

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH LYNDEN GALLOWAY,

Appellant.

No. 40484-2-II

UNPUBLISHED OPINION

Hunt, P.J. — Jeremiah Lynden Galloway appeals his jury trial conviction for first degree robbery.¹ He argues that (1) the evidence was insufficient to prove first degree robbery, (2) the prosecutor committed misconduct during closing argument by referring to impeachment evidence as if it were substantive evidence, and (3) defense counsel was ineffective in failing to object to this improper argument or to request a curative instruction. We affirm.

FACTS

I. Robbery

Early in the morning of September 5, 2009, after an evening of drinking in downtown Olympia, Eboni Rennie called Thomas Turner for a ride home because she was too drunk to drive. Agreeing, Turner met Rennie near a downtown club. Turner was driving his friend

¹ The jury also convicted Galloway of witness tampering. He does not challenge that conviction on appeal.

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Jeremiah Galloway's car; Galloway was in the front passenger's seat. Rennie asked if they would also give rides to her friend Sara Crain and Crain's acquaintance Timothy Nelson. Turner agreed to drive Crain and Nelson to Crain's house, near the Capitol Mall parking lot where Nelson had left his car. Rennie, Crain, and Nelson got into the backseat, with Nelson seated behind Galloway.

On the way to Crain's house, Galloway and Nelson started to argue. Turner stopped the car, and Galloway and Nelson got into a fight outside. Galloway punched Nelson in the face, knocking him to the ground; Galloway hit Nelson a few more times. Turner, Galloway, and Rennie then drove away, leaving Nelson and Crain behind.

Using Nelson's cellular telephone, Crain called for medical assistance. Within 10 minutes of Turner's driving away, Nelson realized that his wallet was missing. Nelson was transported to the hospital and treated for a fractured nose and minor facial abrasions.

Meanwhile, Turner, Galloway, and Rennie drove to Galloway's sister's house and slept for a few hours. According to Rennie, when Galloway and Turner drove her back to her car later that day, she saw Galloway show Turner an under-21 driver's license and a "reddish and black" "credit card" that appeared to have the activation sticker still on it. Report of Proceedings (RP) Mar. 8, 2010 at 52, 50.

Between 7:30 and 8:00 am that same day, Howard Keck found Nelson's wallet on someone's lawn about three or four blocks east of the Capitol Mall. The wallet contained Nelson's Washington Mutual Bank "ATM card" and a business card from the Washington State Employees Credit Union (WSECU). RP Mar. 8, 2010 at 74. A few days later, WSECU helped Keck locate Nelson and return the wallet. Nelson noticed that two items were missing from his

wallet—his driver’s license, which had been issued before he was 21 years old; and his new Wells Fargo “cash card,” which still had the activation sticker on it. RP Mar. 8, 2010 at 21.

II. Procedure

The State charged Galloway with first degree robbery under RCW 9A.56.200(1)(a)(iii). His first jury trial ended in a mistrial when the trial court ruled that Galloway’s misconduct had caused Turner and Rennie to fail to appear to testify. After the mistrial, the State amended the charges to include a witness tampering charge. Galloway pleaded not guilty to both charges, and the case proceeded to a second jury trial.

A. State’s Evidence

1. Nelson

Nelson testified that on the evening of September 4, he had parked his car in the Capitol Mall parking lot in West Olympia and had gone out drinking with friends. By closing time, he was at The Royal Lounge in downtown Olympia and had lost track of his friends. Nelson recognized Crain, with Rennie, and told them that he needed a ride back to his car. The women told him that someone was coming to pick them up and that they planned to go to Crain’s house, which was near Capitol Mall; so he went with them. When Galloway and Turner arrived to pick up Rennie, the two women and Nelson got into the back seat.

As Turner was driving, Rennie told Turner that Nelson had been flirting with her. Nelson became concerned about being in a car with two people “who could be potentially very angry with” him, so he denied having flirted with Rennie even though he had been flirting. RP Mar. 8, 2010 at 15. Nelson testified that after this, “things kind of escalated.” RP Mar. 8, 2010 at 15. Nelson did not recall saying anything to Galloway or referring to Galloway by any derogatory

term, but he did recall Galloway's repeatedly telling him "to shut the F up." RP Mar. 8, 2010 at 15. Concerned for his safety, Nelson tried to open the car door to jump from the moving vehicle, but he was unable to do so because he was still wearing his seatbelt. Turner then pulled over and stopped the car.

Nelson turned to unfasten his seatbelt. When Nelson turned around to get out of the car, Galloway punched him in the nose five to seven times. Nelson "tripped out of the car" and fell to the sidewalk. RP Mar. 8, 2010 at 17. Nelson asserted that he did not fight back and that he did not recall Galloway's saying anything to him. Crain remained with Nelson when Turner drove away, and she called for assistance on his cellular telephone.

Within 10 minutes of Turner's driving away, Nelson noticed that his wallet was missing. Nelson testified that he could not remember very much about what happened after Galloway's first punch. He did not recall Galloway or anyone else reaching into his (Nelson's) pockets to remove the wallet, Galloway's asking for his (Nelson's) wallet, or having thrown the wallet at anyone during or after the altercation. Nelson believed, however, that he and Crain had looked for the wallet and did not find it.

Although there had been no money in the wallet, Nelson testified that it had contained a "Wells Fargo bank card, cash card, [his] ID and [his] Social Security card, . . . [his] Group Health card, [and] some other cards." RP Mar. 8, 2010 at 21. The Wells Fargo card was so new that he had not yet removed the "black and red activation sticker." RP Mar. 8, 2010 at 21. Because he had been under 21 when he got his driver's license, its format was vertical rather than horizontal.

Nelson identified Exhibit 7 as his empty wallet. He testified that someone had found it on the side of the road somewhere in West Olympia and had turned it over to his bank a few days

after the assault. When Nelson got his wallet back, his identification and a “credit card” were missing. RP Mar. 8, 2010 at 24. Nelson did not think that he had left his wallet at The Royal, but he admitted on cross-examination that the day after the assault, he had called The Royal to see if anyone there had found his wallet.

2. Rennie

Rennie testified that, although she had been “highly intoxicated” when Turner and Galloway picked her up and that her memory of what happened during the ride was not very good, she recalled that (1) during the ride, Nelson was gloating that he was “a UFC [Ultimate Fighting Championship] fighter and he was training”; and (2) at some point during the ride, Nelson had tried to open the car door while the car was still moving, though she was not sure why. RP Mar. 8, 2010 at 41. She believed that at one point Nelson may have turned to Crain and said something about not wanting “to get jumped or something” before opening the door. RP Mar. 8, 2010 at 43. She also thought that he may have closed the door after Crain had assured him that he was “fine.” RP Mar. 8, 2010 at 43.

Rennie recalled the car’s stopping, Turner’s telling Nelson three times that he (Nelson) could get out of the car if he was “uncomfortable,” and Nelson’s then opening the car door a second time. RP Mar. 8, 2010 at 43. After Nelson got out of the car, everyone else got out, too. By the time she got out, Nelson was on his back on the ground with his hands or arms covering his face. She did not see anyone hit Nelson, but Turner and Galloway were standing “a couple feet away” from him. RP Mar. 8, 2010 at 59. She also did not see anyone reach into Nelson’s pockets or see Nelson throw his wallet at anyone.

After Crain told Rennie that it was okay for her to leave without her (Crain), Rennie got

back in the car with Turner and Galloway, and they drove to Galloway's sister's house. A few hours later, as Galloway and Turner were driving Rennie back to her car, Rennie saw Galloway showing Turner what "looked like" an under-21 identification card and a "credit card" that was red, yellow, and black and appeared to have a "new activation sticker on it." RP Mar. 8, 2010 at 50, 52. She denied having seen a wallet or anything else belonging to Nelson in the car before Galloway showed Turner the identification and credit card.

3. Crain

Crain testified that on the night of the incident, she and Rennie had been out drinking in downtown Olympia; that she (Crain) had been "[i]ntoxicated" that night; and that she and Rennie had told Nelson he could get a ride with them back to her house, which was near where he had parked his car. RP Mar. 8, 2010 at 82. Crain recalled: (1) everyone talking during the ride, but she was not sure about what; (2) Turner's stopping the car because Nelson wanted to get out, she believed, "[b]ecause of whatever was said"; (3) Nelson and Galloway's getting out of the car and arguing; and (4) Galloway's having hit Nelson several times. RP Mar. 8, 2010 at 87. Crain did not recall Turner or Rennie's getting out of the car, but she did recall that she herself had gotten out of the car and stayed with Nelson after the others left. Crain did not remember seeing Galloway reach into Nelson's pockets or seeing Nelson throw anything at anyone or give anyone his wallet. She also did not remember calling for assistance or helping Nelson look for his wallet.

4. Detective Christopher Johnstone

Olympia Police Detective Christopher Johnstone, testified that he had interviewed Nelson, Crain, Keck, Galloway, and Rennie about the incident. Rennie had told him about a driver's license and a credit card that she had seen a few hours after the incident. Galloway had admitted

that he and Turner had picked up Rennie, Crain, and Nelson, but Galloway had denied there having been a fight. When Johnstone mentioned that a wallet had been taken and told Galloway that he (Johnstone) had information indicating that Galloway had a card from the stolen wallet, Galloway denied having had the card and ended the interview.

5. Turner

Turner² admitted that he had been with Galloway on the night of the assault; that he had been driving Galloway's car; and that he and Galloway had picked up Rennie, Crain, and Nelson. Turner testified that (1) as he drove toward Crain's house, Galloway and Nelson started to argue; (2) although he could not hear everything they said, he thought they were initially arguing about someone "losing something"; (3) when Nelson started talking about being "a fighter," Galloway told him "to shut the F up, you know, be quiet"; and (4) they were almost to Crain's house when Nelson said, "'You shut the f[***] up, nigger,'" and Galloway became angry and told Turner to stop the car. RP Mar. 9, 2010 at 120.

After Turner stopped the car, Galloway told Nelson to get out and walk. Although Nelson initially refused, he got out of the car after Galloway opened the back door. According to Turner, Nelson took a swing at Galloway and Galloway knocked Nelson down with one punch and kicked Nelson, who had continued "swinging and kicking in the air while he was on his back." RP Mar. 9, 2010 at 121. After Turner described this altercation, the State asked, "And then he [Galloway] said, 'Give me what you got?'" RP Mar. 9, 2010 at 121. Turner responded, "No, he didn't say, 'Give me what you got.'" RP Mar. 9, 2010 at 121. Turner then testified that

² Turner was a hostile witness, so the trial court allowed leading questions.

he told Galloway that they should leave.

As Galloway walked back to the car, Turner saw Nelson throw “something that was black that hit [Galloway] in [the] face.” RP Mar. 9, 2010 at 122. Although unsure what it was, Turner testified, “I know for sure it wasn’t a wallet because I never seen [Galloway] pick up anything or make any actions toward grabbing anything.” RP Mar. 9, 2010 at 122. Turner told Galloway that they had to “get out of here,” Galloway and Rennie got back in the car, and they left. RP Mar. 9, 2010 at 123.

Following this testimony, the State attempted to refresh Turner’s memory by showing him the transcript of his interview with Johnstone. After Turner reviewed the transcript, the State asked Turner whether he had told Johnstone that, after Nelson had fallen to the ground, Galloway had said, “Give me what you got.” RP Mar. 9, 2010 at 128. Turner denied having made this statement. The State then directed Turner to the transcript again, asserting that the transcript indicated he had told Johnstone that Galloway had said, “Give me what you got,’ and then [Nelson] made a gesture of his hand, and then I guess [Galloway] came up with his wallet.” RP Mar. 9, 2010 at 128. Turner again denied having made this statement or saying anything about a wallet, asserting that it was Johnstone who had said this was a wallet.

When the State moved to admit the interview transcript, Galloway objected on foundational grounds. The trial court admitted the exhibit but, at Galloway’s request, instructed the jury that the transcript was for impeachment purposes only and that the jury was not to consider it as substantive evidence:

In light of the witness’s testimony that this is his statement but that it doesn’t correctly reflect what he said, I’ve granted the prosecutor’s motion to admit this statement as impeaching of his last statement. Impeaching means it’s contradicting. The written statement that I’ve admitted contradicts what he has

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said on the stand as opposed to substantive evidence, but we'll continue with the examination of this witness and see where that leads us.

RP Mar. 9, 2010 at 131-32.

Turner continued to deny having told Johnstone that Nelson had tossed a "wallet" at Galloway, insisting that he (Turner) had said instead that Nelson had tossed a "black object" at Galloway and that it had not occurred to him (Turner) that this could have been a wallet until Johnstone had said it was a wallet. RP Mar. 9, 2010 at 134-35. In response, the State showed Turner the wallet, which Turner admitted was a "black object." RP Mar. 9, 2010 at 135. Turner also denied Galloway's having an identification card and "credit card" on the day of the assault. RP Mar. 9, 2010 at 135.

On cross examination, Galloway also questioned Turner about his interview with Johnstone:

Q [Defense Counsel]. Now the prosecutor asked you if you had told the detective if [Galloway] said to [Nelson], "Give me what you got." And you said that wasn't what you said.

A. Yeah.

Q. Did you say anything that sounded like that to the detective?

A. Yes, I did.

Q. What did you say?

A. I said, "What you got?" in a fighting manner, but not in a "gimmie what you got" manner. I didn't say that.

Q. But when he said it, you were able to interpret it as show me what you got or give me what you got as far as physical—

A. Yeah, in a fighting manner. As I said, [Galloway] still wanted to fight with the dude and he didn't want it to be over that quick.

Q. Did you ever see—did you ever hear [Galloway] say, "Give me your wallet"?

A. No.

Q. Or "Give me your property"?

A. No.

Q. "Give me money"?

A. No.

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RP Mar. 9, 2010 at 147-48.

6. Johnstone recalled; taped interview played for jury

After Turner left the witness stand, the State recalled Johnstone to testify about Turner's transcribed interview. The trial court again advised the jury that the interview was being admitted for impeachment purposes only and not as substantive evidence. In the recorded interview, the jury heard Turner say that, after Nelson fell to the ground, Galloway approached him and said, "Give me what you got." RP Mar. 9, 2010 at 190. Turner then stated, "And the guy made a gesture of his hand, and then I guess [Galloway] came up with a wallet." RP Mar. 9, 2010 at 190.

The State rested. And the trial court denied Galloway's motion to dismiss the first degree robbery charge for lack of evidence.

B. Galloway's Testimony

Galloway testified that he had started arguing with Nelson in the car after Rennie told Turner that Nelson was flirting with her, and Turner became upset when Nelson denied flirting with Rennie. When Nelson started "going on about how he's a UFC fighter" and his training, Galloway told him to "shut the f[***] up." RP Mar. 9, 2010 at 214. When he (Galloway) asked Crain what was wrong with Nelson, Crain responded that Nelson was "uncomfortable," and Galloway responded that if Nelson felt that way, he could get out of the car. RP Mar. 9, 2010 at 214. Crain assured Galloway that everything was "cool." RP Mar. 9, 2010 at 214. Nelson then started shifting around in his seat and pressing his knees into the back of Galloway's seat. When Galloway asked what he was doing, Nelson responded that he was "looking for something." RP Mar. 9, 2010 at 215. When Galloway told Nelson to stop pressing on the seat, Nelson responded,

“Well, nigger, move your seat up.” RP Mar. 9, 2010 at 216. Angered, Galloway told Turner to stop the car because he wanted to fight Nelson. When Galloway opened Nelson’s door and told him to get out, Nelson refused and told Galloway that he was not getting out until he “[found] what [he was] looking for.” RP Mar. 9, 2010 at 215. After Nelson stepped out of the car, he and Galloway hit each other once before Galloway knocked Nelson down.

Galloway denied (1) having said, “Give me what you’ve got,” to Nelson; (2) having noticed Nelson throw anything at him; or (3) having seen or shown anyone Nelson’s identification or bank card. RP Mar. 9, 2010 at 216.

C. Jury Instructions

Neither party proposed a written limiting jury instruction about Turner’s interview with Johnstone. Nor did the trial court reiterate its earlier oral limiting instruction.

D. Closing Arguments

1. State

In closing, the State argued that Turner’s recorded statement that he had heard Galloway say, “Give me what you got,” was circumstantial evidence of Galloway’s having taken Nelson’s wallet against his will. RP Mar. 9, 2010 at 264-65. Later, after discussing the witness tampering facts, the State argued that this earlier recorded statement contrasted with Turner’s later versions of the events, especially his attempt while testifying at trial to minimize Galloway’s culpability when he (Turner) testified that he saw the wallet tossed to Galloway. Defense counsel did not object to any of the State’s closing argument.

2. Galloway

In closing, defense counsel also mentioned Turner’s “Give me what you got” statement,

arguing that Nelson did not recall Galloway's having made that statement, that it did not happen; and agreeing with the State that Turner was not credible, especially his recorded interview attributing this statement to Galloway.

3. State's rebuttal

In rebuttal, the State argued:

Ladies and gentlemen, [defense counsel] asks you why was it that Mr. Nelson had no notion that the defendant demanded his wallet or took his wallet from his pocket. And I would respond to that by allowing as how perhaps [defense counsel] has never been punched in the nose. You get punched in the nose, maybe some of you ladies and gentlemen have, you get—you take a hit, a hit delivered by a strong young man like this defendant, inflicting the injuries that you saw on Mr. Nelson, you get popped in the nose that hard, driven to the ground, you're stunned. You're seeing stars. You're down. You're disoriented. Especially if you've got a load on of drink like Mr. Nelson. *You take that amount of booze and you take a pop to the face and a few more batters to the head, you're not going to remember a demand, "Give me what you got," and you're not going to feel your wallet getting taken out of your pocket or wherever it was.* That is certainly understandable.

RP Mar. 9, 2010 at 283-84 (emphasis added). Defense counsel did not object to any rebuttal argument.

E. Verdict

The jury found Galloway guilty of first degree robbery and tampering with a witness. Galloway appeals only his first degree robbery conviction.

ANALYSIS

I. Sufficient Evidence

Emphasizing that the trial court admitted Turner's prior statement solely as impeachment evidence, Galloway argues that the State failed to present sufficient other evidence to prove that he took Nelson's wallet. RCW 9A.56.190 provides in part:

A person commits robbery when he or she *unlawfully takes* personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

(Emphasis added). Galloway's sole sufficiency argument is that there was no evidence beyond the impeachment evidence establishing the "taking personal property" element of robbery.³ The record shows otherwise.

When reviewing a sufficiency challenge, we consider the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). We consider circumstantial evidence to be as probative as direct evidence. *State v. Vermillion*, 66 Wn. App. 332, 342, 832 P.2d 95 (1992), *review denied*, 120 Wn.2d 1030 (1993). And we defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses. *State v. Boot*, 89 Wn. App. 780, 791, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998).

Even in the absence of Turner's "Give me what you got" statement, there was sufficient other evidence to support Galloway's robbery conviction: (1) Galloway punched Nelson, knocking him to the ground; (2) after knocking Nelson to the ground, Galloway yelled, "What you got," at Nelson; (3) Nelson then threw his wallet at Galloway; and (4) the next day Galloway

³ Galloway seems to assert that Keck's finding the wallet containing a Washington Mutual ATM card before Galloway apparently showed Turner the bank card later in the day undermines Rennie's testimony that this later event in fact took place. *See* Br. of Appellant at 9-10. This argument is not relevant to our sufficiency analysis because it overlooks Nelson's uncontroverted testimony that it was his new Wells Fargo bank card with the activation sticker still on it that was missing, not his Washington Mutual ATM card.

was in possession of Nelson's missing Wells Fargo bank card with the activation sticker on it and Nelson's under-21 driver's license. RP Mar. 9, 2010 at 148. Moreover, although the statement, "What you got," could be interpreted many ways, taking that statement in the light most favorable to the State, a rational trier of fact could have concluded that Galloway intended this statement to be a demand, which Nelson so interpreted and which prompted him to throw his wallet to Galloway. Accordingly, we hold that the evidence was sufficient to establish that Galloway took Nelson's wallet.

II. Prosecutorial Misconduct Waived; Not Prejudicial

Galloway next argues that the prosecutor's repeated closing argument use of Turner's "Give me what you got" statement as substantive evidence was flagrant and ill-intentioned misconduct that could not have been cured by a proper objection and curative instruction. We disagree.

Where, as here, defense counsel did not object to the alleged prosecutorial misconduct, the defendant bears an extra burden on appeal. In addition to showing that the misconduct was both improper and prejudicial,⁴ he must show that it was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" incurable by a jury instruction or else we deem him to have waived the issue for appeal. *State v. Gregory*, 158 Wn.2d 759, 841, 858, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998)). Galloway fails to meet these burdens.

First, we agree that it was improper for the prosecutor to use as substantive evidence a

⁴ See *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)).

statement that the trial court had ruled admissible only as impeachment evidence. Nevertheless, a timely objection and a proper instruction could have cured this error. Had defense counsel objected to the prosecutor's first improper use of Turner's "Give me what you got" statement, the trial court could have reminded the jury that it could not consider this statement as substantive evidence and cautioned the State not to repeat this error. Thus, Galloway does not meet the heightened burden required for our consideration of this issue that he did not preserve below.

Second, this error was not prejudicial because another version of this statement came in as substantive evidence of Galloway's taking Nelson's wallet. At trial, Turner admitted that he had heard Galloway yell, "What you got," at Nelson after knocking him to the ground. RP Mar. 9, 2010 at 148. That phrase differed only slightly from the phrase Turner apparently used in his interview with Johnstone, "Give me what you got." Nelson and others could have easily interpreted the two similar phrases in the same way. Thus, Turner's testimony on the witness stand tended to offset the prosecutor's improper use of the similar phrase during closing argument.

We hold that Galloway fails to show that the prosecutor's improper use of Turner's "Give me what you got" statement as substantive evidence could not have been cured by a timely objection and a proper curative instruction and that Galloway does not establish prejudice. Therefore, his prosecutorial misconduct argument fails.

III. No Ineffective Assistance of Counsel

Galloway next argues that, if the prosecutor's argument did not amount to flagrant and ill-intentioned misconduct warranting appellate review, then his defense counsel rendered ineffective assistance in failing to object to this improper argument. This argument also fails.

To prove ineffective assistance of counsel, Galloway must show both (1) that defense counsel's performance was deficient, and (2) that this deficient performance prejudiced him. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70 (2006). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703 (2009).

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). Galloway "bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (emphasis omitted) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

First, as we discuss above, the prosecutor's misuse of Turner's statement was not prejudicial. Second, defense counsel's closing argument suggested that he might have intentionally failed to object to the prosecutor's inappropriate use of the phrase so that he (defense counsel) could also use this phrase as substantive evidence: For example, defense counsel argued that this phrase was so significant that Nelson and Rennie would have recalled if Galloway had said it and, therefore, Galloway never said to Nelson, "Give me what you got."

Given that Turner testified at trial that Galloway had said, “What you got?” a phrase that Nelson could also have interpreted as a demand, it was arguably a reasonable tactical decision for defense counsel to emphasize that no one else recalled the more inflammatory of the two possible statements. RP Mar. 9, 2010 at 148. As our Supreme Court recently held in *Grier*, we give considerable weight to any “conceivable legitimate tactic explaining counsel’s performance.” 171 Wn.2d at 42 (quoting *Reichenbach*, 153 Wn.2d at 130). Thus, not only does Galloway fail to establish the absence of any conceivable legitimate tactic explaining defense counsel’s failure to object, the record suggests that there was a legitimate reason for not objecting.

Galloway fails to establish that counsel’s lack of objection was not a legitimate tactical decision; moreover, any error in failing to object was not prejudicial. We hold, therefore, that Galloway does not show that his trial counsel rendered ineffective assistance.

Accordingly, 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.

Quinn-Brintnall, J.