IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER FLYNN, Appellant.	No. 39877-0-II UNPUBLISHED OPINION

Hunt, J. — christopher Flynn appeals his jury trial convictions for attempted second degree rape and resisting arrest.[1] He argues that the evidence was insufficient and that his trial counsel provided ineffective assistance in failing to object to certain testimony. We affirm.

FACTS

I. Attempted Rape and Resisting Arrest

After having a few drinks, DR[2] went to Dawson's Tavern on 56th and South Tacoma Way in Tacoma at 10:30 pm on November 29, 2007; there, she had "two or three" more drinks. 4 Verbatim Report of Proceedings (VRP) at 111. Around 1:00 am, Christopher Flynn approached

[1] The jury also convicted Flynn of indecent liberties, but the trial court "conditionally dismissed" that conviction based on double jeopardy concerns. Clerk's Papers (CP) at 135.

[2] It is appropriate to provide some confidentiality in this case. Accordingly, it is hereby ordered that initials will be used in the body of the opinion to identify some parties involved.

and started to talk to DR, who did not know him. DR told Flynn repeatedly that she was "disinterested" and then tried to ignore him. 4 VRP at 112. Flynn continued to talk to DR for about ten minutes, making her uncomfortable.

Randy Smith, a regular patron who had seen DR before, saw Flynn approach DR, who appeared to want to be left alone. Smith heard Flynn "ask[] [DR] a bunch of questions" and offer her a ride home; Smith heard DR respond that she would "rather not be bothered." V VRP at 288-89. Smith approached Flynn, told him that DR "didn't appear she wanted to be bothered," and asked Flynn to leave DR alone. V VRP at 289. Flynn told Smith to "mind [his] own business," and continued to try to talk to DR. V VRP at 289. Smith left DR and Flynn alone because he did not want to get into a fight.

About five minutes later, Smith saw Flynn holding DR under her arms and "pulling her backwards toward [the tavern's] rear door," with DR "stumbling" along. V VRP at 290. A few minutes later, Smith left. As he was driving away, he noticed "two people laying [sic] in the alley," backed up, and drove down the alley to investigate. V VRP at 292. Smith saw DR on her back with Flynn on top of her, between her legs; DR's pants were off, and Flynn's pants were pulled down mid-thigh. Flynn's hands were on DR's arms as if he were "trying to hold her arms back and down," while DR was "[m]oving back and forth," "hollering" and struggling with Flynn like she was "trying to get away." V VRP at 294. Smith told Flynn to get off DR and that he was going to call the police. Flynn told Smith to "[m]ind [his] own f[**]king business." V VRP at 295.

Smith drove away, parked near the alley, and called 911. At about 1:15 am, Tacoma

Police Officers Kenneth P. Smith and Randy Frisbie responded to the dispatcher's "possible rape . . . in progress" and arrived at the scene in less than 30 seconds. 4 VRP at 230. They saw Flynn on top of DR, appearing "like he was having sexual intercourse with her." 4 VRP at 232. DR was naked from the waist down with her legs up in the air, "propped up against a fence area," almost in a sitting position. V VRP at 275. Her "pants and her panties [were] scattered between the bar door and where they were at in the alley." V VRP at 277. Flynn was on his knees between her legs, his hands under her "grabbing her buttocks," and "doing a thrusting motion towards her vagina area." 4 VRP at 232; V VRP at 254. As the officers approached in their patrol car, Flynn looked directly at them and continued to thrust "his hips toward her hips." V VRP at 364. The officers got out of the patrol car, put their spotlight on Flynn and DR, and "ordered" Flynn to get off DR. 4 VRP at 233.

When Flynn stood up, the officers observed that, although his pants were up and belted, his penis was "hanging out of the zipper portion of the pants." 4 VRP at 234. DR remained on the ground as "if she was in a daze, like she was completely out of it," but in a soft voice she said, "[T]hank you," to the officers. 4 VRP at 235. The officers ordered Flynn to face away from them and to put his hands up. Flynn started to comply but then turned towards the officers and reached towards his right waist area. Concerned that Flynn was reaching for a weapon, Officer Smith shot Flynn with a taser, which had little effect. When Flynn moved towards them, the officers "took [Flynn] down to the ground." 4 VRP at 238-39. Though now assisted by Officer Reginald Gutierrez, the three officers were unable to handcuff Flynn until Officer Smith shot him again with the taser.

The officers moved Flynn to a patrol car and read him his *Miranda*[3] rights, which Flynn waived. By then, Flynn was cooperative, but he appeared to be intoxicated or "high," smelled of "intoxicants[,] and . . . spoke with slurred speech." V VRP at 257-58. In Flynn's pocket, Officer Frisbie found a glass pipe similar to pipes used to smoke crack cocaine. Although he did not know DR's name, Flynn told Officer Smith that he was her friend, she had "asked to smoke some crack out of [Flynn's] pipe" and "he told her that he would . . . '[l]et her hit [his] pipe,' . . . for a blow job." V VRP at 253. Flynn claimed that "he went out to the alley and was trying to . . . 'help her up when'" the police arrived. V VRP at 253. When Officer Smith asked Flynn why his penis was out of his pants, Flynn responded that his "'pants never stay up.'" V VRP at 253. When the officers told Flynn that a witness had seen him dragging DR out of the bar, Flynn explained that DR "was so drunk that she fell down and he was helping her back up." V VRP at 253. When Officer Smith asked why he would have sex with someone who was too drunk to walk, Flynn responded, "'Take my DNA. I didn't put it in. She was giving me a blow job. I don't have to rape women. Look at me. I get it for free.'" V VRP at 254.

Meanwhile, Officer Gutierrez approached DR, still half naked, sitting on the ground, "intoxicated and very upset," screaming and crying, and saying she could not "believe the incident had occurred." V VRP at 338-39. She told Officer Gutierrez that she had "told [Flynn] over and over again to stop and he kept continuing, or he continued doing what he was doing and not listening to what she said." V VRP at 346. Female Tacoma Police Officer Shelbie Brown, VI VRP at 477, arrived to assist with DR who was "obviously very cold" and appeared "very scared

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[and] intoxicated." VI VRP at 480. Officer Brown got a blanket for DR.

The City of Tacoma Fire Department transported DR to Tacoma General Hospital, where she was admitted at about 2:27 am; at that time, her blood alcohol level was .385. DR told Officer Brown that (1) she remembered going into the alley where her car was, falling down, and then the "[n]ext thing she knew she had a man on top of her who she didn't know,"[4]; (2) "[i]t was horrible. [She] just wanted him to stop. He was taking advantage of [her]"[5] (3) but she "didn't think" there had been any penetration.[6] Officer Brown observed three small bruises on the "underside of [DR's] right arm" that "looked like little finger tips." VI VRP at 482-83. At 3:30 am, DR's blood alcohol level was .330.

Initially DR refused to see the sexual assault nurse; DR was so anxious that the hospital staff administered an anti-anxiety medication at 4:48 am. Because of DR's level of intoxication, the sexual assault nurse, Janice Agen, waited until after 9:00 am to obtain DR's consent for a sexual assault examination. DR told the nurse that there had been "penal/vaginal penetration" during the incident, 4 VRP at 178, and that she had blacked out "secondary to her alcohol consumption" during the attack. 4 VRP at 179. She described the attack as follows:

> ["]I was walking out to my car near Dawson's Tavern. I had been drinking, and I was kind of out of it. All I remember is being thrown to the ground and some man trying to have sex with me. I kept pushing him off and telling him to stop. That is all that I really remember.["]

4 VRP at 180. During the exam, DR was "angry," "express[ed] anger at the assailant," and

[4] VI VRP at 481.

[5] VI VRP at 483-84.

[6] VI VRP at 483.

wanted to go home, but she was also "cooperative, articulate." 4 VRP at 180. Agen documented a large bruise on the back of DR's right hip but did not see any external injuries to DR's vaginal area, which Agen did not find unusual in that about 80 percent of rape victims do not exhibit such injuries. Although Agen did not so note, DR later noticed bruising on the inside of her legs where Flynn had pushed them apart.

II. Procedure

The State charged Flynn with (1) second degree rape by forcible compulsion (RCW 9A.44.050(1)(a)) or, in the alternative, second degree rape when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated (RCW 9A.44.050(1)(b)); (2) indecent liberties; and (3) resisting arrest.

Flynn moved in limine to prevent the State's witnesses from referring to DR "as the victim in this case." 3 VRP at 86. The trial court ruled:

> I agree, however, that it does have a little bit of a loaded value to it because it suggests that someone . . ., in fact, victimized this lady, and it sort of assumes things that [haven't] been proved yet.
>
> I would ask that people not use the word "victim," but I'm not going to make a motion in limine because I think it's too easy for people to sort of when they commonly speak to readily say it, but it is not preferable. I would say that. I would ask that people try to avoid it at all costs.

3 VRP at 86.

A. State's Witnesses

The State's witnesses testified to the facts set out above. In addition, DR testified that, after having two or three drinks at the bar, she had gone to the restroom to call her father for a ride home because she knew she was too drunk to drive. But Flynn had grabbed her shirt and

pulled her "out back," at which point she became concerned. 4 VRP at 114. Outside, Flynn wanted to have sex with DR, but she was not "interested in him" and just wanted to get to her car. 4 VRP at 115. A few feet from the bar's back door, he let go of her; she somehow ended up on the ground, where she stayed, thinking it was safer. Flynn then stepped in front of her, held her by the back of her head, unzipped his pants, and kept trying to put his penis in her mouth, even though she kept turning her head away, told him "[N]o," to leave her alone and that she wanted to go home. 4 VRP at 117.

Flynn then got DR on her back in the alley, "got a little frustrated," and "tried to take [her] clothes off." 4 VRP at 117. She kept pushing him away, telling him to leave her alone, and kicking him. Flynn "got [her] pants down to about [her] mid thigh, and then he wasn't getting anywhere after that because [she] used [her] pants to prevent him from getting too close to [her]." 4 VRP at 117-18. She bent her knees to keep him from pulling her pants off and used the pants "as a barrier, to prevent him from getting too close." 4 VRP at 118. As DR was trying to "slide back" or to "scoot back" from Flynn, she hit a "guardrail" that prevented her from going any further and Flynn then pulled her pants off. 4 VRP at 118-19, 142. At that point, "Every cop in Tacoma showed up." 4 VRP at 118.

When the State asked DR if Flynn had "penetrated" her, she responded, "Partially. I just wasn't sitting still for it. So, it was kind of hard to do that to somebody that's—you know, I wasn't laying down for it." 4 VRP at 119. DR then testified that the head of Flynn's penis entered her vagina, but she moved. Later, she testified that when she talked to the police, she had not been sure if there had been penetration because, "I was too busy squirming to try to get away.

I wasn't sure." 4 VRP at 146.

DR did not recall telling the hospital personnel that she had blacked out. She believed that she had received the anti-anxiety medication "at the scene," and recalled getting into the ambulance and being at the hospital, but not the ride to the hospital. 4 VRP at 146. DR denied agreeing to any sexual contact, agreeing to sexual contact in exchange for drugs, or doing drugs, explaining that she would not do drugs because her sister had had drug problems, her brother had died of a drug overdose, and she (DR) worked in the medical field and was "drug-tested all of the time." 4 VRP at 121, 122.

When the State then asked, "What kind of impact does this have on you?" 4 VRP at 123. DR responded, "It is not good. I'm changed. I won't be the same. I don't go out at night. I don't trust people. I don't go anywhere by myself. I just wanted it to go away. It is not . . . ." 4 VRP at 123. Defense counsel did not object to the question or the response. On cross-examination, DR testified that her sister had had a cocaine problem but was currently "doing good." 4 VRP at 126. When defense counsel asked DR whether her sister knew Flynn, DR responded, "[S]he said that she had seen him at meetings, but that is not personally." 4 VRP at 126. Defense counsel did not move to strike this response.

B. Defense Witnesses

Flynn did not testify. Heidi Maas, one of two bartenders on duty at Dawson's on the night of the incident, had noticed Flynn talking to DR, a regular customer, but had noticed nothing that concerned her. Flynn did not look like the bar's regular patrons, did not seem to be there for the music or to play darts, and "looked like he was on drugs." VI VRP at 410. Maas did not see DR

leave but thought DR might have left the tavern between 12:00 am and 12:30 am.

Based on DR's medical records and the police reports, Dr. Michael P. Hlastala opined that DR's .385 blood alcohol level about two hours after the incident was "very high," "in the neighborhood of what's called the coma level, or stupor," VI VRP at 428-29, a level at which a person's ability to make decisions will be severely impacted; short and long term memories are affected; and, for an inexperienced drinker, can cause death.[7] DR's blood alcohol levels could have been lower or higher at the time of the incident, depending on whether she had still been absorbing the alcohol she had earlier ingested. Dr. Hlastala opined it was likely that she was in a blackout stage during the evening, which could have affected her memory; during a sensory blackout, a person can still function and walk or speak, but that person is "not perceiving anything" and, in this state, although still conscious, a person's speech would probably be incoherent and "not perceiving." VI VRP at 439-40.

Unable to agree on the second degree rape charge, the jury found Flynn guilty of attempted second degree rape, resisting arrest, and indecent liberties. Flynn appeals.

[7] Generally three to six drinks over a "several-hour-period" would not usually result in a blood alcohol level of .385; but blood alcohol levels depend on many factors such as the drinker's tolerance, drinking experience, size, as well as other individualized factors. VI VRP at 435.

ANALYSIS

I. Sufficient Evidence

Flynn first argues that the evidence was insufficient to support his convictions. We disagree.

A. Standard of Review

When a person convicted of a crime challenges the sufficiency of the evidence, we view the facts and the inferences drawn therefrom in the light most favorable to the State; evidence is sufficient to support a conviction when it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. O'Neal*, 126 Wn. App. 395, 424, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500 (2007); *see also State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). We defer to the fact finder's resolution of such issues as conflicting testimony, witness credibility, and persuasiveness of the evidence. *O'Neal*, 126 Wn. App. at 424.

B. Attempted Second Degree Rape, Alternative Means

The State charged Flynn with two alternative means of committing attempted second degree rape: by "forcible compulsion" or by attempting to engage in sexual intercourse "when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated." Clerk's Papers (CP) at 11; *see also* RCW 9A.44.050(1)(a), (b). The trial court's to-convict instruction advised the jury that it need not be "unanimous as to which of the alternatives . . . have been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP at 78 (Jury instruction 13). "Where a single offense may be committed by alternative means under . . . a statute, unanimity is required as to

guilt for the single crime charged, but not as to the means by which the crime was committed, *so long as substantial evidence supports each alternative means.*" *State v. Williams*, 136 Wn. App. 486, 497-98, 150 P.3d 111 (2007) (emphasis added) (citing *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988)).

Addressing the first alternative, the trial court defined "forcible compulsion" as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped." CP at 75 (Jury instruction 10). Arguing that the evidence was insufficient to show that he used force to overcome DR's resistance, Flynn focuses on: DR's successful attempts to keep him from inserting his penis into her mouth; her apparently successful attempt to keep him from penetrating her vagina with his penis by using her pants to block him; and the jury's inability to find him guilty of a completed second degree rape (suggesting, according to Flynn, that the jury agreed he never penetrated DR's vagina). In short, Flynn argues that, because he was unable to overcome DR's resistance and, therefore, could not complete the rape, the State did not prove he used force sufficient to overcome DR's resistance.[8]

Flynn's argument (1) fails to recognize that because the jury convicted Flynn of *attempted* second degree rape, the State did not have to prove there was penetration or that Flynn succeeded

[8] Flynn also appears to argue that the evidence was not sufficient to establish that he intentionally used force to overcome DR's resistance, based on his contrary view of the facts, which, in essence, would require us to find his statement to Officer Smith credible and to ignore the other substantial evidence. But, as we note above, we must consider the evidence in the light most favorable to the State, and we defer to jury's resolution of conflicting testimonies, witness credibility, and persuasiveness of the evidence. *O'Neal*, 126 Wn. App. at 424. Accordingly, this argument fails.

in overcoming DR's resistance; and (2) ignores other sufficient evidence that established an attempt to engage in sexual intercourse by forcible compulsion. When the officers arrived, they found Flynn in a position that was clearly related to penal/vaginal intercourse with DR. DR testified that she persistently resisted Flynn's physical advances by trying to turn her face away when he attempted to put his penis into her mouth, trying to "scoot" out of his way, and trying to block his access to her with her pants. 4 VRP at 119. Despite these efforts, Flynn persisted until he had removed DR's pants and underwear and had DR in a position in which she was no longer able to move away from him. In addition, Randy Smith testified that he saw Flynn on top of DR in the alley, holding her arms down. This evidence is sufficient to show that Flynn used physical force to overcome DR's resistance.

Addressing the second alternative, Flynn argues that "the State failed to prove beyond a reasonable doubt that [he] took a substantial step toward intentionally committing . . . second degree rape with another person who was incapable of consent by reason of being physically helpless[9] or mentally incapacitated,"[10] focusing on the "inconsistent" evidence about DR's intoxication. Br. of Appellant at 22.

Dr. Hlastala testified that (1) within two hours of the incident, DR's blood alcohol level

[9] The trial court instructed the jury: "Physically helpless means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." CP at 77 (Jury instruction 12).

[10] The trial court instructed the jury: "Mental incapacity is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." CP at 77 (Jury instruction 12).

was .385, a level at which a person may approach unconsciousness and suffers impairment of the ability to make decisions, to understand the consequences of those decisions, and to communicate unwillingness to engage in an act; and (2) although such person might remain conscious and still be able to walk and to speak, her speech would probably be incoherent and her ability to perceive her surroundings would be impaired. Consistent with this testimony, Randy Smith testified that, when he approached DR and Flynn in the alley, DR was "[j]ust kind of like hollering" but not saying anything. V VRP at 294. And when DR arrived at the hospital, she was too intoxicated to provide any history.

Some of DR's testimony suggested that she was sufficiently conscious to understand the nature or consequences of the acts Flynn was suggesting, to refuse Flynn's advances, and to resist some of Flynn's advances. Nevertheless, taking the evidence in the light most favorable to the State, we hold that evidence was sufficient to permit the jury to conclude that DR was impaired such that she was unable to communicate effectively her unwillingness to participate in any sexual act.

We hold, therefore that there was sufficient evidence to support both means of committing attempted second degree rape.

C. Resisting Arrest

Flynn next argues that his resistance occurred before the officers had probable cause to arrest him and, therefore, there is no evidence to support his conviction for resisting arrest. We disagree, even presuming, without deciding, that Flynn is correct—that the officers had to have intended to arrest him or had probable cause to arrest him to support a resisting arrest conviction.

Flynn refused to comply with the officers' order to face away from them and to put his hands up; instead, he turned towards the officers and reached towards his right waist area. At this point, the officers had probable cause to arrest him for obstructing a law enforcement officer under RCW 9A.76.020(1), which does not require obstructing an actual "arrest" based on probable cause; on the contrary, it covers "hinder[ing]" an officer in the "discharge of his or her official duties" in general.[11] In addition to this evidence of Flynn's completed violation of RCW 9A.76.020(1), he repeatedly violated the statute by continuing to struggle with the officers after they forced him to the ground. We hold, therefore, that the evidence was sufficient to support this conviction, too.

II. Effective Assistance of Counsel

Flynn next argues that defense counsel provided ineffective assistance of counsel in failing to object to (1) DR's testimony about how the incident had impacted her life; (2) DR's testimony that her sister, a drug addict, had seen Flynn "at meetings," 4 VRP at 126; and (3) the repeated use of the word "victim" throughout the trial. 4 VRP at 223; V VRP at 259, 266, 275, 369, 376. These arguments also fail.

A. Standard of Review

We start with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, Flynn must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466

[11] RCW 9A.76.020(1) provides:

> A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-36. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. But legitimate trial strategy does not constitute ineffective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *McFarland*, 127 Wn.2d at 335.

B. Impact Testimony

At the end of the State's direct examination, the State asked DR how the incident had affected her life. DR responded, "It is not good. I'm changed. I won't be the same. I don't go out at night. I don't trust people. I don't go anywhere by myself. I just wanted it to go away. It is not . . . ." 4 VRP at 123. Defense counsel did not object.

To the extent that Flynn contends DR's testimony was inadmissible hearsay testimony, he is incorrect. "'Hearsay' is a statement, *other than one made by the declarant while testifying at the trial* or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c) (emphasis added). DR's statement about how the incident had impacted her was not hearsay because it was a statement that she made "while testifying at the trial." ER 801(c).

We also disagree with Flynn's argument that this testimony was irrelevant to whether the rape had occurred and, therefore, inadmissible evidence of DR's state of mind. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state." ER 402. Nevertheless, it is within the trial court's discretion to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Generally, we give deference to the trial court's exercise of its discretion in such evidentiary rulings. *State v. French*, 157 Wn.2d 593, 605, 141 P.3d 54 (2006) (citing *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995)).

Although DR's testimony was not directly relevant to whether Flynn had raped or attempted to rape her, the impact of the incident on her was circumstantial evidence of forcible compulsion—that the sexual contact was not consensual, an issue that Flynn had introduced. Despite its ultimately holding inadmissible expert testimony about rape trauma syndrome, the Washington Supreme Court's opinion in *State v. Black*, supports the admissibility of DR's testimony here about her particular emotional reactions to the attempted rape:

> We do not imply, of course, that evidence of emotional or psychological trauma suffered by a complainant after an alleged rape is inadmissible in a rape prosecution. *The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence.*

109 Wn.2d 336, 349, 745 P.2d 12 (1987) (emphasis added) (victim emotionally distraught and had nightmares).

Citing *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997), Flynn appears to argue that DR's testimony about the traumatic impact of the incident on her was intended to bolster her credibility, which the State was not entitled to present unless her credibility had first been attacked. *Bourgeois*, however, does not support his argument. The *Bourgeois* court held that a witness's testimony about his reluctance to testify was admissible where the State had reasonably anticipated the defense's attack on this witness's credibility during the course of the trial.[12] *Bourgeois*, 133 Wn.2d at 402-03. Similarly here, the State could have reasonably anticipated that Flynn's statements to Officer Smith would place DR's credibility at issue; furthermore, a key component of Flynn's defense was that DR had consented to exchange sex for drugs. Thus, it is unlikely that the trial court would have sustained any defense objection to this testimony. Furthermore, there was independent evidence of DR's extreme emotional state at the hospital immediately after the incident; thus, Flynn cannot show that her trial testimony about the lasting emotional impact of the incident was prejudicial.

C. "Meetings" Testimony

Flynn next argues that defense counsel was ineffective in failing to object to DR's testimony that her sister, who had a drug problem, had told her (DR) that she had seen Flynn "'at meetings.'" Br. of Appellant at 32 (quoting 4 VRP at 126). Although this testimony was hearsay, defense counsel may have had tactical reasons for not objecting, such as not wanting to draw attention to this somewhat innocuous statement, which did not say that the "meetings" were

[12] The *Bourgeois* court held inadmissible only the direct testimonies of other some State witnesses whose credibility had neither been attacked nor was an attack "reasonably anticipate[d]." *Bourgeois*, 133 Wn.2d at 400-01.

drug-related. Such tactical defense strategy does not constitute ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. Furthermore, the statement was not prejudicial because there was ample other evidence that Flynn was involved in drugs: his own statement to Officer Smith that DR had offered to exchange oral sex for some of his drugs, the drug pipe in Flynn's pocket, and Maas's testimony that Flynn "looked like he was on drugs." VI VRP at 410.

D. "Victim" Testimony

In arguing that defense counsel was ineffective in failing to object to "the repeated use of the term 'the victim' and also for using the term himself," Flynn mischaracterizes the record. Br. of Appellant at 32. Contrary to his assertion, the trial court did not grant his motion in limine to preclude the use of the term "victim" at trial. Although the trial court agreed with Flynn that "people" should "not use the word 'victim,'" it expressly refused to grant his motion in limine to prohibit "the State and the police officers" from referring to DR "as the victim in this case" because it thought "it's too easy for people to sort of when they commonly speak to readily say it, but it is not preferable." 3 VRP at 85-86.

When the trial court denied Flynn's motion in limine, Flynn was deemed to have a standing objection such that defense counsel did not need to object again during the trial. *State v. Powell*, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995) (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), and *State v. Brown* 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)). Accordingly, defense counsel's "failure" to object to the use of "victim" at trial was not deficient

performance.[13] We hold that Flynn has failed to establish ineffective assistance of counsel under

[13] Furthermore, even if defense counsel should have objected, Flynn still could not establish ineffective assistance of counsel on this ground. Of the six record citations Flynn provides, only four of the cited pages contain the word "victim." *See* V VRP at 259, 275, 369, 376; *see also* 4 VRP at 223; V VRP at 266. First, Officer Smith used the term "victim" when describing how he and his partners usually complete reports following an investigation. V VRP at 259. Specifically, Officer Smith testified:

> . . . There may be some instances where the driver writes the report, the general portion of the report. I should say specifically the narrative portion of the report and the passenger would still fill in the blank boxes with the suspect's name, victim's name, time of incident.

V VRP at 259. This brief use of the term "victim" in a context not related to the incident was minor, and it would have been a reasonable tactical decision for defense counsel to choose not to bring any extra attention to this misstatement by objecting.

Second, defense counsel asked Officer Smith if he remembered "what clothes the victim was wearing or [DR] was wearing." V VRP at 275. This was a brief use of the objectionable term, and defense counsel immediately corrected himself. Given the evidence in this case, this minor error was clearly not prejudicial.

Third, on direct, Officer Frisbie referred to DR twice as "the victim" when describing what happened after the officers were able to restrain Flynn. V VRP at 369. Specifically, Officer Frisbie testified:

> We called other units to come out, called for—another officer showed up with a blanket and put it over the victim. I remember the victim just saying "thank you" to us, really soft spoken.

V VRP at 369. The State immediately responded, "You mean [DR]?" and Officer Frisbie replied, "[DR]." V VRP at 369. Because the State quickly corrected this testimony and it would have been a reasonable tactical decision for defense counsel to choose not to further emphasize the error by objecting, defense counsel's failure to object here did not amount to ineffective assistance of counsel.

Fourth, while cross-examining Officer Frisbie, defense counsel again referred to DR as "[t]he victim," this time in a statement to which the State objected as an improper question, the trial court sustained the objection:

> Q [Defense Counsel]: The victim in this case testified earlier that the defendant's pants were all the way down to his ankles, he was naked from the waist down and we had another witness testify that his pants were down—
>
> [STATE]: Your Honor, improper question.
>
> THE COURT: Sustained.

V VRP at 376. Again, this misstatement was minor. Additionally, because the State objected to this question and the trial court sustained the objection, we hold that in light of the other evidence in this case there was no reasonable probability that this misstatement affected the outcome of this case.

any of his three theories.

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:

Penoyar, C.J.

Worswick, J.

Finally, even if we were to consider collectively each individual use of the term "victim," given the evidence in this case, the fact one of the misstatements referred to procedural matters and did not refer to DR or the incident, the objections that arguably cured some of these misstatements, and the possibility that the failure to object to some of these individual statements was a tactical decision, we hold that there is no reasonable probability that these minor misstatements affected the outcome of this case and Flynn's ineffective assistance of counsel claim fails.