

90495-2

NO. 44268-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ROY EUGENE MILLER,

Petitioner.

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PETITION FOR REVIEW

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**A. *IDENTITY OF PETITIONER***

Roy Eugene Miller asks this court to accept review of the decision designated in Part B of this motion.

**B. *DECISION***

Petitioner seeks review of each and every part of the unpublished decision of the Court of Appeals affirming the Cowlitz County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached along with a copy of the order denying Defendant's Motion to Publish.

**C. *ISSUES PRESENTED FOR REVIEW***

In a case in which the state has charged the defendant with second degree assault with a firearm, does a trial court deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the defense to elicit the fact that the defendant feared the complaining witness because she was an active drug dealer?

**D. *STATEMENT OF THE CASE***

The defendant, Roy Eugene Miller has lived for many years in a house at 361 South 8<sup>th</sup> in Kalama, Washington, along with his five-year-old son Matthew, his older son Christopher and Christopher's girlfriend Nicole Reynolds. RP 41-43, 48-50, 231-239. Rachel Robinson, the defendant's ex-wife and the mother of Matthew, had also lived in the house until the summer of 2011 when she and the defendant separated. *Id.* She then moved out, leaving Matthew in the defendant's custody. *Id.* However, while she had

moved out she returned most days to see Matthew and help tend to Matthew although she would occasionally refrain from visiting if she and the defendant had been in an argument. RP 51-52.

Sometime around July 13, 2012, the defendant became aware that Matthew's mother Rachel was using drugs and dealing drugs with her friend Scott Tuitt. RP 16-21, 21-25, 28-29. Once the defendant found out this information he called and texted Rachel telling her what he had found out. *Id.* He also told her that she could not come over to his house and could not see Matthew until she got her drug issue resolved. RP 16-21, 21-25, 28-29, 239-244. The next day, the defendant got a call from Scott Tuitt telling the defendant that he was coming over to speak with him. RP16-21, 21-25, 28-29. This caused the defendant a great deal of concern given his belief that Rachel and Scott Tuitt were dealing drugs together. *Id.* The defendant has a number of physical limitations including five herniated disks in his back that make it difficult for him to physically defend himself. RP 231-239.

According to the defendant, at some point during the afternoon of July 14<sup>th</sup> Scott Tuitt did come over to his house to talk with him. RP 253-255. The defendant was concerned enough about the situation that he armed himself with a hand gun, putting it in his belt in the small of his back. *Id.* During this conversation, which occurred in the house, the defendant looked at his surveillance video and saw Rachel Robinson enter his back yard in

spite of his repeated orders that she stay away from his house and in spite of his no trespassing signs. RP 239-244. In fact, Rachel had come to the property armed with a knife to use against the defendant if necessary. RP 77-84. Upon seeing Rachel the defendant left the house and walked out to the end of the back yard in the garden area where Rachel stood picking berries. RP 239-244. She had a knife in her hand. *Id.* The defendant then confronted Rachel. RP 57-60, 239-244.

According to Rachel, when the defendant came out of the house he was carrying a pipe. RP 57-60. According to the defendant he came out of the house carrying one pipe, set it down, and then picked up another pipe when he saw that Rachel was armed with a knife. RP 239-244. Regardless of the origin of the pipe, both parties agreed that when the defendant confronted Rachel he had a pipe in his hands. RP 57-60, 239-244. As the defendant walked up to Rachel he reminded her that he had forbid her from coming onto his property and ordered her to leave. RP 239-244. She refused. RP 57-60. She then opened the blade on the knife and slashed at the defendant. *Id.* She claimed she took this action because she believed the defendant was going to hit her with the pipe, although she did not claim that he had tried to do so up to that point. *Id.*

Regardless of Rachel's motivation, once she slashed the defendant's arm with the knife the defendant did hit her a number of times with the pipe. RP

59-61. The first blow was to her hand. *Id.* The second was to her shoulder, and the third was to her thigh. *Id.* According to the defendant, he administered each blow in a controlled manner in an attempt to get her to drop the knife. RP 245-250. According to Rachel, the last blow with the pipe knocked her to the ground, after which the defendant stomped on her chest. RP 61-62. The defendant denied this conduct. RP 269. Rather, according to the defendant, she turned and fell over her own feet. *Id.* According to Rachel the defendant then took out his pistol and threatened to kill her with it. RP 61-62. According to the defendant the pistol fell from behind his back and he merely picked it up and put it back in his belt and in no way threatened Rachel with it. RP 251-255.

At about this time a Kalama Police Officer arrived on the scene, having been summoned by a neighbor who had heard the dispute along with a male voice saying "Die Bitch." RP 43-47. This officer approached the defendant and asked if the defendant had any weapons on him. RP 133-138. The defendant stated that he had a gun and a knife. *Id.* The officer then placed the defendant in handcuffs for officer safety and took the defendant's pistol, as well as a switchblade knife and a "leather man" tool the defendant had on his person. *Id.* The defendant later stated that he did not know that it was illegal to possess the switchblade. RP 273. A second officer arrived a short time later and the two officers then took statements from the defendant and

Rachel. RP 145-149, 178-184. Afterward they arrested the defendant and had Matthew leave with Rachel with the defendant's permission. RP 260.

By information filed on July 16, 2012, and amended on November 13, 2012, the Cowlitz County Prosecutor charged the defendant with one count of second degree assault with a deadly weapon against Rachel Robinson, and one count of possession of a dangerous weapon. CP 3-4, 8-9. The first count alleged that the deadly weapon was "a pipe and/or pistol" and that during the commission of the offense the defendant was armed with "a deadly weapon, to wit: a pipe" and that during the commission of the offense the defendant was also armed with "a firearm, to wit: a pistol." *Id.* The case later came on for trial before a jury with the state calling three witnesses: Rachel Robinson and the two police officers who had responded to the defendants house. RP 41, 48, 124, 177. The defense then called three witnesses: the defendant's adult son Christopher, Christopher's girlfriend Nicole Reynolds and the defendant. RP 199, 212, 230. The state then recalled one of the officers for brief rebuttal. RP 275.

Just prior to picking the jury in this case the state moved *in limine* to exclude the defendant from eliciting any evidence, either through its own witnesses or through cross-examination of the state's witnesses, that either Rachel Robinson or Scott Tuitt had either been using drugs or selling drugs, or that these facts caused the defendant any concern for his safety. RP 16-30.

Based upon the court's ruling, the defense did not present any of this evidence, nor argue from it before the jury during closing. RP 16-30, 327-339.

Following the close of evidence in this case the court instructed the jury with neither party making any objections or taking exception to any of the instructions. RP 219-225, 226-227, 285-304; CP 53-82. The parties then presented closing argument with neither party making any objections to the other party's statements to the jury. RP 304-327, 329-339, 339-350. At this point the court released the jury for the day and instructed them to return at 8:30 the next morning to begin deliberations. RP 356. Just a little after noon the next day the jury finished its deliberations and returned verdicts of guilty on both counts. RP 358-361; CP 83-84. The jury also returned special verdicts that the defendant was armed with both a deadly weapon (the pipe) and a firearm during the commission of Count I, and a special verdict that the defendant committed Count I against a family member. CP 85-87.

The court later sentenced the defendant to 54 months in prison on Count I. CP 94. This sentence reflected imposition of 6 months on a range of 3 to 9 months, plus 36 months for the firearm enhancement and 12 months for the deadly weapon enhancement. CP 88, 89-102. The defendant filed timely notice of appeal following imposition of sentence. CP 106.

By unpublished decision filed June 24, 2014, the Court of Appeals,

Division II affirmed the defendant's conviction. On July 15, 2014, the same court denied defendant's motion to publish.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Under RAP 13.4(b)(3), this case presents a significant question of law under both Washington Constitution, Article 1, § 3, as well as United States Constitution, Fourteenth Amendment. Specifically, this case presents this court with an opportunity to refine the body of law explaining what evidence is admissible in support of a claim of self defense. The following examines this issue.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, a defendant charged with a crime has the right to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude

his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, the defense argues an equivalent denial of due process when the court granted the state's request to prevent the defense from

presenting any evidence that the defendant had just become aware that Rachel Robinson and Scott Tuitt were using drugs together, were dealing drugs together, that this was the reason that he had excluded Rachel Robinson from his property, that he felt threatened by Scott Tuitt and Rachel Robinson, and that this was why he had armed himself with a firearm. This evidence was critical in order to support the defendant's claims that he did not leave his home in order to confront Rachel Robinson with a firearm and was relevant to rebut Rachel Robinson's claims that the defendant pulled that firearm and threatened her with it. This evidence was also relevant and important to the defense in order to show the jury that the defendant had not arbitrarily excluded Rachel from access to their son.

However, this evidence was relevant and admissible for a more fundamental reason. This reason was that in the case at bar the defendant endorsed a claim of self-defense. In order to properly raise the issue of self-defense or justified use of force in the State of Washington, the defendant needed to produce evidence supporting the claim that the defendant's conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). Although this evidence did not need to raise to the level of sufficient evidence "necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense," there still needed to be relevant evidence on this issue. *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d

337, 345-46, 562 P.2d 1259 (1977)). In fact, the court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* A defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words, "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before it.'" *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

*State v. Tyree*, 143 Wash. at 317.

The court also stated:

[T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say

was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

*State v. Tyree*, 143 Wash. at 316.

As this review of the law on self-defense explains, evidence addressing the defendant's subjective belief of danger and evidence addressing the objective reasonableness of that belief is relevant and admissible in order to aid the jury in evaluating these two questions. In fact, the existence of such evidence and effective argument from it is necessary in order to effectively make the claim of self defense. This is precisely why the trial court's ruling on the state's motions *in limine* in this case denied the defendant his right to a fair trial.

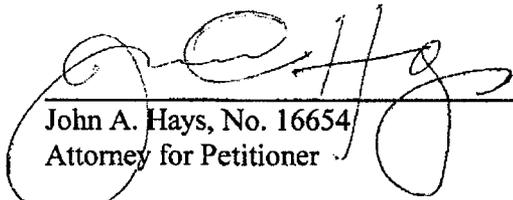
By excluding the evidence of Scott Tuitt and Rachel Robinson's drug use and dealing, of the defendant's knowledge of it and the fear that this fact created, the court prevented the defendant from effectively arguing his defense in the same way as the court in *Ellis* prevented the defendant from presenting his claim of lack of intent by excluding the defendant's expert witnesses. Thus, in the same manner that the defendant was entitled to a new trial in *Ellis*, so the defendant in this case is entitled to a new trial. As a result this court should accept review, reverse the decision of the Court of Appeals, vacate the defendant's conviction and remand for a new trial.

**F. CONCLUSION**

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 16<sup>th</sup> day of July, 2014.

Respectfully submitted,



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Attorney for Petitioner

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

**STATE OF WASHINGTON,  
Respondent,**

**vs.**

**ROY EUGENE MILLER,  
Appellant.**

**NO. 44268-0-II**

**AFFIRMATION  
OF SERVICE**

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The under signed states the following under penalty of perjury under the laws of Washington State. On the day below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 16<sup>th</sup> day of July, 2014 at Longview, Washington.

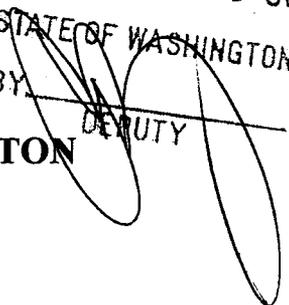


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Donna Baker

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COURT OF APPEALS  
DIVISION II

2014 JUN 24 AM 9:05

STATE OF WASHINGTON  
BY:  DEPUTY

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

**DIVISION II**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ROY EUGENE MILLER,  
  
Appellant.

No. 44268-0-II

UNPUBLISHED OPINION

LEE, J. — A jury convicted Roy Eugene Miller of second degree assault with a deadly weapon enhancement, a firearm enhancement, and a domestic violence enhancement. The jury also convicted Miller of possession of a dangerous weapon. Miller appeals arguing that (1) the trial court improperly excluded evidence that the victim was a drug dealer, (2) the prosecutor committed misconduct, and (3) he received ineffective assistance of counsel. We affirm Miller's convictions.

**FACTS**

Miller and Rachel Robinson lived together for several years and have a son in common. After their relationship ended, Robinson moved out of the house and their son continued to live with Miller. But, Robinson went to Miller's house almost every day to see her son. On July 13, 2012, Robinson was at Miller's house. She put her son to bed and made plans to come and pick him up the next afternoon. The next morning, Robinson received a text message from Miller stating that if she came to the house she would leave in an ambulance. In the late afternoon,

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Robinson went to the house to pick up her son as planned. She went into the yard and began picking berries while she waited to see if her son would come out to meet her.

After a few minutes, Miller came running out toward her holding a large pipe. When Robinson saw Miller, she opened the pocketknife she was carrying and swung it at Miller causing a superficial cut on his arm. Miller hit Robinson three times with the pipe: once on her left hand, once on her left hip, and once across her shoulder blade. After Miller hit Robinson on the shoulder blade, she fell onto the ground. Then Miller pulled a gun from his waistband, and pointed it at Robinson. Miller stated, "I should just finish you off now," stomped on Robinson's ribcage and left her lying on the ground. 1A Report of Proceedings (RP) at 62.

Miller's neighbor heard the argument. When he heard a male voice yell, "Die, bitch," he called the police. 1A RP at 47. Kalama Police Officer Jeff Skeie and Sergeant Stephen Parker responded to the call. When Skeie arrived on the scene, he secured several weapons in Miller's immediate possession: the gun, an illegal spring blade knife, a pocket knife, and a "Leatherman" knife tool. 1A RP at 134. After speaking with Miller and Robinson, Parker arrested Miller.

The State charged Miller with second degree assault with a firearm enhancement and a deadly weapon enhancement. The State also charged Miller with unlawful possession of a dangerous weapon. Prior to trial, the State moved to exclude evidence related to Robinson using or selling drugs. Miller argued that the evidence was relevant because it explained why he did not want Robinson in the house and why he had a gun. The trial court made the following ruling:

I can see where, potentially, this is relevant in a very narrow perspective of his belief that she's involved in an illegal activity. Uh, and that—so that it doesn't cast dispurpleon [sic] on him of, as you say of why he would not want her there. The problem is, now we're looking at this great big open door to, you know, was she really doing it or not? And, that's where I'm having some real problems with going down this path of trying a case about a drug deal because that's not what we're here for. Uh, it's about an assault that took place, and, if— if there's some way to fashion this in a very narrow—um—restricted manner that that was his belief, then I could see where that—I, you know, may be willing to allow that. But, anything else that starts opening this great big door, you know, if that's his belief and that's what he told her and that's why he told her, then it could be for a very limited purpose. So—

....

All right. I will—I do find there is at least some relevance, although very limited, and, you know, essentially we're going to have to see how this evolves. But, if this starts evolving into a trial about a drug deal, I'm going to stop it right there, because that's going down the road that's not relevant. That's a separate action that is not at the heart of this case. Uh, and, as long as it continues to be tied in and we're not opening, as I said, this door to try a separate incident I will allow it. But, it—it's going to have to be kept very narrow, and if it's not then I expect the objections and I will rule on it at that time. Okay.

1A RP at 27, 30. During trial, Miller did not attempt to introduce any evidence about Robinson doing or selling drugs.

At trial, Robinson testified to the facts stated above. She also explained that she went to the house, even after Miller told her not to, because he would often send her angry messages but be fine by the time she arrived at the house to see her son. She also stated that she brought the knife with her for her own protection. During cross-examination, Robinson testified that Miller had assaulted her in the past.

Miller testified to support his claim of self-defense and lawful use of force. Generally, Miller's account of the incident was similar to Robinson's. He agreed that she was in the backyard eating berries when he first saw her. But, Miller testified that he did not pick up the

pipe until he was outside, and he did not raise or swing the pipe until after Robinson attacked him with the knife. Miller testified that Robinson tried to stab him with the knife several times and each time he responded with the pipe to keep her from stabbing or cutting him. He also testified that he never threatened Robinson with the gun. Rather, he testified that during the struggle with Robinson, the gun fell out of his waistband. When the gun hit the ground, a round jammed in the chamber. While he was trying to clear the gun, Robinson began to get up, so Miller put his foot on her shoulder, pushed her back down, and told her to stay on the ground.

The jury found Miller guilty of second degree assault and possession of a dangerous weapon. The jury also entered three special verdict forms finding: (1) Miller was armed with a firearm, (2) Miller was armed with a deadly weapon (the pipe), and (3) Miller and Robinson were household or family members. Miller appeals.

## ANALYSIS

### A. EXCLUSION OF EVIDENCE

Miller argues that the trial court erred by excluding evidence of Robinson's drug use. Miller's argument is frivolous. The trial court did not exclude all evidence that Robinson was involved in doing or selling drugs. Rather, the trial court ruled that any evidence would be limited to evidence that was relevant to the issues in the case. And, the trial court was clear that it would not permit Miller to turn the trial into a trial about whether Robinson actually did or sold drugs. However, these ruling did not preclude Miller from asking Robinson directly about her alleged drug use, or from presenting evidence to impeach her if she denied it. Further, the ruling did not exclude Miller from testifying about his personal knowledge about Robinson's involvement in doing or selling drugs and how that related to his beliefs and actions at the time

of the incident. Accordingly, the trial court did not exclude evidence that prevented Miller from presenting his defense and Miller's argument fails.<sup>1</sup>

B. PROSECUTORIAL MISCONDUCT

Miller argues that the prosecutor committed misconduct by introducing improper opinion testimony during its redirect examination of Sergeant Parker. Miller did not object to the question or answer. Here, he has failed to meet the high burden imposed when a defendant fails to object to alleged prosecutorial misconduct.

To prevail on a prosecutorial misconduct claim, a defendant must show that the prosecutor's conduct was improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, a defendant must show a substantial likelihood that the misconduct affected the verdict. *Thorgerson*, 172 Wn.2d at 442-43. A defendant who fails to object to the prosecutor's improper act at trial waives any error, unless the act was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Thorgerson*, 172 Wn.2d at 443. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

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<sup>1</sup> In his issue statement, Miller also asserts that the trial court erred "when it refused to allow the defense to elicit the fact that the complaining witness had not told the police that the defendant had threatened her with a gun." Br. of Appellant at 1. However, Miller fails to support this assertion with any argument or authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we do not consider issues that are unsupported by citation to argument or authority). We do not address the issue any further.

Here, Miller points to one specific incident of alleged prosecutorial misconduct that occurred during the prosecutor's redirect examination of Sergeant Parker:

[STATE]: Um, why didn't you arrest Rachel Robinson?

[PARKER]: Well, as far as the assault, we didn't believe that she was the primary physical aggressor.

1A RP at 193. Miller argues that the prosecutor's question was improper because it elicited inadmissible opinion testimony. Even assuming, without deciding, that the question was improper, Miller has failed to meet his burden to show prejudice.

If Miller had objected, the jury could have been instructed to disregard Sergeant Parker's answer. We assume that juries will follow the court's instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Therefore, if the jury had been instructed to disregard Parker's opinion that Robinson was not the primary aggressor, any prejudice from the comment would have been cured. Because a jury instruction could have cured the prejudice, Miller has failed to meet his burden to prove prosecutorial misconduct.

#### C. INEFFECTIVE ASSISTANCE OF COUNSEL

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Here, Miller cannot meet his burden to show the absence of any legitimate trial tactic explaining defense counsel's decision not to ask the trial court to strike Robinson's references to prior abuse by the defendant.

Miller asserts that he received ineffective assistance of counsel because his defense counsel did not ask the trial court to instruct the jury to disregard several of Robinson's nonresponsive answers regarding prior assaults by the defendant. Specifically, he argues that Robinson's comments were inadmissible propensity evidence. However, as the State correctly points out, the question currently before this court is not whether Robinson's statements were admissible under ER 404(b), but rather whether Miller can meet his burden to show ineffective assistance of counsel on appeal.

During Miller's cross-examination of Robinson, the following four exchanges took place:

[DEFENSE]: So, why do you think you needed a knife that time?

[ROBINSON]: Because me and him got in fights. I know how he is. I've put up with him hitting me upside the head and my ear bleeding. I mean, he's pulled his gun on me in front of our son. This is just him, I mean, he's—and yeah, I've fought back previous times, too. And this time I felt a little bit better and he also was telling me that he was getting—giving my stuff away. Giving my car key away, my spare car key, and the X-Box, the Wii, he said he was, you know, giving—getting rid of all my stuff. Giving it away to someone who despises me. And I have no idea who that was.

[DEFENSE]: And so you took the knife there to stab him?

.....

[DEFENSE]: You said you hadn't really paid attention to that gun before?

[ROBINSON]: Oh, I got it pulled on me so many times, it's not that I don't pay attention to it. I kind of got used to him pulling a gun on me.

....

[DEFENSE]: Are you aware that he has some physical limitations?

[ROBINSON]: What do you mean by that? Physical limitations?

[DEFENSE]: Bad back, a bad left arm?

[ROBINSON]: Yeah, that's never stopped him before from beating on me.

[DEFENSE]: Okay, that wasn't really my question. My question was you're aware that he has the bad back?

....

[DEFENSE]: You weren't trying to set [Miller] up were you?

[ROBINSON]: No, I wasn't. I've never done that. If that was the case, I would have done it a long time ago. All the twenty, thirty other times he's beat on me. That was not my intention—I did not. The neighbors called that I don't talk to, I don't talk to his neighbors. I wanted to get arrested because I was afraid of [Miller], the way he would react, I mean, and I asked Officer Skeie, who—you know, who called the cops? And he said the neighbor.

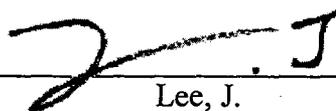
1A RP at 86, 88, 93, 95.

Miller's defense was primarily that Robinson was the primary physical aggressor and that he acted in self-defense. Miller also argued that Robinson set him up to get him arrested. Robinson's answers during cross-examination could actually support Miller's theories. For example, Miller implied that it was not plausible that Robinson would have gone to Miller's house if she was legitimately afraid of being assaulted, and therefore, she went there to attack Miller. Further, if Miller had repeatedly assaulted her, she would have a motive to set him up and get him arrested. There are legitimate trial tactics that explain defense counsel's performance in this case. Because Miller has failed to show the absence of any legitimate trial tactic, he cannot show his defense counsel's performance was deficient, and his ineffective assistance of counsel claim must fail.

No. 44268-0-II

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



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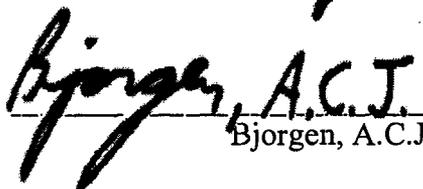
Lee, J.

We concur:



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Hunt, J.



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Bjorgen, A.C.J.

**HAYS LAW OFFICE**

**July 16, 2014 - 10:52 AM**

**Transmittal Letter**

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Case Name: State vs Roy E. Miller

Court of Appeals Case Number: 44268-0

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**Comments:**

Petition for Review for Roy E. Miller

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