IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM ROBERT BAILEY, Appellant.	No. 38422-1-II UNPUBLISHED OPINION

Hunt, J. — William Bailey appeals his jury convictions for second degree assault and unlawful imprisonment. He argues that defense counsel rendered ineffective assistance in failing to object to hearsay and propensity testimony from the victim's father, failing to request a limiting instruction for this hearsay and propensity testimony, and failing to object to a detective's vouching for the victim's credibility. Bailey also argues the trial court abused its discretion by (1) allowing this detective to vouch for the victim's credibility and to relate the victim's inadmissible hearsay; and (2) in response to a jury question, instructing them that they could find Bailey not guilty or guilty of only second degree assault, not an inferior degree of assault. Statement of Additional Grounds (SAG).[1] Finally, Bailey argues that cumulative error requires us to reverse his convictions. We affirm.

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[1] RAP 10.10.

FACTS

I. Assault and Unlawful Imprisonment

Rachel Bailey was performing "work crew"[2] as part of her sentence for assaulting her husband William Bailey (Bailey). They had been married for two years, when one afternoon in January 2007, Rachel[3] returned home after work crew, argued with Bailey about Rachel's wanting to spend time with "somebody new" whom she had met. Bailey was jealous and did not want Rachel to spend time with "somebody new."

Rachel left the house to cool off and to smoke a cigarette. Bailey followed her outside. As Rachel walked down the street, Bailey yelled, "Call the cops, call the cops." She told him to stop yelling. Bailey grabbed Rachel around the throat. She could not breathe, her vision dimmed, and she felt as if she were blacking out. Bailey hit Rachel and she stumbled. Bailey grabbed Rachel by her jacket collar and dragged her back to their house. When Rachel fell, Bailey kicked her in the back with his steel-toed boot. When she tried to get up, Rachel twisted her wrist "wrong."

Once inside the house, Bailey pulled Rachel toward their bedroom. Rachel grabbed one side of the bedroom door frame with both hands. Bailey shut the door on her wrist such that Rachel felt that her wrist was broken. Bailey then put Rachel on the bed. When she tried to kick him off her, Bailey punched her shins. When Rachel told Bailey that she wanted to leave, Bailey got off her, left the bedroom, and shut the door behind him, holding it shut from the outside.

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[2] "Work crew" is a monitored program of partial confinement in which offenders perform civic improvement tasks. *See* RCW 9.94A.030(55); RCW 9.94A.725.

[3] For purposes of clarity, we use Rachel Bailey's first name; we intend no disrespect.

Rachel tried to escape through the bedroom window, but her father-in-law, Robert Bailey, prevented her exit by standing in the way. Trapped, Rachel remained in the bedroom, cried for "maybe" an hour and a half, and, after everyone had calmed down, walked out of the bedroom and sat down on the couch in the living room, where Bailey was sitting in his recliner. After everyone went to sleep, when Rachel was sure that she was not going to be chased, she "ran away from the house to stay with a friend." Rachel and Bailey stopped living under the same roof at that time and discontinued contact.

Several days later, Rachel called her father, Arthur Hooper, crying and needing a place to stay. When Rachel arrived at her father's house, she called Vancouver Police Sergeant David Henderson about a fire that had occurred earlier that evening at the home she had shared with Bailey.[4] During their conversation at the police station, Sgt. Henderson observed "heavy bruising . . . several days old" on Rachel's wrist. Another officer, Officer Ross, photographed this bruising, as well as other bruising he observed on Rachel's back. Rachel also exhibited a scrape on the middle of her right forearm. Rachel indicated that she had received the injuries during her altercation with Bailey. Sgt. Henderson asked Detective Boswell, with the Vancouver police domestic violence unit, to follow up on Rachel's assault by her husband. Det. Boswell then interviewed Rachel and photographed her bruises.

Within twenty-four hours of interviewing Rachel, Sgt. Henderson contacted Bailey at the local inn where he had been staying since the house fire. Bailey appeared "somewhat intoxicated" and drank alcohol during the meeting. When questioned about the day of the assault, Bailed

[4] Rachel had learned from her mother that at some point after Rachel left the house, it looked like it was on fire.

admitted that Rachel "had gotten out of control" and that he had "dragged her in [to the house] while he was yelling for the police." Bailey never in fact called 911 that day. When asked whether he had assaulted Rachel, Bailey replied that he had not. When asked about Rachel's bruises, Bailey said that Rachel had "slammed her own wrist into the wall to make it look like he had assaulted her."[5]

II. Procedure

The State charged Bailey with one count of assault in the second degree, by strangulation, and one count of unlawful imprisonment. The case proceeded to a jury trial.

A. Arthur Hooper's Testimony

During the State's direct examination of Hooper, the following exchange occurred:

> STATE: [H]ad [Rachel] ever tried to leave [Bailey] prior to this occasion?
> HOOPER: Yes, many times.
> Q: Did you—were there other occasions where you witnessed your daughter with injuries?
> A: I've seen bruises off and on when [Rachel has] come over to the house *and said that they were received from Bailey. Most of it was from him kicking her while in bed.*
> Q: Okay.

Report of Proceedings (RP) at 47-48 (emphasis added). Bailey did not object.

B. Rachel's Testimony

Rachel testified about how she had sustained her wrist injury during the altercation with Bailey. She described that Bailey had "twisted her wrist wrong" as she tried to get up after falling down; then he had "slammed [the bedroom door] on [her] wrist" as she held onto the door frame. She also testified that Bailey had "chased [her] down the street," RP at 55; "grabbed [her] around

[5] The record on appeal does not indicate whether the police eventually arrested Bailey and, if so, the date and circumstances.

the throat. . .so tight [that she] couldn't breath," causing her to "black out," RP at 55; "picked [her] up by [her] jacket collar and . . . dragg[ed] [her]," RP at 55-56; and "kicked [her] with his shoe in the back" with steel-toed boots, RP at 56. Rachel further testified about the pictures of her injuries the police took during their investigation.

Rachel admitted to having signed a false written statement about the assault that Bailey's sister Patricia Totten had prepared. Rachel had agreed to sign the document in return for an automobile that Bailey and Totten's family had apparently promised to give her. In this false statement, notarized at a bank, Rachel claimed that she had lied[6] about the altercation with Bailey. Rachel later testified at trial, however, that in fact she did not lie to police about the incident.

C. Det. Boswell's Testimony

During the State's direct examination of Det. Boswell, the following exchanges occurred.

1. Rachel's description of her injuries

> STATE: I have what's been marked Plaintiff's Identification 1. Can you identify that picture for me.
> DET. BOSWELL: That is a picture of Rachel's right wrist and arm, with a scrape, laceration on her—about the middle of her forearm.
> Q: *Okay. And did [Rachel] indicate to you how she received that scrape?*
> A: *Yes. She said this—this occurred during the assault. She wasn't exactly sure at what point she sustained that injury.*

RP at 111 (emphasis added). Bailey did not object.

> STATE: Plaintiff's identification No. 2. What's that a picture—well, I'm actually going to hold that aside.
> Plaintiff's identification No. 3. What's that a picture of?
> DET. BOSWELL: That's a closer picture of Rachel's—the inside, if you will, of Rachel's right wrist, showing a reddened area.

[6] The record before us does not say to whom Rachel had lied. Nor does the record include a copy of this statement.

> Q: Okay. And did she indicate how she had received that injury?
> A: Yes, she did
> MR. DUNKERLY:[7] *Objection, hearsay.*
> STATE: Okay.
> THE COURT: (Pause.) The question again.
> STATE: Did—well, *it didn't call for hearsay yet.*
> Q: But did – did - did she indicate –
> MR. DUNKERLY: *But it will.*
> Q: Did [Rachel] indicate how she received the injury?
> A: Yes.
> Q: *Okay. And was it part of the altercation*?
> A: Yes.
> MR. DUNKERLY: *Objection, Your Honor, it's hearsay.*
> THE COURT: All right, I'll permit that.[8]

RP at 112-13 (emphasis added).

> DET. BOSWELL: That's a picture of a scrape or laceration on Rachel's back.
> STATE: Okay. And does it look the same if not similar as the day that you took it?
> A: Yes.
> Q: And did she indicate that that had happened during the altercation?
> A: Yes.

RP at 115-16. Bailey did not object.

> STATE: Okay. And what were you trying to capture there?
> DET. BOSWELL: Three noticeable bruises on the front of [Rachel's] shin.
> Q: Okay. And did she indicate how she'd received those bruises?
> A: She did.
> MR. DUNKERLY: *Objection again, hearsay.*
> THE COURT: She can answer that.
> Q: I think you did, yeah, your answer was yes?
> A: Yes.
> Q: *Okay. And that was received during the altercation*?
> A: *Yes*.

RP at 117 (emphasis added).

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[7] Edward Dunkerly represented Bailey at trial.

[8] The trial court did not explain its ruling on the record.

2. Consistency of Rachel's statements

> STATE: *Okay.* And is that—is that what you—what you were trying to capture with your camera, *was that consistent with what she said occurred*?
> DET. BOSWELL: *Ye*s.
> Q: *Okay. The injury was consistent with what she had said occurred*?
> A: *Yes*.

RP at 115 (emphasis added). Bailey did not object.

> STATE: And all of these injuries that you tried to capture, did the—were—was—were they *consistent with the—what [Rachel] had explained happened*?
> MR. DUNKERLY: *Objection, sufficiency of foundation.*
> THE COURT: Excuse me?
> MR. DUNKERLY: Sufficiency of the foundation. This requires some sort of expertise that the officer may be lacking.
> THE COURT: You may answer.
> DET. BOSWELL: *Yes, they were consistent with what she reported*.

RP 118-19 (emphasis added).[9]

D. Jury

The trial court instructed the jury on the offenses of assault in the second degree, by strangulation, and unlawful imprisonment. The trial court did not instruct the jury on any inferior degree assaults. The jury found Bailey guilty, as charged, of assault in the second degree by strangulation and unlawful imprisonment.

Bailey appeals.

[9] Bailey did not present a defense case.

ANALYSIS

I. Effective Assistance of Counsel

Bailey argues that his trial counsel rendered ineffective assistance on several grounds. None of these grounds persuade us to reverse.

A. Standard of Review

To prove ineffective assistance of counsel, Bailey must show that (1) counsel's performance was deficient, and (2) this deficient performance prejudiced him. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996)); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re the Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We give great judicial deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting Hendrickson*, 129 Wn.2d at 77-78).

B. Failure to Object To Hearsay and Propensity Testimony and To Request Limiting Instruction

Bailey first argues defense counsel was ineffective in failing to object to the hearsay and propensity testimony of Hooper, Rachel's father, and in failing to request a limiting instruction in

connection with Hooper's testimony about having seen bruises on Rachel when she had come over to his house and that she had received these bruises from Bailey, mostly from his kicking her while in bed. These arguments fail.

At the outset we note that the State's initial question to Hooper—about *whether* Rachel had told him how she had been injured—did not call for hearsay or propensity testimony.[10] Thus, it did not merit an objection, and failure to object cannot constitute ineffective assistance of counsel.

But Hooper's hearsay answer to this question—that Rachel said Bailey had kicked her and caused her bruises—was non-responsive to the State's question. Bailey argues that counsel's failure to object to this hearsay answer or to request a limiting instruction also constituted ineffective assistance. We agree that the answer was hearsay but we disagree with Bailey's characterization of counsel's silence. "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions," and, therefore, cannot form the basis of an ineffective assistance claim.[11] *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).

We presume that defense counsel's failure to object was a legitimate trial strategy or

[10] Defense counsel would, however, have been justified in objecting if the State had asked Hooper what Rachel said about *who or what* caused her bruises.

[11] Although "in egregious circumstances, on testimony central to the State's case . . . , failure to object [can] constitute incompetence of counsel justifying reversal," *Johnston*, 143 Wn. App. at 19 (quoting *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)), such is not the case here because the State proved its case primarily on Rachel's live testimony on the witness stand, not by her hearsay statements to others.

tactic. *Id*. at 21. We similarly presume a failure to request a limiting instruction to have been a tactical decision "[to avoid] reemphasiz[ing] damaging evidence." *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Bailey has not borne his burden of "demonstrat[ing] an absence of legitimate strategy or tactics in failing to object" or in failing to request a limiting instruction. *Johnston*, 143 Wn. App at 21; *Barragan*, 102 Wn. App. at 762. And because "[d]eficient performance is not shown by matters that go to trial strategy or tactics," *Cienfuegos*, 144 Wn.2d at 227 (*quoting Hendrickson*, 129 Wn.2d at 77-78, Bailey fails to establish ineffective assistance of counsel.

C. Failure to Object to "Vouching" Testimony

Bailey next argues that counsel was ineffective in failing to object to what he characterizes as Det. Boswell's "vouching" testimony—that the photos he (Det. Boswell) took of Rachel's injuries were "consistent with what she said occurred," and "consistent with what she reported." But Det. Boswell offered no opinion about Rachel's truthfulness or credibility. On the contrary, he testified about Rachel's visible injuries during his investigation. Because there was no "vouching," there was no cause for defense counsel to object on this ground.[12] Therefore, Bailey has again failed to establish ineffective assistance of counsel.

II. No Abuse of Trial Court Discretion

Bailey next argues that the trial court abused its discretion in admitting various testimony into evidence. These arguments also fail.

A. Standard of Review

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[12] Even if Det. Boswell's testimony could be construed as "vouching," as we held in the above section of this Analysis, Bailey does not meet his burden of establishing that defense counsel's failure to object was not a strategic or tactical decision. *Johnston*, 143 Wn. App. at 19.

We review a trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (*quoting Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983). We find no abuse here.

B. "Vouching"

Bailey first argues that the trial court abused its discretion by allowing Det. Boswell to "vouch" for Rachel's credibility. Specifically, Bailey points to two instances of alleged "vouching."

> STATE: Okay. And is that—is that what you—*what you were trying to capture with your camera, was that consistent with what she said occurred*?
> DET. BOSWELL: *Yes*.
> Q: *Okay. The injury was consistent with what she had said occurred*?
> A: *Yes*.

RP at 115 (emphasis added). Bailey did not object.

> STATE: And all of these injuries that you tried to capture, did the—were—was—*were they consistent with the—what [Rachel] had explained happened?*
> MR. DUNKERLY: *Objection, sufficiency of foundation.*
> THE COURT: Excuse me?
> MR. DUNKERLY: Sufficiency of the foundation. This requires some sort of expertise that the officer may be lacking.
> THE COURT: You may answer.
> DET. BOSWELL: *Yes, they were consistent with what she reported*.

RP 118-19 (emphasis added).

In neither of these instances did Det. Boswell testify or offer an opinion about Rachel's truthfulness or credibility. Det. Boswell simply testified about observations he had made during the investigation. There was no "vouching" for the trial court to have stricken or prevented from the record.

C. Hearsay

Bailey next argues that the trial court abused its discretion by admitting four hearsay portions of Det. Boswell's testimony. None of this testimony is grounds for reversal.

1. No objection

We do not reach Bailey's argument about the first[13] and third[14] portions of Det. Boswell's testimony because Bailey's failure to object at trial, on hearsay grounds, precludes his raising this hearsay challenge for the first time on appeal. "A party cannot appeal a ruling admitting evidence

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[13] The first dialogue that Bailey challenges on appeal went as follows:

> STATE: I have what's been marked Plaintiff's Identification 1. Can you identify that picture for me.
> DET. BOSWELL: That is a picture of Rachel's right wrist and arm, with a scrape, laceration on her—about the middle of her forearm.
> Q: Okay. And did [Rachel] indicate to you how she received that scrape?
> A: *Yes. She said this—this occurred during the assault. She wasn't exactly sure at what point she sustained that injury.*

RP at 111 (emphasis added). Bailey did not object on hearsay or any other ground.

[14] The third dialogue that Bailey challenges on appeal went as follows:

> DET. BOSWELL: That's a picture of a scrape or laceration on Rachel's back.
> STATE: Okay. And does it look the same if not similar as the day that you took it?
> A: Yes.
> Q: *And did she indicate that that had happened during the altercation*?
> A: *Yes*.

RP at 115-16 (emphasis added). Bailey did not object.

unless the party makes a timely and specific objection to the admission of the evidence." *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996) (*citing* ER 103). The failure to object to the admission of evidence at trial or to testimony from State witnesses precludes appellate review. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Therefore, we do not address whether the trial court erred in failing *sua sponte* to strike Det. Boswell's testimony that Rachel told him she had received a scrape on her forearm "during the assault" and "during the altercation."[15]

2. Not hearsay

Bailey mischaracterizes the State's initial question and Det. Boswell's answer in the second portion[16] of the challenged testimony. The State initially asked Det. Boswell only whether

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[15] Nonetheless, we note that this testimony did not name Bailey or anyone else as Rachel's assailant.

[16] The initial question and answer of the second dialogue that Bailey challenges on appeal went as follows:

> STATE: Plaintiff's identification No. 2. What's that a picture—well, I'm actually going to hold that aside. Plaintiff's identification No. 3. What's that a picture of?
> DET. BOSWELL: That's a closer picture of Rachel's—the inside if you will, of Rachel's right wrist, showing a reddened area.
> Q: Okay. *And did she indicate how she had received that injury?*
> A: *Yes, she did*
> MR. DUNKERLY: *Objection, hearsay.*
> MS. BANFIELD: Okay.
> THE COURT: (Pause.) The question again.
> MS. BANFIELD: Did—well, *it didn't call for hearsay yet.*
> Q: But did—did—did she indicate—
> MR. DUNKERLY: *But it will.*
> Q: Did [Rachel] indicate how she received the injury?
> A: Yes.

Rachel had told him how she had received her bruises; and his initial answer related only that she had disclosed the source of her bruises, without identifying that source. Because Boswell's answer did not include an out-of-court statement offered to prove how it had happened that Rachel had gotten bruised, let alone that Bailey had assaulted her, it was not hearsay. ER 801(c). Moreover, Bailey did not object. Accordingly, the trial court did not err in "failing" to strike this initial testimony *sua sponte*.

3. Preserved objections—harmless error

Bailey did, however, object on hearsay grounds both before and after the remaining second[17] portion of Boswell's alleged hearsay testimony and just before the fourth portion.[18]

RP at 112-13 (emphasis added).

[17] The remainder of the second dialogue that Bailey challenges on appeal went as follows:

> MR. DUNKERLY: *Objection, hearsay.*
> MS. BANFIELD: Okay.
> THE COURT: (Pause.) The question again.
> MS. BANFIELD: Did—well, *it didn't call for hearsay yet.*
> Q: But did – did - did she indicate –
> MR. DUNKERLY: *But it will.*
> . . . .
> Q: Okay. *And was [the source of Rachel's injury] part of the altercation*?
> A: *Yes.*
> MR. DUNKERLY: *Objection, Your Honor, it's hearsay*.
> THE COURT: All right, I'll permit that.

RP at 112-13 (emphasis added).

[18] The fourth dialogue that Bailey challenges on appeal went as follows:

> STATE: Okay. And what were you trying to capture there?
> DET. BOSWELL: Three noticeable bruises on the front of [Rachel's] shin.
> Q: Okay. And did she indicate how she'd received those bruises?
> A: She did.
> MR. DUNKERLY: *Objection again, hearsay*.
> THE COURT: She can answer that.
> Q: I think you did, yeah, your answer was yes?

Although we consider these hearsay objections preserved for our consideration on appeal,[19] error,[20] if any, was harmless.

It has long been the rule in Washington that an error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Brown v. Spokane County Fire*

A: Yes.
Q: *Okay. And that was received during the altercation*?
A: *Yes*.
RP at 117 (emphasis added).

[19] During the second challenged dialogue (*see* n.10), defense counsel objected on hearsay grounds to the State's question to Det. Boswell about whether Rachel had "indicate[d] how she had received that injury [a reddened area inside her right wrist]." When the State responded that the question "didn't call for hearsay yet," defense counsel again objected, "[B]ut it will" call for hearsay. After Det. Boswell answered "yes" to the non-hearsay question, the State asked a question more likely to elicit hearsay: "And was it [Rachel's injury] part of the altercation?" When Det. Boswell answered, "Yes," defense counsel again objected, "Your Honor, it's hearsay." But the trial court allowed it.

Similarly, during the fourth challenged dialogue (*see* n.11), defense counsel again objected on hearsay grounds to the State's question to Det. Boswell about whether Rachel had "indicate[d] how she'd received those bruises [on the front of her shin]." Again, the trial court allowed Det. Boswell to answer "yes." Although defense counsel did not again object to Det. Boswell's arguably hearsay answer that Rachel had also received this injury "during the altercation," we do not hold that he thereby failed to preserve this error for appeal. This "fourth" challenged dialogue and series of objections occurred shortly after the "second" dialogue, which we discuss above. Defense counsel made it clear to the trial court that he was objecting to hearsay testimony, even going so far as to anticipate that a preliminary State question would ultimately call for a hearsay answer. Under these circumstances, defense counsel could very well have deemed it futile to object again only seconds after his previous objection.

[20] To the extent that Det. Boswell's testimony served to show Rachel's prior consistent statement and to rebut Bailey's cross examination challenge to her credibility on the witness stand, this testimony was not hearsay because it was not offered "to prove the truth of the matter asserted." ER 801(c); ER 801(d)(1)(ii). Consistent with his approach on cross examination, Bailey also attacked Rachel's credibility in closing argument. Although we can affirm the trial court on any alternative ground, *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986), we do not do so here because the record does not indicate that the State argued this ground to counter Bailey's hearsay objection.

Protection Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (*citing Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)). And error is not prejudicial unless "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred."[21] *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (*citing State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

Even if hearsay, Det. Boswell's testimony about the source of Rachel's injuries—Rachel's altercation with Bailey—constitutes harmless error because Rachel had already testified and was subject to cross examination about her wrist injury that resulted from the altercation with Bailey, and about the photographs of her injuries that the police took during the investigation. Not only was Det. Boswell's allegedly hearsay testimony of minor significance relative to the record as a whole, but also, within reasonable probabilities, the outcome of the trial would not have been materially different had the jury not heard this testimony. Thus, its admission into evidence was not reversible error.

III. Jury Instruction: Second Degree Assault or Nothing

In his SAG,[22] Bailey argues that the trial court erred by instructing the jury it must convict him of assault in the second degree or nothing: "The jury asked if they could convict me of a lesser charge, like Assault 4, but was instructed that this was not an option and that they had to convict me of Assault 2 or nothing." This argument appears to relate to the second of two

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[21] Additionally, "[t]he improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (*citing Ngiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)).

[22] RAP 10.10.

questions the jury transmitted to the trial court during their deliberations, when the jury asked, "Can assault in the 2nd degree be anything other than strangulation?"

First, Bailey mischaracterizes the jury's question; the jury did not inquire about an inferior charge as a possible conviction. Second, the trial court properly answered the jury's question, "No." Bailey was specifically charged with second degree assault *by strangulation* under RCW 9A.36.021(1)(g). Therefore, as properly noted by the trial court, "Strangulation [was] the only manner by which [the jury could] find [Bailey] guilty." RP at 261. The trial court did not err in so instructing the jury.

IV. No Cumulative Error

Finally, Bailey argues that cumulative error deprived him of a fair trial. This argument also fails.

The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). Instead, the combined errors effectively denied the defendant a fair trial. *Id*. at 673-74. Bailey bears the burden of proving an accumulation of error of sufficient magnitude to require a retrial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Because Bailey has failed to show any individual errors, he has failed to meet his burden of proving cumulative error.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.