90596-7

No. 691236-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIAL MONROE,

Petitioner.

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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TABLE OF CONTENTS

Page

I. IDENTITY OF PETITIONER....1

II. CITATION TO COURT OF APPEALS DECISION....1

III. ISSUES PRESENTED FOR REVIEW....1

IV. STATEMENT OF THE CASE....2

V. ARGUMENT

A. The Court of Appeals decision allowing evidence of prior felony convictions should be reviewed because it conflicts with decisions of this court, decisions from the Court of Appeals, and raises questions under applicable constitutional provisions....6

B. The Court of Appeals decision affirming the Trial Court's decision to proceed to verdict without a limiting instruction concerning the cross-examination relating to the Petitioner's juvenile criminal history conflicts with decisions of this court and the court of appeals and should be reviewed....16

VI. CONCLUSION....20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Seattle v. Patu, 108 Wn.App. 364, 377, 30 P.3d 522 (2001).....18

State v. Alexis, 95 Wn. 2d 15, 19, 621 P.2d 1269 (1980).....11, 12, 13

State v. Avendano-Lopez 79 Wn. App. 706, 714, 904 P.2d 324 (1995).....9

State v. Berlin, 133 Wash.2d 541, 544, 947 P.2d 700 (1997).....17

State v. Brush, 32 Wn. App. 450, 451, 648 P.2d 897 (1982).....8

State v. Cunningham 93 Was.2d 823, 831, 613P.2d 1139 (1980).....15

State v Hartzell, 153 Wn.App. 137, 221 P.3d 928 (2009).....11

State v. Johnson, 90 Wash.App. 54, 62, 950 P.2d 981 (1998).....14

State v. Jones, 101 Wn.2d 113, 122, 677 P.2d 131 (1984).....12, 13, 15

State v. Lough, 125 Wn. 2d 847, 863, 889 P.2d 487 (1995).....10, 11, 14

State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).....7

State v. Robtoy, 98 Wash.2d 30, 44, 653 P.2d 284 (1982).....15

State v. Saltarelli, 98 Wash.2d 358, 362, 655 P.2d 697 (1982).....15

State v. Stephens, 93 Wash.2d 186, 191, 607 P.2d 304 (1980).....15

State v. Walker 136 Wn.2d 767, 772, 966 P.2d 883 (1998).....17

U.S. SUPREME COURT CASES

Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).....15

United States v. Gross, 603 F.2d 757 (9th Cir.1979).....13

RULES, STATUTES AND OTHERS

U.S. Const. amend. V.....6

Wash. Const. art. I, §3.....6

RCW 9A.88.070 18

ER 404.....6, 8, 10, 12, 15, 20

ER 403.....10, 14, 21

ER 609.....6, 12, 15,16, 21, 22

I. IDENTITY OF PETITIONER

This Petition for Discretionary Review to the Washington State Supreme Court is made by and on behalf of the Petitioner/Defendant Antonial M. Monroe ("Petitioner").

II. CITATION TO COURT OF APPEALS DECISION

The Petitioner seeks the Supreme Court's review of the decision of the Court of Appeals, Division One, contained in the Unpublished Opinion, dated and filed on June 16, 2014 in the matter of No. 69123-6-I, *State v. Monroe,* denying The Petitioner's Motion for Reconsideration.

III. ISSUES PRESENTED FOR REVIEW

A. Does the court of appeals decision conflict with State v. Jones, 101 Wn.2d 113, 677 P.2d (1984) when it permitted admission into evidence of all prior felony convictions under the "opening the door" doctrine without regard to Jones balancing factors or their bearing on credibility?

B. Does the Court of Appeals decision to admit evidence of all prior felony convictions violate the defendant's right to a fair trial under the Fifth and Fourteenth Amendments to the United States' Constitution as well as Washington Constitution Art. I, Sec. 22?

C. Does the Court of Appeals decision which applies the "open the door" doctrine to allow admission of all prior felony convictions conflict with State v. Ortega, 134 Wa. App. 617, 626, 142 P.3d 175 (2006) when

the testimony of the defendant about what he said at the time of the arrest would have been admissible if offered by the opposing party? See ER 801 (d)(2)(i) and ER 803 (a)(2)

D. Does the court of Appeals decision which applies an abuse of discretion standard to wrongful admission of juvenile convictions; the court's failure to strike or even provide a curative instruction; and holding that admission of this evidence was "harmless" conflict with this court's decision in Jones as well as the Fifth and Fourteenth Amendments to the US Constitution as well as Art. I, Sec. 22 of the Washington constitution?

IV. STATEMENT OF THE CASE

Monroe was charged with Promoting Prostitution in the First Degree. The trial court ruled that only Monroe's crimes of dishonesty could be admitted into evidence if Monroe took the stand. During his direct examination Monroe was asked if was previously convicted for identity theft. He answered affirmatively and confirmed the year in which the conviction took place.

During direct examination, Monroe's trial attorney asked Monroe to explain why he made "obscene" comments when he was being arrested. She asked him if he was just acting up because he didn't know why he was being arrested. Monroe responded that he did not understand why he was being arrested. She followed up by asking him to explain what his

comments were to police at the time of his arrest. Monroe answered by saying that he was yelling to the police that, "I don't do nothing." and "I don't commit crimes". This testimony was within a few minutes of his admission to a previous crime.

Monroe's trial counsel argued that the trial court needed to look at the context of Monroe's statement. First and most fundamentally this statement was not offered for its truth but rather as a factual statement of what was actually said at the time of a rather dramatic arrest. This was certainly not a blanket statement concerning his entire life offered for its truth. Monroe's trial counsel also argued Monroe had already admitted to his identity theft conviction in his testimony and thus the jury would not interpret his statement to mean he has never committed a crime in the past. Nevertheless the trial court ruled that Monroe's statement "opened the door" to allow the Prosecutor to ask Monroe about *all* of his prior adult misdemeanor and felony convictions during cross-examination without either determining these priors showed lack of truthfulness on Monroe's part or weighing the *Jones* factors to determine their prejudicial effect on his right to a fair trial.

The Court did limit his ruling to allow specific questions about felonies and generic questions about all the misdemeanors as a category rather than each specific offense. The Court further stated, and repeated,

that the prosecutor was precluded from asking questions concerning juvenile convictions. RP 702.

Despite the trial court's clear ruling the prosecutor could not make reference to any of Monroe's juvenile convictions, the prosecutor asked Monroe about the following six juvenile convictions: assault, malicious mischief, reckless endangerment, trespass, resisting and obstructing, and harassment.

After the prosecutor asked Monroe about six of his prior juvenile convictions, the trial court recognized that the juvenile convictions were improperly put before the jury. The prosecutor stated he had a misunderstanding despite the record reflecting that he clarified with the trial court that he could not ask about Monroe's juvenile convictions. He had been the one to present the detailed and dated list of offenses to the court. Monroe's trial counsel argued that the court should strike any reference that was made regarding Monroe's juvenile criminal history.

The trial court heard argument from both sides and initially was inclined to rule that the trial court intended to strike the prosecutor's reference to Monroe's juvenile matters because the court recognized this evidence would prejudice Monroe. However, the trial court instead decided to not take any action to remedy the situation. The court read the pattern jury instruction 5.05 that the trial court had already anticipated

reading prior to the Prosecutor's improper questions, which was no remedy at all. Jury instruction 5.05 merely states the general rule applying to *otherwise admissible* evidence of prior criminal convictions: "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose."

This instruction does not address the issue of improper testimony being elicited, nor does it undo the prejudice suffered by Monroe due to his juvenile criminal history being made a part of record. The Petitioner answered many of the prosecutor's inquiries, at least 5 consecutive questions, by stating that the offense occurred while he was a juvenile. The prosecutor continued to push. More specifically and for example, the prosecutor questioned Monroe about his past juvenile conviction for harassment and the following was the exchange that occurred.

"Q. And harassment?
A. As a juvenile.
Q. And harassment means making threats, right?
A. No.
Q. What does harassment mean to your knowledge?
A. Arguing.
Q. You believe your harassment conviction was because you got in an argument with somebody?
A. It was over a bike as a juvenile. Yeah, we were arguing over a bike."

RP 713-714.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review of this matter should be accepted pursuant to RAP 13.4(b) because the Court of Appeals decision conflicts with decisions of the Supreme Court; it conflicts with other decisions of the Court of Appeals; it raises significant questions of law under the Constitutions of the United States and Washington; and presents issues of substantial interest that should be determined by the Supreme Court.

A. The Court of Appeals decision allowing evidence of prior felony convictions should be reviewed because it conflicts with decisions of this court, decisions from the Court of Appeals, and raises questions under applicable constitutional provisions.

The question before the trial court was whether to allow testimony relating to the prior criminal history of the Petitioner. The rules governing the use of prior convictions as evidence are ER 609 and ER 404, yet the appellate court does not cite or rely upon either of them. ER 404 precludes the use of prior convictions to prove action in conformity with prior acts (propensity), while ER 609 allows introduction of such evidence if used for the purposes of impeachment but only when the prior acts involved a crime of dishonesty. But even then admission of such prejudicial evidence must be carefully weighed by the trial court pursuant to *State v. Jones*, 101 Wn.2d at 121, et seq. to guard against undue prejudice. These evidence rules are in place to ensure a fair trial and thus any action taken by the court that defies these rules denies a defendant the right to a fair trial. As

seen in this court's *Jones* decision they closely track the 5th and 14th Amendment's constitutional right to Due Process, as rearticulated in Article 1 Section 3 and 22 of the Washington State Constitution.

Jones held the prospect of the admission of evidence regarding prior criminal convictions if the defendant takes the stand "has a direct effect on a defendant's constitutional right to testify in his own defense." Id. at 124 Moreover improper admission of prior convictions is subject the very strict constitutional harmless error test which requires proof the error is harmless beyond a reasonable doubt. Id. at 125

Rather the court of appeals decision rests entirely on the claimed "opening the door" doctrine pointing to language in *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) that, "A party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence." However, in *Ortega*, unlike here, evidence of a prior conviction was admitted to prove an element of the crime charged. The defendant claimed to have been falsely arrested when he was actually convicted of violation of a protection order which was an element of necessary proof in a felony harassment prosecution. *Id.* Therefore the court admitted evidence of the prior conviction under quite different circumstances than the case at bar. Here, prior to the statement in question, the Petitioner admitted to a

previous crime of dishonesty, described concurrent misconduct by stating that had been driving while having a suspended license. But in *Ortega,* the court ruled only that his statement opened the door to that fact that he pled guilty to the crime he asserted he had been falsely accused of. It did not open the door to his entire previous criminal history. *Id.*

The court of appeals also cited *State v. Brush,* 32 Wa. App. 450, 451, 648 P.2d 897 (1982) to claim regardless of admissibility otherwise; once the door is open prior convictions will be allowed as evidence. However, in *Brush* the defendant presented a long narrative of good character evidence. He and other defense witnesses related his position as a county fire marshal and building inspector, his long history of employment, and his positive community involvement in order to portray him as an upstanding citizen incapable of committing the charged crime. *Id.* at 452. The court further pointed out that the trial court in that case went to commendable lengths in exercising its discretion. *Id.* at 453. Here, no reasonable person could have witnessed the trial or reviewed the record and made a determination that the Petitioner made a substantial effort to portray himself as "pure as the driven snow", which is how the court characterized his statements effect. RP 689. The phrase he uses directly after the statement in question was, "I just—I'm just a fuck boy. I fuck bitches." RP 652. Whether or not that statement rises to the level of

admitting to prior misconduct, it directly factors into whether or not the Petitioner was attempting to portray himself as someone of high moral character. Moreover *Brush*, a 1982 decision, seems to conflict with the subsequently decided *Jones* in 1984. This in and of itself deserves review by the Supreme Court as this Court of Appeals decision seems to hold the "open-door" doctrine trumps the rules of evidence as well as *Jones* when it comes to admitting prior convictions.

The court of appeals cites *State v. Avendano-Lopez* as precedent that the open-door doctrine promotes fairness by preventing one party from bringing up a subject to gain an advantage and then barring the other party from further inquiry. *State v. Avendano-Lopez,* 79 Wn. App. 706, 714, 904 P.2d 324 (1995). The court held the defendant did not open the door because he was not attempting to place his character in issue when he testified. *Id.* at 715. Also, in that case the defendant actually referenced a previous stint in jail and the appeals court still found that he had not opened the door. *Id.* at 714. Here, Monroe stated that he had previously committed identity theft and then stated that he told the police at the time of his arrest that he did not commit crimes. RP 689. He never misstated his criminal history in his direct testimony, he simply truthfully related a statement that he previously made at the time of his arrest. While this may "open the door" to questions about that statement for clarification

purposes; by allowing essentially unfettered questioning into his criminal history the trial court misinterpreted the rule and denied Monroe a fair trial. Whether the "open-door" doctrine trumps ER 609, ER 404, and *Jones* is an important question to be answered by this court on review.

Not only do the cited cases not support the Court of Appeals wholesale admission of prior felony convictions under the "opening the door" pretext, the doctrine is not satisfied by its own terms which requires "A party's introduction of evidence that would be inadmissible if offered by the opposing party..." Slip opinion at 5, Ortega, 134 Wa. App. at 626 This testimony of what was said at the time of arrest could have been introduced by a police officer called by the prosecution. It is not hearsay. ER 801(d)(2), ER 803 (a)(2) The court has no discretion to apply the "opening the door" doctrine to circumstances which do not fit the boundaries of the doctrine. This is plain legal error subject to de novo review as a question of law.

Nor could the prior conviction evidence have been introduced under ER 404. The court has established multiple systems of analysis for determining admissibility under ER 404(b). Both *State v. Alexis* and *State v. Lough* establish tests. In *State v. Lough*, the prior acts are admissible if they, "are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an

element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." *State v. Lough*, 125 Wn. 2d 847, 863, 889 P.2d 487 (1995). In this case the acts are previous convictions and as such the first prong is uncontested. These acts, being previous convictions are unrelated and therefore could not be used to prove a common scheme or an element of the current charge. That does not fulfill the requirements of the second and third prong. The crimes in question provide no probative value to determining the Petitioner's guilt or innocence and as such any prejudicial value would outweigh the probative value. This means the fourth prong is failed as well.

By failing three of the four prongs, the evidence should have been disqualified under any reasonable analysis. The trial court questioned the State about doing an ER 403 analysis. RP 680. The State flatly denied this requirement by citing *Hartzell. State v Hartzell*, 153 Wn.App. 137, 221 P.3d 928 (2009)]. The *Hartzell* court did an ER 404 analysis exactly as above, by citing *Lough. Id.* at 150. The fourth prong of the four-part test is a 403 analysis. Previous acts are clearly, "not admissible to show that a defendant is a "criminal type", and thus is likely to have committed", the presently charged crime. *Lough* at 853.

In *State v. Alexis* the Court actually established a 6-factor test to be used when doing an ER 404 analysis. *State v. Alexis,* 95 Wn. 2d 15, 19,

621 P.2d 1269 (1980). Those factors are, "1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime." *Id.*. The trial court made no reference to any test or analysis. It stated that when the Petitioner made his statement, "it struck [the court] that there was an opening of the door." RP 689. It went on to state that, "Nothing in my consideration over the course of the evening recess or reviewing the quotes and the comments from the cases that have been cited has changed that view. *Id.*

The trial court, with the exception of stating that it believed that none of the previous crimes would elicit an emotional response from the jury, made no mention of any factors, and did not detail its analysis for the record. The appeals court made no mention of the lack of a record. However, in *State v. Jones*, the Supreme Court ruled that the trial court must articulate, for the record, the factors which favor admission or exclusion. *State v. Jones,* 101 Wn.2d 113, 122, 677 P.2d 131 (1984). In that case the Supreme Court found that the trial court's conclusory statement that the, "probative value of the evidence substantially outweighed the prejudicial effect", was not sufficient analysis to justify the admission of prior convictions. *Id.* at 123. Without a record it is

impossible for an appeals court to determine if the trial court effectively exercised its discretion (if there was any to be exercised), therefore failure to create an adequate record constitutes an abuse of discretion. *Id.* The record created by the trial court as described above does not meet the standards of *Jones* and therefore there it was an abuse of discretion to allow the prior convictions as evidence.

Further, the burden is on the State to show that the probative value is greater than the prejudice suffered as a result. *United States v. Gross*, 603 F.2d 757 (9th Cir.1979). As in *Jones, Jones* at 123, here, because of the lack of a record, there is no indication that the State has met its burden. Therefore, there must be a finding that the trial court erred in admitting the Petitioner's prior convictions.

Because the trial court could not permit the testimony under ER 404, the only other rule that allows for such testimony is ER 609. This rule allows for impeachment of a witness using that witnesses prior criminal convictions under specific circumstances. Rule 609 has been used as the means to create the "open-door" rule that allows prior criminal convictions to be used for impeachment purposes once a party alludes to such evidence in a way that may serve to mislead the jury in a manner advantageous to the "door-opening" party. The opposing party may then use such evidence to impeach the witness.

The court uses an abuse of discretion standard when reviewing a trial court's decision to allow cross-examination under the open-door rule. *Lough* at 861. However where the facts fall outside the rule there is simply no discretion to impose an inapplicable rule. At most rule 609 might permit evidence of crimes involving dishonesty. ("...a trial court must bear in mind at all times that the sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant's credibility as a witness. Therefore, prior convictions admitted for the purpose of impeachment must have some relevance to the defendant's ability to tell the truth. Jones, 101 Wn.2d at 118-119. However here the trial court determined the prior convictions at issue had no relation to the defendant's ability to tell the truth. The Court just admitted them contrary to *Jones*, and was it was improperly affirmed by this Court of Appeals decision.

The availability of other means of proof is a factor to consider when deciding whether to exclude prejudicial evidence. *State v. Johnson*, 90 Wash.App. 54, 62, 950 P.2d 981 (1998)(citing ER 403). The State had the ability to bring evidence of all elements of the crime without using the Petitioner's prior convictions. It even had the ability to impeach and clarify any perceived false impression without using his prior convictions (outside his conviction for identity theft). The admission of prior

convictions for impeachment purposes was unnecessary to achieve its stated purpose and prejudicial to the considerations of the jury.

The abuse of discretion standard is applicable if the circumstances fall within the rule; however if they do not the court had no discretion to impose an otherwise inapplicable rule. That is an error of law which must be reviewed de novo. However even assuming abuse of discretion is applicable, it must be accompanied by enough prejudice for the court to conclude that, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham* 93 Was.2d 823, 831, 613P.2d 1139 (1980). The Court uses a non-constitutional harmless error test when considering errors in admitting 'other crimes' evidence under ER 404(b). *State v. Jones*, at 124 (citing *State v. Saltarelli*, 98 Wash.2d 358, 362, 655 P.2d 697 (1982); *State v. Robtoy*, 98 Wash.2d 30, 44, 653 P.2d 284 (1982). Conversely the Court uses the higher "constitutional" harmless error analysis for errors involving admission of evidence under ER 609(a)(1). *State v. Jones,* at 125.

Under the constitutional harmless error analysis, the error must be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *State v. Stephens*, 93 Wash.2d 186, 191, 607 P.2d 304 (1980). The Court uses the

"Overwhelming Evidence Test" to determine if the error was harmless beyond a reasonable doubt. *Id.* Under the "Overwhelming Evidence Test", the appellate court examines the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. Here, the evidence was not so overwhelming that the error can be considered harmless beyond a reasonable doubt.

The State and the court claimed to be worried that the jury would possibly see the Petitioner as "pure as the driven snow". RP 689. The State actually stated that, "This case is all about credibility." RP 692. In this the state was surely correct as this was the classic swearing contest of he said she said. The jury's opinion about the Petitioner's credibility and character were central to the outcome, therefore the abuse of discretion that led to the destruction of that credibility was not harmless error beyond a reasonable doubt, and the Court of Appeals decision applied the wrong standard as a matter of law. This also justified review.

B. The Court of Appeals decision affirming the Trial Court's decision to proceed to verdict without a limiting instruction concerning the cross-examination relating to the Petitioner's juvenile criminal history conflicts with decisions of this court and the court of appeals and should be reviewed.

Rule 609 governed the court's decision whether or not to allow juvenile defenses to be used for impeachment purposes. The Court interpreted it to allow previous adult convictions to be brought into

evidence, but precluded any mention of juvenile offenses. RP 702. When juvenile offenses were repeatedly mentioned in just the way the court forbid, the court contemplated, but ultimately decided against, giving the jury a limiting instruction. Any ruling concerning interpretation of a rule of evidence or the purpose for which testimony can be used must be considered a ruling of law.

"The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo." *State v. Walker* 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (citing *State v. Berlin*, 133 Wash.2d 541, 544, 947 P.2d 700 (1997)). The court believed that it would only further confuse things. As stated above this type of decision is reviewed de novo so it is up to the Court to decide if the decision to refuse to give a limiting instruction was in error without any presumption in favor of the lower court's decision.

The court decided to use the pattern jury instruction 5.05, without any additional limiting instruction. This directed the jury to, "consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose." RP 765. This is no cure to the blatant violation of the Court's previous ruling. The court discusses the possibility that including a limiting instruction may do more harm than good. Allowing the testimony into the record at all was an error, allowing the State to continue

its questioning while repeatedly violating the ruling was worse, making no attempt to correct the record was egregious.

In *Patu* the court explains that "[t]he jury may assume, first, that the person with a criminal record has a 'bad' general character, and deserves to be sent to prison whether or not they in fact committed the crime in question[, and second,] the jury may perceive the prior convictions as proof of the defendant's criminal propensities, making it more likely the defendant committed the crime charged." *City of Seattle v. Patu*, 108 Wn.App. 364, 377, 30 P.3d 522 (2001) (citing *State v. Newton* 109 Wash.2d, 69, 73, 743 P.2d 254 (1987)). The Court goes on to explain that in that case the error was harmless because the record showed that the prosecutor did not argue, "that the conviction made it more likely that Patu was a bad person or that he had a propensity," to engage in an element of the crime. *Patu* at 377.

Here, when the State was questioning the Petitioner about his juvenile harassment conviction, there was a follow up question that went straight to propensity. The question was, "And harassment means making threats, right?" RP 713. One of the elements to Promoting Prostitution in the 1st Degree is, "compelling a person by threat or force to engage in prostitution or profits from prostitution that results from such threat or such force." RP 766, RCW 9A.88.070(1)(a). The trial court had already

ruled questions about juvenile offenses would not be permitted. This question was asked not as the result of a discretionary (albeit erroneous) ruling of the trial court but in violation of the trial court ruling. The trial court thus ruled these questions about juvenile priors were inadmissible yet provided no remedy. This was not and could not be harmless as a matter of law. See *Jones*, supra.

During the rest of the prosecution's cross-examination of the Petitioner, the Petitioner repeatedly had to assert on the stand that certain crimes were juvenile offenses while the State continued its questioning unabated. Defense counsel maintained her objection from the outset, and while not continuously objecting, brought the issue to the court's attention at the next break. There was confusion amongst the court and the attorneys but the only one to suffer was the Petitioner. RP 738-744. His standing with the jury was damaged more than it would have been had the court's ruling been effective. The failure of the court to strike the testimony or at least give a limiting instruction only served to cement the view of the Petitioner as a lifetime criminal in the mind of the jury. If the State was confused it was a very convenient confusion because it helped achieve its goal of painting the Petitioner in a grossly negative light when the impeachment of his previous testimony did not require such all-inclusive testimony.

As discussed above, any ER 404 or ER 609 analysis of whether there was harmless error must consider whether absent the error there was overwhelming evidence to convict and that the error did not cause the conviction beyond a reasonable doubt. Here, the lack of a limiting instruction combined with the introduction of juvenile offenses created an error that was anything but harmless and deserves review.

VI. CONCLUSION

The Court of Appeals decision conflicts with precedent from this court (especially *Jones*), the Court of Appeals, and raises important questions under the state and federal constitutions. The trial was a credibility contest while the defendant's credibility was destroyed by unfairly parading an otherwise irrelevant series of prior convictions. Monroe was denied due process by a Court of Appeals decision which rejected this court's settled law on admission of prior convictions and invented an application of the open-door doctrine out of whole cloth contrary to even Court of Appeal precedent. Review should be granted.

DATED this 16th day of July, 2014.

Respectfully submitted,

Law Office of Corey Evan Parker

By _____

Corey Evan Parker, WSBA No. 40006
Attorney for Petitioner, Antonial Monroe

Appendix

RULE ER 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. 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.

RULE ER 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

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.

RULE ER 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than

10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose.

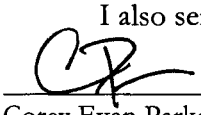
Proof of Service

On July 16, 2014, I hand delivered a copy of the Petition for Review as it pertains to Antonial M. Monroe, No. 691236-I to the King County Prosecuting Attorney at the following address:

King County Prosecuting Attorney – Appellate Unit

King County Courthouse
516 3rd Avenue – W-554
Seattle, WA 98104

I also sent a copy to Antonial Monroe at the Monroe Correctional Center.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 69123-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ANTONIAL M. MONROE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 28, 2014

LAU, J. — A jury found Antonial Monroe guilty of promoting prostitution in the first degree. We conclude that the trial court did not abuse its discretion in ruling that Monroe's testimony "opened the door" to admission of his prior adult convictions and that any error in the admission of Monroe's juvenile offenses was harmless. Monroe's claims that the trial court erred in failing to investigate juror misconduct and that defense counsel was constitutionally deficient are also without merit. We therefore affirm.

FACTS

The State charged Antonial Monroe with one count of promoting prostitution in the first degree. At trial, 21-year-old JW testified that she was three when her parents divorced. She then lived with various relatives. JW gave birth to her first child in ninth grade and dropped out of school in the eleventh grade.

In 2010, JW met a pimp named Quinton Jones. Jones eventually beat JW, threatened her and her children, and forced her to prostitute herself. After Jones was arrested, JW continued to prostitute herself for Jones and another pimp.

In September 2011, JW met a woman named Victoria Burden and moved into Burden's apartment in Renton. In October 2011, JW and Burden went to a dance club and got into a fight with some other patrons. As the women were leaving the club, Monroe approached and asked JW, who was bleeding, if she was okay. The two exchanged telephone numbers.

JW and Monroe communicated several times during the following weeks. Monroe told JW that "we could get money together, and be successful together and stuff." Report of Proceedings (June 5, 2012) (RP) at 398. A short time later, JW left Washington and worked as a prostitute in both Las Vegas and Los Angeles. JW remained in contact with Monroe, who made it clear that he wanted her to work for him.

JW returned to Seattle around Thanksgiving 2011 and continued to work as a prostitute. After arresting one of JW's customers, police officers took her to the Genesis Project, which assists victims of sex trafficking. The Genesis Project helped JW move to the Dream Center in Los Angeles for further assistance.

In February 2012, JW returned to Washington and moved in again with Burden in Renton. After a few weeks, JW got into an argument with Burden and contacted Monroe for assistance. Monroe picked up JW and took her to the house in Kirkland where he was living. While staying in Kirkland, JW began "walking" for Monroe. RP (June 5, 2012) at 413. Monroe drove JW from Kirkland to Highway 99, dropped her off,

and then picked her up when she was done. Using Monroe's credit card, JW posted advertisements on an escort website.

After several days in Kirkland, Monroe and JW moved to the Golden West Motel on Highway 99 in Edmonds, where JW continued to work for Monroe. Monroe told JW that she was "his girl" and was supposed to do what he wanted. RP (June 5, 2012) at 430. JW testified that although Monroe never beat her, he threatened her, became angry and loud, and ripped her jacket. JW gave all of the money that she earned to Monroe.

On March 14, 2012, after spending about two weeks with Monroe, JW called Kyla Conlee at the Dream Center in Los Angeles. JW, who was crying and scared, told Conlee where she was staying and asked for help. Conlee said that she would arrange for assistance. Conlee contacted the Genesis Project, who contacted FBI Agent Steven Vienneau, who worked with agencies assisting victims of human trafficking.

Later that day, Monroe brought two other women to stay with JW at the motel. Monroe had sex with one of the women. He then drove off with the two women, leaving JW at the motel. While he was gone, JW sent a text message to Monroe, warning him not to return to the motel because the police were there. Agent Vienneau, who knew JW from the investigation of Quinton Jones, arranged for task force members to arrest Monroe as he returned to the Golden West Motel.

Monroe testified that he never asked JW to "walk" for him and denied that she used their room at the Golden West Motel for prostitution or that she ever gave him money. He also denied threatening her or asking her to be his "bottom bitch," the woman in charge of his other prostitutes. RP (June 6, 2012) at 594. Monroe explained

that he was planning to make pornographic videos with the two women at the motel and that he hoped to "be big" in the video industry. RP (June 6, 2012) at 594.

Monroe claimed that when he received JW's text message warning him about the police, he became concerned that she might be committing suicide and raced back to the motel. As he arrived at the motel, the police started "coming out of the trees, the fences, everywhere with assault rifles telling us put your hands out the car." RP (June 6, 2012) at 649. The police forced Monroe to lie on the ground in a puddle before arresting him. Monroe acknowledged that he started "acting up" because he had no idea why he was being arrested. When officers refused to tell him why he was being arrested, Monroe told them, "I don't do nothing. I don't commit crimes." RP (June 6, 2012) at 652.

Prior to trial, the parties agreed that if Monroe testified, his prior convictions for second degree identity theft and giving false information to a police officer were admissible under ER 609(a)(2). After Monroe testified that "I don't commit crimes," the trial court ruled that he had opened the door to evidence of his other adult felony and misdemeanor convictions.

The jury found Monroe guilty as charged, and the court imposed a 120-month standard range sentence.

ANALYSIS

Opening the Door

Monroe contends the trial court erred in ruling that his testimony "opened the door" to the admission of his prior nondishonesty adult felony and misdemeanor convictions. He argues that his statement "I don't commit crimes" was not a general

claim of good character but indicated only that he did not understand why he was being arrested on the particular occasion.

"A party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence." State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). When a witness "opens the door," the opposing party may introduce prior convictions to counter assertions of a law-abiding past regardless of whether the conviction would have been admissible under ER 609. See State v. Brush, 32 Wn. App. 450, 451, 648 P.2d 897 (1982). The doctrine promotes fairness by preventing one party from bringing up a subject to gain an advantage and then barring the other party from further inquiry. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). We review a trial court's determination that a party has opened the door for an abuse of discretion. Ortega, 134 Wn. App. at 626.

During his direct-examination, Monroe testified that as he was returning to the Golden West Motel, the police officers suddenly came "out of the trees, the fences, everywhere with assault rifles." RP (June 6, 2012) at 649. According to Monroe, the officers then forced him to lie on the ground in a puddle, placed an assault rifle in his back, and then arrested him without providing any explanation.

Monroe acknowledged that he started "acting up" and "making obscene comments" because he did not understand why he was being arrested and the officers refused to tell him:

> I was just explaining that I don't know what I was being investigated for, so my only hints--I just left the room with females, so I don't know what I was being arrested for, so I just said, man, I don't do nothing. I was just saying I don't do nothing. I don't commit crimes. I just--I'm just a fuck boy. I fuck bitches. What am I being arrested for?

RP (June 6, 2012) at 651-52 (emphasis added).

At the next break, the deputy prosecutor argued that Monroe's assertion that "I don't commit crimes" opened the door to the admission of his extensive adult and juvenile criminal history. Defense counsel maintained that Monroe's comment did not open the door to prior convictions because he was merely explaining that he did not know why he was being arrested on this occasion. Counsel also noted that the jury was unlikely to understand the comment as a general denial of criminal history because Monroe had earlier admitted a conviction for "identity theft."

After considering the issue overnight and hearing additional argument, the trial court found that Monroe had attempted to create a "false impression with the jury" by "describing this over-the-top arrest process on a person who is, you know, pure as the driven snow but for this identity theft . . . ." RP (June 6, 2012) at 689. The court concluded that the testimony had opened the door to evidence of his significant criminal history. After further argument and discussion, the court ruled that the State would be able to ask Monroe about his adult felony and misdemeanor convictions without specifying the number of convictions for each type of crime.

During his direct-examination, Monroe described in detail what he perceived as an unfairly aggressive arrest process. During the course of that description, Monroe claimed, "I don't do nothing. I was just saying I don't do nothing. I don't commit crimes."

Monroe provided this characterization of himself without any reservations or limitations. Viewed in context, Monroe's statement suggested that he was generally a law-abiding citizen, despite the prior conviction for identity theft. The trial court did not abuse its discretion in concluding that Monroe had opened the door to evidence of his prior criminal history.

Juvenile Convictions

After concluding that Monroe had opened the door to evidence of his criminal history, the trial court limited the State's questioning to Monroe's adult felonies and misdemeanors. The court explained, "I'm satisfied that that's the appropriate boundaries [adult felonies and misdemeanors] to put on it that you've put on yourself with the exception that I also want to have you make no reference to the juvenile matters." RP (June 6, 2012) at 702 (emphasis added). Monroe contends that the deputy prosecutor then blatantly violated the court's order by asking him about juvenile convictions and that the trial court violated his right to a fair trial by failing to rectify the misconduct.

During cross-examination, Monroe acknowledged prior adult convictions for unlawful possession of a firearm, bail jumping, and assaults, including misdemeanor assault, felony assault, and custodial assault. The deputy prosecutor then asked Monroe about convictions for arson, malicious mischief, reckless endangerment, trespass, resisting and obstructing, and harassment. Monroe denied having ever been convicted of malicious mischief and asserted that all of the remaining offenses, including arson, involved juvenile convictions. Defense counsel raised no objection.

During the next recess, in response to a question from defense counsel, the trial court confirmed that it had intended to exclude all juvenile history. Defense counsel asked for a limiting instruction. The deputy prosecutor apologized and explained that he had misunderstood the court's ruling to exclude only Monroe's juvenile felonies for robbery and taking a motor vehicle.

In considering how to address the admission of juvenile offenses, the court noted that Monroe had erroneously asserted that his arson conviction was a juvenile offense rather than an adult conviction. In addition, contrary to his testimony, Monroe informed the court that the only juvenile offenses at issue were reckless endangerment, malicious mischief, and harassment. The court found that under the circumstances, an instruction that simply directed the jury to disregard references to juvenile convictions would be misleading and inaccurate.

Defense counsel conceded that a limiting instruction "could be awkward" and declined the court's invitation to propose a limiting instruction that not only reflected the court's ruling but also corrected Monroe's erroneous characterization of his juvenile history. RP (June 7, 2012) at 742. The trial court eventually decided that it would not give a special limiting instruction on juvenile offenses and would rely solely on the pattern instruction for prior convictions admitted under ER 609.[1]

> While the Court's view was that the juvenile--the more remote in time--this will just take a second--the more remote in time the conviction, the less probative

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[1] Instruction 6, based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.05 at 172 (3d ed.) provided: "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose."

> value it had with respect to the credibility, I agree with the State that it is--given the fact that the door was opened the way it was opened, it is--it has some probative value. I'm going to leave it to the jury with this limiting instruction, which I think covers it amply.
>
> It is complicated by the fact that there was an assertion that the arson was a juvenile offense, the first degree arson, which is probably the most serious of the--it's the only class A felony that I think was listed, was a juvenile matter. So I'm not going to muddy the waters by calling attention and potentially commenting on the evidence as to what was juvenile and what was adult.

RP (June 7, 2012) at 755-56.

Monroe argues that the trial court erred in failing to give a limiting instruction, but he fails to address all of the circumstances that the court considered in making its decision. Monroe's testimony about his juvenile history was inaccurate. Among other things, he characterized his adult conviction for first degree arson—a class A felony—as a juvenile offense. Defense counsel acknowledged that any limiting instruction under the circumstances would be "awkward" and made no attempt to draft an appropriate instruction. Although an accurate limiting instruction would have addressed three juvenile misdemeanors, it might also have emphasized the existence of Monroe's most serious adult conviction and suggested that Monroe had falsely described his juvenile history. The State did not attempt to correct the inaccuracies in Monroe's testimony. Under the circumstances, the trial court did not abuse its discretion in relying on the standard pattern instruction for prior convictions. See State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (trial court's decision to give a particular limiting instruction is reviewed for an abuse of discretion).

Moreover, any error in the admission of the three juvenile offenses was harmless. The reference to each offense was brief. Monroe flatly denied ever

committing malicious mischief and explained that the harassment conviction involved "arguing over a bike," and the State never offered any rebuttal evidence to challenge his assertions. RP (June 7, 2012) at 714. Finally, Monroe was charged with promoting prostitution in the first degree. Nothing in the record suggested that the circumstances of the juvenile misdemeanors were similar to the charged offense or that they might have triggered an emotional response by the trier of fact. Given the unchallenged evidence of Monroe's criminal history, there was no reasonable likelihood that the admission of the three juvenile offenses had any effect on the outcome of the trial. See State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

Juror Misconduct

During a recess, defense counsel informed the court that "somebody in the audience said ... a juror might've been sleeping for a while, and another juror next to them are nudging them awake." RP (June 5, 2012) at 477. The judge responded that she had not noticed the incident and commented, "[I]t is something that we have to battle against from time to time in the afternoons." RP (June 5, 2012) at 477. After the deputy prosecutor indicated he had not seen anything, the court asked for counsels' assistance in watching out for any potential misconduct. Defense counsel agreed. Monroe contends that the trial court violated his right to a fair trial when it failed to investigate the possible juror misconduct.

The trial judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . inattention . . . or by reason of conduct or practices incompatible with proper and

efficient jury service." RCW 2.36.110. RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a jury. State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000). The trial court need not follow any particular format in establishing a record of juror misconduct and has broad discretion to resolve misconduct issues "in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Jorden, 103 Wn. App. at 229.

Here, defense counsel communicated an anonymous report that an unidentified juror "might've been sleeping for a while." Neither counsel nor the trial judge had observed the alleged incident. Defense counsel raised no objection, did not request an investigation, and agreed to assist in watching out for any future misconduct. Given the vague nature of the reported conduct, the trial court's decision to forgo an immediate investigation and focus additional attention on the jurors was reasonable. The record contains no further allegation of juror misconduct.

Monroe asserts that he is "entitled to a new trial regardless of whether the record shows misconduct occurred." Br. of Appellant at 44. But he relies solely on decisions in other jurisdictions involving specific and corroborated incidents of possible juror misconduct. See, e.g., People v. Valerio, 141 A.D.2d 585, 529 N.Y.S.2d 350 (1988) (trial judge failed to conduct inquiry despite announcing that "[w]e had two jurors that were dozing"); People v. South, 177 A.D.2d 607, 576 N.Y.S.2d 314 (1991) (trial court observed juror with eyes closed); Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 912 N.E.2d 525 (2009) (trial court observed juror repeatedly falling asleep). No comparable

circumstances were present here. The trial court's failure to undertake an immediate investigation was not an abuse of discretion.

Ineffective Assistance of Counsel

Monroe next contends that defense counsel's performance was constitutionally deficient. He therefore bears the burden of demonstrating (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice, i.e., a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We begin our analysis with the "strong presumption" that counsel's performance was reasonable. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To rebut this presumption, Monroe must establish the absence of any conceivable legitimate tactic explaining counsel's performance. State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). We review ineffective assistance claims de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Venue

Monroe asserts that the case should have been tried in Snohomish County and that defense counsel was therefore deficient because she failed to challenge venue in King County or propose that venue be included in the jury instructions. But the record establishes that venue was proper in King County.

Generally, criminal actions must be commenced in the county where the offense, or an element of the offense, was committed. CrR 5.1(a). Under article I, section 22 of the Washington Constitution, the defendant has the right "to have a speedy public trial

... [in] the county in which the offense is charged to have been committed . . . ." If there is "reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county." CrR 5.1(b).

Venue is not an element of a crime, and the defendant must generally raise any challenge before trial. State v. Dent, 123 Wn.2d 467, 479-80, 869 P.2d 392 (1994). If the defendant challenges venue based on evidence presented during trial, the State must prove venue by a preponderance of the evidence. Dent, 123 Wn.2d at 480-81.

In order to convict Monroe of promoting prostitution in the first degree, the State had to prove that he knowingly advanced prostitution or profited from prostitution by compelling JW with threat or force to engage in prostitution. RCW 9A.88.070(1)(a). A defendant advances prostitution by causing or aiding another person to engage in prostitution or engaging "in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution." RCW 9A.88.060(1).

The State presented evidence that Monroe began pressuring JW to work for him as a prostitute while he was living in Kirkland and she was living in Renton. Shortly after moving in with Monroe in Kirkland, JW began "walking" for him. Monroe drove JW from Kirkland to Highway 99, dropped her off, and then picked her up when she was done.

Because the State presented evidence that Monroe advanced prostitution in King County, venue was proper in King County. CrR 5.1(a)(2). Consequently, Monroe cannot demonstrate that defense counsel's failure to challenge venue was either

deficient performance or prejudicial.

Agent Vienneau's E-mail

Monroe contends that defense counsel was ineffective for failing to present evidence about Agent Vienneau's "crucial e-mail that stated his belief at the time that Monroe was not a threat to the alleged victim." Br. of Appellant at 53. When defense counsel sought to cross-examine Detective Jaycin Diaz about the contents of the e-mail, the trial court sustained the State's hearsay objections. Monroe argues that defense counsel should have asked Agent Vienneau about the e-mail to avoid the hearsay objections.

To support his argument, Monroe cites only defense counsel's attempt to ask Detective Diaz whether "that e-mail actually state[s] that [JW] was prostituting." Br. of Appellant at 54. But Monroe makes no showing that Agent Vienneau's e-mail offered any opinion on Monroe or the potential threat that he may have posed to JW. Consequently, his claim of ineffective assistance necessarily fails.

Failure to Call Victoria Burden

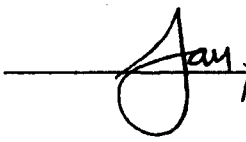
Monroe next contends that defense counsel was ineffective for failing to call Victoria Burden "or any other defense witness." Br. of Appellant at 57. But the decision whether to call a specific witness is generally a matter of trial strategy that will not support a claim of ineffective assistance. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). Moreover, Monroe fails to identify what Burden or any other potential defense witness would have said. See State v. Weber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (The failure to investigate or call witnesses is not prejudicial unless the

record establishes that the witnesses would have been helpful to the defense.). His claim that Burden "likely" would have testified that she never witnessed Monroe threaten JW is unsupported by anything in the record and therefore cannot be addressed on direct appeal. See McFarland, 127 Wn.2d at 337–38.

Inadequate Trial Preparation

Finally, Monroe contends that retained defense counsel, who substituted in six days before trial began at his insistence, was unprepared for trial. He fails, however, to identify any instances of deficient performance beyond those already alleged. For the reasons already discussed, Monroe has made no showing that defense counsel's failure to challenge venue, call additional defense witnesses, and or cross-examine Agent Vienneau about his e-mail was deficient performance or prejudicial. His claims of inadequate trial preparation are therefore without merit.

Affirmed.



WE CONCUR: