

64029-1

64029-1

NO. 64029-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES GROTH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. Whether the trial court correctly ruled that the destruction of physical evidence by the police did not warrant the harsh remedy of dismissal because the evidence in question was not material exculpatory evidence, and because there was no evidence of bad faith on the part of the police.

2. Whether this Court should reject the defendant's argument for a different analysis regarding the destruction of physical evidence under the state constitution because the Washington Supreme Court has already held that the state constitution does not mandate a different analysis.

3. Whether the trial court exercised sound discretion in admitting expert testimony from a master tracker who examined the crime scene photographs and utilized his vast knowledge in interpreting footprints at the crime scene because the expert was qualified and his testimony was helpful to the jury.

4. Whether sufficient evidence supports the jury's verdict because the evidence showed that the defendant had motive, opportunity, and access to the murder weapon, and because the defendant's behavior and statements were both inculpatory and inconsistent.

5. Whether this Court should reject the defendant's claims of prosecutorial misconduct in closing argument because the arguments were entirely proper and because the defendant did not object to them at trial.

6. Whether this Court should reject the defendant's claim that he received ineffective assistance of counsel at sentencing because counsel's representation at sentencing was consistent with a reasonable strategy of maintaining the defendant's innocence, and because the defendant cannot show that the outcome of the proceedings would have been different if counsel had taken a different approach.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, James Groth, with Murder in the First Degree for the February 14, 1975 murder of 16-year-old Diana Peterson. CP 1-6. The trial was held in March, April and May 2009 before the Honorable Laura Inveen. At the conclusion of the trial, the jury convicted Groth of the lesser offense of Murder in the Second Degree. CP 419; RP (6/2/09) 1836-41.

In accordance with the law in effect in 1975, the trial court imposed an indeterminate sentence of life in prison with a minimum

term of 200 months. CP 461-68; RP (7/24/09) 1874. Groth now appeals. CP 469.

2. SUBSTANTIVE FACTS

At 6:00 a.m. on Saturday, February 15, 1975, George Peterson awoke and heard his daughter's dog barking in the back yard. RP (5/12/09) 630-31. When George Peterson went into the back yard to investigate, he discovered the body of his 16-year-old daughter, Diana Peterson, lying on her back below the rockery. George went inside, called his priest, called the police, and informed his wife Leanne that their daughter was dead. He then went outside and covered the body with a blanket. RP (5/12/09) 631-32.

Detectives from the King County Sheriff's Office responded to the scene. One of them, former detective Rolf Grunden, noted that there were fresh footprints at the crime scene that had a "stars and bars" tread pattern. Other fresh footprints appeared to be consistent with Diana Peterson's smooth-soled shoes. RP (5/13/09) 171-19. Grunden took precautions so that the footprints would not be stepped on by others so that they could be documented. RP (5/13/09) 698-99.

In accordance with standard procedures, no one moved

Diana Peterson's body until personnel from the medical examiner's office moved her at approximately 2:30 p.m. RP (5/18/09) 1048. Before the body was moved, the police did not know how Peterson had been killed. RP (5/13/09) 780. When her body was turned over, however, they discovered a large, bone-handled hunting knife sticking out of her back. RP (5/18/09) 1049. The knife was buried in her back up to the hilt. RP (5/13/09) 745.

The police began their investigation by interviewing members of the Peterson family. Diana Peterson's mother Leanne and her younger sister Marilyn were able to establish that Peterson had been killed shortly after 10:30 p.m. on Friday, February 14, 1975. When Marilyn got home from a party that night at approximately 10:00 p.m., she watched "Police Woman" on television with Leanne in Leanne's bedroom. RP (5/12/09) 553-55. Leanne then heard Diana enter the house at approximately 10:30 p.m. RP (5/12/09) 594. Although Diana was on restriction because she had not obeyed her curfew the night before, Leanne had allowed her to go to a pizza parlor with her friends. RP (5/12/09) 583-84. Shortly after hearing Diana enter the house, Marilyn and Leanne heard noises in the back yard. Leanne thought she heard Diana scream, whereas Marilyn thought she heard someone say

"stop it" or "don't" in a "playful" way. RP (5/12/09) 555, 595.

Leanne opened the window and saw "two shadows, very close together" that appeared to be Diana and someone else either playing or struggling. RP (5/12/09) 595-96.

Leanne went downstairs to investigate. When she went into the basement, she discovered that the sliding door was open, although she had closed and locked it earlier. RP (5/12/09) 597. Leanne walked out onto the patio and called Diana's name, but there was no response. Leanne assumed that Diana had snuck out of the house, so she let out Diana's dog and closed and locked the sliding door again. RP (5/12/09) 597-600.

The police very quickly focused their suspicions on Diana Peterson's 19-year-old next-door neighbor, Tim Diener. Diana and Diener were having a sexual relationship, in spite of the fact that Diana's parents did not approve of Diener and tried to keep Diana from seeing him. Diana frequently snuck out of the house in order to spend time with Diener. RP (5/12/09) 642; RP (5/14/09) 882-83. The hunting knife that was used to kill Diana belonged to Diener. RP (5/18/09) 1089. However, it was undisputed that the basement door that led to Diener's bedroom was always unlocked, and that all of the neighborhood kids had seen Diener's knife. RP (5/19/09)

1394; RP (5/20/09) 8, 11, 175. The knife was kept in plain view in Diener's bedroom on a table; the kids liked to handle it because it was "cool-looking[.]" RP (5/20/09) 11-12.

When the police first interviewed Diener on February 15, 1975, Diener reported that someone had stolen the knife. RP (5/18/09) 1083. Diener also explained that he had been at a friend's house on February 14th and did not arrive home until approximately 11:00 p.m., and that he heard Diana's dog barking in the yard when he got home. CP 501-07. Diener's friend Dean Blackburn corroborated that Diener was with him until almost 11:00 p.m. RP (5/20/09) 183. Nonetheless, Diener was arrested and booked for Diana's murder on February 19, 1975. RP (5/18/09) 1088-89. He was released the following day, and no charges were filed because the evidence was not sufficient. After that, Diener retained an attorney and refused to speak further with the police.¹ RP (5/18/09) 1096.

Despite the focus on Diener, the police also spoke with Groth several times in the days following the murder. Groth lived

¹ After the investigation was reopened, Diener testified at an inquiry judge proceeding in 2007. RP (5/18/09) 1021-26. Diener also gave a deposition, a redacted version of which was played at Groth's trial in lieu of live testimony because Diener was dying of liver cancer. CP 470-700.

two doors down from the Petersons, and he spent a lot of time at the Petersons' house visiting with Diana. RP (5/12/09) 546-47. Several neighborhood kids had noticed that Groth was infatuated with Diana; he made comments about her breasts, he said he wanted to "fuck" her, and he liked to grab her and wrestle with her. RP (5/12/09) 548; RP (5/14/09) 880-81; RP (5/19/09) 1397; RP (5/20/09) 174, 194-95. Diana didn't like it, and told Groth to stop it. RP (5/20/09) 196.

Groth initially told the police that on the night of the murder, he was at the Petersons' house until after Diana went to get pizza with her friends. He then walked to Arden Lanes, the neighborhood bowling alley, and then walked home. RP (5/18/09) 1075-77. In a second statement to the police, Groth said that he cut through the Petersons' back yard on his way home from the bowling alley, and found Diana Peterson's dead body "laying (sic) face down right by the rockery" with "a knife handle sticking out of her back." RP (5/18/09) 1082. The detectives also noted that Groth had scratches on his forearm after the murder; these scratches were never explained. RP (5/19/09) 1295-96.

At noon on February 15, 1975, the day Diana Peterson's body was discovered, Steven Larsen was pulling into his driveway

after spending the night at a friend's house. Larsen could not help but notice that there were police cars everywhere. RP (5/19/09) 1398-99. Groth, who lived across the street, came up to Larson's car and told Larson that Diana Peterson had been "knifed." RP (5/19/09) 1399-1403. This was more than two hours before Diana's body was turned over. RP (5/18/09) 1048.

On April 4, 1975, Eric Hansen was working at the Seattle Times newspaper shack when he had a confrontation with Groth. RP (5/14/09) 974. Groth pushed Hansen and knocked his glasses off. When Hansen threatened to tell his father, Groth replied, "I've killed a girl and I can kill again." RP (5/14/09) 973.

For whatever reason, the investigation in this case went cold. Although two detectives filled out forms in 1976 and in 1978 requesting that the physical evidence in this case be preserved indefinitely, in 1987 a sergeant ordered all of the evidence except for the murder weapon to be destroyed. CP 102, 104-05, 107-08.

Detective Jim Allen then began looking at the case anew in April 2006. RP (5/12/09) 654. Allen noted that the physical evidence other than the knife was gone, and that no fingerprints or DNA could be obtained from the knife. RP (5/21/09) 90, 92-94. Allen searched exhaustively for any lab reports from any tests that

might have been conducted before the evidence was disposed of, and found none. RP (5/2/09) 95-97.

However, Allen noted that Leanne's and Marilyn's statements established that Diana was stabbed between 10:35 and 10:45 p.m. on February 14, 1975, and that statements from Diener's friends established that Diener was not home at that time. RP (5/21/09) 1447-48. Based on these facts, Allen decided to focus his attention on Groth. RP (5/21/09) 1449.

Detective Allen interviewed Groth several times in May 2006. During their first meeting, Groth did not mention finding Diana Peterson's body until Allen pointed out that he had talked about that in his second statement to the police in 1975. RP (5/26/09) 1475. During Allen's second interview with Groth, Allen accused Groth of holding back information about the murder. Groth responded by slumping in his chair and putting his head down; he had tears in his eyes. RP (5/26/09) 1478-79. Groth then became angry and agitated when pressed for details about finding the body. RP (5/26/09) 1479-80. Groth did not deny killing Diana until Allen pointed out that he had not denied it. Groth's subsequent denial was "weak." RP (5/26/09) 1979. Then, during Allen's third meeting with Groth, Groth agreed with Allen that there was "something

important" Groth had to tell him, "such as that [Groth] was there at the time of the murder," but Groth stopped short of admitting anything specific. RP (5/26/09) 1483. Groth was finally arrested for Diana Peterson's murder on December 21, 2007. RP (5/26/09) 1489.

Although the physical evidence other than the knife was gone, the crime scene photographs still existed. Detective Allen provided the photographs to Joel Hardin, a master tracker, to find out whether Hardin could interpret any of the footprints that had been observed at the crime scene. RP (5/26/09) 1487. In general terms, tracking is a skill that enables the tracker to find and understand evidence of the passage or presence of a person in a particular area. RP (4/16/09) 6-7. Such evidence is known in tracking parlance as "sign," and includes footprints and other ground compressions. RP (4/16/09) 8. Through the interpretation of "sign," a tracker can establish when a person was in an area, what they were doing, and how long they remained. RP (4/16/09) 7. Tracking is a skill that requires many years of experience and training in order to reach the level of "sign cutter," or master tracker. RP (5/19/09) 1311-13.

Hardin examined the photographs in this case, and

concluded that there were "two persons in the same area moving their feet about, but not really going anywhere" at the same time at the crime scene on the night of the murder. RP (5/20/09) 87-88. One of these people was wearing "stars and bars" tread boots consistent with Groth's "Vibram" soles; the other was wearing a flat, gum rubber-soled shoe consistent with Diana Peterson's "Wallabees." RP (5/20/09) 48-53, 56-59.

Additional facts will be discussed further below as necessary for argument.

C. **ARGUMENT**

1. **THE TRIAL COURT CORRECTLY RULED THAT THE DESTRUCTION OF PHYSICAL EVIDENCE BY THE SHERIFF'S OFFICE DID NOT MERIT DISMISSAL UNDER ARIZONA V. YOUNGBLOOD.**

Groth first claims that the trial court erred in ruling that the destruction of physical evidence in this case by the King County Sheriff's Office in 1987 did not warrant the remedy of dismissal under the standard established by Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), and its progeny. More specifically, Groth argues that due process requires dismissal because the evidence was material and exculpatory, and because the evidence was destroyed in bad faith. Brief of Appellant, at 19-30. These arguments should be rejected. As the trial court found,

the evidence in question was not material exculpatory evidence; rather, it was potentially useful evidence. In addition, Groth did not establish bad faith on the part of the police. Accordingly, dismissal was not warranted, and this Court should affirm.

A defendant's constitutional due process rights are violated and a criminal case should be dismissed when the State fails to preserve material exculpatory evidence. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), and Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). But in order for evidence to qualify as "material exculpatory evidence," a two-part standard must be satisfied:

[The] evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Trombetta, 467 U.S. at 489.

On the other hand, when the evidence in question would have been potentially useful, but is not clearly exculpatory, the harsh remedy of dismissal will not be imposed unless the defendant demonstrates bad faith on the part of the police in failing to preserve the evidence. Youngblood, 488 U.S. at 58; State v.

Copeland, 130 Wn.2d 244, 280, 922 P.2d 1304 (1996). Unlike material exculpatory evidence, whose exculpatory nature is obvious, potentially useful evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."

Youngblood, 488 U.S. at 57. As the United States Supreme Court explained in holding that a defendant must show bad faith to obtain a dismissal when potentially useful evidence is destroyed,

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Youngblood, 488 U.S. at 58.

In his concurrence in Youngblood, Justice Stevens specifically observed that the evidence at issue -- rape kit swabs and the victim's clothing in a child rape case -- was more likely to have been inculpatory than exculpatory, and that the destruction of this evidence damaged the State's case and gave the defendant's

attorney the opportunity to argue to the jurors that they should acquit the defendant because the evidence had been destroyed. Youngblood, 488 U.S. at 59-60 (Stevens, J., concurring). In other words, "the uncertainty as to what the evidence might have proved was turned to the defendant's advantage." Id. at 60. Accordingly, "[i]n cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence." Id. at 59. A very similar case presents itself here.

In this case, all of the physical evidence other than the murder weapon was destroyed in 1987 for reasons that remain somewhat unclear, although detectives from the King County Sheriff's Office recalled that the sergeant who ordered the evidence destroyed had "made a decision to clear out evidence in many cases" in the 1980s due to a lack of storage space. CP 262. The evidence in question, which included the victim's fingernail scrapings and casts of footwear impressions, was not material exculpatory evidence. Rather, like the swabs and clothing in Youngblood, the evidence in this case was potentially useful evidence, i.e., "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which

might have exonerated the defendant." Youngblood, 488 U.S. at 57. Indeed, as in Youngblood, the physical evidence in this case most likely would have been far more helpful to the State than to Groth. Also as in Youngblood, the absence of this evidence was damaging to the State's case and provided Groth with the opportunity to receive a "missing evidence" instruction and to argue for acquittal based on its absence. In other words, "the uncertainty as to what the evidence might have proved was turned to the defendant's advantage." Id. at 60 (Stevens, J., concurring).

Furthermore, nothing in the record suggests that the evidence was destroyed in bad faith in order to deprive Groth of his ability to mount a defense. Rather, the record indicates that the evidence was destroyed along with evidence in other cases in the 1980s due to storage space concerns. In sum, the trial court correctly ruled that the evidence that was destroyed was not "material exculpatory evidence," and that dismissal was not warranted because there was no showing of bad faith by the police.

Nonetheless, Groth suggests that Kay Sweeney, the crime lab analyst who looked at the evidence before it was destroyed, had performed forensic tests that "did not implicate" Groth, and thus, the evidence qualifies as material exculpatory evidence under

Youngblood. Brief of Appellant, at 21-23. This overstates the record. Sweeney testified only that he "looked at" or "examined" the evidence, and he had no independent memory of anything he did. RP (5/14/09) 933. Moreover, in a portion of the record Groth cites for the proposition that Sweeney performed tests that did not implicate Groth, the prosecutor actually stated that while Sweeney had observed a trace of blood on the pocket of Tim Diener's jeans, "Sweeney also shared with the detective that he had done the analysis of the physical evidence, and that there was essentially nothing to support a case against Tim Diener." RP (4/20/09) 117. In other words, all that can really be said about the evidence is that Sweeney looked at it, and nothing definitive was found.

On the other hand, everyone including Sweeney agreed that if the evidence still existed, it could be subjected to tests that could yield valuable information. See, e.g., RP (5/14/09) 938, 945-46. This is the very definition of "potentially useful evidence," i.e., "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, 488 U.S. at 57. Again, the trial court was correct when it found that the evidence was not obviously exculpatory.

In addition, Groth cites two federal trial court cases and an Ohio appellate case for the proposition that bad faith is necessarily shown when evidence is destroyed in violation of established police procedures. Brief of Appellant, at 27-38 (citing United States v. Montgomery, 676 F. Supp. 2d 1218 (D. Kan. 2009), United States v. Elliott, 83 F. Supp. 2d 637 (E.D. Va. 1999), and State v. Durnwald, 163 Ohio App. 3d 361, 837 N.D.2d 1234 (2005)). These cases are not on point. In each case, unlike in this case, there were explicit procedures that were violated when the evidence in question was destroyed. Also, it is noteworthy that in each of these three cases, the remedy was not dismissal, but the suppression of testimony or other evidence relating to the evidence that was destroyed.²

In addition, other courts have held, based on the language of Youngblood itself, that a finding of bad faith requires a showing that the evidence was destroyed with intent to deprive the defendant of

² See Montgomery, 676 F. Supp. 2d at 1242-45, 1249 (written DEA protocols violated by failure to document and photograph marijuana plants and by destruction of plants themselves only 18 days after seizure; other evidence regarding number of plants suppressed); Elliott, 83 F. Supp. 2d at 644-47, 649 (written DEA procedures violated by destruction of glassware containing unknown residue and defendant's fingerprints almost immediately after seizure; defendant's fingerprints suppressed); Durnwald, 163 Ohio App. 3d at 369-71 (specific state patrol protocol violated by recording over videotape of defendant's DUI arrest; trooper's testimony regarding field sobriety tests suppressed).

the ability to mount a competent defense, police procedures or lack thereof notwithstanding. See, e.g., Guzman v. State, 868 So. 2d 498, 509 (Fla. 2004) (holding that a "determination of bad faith does not turn on whether law enforcement officers followed established procedures," and that "bad faith exists only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant," citing Youngblood); State v. Patterson, 356 Md. 677, 698, 741 A.2d 1119 (1999) (noting that the "intent or motive behind the destruction of the potential evidence is generally a determinative factor" in deciding whether bad faith exists); State v. Holden, 964 P.2d 318, 324 (Utah Ct. App. 1998) (noting that a finding of bad faith turns on the intent of the police, and whether they destroyed the evidence because it could have been exculpatory, quoting Youngblood); State v. Delisle, 102 Vt. 293, 648 A.2d 632 (1994) (noting that bad faith "is commonly understood to connote an action that was improperly motivated") (internal quotation marks and citation omitted).

In this case, although the record shows that two detectives had asked that the physical evidence be preserved, it was destroyed in 1987 -- 12 years after the crime occurred -- due to space considerations. CP 102, 104-05, 107-08. Nothing in the

record even remotely suggests that the evidence was destroyed by the police because it could have exonerated Groth. Moreover, although former detective Roger Dunn testified that he considered it "automatic" that evidence in a homicide case would be preserved "forever," there was no evidence of any explicit written protocols to that effect. RP (5/18/09) 1103-04. Therefore, even under the three cases Groth cites, a finding of bad faith is not warranted.

In sum, Youngblood dictates that the harsh remedy of dismissal will be imposed due to the destruction of evidence only if one of two requirements has been fully satisfied: 1) the defendant has demonstrated that the evidence in question meets the strict definition of "material exculpatory evidence"; or 2) the defendant has demonstrated that the evidence was destroyed in bad faith, i.e., for the purpose of depriving the defendant of potentially useful evidence. Groth's claim meets neither of these requirements, and the trial court's ruling is sound. This Court should reject Groth's claim, and affirm.

2. THE WASHINGTON SUPREME COURT HAS ALREADY HELD THAT THE WASHINGTON CONSTITUTION DOES NOT MANDATE A DIFFERENT STANDARD, AND THAT YOUNGBLOOD CONTROLS.

In a related claim, Groth argues that, even assuming that his

claim fails under the standard set forth in Youngblood, the Washington State Constitution mandates a different, broader standard under which he contends he should prevail. More specifically, Groth has provided a state constitutional analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and argues for a due process "balancing test" analysis as set forth in State v. Vaster, 99 Wn.2d 44, 659 P.2d 699 (1984), and State v. Wright, 87 Wn.2d 783, 557 P.2d 1 (1976). This claim should be rejected because the Washington Supreme Court has already held that the state constitution does not require a different due process analysis in these circumstances, and that Vaster and Wright have been supplanted by Youngblood.

In State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992), the court considered the same claim that Groth makes in this case, i.e., whether the state constitution mandates a broader due process analysis than the test set forth in Youngblood for cases where evidence has been lost or destroyed. Ortiz, 119 Wn.2d at 302. After considering the Gunwall factors, the court held that there was no basis for a different standard under the state constitution, and thus, that Youngblood controls. Ortiz, 119 Wn.2d at 302-05. Two years later, the court reaffirmed this holding in State v.

Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994):

We are not convinced separate and independent state grounds exist to support a broader interpretation of the state due process clause in the context of preservation of evidence. We hold Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) provides the proper standard for preservation of exculpatory evidence, and under our analysis above, we find no due process violation.

Wittenbarger, 124 Wn.2d at 481.

Ortiz and Wittenbarger are directly on point. Accordingly, Groth's claim must be rejected.

3. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING EXPERT TESTIMONY FROM MASTER TRACKER JOEL HARDIN REGARDING "SIGN" LEFT AT THE CRIME SCENE.

Groth next claims that the trial court abused its discretion in admitting testimony from tracking expert Joel Hardin, in which he described and interpreted the footwear impressions visible in photographs of the crime scene. Brief of Appellant, at 40-56. This claim should be rejected. The trial court exercised sound discretion in finding that Hardin is an expert in the field of tracking, that his testimony would be helpful to the jury in understanding the evidence, and that Groth's challenges to Hardin's testimony were matters going to weight, not admissibility. CP 277-78. The trial court's ruling should be affirmed.

Under ER 702,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. The decision to admit expert testimony is addressed to the sound discretion of the trial court. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). A trial court abuses its discretion only if its decision is manifestly unreasonable or is based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A reviewing court will find an abuse of discretion only if it concludes that no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

The Washington Supreme Court has already held that Joel Hardin is "clearly qualified to testify" as an expert in tracking due to his "extensive training and experience as a tracker." Ortiz, 119 Wn.2d at 310. As the Ortiz court observed,

For 23 years, [Hardin] has worked as a special agent with the United States Border Patrol as an expert tracker and as a trainer and instructor in his field. For 8 of those 23 years, he was stationed on the Mexican border. He has been qualified as an expert by National Search and Rescue, which requires 8,000 to

10,000 hours of experience, as well as the United States Border Patrol, the United States Marshall's Service, and the Federal Bureau of Investigation. Courts in California and Washington have previously recognized his expert status.

Id.

Since 1992 when Ortiz was decided, Hardin has continued to apply his skill and experience as a tracker, and has developed an intensive training and certification program for trackers through his company, Joel Hardin Professional Tracking Services. RP (3/16/09) 24-25. Hardin has worked as a consultant on approximately 100 criminal cases, including cases where he has gone to the crime scene as well as cases where he has examined photographs for evidence of "sign." RP (3/16/09) 37-40. Hardin is a "sign cutter," or master tracker, which is the highest skill level that a tracker can achieve. RP (3/17/09) 159. In sum, there can be no real dispute that Hardin qualifies as an expert in the field of tracking.

There can also be no real dispute that Hardin's testimony was helpful to the jury. Hardin testified that based on the evidence of "sign" that he could see in the crime scene photographs, someone wearing "stars and bars" tread boots consistent with Groth's and someone wearing flat rubber-soled shoes consistent

with Diana Peterson's were together in the same small area of the Petersons' back yard on the night that Diana was murdered. RP (5/20/09) 46-93. Hardin interpreted the evidence of these footfalls in the photographs and explained that there were "two persons in the same area moving their feet about, but not really going anywhere" at the same time and place at the crime scene. RP (5/20/09) 87-88. Hardin was very clear that he could not "match" the footprints to a particular shoe. RP (5/20/09) 50, 58-59. Nonetheless, Hardin's testimony was clearly relevant, and was helpful to the jurors because it assisted them in understanding what occurred at the crime scene. Therefore, because Hardin qualifies as an expert and his testimony was helpful to the jury, the trial court properly exercised its discretion in admitting Hardin's testimony under ER 702.

Nonetheless, Groth argues that the trial court erred in admitting Hardin's testimony because Hardin exceeded the bounds of his expertise. Specifically, Groth argues (as he did at trial) that Hardin's testimony was inadmissible because Hardin applied tracking principles to evidence in photographs rather than in the field, and because Hardin testified as a footwear impression expert rather than a tracker. Brief of Appellant, at 51. These arguments

are without merit.

First, although firsthand observations of the crime scene would certainly be preferable to working with photographs, this would be true for *any* expert, not just a tracker such as Hardin. Nonetheless, experts in any number of fields are still able to render opinions based on evidence observable in photographs. See, e.g., State v. Roberts, 142 Wn.2d 471, 522, 14 P.3d 713 (2000) ("Although [the blood pattern expert] did not travel to the crime scene, she personally viewed photographs and a videotape of the scene."); State v. Luj, 153 Wn. App. 304, 320-21, 221 P.3d 948 (2009), rev. granted, 168 Wn.2d 1018 (2010) (The medical examiner "testified based on his own expertise in strangulation and his independent review of the autopsy photographs and other data recorded in the autopsy report."); State v. Stellman, 106 Wn. App. 283, 286, 22 P.3d 1287 (2001) ("The court heard expert testimony on the age of persons depicted in the photographs that formed the basis for the [charges]."). Indeed, Groth's own forensic expert, Jon Nordby, rendered a variety of opinions based on photographs of the crime scene and the autopsy. CP 66-77; RP (5/26/09) 1616-76. This would be the case with almost all defense experts, who are generally retained months after a case has been filed, and thus,

they are seldom able to visit a fresh crime scene.

As with any other field of expertise, applying tracking principles to interpret sign in photographs is necessarily limited by what is actually depicted in the photographs and the quality of the photographs. However, such limitations go to weight, not admissibility. This Court should reject the notion that Hardin should not have been allowed to testify because his testimony was based on photographs rather than the crime scene itself.

Second, Groth's assertion that Hardin exceeded the scope of his expertise and testified as a footwear impression expert is contrary to the record. Hardin was very specific in his testimony that he was not a footwear impression expert, and that he was not making a "match" between the footprints he observed in the photographs to any particular shoes. RP (5/20/09) 50, 58-59, 100-02. Hardin explained at some length that what he does as a tracker and what a footwear impression expert does are very different disciplines, that that neither expert could do what the other does. RP (5/20/09) 101-03. This Court should reject Groth's argument that Hardin's testimony should have been excluded because he exceeded the scope of his expertise.

Finally, Groth suggests throughout his briefing that Hardin's

testimony should have been excluded because it was not based on scientific principles. Groth cites the opinions of his own experts, Jon Nordby and William Bodziak, both of whom were highly critical of Hardin's methodology and conclusions. RP (5/26/09) 1609-15; RP (5/27/09) 1754-82. However, both Nordby and Bodziak readily admitted that they had no expertise in tracking. RP (5/27/09) 1680-82, 1793. Moreover, as the Ortiz court observed, "Hardin's testimony was not based on novel scientific experimental procedures, but rather upon his own practical experience and acquired knowledge." Ortiz, 119 Wn.2d at 311. Therefore, Groth's contention that Hardin's testimony should have been excluded because it was "unscientific" misses the mark, because tracking is a skill rather than a science.³

In sum, Groth cannot show that the trial court abused its discretion in admitting Hardin's testimony. Hardin qualifies as an expert in tracking, his testimony was helpful to the jury, and Groth's arguments go weight, not admissibility. Moreover, Hardin was

³ Groth's reliance upon Commonwealth v. Patterson, 445 Mass. 626, 840 N.E.2d 12 (2005) is misplaced for this reason as well. In Patterson, the court held that a particular methodology of fingerprint identification was inadmissible because it was not accepted in the relevant scientific community, i.e., fingerprint identification experts. In this case, criticism of Hardin's work by experts in fields other than tracking does not establish a "relevant scientific community" for these purposes.

extensively cross-examined by Groth's counsel, and Groth presented two experts who criticized Hardin's work. In accordance with their instructions, the jurors were able to evaluate Hardin's testimony and conclusions for themselves.⁴ The trial court exercised sound discretion in admitting the testimony, and this Court should affirm.

4. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT THAT GROTH KILLED DIANA PETERSON.

Groth next claims that the State produced insufficient evidence at trial to prove that he killed Diana Peterson. Brief of Appellant, at 56-58. This claim should be rejected, because the jury's unanimous verdict that Groth killed Peterson is supported by substantial evidence.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851

⁴ The trial court gave the standard instruction on expert testimony, which states that the jurors were not bound by any expert's opinion, and that it was up to them to determine what weight to be given to the expert testimony based on "education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information," or any other factors. CP 407 (WPIC 6.51).

P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992).

Furthermore, an appellate court considering a sufficiency challenge must defer to the jury's determination as to the weight and credibility of the evidence, and to the jury's resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75.

Circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In sum, under these deferential standards, any question as to the meaning of the evidence should be resolved in favor of the conviction whenever such an interpretation is reasonable.

In this case, the evidence showed that on the night Diana Peterson was killed, Groth stayed behind in the Petersons' basement when Diana went out for pizza with her friends. Diane's mother Leanne found Groth in the basement alone at about 9:30

p.m. Groth told Leanne he was waiting for the girls to bring a pizza back to the house, but Leanne told him they were eating it at the restaurant, so Groth left. RP (5/12/09) 586-92. Leanne locked the sliding door behind him, and went to her bedroom to watch television. RP (5/12/09) 593.

The evidence also showed that Diana Peterson was killed shortly after she returned from the pizza parlor at 10:30 p.m., when her sister Marilyn and her mother Leanne both heard noises in the back yard while they were watching "Police Woman" on television in Leanne's bedroom. RP (5/12/09) 555-58, 593-600. Leanne looked out the window and saw what appeared to be Diana and someone else either playing or struggling. RP (5/12/09) 596. Leanne went down to the basement and found the sliding door open; she went out onto the patio and called Diana's name, but there was no answer. Leanne then let out Diana's dog, and closed and locked the slider again. RP (5/12/09) 597. Early the next morning, Diana's father George heard the dog barking outside and found Diana's body in the back yard. RP (5/12/09) 630-32.

At around noon, after numerous police officers and detectives had already responded to the crime scene, Steven Larson, who lived across the street from Groth, was just arriving

home from spending the night at a friend's house when Groth came up to his car. RP (5/19/09) 1398-99. Groth told Larson that Diana Peterson had been "knifed." RP (5/19/09) 1399-1403. This was very significant, because Diana had died lying on her back in a position where the knife was not visible, and the police did not discover the knife in her back until the medical examiner turned the body over, more than two hours after Groth said that Diana had been "knifed." RP (5/18/09) 1048-49.

Prior to the murder, some of Diana Peterson's friends had noticed that Groth was infatuated with Diana, and followed her around "like a little puppy dog." RP (5/14/09) 881. Groth had told Steven Larson that Diana had "nice boobs" and that he would "like to fuck her." RP (5/19/09) 1397. Groth would often grab Diana, and she would push him away and tell him to stop. RP (5/20/09) 196. Groth was aware that Diana was having a sexual relationship with Tim Diener. RP (5/19/09) 1395-96. Diener's friend Dean Blackburn had the distinct impression that Groth was jealous of that relationship. RP (5/20/09) 174.

In the days immediately following Diana's murder, Groth gave multiple statements to the police. These statements contained significant inconsistencies. For example, in the first

statement he gave, Groth said that he left the Petersons' at approximately 10:00 p.m., went to the bowling alley, and then went home. RP (5/18/09) 1075-77. In the second statement, Groth said that he cut through the Petersons' back yard on his way home from the bowling alley, and found Diana Peterson's dead body "laying (sic) face down right by the rockery" with "a knife handle sticking out of her back." RP (5/18/09) 1082. In addition to the obvious inconsistencies between these two statements, the second statement is inconsistent with the physical evidence, which showed that Diana could not have been face down for any significant period of time after she was stabbed, and that she died lying on her back, not face down. RP (5/18/09) 1151-52; RP (5/28/09) 33-35. The detectives also noted that Groth had scratches on his forearm after the murder; these scratches were never explained. RP (5/19/09) 1295-96.

On April 4, 1975, Groth had a hostile encounter with Eric Hansen, a neighborhood boy who worked at the Seattle Times newspaper shack. RP (5/14/09) 972, 974. Groth pushed Hansen and knocked his glasses off. Hansen told Groth that he was going to tell his father that Groth broke his glasses, and Groth said in a threatening manner, "I've killed a girl and I can kill again." RP

(5/14/09) 973.

When the investigation was finally reopened, Groth was re-interviewed by Detectives Garske and Allen in May 2006. When the detectives accused Groth of holding back information about the murder, Groth slumped in his chair, put his head down, and "teared up a little." RP (5/26/09) 1478-79. Groth did not deny killing Diana Peterson until the detectives pointed out that he had not denied it. RP (5/26/09) 1979. Groth also became agitated and angry when the detectives asked him for specific details about finding the body. RP (5/26/09) 1479-80. And, for the first time since the murder occurred, Groth told the detectives that he had actually touched the body (which he still maintained was face down) to check for a carotid pulse, and that he confirmed that Diana was dead. RP (5/26/09) 1480.

Several days later, Groth met the detectives again in the parking lot of a restaurant in Ballard. Detective Allen told Groth that "the fact that you showed up here shows me that you have something to tell me." Groth nodded in agreement. Allen said that "it appears that there's something important that you have to tell me, such as you were there at the time of the murder or you have some explanation." Groth nodded again. Allen stated that "there's

two sides of every story, even on something like a murder." Again, Groth nodded. Allen said that "nothing's cut and dried, even a murder." Groth nodded in agreement with this statement as well. RP (5/26/09) 1483.

As addressed at length above, Joel Hardin was retained as an expert tracker to examine the crime scene photographs for footprints, or "sign." Based on his examination of the photographs, Hardin concluded that two people who were wearing shoes consistent with Diana's "Wallabees" and with Groth's "stars and bars" tread boots were moving around in the same small area at the same time on the night of the murder. RP (5/20/09) 61-62.

In addition to the inculpatory evidence against Groth, the State presented substantial evidence exculpating Tim Diener. Although the hunting knife that was used to kill Diana Peterson belonged to Diener, it was undisputed that the door to Diener's basement bedroom was always unlocked, that Groth was a frequent visitor of Diener's, that all the neighborhood kids had seen Diener's knife, and that the knife was always lying around in plain view. RP (5/19/09) 1393-94; RP (5/20/09) 8-12, 172-73, 175. In addition, the evidence showed that Diener was with his friends and not in the neighborhood when Diana was killed. RP (5/20/09) 13-

15. This was confirmed by the fact that Diener heard Diana's dog barking or whining outside when he got home that night, and the evidence showed that Leanne Peterson did not let the dog out until after Diana had been stabbed. CP 506-08; RP (5/12/09) 595-97. When Diener later told Groth about hearing the dog that night, Groth snapped at Diener that he should "shut up about that damn dog" or he would end up in jail. CP 617.

Diener's emotional reactions when he learned of Diana's death were consistent with innocence; he was "[b]ummed," "freaked out," "shook up," and crying. RP (5/20/09) 15-16. Also, Diener's friend Paul Hansen testified that Diener had no idea what had happened to his knife, and that he helped Diener look for it the day after the murder. RP (5/20/09) 16-17.

After viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences from the evidence in favor of the State, the evidence shows that the jurors were justified in concluding beyond a reasonable doubt that Groth murdered Diana Peterson. The evidence proved that Groth had both motive and opportunity, as well as access to the murder weapon, and that Groth's behavior and statements after the murder were both inculpatory and inconsistent. Groth also had unexplained scratches

on his arm the day after the murder, and footprints left at the crime scene were consistent with his boots. On the other hand, Tim Diener had an alibi, and his reactions to both the murder and the disappearance of his knife were consistent with innocence. Also, Diener specifically recalled hearing Diana's dog barking outside when he got home the night of the murder -- an event that could only have occurred after the stabbing based on Leanne Peterson's testimony. In sum, the evidence is sufficient to support the jury's verdict, and Groth's claim to the contrary should be rejected.

5. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE NEITHER IMPROPER NOR PREJUDICIAL.

Groth next claims that the prosecutor committed misconduct in closing argument. Specifically, Groth claims that the prosecutor misstated the burden of proof, misstated the court's instruction regarding circumstantial evidence, and misstated the meaning of the so-called "missing evidence" instruction. Brief of Appellant, at 58-68. But the prosecutor's remarks were neither improper nor prejudicial, and thus, Groth's claims are without merit.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire

record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, a defendant who did not make a timely objection has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "in the

context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. Groth's claims of misconduct fail in light of these standards.

As a preliminary matter, Groth did not object to any of the remarks that he now claims were improper. In fact, Groth made no objections whatsoever during either closing argument or rebuttal. RP (5/28/09) 46-80, 125-32. Accordingly, as to each of his claims, Groth bears the burden of showing that the prosecutor's remarks constituted flagrant and incurable misconduct. Brown, 132 Wn.2d at 561.

First, Groth argues that the prosecutor misstated the burden of proof when she said that the jury would have "unanswered questions" about the case, but that these unanswered questions did not amount to reasonable doubt. Brief of Appellant, at 62-63. But there was nothing even remotely improper about these remarks when considered in context because the "unanswered questions" the prosecutor was referring to were not unanswered questions regarding the elements of the crime. Rather, the prosecutor was referring to unanswered questions regarding other matters, as the following passage illustrates:

And ladies and gentlemen, there are unanswered questions. There are things you're not going to know the answers to. And that doesn't equal reasonable doubt either. You may not know exactly when Jim Groth decided to kill Diana Peterson. You may not know certain things like exactly what route Diana Peterson stumbled by that rockery before landing on her back. You may not know whether Jim Groth ended up with any blood on him after killing Diana Peterson. You know Tim Petrowitz did not see any.

RP (5/28/09) 77-78. After discussing the missing physical evidence, the prosecutor continued,

But again, there are questions you're simply not going to know the answer to, and you don't have to [to] find Jim Groth guilty. *You just have to be convinced beyond a reasonable doubt that he committed this crime*, and when you piece together the circumstantial evidence, you will be.

RP (5/29/09) 79 (emphasis supplied).

As these passages demonstrate, the prosecutor was saying that the jurors would always have questions about certain things, but so long as they were convinced by the evidence beyond a reasonable doubt that Groth killed Diana Peterson, they should find him guilty. This argument is unquestionably proper.

As Groth notes, the prosecutor returned to this theme in rebuttal, but again, the context of the argument demonstrates that these remarks were also entirely proper. First, the prosecutor

addressed defense counsel's attempts to explain away certain pieces of evidence:

And as I said, this is a circumstantial case with circumstantial pieces of evidence that, by themselves, one at a time, would clearly not be enough. [Defense counsel] spent a considerable amount of time in her closing explaining away as many pieces of that circumstantial evidence as she could.

What I'd ask you to do is ask yourselves if it is reasonable, if those explanations explaining it away are reasonable, every single one of them, or is it more reasonable that instead the reason we have all this evidence is because Jim Groth did it. Think about that when you are thinking about these pieces of evidence.

RP (5/28/09) 129-30. The prosecutor then analogized this case to a puzzle, stated that the jurors were "not going to have every piece," and repeated that "there are going to be some unanswered questions. That doesn't equal reasonable doubt." RP (5/28/09) 131. Again, however, the prosecutor was referring to unanswered questions *other than* the fundamental question the jury was required to answer beyond a reasonable doubt, i.e., whether Groth murdered Diana Peterson on February 14, 1975. These remarks were entirely appropriate, particularly given the nature of the case, and it strains reason to suggest otherwise.

Nonetheless, Groth argues that this case is like State v.

Warren, 165 Wn.2d 17, 27, 195 P.3d 377 (2009) (wherein the prosecutor said that reasonable doubt does not mean giving the defendant the benefit of the doubt), State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (wherein the prosecutor said that the jurors had to fill in a "blank" to give a reason to doubt the defendant's guilt), and State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (wherein the prosecutor stated that the presumption of innocence was eroded every time the jury was presented with a piece of evidence). But the arguments at issue in these cases are self-evidently nothing like the argument made in this case, and Groth's reliance is misplaced.

In sum, the prosecutor did not misstate the burden of proof when she said that the jury would have unanswered questions about this case. Therefore, Groth has not shown misconduct at all, let alone flagrant and ill-intentioned misconduct that could not have been cured by an instruction to the jury.

Second, Groth argues that the prosecutor committed misconduct when she argued that direct evidence and circumstantial evidence were "equal." Brief of Appellant, at 63-64. This argument is also completely meritless.

In this case, the trial court gave the standard instruction

regarding direct and circumstantial evidence:

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonable inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

CP 406 (WPIC 5.01). This instruction sets forth the well-settled principle that in the eyes of the law, "circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Accordingly, the prosecutor argued as follows:

Now, ladies and gentlemen, the case that you have before you and that you're going to begin deliberating shortly is what we call a circumstantial case. It is a bunch of pieces of circumstantial evidence that when you put them together and add them up, lead to one conclusion, and that is that Jim Groth committed this crime. You don't have direct evidence like an eyewitness who saw the murder or DNA left at the scene or a confession. What you do have is a lot of circumstantial evidence.

Now, the Court just read you an instruction that discusses direct evidence and circumstantial evidence and I want to spend a moment talking about that with you right now because it is very important in a case such as this where the evidence you are to consider is circumstantial evidence.

The instruction tells you that circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. In other words, you don't have an eyewitness who saw the murder but you have other pieces of evidence that when you consider that and use your commonsense (sic), add up to a certain conclusion.

What is also very important is that the law makes no distinction between the weight you give to direct evidence or circumstantial evidence. They are equal. They are to be given equal weight. In other words, circumstantial evidence is not any less valuable than direct evidence.

RP (5/28/09) 46-47. The prosecutor then gave several examples of how conclusions may be reasonably inferred from circumstances.

RP (5/28/09) 48-49. She then continued,

That is what it means. It means that you can infer facts from the existence of other facts. You don't have to have an eyewitness. You don't have to know from somebody telling you they did it that they committed the crime of murder. You can infer it from other things. And in a few moments I'm going to go over with you the circumstantial evidence that has been presented to you in this case that when you add it up and put it together, it will convince you beyond a reasonable doubt, that Jim Groth committed this crime.

RP (5/28/09) 49-50.

Again, there is nothing improper about this argument. The prosecutor accurately stated the law, gave examples of how the

legal principle at issue could apply in everyday life, and argued that the jury should apply that principle to the case at hand and find the defendant guilty. Groth cannot show any misconduct at all, let alone conduct so flagrant that a curative instruction would have been ineffective.

Nonetheless, Groth cites State v. Gosby, 85 Wn.2d 758, 766-76, 539 P.2d 680 (1975), for the proposition that it is up to the jury to decide what weight to give to any evidence presented at trial. Brief of Appellant, at 64. This is certainly true in every case, but nothing that the prosecutor said in her closing argument suggested otherwise. Rather, the prosecutor merely stated that direct and circumstantial evidence were equal in the eyes of the law, and that "circumstantial evidence is not any less valuable than direct evidence." RP (5/28/09) 47. Groth's claim is wholly without merit.

Groth's third misconduct claim is that the prosecutor misstated the meaning of the so-called "missing evidence instruction." Brief of Appellant, at 65-66. This argument is specious as well.

Due to the fact that a sergeant with the King County Sheriff's Office ordered all of the physical evidence other than the murder

weapon to be destroyed in 1987, the trial court gave the following instruction:

If you find that the state has destroyed, caused to be destroyed, or allowed to be destroyed, any evidence, the contents or quality of which is in issue, you may infer that the evidence would have been unfavorable to the state, if you believe such inference is warranted under all the circumstances of the case.

CP 408. In accordance with this instruction, the prosecutor argued as follows:

There are going to be unanswered questions. You may not know why the police destroyed that evidence. Why is it gone? And I want to talk about that for a minute, because you had an instruction from the judge telling you that you can infer if you find any evidence to support it, that the evidence could have gone against the case against Jim Groth.

That instruction is there simply to tell you that if you have heard about circumstances that make you believe that perhaps it was destroyed intentionally, perhaps there is something that tells you that evidence would have shown that Jim Groth didn't do it, then you could make that inference, but I suggest to you that you don't have any evidence of that at all.

The cast impressions? Well, very likely those were Jim Groth's. He himself said he walked across that yard. The fingernail scrapings? You have no evidence to suggest that those are going to do anything except show that it was Jim Groth who was underneath her fingernails.

So make that inference only if you find the circumstances support it, only if you feel that you have heard evidence in this case to suggest that you

should draw such an inference from the destruction of this evidence.

And you did not hear that. You heard it got destroyed in 1987. No one knew why. You certainly heard nothing about being malicious or trying to hide something.

RP (5/28/09) 78-79.

The prosecutor did not misstate or misconstrue the "missing evidence" instruction when making these remarks. Rather, she merely argued that the jurors should not draw a negative inference from the missing evidence unless they found that such an inference was "warranted under all the circumstances of the case." CP 408. As examples, the prosecutor argued that an inference could be drawn against the State if the evidence had been destroyed maliciously, or if the character of the missing evidence was such that it would prove Groth's innocence. Because the record did not support such conclusions, the prosecutor argued that the jury should not draw a negative inference from the missing evidence. This argument was entirely proper, and this Court should soundly reject Groth's claim to the contrary.

Nonetheless, Groth argues that "[t]he prosecutor misled the jury by arguing it could not utilize the inference unless there was evidence to support it, and the argument prejudiced Mr. Groth."

Brief of Appellant, at 66. But the trial court's instruction specifically stated that the jurors could draw the negative inference if they found that it was "warranted under all the circumstances of the case." CP 408. All the prosecutor did here was give examples of how such an inference could be warranted, and then argued that it was not warranted under the circumstances of this case. Again, Groth has failed to show any misconduct at all, let alone flagrant and ill-intentioned misconduct that an instruction from the trial court could not have cured.

In sum, Groth's claims of prosecutorial misconduct in closing argument are completely without merit because all of the arguments at issue were proper, and this Court should hold that these claims have been waived by the failure to make timely objections at trial.

6. GROTH RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Lastly, Groth claims that his trial attorney was constitutionally ineffective at sentencing. More specifically, he argues that he received ineffective assistance of counsel because his attorney did not present further information about Groth to the trial court, and she did not make a specific sentencing recommendation. Brief of

Appellant, at 68-75. This claim should also be rejected for two reasons. First, the record makes it abundantly clear that Groth's trial counsel's strategy throughout this case was to prove that Groth was innocent. Counsel's representation at sentencing was consistent with that strategy, and thus, Groth has not shown ineffective assistance of counsel. Second, Groth cannot show that, but for counsel's decision not to recommend a specific sentence, the result of the proceedings would have been different. This Court should reject Groth's claim, and affirm.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective

standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. As the United States Supreme Court has warned, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and to judge counsel's performance

from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that challenged actions were the result of a reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Courts must bear in mind that, in any given case, effective representation may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant also has the burden to affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing merely that an error by counsel had some conceivable effect on the outcome of the proceedings. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland,

466 U.S. at 694.

As a preliminary matter, the record shows that Groth's trial counsel provided a written presentence report to the trial court, and that the trial court considered it. RP (7/24/09) 1811. This document has not been made part of the record; however, its very existence weighs against Groth's claim that his trial counsel provided constitutionally inadequate representation by not arguing his case at sentencing.

But in any event, Groth cannot show that his attorney's choice not to argue for a specific sentencing recommendation was not part of a legitimate strategy that Groth himself had endorsed.

In general, a criminal defendant controls the goals of the litigation and counsel determines the appropriate strategy. State v. Cross, 156 Wn.2d 580, 613, 132 P.3d 80 (2006). However, the Washington Supreme Court has expressly declined to adopt a rule "that would suggest that taking nontactical considerations into account, such as a client's clearly expressed wishes, automatically renders counsel's decision constitutionally infirm." In re Personal Restraint of Jeffries, 110 Wn.2d 326, 333, 752 P.2d 1338 (1988). In this case, the record indicates that both Groth and his counsel had decided not to request any particular sentence, and had decided

instead to make a strong statement reiterating Groth's claim of innocence:

[Defense counsel]: Essentially, I don't have a recommendation for a sentence for a man I believe is innocent. Mr. Groth maintains his innocence. The Court is going to have to make a determination on its own.

That's all we have to offer. Thank you.

THE COURT: Mr. Groth, is there anything you would like to say at this point?

THE DEFENDANT: No, Your Honor.

RP (7/24/09) 1871-72.

Trial counsel's statement that no sentence is appropriate for an innocent person, particularly when coupled with Groth's refusal to exercise his right to allocution, shows that the decision not to make a sentencing recommendation was part of a legitimate strategy of maintaining Groth's innocence. Although this strategy might not be reasonable in some cases, it is not by any means unreasonable in this case. Moreover, given the nature of the crime and Groth's history of crimes of domestic violence during the time intervening between the murder and his eventual arrest, counsel may well have decided that presenting additional information about Groth would not have been helpful, and may have further undermined his claim of

innocence. Furthermore, a reiteration of Groth's claim of innocence is at least an implicit request for a lenient sentence. In sum, given the unique circumstances present in this case, the decision not to make a sentencing recommendation in light of Groth's unequivocal claim of innocence was a legitimate strategic choice. As such, counsel's representation was not deficient, and Groth's claim fails.

In addition, even if this Court were to decide that maintaining Groth's innocence in lieu of making a specific sentencing recommendation constitutes deficient performance, Groth cannot show that the outcome of the proceedings would have been different if a sentencing recommendation had been made. To state the obvious, this is a case where the defendant was convicted of stabbing a 16-year-old girl in the back with a large hunting knife that he had stolen from a friend, and the defendant was not held accountable for that crime for 34 years. Moreover, although Groth argues that he could have received a suspended sentence or even a deferred sentence for this crime if his counsel had recommended one, the trial court was specifically required to "set the minimum term reasonably consistent with the purposes, standards, and sentencing ranges adopted under" the Sentencing Reform Act. RCW 9.95.011(1). Obviously, a suspended or deferred sentence for

second-degree murder is not "reasonably consistent with" the SRA.

In addition, although Groth's criminal history is by no means overwhelming, it does consist almost entirely of crimes against women. Any arguments for a more lenient sentence that counsel might have made would have been diminished by this disturbing fact. For all of these reasons, and given the nature of the offense, Groth cannot show that the outcome of the proceedings would have been different if counsel had specifically recommended a more lenient sentence rather than staunchly maintaining Groth's innocence.

In sum, Groth cannot show that trial counsel was constitutionally deficient, or that he would have received a more lenient sentence if she had made a different strategic decision. Groth's claim fails both prongs of Strickland, and his sentence should be affirmed.

D. CONCLUSION

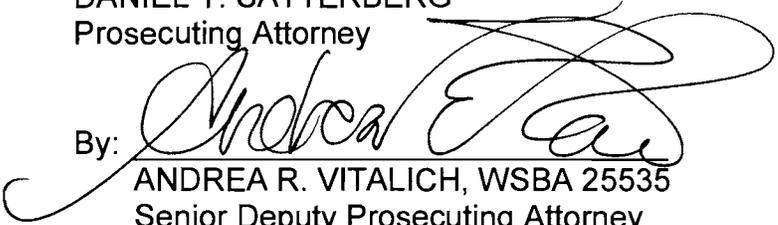
None of the errors that Groth alleges merits reversal. For all of the reasons set forth above, this Court should affirm Groth's conviction and sentence for Murder in the Second Degree.

DATED this 13th day of December, 2010.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:

A handwritten signature in black ink, appearing to read "Andrea Vitalich", written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JAMES GROTH, Cause No. 64029-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

12/13/10
Date

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