

24944-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACKIE R. BURTON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Ms. Burton was denied due process by the State's failure to timely produce a trial transcript.
2. The record produced four years after Ms. Burton's trial was unintelligible, made no sense, and was so replete with errors as to be rendered wholly unreliable.
3. The trial court erred by denying Ms. Burton's motion to vacate the judgment based upon the tardy, unreliable transcript.
4. The prosecutor committed misconduct by intentionally eliciting impermissible ER 404(b) evidence that was highly prejudicial to Ms. Burton.
5. Ms. Burton received ineffective assistance of counsel when trial counsel failed to object to the State's introduction of multiple highly prejudicial descriptions of Ms. Burton's prior bad acts.
6. Ms. Burton was denied her right to a fair trial because Instruction 10 failed to include the defendant's burden of proof:

Entrapment is a defense to a criminal charge if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime.

(CP 68)

7. In closing argument, the State committed prosecutorial misconduct by arguing that the State's burden of establishing guilt was lower than beyond a reasonable doubt.
8. Ms. Burton received ineffective assistance of counsel when trial counsel failed to object to the State's misconduct in closing argument.
9. The presence of cumulative errors entitles Ms. Burton to a new trial.

II.

ISSUES PRESENTED

- A. HAS THE DEFENDANT SHOWN PREJUDICE CAUSED BY THE DELAY IN PRODUCTION OF THE TRIAL TRANSCRIPT?
- B. WAS THE RECORD CERTIFIED BY THE TRIAL COURT SUFFICIENT FOR APPELLATE PURPOSES?
- C. DID THE TRIAL COURT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION TO VACATE JUDGMENT DUE TO ALLEGED DEFECTS IN THE TRANSCRIPT?
- D. DID THE PROSECUTOR COMMIT MISCONDUCT BY ASKING QUESTIONS OF STATE'S WITNESSES ADDRESSING THE MOTIVES AND INTENT OF THE DEFENDANT?
- E. WAS TRIAL DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S QUESTIONS ALLEGEDLY IN VIOLATION OF ER 404(B)?
- F. WAS THE ENTRAPMENT INSTRUCTION DEFECTIVE?

- G. DID THE PROSECUTOR COMMIT MISCONDUCT IN HIS CLOSING ARGUMENTS?
- H. WAS TRIAL DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENTS?
- I. DOES THE CUMULATIVE ERROR DOCTRINE APPLY TO THIS CASE?

III.

STATEMENT OF THE CASE

The defendant was charged with one count of solicitation to commit murder in the first degree for allegations of soliciting an undercover officer to murder her former lover and boss, local attorney Pete Dahlin.

Mr. John Ballentine was at attorney Mike Riccelli's office when he was introduced to the defendant on January 6th or 7th of 2005. RP 62. The defendant was introduced as Mr. Riccelli's new employee. RP 62. The defendant obtained one of Mr. Ballentine's business cards and stated that she wanted to talk to Mr. Ballentine. RP 62.

The defendant contacted Mr. Ballentine who was going to a local bar to meet some friends. RP 63. According to Mr. Ballentine, the

defendant sat with the group of friends and had a “couple” of drinks. RP 63. The defendant then asked Mr. Ballentine to go outside to talk. RP 64. The defendant stated that Mr. Ballentine was of the character to handle a murder for the defendant. RP 64. Mr. Ballentine stated to the defendant that discussing the items they were talking about could be conspiracy to commit murder. RP 64. Undeterred, the defendant asked, “Are you for hire?” RP 64. Mr. Ballentine said he would think about it and got out of the car. RP 64.

The defendant came over to Mr. Ballentine’s residence that evening and continued to talk about Pete Dahlin. RP 64. The general thrust of her reasons for wanting Mr. Dahlin killed had to do with a love/hate relationship between she and Mr. Dahlin. RP 65. According to what the defendant said to Mr. Ballentine, there were numerous incidents of physical violence between the two with her hitting Mr. Dahlin and Mr. Dahlin hitting the defendant. RP 65. The defendant eventually left Mr. Ballentine’s residence. RP 65.

Mr. Ballentine contacted Mr. Riccelli as Mr. Ballentine was getting concerned that the defendant was “...going to hurt somebody.” RP 65. Mr. Riccelli contacted the police department and Mr. Ballentine arranged to help the police. RP 67. Mr. Ballentine was instructed by police to get

the defendant to a local motel where the defendant described to an undercover police officer what she wanted to do. RP 68.

Mr. Ballentine saw the defendant hand money to the undercover police officer. RP 68.

Mr. Peter Dahlin testified that he is an attorney in the Spokane area. RP 101. Mr. Dahlin testified that the defendant came to work for him as a legal assistant in 1992. RP 102.

After the defendant was divorced, the working relationship between Mr. Dahlin and the defendant became an intimate relationship in the Fall of 2002. RP 102. Mr. Dahlin testified to numerous arguments between the pair. RP 102. The police were called on four occasions and she was arrested on those occasions. RP 103. In August of 2004, Mr. Dahlin terminated her employment due to drinking problems. RP 104-05.

The termination of the defendant apparently was not a "clean" one as Mr. Dahlin allowed the defendant to return to work. On August 14, 2004, after Mr. Dahlin told the defendant he would not have a relationship with her, she followed his vehicle in her own vehicle and eventually attempted to hit him head on. RP 105. Mr. Dahlin received a cellphone call from the defendant with a caller ID of his residence. RP 105. When he arrived home, Mr. Dahlin passed the defendant going the opposite direction in the driveway. RP 105.

Mr. Dahlin found that one of his two cats was missing and his waterbed had been punctured multiple times. RP 105-06.

Mr. Dahlin testified that he was contacted by police and agreed to fake his own death and have it photographed by the police. RP 111-12.

Det. John Miller testified that he worked for the Major Crimes Unit of the Spokane Police Department. RP 122. Det. Miller testified about being contacted by Mr. Ballentine regarding the defendant's desires to have Mr. Dahlin killed. RP 123. Det. Miller stated that he had never met Mr. Ballentine prior to their initial meeting on January 7th. Det. Miller testified as to Mr. Ballentine giving the police information regarding Mr. Ballentine's concerns that the defendant wanted to have someone killed. RP 128.

The police asked Mr. Ballentine to stay in contact with them and Mr. Ballentine agreed. A short time later, the police requested that Mr. Ballentine arrange a formal meeting with the defendant. RP 128. Mr. Ballentine advised that he had made an arrangement for that evening. RP 129.

Mr. Ballentine was advised by the police not to initiate any conversation regarding killing someone but to allow the defendant to do so. RP 129. Mr. Ballentine was told by police that if the topic came up, he was to say that perhaps he did know some people who could do the job.

RP 129. Mr. Ballentine subsequently met with police at a restaurant and Mr. Ballentine made a telephone call to the defendant to advise her that he had made contact with a person who could provide the “service” for her. RP 131.

Det. Fairbanks of the Spokane County Sheriff’s Office was selected to be the undercover contact. RP 130. The police obtained judicial permission to videotape and audio record happenings in a room at the Travelodge Motel. RP 132-33.

Detective Leroy R. Fairbanks works as a detective for the Spokane County Sheriff’s Office. Det. Fairbanks testified to conversations he had with Mr. Ballentine and how he gave very specific instructions to Mr. Ballentine regarding possible entrapment issues. RP 165-66. Det. Fairbanks was to play the “hitman” for this operation. RP 166.

The videotapes of the defendant’s actions were displayed to the jury. During the first tape, the defendant handed Det. Fairbanks a bank envelope containing money, and a drawing of Mr. Dahlin’s residence. 12/6 RP 8-9.

Det. Fairbanks explained his experiences with intoxicated persons and testified that the defendant had no indication whatsoever of being intoxicated. 12/6 RP 10.

A few days later, arrangements were made to meet the defendant at a Yoke's parking lot to show the defendant pictures of Mr. Dahlin, supposedly deceased. 12/6 RP 11. This incident was also recorded both visually and aurally. The tape was played for the jury. 12/6 RP 11. The two "dead" photographs were also given to the jury. 12/6 RP 13.

The defendant provided the detective with a second bank envelope. 12/6 RP 13. Det. Fairbanks did not see any indications of intoxication from the defendant. 12/6 RP 13.

The defendant took the stand and attempted to negate nearly all aspects of the State's case. She explained away damning statements on the videotapes as being caused by fear and intoxication. She claimed to have been "...groomed by Mr. Ballentine." 12/6 RP 70. Intoxication and fear were also the reasons given for why the defendant did not contact the police. The defendant did admit to ramming Mr. Dahlin's car. 12/6 RP 73.

The defense called Dr. Mark Mays to testify as to the defendant's mental condition. 12/6 87. Dr. Mays conducted an examination of the defendant and concluded that she had an alcohol problem. 12/6 RP 99. Dr. Mays concluded that the defendant could be intoxicated without appearing to outsiders to actually be intoxicated. 12/6 RP 99. Dr. Mays also concluded that the defendant would be more susceptible to a threat

than an average person. 12/6 RP 101. Dr. Mays testified that during his two hour interview with the defendant, she did not mention being intimidated by Mr. Ballentine. 12/6 RP 109-10.

The jury found the defendant guilty as charged. CP 121-133. She was sentenced to 180 months in prison. CP 127. The defendant filed this appeal on February 7, 2006. CP 134.

IV.

ARGUMENT

A. THE DEFENDANT CANNOT SHOW PREJUDICE FROM THE DELAY IN THE PRODUCTION OF THE TRIAL TRANSCRIPT.

The defendant argues that the delay of four years from the time the transcript was requested until the transcript was produced violated the defendant's due process rights.

The State agrees with the defendant's procedural outline for analyzing cases involving delayed production of the transcript. The State agrees that enough delay has occurred in the production of the transcript to warrant a further examination. It should, however, be noted that while there was a three year delay in the production of the final transcript, the fourth year was largely a result of legal actions brought by appellate

defense counsel. Those delays should not be attributed to the general discussion of delay in obtaining the transcript.

“Washington guarantees the right to appeal criminal prosecutions, and substantial delay in the appellate process may constitute a due process violation.” *State v. Lennon*, 94 Wn. App. 573, 577, 976 P.2d 121 (1999) (*citing* Const. art. I, § 22 (amend.10)).

There are four factors to discuss: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's diligence in pursuing the right to appeal, and (4) the prejudice to the defendant. *Lennon*, 94 Wn. App. at 578. These factors appear to have been adopted from *Barker v. Wingo*, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The adoption of the factors listed is suspect because the Court in *Wingo* was discussing speedy trial delays. Obviously, such pre-trial delays have different effects than post-conviction delays. The factors provide *some* guidance, but the State questions their application.

The first factor, length of the delay has no hard and fast rules and does not control the outcome directly. However, the caselaw seems to indicate that a 3-year delay, such as in this case, is a large enough period to trigger the examination of the other factors. The State concedes that the time delay in this case is long enough to trigger the remainder of the analysis.

The second factor is the reason for the delay. The ultimate reason why the court reporter agreed to employment with the county and then disappeared, is unknowable. Similarly, the reasons why the reporter in question refused to perform, despite multiple and increasingly serious threats from the Spokane Court of Appeals and the Spokane County Superior Court, are also beyond the knowledge of the parties.

However, what *is* known is that the court, the State and the defendant are not at fault. Thus, this second factor is of no utility in the determination of this case. Without directly alleging that the delay was the fault of the State, the defendant repeatedly assumes in her arguments that the State was somehow at fault. The defendant does not explain how the State is at fault in this case, or how the State could even *be* at fault in the delay of the transcript. The State does not select the court reporters.

The third factor is the diligence of the defendant in trying to obtain the transcript. In this very odd situation, the State is not sure what anyone could do to force compliance on the part of the reporter. Threats from multiple courts and increasing fines had little effect. In the State's view there was no lack of diligence on any party's part, except for the reporter.

The fourth factor, prejudice, is the key to this analysis. The defendant claims prejudice because she has been incarcerated for two years waiting for the trial transcripts. What the defendant glosses over is

the fact that the defendant was not in jail awaiting the completion of the trial transcripts. The defendant was in jail because she was sentenced to 180 months of incarceration on the charge of solicitation to commit murder in the first degree. The defendant was not going anywhere.

The defendant claims that her incarceration has led to great anxiety and reduced the opportunity for reliable development of new facts for a new trial. The defendant would remain incarcerated for the duration of any appellate procedures. It would not be unusual for appellate procedures to last more than two years. More to the point, the defendant's "anxiety argument" presumes that she would have a successful appeal and be released. This is speculation at best. As the *Lennon* court noted, it is not unusual for appellants to serve their entire sentences before their appeals are heard. *Lennon, supra* at 578.

As for the claim of being unable to develop new facts, the defendant simply throws out a generalized claim. The defendant does not explain what facts she expects to develop, why these facts weren't developed for her trial, how being incarcerated interferes with her ability to develop new facts or how new facts would be developed if she was not incarcerated. Again, the defendant's claim is nothing but a naked casting in the constitutional sea. *City of Tacoma v. Price*, 137 Wn. App. 187, 188,

152 P.3d 357 (2007) (naked castings into the constitutional sea insufficient to warrant judicial attention and discussion).

The defendant has supplied no showing of prejudice other than generalized claims derived from other cases. The defendant has not shown that she has been harmed in any fashion except that she has had to serve time in prison that she would have had to serve in any event.

The defendant writes extensively regarding supposedly defective and inadequate transcripts when she wishes to attack the State's closing arguments, but when the argument turns to an ER 404(b) based attack, not a single word is said about the record. The defendant seems to have no trouble deciphering the sections of the record which support her arguments.

B. THE EXISTING TRANSCRIPT, WHEN AUGMENTED WITH THE AFFIDAVITS OF THE TRIAL PROSECUTOR PROVIDES AN ADEQUATE RECORD.

The defendant argues that the record is insufficient to provide for a proper appeal.

RAP 9.4 provides:

[P]arties may prepare and sign an agreed report of proceedings setting forth only so many of the facts averred and proved or sought to be proved as are essential to the decision of the issues presented for review. The agreed report of proceedings must include only matters which

were actually before the trial court ... agreed report of proceedings may be prepared if either the court reporter's notes or the videotape of the proceeding being reviewed are lost or damaged.

RAP 9.4.

According to the holding in *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)), a “defendant is ‘constitutionally entitled to a “record of sufficient completeness” to permit effective appellate review of his or her claims.’” *Id.* However, a record of “sufficient completeness” does not necessarily “translate automatically into a complete verbatim transcript.” *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003).

“A new trial will seldom be required when a report of proceedings is not recorded or is lost. In most cases, a reconstructed record will provide the defendant a record of sufficient completeness for effective appellate review.” *State v. Tilton*, 149 Wn.2d at 785.

The defendant relies on *State v. Claussen*.¹ The court in *Classen* examined cases in which reconstructed records were adequate and some cases in which records were deemed inadequate by various courts.

¹ There is no “Claussen” at the numerical citation given by the defendant. The correct spelling is “Classen.” The State will disregard the multiple misspellings and refer to the case as “Classen.” *State v. Classen*, 143 Wn. App. 45, 176 P.3d 582, review denied, 164 Wn.2d 1016 (2008).

Classen, supra at 55. In *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963), the Washington State Supreme Court found a record created from the trial judge's notes insufficient to substitute for a completely missing verbatim report. *Larson, supra*. In *Tilton*, the reconstructed record was deemed insufficient when the defendant's testimony turned up missing because a recorder had not been turned on. *Tilton, supra*.

The *Classen* court noted two cases in which the reconstructed record was deemed adequate. In *State v. Putman*, 65 Wn. App. 606, 829 P.2d 787 (1992), *review denied*, 122 Wn.2d 1015, 863 P.2d 73 (1993), the State's *narrative* report (prepared from contemporaneous notes) along with the trial court's written findings of facts and conclusions of law were deemed sufficient to substitute for a verbatim report of proceedings. The trial court mistakenly did not record a suppression hearing in which a murder weapon was found admissible. *Putnam, Id.*

The Court of Appeals in *State v. Miller*, 40 Wn. App. 483, 698 P.2d 1123 (1985), *review denied*, 122 Wn.2d 1015, 863 P.2d 73 (1993) held that the trial court should try to reconstruct the record using existing resources, even third parties. *Id.* at 487-88 (*quoting Glaser v. Holdorf*, 53 Wn.2d 92, 94, 330 P.2d 1066 (1958)).

Despite the defendant's attempts to elevate an opinion's status, the *Classen* court merely mentions some analytical tools in deciding the adequacy of reconstructed transcripts. What the *Classen* court said was:

Read together, *the pertinent holdings largely depend on such factors as* (1) whether all or only part of the trial record is missing or reconstructed, (2) the importance of the missing portion to review the issues raised on appeal, (3) the adequacy of the reconstructed record to permit appellate review, and (4) the degree of resultant prejudice from the missing or reconstructed record, if any, to the defendant.

Classen, supra at 57. (emphasis added).

The *Classen* court did not purport to create four factors and engrave them on rocks. The *Classen* court merely summarized the various opinions it had found and explained why and how records ended up being sufficient or not. The defendant names the analysis as "factors." The term "factor" is typically reserved for concepts that have been used by other courts and are entitled to special authority. Using the term "factors" is a shorthand method of giving increased authority to what is simply the *Classen* court's ruminations.

Even using the four items mentioned by *Classen*, the record in this case is sufficient for appellate review. (1) A large proportion of the trial has been transcribed. Admittedly, there are some garbled sections. However, the prosecutor presented affidavits in which he related the State's recollections. The trial defense counsel submitted no affidavits

pertaining to the trial record, but did file a certificate of trial defense counsel agreeing that the material submitted by the State was accurate. The trial court has examined the verbatim report of proceedings and the State's submissions and ruled that the record is adequate. (2) There does not appear to be any "missing" portion of the record. There are, as previously mentioned, garbled sections in the transcript. However, the defendant has not had any problem generating seven assignments of error. The defendant does not mention any trial errors that could not be addressed due to missing parts in the record. It is interesting that the defendant claims an insufficient record while attacking the admission of ER 404(b) evidence, claiming ineffective counsel on the ER 404(b) question, attacking the entrapment instruction and the State's arguments.

The brief submitted by the defendant shows a robust series of attacks on multiple portions of the trial, each area dealing with an individual portion of the record. The defendant does not appear hampered in any way by the state of the record. (3) The appellate court is presented with a standard transcript for much of the trial and an affidavit filling in garbled sections. There should be no trouble in reviewing this case. (4) As noted previously, the defendant has presented a robust appellate brief of 49 pages. The defendant attacks a broad range of issues using the record as it exists. There is no doubt that the defendant complains

vociferously about the state of the record. However, those complaints do not align with the defendant's extensive briefing and appear to be hyperbole. For example, the defendant claims that the record is "not serviceable" for a direct appeal because of errors in the section of transcript regarding the prosecutor's closing arguments. Brf. of App. 30. Yet, the defendant presents five pages of detailed arguments regarding allegations of prosecutorial misconduct. Brf. of App. 41-45. The obvious question would be: If the transcript was unusable, from what did the defendant generate her extensive arguments?

The defendant's citation to *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed 891 (1956), is not well taken. The Court in *Griffin* was addressing situations in which indigent defendants could not get trial transcripts while defendants with funds could get transcripts. The defendant mischaracterizes the *Griffin* opinion by adding the word "adequate" and claiming that it is the State's duty to provide "adequate" transcripts for indigent defendants. Brf. of App. 24. Nowhere in the *Griffin* decision does the Court discuss "adequate transcripts" in the sense that is being discussed in this case. The defendant's citation to *Mayer v. City of Chicago*, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971)), continues the mischaracterization started in the discussion of *Griffin*. The *Mayer* Court's focus was on ensuring that there was no

disparity between the trial record available to indigent defendants and those defendant's with means. The defendant twists that part of the holding, (which is generally the main part of the holding) into a support for the defendant's "inadequate record" arguments. The line of indigent access to trial records cases do not apply in this case as there is no issue of an indigent defendant being denied a copy of the record because she was impecunious.

In a passage in *Mayer*, the Court states:

A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to *195 this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript

does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review.’

Mayer v. City of Chicago, 404 U.S. at 194.

“The absence of a portion of the record is not reversible error unless the defendant can demonstrate prejudice.” *State v. Miller*, 40 Wn. App. at 488. The defendant wishes to mix together trial delay caselaw with the delay in obtaining a transcript in this case as a quasi-substitute for actual prejudice. Brf. of App. 21. The defendant claims a “tangible prejudicial impact” in dimmed memories of trial counsel. Brf. of App. 21. The defendant states, “...the memories of both trial counsel *had to be impaired* as a result of the passage of time” Brf. of App. 21.

Stated another way, the defendant’s *only* proof of prejudice arising from delay is a synthesized theory created by blending an unrelated case with this case and the bald claim that the memories of defense counsel *had to be impaired*. The defendant on appeal has no proof at all that trial counsel’s memories were actually dimmed. It has been a curiosity from the outset of this appeal that the trial prosecutor could generate extensive affidavits covering garbled sections of transcript, yet trial defense counsel has been unable to recall a single aspect of the trial. Even though he could not recall the trial, defense counsel did produce a statement saying that the

prosecutor's versions were accurate. CP 288. How would counsel judge that the prosecutor's affidavit was accurate if he did not remember anything?

The usual remedy for a defective record is to supplement the record with appropriate affidavits and have the judge who heard the case resolve those discrepancies. *Tilton, supra* at 783. That has happened in this case. The trial court, in response to a motion by the defendant, held that a complete record had been generated with supplementation in the form of affidavits from trial counsel. CP 334-336. The trial court also noted that trial defense counsel did not challenge the affidavit created by the trial prosecutor. CP 334-336. The trial court held that the record "...satisfactorily recounts the events material to the issues on appeal." CP 334-336. The defendant did not challenge the trial court's findings. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). The lower court did not specify which findings were factual and which were legal. To whatever extent a particular finding is factual, it should be a verity for this appeal.

The trial court, (who also had memories and notes of the trial), found a complete and adequate record had been created. This finding removes the basis for much of the defendant's appellate arguments regarding missing or defective transcripts.

C. FOR THE REASONS PREVIOUSLY DISCUSSED, THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION TO VACATE JUDGMENT DUE TO ALLEGED DEFECTS IN THE TRANSCRIPT.

The defendant's brief is a bit confusing in that the list of assignments of error notes a Number 3, which assigns error to the failure of the trial court to vacate the defendant's conviction due to alleged mistakes in the transcript and delays in the transcript's production.

However, the defendant's brief contains no argument section for assignment of error No. 3. If an assignment of error is not supported by argument or citation to authorities, it will not be considered by the court. *see* RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

D. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ASKING QUESTIONS OF STATE'S WITNESSES ADDRESSING THE MOTIVES AND INTENT OF THE DEFENDANT.

Evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity with it. ER 404(b). The defendant argues that the prosecutor elicited testimony in violation of ER 404(b).

The defendant mischaracterizes what the prosecutor represented to the trial court during *in limine* discussions of ER 404(b). The prosecutor

stated that he did not intend to get into 404(b) areas unless defense counsel “opened the door.”

To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

The defendant asserts that both the State and the trial court erred in permitting Mr. Dahlin to testify about being nearly run off the road by the defendant, the defendant’s drinking, arguments between Mr. Dahlin and the defendant and an incident in which Mr. Dahlin’s waterbed was found to be punctured. On appeal, the defendant claims that all such testimony should have been excluded as prior bad acts under ER 404(b).

What the defendant does not mention on appeal is that trial defense counsel’s opening statement to the jury began with a set of claims setting up an entrapment defense. Trial defense counsel blamed the situation on the police, saying that police put words into the mouth of the defendant. In other words, the defendant had no desires to harm Mr. Dahlin. The

State then needed to bring in testimony of other angry acts on the defendant's part towards Mr. Dahlin to counter the defendant's positions.

Besides an opening statement setting up an obvious entrapment defense, trial defense counsel cross-examined State's witness, John Ballentine, for a *very* long period of time. Defense counsel attacked Mr. Ballentine's character, behaviors, associations, lifestyle and numerous other areas.

A second reason to permit the contested 404(b) testimony is found in the rule itself. ER 404(b) notes that evidence that might normally be inadmissible can be admissible for "...other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Given the complete denial position taken by the defendant, proof of motive becomes highly relevant.

The defendant completely misconstrues the prosecutor's *in limine* statements to the trial court in relation to ER 404(b). What the prosecutor stated was "Your Honor, I do not intend to introduce in my Case in Chief a prior incident involving Mr. Dahlin and Ms. Burton." RP 9. The prosecutor elaborated that he was talking about a police referral from the Spokane County Sheriff's Office. RP 9. The prosecutor went into a few details of the incident and mentioned that trial defense counsel had been given a copy of the police report. RP 9. The prosecutor did not violate

any motion *in limine* as the trial court reserved on the issue of ER 404(b) evidence.

E. THE DEFENDANT DID NOT RECEIVE
INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates

review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . .that course should be followed.” *Strickland*, 466 U.S. at 697.

A defense counsel's effectiveness is not determined by the result of the trial. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)), review denied, 123 Wn.2d 1004 (1994). “{T}he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy.” *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied 506 U.S. 958 (1992) (citing *Strickland*, 466 U.S. at 689); see *State v. Hendrickson*, 129 Wn.2d 77, 78, 917 P.2d 563 (1996).

The defendant asserts that trial defense counsel should have objected to the prosecutor's questions to Mr. Dahlin regarding the defendant's prior acts and attitudes towards Mr. Dahlin. The State has shown that the prosecutor did not err in bringing forth prior bad acts of the defendant. The acts were responsive to the defendant's initial trial arguments and testimony essentially stating that the defendant had not been angry with Mr. Dahlin.

The defendant on appeal fails to mention that the trial defense counsel *did* object and asked for a limiting instruction. RP 107-09. The request was granted but there is nothing in the record that such an instruction was given. It is not clear from the record why that instruction was not given.

The defendant cannot show that the defense counsel's failure to follow through on a limiting instruction was an example of ineffective assistance of counsel. Failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); *See State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005).

F. THE ENTRAPMENT INSTRUCTION WAS NOT
"FAULTY."

The defendant attacks the trial court's giving of Instruction No. 10, the entrapment instruction. The defendant's allegation is that since the instruction does not contain the last paragraph of the WPIC instruction, it is defective. The missing language tells the jury that the defendant needs to prove entrapment by a preponderance of the evidence.

The instruction in question does not change the defendant's burden of proof. In fact, had the instruction *contained* the language used by the

defendant in declaring a defective instruction, the situation would have been worse for the defendant. The jury instructions tell the jury that the defendant has no burden to prove anything and the State must prove its case using a “beyond a reasonable doubt” standard. Despite the defendant’s arguments to the contrary, there is nothing in the instructions to the jury that state that the entrapment must be proven by the defendant, beyond a reasonable doubt. It would have been a strange request by the defense to include any sort of proof standard in what is a defense instruction. As the instruction was given, the defendant was left to argue anything she wished. It is difficult to fathom why a defense counsel would want to limit his arguments if he could convince the trial court to give the instruction as it was given.

The State posits that the trial court erred in giving instruction No. 10 in *any* form. The instruction in question is an entrapment instruction. Entrapment occurs only where the criminal design originates in the mind of the police officer and not with accused; and the accused is lured or induced into committing a crime he had no intention of committing. When the crime originates in the mind of another, an officer may, when acting in good faith, make use of deception, trickery or artifice. *State v. Gray*, 69 Wn.2d 432, 434, 418 P.2d 725 (1966). Entrapment is a positive

defense that requires more than a scintilla of evidence to justify an entrapment instruction.

In this case, the defendant denied poking holes in the victim's waterbed, denied all other accusations and stated, "I never suggested anything." RP 50. Since, according to the defendant, she did nothing of a criminal nature, there was no need for an entrapment defense instruction. It is logically inconsistent to argue both that the defendant did nothing criminal but was lured into the "not doing" by the police. The defendant cannot have it both ways.

On a practical level, it is to be noted that the *defendant* proposed the contested instruction. Having requested the allegedly faulty instruction, when the trial court asked the defense if there were any exceptions or objections to the jury instructions, the defense counsel replied, "I have none, Your Honor." RP 114.

Essentially, the defendant is arguing that there is a problem with an instruction to which the defense raised no objection. The instruction in question benefitted the defendant. At worst, the failure of the trial court to include the last paragraph of WPIC 18.05 was harmless error.

G. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS.

The defendant assigns error to the prosecutor's closing arguments regarding "reasonable doubt." The defendant mischaracterizes the prosecutor's closing in order to make her arguments.

According to the defendant, the State told the jury that "reasonable doubt" was more of a casual thing, something that one might discuss at a party a year later. This is a complete misrepresentation of what the prosecutor said. In the first place, the prosecutor was discussing "abiding belief," not "reasonable doubt." The prosecutor was presenting the jury with his analytical framework for deciding "abiding belief." RP 274-75. The "reasonable doubt" instruction contained "abiding belief" language. The prosecutor did not err in arguing his ideas on how a finder of fact might think about "abiding belief."

First, the prosecutor repeated the language from instruction number three which contained typical "reasonable doubt" language. Then the prosecutor stated "I want to take a minute and look at that abiding belief what does the word mean?" RP 127.

In attempting to explain "abiding belief" to the jury, the prosecutor used an analogy. The prosecutor described a theoretical discussion at a party a year after the trial. RP 127. The point of the analogy was that an

abiding belief was a belief that would still be valid to a particular juror even as far out as a year from the trial.

The language used by the prosecutor in closing did not change the burden on the question of “reasonable doubt.” The jury instruction stated that the jurors needed to have an “abiding belief.” Inst. No. 3. The apparent purpose of the prosecutor’s comments was to distinguish a passing, temporary conclusion from a permanent belief. As mentioned above, the abiding belief was *part* of the “reasonable doubt” instruction.

The trial defense counsel did not object to the prosecutor’s comments. The State submits that counsel did not object because any non-hypertechnical interpretation of the prosecutor’s comments showed that the prosecutor’s comments were not objectionable. It is only through extreme parsing of the closing arguments that the defendant can make an argument.

Closing arguments should be reviewed in light of the context in which they are made including the trial court’s instructions to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995); *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). The defense bears the burden of establishing the impropriety of the challenged remarks. *Russell* at 85. If defense counsel does not make an objection,

the misconduct requires reversal only if it is so flagrant and ill-intentioned nothing could have prevented or cured the resulting prejudice. *Russell* at 86; *State v. Stith*, 71 Wn. App. 14, 20, 856 P.2d 415 (1993).

In this case, there was no objection and the prosecutor's comments were not flagrant and ill-intentioned. The prosecutor's closing argument was simply an attempt to explain an otherwise difficult concept. The defendant's arguments on appeal are without merit.

H. THE DEFENDANT HAS NOT SHOWN THAT
HER TRIAL DEFENSE COUNSEL WAS
INEFFECTIVE.

The defendant assigns error to trial defense counsel's failure to object to prosecutor's closing arguments.

Since this is a reprise of the defendant's earlier assertions of ineffective assistance of counsel, the State requests to incorporate by reference the earlier caselaw citations provided by the State.

As noted previously, the person claiming that their counsel was ineffective must show that they were prejudiced by the allegedly defective performance of counsel. *Strickland v. Washington*, 466 U.S. at 687. The defendant again misstates what the prosecutor argued in his closing remarks.

According to the defendant, the prosecutor argued for "...lessening its burden of proof by informing jurors they should convict if they could envision themselves at a cocktail party...." Brf. of App. 45. This is a disingenuous misrepresentation of what the prosecutor argued. The prosecutor described his perspective of "abiding belief". RP 126-27; CP 274. The prosecutor used the cocktail party to describe how a juror might find themselves thinking about this case at some future point. The prosecutor did not address "reasonable doubt" specifically but rather the "lingering" aspect of "abiding belief." What the prosecutor said was that if a juror at a later point described this case as where "...a lady hated her boss and hired a hit man to kill him and paid \$500 and the whole thing was videotaped then Ms. Burton was guilty." CP 274-75.

There was no lessening of anything by the prosecutor. The prosecutor simply summarized the case and attempted to explain how an abiding belief would be if a juror still thought of the case in the summarized terms of the prosecutor at some future point. The closing arguments were nothing like what the defendant has represented on appeal.

The defense trial attorney did not object to the prosecutor's closing because there was nothing to which to object. There was nothing incorrect in the prosecutor's closing arguments.

I. THERE WAS NO ERROR SO THERE COULD NOT BE CUMULATIVE ERROR.

The State has shown that there were no errors in this trial that prejudiced the defendant. Therefore, this defense argument has no support.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 14th day of February, 2011.

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Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 24944-1-III
 v.)
) CERTIFICATE OF MAILING
 JACKIE R. BURTON,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on February 14, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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PO Box 9166
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and to:

Jackie R. Burton
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2/14/2011
(Date)

Spokane, WA
(Place)


(Signature)