IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD A. PLECHNER, Appellant.	No. 40526-1-II ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION IN PART

Appellant Richard A. Plechner has moved for reconsideration of the opinion in this case. After due consideration, we grant the motion and amend the opinion in part as follows.

On pages 9 and 10, we remove Section A of our Statement of Additional Grounds analysis, discussing Plechner's claimed sentencing error and replace it with:

A. *Ineffective Assistance of Counsel*

First, Plechner argues that he received ineffective assistance of counsel at sentencing because his counsel failed to argue his convictions for second degree assault by strangulation and felony harassment based on a threat to kill were the same criminal conduct. We disagree.

We review ineffective assistance of counsel claims de novo. *State v. Brown*, 159 Wn. App. 366, 370, 245 P.3d 776, *review denied*, 171 Wn.2d 1025, 257 P.3d 664. (2011). In asserting an ineffective assistance of counsel claim, a defendant must overcome a strong presumption of effective representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To overcome that presumption, a defendant must show both that (1) his counsel was deficient and (2) his counsel's deficient performance prejudiced the outcome. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness and was not based on a tactical decision. *State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849 (2005). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *Beasley*, 126 Wn. App. at 686. We end our inquiry if a defendant fails to establish either prong of the ineffective assistance of counsel test. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Plechner's counsel below essentially conceded that his convictions were not the same criminal conduct. Specifically, in arguing that the sentencing court should not impose a high-end sentence, Plechner's counsel stated: "[Q]uite frankly, the two offenses here, while probably not the same criminal conduct—as that term is defined—come[] pretty close to being the same criminal conduct." 4 Report of Proceedings (RP) at 565. Thereafter, the sentencing court mentioned that Plechner's current convictions were not based on the same criminal conduct, stating that it included a point in his offender score "for a current [offense] because, they're not [the] same [just] similar." 4 RP at 570.

Based on the circumstances of this case, we begin our analysis by evaluating whether Plechner's counsel's concession that his current offenses were not the same criminal conduct prejudiced him. When a defendant alleges a same criminal conduct error within the context of an ineffective assistance of counsel claim, we analyze prejudice by determining whether the sentencing court would likely have concluded the current offenses were the same criminal conduct if counsel had argued the issue. *See Beasley*, 126 Wn. App. at 686; *see also McFarland*, 127 Wn.2d at 335.

A sentencing court calculates a defendant's offender score by adding the defendant's prior convictions to his or her current offenses. RCW 9.94A.589(1). A sentencing court must count a defendant's current offenses separately in determining his or her offender score unless the sentencing court enters a finding that the current offenses are the same criminal conduct. *State v. Nitsch*, 100 Wn. App. 512, 520-21, 997 P.2d 1000 (2000).

Current offenses constitute the same criminal conduct when two or more crimes (1) require identical criminal intent, (2) occur at the same time and place, and (3) against the same victim. RCW 9.94A.589(1)(a); *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). The State concedes that Plechner committed both his second degree assault and his felony harassment against the same victim, his then-girl friend, and at the same time and place. Thus, the only element at issue is whether Plechner had the same objective criminal intent when he committed his current offenses.

A defendant acts with the same objective criminal intent when he or she commits the crimes simultaneously. *See State v. Wilson*, 136 Wn. App. 596, 614-15, 150 P.3d 144 (2007); *see also State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). But if the defendant commits the two criminal acts sequentially, rather than simultaneously, he or she does not act with the same objective criminal intent. *See State v. Blanks*, 139 Wn. App. 543, 554, 161 P.3d 455 (2007). Where a defendant commits an assault, pauses for a moment, and then makes a statement that forms the basis for a felony harassment conviction, the assault and the felony harassment are distinct acts and are not the same criminal conduct. *See Blanks*, 139 Wn. App. at 554.

Here, Plechner threatened to kill Sherri twice. First, while Plechner had his hands around

Sherri's neck, he told her that he was going to kill her, "put [her] through a chipper and . . . bury [her] six feet under." 2 RP at 174. But then, he removed his hands from her neck and told her that she "better get a good attorney or [he would] kill [her] and bury [her] at Hanks Lake." 2 RP at 189-90. Thus, as in *Blanks*, Plechner committed an assault by strangling Sherri, then he removed his hands and paused for a moment, and then he threatened to kill Sherri sometime in the future. 139 Wn. App. at 554. Because the second time Plechner threatened to kill Sherri, he had already removed his hands from her neck, he committed the assault by strangulation and the felony harassment sequentially. Thus, Plechner did not commit his crimes with the same objective criminal intent and, thus, in accordance with *Blanks*, his crimes are not based on the same criminal conduct. 139 Wn. App. at 554.

Because Plechner's crimes were not the same criminal conduct, the sentencing court would not likely have found that they were the same criminal conduct if counsel had argued the issue. *See Beasley*, 126 Wn. App. at 686. Thus, there is not a reasonable probability that the outcome would have differed had Plechner's counsel argued the issue. Accordingly, Plechner fails to establish that he was prejudiced by counsel's failure to argue same criminal conduct. Since Plechner cannot establish prejudice, Plechner's argument fails and we end our inquiry without considering whether counsel's performance was deficient.

We do not amend any other portion of the opinion or the result.

SO ORDERED.

Dated this _____ day of _____, 2012.

_____
Worswick, C.J.

We Concur:

_____
Armstrong, J.

_____
Quinn-Brintnall, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD A. PLECHNER, Appellant.	No. 40526-1-II UNPUBLISHED OPINION

Worswick, A.C.J. — Richard Plechner appeals his convictions for second degree assault and felony harassment, both with special verdicts for domestic violence. He argues that (1) his right to self-representation was violated, (2) the trial court committed evidentiary error under ER 404(b), and (3) the evidence is insufficient to support his felony harassment conviction. He also raises a multitude of issues in a statement of additional grounds (SAG).[1] We affirm.

FACTS

On March 17, 2009, Sherri Wurzbacher went to her sister Gina's home.[2] Sherri and Gina's friend, Shelly Gardner, then left to run an errand. While they were gone, Plechner, Sherri's boyfriend, talked by phone with Gina. Gina told Plechner that Sherri came to Gina's house early that morning to pay back money that Sherri owed to Gina. Plechner told Gina that he believed

[1] RAP 10.10.

[2] Because Sherri Wurzbacher and Gina Wurzbacher share the same last name, we refer to them by their first names, intending no disrespect.

Sherri had taken the money from him. After checking his home, Plechner called Gina again and told her that all of his money was missing. Plechner then went to Gina's house to talk to Sherri.

Plechner arrived at Gina's house before Sherri and Gardner returned. Gina asked Plechner to leave when Sherri and Gardner pulled up in front of the house, but he refused. He also went into the kitchen, telling Gina that he did not want Sherri to see him. Then, as Sherri entered the house, Plechner exited the kitchen and started struggling with her. He immediately accused Sherri of stealing his money. Plechner then grabbed Sherri's throat and told her that he was going to kill her and bury her body at Hanks Lake.

Gina and Gardner called 911, but Plechner left before Shelton Police Officer Christopher Kostad responded. Shelton Police Detective Harry Heldreth arrived later and interviewed Sherri, Gina, and Gardner. Sherri said that Plechner had strangled her, and Detective Heldreth noticed that Sherri's neck was red and appeared to have fresh finger impressions around it. Shortly thereafter, Plechner called Gina, and she allowed Detective Heldreth to speak with him. During his conversation with Detective Heldreth, Plechner denied any knowledge about what happened.

Detective Heldreth took Sherri to the police station to take her statement and to photograph her neck. Later that day, Plechner called Detective Heldreth at the police station. Plechner again denied any knowledge about what happened at Gina's house and stated that "[he] was not even there" that day. 3 Report of Proceedings (RP) at 347-48.

The State charged Plechner with one count of second degree assault by strangulation and one count of felony harassment. Both counts included domestic violence enhancements.

At trial, the court allowed Detective Heldreth to testify that, in an unrelated January 2009 police investigation, Plechner had told him that "the next time somebody steals money from him, he was not gonna call the cops and he was going to take matters into his own hands." 3 RP at 355. Then, near the end of the State's case in chief, Plechner sought to represent himself. He expressed his concern that his attorney was not even trying to defend him and stated that he felt he had no choice but to continue his representation on his own. The trial court engaged in the followng discussion with Plechner:

> COURT: Mr. Plechner, at this point you have gone . . . probably halfway through the jury trial with the use of an attorney. . . . The court would not find that his representation of you has been at all inadequate or incompetent. . . .
>
> You have indicated that you . . . feel you have no choice, which tells me that . . . this is more of an equivocal request to represent yourself. . . .
>
> And I'm concerned [about] allowing you to do that . . . because we're in the middle of trial . . . [a]nd you have not had the opportunity . . . to prepare the case.
>
> . . . .
>
> PLECHNER: Well, if me and [my counsel] could resolve the two [evidentiary] issues I have . . . then maybe we could go on . . . .
>
> COURT: [B]ecause you're not familiar with the rules of evidence . . . . [y]ou could say something in defense of yourself that opens the door to allow the State to get into other evidence that you may not want to entertain.
>
> . . . .
>
> I . . . am really weighing towards not allowing you to represent yourself at this juncture [because I am] hearing that the issues are something that I'm thinking . . . can be resolved and . . . you [and your counsel] can go forward . . . I'm concerned with . . . you being unable to put forward what you want because the [c]ourt finds [it inadmissible]. And [then] you're in a weaker position.
>
> . . . .
>
> PLECHNER: Your Honor, like I said, I feel I have no choice.
>
> . . . .
>
> I'd rather do [an] offer of proof.
>
> . . . .
>
> COURT: [Washington] doesn't allow . . . an attorney to be partly representing and not representing you. . . . [B]ecause we're midstream in trial, I am [going to] deny your request to represent yourself for the reasons I have given.
>
> And . . . you cannot make the offer of proof at this time. . . . Your attorney

> can make an offer of proof for you if he feels he needs to do that, and you also still have . . . the right to testify in your [defense].

3 RP at 290-311. Thus, the trial court denied Plechner's requests to represent himself and to make an offer of proof of the evidence he wanted the trial court to admit. Plechner's attorney believed the evidence was inadmissible and declined to make an offer of proof. Plechner decided not to testify in his defense.

A jury found Plechner guilty as charged. The trial court then sentenced Plechner to a standard range sentence of 80 months on count I and to a standard range sentence of 60 months on count II based on an offender score of nine on both counts with both sentences running concurrently. Plechner now appeals.

ANALYSIS

I. Self-Representation

Plechner first contends that the trial court denied him his constitutional right to represent himself. Although the constitutional right to self-representation is fundamental, it is neither absolute nor self-executing. Wash. Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 819-21, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); *State v. Woods*, 143 Wn.2d 561, 585–86, 23 P.3d 1046 (2001). A defendant's request to proceed pro se must be both timely and unequivocal. *State v. Stenson*, 132 Wn.2d 668, 742, 940 P.2d 1239 (1997) (trial court did not abuse discretion by denying request to proceed pro se based on conditional and equivocal statements). Moreover, a defendant does not have an absolute right to choose any particular advocate, and the desire not to be represented by a

particular attorney does not by itself constitute an unequivocal request for self-representation. *State v. DeWeese*, 117 Wn.2d 369, 375–76, 816 P.2d 1 (1991).

We review a trial court's denial of a request for self-representation for abuse of discretion. *Madsen*, 168 Wn.2d at 504. A trial court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002). The "court's discretion lies along a continuum, corresponding to the timeliness of the request." *Vermillion*, 112 Wn. App. at 855. If the request is made during the trial, "the right to proceed pro se rests largely in the informed discretion of the trial court." *Vermillion*, 112 Wn. App. at 855 (quoting *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)).

Contrary to Plechner's contention, the record clearly supports the trial court's decision to deny his request to represent himself. Following a fairly detailed colloquy, the trial court determined that Plechner's request to represent himself was equivocal and that he could not capably defend himself pro se. The trial court further found that because Plechner made his request midway through trial, he lacked time to prepare his own defense. Because the trial court did not abuse its discretion, Plechner's argument fails.

II. Prejudicial Evidence

Plechner next contends that the trial court erred in admitting part of Detective Heldreth's testimony. He argues that the testimony regarding Plechner taking "matters into his own hands" should have been excluded because it was more prejudicial than probative and was improper ER 404(b) evidence.

"Although relevant, evidence may be excluded 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.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). Nonetheless, if a trial court admits evidence under ER 404(b), it must both identify the purpose for which it is admitting the evidence and determine that the evidence is necessary to prove an element of the crime charged. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

We review the trial court's decision to admit evidence for an abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion when its exercise of that discretion is manifestly unreasonable or based on untenable grounds. *Powell*, 126 Wn.2d at 258.

The evidence at issue here is Detective Heldreth's testimony that two months before the incident involving Sherri, Plechner said that the "next time somebody steals money from him, he was not gonna call the cops and he was going to take matters into his own hands."[3] 3 RP at 355.

[3] Plechner went on to state that "[he would] take the person out and kill them, [so that police would] never find the body. Even if [police found] a blood trail from [his] van to the house, [police would] not find a body because [he would] take it out and bury it [at Hanks Lake]." 3 RP at 282. The State conceded that the relevance of this portion of Plechner's statement was outweighed by its undue prejudice. The trial court bifurcated the statement, admitting under ER 404(b) only the portion of Plechner's statement that he would take matters into his own hands and not call police the next time someone stole from him.

The trial court did not abuse its discretion by allowing the State to introduce this testimony. The State contends this evidence was proper to show Plechner's intent, lack of accident or mistake, and motive when he assaulted and threatened Sherri because he believed she stole money from him. We agree that the trial court's decision to admit this statement for these purposes was neither manifestly unreasonable nor based on untenable grounds nor was it unduly prejudicial.

The improper admission of evidence is harmless error if that evidence is of minor significance to evidence that is, as a whole, overwhelming. *State v. Rodriguez*, 163 Wn. App 215, 233, 259 P.3d 1145 (2011). Even if we were to hold this statement improper under ER 403 or ER 404(b), it certainly was harmless in light of the wealth of other evidence implicating Plechner. Specifically, both Gina and Gardner testified that they witnessed Plechner attack Sherri, Sherri similarly testified that Plechner assaulted her, and Detective Heldreth testified that he noticed Sherri's neck was red and appeared to have finger impressions on it. Based on this other admissible evidence, Detective Heldreth's testimony on Plechner's statement that he would take matters into his own hands was of minor significance in light of the overwhelming evidence against Plechner. Thus, Plechner's argument fails.

III. Sufficient Evidence for Felony Harassment

Plechner next contends that the evidence was insufficient to support his felony harassment conviction. We review challenges to the sufficiency of the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Further, our review draws all reasonable inferences from the evidence in favor of the

State and we strongly interpret such inferences against the defendant. *Hosier*, 157 Wn.2d at 8. A defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it by challenging the sufficiency of the evidence. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). We defer to the fact finder on the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

To convict a defendant of felony harassment based on a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(b); *State v. Mills*, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005). Plechner relies on *State v. C.G.*, to support his argument that threats to kill someone are insufficient to support a felony harassment conviction if the person threatened did not actually fear being killed but only believed that they may be harmed in the future. 150 Wn.2d 604, 607-10, 80 P.3d 594 (2003). In *C.G.*, our Supreme Court found insufficient evidence of such a threat where the juvenile defendant told a school vice-principal that she would kill him, and the vice-principal testified that the defendant's threat caused him concern, not that he actually feared the threat would be carried out. 150 Wn.2d at 610.

Here, Plechner misapplies the *C.G.* decision to the facts of this case. There is significant evidence in the record to support Plechner's conviction, including Sherri's own testimony that Plechner put his hands around her neck and told her that he was going to kill her, along with Sherri's further testimony that she was afraid that Plechner would very possibly carry out that threat. Based on this, Plechner's argument on this point fails.

IV. Statement of Additional Grounds

Plechner also raises a series of issues in his SAG. In addition he also filed an "interlocutory appeal" pro se with the trial court following his conviction. Because such an appeal was procedurally improper, the county clerk forwarded it to us. We consider it as a supplement to his SAG.[4]

A. *Sentencing Error*

First, Plechner contends that the trial court unfairly sentenced him because the court treated felony assault and felony harassment as separate criminal conduct for purposes of sentencing, causing him to receive an extra sentencing point. However, Plechner did not raise this issue at the trial court.

Although a criminal defendant may have the right to challenge an offender score for the first time on appeal, a defendant waives that right by alleging an error based on a factual dispute or trial court discretion. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Where a defendant is charged with more than one crime, the trial court must make both factual and discretionary decisions in determining whether those crimes arose from the same criminal conduct. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). Thus, by failing to raise the issue of same criminal conduct at sentencing, a defendant waives the right to argue that issue on appeal. *State v. Jackson*, 150 Wn. App. 877, 892, 209 P.3d 553 (2009); *In re*

[4] In this supplemental SAG, Plechner raises many of the same arguments as in his other SAG submission. He also relies on factual assertions about matters that are outside the record. We cannot consider matters outside the record on a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition.").

Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007). Plechner failed to raise this issue during sentencing. Plechner's attorney even acknowledged that the felony harassment and felony assault were"probably not the same criminal conduct." 4 RP at 565. Because Plechner implicitly agreed that his offenses were based on separate criminal conduct and because he did not raise this issue below, he waived it on appeal. Thus, his argument fails.

B. *Testifying in Own Defense*

Plechner next contends that he was denied his constitutional right to testify on his own behalf. The United States Supreme Court has recognized that a criminal defendant has a constitutional right to testify on his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). On the federal level, the defendant's right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. *Rock*, 483 U.S. at 51-52. In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution. Wash. Const. art. I, § 22. This right is fundamental, and cannot be abrogated by defense counsel or by the court. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Only the defendant has the authority to decide whether or not to testify. *Thomas*, 128 Wn.2d at 558. Although the defendant does not need to waive the right to testify on the record, such a waiver must be made knowingly, voluntarily, and intelligently. *Thomas*, 128 Wn.2d at 558.

Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify. *State v. Robinson*, 138 Wn.2d 753, 760, 982 P.2d 590 (1999). Instead, defendants must show some "particularity" to give their claims sufficient credibility and show they warrant further

investigation. *Robinson*, 138 Wn.2d at 760 (quoting *Underwood v. Clark*, 939 F.2d 473, 476, (7th Cir. 1991)). In doing so, the defendant must "allege specific facts" and must demonstrate their credibility from the record. *Robinson*, 138 Wn.2d at 760 (quoting *Passos-Paternina v. United States*, 12 F.Supp. 2d 231, 239, (D.P.R. 1998)).

The record shows that Plechner's attorney advised him not to testify in his defense but acknowledged that it was Plechner's case and that he had the right to testify. The record also shows that Plechner decided not to testify after his attorney and the trial court told him nine times that he had the right to testify. Because the record does not show his attorney prevented him from testifying, Plechner has failed to meet his burden because his SAG fails to allege specific, credible facts supporting his argument. Thus, his argument fails.

C. *Detective Heldreth Medical Expert Testimony*

Plechner also argues that at trial Detective Heldreth was allowed to testify as a medical expert regarding his conclusions regarding the strangulation of Sherri. There is no support in the record for this contention. Thus, Plechner's argument fails.

D. *Suppressed Evidence of Victim's Drug Use*

Plechner next contends that the trial court erroneously suppressed evidence of Sherri's supposed prior drug use as irrelevant. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. ER 401. Irrelevant evidence is inadmissible, even if offered by a criminal defendant in his defense. ER 402; *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009); *State v. Maupin*, 128 Wn.2d 918, 925, 913 P.2d 808 (1996). Although criminal defendants have a constitutional right to present

relevant evidence in their defense, this right is not unfettered and the trial court has broad discretion in admitting or refusing to admit evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). We review a trial court's evidentiary rulings for an abuse of discretion. *Powell*, 126 Wn.2d at 258.

Here, the trial court did not allow Plechner to ask Sherri whether she took any "controlled substances" because it found the question too broad and irrelevant. 2 RP at 201, 203-04. Instead, the trial court determined that before inquiring into her drug use, Plechner needed to lay a foundation that Sherri's use of specific drugs affected her credibility. Although Plechner argued that Sherri routinely took OxyContin, Vicodin, and methamphetamine such that her ability to perceive and relate facts could be compromised, Plechner's attorney discussed the issue with Gina and Gardner and did not believe Sherri was under the influence when Plechner met her at Gina's house. Plechner's attorney decided not to pursue questions on Sherri's use of specific drugs based on his conversation with Gina and Gardner. Thus, Plechner's defense did not include any evidence of drug use by Sherri.

Because the trial court found that broad questions on Sherri's general drug use did not affect her credibility, it ruled that such questions were clearly irrelevant. The trial court acted within its sound discretion in ruling that Plechner could not make general inquiries into Sherri's use of controlled substances. Further, the trial court did not actually suppress any evidence of Sherri's use of specific controlled substances because Plechner's trial counsel decided to "drop it." 2 RP at 207. Therefore, Plechner's argument on this point also fails.

E. *CrR 7.8 Hearing*

Plechner further contends that the trial court abused its discretion when it failed to follow "the mandates for [his] requested CrR 7.8 hearing, without conducting a show cause hearing." SAG at 12. CrR 7.8 provides for relief from a judgment or order in case of clerical errors, mistakes, inadvertence, excusable neglect, newly discovered evidence, and fraud, among others. However, CrR 7.8(c) requires that a motion for relief from judgment be made by motion and supported by affidavits stating the grounds for relief and the facts supporting the motion. Further, we do not consider SAG arguments that do not inform us of the nature and occurrence of the alleged error nor are we required to search the record to find support for a defendant's claims. RAP 10.10(c).

Here, the record does not contain either any reference to the grounds for relief or any supporting affidavits as required by CrR 7.8. Indeed, our review of the record produced only one speculative reference to a CrR 7.8 motion when Plechner's attorney at sentencing stated: "I think I would still have the ability, legally, to file, for example, a CrR 7.8 motion . . . ." 4 RP at 561-62. It does not appear to us that Plechner actually made a CrR 7.8 motion below and, thus, his SAG argument on this point fails to inform us of the nature and occurrence of his alleged error as required by RAP 10.10(c). For this reason, we decline to further consider his argument.

F. *Detective Heldreth ER 404(b) Evidence*

Plechner next contends that the trial court erred when it allowed Detective Heldreth to testify regarding Plechner's prior statement that he would take matters into his own hands. Because this issue is addressed on direct appeal by counsel, we do not separately consider Plechner's similar pro se argument. *State v. Johnston,* 100 Wn. App. 126, 132, 996 P.2d 629

(2000).

G. *Prosecutor's Prejudicial Statements*

Plechner also contends that the "prosecutor knowingly [let] the jury hear a [bold-faced lie]." SAG at 21. More specifically, Plechner references a report and Detective Heldreth's testimony stating that about a month after Plechner confronted Sherri at Gina's house, Plechner filed a complaint against Sherri for stealing from him. In order to prevail on this claim, Plechner must show that the State knowingly solicited false testimony. *State v. Lopez*, 142 Wn. App. 341, 355, 174 P.3d 1216 (2007). But Plechner does not show that the State knowingly solicited perjured testimony from Detective Heldreth. Thus, Plechner's argument here fails.

H. *Inferior Degree Offense Instruction*

Plechner next contends that he received ineffective assistance when his counsel failed to request an inferior degree instruction for third degree assault. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee effective assistance of counsel. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 779-80, 863 P.2d 554 (1993); *State v. Sardinia*, 42 Wn. App. 533, 538, 713 P.2d 122 (1986). Denial of effective assistance is manifest error affecting a constitutional right, reviewable for the first time on appeal. *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (1994); RAP 2.5(a). We review ineffective assistance claims de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). In order to show that he received ineffective

assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because both prongs must be met; a failure to show prejudice will end the inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

When the State charges a defendant with an offense that consists of different degrees, the jury may find the defendant guilty of an inferior degree than charged. RCW 10.61.003; RCW 10.61.010. But, a defendant is only entitled to an inferior degree jury instruction if:

> (1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133Wn.2d 885, 891, 948 P.2d 381 (1997)). The third, factual prong requires evidence that affirmatively establishes the defendant's theory that he committed only the inferior degree offense and not the offense charged. *Fernandez-Medina*, 141 Wn.2d at 455.

Here, only the factual prong is at issue. In his SAG, Plechner fails to present any factual evidence. Because Plechner does not show any factual evidence that he committed only third degree assault to the exclusion of second degree assault and fails to cite to the record, we do not further address this argument. RAP 10.3(a)(6); *See Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005). Because Plechner failed to show he was entitled to an inferior degree offense instruction, he failed to show he was prejudiced by not receiving such an instruction. Since Plechner failed to show prejudice, his ineffective assistance of counsel claim

fails.

I. *Prosecutorial Misconduct*

Plechner also raises two additional prosecutorial misconduct "events." SAG at 34, 40. But in both of these instances, it is unclear from the SAG and the record citations to what exactly Plechner is referring. *See* RAP 10.10(c). For these reasons, we do not address these arguments.

J. *"Domestic Violence" Enhancement*

Plechner contends that it was improper for the State to charge the crimes with domestic violence enhancements. But RCW 10.99.020(3) defines "family or household members" for purposes of the domestic violence enhancement to include those who have had a dating relationship. Because Plechner and Sherri were dating, this qualifies and his argument fails.

K. *Bail Pending Appeal*

Plechner also contends that the trial court erred in refusing to set bail pending appeal. But there is no constitutional right to bail pending appeal. *State v. Smith*, 84 Wn.2d 498, 499-500, 527 P.2d 674 (1974). Thus, Plechner's argument fails.

L. *Cumulative Error*

Lastly, Plechner contends that cumulative error denied him his right to a fair trial. The cumulative error doctrine applies when several errors occurred at the trial court that would not merit reversal standing alone, but in aggregate effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Because no errors occurred at trial, Plechner's argument fails. We affirm.

A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

_____
Worswick, A.C.J.

We concur:

_____
Armstrong, J.

_____
Quinn-Brintnall, J.