Admission of the no contact order evidence did not result in harmful error.

There is no evidence that admission of the no contact order evidence resulted in harmful error. The defense argues that the evidence of the no contact orders was inadmissible and harmful because there was a reasonable probability that the jury considered the evidence to establish that defendant was a bad guy with a history against the victims and

therefore was likely to reoffend. Appellant's brief at 18. To make that argument is to assume that the jury would find defendant guilty on all counts against any victim. The jury returned a guilty verdict for Count VII (Obstructing a Law Enforcement Officer), but returned a not guilty verdict for Count VIII (Resisting Arrest). CP 153; RP 465. Inconsistent with defendant's assertion that the jury was overcome by prejudicial error, the jury returned selective convictions on Counts I-II, IV, V, and VII, but not on Count VIII. CP 142. It is evident that the jury was objective in reaching its verdicts as it was not inclined to find defendant guilty on all counts.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL AFTER THE COURT DISMISSED THE TWO NO CONTACT ORDER CHARGES.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was

rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir.

1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the present case, defendant seeks to show ineffective assistance of his trial counsel for failure to move for a mistrial after the court dismissed the two no contact orders between defendant and Mrs. LeBoeuf and Ms. Hardy that had been improperly charged. To prevail on a claim of ineffective assistance of counsel, defendant must show counsel's failure to move for a mistrial constitutes as deficient performance, and that the deficiency prejudiced defendant. *State v. Fox*, 156 Wn. App 1031 (2010). Prejudice could be shown if defendant establishes, with reasonable probability, that but for counsel's errors the outcome of the proceedings would have been different. *Id.*

- a. Defense counsel's representation did not fall below an objective standard of reasonableness.

Defense counsel incorrectly argues that trial counsel was ineffective for failing to move for a mistrial after evidence of no contact orders between the parties was admitted at trial. Under the first *Strickland* prong, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Here, both counsels presented arguments regarding the no contact order evidence before the Court, and the matter was litigated extensively.

The record indicates that trial counsel's representation was reasonable under an objective standard. He examined and cross-examined vigorously, pressed his objections to evidence, and initiated the half-time motion to issue a limiting instruction of no contact order evidence to the jury under ER 404(b). RP 376. The effectiveness or the competence of counsel cannot be measured by the result obtained; some defendants are, in fact, guilty, and no amount of forensic skill is going to bring about an acquittal. *State v. Thomas*, 71 Wn.2d 472, 429 P.2d 233 (1967). Based on trial counsel's preparation for, and involvement in the trial, it is impossible to claim his performance fell below an objective standard of reasonableness.

Defense counsel's decision to allow a limiting instruction instead of filing for a mistrial could likely have been a tactical decision. The courts presume trial counsel adequately performed and gave "exceptional

deference” to “strategic decisions.” *State v. Goldberg*, 123 Wn. App 848, 852, 99 P.3d 924 (2004), (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *Strickland*, 466 U.S. at 689). Further, 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. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

Here, defense counsel actively participated in the drafting of the limiting instruction when the Court instructed counsel for both parties to work together in crafting something agreeable between them for the purpose of the evidence. RP 386. It did not appear that the trial was overly one-sided, and defense counsel may have felt confident that defendant could be acquitted with the adoption of the limiting instruction. Defense counsel had no issue with allowing evidence of the no contact orders being admitted, so long as it specifically was not admitted to show propensity. *Id.* Pursuant to RPC 3.1(1):

The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.

The judge reached his decision to allow the limiting instruction only after extensive litigation and after hearing arguments from both parties. RP 398. The decision was not made with haste. *Id.* Trial counsel

had the professional responsibility to refrain from filing frivolous claims abusing legal procedure. Because the judge reached his decision after careful consideration, a further claim by trial counsel would have been frivolous. Further, there is no evidence indicating defense counsel had reason to doubt the integrity of the jury or to believe it would not heed the limiting instruction.

- b. Defendant was not prejudiced by defense counsel's decision to allow limiting jury instruction regarding no contact order evidence.

Under the second *Strickland* prong, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” Defendant is incapable of showing that trial counsel’s decision to allow a limiting instruction regarding the no contract order evidence prejudiced defendant.

Defendant argues that the no contact order information flooded the case, and that defense counsel should have deemed the curative instruction offered by the state and given by the court inadequate. Appellant’s brief at 11. Regardless of whether the jury had knowledge that victims had no contact orders against defendant, the jury was presented with overwhelming evidence to find defendant guilty on Counts I, II, IV, V, and VII. CP 142. Because there was overwhelming evidence of guilt,

defendant cannot show there was a reasonable probability that, but for his trial counsel's decision to allow a limiting instruction rather than file for mistrial, the outcome of the trial would have been different.

3. EVIDENCE WAS SUFFICIENT FOR A JURY TO FIND DEFENDANT GUILTY BEYOND A REASONABLE DOUBT WHEN DEFENDANT ASSAULTED VICTIMS AND THREATENED THEM WITH A KNIFE.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (quoting

*State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, determinations of credibility are for the fact finder and are not reviewable on appeal. *Brockob*, 159 Wn.2d at 336; *State v. Locke*, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980). In addition, a jury can infer the specific criminal intent of a criminal defendant where it is a matter of logical probability. *Id.*

- a. State proved beyond a reasonable doubt assault in the second degree when defendant brandished a knife and threatened to kill the victims.

Defendant was convicted of Assault in the Second Degree with a Deadly Weapon. CP 142. The jury was presented with the elements of the crime as follows, consistent with the Washington Pattern Jury Instructions (WPIC):

- 1) That on or about October 3<sup>rd</sup>, 2014, Mr. Farrell assaulted Mrs. LeBoeuf and Ms. Hardy with a deadly weapon; and
- 2) That this act occurred in the State of Washington.

Defendant's claim is limited to the "assault" element above, alleging the State did not present sufficient evidence for a reasonable jury

to conclude that defendant had caused Mrs. LeBoeuf and Ms. Hardy “reasonable” fear by his actions. The jury was presented with the jury instruction regarding assault as follows:

An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which, does create in another a reasonable apprehension and imminent fear of bodily injury, even though the actor did not actually intend to inflict the bodily injury.

All three elements of assault have been satisfied and are proven by defendant’s actions and circumstantial evidence. Defendant demonstrated his intent to create apprehension and fear in Mrs. LeBoeuf through his verbal threats, body language, and *brandishing of a weapon*.

Additionally, he positioned himself at the corner of his front yard, which placed him as close to Mrs. LeBoeuf’s yard as possible without technically encroaching upon it. RP 86. Defendant’s erratic behavior had been continuous since the previous night, and he placed Mrs. LeBoeuf in fear more than once during that time. RP 73-74. Mrs. LeBoeuf was first fearful while she was gardening by the wooden fence separating her yard from defendant’s yard on the sides of both houses. RP 70. She heard defendant call her by name and say, “Dori, yah, I’m talking to you. You are going to get it. I’m going to get you Dori.” RP 70-71. Mrs. LeBoeuf could then hear a cacophony coming from defendant’s home. RP 72.

Defendant's threat, in conjunction with his volatile behavior, frightened Mrs. LeBoeuf, so she called the police. *Id.* Mrs. LeBoeuf was understandably on edge from defendant's behavior and threats, and defendant did not stop there with his threats. RP 79. Instead, defendant's behavior toward Mrs. LeBoeuf escalated, and he supplemented his verbal attacks with a pointed, edged weapon. *Id.*

Mrs. LeBoeuf testified that defendant, while facing Mrs. LeBoeuf's home and staring at her, yelled, "Dori, you fucking cunt. I'm going to kill you. Yes, you. You fucking cunt, I'm going to kill you," while grasping a garden hose *and a knife*. RP 79. Defendant specifically was facing Mrs. LeBoeuf's home and was intentionally looking directly at her inside her house through her living room window. *Id.* There was no fence separating defendant from Mrs. LeBoeuf's yard, and defendant was standing right along the property line. RP 125; Exhibit 43.

Officers also testified that when they arrived at defendant's residence, he was standing on the perimeter of his front yard *jabbing the knife into the air* and yelling, "Fuck you," repeatedly. RP 185. The officers had to remain at a distance because of defendant's hostility and because he was armed with a knife. *Id.* Defendant's behavior was so concerning that the officers did not want to force a confrontation on him. RP 189. Even after continuous coaxing, the officers were unable to calm

defendant down, and remained approximately 30 yards away for their safety. RP 187; RP 189.

The second element of assault—that defendant’s actions caused Mrs. LeBoeuf apprehension and fear—is demonstrated through Mrs. LeBoeuf’s actions immediately following the incident. Mrs. LeBoeuf immediately called 911 and instructed her husband to shut and lock and deadbolt all the doors out of fear that defendant would try to come after her inside the house. RP 82. Mrs. LeBoeuf was hysterical during her phone conversation with the 911 operator because she truly believed defendant might try to break into her home. RP 97. Mrs. LeBoeuf stated in her victim impact statement that defendant had exploded into him threatening her *while pointing a knife at her* and yelling, “You bitch, cunt, I will kill you.” RP 145.

The third element of assault is satisfied because Mrs. LeBoeuf’s apprehension and fear was reasonable in response to defendant’s behavior. Ms. LeBoeuf had obtained a no contact order against defendant on May 14, 2014, which she indicated to the 911 operator. *Id.* Mrs. LeBoeuf was reasonably fearful of defendant because of his blatant disregard for the no contact order.

The State has presented a prima facie case for Assault in the Second Degree with a Deadly Weapon because it has satisfied all of the

elements. First, the defendant acted when he brandished the knife. Second, defendant demonstrated his intent to cause the victims reasonable fear and apprehension of bodily injury through his volatile demeanor, use of profane language, and threats to kill them while armed with a knife. Third, defendant did in fact cause the victims' fear and apprehension of bodily injury, which is demonstrated by their 911 phone calls and immediate retreats into their homes. Further, defendant possessed a knife with a blade exceeding three inches in length while committing the assault, and the knife constitutes a deadly weapon, as argued below.

- b. State proved beyond a reasonable doubt that the steak knife was a deadly weapon when the knife was capable of producing substantial bodily harm and exceeded three inches in length.

The State presented sufficient evidence for a reasonable jury to conclude that the steak knife was a deadly weapon. A deadly weapon is defined as:

Any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial harm.

CP 26.

The jury was instructed that substantial bodily harm is defined as:

Bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any

bodily part or organ, or that causes a fracture of any  
bodily part.

CP 27.

Further, by statutory definition, a knife having a blade longer than three inches is a deadly weapon as a matter of law. *State v. Thompson*, 88 Wn.2d 546, 548, 564 P. 2d 323, 324 (1977); *State v. Sorensen*, 6 Wn. App 269, 273, 492 P. 2d 233, 236 (1972). The character of an implement as a deadly weapon is determined by its capacity to inflict death or injury, and its use as a deadly weapon by the surrounding circumstances, such as the intent and present ability of the user, the degree of force, the part of the body to which it was applied, and the physical injuries inflicted. *Id.* at 549.

There was a consensus among the witnesses that the blade of the knife exceeded three inches.<sup>1</sup> As a matter of law and under *Thompson*, constitutes a deadly weapon. A knife with a 4-inch blade is per se a deadly weapon ... it comes within the current statutory list of deadly weapons, and without any extrinsic evidence, is an instrument that has the capacity to produce death. *State v. Samaniego*, 76 Wn. App. 76, 80, 882 P.2d 195 (1994). The court further held that it is obvious that there is a certain class of instruments that require nothing more than their existence

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<sup>1</sup> RP 93-94: Dori LeBoeuf testified the knife had a blade between three and four inches; RP 167: Michael LeBoeuf testified the knife had a four-inch blade; RP 234: Lisa Hardy testified the knife had a six-inch blade.

for proof of their nature, e.g., a loaded firearm or a knife with a blade over three inches. *Id.* Because there was a consensus among the witnesses that the blade of the knife defendant was wielding exceeded three inches, and because the jury accepted that testimony as true, there was sufficient evidence to determine the knife was a deadly weapon.

Assuming, arguendo, that this court were to find that the knife was not a per se deadly weapon, the knife defendant was wielding was capable of inflicting substantial harm, and, therefore, constitutes a deadly weapon. Defense counsel argues that, regardless of whether the blade exceeded the statutory length requirement, there was no evidence the knife was used in a manner capable of causing death or substantial bodily injury.

Appellant's brief at 9. Defense counsel incorrectly contends that because of defendant's proximity to the victims, the knife was incapable of being used in a deadly manner. In *Samaniego*, the court found a knife with a 4-inch blade to be a deadly weapon when the knife was lodged under the defendant's car seat because the knife was readily available to the defendant for offensive or defensive purposes. *Id.* In the current case, the knife was easily accessible and readily available for defendant to use in a deadly manner because he was physically holding and jabbing it. Further, is it not unreasonable to assume that defendant could quickly advance upon the victims with the knife from 25 feet away. Further, in some areas,

there was no fence or any type of barrier separating defendant from Mrs. LeBoeuf's property, and defendant intentionally positioned himself on the perimeter closest to Mrs. LeBoeuf's front yard. RP 86.

In another case, the court found a knife with a blade length of 2 and 3/8 inches constituted a deadly weapon. *State v. Cobb*, 22 Wn. App. 221, 589 P.2d 297 (1978). The court recognized that a pocket knife with a blade less than three inches may be a deadly weapon depending on the circumstances of its use. *Id.* at 223. If the blade is less than three inches, the question merely becomes one of fact rather than of law. *Id.* Quoting *State v. Braun*, 11 Wn. App. 882, 526 P.2d 1230 (1974); *State v. Rolax*, 7 Wn. App. 937, 503 P.2d 1093 (1972); *State v. Sorenson*, 6 Wn. App. 269, 492 P.2d 233 (1972). The court ruled that the test is not the extent of the wounds actually inflicted. *Id.* Rather, the test is whether the knife was capable of inflicting life-threatening injuries under the circumstances of its use. *Id.*

The rule in *Cobb* may be applied in the present case. Even if the blade of the knife did not exceed three inches, and even if some distance did separate defendant from the victims, the knife still constitutes a deadly weapon based on the circumstances of the situation. The defense argues that because the victims retreated into their homes while defendant continued wielding the knife, the knife was incapable of inflicting harm.

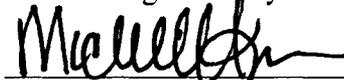
Defense counsel's argument is without merit based on the reasoning in *Cobb* because defendant was capable of inflicting harm upon the victims by using the knife.

D. CONCLUSION.

The trial court properly excised its discretion by admitting the no contact order evidence under ER 404(b) because it showed the victims' fear of the defendant was reasonable, and any prejudice was neutralized with the limiting instruction the parties agreed upon. Trial counsel was not ineffective for failing to move for a mistrial after the court dismissed the two no contact order charges. Finally, there was sufficient evidence for a jury to find defendant guilty beyond a reasonable doubt when he brandished the knife and threatened to kill the victims.

DATED: July 7, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.7.10 Theresa Kar  
Date Signature

**PIERCE COUNTY PROSECUTOR**

**July 07, 2016 - 3:52 PM**

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