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WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON, Respondent, VS DAVID DARLING, Appellant/Defendant.	C.O.A. NO. 44186-1-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (RAP 10.10)

I, David Darling, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

The prosecutor confirms in the Sentencing portion of the transcripts (VRP 354-55) That "on Count II there is no community custody, and that Count III carries community custody." I was already sentenced to the Statutory Maximum of 60 Months, so there is no room for community custody to be imposed. Count I was determined to be "Same Criminal Conduct" as Count III. Therefore,

Count I and Count III are run together and sentecing is only imposed on Counts II and III. VRP 361. I received a sentence of 38 months on Count II, which carries no community custody; and sentenced to 60 months on Count III. The trial court exceeded its authority in imposing community custody beyond the statutory maximum. See State v Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

ADDITIONAL GROUND TWO

Should the alleged victims Smith Affidavit been provided to the jury and submitted into evidence?

The prosecutor was trying to impeach his own witness which placed the burden of proof onto the defendant. My attorney Art Bennett objected to the introduction of the affidavit as hearsay, and the alleged victim did not confirm any of the allegations in the affidavit on the stand. The jury is supposed to determine the truthfulness of the testimony given on the stand, and the contradictory affidavit should not have been submitted into evidence or presented to the jury. This improperly denied the defendant a fair trial by placing the burden upon him, when it is not his burden to carry.

ADDITIONAL GROUND THREE

During trial the court allowed evidence of a prior conviction(s) of harassment and assault 4. VRP 2, 87-99, 268-272, and 306. Defendant had taken a Newton Plea (aka Nolo contendre, Alford Plea) on August 6, 2012 to the harassment and

assault 4. These types of pleas are where the defendant does not admit the truth of the charges, but also does not deny them. If a court accepts the plea as voluntary and proper, it has the same effect as a plea of guilty, but it cannot be used against the defendant in any other action. The judge should not have allowed the introduction of these charges in my trial. They should have been held inadmissable, and admissability of those charges prejudiced my case to the jury.

ADDITIONAL GROUND FOUR

I am trying to challenge the jury instructions and I never received the instructions in their entirety. The preliminary instructions were not transcribed for me to review, or my counsel. VRP 48, and 50. I should have been allowed transcription under State v Giles, 148 Wn.2d 449, 450, 60 P.3d 1208 (2003) ("[t]he state must provide indigent crimiinal defendants with the means of presenting their contentions on appeal which are as good as those available to nonindigent defendants with similar contentions." See also State v Harvey, 175 Wn.2d 919, 921, 288 P.3d 1111 (2012) and Draper v Washington, 372 U.S. 487, 496, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963)). The defendant need not make a particularized factual showing to be entitled to the record. Giles, 148 Wn.2d at 451, 60 P.3d 1208 (citing Britt v North Carolina, 404 U.S. 226, 228, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971)).

The preliminary instructions included what would be allowed to be admitted and what would not. These instructions would help me to challenge the validity of the conviciton based upon Additional Ground Three.

Transcription should have been done so that I may raise any grounds I feel necessary for proper review of my claims.

ADDITIONAL GROUND FIVE

Improper Instruction to the Jury. On the Harassment charge the jury was instructed with the word "felony (Count II)." WPIC 36.07.02.

For ease of reference, the WA Supreme Court committee on jury instructions has referred the word "Felony" should not be included unless the jury is also being instructed on the Gross Misdemeanor form of the crime.

In the present case, the jury was only instructed on the felony term. This changed the burden to the defendant by the jury not having the entire instruction accurately presented and allowed them to consider punishment only in the context of a felony. The jury is not to consider punisment when presented with instructions, yet this instruction did not alolow the jury to decide whether it was a felony or a gross misdemeanor. The word "felony" alone gives rise to a conclusive presumption of prejudice. Had the jury not been instructed just on the word "felony," it is reasonable to assume the jury would not have delivered a verdict of guilty on a felony harassment charge if they were instructed properly. See Comment for WPIC 36.07.02 in Washington Practice Vol. 11 at page 582.

ADDITIONAL GROUND SIX

Improperly instructed Jury on Felony violation of a No-Contact Order. This argument is similar to Additional Ground Five, wherein the jury was instructed only to the felony

violation, and not the gross-misdemeanor together.

ADDITIONAL GROUND SEVEN

Ineffective Assistance of Trial Counsel.

A. Failure to Object to the Prosecutor's Questioning. The prosecutor lead the witness on the stand by stating without proof "you still love David," and "you don't want to see anything bad happen to him." VRP 112-13.

My attorney Art Bennett did not object to the line of questioning that was prejudicial. No matter how the witness (Julie) answered the badgering it would have been bad for my case.

1. Julie answered yes. This shows a propensity to lie on the stand to save me from getting into trouble, but more realistically, led the jury to believe that she may be affraid of me.

2. Had Julie answered no, then it would show she may lie to cover up the fact that she actually did care for him, which would make her testimony suspect considering that the prosecutor introduced the Smith Affidavit of conflicting testimony.

B. Failure to Object to Prosecutor's leading the witness (Julie). The prosecution lead the witness by telling the witness that "prior to him going for the phone" before asking the question, was not in evidence that I actually wentt for the phone. The comment leads the jury to believe that the witness is agreeing to something that was not presented in any testimony or was provided by competent evidence. Counsel did not object to leading the witness. VRP 122.

C. Failure to Object to Badgering the witness. Art Bennett, trial attorney failed to object to the Prosecutor's repeated asking of the same questions when they were already answered. The prosecutor started to comment "so I just mean that night. . ." and then asked the same question as prior to that one. The anser was already given "David has never hit me." This prejudices the jury in the fact that it relates to them believeing that I never hit her before that night. I have never hit her at all, and counsel should have objected to this questioning even if it brought attention to the fact. VRP 123.

D. Failure to Object on basis of no foundation. The prosecutor asked of the witness "had the defendant ever expressed jealousy towards you before that night?" VRP 142. This question has no base or foundation at this point. It was nothing more than to try and invent motive in the juries mind. There was no basis for that question together with the one before it. Counsel's failure to object prejudiced my case in the eyes of the jury.

E. Failure to Object to Prejudicial Questioning. The Prosecution asked of the witness: "At this point is it still your hope to keep a relationship with the defendant?" This serves no justifiable reason for questioning, other than to prejudice my case. Once again this question relatively posess risk either way it is answered.

1. If she says "yes" then it looks like she is lieing for me in her testimony because she loves me and still wants to be with me.

2. If she says "no" then it makes it appear as if my actions of that night were so horrible that Julie wants nothing more to do with me. Counsel should have objected to that questioning. His failure showed the jury that she was either lieing or protecting me. VRP 149.

F. Failure to Object. The prosecutor asked the witness if the redness on my face could be from drinking. The witness is not an expert on the effects and signs of alcohol and Counsel should have objected because it led the jury to believe that the redness on my face as due to drinking and not due to the alleged victim having punched me in the face. The alleged victim would not have any way to explain away the fact that my face was red from being hit, not flushed from alcohol. VRP 166.

G. Failure to Object. Counsel should have objected to the Prosecutor's comments that were leading the witness in the term of "Or at least not as much or somthing else? Before he made those comments was the victim shaking?" This relates to the officer saying the alleged victim was shaking after I made a comment. Counsel should have objected to this line of questiioning. VRP 175.

H. Failure to Object to the Evidence used from the Newton Plea. As stated in Additional Ground Three the use of the Newton Plea convictions prejudiced me in the eyes of the jury. Counsel should have objected to the use of the prejudicial questioning, which should not have been used or presented to the jury as evidence. However, the prosecutor used it at every chance that he

could slide it in (VRP 2, 87-99, 268-272, and 306). Counsel failed to object to this questioning and this could not be determined to be trial strategy when it is clearly said that those types of pleas are not to be used in later prosecution.

I. Failure to Present Favorable Evidence. At VRP 11 there is a reference to the tape recorded interview conducted by Brad Morrow and who was questioned about what the alleged victim stated in the interview. Why didn't that interview get submittedinto evidence? The jury didn't even get to know what was stated in the interview, yet Julie Barnes' Smith Affidavit was able to be viewed by the jury. Art Bennett didn't even attempt to get the interview heard or transcribed and Julie wasn't questioned about what was stated in the interview. Considering what was said at trial, I imagine that it was closely related in substance.

Counsel's performance fell below an objective standard of reasonableness which prejudiced my case. His failure's to object to any of the questioning that was prejudicial, including the Newton Plea that were made was also prejudical. Moreover, the fact that he allowed jury instructions to the jury that were incomplete that allowed the jury only to see "felony" instead of being instructed on both felony and gross-misdemeaner was prejudicial. Overall, counsel's performance was deficient and the result was prejudice to my case by this performance. This cannot be considered trial strategy when he failed on so many levels to even provide a defense for me, or provide adversarial testing of the state's case. His performance fell below a constitutional standard, and prejudiced my case.

CONCLUSION

Appellant requests that the Court remand for a new trial based upon the ineffective assistance of trial counsel, faulty jury instructions, and prejudice as a result of the Smith Affidavit and improper questioning by leading the witness with prejudicial comments. In the alternative, remand for resentencing within the statutory maximum.

Dated this 18th day of September, 2013 in Connell, WA.

David Darling
Appellant, Pro Se

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