

19-6732
No. _____

Supreme Court, U.S.
FILED

SEP 26 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Martin Stanley Ivie — PETITIONER
(Your Name)

vs.

State of Washington — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of State of Washington
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Martin Stanley Ivie
(Your Name)

191 Constantine Way
(Address)

Aberdeen, WA 98520
(City, State, Zip Code)

(Phone Number)

Martin Stanley Ivie

RECEIVED

NOV 19 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED

OCT 29 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

QUESTION(S) PRESENTED

per Rule 14.1(a)

I. QUESTIONS OF LAW

1. Is it legally permissible for State officials to use spurious evidence that is proven unanimously by professional forensic analysis to be forged in order to 'create conviction' of a US Citizen?
2. Is it legally permissible for State officials to conceal abusive police actions by charging and convicting a US Citizen for crimes proven to have not happened?
3. Is it legally permissible for State officials to commit perjury that diametrically opposes police radio call log and Professional Ballistic Forensic records that were openly tampered with in order to falsely frame a US Citizen?
4. Is it legally permissible for State officials to commit perjury by lying under oath and concealing proof of that fraud by withholding exculpatory police records and purposefully introducing perjured witness testimony?
5. Is it legally permissible for police officers to harbor personal grudges throughout a multi-year, documented history of abusive and embarrassing false arrests, and act out upon that frustration by ambushing an unarmed US Citizen in his own private gated community, who is committing no crime, and shooting him and his dog in the back with an automatic assault rifle?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

96860-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

in re: Mason County No. 12-1-64-6 & CoA No. 49526-1-II

Martin Stanley Ivie, Plaintiff

v.

State of Washington, Defendant

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	6

INDEX TO APPENDICES

APPENDIX A	Radio Log
APPENDIX B	Crime Scene Maps
APPENDIX C	Expert Ballistic Analysis
APPENDIX D	Notice of Court Misconduct with Juror
APPENDIX E	Plaintiff's Valid Forestry Permit
* APPENDIX F	Lower Court Rulings <u>per Rule 14.1(i)</u>
APPENDIX G -	Memorandum of Facts
APPENDIX H -	IIFP Application

TABLE OF AUTHORITIES CITED

1. AUTHORITIES CITED

CASES

~~Costantino v. DSHS, 627 F.3d 1101, 1111 (9th Cir. 2010)~~
Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001)
Gantt v. City of LA, 717 F.3d 702, 707 (9th Cir. 2013)
Gravalet-Blondin v. Shelton, 728 F.3d 1086, 1096 (9th Cir. 2013)
Halsey v. Pfeiffer, 750 F.3d 273, 292-3 (3d Cir. 2014)
Miller v. Pate, 386 US 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)
US v. Throckmorton, 98 US 61, 25 L.Ed.93 (1878)

RULES

10 USC §3
18 USC §4
18 USC §§§§1962-1965
US Constitution, Amendments IV, VIII, XIV

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

(per 14.1(d))

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix F to the petition and is

- ☒ reported at 11.6.19 & 8.6.19 in # 96860-8; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Court of Appeals court appears at Appendix F to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

1.23.19 in # 495261-II
1.

[LOWER COURT OPINIONS IN EXHIBIT F]

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 8.6.19.
A copy of that decision appears at Appendix F.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

* The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

See next page for invocation of
this Court's jurisdiction under Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

— RULE 14.1(e) —

Jurisdiction of this Court is invoked under Rule 13 where the Supreme Court of Washington entered judgment on 8.6.19 (see Exhibit F), and this Petition for Writ was initially filed/received by SCOTUS in timely fashion (e.g. within 90 days) on 10.1.19.

Therefore, Jurisdiction of SCOTUS is invoked.

— *

✶ US Constitution, Amendments 4, 8 & 14
expressly prohibit law enforcement officials from abusing their office to attack unarmed, law-abiding citizens with government-funded assault rifles, and then manipulation evidence to proffer physically-impossible fables to cover-up their criminal savagery.

— *

STATEMENT OF THE CASE

(14.1(g))

On February 9, 2012, Mason County (WA) Sheriffs Wm. Reed & T. Adams purposefully and without cause stalked and entrapped the Petitioner in his own private neighborhood in the rural forests above the town of Hoodspart, Washington where he was acting in compliance with his "unlimited" forest products harvesting permit (see Exhibit E).

Petitioner Ivie avoided confrontation and endeavored to drive, unarmed, to his residence. He was ambushed by the sheriffs and shot multiple times with a machine gun.

Later, the sheriffs crafted physically-impossible stories to create false grounds for convicting Petitioner to a 222 month sentence for 2 counts of 1st assault even though neither officer was ever harmed in any way. Petitioner has exhausted all State remedies in the pursuit of Justice under Law.

REASONS FOR GRANTING THE PETITION

III. GROUND'S FOR DISMISSAL

Each of the following State Officials have incontrovertibly committed one or more of the following criminal acts resulting in the illegal theft of Plaintiff's Liberty in violation of the US Constitution, amendment VIII: pre-meditated Attempt to Murder under color of law, tampering with and forging fake evidence to recreate the scene of that Ambush and Attempt to Kill Plaintiff, Perjury, Fraud, Accomplishment to, and Misprision of, Felony in the form of Cruel & Unusual abuse of Plaintiff and his canine companion.

"The 14th Amendment prohibits the deliberate fabrication of evidence by a State official", as determined in 'Devereaux v. Abbey, 263 F.3d.1070, 1074-75 (9th Cir. 2001), continuing, "There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government."

Additionally, Plaintiff herein fulfills the requirements outlined in 'Costanich v. DSHS, 627 F.3d 1101, 1111 (9th Cir. 2010), "To prevail on a claim of deliberate fabrication, plaintiff must prove that (1) the defendant official deliberately fabricated evidence, and (2) the deliberate fabrication caused the plaintiff's deprivation of Liberty."

Considering that any single criminal act deployed by State in the malicious frame of Plaintiff shall result in complete Case Dismissal with Extreme Prejudice, Plaintiff stands on the repetitive acts of criminal malice, and misprision of them, as irrefutably proven herein.

Only the most salient examples of these crimes are described below for each of the main responsible villains, each of whose behavior represents an outrageous threat to the very stability of American society:

(see pp. 3-8 of Original Petition)

IV. CONCLUSION

Plaintiff is imprisoned for crimes that not only are proved to have been physically impossible by all authentic forensic evidence, but also were fraudulently forged by State officials to conceal their own criminal acts. Witnesses' testimonies contradict each other and irrefutable facts of science and nature. The police's Radio Call Log and the only professional ballistics report prove the rampant perjury.

State courts persist in taking State officials' testimony as truth and fact when, in fact, it cannot be true because it contradicts proof in evidence - even proof in the State's own records.

Such canine forgery theatrics to conceal abusive police violence are already well-documented in Mason County. Neither State nor US Constitutions can tolerate such egregious acts that are proven to be occurring again at this time.

(see pp. 8-9 of Original Petition)

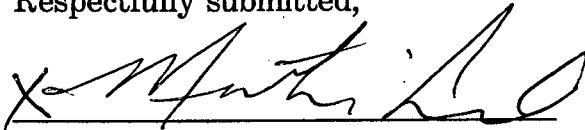
So, while this Motion seeks accountability to seminal US Law protecting Life, Liberty & Property, it also doubles as the first accurate Public Record filing of what really happened on the night of February 9, 2012 in the primitive forest on Dow Mountain in the Lake Cushman community above Hoodspart, Washington.

Accordingly, it also serves as public notice via the Court that violent, ~~scheming criminals that are abusing their official positions are loose.~~ In no uncertain terms, these people are grave threats to domestic national security. By due course of law, this filing also legally serves as public notification of misprision liabilities that accrue daily for all complicit parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "X. M. L.", written over a horizontal line.

Date: October 8, 2019

II. PROSECUTORIAL MISCONDUCT

Ivie argues that the prosecutor committed flagrant and ill-intentioned misconduct by disparaging the role and integrity of defense counsel. We agree that the prosecutor's comments were improper, but we disagree that they were flagrant and ill-intentioned or prejudicial.

A. Legal Principles

To establish prosecutorial misconduct, the defendant must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). "In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

We analyze prejudice in misconduct claims under one of two standards of review. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, the defendant need only show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Id.* If, however, the defendant did not object at trial, the defendant is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id.* at 760-61. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Because Ivie did not object to the claimed misconduct by the prosecutor, we apply the latter two-part test.

B. Improper Remarks in Prosecutor's Rebuttal Closing Argument

Ivie claims four instances when the prosecutor allegedly "impugned the role and integrity of defense counsel" in his rebuttal closing argument. Br. of Pet'r at 40. The prosecutor stated, in pertinent part, as follows:

Apparently *Mr. Foley wants you to ignore the testimony* of, for instance, Fred Doughty and Martin Hayes.

....

But *Mr. Foley wants you to forget* about everything else that you heard evidence of.

....

Again, thank goodness for headlights. *Mr. Foley would have you believe that these rogue cops* dressed in black in the dark of night were just in the road and nobody could see them.

....

Mr. Foley says that the angles of the shots that Sergeant Adams fired don't add up. Apparently *he's really asking you to again ignore the testimony* of all of the witnesses.

VRP at 775, 780-81 (emphasis added.)

Ivie points to *Warren* to support his argument that the prosecutor's statements were improper. 165 Wn.2d at 29. In *Warren*, the court concluded that "it was improper for the prosecutor to tell the jury there were a 'number of mischaracterizations' in defense counsel's argument as 'an example of what people go through in a criminal justice system when they deal with defense attorneys.'" *Id.* Additionally, the prosecutor "described defense counsel's argument as a 'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" *Id.*

Although the court concluded these statements were improper, the statements were not so flagrant and ill-intentioned that a curative instruction could not have obviated the prejudice. *Id.* at 29-30.

Ivie also cites *State v. Negrete*, 72 Wn. App. 62, 66, 863 P.2d 137 (1993), in which during closing argument defense counsel cast an undercover police officer as a “trained liar” and a confidential informant as a snitch paid to “frame people.” *Id.* at 66. In rebuttal, the prosecutor stated:

I have listened with great interest to the comments of [defense counsel]. Two things come to mind: I have never heard so much speculation in my entire life in going into facts that weren’t even presented into evidence. And the second is, *he is being paid to twist the words of the witnesses by Mr. Negrete.*

Id. at 66. The court concluded the statement was improper, but held that there was no prejudice because Negrete did not establish a substantial likelihood that the remark affected the jury’s verdict. *Id.* at 67-68.

The prosecutor’s statements here and in *Warren* rest on a common core: the accusation, either express or plainly implied, that defense counsel did not fairly present the evidence in an attempt to mislead the jury. In each case, the prosecutor’s message was that defense counsel wanted the jury to ignore facts and violate their oath. This message crosses the line from legitimate, aggressive argument into unsupported personal attacks on defense counsel’s motivation and purpose. We follow the Supreme Court’s decision in *Warren* and hold that the prosecutor’s comments here impugned the role of defense counsel.

The State also maintains that the prosecutor’s statements were proper because they were invited or provoked by defense counsel’s closing argument. The State claims that counsel’s extended metaphor contained accusations that the prosecution had deceived the jury. The State

argues that the defense counsel's accusations permitted the prosecutor to respond in kind. However, whether or not this is an accurate characterization of the defense's argument, an improper argument by one party does not license a rebuttal that itself descends to the improper. The State's attempted justification is not persuasive.

On balance, we conclude the prosecutor's statements were improper because they impugned the role and integrity of defense counsel and were not justified by defense counsel's closing argument.

C. Prejudice: Heightened Standard

As noted, Ivie will be deemed to have waived his prosecutorial misconduct claim unless he shows that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *See Emery*, 174 Wn.2d at 761. Ivie makes neither showing.

To meet the first of these prongs, Ivie must show that the challenged remark "is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *See Thorgerson*, 172 Wn.2d at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 757 (1994)). The impropriety in the prosecutor's remarks was the message that defense counsel wanted the jury to ignore facts and violate their oath. A reasonable curative instruction would have informed the jury that the prosecutor's remarks were improper and directed them not to consider those remarks, thus likely removing prejudice and placing the prosecutor in a less than flattering light. Ivie thus does not make the first showing.

The second showing in the heightened standard is that of “a substantial likelihood that the misconduct affected the jury verdict.” *Emery*, 174 Wn.2d at 760. “In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” *Warren*, 165 Wn.2d at 28.

Although the prosecutor’s comments were improper, in the context of the total argument they were not prejudicial. In *Negrete*, the court concluded the defendant could not show prejudice even when the prosecutor openly claimed defense counsel was “being paid to twist the words of the witnesses” by the defendant. 72 Wn. App. at 66 (emphasis omitted). The remarks by the prosecutor here essentially reminded the jury to weigh evidence that defense counsel had not mentioned, although in a way that improperly attributed a motive to defense counsel. Their effect is much less potent than the remarks in *Negrete*. Given the weight of the evidence against Ivie and the nature and context of the prosecutor’s remarks, we do not see a substantial likelihood that those remarks affected the verdict.

Ivie has not shown that either prong of the heightened standard from *Emery* is met. Therefore, his claim of prosecutorial misconduct fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Ivie argues that defense counsel was ineffective for several reasons. We analyze each claim in turn.

A. Legal Principles

A claim of ineffective assistance of counsel “presents a mixed question of fact and law reviewed de novo.” *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To demonstrate ineffective assistance of counsel, Ivie must satisfy the two-pronged test laid out in

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). If Ivie fails to establish either prong of the test, we need not inquire further. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

First, Ivie must show that counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To demonstrate deficient performance, the record must show no legitimate strategic or tactical rationale for the trial attorney's decisions. *McFarland*, 127 Wn.2d at 335-36. Second, Ivie must show prejudice. *Id.* at 335. Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). In the context of a PRP, a petitioner who shows prejudice under this standard effectively meets his burden in showing actual and substantial prejudice on collateral attack. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 848, 280 P.3d 1102 (2012).

Still, we must be "highly deferential" in evaluating a challenged attorney's performance. *Strickland*, 466 U.S. at 689. We strongly presume that the appellant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

B. Failure to Call Crime Scene or Forensic Expert Witnesses

Ivie argues that his defense counsel's failure to consult with a qualified crime scene or forensics expert was deficient and prejudiced his right to a fair trial. We disagree.

On the matter of deficiency, he claims that had a qualified crime scene or forensics expert presented testimony, he or she would have rebutted the State's evidence and corroborated his testimony that he was not driving directly toward Adams when Adams fired the shots. Ivie supports his claim with an expert's declaration and post-conviction lab report. Additional expert

testimony, Ivie argues, would have controverted the State's theory as to the path of the vehicles, trajectory of the bullets, and his resulting gunshot wounds.

However, the evidence at trial indicated that Ivie began accelerating directly at Adams. *Ivie*, slip op at 187 Wn. App. 1008 at *4. Adams then moved out of the way sideways along the embankment and fired four initial shots at Ivie's truck and, as Ivie continued down the road, four additional shots. *Id.* at *5. The expert report only provides an opinion that Adams "was not in the direct line of travel by Mr. Ivie's truck at the time any of the eight shots were fired." Br. of Pet'r, Decl. of Kay Sweeny, App. 1-6, at 4. Thus, the report is not dispositive of whether Ivie ever drove directly at Adams, the critical element of the assault charge.

"Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); *see also State v. Mannering*, 150 Wn.2d 277, 287, 75 P.3d 961 (2003) (failure to call defense expert witness was strategic). Defense counsel called private investigator Doughty to provide expert opinion testimony. Doughty provided testimony regarding, among other matters, the path of the vehicles and trajectory of the bullets. Defense counsel had Doughty draw a picture in court that illustrated his opinion as to vehicle orientation and bullet trajectory. Counsel's questioning revealed that the testimony of Doughty was part of counsel's strategy to counter the State's forensic evidence.

Defense counsel also called firearms expert Hayes who testified that he had experience in the use of force, ballistics, accident reconstruction, and blood stain pattern analysis. The examination likewise countered the State's evidence as to vehicle orientation and bullet trajectory. Hayes testified that "the vehicle itself was veering away from Sergeant Adams'

vehicle, and of course where Sergeant Adams said he was.” VRP at 461-62. The decision to rely on the testimony of Doughty and Hayes on these points was a legitimate strategic choice.

Ivie therefore has not shown that defense counsel was deficient for calling these individuals, instead of others. Because Ivie has not established deficient performance, this claim fails.

C. Failure to Introduce Veterinary Records and Testimony

Ivie argues that his defense counsel’s failure to introduce veterinary records and testimony was deficient and prejudiced his right to a fair trial. Ivie supports his claim with a copy of the veterinary records and the declarations of two veterinarians who reviewed the records. He claims this failure to introduce was deficient because the records and testimony would have weakened Reed’s credibility and strengthened his credibility. We disagree.

“Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics.” *Davis*, 152 Wn.2d at 742. Reed and Adams testified that they did not see or hear a dog during the events of that night. Testimony from Ivie and Marx showed that Ivie had his dog with him at the time of the incident and that the dog may have been shot. At trial, Doughty testified that he reviewed the veterinary records, which verified the dog had suffered a gunshot wound.

However, evidence that the dog was shot during the incident would not contradict the officers’ testimony that they did not see or hear a dog during the events. Thus, veterinary records or testimony showing the dog was shot would have had no effect on Reed’s credibility and would, at best, only add cumulative weight to Ivie’s story. Defense counsel was not deficient in not offering the veterinary evidence.

D. Failure to Contact or Call Dr. Ferrer at Ivie's CrR 3.5 Hearing

Dr. Ferrer cared for Ivie while he was at the hospital following the shooting. Ivie avers that defense counsel's failure to contact Dr. Ferrer or call him to testify at the CrR 3.5 hearing regarding Ivie's physical and mental condition when the police interrogated him was deficient. Further, he argues this failure "prejudiced his ability to challenge the admissibility of his hospital statement and prejudiced him at trial." Br. of Pet'r at 20. We agree that defense counsel's failure to contact Dr. Ferrer was deficient, but we disagree that it was prejudicial.

1. PRP Threshold

The State claims that this issue was already raised and decided on direct review in *Ivie*. In the context of a PRP, "[a] defendant may not recast the same issue as an ineffective assistance claim; simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previous rejected claim." *Davis*, 152 Wn.2d at 671 (quoting *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001)).

On direct appeal, Ivie claimed that "the admission of the statements he made in the hospital violated his right to due process because he made them involuntarily." *Ivie*, slip op at 187 Wn. App. 1008, at *6. In response, we noted that "Ivie presented no expert medical testimony concerning his condition at the time or the effects of any drugs he had taken." *Id.* at *7. We held, however, that the evidence presented was sufficient to support the conclusion that Ivie made the hospital statements voluntarily. *Id.* at *13.

In his PRP, Ivie claims that defense counsel "never interviewed . . . [his] doctor as to the nature of his injury or his condition at the time of his hospital interrogation." Br. of Pet'r at 22. To support his claim, Ivie provides a declaration from Dr. Ferrer describing Ivie's injuries,

stating that Ivie reported severe pain, and describing the morphine doses that Ivie received. Ivie also provides a supplemental declaration from Dr. Ferrer that states defense counsel never contacted him.

While we did conclude that Ivie's hospital statements were properly admitted, we did not make a judgement as to whether counsel was ineffective for failing to investigate and obtain testimony from Dr. Ferrer. Therefore, Ivie's present claim differs from the one raised on direct review and, as such, we consider his ineffective assistance of counsel claim.

2. Failure to Contact Dr. Ferrer was Deficient

Ivie claims that testimony from Dr. Ferrer "would have corroborated and elaborated . . . that he was in pain and heavily medicated at the time he was interrogated." Reply Br. of Pet'r at 7; *see also* Br. of Pet'r at 23. He believes Dr. Ferrer's testimony would have supplied evidence that he did not provide a knowing and voluntary waiver of his right to silence. *Id.*

Dr. Ferrer's declaration provides a detailed medical description of Ivie's gunshot wounds. The declaration also states that Ivie reported severe pain and had been administered morphine. The medical reports attached to Dr. Ferrer's declaration show that Ivie was given morphine intravenously five times on February 10, 2010 and that Percocet was ordered but not administered. Further, Dr. Ferrer states that "it is frequently difficult to obtain information from a patient who is experiencing extreme pain and receiving morphine." Br. of Pet'r at 53. Finally, Dr. Ferrer stated that if subpoenaed, he would have testified consistently with his declaration and the medical records. This evidence would have been relevant to the nature of Ivie's surgery, the severity of his wounds, and the effect of extreme pain and morphine.

In Ivie's direct appeal, we outlined the trial court's oral findings as follows:

(1) [P]olice obtained permission from hospital staff before questioning Ivie, (2) Ivie was well enough to walk at the time, (3) Ivie generally gave coherent, responsive answers to their questions, without significant pauses, (4) when police asked open ended questions, Ivie gave detailed answers and added his own thoughts, (5) Ivie admitted that he had memories of the interrogation independently of the recording, and (6) no evidence showed that police sought to coerce Ivie or overbear his will. The court also noted that Ivie presented no evidence of the exact nature, timing, or duration of the surgery or of the severity of his wounds, other than his own testimony that he had been repeatedly shot, suffered a concussion, and was under the influence of morphine and OxyContin.

Ivie, slip op at 187 Wn. App. 1008, at *7. However, we only made this decision, in part, because “Ivie presented no expert medical testimony concerning his condition at the time or the effects of any drugs he had taken.” *Id.* at *7.

“Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics.” *Davis*, 152 Wn.2d at 742. However, this does not relieve an attorney of the

duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.

Strickland, 466 U.S. at 691.

Dr. Ferrer declared that defense counsel did not contact him. Dr. Ferrer was Ivie’s treating physician immediately after the shooting and was the primary source of information regarding Ivie’s medical condition before he provided a recorded statement. Defense counsel should have contacted Dr. Ferrer, at least, to rule out whether Ivie was capable of providing a knowing and voluntary waiver. *See State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) (“Failure to investigate or interview witnesses, or to properly inform the court of the substance of

their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest.”).

Because counsel did not reasonably investigate whether Dr. Ferrer had information pertaining to Ivie’s physical and mental condition after the shooting, it was impossible for counsel to have made an informed decision as to whether Dr. Ferrer should testify at the CrR 3.5 hearing. Accordingly, defense counsel was deficient.

3. Failure to Contact Dr. Ferrer was Not Prejudicial

Dr. Ferrer’s declaration does not contradict the trial court’s oral findings. While Dr. Ferrer declared that it is “frequently difficult” to obtain information from a patient experiencing pain and under the influence of morphine, he did not claim to have any personal knowledge of Ivie’s interrogation or the circumstances in which he provided information in response to questioning. Thus, Dr. Ferrer’s declaration does not show that it was difficult for Ivie to provide information in his circumstances.

Further, consistently with the trial court’s findings, Dr. Ferrer did not declare that Ivie would have been incapable of providing coherent answers to police questioning. Although Dr. Ferrer would have been able to provide testimony of the exact nature, timing, and duration of the surgery and of the severity of Ivie’s wounds, his testimony, as reflected in his declaration, would not have undermined the trial court’s findings regarding the circumstances and manner in which Ivie responded to police questioning. For this reason, Ivie fails to demonstrate that the failure to contact or call Dr. Ferrer to testify prejudiced Ivie. Because Ivie has not demonstrated prejudice, his claim of ineffective assistance fails.

E. Failure to Call Dr. Ferrer at Trial Regarding Hospital Statement

Related to the previous issue, Ivie argues that defense counsel's failure to obtain Dr. Ferrer's testimony was deficient and prejudiced him at trial because his credibility had been attacked through impeachment and Dr. Ferrer would have served to rehabilitate his credibility.² We agree that defense counsel's failure to contact Dr. Ferrer was deficient, but we disagree that it was prejudicial.

Ivie argues that because defense counsel failed to investigate or call Dr. Ferrer, he lost an opportunity to explain why there were inconsistencies between his direct testimony and his hospital statement. Ivie claims that counsel was deficient because the jury would have found Dr. Ferrer more believable at trial. Ivie contends that his hospital statement was unreliable because of the trauma he recently experienced and the medications he was administered. He contends that Dr. Ferrer's testimony would have explained to the jury why his hospital statement was unreliable, thereby rehabilitating his credibility. In addressing these contentions, we focus on whether counsel provided ineffective assistance in not contacting Dr. Ferrer or investigating his potential testimony.

1. Failure to Investigate Dr. Ferrer's Potential Testimony was Deficient

As noted, the decision whether to call a particular witness is presumed to be a matter of legitimate trial tactics. *Davis*, 152 Wn.2d at 742. However, this does not relieve an attorney of the

duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular

² Ivie argues that "[i]t appears that he was impeached no less than 13 times with statements he made at that hospital that differed from his trial direct examination." Br. of Pet'r at 25.

decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 691.

Dr. Ferrer declared that defense counsel did not contact him. Dr. Ferrer was Ivie's treating physician immediately after the shooting and was the primary source of information regarding Ivie's medical condition before he provided a recorded statement. Ivie was interviewed soon after sustaining serious gunshot wounds for which he had been given morphine. Defense counsel should have contacted Dr. Ferrer, at least to determine whether Ivie was capable of providing a knowing and voluntary waiver. *See Ray*, 116 Wn.2d at 548 ("Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest."). If defense counsel had done so, he would have been able to make an informed decision as to whether to call Dr. Ferrer at trial to neutralize the impeachment using Ivie's hospital statements. Accordingly, defense counsel was deficient.

2. Failure to Investigate Dr. Ferrer's Potential Testimony was Not Prejudicial

Ivie, however, does not show a reasonable probability that, but for counsel's failure to call Dr. Ferrer, the verdict would have been different. Ivie testified he was shot in the back. VRP at 592. He also testified that he was in pain and on morphine and OxyContin. VRP at 552. Dr. Ferrer's generalization that it is difficult to obtain information from a patient experiencing extreme pain and receiving morphine by itself has little application to Ivie's specific circumstances. Although defense counsel performed deficiently by neglecting to contact Dr. Ferrer to investigate whether Ivie was capable of providing a knowing and voluntary waiver, Dr.

Ferrer's declaration does not present any facts, beyond the noted generalizations, that call the knowing and voluntary nature of Ivie's waiver into question in the circumstances presented.

This evidence does not show a reasonable probability that the verdict would have differed had Dr. Ferrer's potential testimony been investigated. Thus, Ivie does not demonstrate that he was prejudiced.

Accordingly, this claim of ineffective assistance fails.

F. Failure to Call Dr. Ferrer Regarding Location of Ivie's Gunshot Wounds

Ivie argues that his counsel's failure to obtain Dr. Ferrer's testimony was deficient and prejudiced him at trial because Dr. Ferrer would have provided evidence as to the location of his gunshot wounds. This, in Ivie's view, would challenge the State's version of the shooting. We disagree.

Ivie contends that because he was shot in the back, the jury could reasonably infer that Adams "was not . . . standing directly in front of the truck . . . but standing on the driver's side of the truck and fired after the truck had passed." Br. of Pet'r at 25. Adams testified that he would have been hit "dead center" and "squished or killed" if he did not take evasive actions. VRP at 315. He also testified, "I was surprised I didn't get hit. I was surprised that I was able to move across the bank fast enough to not get hit by the front of the truck. I didn't bother firing any rounds at that point because I would have hit nothing but grille." VRP at 320. Adams testified that he fired four rounds in the side of the truck and then an additional four rounds as the truck was moving past and away from him.

Dr. Ferrer was not at the scene, so he could not testify as to whether Ivie accelerated towards Adams. Similarly, he could not testify as to whether Adams took evasive actions to

avoid being struck. More to the point, any testimony by Dr. Ferrer that Ivie was shot in the back would be consistent with Adams' testimony that he fired the four final shots as Ivie was going past and away from him.

Therefore, defense counsel was not deficient in failing to call Dr. Ferrer to testify to the location of the wounds. Accordingly, this claim of ineffective assistance fails.

G. Failure to Introduce Photographs of Ivie's Gunshot Wounds

Ivie argues that his counsel's failure to introduce photographs of his gunshot wounds was deficient and prejudiced him at trial. We disagree.

Ivie claims that introducing the photographs would have corroborated his story and discredited Adams' testimony. However, as discussed above, Adams testified that he fired his weapon from the side and rear of Ivie's truck. The State's testimony is relatively consistent with the location of Ivie's gunshot wounds, which presents a strategic reason for not introducing the photographs. Moreover, the photographs do not address the issue of whether Adams was in the path of Ivie's vehicle before he fired the shots. Hence, counsel was not deficient for not introducing photographs.

Therefore, this claim fails.

H. Failure to Prepare Ivie to Testify

Ivie claims that defense counsel's failure to prepare him to testify was deficient and prejudiced him at trial. Assuming, without deciding, that counsel was deficient, we hold that Ivie does not show prejudice; that is, a reasonable probability that the verdict would have been different if he had been better prepared to respond to inconsistencies between his hospital statement and his trial testimony.

Ivie claims that “counsel never showed him a transcript or played him the recording of the statement he made” while he was at the hospital. Br. of Pet’r at 28. He supports this with his own declaration. Ivie argues that, as a result, “he was unprepared to respond to questions about discrepancies between his trial testimony and his hospital statement.” Br. of Pet’r at 28. However, before Ivie testified, his hospital statement was the subject of a motion to exclude. At this hearing, an audio recording of his statement was played in court, and Ivie acknowledged that he listened to the recording.

Ivie’s argument presupposes that he would have been better prepared to answer the prosecutor’s questions on cross-examination if counsel had showed him a transcript or played him the recording of his hospital statements before he testified at trial. However, regardless of whether Ivie’s trial testimony could have been clearer about his prior inconsistent statements, or whether his demeanor or credibility could have been improved with added preparation, Ivie does not claim that the substance of the testimony he provided under oath at trial would have been any different.

The purpose of Ivie’s testimony, in part, was to undermine the reliability of his hospital statement by explaining that he was heavily medicated post-surgery thereby rendering him unable to provide coherent, credible information to the police investigators. Ivie provided positive testimony on those points when the prosecutor impeached him with prior inconsistent statements on cross-examination. He also provided contradictory testimony on cross-examination refuting parts of his hospital statement.

When asked about the discrepancy between his hospital statement and trial testimony regarding when he noticed that the police were tailing him with their lights on, Ivie clarified that

No. 49526-1-II

he testified inconsistently because he “was under the influence of morphine and OxyContin” at the hospital. VRP at 614. Even if counsel had prepared him better, the substance of Ivie’s answer would still be the same—his hospital statements were unreliable because he was heavily medicated. That testimony supplied a reasonable explanation for any inconsistency in his memories of whether the lights were on. Hence, we see no prejudice in the allegedly deficient preparation.

When the prosecutor asked Ivie about when he noticed he was being chased by the police, when he saw the police vehicle lights, and why he failed to stop, he confirmed he made certain statements at the hospital, but stated, at trial, “that’s not what I meant” and provided an alternative explanation. VRP at 625-29. Even with better preparation by counsel, the essence of Ivie’s answer would in all probability remain the same: explaining that the prosecutor had misinterpreted his hospital statement and describing what was going through his mind at the time. Hence, the failure to prepare him did not result in prejudice.

The prosecutor impeached Ivie about his relationship with a neighbor and his awareness about her presence at the trailer where he attempted to turn his vehicle around. At the hospital, Ivie stated his neighbor lived there only during the summer. However, at trial, Ivie testified that “Cynthia comes up throughout the year” and “comes up once in awhile [sic] during the winter.” VRP at 634-35. He said, “I was in hopes that there would be” someone at the trailer when he turned in that direction. VRP at 634. He clarified, “She just doesn’t live up there. She – lives somewhere else – during the winter. There’s a lot of people that come up once in awhile [sic].” VRP at 634-35.

Again, even if counsel had more thoroughly prepared Ivy, the substance of his answer would likely be the same: he did not know whether Cynthia was currently residing at the trailer, but hoped so. Also, there was no obvious inconsistency between Ivie's statement at the hospital that Cynthia lives there only during the summer and his trial testimony that she comes up throughout the year. We see no prejudice to Ivie from these statements.

The prosecutor impeached Ivie in his testimony about Adams' vehicle and his location. Ivie's hospital statement referred to the vehicle as a car. Ivie stated that when he came around, Adams had blocked the road again, and he was out of the vehicle. He also stated that he noticed the red and blue lights on the vehicle. At trial, however, Ivie testified he did not necessarily know if it was a car or truck, could not see Adams out of the vehicle, and did not notice any red and blue lights engaged on the vehicle at the time. As above, even if counsel had prepared him better, the substance of Ivie's answer, if truthful, would likely have been the same. More to the point, these minor inconsistencies were readily explained by Ivie's testimony about his condition at the hospital. We see no prejudice to Ivie from these statements.

The prosecutor impeached Ivie about his understanding of who owned the property where the maple tree was. At the hospital, Ivie stated, "[I]t's in the greenbelt; belongs to everybody in Cushman." 4 VRP at 642. At trial, Ivie testified that the property belonged to a man named John Spurrier. Ivie also explained at trial, however, that "[t]here's a greenbelt right next to John's property. And where the tree is, I believe it's on the greenbelt." 4 VRP at 642. Ivie does not explain how his answer would have differed if he had been better prepared. Also, his testimony about his condition at the hospital provided his best explanation for this minor discrepancy. We see no prejudice from these statements.

Ivie's post-trial declaration does not claim that he would have made different substantive statements at trial if he had been better prepared. Thus, additional pretrial preparation producing more comprehensive answers would likely have added little to the essence of his testimony. Ivie chose to testify at trial. His trial testimony would either be consistent or inconsistent with his hospital statement. Presuming Ivie's trial testimony was truthful, no amount of preparation would have changed Ivie's trial testimony to avoid inconsistency with his purportedly inaccurate hospital statement. Further, no amount of preparation would have precluded the State from impeaching Ivie with his prior inconsistent statements. Ivie has not shown a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. Accordingly, Ivie was not prejudiced by counsel's alleged failure to prepare him.

I. Failure to Object to State's Evidence and to Adequately Cross-Examine Witnesses

Ivie argues that his counsel's failure to object to Simper's testimony regarding the computer-based crime scene reconstruction was deficient and prejudiced him at trial. We disagree.

Ivie claims that defense counsel should have objected to Simper's testimony because the prosecutor did not lay a proper foundation for the testimony. In addition, Ivie argues that on cross-examination, "counsel asked no questions challenging the images, the measurements, or the accuracy of the bullet trajectories contained on the images." Br. of Pet'r at 30. Ivie argues that "[t]he Total Station diagrams and the State's demonstrative photographs with the colored rods were inaccurate and misleading as to the trajectory of the shots fired by Adams." Reply Br. of Pet'r at 12.

The State introduced several computer-generated images (i.e., Total Station diagrams) of the crime scene through the testimony of Simper. The images allegedly depicted the location of various items of evidence such as shell casings, Adams' vehicle, the path of Ivie's truck, and the trajectory of the bullets fired by Adams.

When the basis of an ineffective assistance argument is the failure to object to evidence, the appellant must show "(1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted." *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted). Ivie argues that the failure to object could not be a legitimate strategy or tactic because the evidence does not support his expert's theory regarding vehicle orientation and bullet trajectory.

However, defense counsel may have decided that an objection would draw attention to evidence that was inconsistent with his defense. In *State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003), the court concluded that the failure to object was a legitimate trial tactic where counsel may have decided that an objection would draw attention to the information he sought to exclude. By not objecting to Simper's testimony, jurors were less likely to place undue weight on that evidence. Counsel may also have decided that Simper's testimony actually helped Ivie, because the bullet holes in the side of the car were inconsistent with the claim that Ivie drove straight at Adams. Ivie has not rebutted the presumption that the failure to object was the product of legitimate trial tactics or strategy.

Ivie also argues that "[d]uring cross-examination of Detective Simper, counsel asked no questions challenging the images, the measurements, or the accuracy of the bullet trajectories

contained on the images.” Br. of Pet’r at 30. However, on cross-examination, when counsel asked whether Simper could form an opinion about where Adams was standing when he fired at Ivie’s vehicle, Simper testified,

[T]hat would be narrowed down to a specific area, just based on the position where those shell casings were located. However, to determine exactly where Sergeant Adams was at the time that each shot was fired would be . . . futile, just based on . . . several variables.

VRP at 251.

Thus, counsel’s question was able to convey to the jury that determining Adams’ exact location would be an exercise in futility and, as such, questioned the accuracy of the total station software. *Id.* Notwithstanding the fact that Ivie now claims he would have asked different (or more) questions on cross-examination, shrewd arguments often look obvious in hindsight. As the court stated in *Strickland*, 466 U.S. at 669,

a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.

We presume counsel was reasonable in his line of questioning because the manner of cross-examination is generally a matter of judgment and strategy. *See Davis*, 152 Wn.2d at 720. Ivie has not shown the contrary. Therefore, he has not established deficient performance, and his claim fails.

J. Failure to Contact Lay Witnesses (Churchill)

Ivie claims that defense counsel’s failure to locate and interview lay witnesses to corroborate his testimony was deficient and prejudiced his defense. Specifically, Ivie claims that

if counsel had performed an objectively reasonable investigation of lay witnesses he would have contacted Churchill, who claims Reed attempted to fabricate evidence against Ivie. We disagree.

To provide effective assistance, defense counsel must investigate the case, which includes investigation of witnesses. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). The duty to investigate does not necessarily require that every witness be interviewed, but defense counsel has an obligation to provide factual support for the defense where it is available. *Davis*, 152 Wn.2d at 739. “Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest.” *Ray*, 116 Wn.2d at 548. Therefore, failure to interview a particular witness may constitute deficient performance. *Jones*, 183 Wn.2d at 340. Whether performance is deficient may hinge on the reason for such failure to interview. *Id.* Further, “[i]n evaluating prejudice, ‘ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.’” *Davis*, 152 Wn.2d at 739 (quoting *Rios v. Rocha*, 299 F.3d 796, 808-09 (Ninth Circ. 2002)).

Because the merits of Ivie’s contentions could not be determined solely on the record before us, we remanded the petition for a reference hearing on this specific issue. At the reference hearing, Foley, Churchill, Doughty, and Reed testified. After the hearing, the superior court reviewed defense counsel’s file and his billings that referenced Churchill. The superior court also accepted a stipulation of the parties that Marx, Ivie’s girlfriend, was contacted by Doughty regarding Churchill.

In sum, the superior court found the following relevant facts: (1) Ivie advised defense counsel that Churchill was a potential witness, (2) defense counsel had knowledge that Churchill

was a potential witness and knowledge concerning the substance of his testimony, (3) defense counsel directed Doughty, his private investigator, to locate and/or contact Churchill, (4) Doughty attempted to locate and/or contact Churchill by phone and on-line searches, (5) the online search disclosed two possible addresses for Churchill, one in Shelton and one in Union, (6) Doughty investigated one possible address, where he contacted a woman who claimed she did not know where Churchill was, but the superior court's order does not discuss whether Doughty contacted the other address, (7) it is more probable than not that the attempts to find Churchill were limited to those testified to by Doughty, (8) defense counsel testified that he never contacted Churchill because he could not find him, (9) Churchill testified that Reed attempted to suborn false testimony from him for use in Ivie's trial, and (10) Reed testified that he has never asked a potential witness to testify falsely, including Churchill.

The record does not support Ivie's assertion that his counsel's performance fell below an objective standard of reasonableness. Instead, the record shows that defense counsel attempted to investigate Churchill's allegations, but his private investigator, Doughty, was unable to locate or contact him. *Cf. In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 355, 325 P.3d 142 (2014) (after defendant suggested defense counsel contact potential lay witness, counsel made numerous attempts to interview the lay witness, and even tried to subpoena her, but to no avail). Defense counsel's attempts to locate and/or contact Churchill through his private investigator were objectively reasonable. The inability to locate and/or contact a potential witness—after reasonable efforts have been made—does not constitute deficient performance. *See id.* at 355-56.

Furthermore, the facts suggest that defense counsel was generally aware of the facts and testimony Churchill would have provided to support Ivie's credibility argument against Reed. Counsel's choice not to develop this argument following the inability to locate and/or contact Churchill was similarly objectively reasonable. *See id.* at 355-56. Therefore, we do not address the prejudice prong of the *Strickland* test, and Ivie's claim fails.

K. Failure to Present Adequate Closing Argument

Ivie claims that his counsel's failure to present an adequate closing argument including basic exculpatory facts was deficient and prejudiced him at trial. Specifically, Ivie claims that counsel's failure to address the location of his gunshot wounds and his physical and mental condition at the time he provided his hospital statement in closing was objectively unreasonable. We disagree.

There are many different ways to present a closing argument. Decisions about what to include (or exclude) in closing argument necessarily involves trial strategy and tactics. *Grier*, 171 Wn.2d at 33-34. During closing argument, defense counsel emphasized Ivie's testimony that it was dark outside, the officers were wearing black, he did not see Reed or Adams, and he did not intend to hit either of them with his vehicle. This was consistent with a legitimate defense strategy to bolster his client's testimony. Counsel may have had a strategic reason for not emphasizing the location of the gunshot wounds and his hospital statement. For example, the hospital statement had already been used to impeach Ivie's direct testimony, which counsel was trying to highlight in closing. Given the strong presumption that counsel's performance was effective, we hold that his closing argument was not deficient.

L. Failure to Object to the State's Rebuttal Closing Argument

Ivie claims that defense counsel's failure to object to the prosecutor's rebuttal closing argument described in Part II., B. of the Analysis was deficient and prejudiced him at trial.

In Part II. B. and C., above, we concluded that the prosecutor's rebuttal closing was improper, but that it was not prosecutorial misconduct because it failed the heightened standard of *Emery*. It failed that standard, we concluded, for two separate reasons: a curative instruction would have obviated any prejudicial effect on the jury and the improper remarks did not have a substantial likelihood of affecting the jury verdict. The latter is the same standard for showing the prejudice necessary for ineffective assistance of counsel. Therefore, even if we assume that counsel's failure to object to the prosecutor's improper remarks was deficient, Ivie still has not shown the requisite prejudice for ineffective assistance of counsel. With that, this claim of ineffective assistance of counsel fails.

IV. CUMULATIVE ERROR

Finally, Ivie argues that the cumulative effect of the errors he has identified deprived him of a fair trial. We disagree.

Under the cumulative error doctrine, a reviewing court may reverse a defendant's conviction when the combined effect of trial errors denied him a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Stated another way,

[f]or relief based on the cumulative error doctrine, the defendant must show that while multiple trial errors, 'standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.'"

State v. Clark, 187 Wn.2d 641, 649, 389 P.3d 462 (2017) (quoting *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279.

The case law offers some guidance as to how these abstractions are to be implemented. In *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963), the Supreme Court held that an accumulation of errors required a new trial. The errors included the failure to give the required precautionary instruction when one of two co-defendants confessed to the crime; the failure to give the required precautionary instruction when the case was submitted to the jury solely on uncorroborated accomplice testimony; and the failure to inform the jury that the verdict must be unanimous in the absence of adequate evidence the jury was polled. *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992), held that reversal was required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing. Finally, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), reversed a conviction on the basis of (1) the court's severe rebuke of the defendant's attorney in the presence of the jury, (2) the court's denial of the testimony of the defendant's wife, and (3) the jury listening to a tape recording of a lineup in the absence of court and counsel.

In this decision we hold or assume that a number of Ivie's challenges show improper or deficient conduct, but that they fail for lack of prejudice. We summarize their effects below and examine whether their combined effect denied Ivie a fair trial.

First, we hold above that the failure to contact Dr. Ferrer or investigate his potential testimony about Ivie's condition at the hospital was deficient in two respects: it may have provided evidence that Ivie's waiver of the right to silence was not voluntary, and it may have better explained the inconsistencies between Ivie's hospital statement and his trial testimony. We recognize that Dr. Ferrer's testimony as reflected in his declaration would have helped Ivie to some degree in arguing an involuntary waiver or in repairing his credibility. Dr. Ferrer, though, did not testify about Ivie's condition individually. Rather, he opined that "it is frequently difficult to obtain information from a patient who is experiencing extreme pain and receiving morphine." Br. of Pet'r, App. 51-53, Decl. of Ferrer. Any benefit to Ivie from this opinion is limited by its generality. In addition, the description in Dr. Ferrer's declaration of Ivie's wounds, his reporting severe pain and his taking morphine was largely cumulative of Ivie's testimony.

Next is Ivie's claim that defense counsel did not inform him of the content of Ivie's statements at the hospital, which in turn impaired Ivie's ability to withstand cross-examination based on those statements. Part III. H., above, describes the specific instances in which Ivie was impeached with the hospital statements and Ivie's explanations of the inconsistencies. It also notes that Ivie's post-trial declaration does not claim that he would have made different substantive statements at trial if he had been better prepared.

Finally, we hold above that the impugning remarks in the State's rebuttal closing argument were improper, and we also assume that defense counsel's failure to object to them was deficient. The effect these actions may have had would lie in the jury's attitude toward defense counsel.

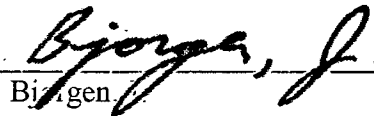
The State presented substantial evidence against Ivie. The impropriety and deficiencies just described, viewed individually, did not prejudice Ivie. Considering the nature and context of these actions, the substantial evidence against Ivie, and having reviewed the record, we cannot say that their combined effect deprived Ivie of a fair trial. This conclusion is supported by a comparison to the more serious errors that underlay the cumulative error in *Badda, Alexander, and Whalon*, noted above.

For these reasons, cumulative error does not warrant granting this petition.

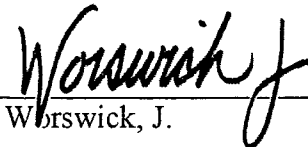
CONCLUSION

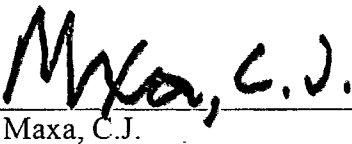
Ivie's PRP is denied.

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.


Bjorge, J.

We concur:


Worswick, J.


Maxa, C.J.