IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. CHRISTOPHER AHLSTEDT, Appellant/Cross Respondent.	No. 41234-9-II UNPUBLISHED OPINION

Penoyar, J. — Christopher Ahlstedt appeals his first degree assault and intimidating a witness convictions, arguing that the trial court erred by not issuing written findings of fact and conclusions of law after a CrR 3.5 hearing. He also contends that his attorney was ineffective for failing to present certain expert testimony and that the prosecutor committed prosecutorial misconduct when he performed a physical demonstration of the assault during closing argument. He lastly contends that the trial court improperly found facts for the purposes of sentencing when it evaluated whether his prior convictions had "washed out" under former RCW 9.94A.525(2)(b) (2008). Ahlstedt also raises several arguments in his statement of additional grounds (SAG),[1] none of which requires reversal. We affirm.

FACTS

Ahlstedt loaned his truck and trailer to Chad Beauchesne on Saturday, February 14, 2009. Ahlstedt expected Beauchesne to return the truck the next day. Beauchesne finally returned the truck on Monday evening.

Beauchesne and his girl friend, Sara Hughes, returned the truck and trailer sometime

[1] RAP 10.10.

between 8:00 and 10:00 p.m. The house lights were off and no one answered the phone, so they left. He later received an irate phone call from Ahlstedt, who alleged that Beauchesne had damaged the trailer. He returned to Ahlstedt's home around 11:00 p.m., fixed the jack stand, and called Ahlstedt. When Ahlstedt learned Beauchesne was in the driveway, he hung up the phone and stormed outside, yelling "I should kill you punk." Report of Proceedings (RP) (July 7, 2010) at 22. Beauchesne "heard a click of a knife and that's when he put it in my stomach and I went to the ground." RP (July 7, 2010) at 22. Beauchesne had consumed "crystal meth and heroin, maybe Xanax" the night of the incident. RP (July 7, 2010) at 33.

Hughes watched from Beauchesne's truck when Ahlstedt approached Beauchesne. Ahlstedt and Beauchesne "exchanged a couple of brief words" and then she "thought [Ahlstedt] had punched [Beauchesne]." RP (July 7, 2010) at 58. When Ahlstedt turned around "he had a knife in his hand and [Beauchesne] was on the ground." RP (July 7, 2010) at 58.

At trial, Ahlstedt testified that after Beauchesne returned the truck, Ahlstedt found that the trailer's jack stand was damaged. He called Beauchesne and left messages asking him to repair the truck. Ahlstedt claimed that he went to sleep and awoke to an angry phone call from Beauchesne at around 11:20 p.m. He and his wife, Sara Ahlstedt,[2] awoke, got dressed, and went out to the yard, where Beauchesne was "going crazy." RP (July 8, 2010) at 142. He testified that when he found Beauchesne at the back of the trailer, Beauchesne was "yelling at me, see I told you there's nothing the matter with these." RP (July 8, 2010) at 142. Ahlstedt testified that as they walked around the trailer, Beauchesne stopped and suddenly "was coming at me." RP (July 8, 2010) at 146. Ahlstedt "sort of rushed him and threw him [on] the ground and said what are

[2] For clarity, we refer to Sara Ahlstedt by her full name.

you doing, this has got to stop," and Beauchesne fell in a pile of debris near a small shed. RP (July 8, 2010) at 146. After Beauchesne fell, he noticed a knife on the ground. Ahlstedt picked up the knife, said "this isn't the time or place," and Beauchesne "hopped up, dusted himself off, walked over to his truck, jumped in and drove off." RP (July 8, 2010) at 147. Beauchesne did not appear hurt and drove himself away.

The State charged Ahlstedt with first degree assault. While awaiting trial in jail, Ahlstedt wrote letters to someone named "HP" offering to give HP his truck "if this problem of mine would go away." Ex. 37. The letter implied that Ahlstedt did not want Beauchesne to testify at trial:

> My lawyer think[s] if he [Beauchesne] doesn't show for court I will walk[.] What do you think[?] This is a funny world we live you just never know what might or might not happen[.] It[']s a nice day to go for a walk.

Ex. 37. Police found the letter, along with other letters, with Sara Ahlstedt's purse after arresting her for driving with a suspended license. The State subsequently charged Ahlstedt with intimidating a witness.

The jury found Ahlstedt guilty as charged. Ahlstedt appeals. The State cross-appeals.

ANALYSIS

I. CrR 3.5 Hearing

Ahlstedt first argues that the trial court erred when it failed to memorialize its findings of fact and conclusions of law after a CrR 3.5 hearing. Ahlstedt requested that this case be remanded to the trial court for entry of the required findings and conclusions. After the appellate briefs were filed, the trial court entered written findings of fact and conclusions of law, and the State filed a supplemental designation with those findings and conclusions. This assignment of

error has been resolved, so we need not consider this issue further.

II. Ineffective Assistance of Counsel

Ahlstedt next contends that he received ineffective assistance of counsel when counsel failed to introduce expert Mike Flynn's testimony. We disagree.

On the night of his injury, Beauchesne tested positive for amphetamines, opiates, benzodiazepines, and marijuana. The defense submitted a declaration by Flynn, a certified chemical dependency professional. It stated in part:

> I have been asked to describe how people present while using various drugs, particularly methamphetamine, heroin, and benzodiazepines and how they present while using these drugs at the same time. Because each drug presents different effects during different phases of use, I will also describe typical changes that occur as the drug passes from its intoxicating effects through its withdrawal effects.

1 Supplemental Clerks Papers (Suppl. CP) at 51.

The State moved in limine to preclude the defense from calling Flynn as an expert witness. The State argued that Flynn was not qualified to discuss the specific pharmacological effects drugs had on an individual's system. Defense counsel admitted that after reviewing the case law, his "thoughts were the same whether or not he would qualify." RP (July 6, 2010) at 10. Defense counsel asserted, however, that Beauchesne "was on four or five high-powered narcotics" at the time of the events in question. RP (July 6, 2010) at 11. Counsel explained that he would ask Flynn "to describe what kind of behaviors he would expect to see in a person with that kind of a drug cocktail in them." RP (July 6, 2010) at 11.

The trial court granted the State's motion in limine but explained that it might reconsider its ruling:

> I'm going to grant the motion in limine at this time. It simply does not bring up what Mr. Flynn may or may not testify to in the presence of the jurors. If, however, there is foundational testimony, for example someone identifies that Mr.

> Beauchesne acted in a certain fashion and then Mr. Flynn can somehow establish he's familiar with one, the drugs and, two, those sorts of behavior and, three, they are consistent among those who are using those drugs, then his testimony might be allowed. But we'll address that outside the presence on [sic] the jury first.

RP (July 6, 2010) at 11-12. Defense counsel responded, "There will be testimony to that effect." RP (July 6, 2010) at 12. The defense never called Flynn to testify.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove deficient performance, the defendant must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "There is a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863. To satisfy the prejudice prong, the defendant must show that the outcome of the proceedings would have differed but for counsel's deficient performance. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Strickland*, 466 U.S. at 687.

Ordinarily, the decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). The presumption of counsel's competence can be overcome, however, by showing counsel failed to conduct appropriate investigations to determine what defenses were available, to adequately prepare for trial, or to subpoena necessary witnesses.

Maurice, 79 Wn. App. at 552.

Ahlstedt contends that *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), supports his position. In *Thomas*, the trial court found the proposed expert witness not qualified. *Thomas*, 109 Wn.2d at 231. Our Supreme Court held that counsel was deficient for failing to investigate that the proposed expert was, in fact, only a trainee. *Thomas*, 109 Wn.2d at 231. When considering whether the deficiency prejudiced Thomas, the court held that the expert's testimony was crucial where the defendant testified that she had experienced blackouts as a result of her intoxication. *Thomas*, 109 Wn.2d at 232. Since the prosecutor attempted to capitalize on the testimony's damaging nature and the expert witness would have supported Thomas's testimony, the deficiency constituted ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 232.

Ahlstedt argues that he similarly was prejudiced by the lack of expert testimony. But that argument skips the necessary first step, deficiency. In *Thomas*, counsel attempted to put forth necessary expert testimony but failed to conduct a proper investigation. 109 Wn.2d at 231. Such behavior could not be tactical and was clearly deficient. Here, Ahlstedt does not allege that counsel failed to investigate Flynn's qualifications or that counsel failed to put forth the testimony of a more qualified expert. Ahlstedt alleges only that counsel did not present Flynn's testimony.

Counsel's decision not to call Flynn could have been tactical. Counsel had reservations about Flynn's qualifications. Other witnesses testified regarding Beauchesne's erratic behavior. Flynn's testimony may have been cumulative to that testimony. Many other considerations, including the length of the trial, the required time presenting the necessary foundational testimony, and the risk that the court would ultimately exclude Flynn's testimony anyway, show that the decision could have been tactical. Also, defense counsel may well have concluded after applying

the trial court's ruling that Flynn lacked the necessary foundation to testify, including knowledge about the pharmacological effects of any of the drugs in one's system. We will not second guess such decisions on appeal. *See Grier*, 171 Wn.2d at 43 ("[H]indsight has no place in an ineffective assistance analysis."). We need not evaluate resulting prejudice because Ahlstedt's counsel was not deficient. Ahlstedt has failed to show ineffective assistance of counsel.

III. Demonstration in Closing Argument

Ahlstedt next argues that the prosecutor committed misconduct when the prosecutor and a detective reenacted the crime during rebuttal argument. We reject Ahlstedt's argument because the reenactment was not evidence but proper argument.

During closing arguments, the prosecutor has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). The defendant has the burden to show that the prosecutor's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is a ground for reversal only where there is a substantial likelihood the improper conduct affected the jury. *Fisher*, 165 Wn.2d at 747. If the defendant does not object to the misconduct at trial, the defendant must demonstrate that the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" incurable by a jury instruction. *Gregory*, 158 Wn.2d at 841 (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

During closing argument, the following exchange occurred:

> [PROSECUTOR]: Now, with the Court's permission I will ask Detective Hollis to come up here—
> THE COURT: You may.
> [PROSECUTOR]: —this is the knife and under Mr. Ahlstedt's version of

> events, let's say I'm Mr. Ahlstedt I'm obviously not as tall as he is but let's say Chad Beauchesne is acting up, he has a knife, somehow I don't see that he has a knife although I'm not really sure how it's possible considering it's his right hand, and I take Mr. Beauchesne and throw him on the ground. What is the normal thing people do? What would you do? You put out your hands to protect yourself. You don't stab yourself in the gut like that, put your hands down like that, drop the knife so you don't fall on anything. That's what people do and that's why Mr. Ahlstedt's version of events—thanks, John you can go ahead and sit down—is contrived, glib and improbable.

RP (July 12, 2010) at 61-62. Ahlstedt did not object.

The State argues that the demonstration was proper because it was not evidence. We agree. The demonstration was based on testimony, and the prosecutor obtained the trial court's permission beforehand.

This case is analogous to *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1977). There, the State conducted a demonstration during closing argument to show that the victim's version of events could have been physically accomplished. *Kroll*, 87 Wn.2d at 845-46. Our Supreme Court found "no abuse of discretion in allowing the prosecutor to demonstrate a reasonable inference from the evidence." *Kroll*, 87 Wn.2d at 846; *see also State v. Balisok*, 123 Wn.2d 114, 117-19, 866 P.2d 301 (1994) (a jury's reenactment during deliberations was not misconduct where the jury used only evidence and exhibits admitted at trial, so the reenactment applied "common sense and the normal avenues of deductive reasoning"). Here, like in *Kroll* and *Balisok*, the prosecutor's demonstration made reasonable inferences from the evidence presented at trial and was not improper.

Ahlstedt argues that, unlike in *Kroll* where there had been specific testimony explaining what had happened, no one here had testified to how Beauchesne fell. Accordingly, the demonstration went beyond the evidence. We disagree. The prosecutor is entitled to make

inferences from the testimony. Those inferences may be communicated to the jury in the form of a brief demonstration based on the evidence.

Ahlstedt argues that the prosecutor had to follow the procedures for the admission of demonstrative evidence before performing the demonstration. But because the demonstration was not evidence, the State needed not follow procedures required for admitting evidence.

Since the prosecutor's actions were not misconduct, no curative instruction would have been necessary and we need not evaluate whether the prosecutor's actions were flagrant and ill-intentioned. We reject Ahlstedt's prosecutorial misconduct argument.

IV. Sentencing

Ahlstedt argues that a jury, not the trial court, should have decided the dates and nature of his confinement. But our Supreme Court answered this argument in *State v. Jones*, when it held that the court, not a jury, should determine whether a defendant was on community custody at any given point in time. 159 Wn.2d 231, 247, 149 P.3d 636 (2006). The court explained that to "give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts 'intimately related to [the] prior conviction' such as the defendant's community custody status." *Jones*, 159 Wn.2d at 241 (quoting *United States v. Moore*, 401 F.3d 1220, 1225 (10th Cir. 2005)). We see no difference between a defendant's community custody and his actual custody. The trial court appropriately determined Ahlstedt's custodial history.

V. Statement of Additional Grounds

A. Prosecutorial Misconduct

Ahlstedt next contends that the prosecutor committed several alleged instances of misconduct. We reject these arguments because Ahlstedt did not object to any of the alleged instances of misconduct at trial and because he failed to show that the misconduct was so flagrant and ill-intentioned that it resulted in prejudice that could not have been cured by a curative instruction.

1. Comment Relating to Tyson as an Expert Witness

We first reject Ahlstedt's argument that the prosecutor improperly vouched for Allan Tyson's credibility, the State's expert at sentencing, because the prosecutor's argument was made to the trial court and not in front of the jury.

2. Comment Relating to Sara Hughes

We reject Ahlstedt's argument that the prosecutor made comments about Hughes that impugned Sarah Ahlstedt's credibility because the prosecutor did not discuss Hughes during closing; he merely drew inferences from the record. This was not prosecutorial misconduct.

3. Comment Relating to Lisa Collins

We similarly reject Ahlstedt's argument that the prosecutor misrepresented the forensic scientist's testimony because the prosecutor accurately described the forensic scientist's testimony that Beauchesne was excluded as a substantial contributor to DNA found on the handle of a knife.

4. Comment Relating to Tina Sloan

Ahlstedt next argues that the prosecutor improperly impugned Tina Sloan's[3] credibility when he argued that Sloan was not credible. The prosecutor's statements here were not improper. The circumstantial evidence suggested an inference that Sloan was not a credible witness. Such an inference is permitted because it is based on the evidence presented at trial. *See State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009) (prosecutor's comments that the witnesses' testimony was "made up on the fly" did not express improper personal opinions about the witnesses' credibility or the defendant's guilty). Ahlstedt certainly does not show flagrant and ill-intentioned conduct sufficient to render a curative instruction unnecessary.[4]

5. Comment Relating to the Knife

We reject Ahlstedt's argument that the prosecutor committed misconduct when he told the jury that the knife belonged to Ahlstedt rather than to Beauchesne. The State presented the recording of Detective Sergeant Lyman Moores's interview of Ahlstedt after his arrest, where Ahlstedt admitted owning a knife like the one found on his bed stand. In closing, the prosecutor stated that, "We also know from Mr. Ahlstedt's own statement that stab was—excuse me, Chad Beauchesne was stabbed not with his own knife but with Mr. Ahlstedt's knife." RP (July 12, 2010) at 23. The State then played a portion of the recorded interview.

The prosecutor made a fair inference from the record. The argument permitted the jury to

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[3] Sloan spent the night in Ahlstedt's rental house, but left immediately after the incident.

[4] Ahlstedt incorrectly argues that the comments were misconduct under *State v. Martin*, 41 Wn. App. 133, 703 P.2d 309 (1985). The *Martin* court never decided that the prosecutor committed misconduct but held only that, assuming that the comments were improper, the record does not indicate any substantial likelihood the remarks affected the jury's decision. *Martin*, 41 Wn. App. at 140.

evaluate the recorded interview and determine whether the prosecutor made an accurate representation of the record.

We also reject Ahlstedt's contention that the prosecutor discussed the tape of Ahlstedt's interrogation in violation of an order in limine. The pretrial order in limine permitted the tape to be played in its entirety before the jury.

6. Comment Relating to Any Recorded Admission

Ahlstedt contends that the prosecutor misrepresented Ahlstedt's statements on the recording of his interrogation, positing that the prosecutor stated, "I stabbed him just once, two times" and that the trial court agreed that "the tape did not say that." SAG at 5.

Ahlstedt has failed to provide us a citation to the portion of the record containing this statement. The prosecutor stated in closing, "[T]his snippet Detective Sergeant Moores is pushing Mr. Ahlstedt a bit and he says, you know, looks like it wasn't multiple times, it was just once, Mr. Ahlstedt is doing this business about diverting attention and so forth, I could hear him say twice, it's just once and here's that snippet." RP (July 12, 2010) at 21-22. The recording of the comment was then played for the jury.

Ahlstedt contested the prosecutor's statement in his closing, arguing that Ahlstedt never admitted to stabbing Beauchesne. The prosecutor then responded in rebuttal, "First, I beg to disagree with counsel, twice on the tape which I played earlier he did say I stabbed him just once, it was just once. You have to look hard for it but it's there, and we played that portion for you." RP (July 12, 2010) at 64.

The transcript shows that the recording includes the following exchange:

[Detective]: So was it, was it just one time or was it multiple times?
[Ahlstedt]: Yeah, just once.
[Detective]: Pardon me?
[Ahlstedt]: Just once I guess, I don't know. It was just once, I guess.

Ex. 36 (admitted for illustrative purposes only), at 12; *see also* Ex. 12 (recording).

The prosecutor's statement was a fair representation of the evidence. Ahlstedt has failed to show prosecutorial misconduct on these grounds.

7. Failure to Make State Witness Available for Interview

We reject Ahlstedt's argument that the prosecutor committed misconduct in failing to make Sara Hughes available for an interview before trial. The only evidence in the record is that the defense did not interview Hughes before trial. There is no evidence before us that the prosecution discouraged any interview of Hughes. *See Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981) (witness "may of his own free will refuse to be interviewed by either the prosecution or the defense"). Ahlstedt's claims that the prosecutor prevented him from interviewing Hughes apparently involves facts outside the trial record and we cannot act on this claim. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (reviewing court will not consider matters outside the trial record.

B. Ineffective Assistance: Failure to Move to Sever Counts

Ahlstedt argues that he received ineffective assistance when his counsel failed to move to sever. We disagree because the evidence was cross-admissible.

A trial court may sever offenses if doing so will promote a fair determination of the defendant's guilt or innocence in each offense, considering any resulting prejudice to the

defendant. CrR 4.4(b); *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Washington law disfavors separate trials. *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002). Severing charges is necessary when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant seeking severance must show that a trial on multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

The court considers the strength of the State's evidence on each count; the clarity of defenses as to each count; court instructions to the jury to consider each count separately; and the admissibility of the evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Here, as the trial court ruled, the intimidating a witness evidence would be relevant and admissible as circumstantial evidence of guilty knowledge in a separate trial for the assault charge. *See State v. Sanders*, 66 Wn. App. 878, 885-86, 833 P.2d 452 (1992). Since the evidence would have been admissible even if the counts had been severed, Ahlstedt cannot show that the trial court would have granted the motion had counsel sought severance. Trial counsel could not have been deficient for failing to bring a motion that would have been denied.

C. Ineffective Assistance of Counsel: Failure to Request Comparability Analysis

We also reject Ahlstedt's argument that counsel failed to request a comparability analysis of Ahlstedt's out-of-state prior felonies to establish that three convictions were not comparable. The State provided a comparability analysis for the three out-of-state 1980 burglary counts used in its offender score calculation. The State agreed that Ahlstedt's 1992 burglary conviction was

not comparable to a Washington felony, so it did not include it.

Where the State provided a comparability analysis on the out-of-state 1980 burglary convictions and otherwise did not use additional burglaries in calculating his offender score, counsel was not deficient for not requesting a comparability analysis. Ahlstedt's ineffective assistance claim fails.

D. Right to Be Present

Ahlstedt's argument that he was denied his right to be present when the trial court failed to notify him that the jury sent questions to the court during deliberations fails because Ahlstedt cites no portion of the record showing that a jury question was sent to the court during deliberations and while our review of the record shows that the jury submitted a note, there is no jury question in the record. Under RAP 10.10(c), a defendant must inform us of the "nature and occurrence of alleged errors," and we are not obligated to search the record in support of claims made in a defendant's SAG. Ahlstedt has not adequately identified the nature and occurrence of this alleged error, nor is the record sufficient, we reject his argument.

E. Challenge to Vehicle Search of Sara Ahlstedt

We reject Ahlstedt's argument that the trial court erroneously failed to suppress certain letters officers seized from Sara Ahlstedt in violation of *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). These letters were obtained when a police officer arrested Sara Ahlstedt for driving with a suspended license and inventoried her personal belongings, including her purse, where the officer found the letters. Sara Ahlstedt claimed that the letters were on the passenger seat of the car when she was arrested, but the officer placed the letters in her purse and brought the purse with Sara Ahlstedt to jail. Ahlstedt did not seek suppression of the evidence at

trial.

Under *Gant*, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556 U.S. at 351. The general rule is that a party must raise an issue at trial to preserve it on appeal, unless the party can show the presence of a "'manifest error affecting a constitutional right.'" RAP 2.5(a)(3); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). We first determine whether the alleged error is truly constitutional. *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). Ahlstedt alleges that the State violated his right to privacy under either the Fourth Amendment or article I, section 7, which is constitutional in nature.

Second, we determine whether the alleged error is "manifest." *Kirkpatrick*, 160 Wn.2d at 880. For an error to be "manifest," the defendant must show that the asserted error had practical and identifiable consequences. *State v. Grimes*, 165 Wn. App. 172, 186, 267 P.3d 454 (2011). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). "'If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.'" *O'Hara*, 167 Wn.2d at 99 (quoting *McFarland*, 127 Wn.2d at 333).

Here, Ahlstedt cannot show a manifest error because he did not move to suppress the evidence before trial. Sara Ahlstedt's location during the alleged search is indiscernible from the record because the record was not developed during a suppression hearing. Without certainty

that Sara Ahlstedt was secured before the search, and, thus, did not pose a threat to the officers or the destruction of evidence, we cannot fairly decide whether the search of the car incident to arrest violated article 1, section 7 or the Fourth Amendment. The State did not have an opportunity to fully develop the record and show how the warrantless search was lawful. The record does not indicate whether the trial court would have granted the motion, and Ahlstedt thus cannot show prejudice.[5] *State v. Fenwick*, 164 Wn. App. 392, 405, 264 P.3d 284 (2011), *review denied*, 173 Wn.2d 1021 (2012); *McFarland*, 127 Wn.2d at 334. We hold that Ahlstedt cannot raise the suppression issue for the first time on appeal. RAP 2.5(a).

F. Ineffective Assistance of Counsel: Failure to Suppress Letter Evidence

Finally, we reject Ahlstedt's argument that counsel was ineffective for failing to seek suppression of the letter that he alleges was illegally seized. He contends that counsel provided bad advice and that, after the verdict, jury members indicated that they convicted Ahlstedt because of the letter. First, the record does not support Ahlstedt's contentions. Ahlstedt's descriptions of conversations between himself and counsel are outside the record and we may not consider them. *See* RAP 9.1. Second, statements jurors make to attorneys about the evidence they relied on to convict after the trial concludes are outside the record. Third, Ahlstedt refers in

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[5]We note that had Ahlstedt sought suppression of the letters, it is unclear whether he would have had standing to do so. When a defendant seeks to suppress evidence on privacy grounds and the State contests the defendant's standing, the defendant has the burden to establish that the search violated his own privacy rights. *State v. Cardenas*, 146 Wn.2d 400, 404, 47 P.3d 127, 57 P.3d 1156 (2002); *State v. Jacobs*, 101 Wn. App. 80, 87, 2 P.3d 974 (2000). A claimant who has a legitimate expectation of privacy in the invaded place has standing to claim a privacy violation. *Jacobs*, 101 Wn. App. at 87. A two-part inquiry resolves a question of standing: (1) did the claimant manifest a subjective expectation of privacy in the object of the challenged search; and (2) does society recognize the expectation as reasonable? *Jacobs*, 101 Wn. App. at 87. We cannot tell from the record whether Ahlstedt owned the vehicle allegedly searched and therefore may have had standing to challenge the search.

his SAG to a motion in limine filed June 15, 2010, which has not been designated on appeal nor is it part of the record. Finally, even if Ahlstedt's counsel had objected to the admission of the evidence, he cannot show that the trial's outcome would have differed since we are unable to evaluate whether the evidence would have been suppressed.

Since we affirm Ahlstedt's convictions and sentence, we need not address the State's argument on cross-appeal. *See* RAP 2.4(a); *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 259, 139 P.3d 1131 (2006).

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.

Penoyar, J.

We concur:

Armstrong, J.

Johanson, A.C.J.