NO. 308341-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

V.

RUSSELL HARRINGTON,

Appellant.

ON APPEAL FROM THE SUPERIOR FOR BENTON COUNTY

S.A.G.

ADDITIONAL GROUNDS FOR REVIEW, RAP 10.10

Benton County Pros. Office
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Kennewick, WA., 99336-2359

Russell Harrington
Stafford Creek Corr. Ctr.
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III. STATEMENT OF FACTS

On December 31, 2009, Mr. Harrington was charged with Kidnapping in the first degree, [domestic violence] with use of a firearm and an allegation of deliberate cruelty based on events that occurred-

on December 30, 2009. CP 1.

In June 2003, the appellant was electrocuted while at his employment. He burned his sciatic and sympathetic nerves and the myelin coating. RP 451. This accident caused the appellant to be unable to work or be physically active. RP 451-52. His wife,[2] Mrs. Michelle Harrington, contributed to the appellant's abuse of opiate type prescription medications to manage the appellant's excruciating pain. RP 454-55. He later developed lesions on his brain and had a stroke. RP 451.

Around the Thanksgiving/Chirstmas holidays in 2009, Ms. Harrington informed the appellant that she wanted a divorce, ending their 20-year marriage. RP 52. He became despondent and contemplated taking his own life on December 13, 2009. RP 456; 459; 462.

In this regard, the appellant had begun preparing his will, with instructions for his burial, as well as a number of letters addressed to, people who were important to him. RP 462-466. Four days later, the appellant attempted to commit suicide. RP 468.

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[2] The couple has since divorced, and Michele has since kept the Harrington name. She will be referred to as "Ms. Harrington" henceforth.

Mental health professionals advised appellant's family to remove all guns from the appellant's home. RP 61; 465. He secretly purchased a handgun shortly thereafter. RP 475. The couple continued to discuss divorce along with selling their home and some valuables.

On December 30, 2009, the appellant observed his wife pull up in the driveway while he was in his shop. He did not greet her before she entered their home nor did he ask to use her cellphone. When the appellant entered their home, he asked his wife if she was serious when she previously stated that the appellant would never have a chance to see his son ever again and she replied "yes." At this point, the appellant gathered a syringe, some pills, and internet instructions on how to kill himself and went into the bedroom. RP 71; 482-84.

While preparing to commit suicide, the appellant heard "a couple of clicks," and turned around to see his wife pointing her .357 handgun at him. RP 484. Ms. Harrington observed a 40 caliber handgun on the appellant's hip when he turned his back to her and took off his coat. RP 485. At this point, appellant told his wife to calm down and drink some more scotch, as she was hung over from the previous night. RP 75; 485-86. In despair, appellant reasoned that he was only trying to save his marriage. Frantically,-

Ms. Harrington, in observing that her husband might succeed, automatic-dialed a phone number, and tossed the phone onto the bed. RP 486. A co-worker from her place of employment answered the phone, and allegedly heard yelling and crying, and the appellant threatening to kill himself. RP 7-9; 15-16. Thereafter, a co-worker dialed 9-1-1. RP 34. Mr. Harrington discovered that his wife dialed a phone number, and left the bedroom on several occasions to see if she had called the police and if they had arrived. RP 486. Each time he returned, the bedroom door was open, and his wife was still present in the bedroom. He did not see his wife's handgun at one point when he walked back to the bedroom. RP 487. When the appellant left again, and walked to the front door, he observed police in front of the residence.

Concerned that he would not have time to inject himself with the liquid mixture of his medication, he pulled his 40 cal. and put it to his mouth. Id. He thought he heard someone say "no!" so he laid the gun on the bed. Instead, he inserted the syringe and hit the plunger, swallowed 168 oxycodone pills, and not able to walk, crawled out into the hallway. Concerned that his wife may be caught in a potential crossfire, appellant left the handgun and its clip in the hallway as he crawled-

out into the front porch. Thereafter, the appellant had indicated to police, inter alia, that his gun was in the hallway. RP 488. Appellant eventually fell into a coma, whereas, he awoke in the Sacred Hearts Hospital. He later testified that his only intention was to kill himself, and that he never had any intention of taking his wife's life. RP 515; 517.

Responding officer's testified that appellant emerged from the residence and had begun yelling for them to shoot him because he wanted to die. RP 160. Deputies discovered appellant's suicide letters the next day. RP 165.

Ms. Harrington painted a different picture of the events during her testimony, and contradicted her previous statements she made of the events that transpired on the day in question. She testified that on the day in question, the appellant met her outside at her vehicle and asked to use her cellphone. Once inside, he closed the the door to the residence and insisted that she get on the floor. RP 71-72. While in the bedroom, she saw a syringe, a pill bottle, alcohol shot glass, Pepsi-can, and a handgun lying on the bed. She managed to use her cellphone to dial her work number and leave the line open.

Ms. Harrington testified that at one point, the appellant grabbed her throat, pushed her against a wall and put his gun to her forehead. RP 76. These statements were made for the first time in over 2-years. Further, appellant was incapable of these physical tasks due to his injuries which resulted in him walking with a cane.

The truth of the matter surfaced when Ms. Harrington testified that the appellant had placed his gun in his mouth and then injected himself with a syringe. He collapsed and she ran out of the home. RP 78. Experts testified that only the appellant's DNA was found on the gun. RP 151-52. The entire ordeal lasted about twenty minutes. RP 29.

Immediately after the event, she told officers:

> "[H]e said multiple times there was options on how this would end up either M [their son] would end up having one parent or working it all out and end the divorce ... Said he is going to kill himself and do it right this time. If I did what he said I would only end up with a hangover."

Thirteen months later, in a deposition, she stated:

> "It's not physical emotion (sic) abuse. He had it in his head there was some other reason why I would divorce him. He said we can do this the easy way or-

> the hard way but this is going to work out. Either M. will have one parent or two parents and he said "if you cooperate with me all you will have is a hangover."

RP 124-25. However, at trial, Ms. Harrington testified that the appellant was going to kill her and then himself. RP 125.

Three years had past between the time-line as to Ms. Harrington's testimony and the appellant's charge of kidnapping.

The trial court dealt with issues in regards to appellant's competency to stand trial. The court granted numerous continuances while awaiting psychological evaluations, whereas, appellant was found incompetent to stand trial. At one point, there were insufficient number of jurors available for the jury pool, and the trial court declared a mistrial. CP 10-76; 79-80; 83-89; 105; 1RP 19.

As part of the appellant's evaluation, Dr. Scott-Mabee, a defense expert, testified that kidnapping in the first degree specifically required intentional abduction of a person, with an additional specific intent to inflict bodily injury or extreme mental distress. He further testified that the appellant was incapable of intent to cause bodily injury or-

"extreme mental distress." RP 145. Rather, in his opinion, because Mr. Harrington suffered from chronic physical pain, misused pain medications to cope with that pain, couple with battling major depression from the inability to provide for his family to due to his work-related injuries, the appellant's intent was to demonstrate his hopelessness, not inflict bodily injury or extreme mental distress on his wife. RP 415-16.

The trial court gave the following pertinent jury-instructions:

> Instruction No. 6:
>
> A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with the intent to inflict bodily injury on the person or to inflict extreme mental distress on that person or a third person. CP 123.
>
> Instruction No. 9:
>
> Bodily injury means physical pain or injury, illness, or an impairment of physical condition. CP 126.
>
> Instruction No. 13:
>
> A person commits the crime of kidnapping in the second degree when he or she intentionally abducts another person. CP 131.
>
> Instruction No. 15:
>
> A person commits the crime of unlawful imprisonment when he or she knowingly-

> restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception. The offense is committed only if the person acts knowingly in all these regards.
> CP 133.

The jury submitted one question to the trial court: "What is the definition of extreme mental distress?" The trial court instructed the jury to use its collective memory of the evidence and the court's instructions.[2] CP 151. "Extreme mental distress" is not a legal term of art and it is not beyond the common understanding of ordinary persons.

Mr. Harrington was found guilty of kidnapping in the first degree, (domestic violence), with use of a deadly weapon. [3] CP 170. He makes this timely appeal. CP 185.

III. SUPPLEMENTAL ARGUMENT

B. THE APPELLANT'S CONVICTION WAS A DIRECT RESULT OF INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Mr. Harrington has supplemented his appellate counsel's brief on the sufficiency of evidence, to-

[2] "Emotional distress" is a "[h]ighly unpleasant mental reaction that results from another person's conduct." Blk's Law, 6th.
[3] RCW §§ 9.94A.602, 9.94A.825 (2009).

support the kidnapping conviction.

Due Process requires the State to prove all elements of the crime beyond a reasonable doubt. State v. Lord, 117 Wn.2d 829, 881, 822 P.2d 177 (1991). In reviewing this challenge to the sufficiency of evidence, the test is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of first degree kidnapping beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). An appellate court draws all reasonable inferences from the evidence in favor of the State. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In its essentials, based on Jackson v. Virginia, 443 U.S. 307, 61 L.ed.2d 560, 99 S.Ct. 2781 (1979), as charged in this offense, the two elements are (1) intentional abduction and (2) intent to inflict bodily injury or extreme mental distress on that individual. See RCW 9A.49.020 (c)(d). "Abduct" means to restrain a person by either (a) secreting or holding her in a place where she is not likely to be found, or (b)-

using or threatening to use deadly force. RCW - 9A.40.010 (1). "Restraint" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with her liberty. RCW 9A.40.010 (6). Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception. Green, 94 Wn.2d at 225.

First, Mr. Harrington argues that his intent was not to inflict "bodily injury" upon his wife, but himself.

Criminal attempt is defined in RCW 9A.28.020 as follows:

> (1) A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020. An intent to "abduct" is a specific intent. RCW 9A.28.020, in defining a criminal intent, requires that the substantial step be taken "with intent to commit a specific crime.

Here, the specific crime involved is "kidnapping," and the required intent is the intent to abduct. While a finding of a specific intent can be inferred, it can only be inferred from "conduct where it is-

plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the instant case, as appellant's counsel pointed out, Ms. Harrington voluntarily followed her husband into their home, which does not plainly indicate any specific intent.

While one may be suspicious of appellant's motives, the suspicion is only general. His purpose is unknown, and if he had a specific intent, it is also unknown. The prosecution must engage in one supposition after another in order to reach the conclusion that the defendant had an intent to "restrain" his wife by secreting or holding her in a place where she was not likely to be found -- their bedroom.

Based on the record as a whole, including Ms. Harrington's statements made to police at the time of the event, appellant's purpose in stating on multiple occasions, "there are options on how this will end up -- either our son will end up having one parent, or we can work it out by ending the divorce," and Ms. Harrington, in following him into the home, could have been innocent, in the sense that no criminal-

intent was present, it could have been other than an intent to kidnap. A fact pattern of this general nature does not meet the requirements for "permissive inferences."

A permissive inference is valid when there is a "rational connection" between the proven fact and the inferred fact, and the inferred fact flows "more likely than not" from the proven fact. See State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989) (citing, County Court of Ulster Cy. v. Allen, 442 U.S. 140, 157, 60 L.Ed.2d 777, 90 S.Ct. 2213 (1979).

Permissive inferences do not relieve the State of its burden of persuasion because the State must still convince the jury that the suggested conclusion should be inferred from the basic facts proved. See Francis v. Franklin, 471 U.S. 307, 313-14, 85 L.Ed.-2d 344, 105 S.Ct. 1965 (1985).

The prosecution may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. Ulster, 442 U.S. at 166-67.

Here, the record reflects that the prosecution relied solely on an inference as its sole evidence supporting the element of kidnapping. In this -

regard, the evidence fails to support a finding of an intent to restrain Ms. Harrington by "secreting or holding" her in a place where she was not likely to be found. Based on the facts of this case, there is no suggestion of the use or threatened use of force as Ms. Harrington followed the appellant into their residence.

The State argued that the defendant had a gun. However, Ms. Harrington had a gun as well -- hidden under the mattress. RP 92-93.

In the State's response, it cites Division Two's case in State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004), for the proposition that a victim's voluntary entry into the defendant's home does not preclude a successful kidnapping if the victim is involuntarily restrained inside. Id. at 815. However, Saunders an accomplice, and Williams, invited a passer-by, into Saunder's home for a drink, where the passer-by was forcibly restrained by placing her in leg shackles, handcuffs, and taping her mouth shut. Id.

In the instant case, there is no evidence that the appellant abducted his wife in their home. Ms. Harrington was not under "restraint." Mere presence in their home does not amount to restraint. Had Ms. Harrington elected to leave, she had ample opportunity.

Specifically, the appellant left the bedroom to their residence on multiple occasions, leaving the door open, to look outside to see if police had arrived.

If an appellate court assumed for the sake of discussion, that this alleged victim was restrained due to Ms. Harrington's change of testimony, the element of intent to abduct would still be missing. **Unlawful** Imprisonment is an entirely separate offense from kidnapping -- it requires "knowingly restraining another person." RCW 9A.40.040. The evidence to support intent to abduct would still be lacking. In this regard, a reasonable jury would not have inferred that the appellant's intent was to abduct his wife.[2]

IV. CONCLUSION

For the reasons stated, Mr. Harrington respectfully requests that the Court reverse his convictions, and remand with instructions to dismiss with prejudice.

ARGUMENT

Point 2:

C. APPELLANT'S CONVICTION WAS A DIRECT RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

An effective assistance of counsel claim presents a mixed question of the law and fact, thereby requiring-

[2]This case is further absent "restriction of movement" under RCW 9A.40.010(1)(b).

de novo review. See In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wn.App. 29, 146 P.3d 1227 (2006).

The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the States through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Likewise, Article I, §22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel ..." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-22 (3rd. Cir. 1995).

An appellant claiming ineffective assistance of counsel must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness, and (2) that the deficient -

performance resulted in prejudice, meaning "a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also State v. Pittman, 134 Wn.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." Reichenbach, Id. at 130. Any strategy "must be based on reasoned decision-making..." In re Hubert, 138 Wn.App. 924, 929, 158 P.3d 1282 (2007). In this regard, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel made a tactical decision by not objecting to the introduction of evidence of ... prior -

convictions has no support in the record.")

1. Counsel was Ineffective in His Communication with the defendant

Prior to trial, the appellant was kept in a condition by the State that impaired his ability to communicate with counsel during critical stages. This included being kept under conditions amounting to punishment which kept him from actively participating in pre-trial communication and decision-making with trial counsel. See e.g. United States v. Stringer, 521 F.3d 1189 (9th. Cir. 2008) (collecting cases on governmental interference with counsel).

This in part, affected defense counsel's assumptions and caused counsel to pursue an objectively unreasonable trial strategy while disregarding the appellant's chosen trial objective of proving his innocence and singly admitting guilt through an affirmative defense of "dimminished capacity." See RP(August 18, 2010) 2 ("At best, our defense is diminished capacity.")

2. The State Interfered with Counsel's Representation By Co-opting Counsel To Put off And Abbreviate Interviews and Investigations.

On January 6, 2010, the appellant was arraigned, and bail was excessively set at $500,000.00. Counsel failed to interview the alleged witness for over a year. RP(October 29, 2011) 29 ("Mr. Holt has requested a victim interview, so we'll work on the -- scheduling that, as well.")

In this regard, 21-months had elapsed. In this regard, counsel failed to timely interview the alleged witness. The prosecution prevented defense counsel from interviewing the alleged witness. Counsel, in waiting this extended period to conduct an interview, was objectively unreasonable. This resulted in counsel not being fully prepared to actively challn challenge the prosecution's case, thereby prejudicing the defense. RP (April 16, 2012) at 6 (Defense counsel noted to the court of his client's concern for adequate representation).

3. Counsel's Belief of Guilt An Admission of Guilt Rendered Him Ineffective In Representing The Appellant

"At best, our defense is diminished capacity." This statement overruled the appellant's stated trial objective to pursue a claim that he was not guilty of the kidnapping offense.

Just because a defendant has mental health issues, does not mean he committed the offense charged. Consequently, this mindset of counsel may have persuaded the jury that the appellant was guilty as charged.

4. Counsel Failed To Investigate and Prepare For Trial

Defense attorney's have a duty to make reasonable investigations. In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). A lawyer who 'fails adequately to investigate, and to introduce into evidence that demonstrate his client's factual innocence, or that raises sufficient doubt as to that question, undermines confidence in the verdict, and renders deficient performance. Strickland, 466 U.S. supra at 689; Riley v. Payne, 352 F.3d 1313, 1318 (9th. Cir. 2003), cert. denied, 543 U.S. 917 (2004).

An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his or her choice and ineffective assistance claims based on a duty to investigate, must be considered in light of the strength of the government's case. Davis, 152 Wn.2d at 722 (citation omitted).

In the instant case, Mr. Harrington contends that counsel failed to adequately raise sufficient doubt as to his innocence. In particular, counsel failed to -

investigate possible methods of impeachment. See Tucker v. Ozmint, 350 F.3d 433, 444 (4th. Cir. 2003).

Here, counsel knew of the "unsecured crime scene," which consisted of pictures of the computer, the daycare issue, and the phone lines being supposedly cut by the defendant. This unsubstantiated evidence was crucial because this would obviously show that the alleged victim falsified the evidence after two and a half years to get her story straight -- all uninvestigated.

In this regard, this severely prejudiced the defense and under the totality of the circumstances, shows that the incident would have been in a different light and undermines confidence in the verdict.

Had counsel done a prompt investigation, he would have discovered that, (1) the "computer error" was done several days after the incident, (2) the couple's son had attended daycare on a regular basis, and (3) the phone-system consisted of only one jack that worked, which was located in the master bedroom where the alleged crime had taken place. The phone company had done a check on the other phone-jacks in the residence, and had concluded that it would require major repairs as to which insurance would not cover the cost. When it rained or snowed, the only working phone-jack would not function.

In its essentials, had counsel investigated and prepared for trial, he may have had the ability to impeach-

Ms. Harrington's testimony as to what actually occurred on the day in question.

On April 16, 2012, during the testimony of Lauren Parchen, when it was found that the notes the State witnesses used to refresh their memories were not contemporaneous, and used under the present sense impression heresay exception, but compiled and possibly scripted, the following had taken place:

Counsel: "Did you ever here the defendant say that he was going to kill himself during the call?"

Parchen: "Not that I can recall and it's not in my notes."

Counsel: "If I could have you look at the second paragraph?"

Parchen: "I didn't hear that myself."

Counsel: "Objection then your honor."

In this regard, counsel's open objection, while preserving the issue for review, failed to follow up with any further questions. It was material as to the innocence or guilt of the accused whose notes Parchen had been using during her testimony at trial. Consequently, this subjected the appellant to unopposed testimony supporting the alleged victim that may have been scripted for maximum effect, perjured or staged.

During the playing of the 9-1-1 tape for the jury, the victim's employer, after having testified that the -

alleged victim, Ms. Harrington, "only had a working relationship," said that there was a ".357" handgun in the couple's home. This is quite an intimate detail for someone to know, who only has a work relationship with the alleged victim. RP 31:

> Q. "Did you have a relationship outside of work or strictly work related?"
>
> A. "Work related."

In this regard, defense counsel failed to go back to reopen Ms. Drader's testimony for impeachment purposes. This was also objectively unreasonable, given that a demonstration of possible collaboration could have swung the issue of credibility between the defendant and the alleged victim in this case, for the jury to point to as to undermine confidence in the outcome.

Further, defense counsel ineffectively grazed over the subject as to the .357 handgun, when questioning Ms. Harrington. For instance, RP 106:

> Q. "On the 911 tape, Ms. Drader specifically identifies that there is a .357 in the house. Do you know how she was aware that there would be a .357 in the house?"
>
> A. "I have no idea."

This particular open questioning, was objectively unreasonable and undermined Mr. Harrington's right to a complete defense, and this conduct resulted in a pattern-

that repeats itself during trial.

Defense counsel inadequately cross-examined the alleged victim because he was unprepared to challenge the truthfulness of the State's case due to a lack of investigation and preparation. RP 73; 118-19.

Q. "You stated that he took the phone away from you?"

A. "Yeah, yes."

Q. "Yet your statement you said that he noticed that the phone call had ended is when he became upset?"

A. "No. When he said he told me he heard somebody he said who is that, what have you done. He went to the bed and looked at the phone and that's when he saw there was an outgoing call."

Q. "You actually had the phone in your hand all the time this was going on, correct?"

A. "No, if I did I probably could have gotten further help."

Q. "You did, you made the phone call and left the line open until the police arrived?"

A. "That was by the grace of God a phone call went out."

RP 118-19.

Here, it was objectively unreasonable for defense counsel not to demonstrate how that version of the iphone operates to the jury. Naturally, the jury would have reasonably been informed to determine the truth and come to a conclusion. However, this was not the case. This incident happened awhile go and the iphone in question-

would have likely been the "iphone 3."

In its essentials, had counsel demonstrated the purely visual, multi-layer system without the shortcuts now presently available on the new version, the jury may have concluded that the possibility of the phone call being made from behind Ms. Harrington's back, is the same as putting a chimp in front of a typewriter and produce the New York Times!

In this regard, questions of credibility, like this one, need to be brought to the jury. It is material because it places the case in such a different light as to undermine credibility in the verdict. Banks v. Greene, 540 U.S. 668 (2006); Smith v. Cain, ___ U.S. ___ (2012); Strickler v. Green, 527 U.S. 263 (1999).

In sum, the presence of notes of Ms. Parshen not being hers, and the knowledge of the .357 handgun that she could not have reasonably known about during the 9-1-1 tape conversation, were left unquestioned from the jury's standpoint.

Coupled with an admission of guilt through counsel's diminished capacity defense, this may have hamstrung defense counsel's ability to challenge the credibility of the State, thereby prejudicing Mr. Harrington's defense.

Next, the appellant submits that defense counsel failed to demonstrate that Ms. Harrington had access to her handgun during the incident in question RP 92-93. Ms. Harrington testified that she had her handgun hidden under the mattress:

A.: "...I told the police officer where I had that [.357 handgun] hidden."

Id. This was also material because, if Ms. Harrington had access to a her handgun at any time, she may have been the one in control. The defense's theory that the alleged victim made an attempt to prod her husband to commit sucide to get rid of him was not adequately brought forth to the jury.

Furthermore, there are several other portions of the alleged victim's testimony that defense counsel failed to obtain impeachment evidence.

1. Harrington's daughter Katie

Ms. Harrington testified that their daughter Katie had moved out of their home:

A.: "She graduated in 2009, and she moved out after graduation."

Q.: "So about June?"

A.: "Yes."

Q.: "Did she move out for any other reason other than graduating and moving on?"

A.: "She moved in with her boyfriend..."

Had counsel interviewed Katie, the evidence would have revealed that Katie was forced to move out of the home by her mother, Ms. Harrington. This failure to investigate and prepare was highly objectively unreasonable and prejudiced the appellant's defense.

2. Daycare Records

Ms. Harrington spun a story about their son and his being in daycare, repeatedly stating that their son was there because the appellant wanted him there. The alleged victim wanted the jury to believe that their son had never been in daycare prior. RP 58-59; 115-16. Counsel failed to obtain the daycare records in this respect. These records reveal that Ms. Harrington had been taking their son to the daycare, and this impeachment evidence would have undermined the alleged victim's credibility.

3. False Evidence

The majority of Ms. Harrington's testimony in regards to the appellant's actions on the day in question, would have required him to have three hands. RP 74. In this regard, the appellant, who is crippled with walking aids, had (1) a gun pointed against Ms. Harrington's forehead with one hand, (2) had his cane in the other hand, and (3) was able to take a scrapper-

extension (metal bar) away from his wife with his other hand. In this regard, counsel was unprepared to challenege this "third hand" due to a lack of investigation and familiarity with the facts of the case. This same pattern of prejudicing the defense went on several times during trial. For instance, Ms. Harrington testified as follows:

> "He got really mad because I wouldn't take another shot so he took me by my throat with his hand and pushed me up against the wall and he had the gun shoved into my forehead right between my eyes."

RP 76.

Eventually, defense counsel asked where this "third hand" had come from:

> Q.: "I'm asking where the third hand came from?"
>
> A.: "He threw the cane down ..."

RP 120.

However, defense counsel failed to follow up. The vital question was how could a crippled man could grab someone by the throat and throw that person against the wall while holding a gun to her forehead. The appellant cannot stand with the use of his cane. Again, counsel's lack of effective assistance was objectively unreasonable in light of the circumstances.

4. Unsecured Crime Scene Evidence

Next, the appellant argues that counsel failed to challenge the evidence Ms. Harrington presented to police from an unsecured "crime scene."

The police had taken the appellant into custody, and failed to secure the alleged crime scene. Over the next several days, Ms. Harrington kept 'finding' and 'presenting' physical evidence to police, on the theory that the appellant had committed prior bad acts during the incident in question. Given the dubious testimony by the alleged victim, counsel failed to challenge this evidence. RP 81:

> "I found several things over the next couple of days and one of the things that I found that came out was that our phone lines were out or disabled in some manner..."
>
> RP 88:
>
> "After the police left, it was later that night or the next morning ... I talked with Detective Runge and he had an officer come out and collect the receipt and take pictures of the phone lines."

This evidence was presented to police by Ms. Harrington from an unsecured "crime scene," which should have been challenged and objected to by counsel. This conduct was also objectively unreasonable and prejudiced the defense.

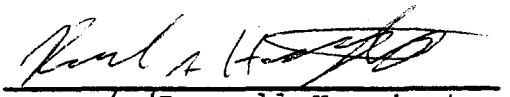
Next, the appellant argues that defense counsel failed to challenge the credentials of the State's-

psychologist. RP 190-92. Dr. Henry presented his credentials from the Eastern State, who had done over 400 evaluations on behalf of the State. The appellant submits that Dr. Henry was not qualified to evaluate him as he was not Board certified. This conduct by counsel was objectively unreasonable.

IV. CONCLUSION

Based upon the foregoing, Mr. Harrington respectfully request that this Court find that he was deprived of ineffective assistance of counsel, and reverse, and remand for new trial.

RESPECTFULLY SUBMITTED on this 22 day of August, 2013.



/s/Russell Harrington
Appellant, pro-se

SCCC- 191 Constantine Way,
Aberdeen, WA., 98520

CERTIFICATE OF SERVICE OF MAIL
GR 3.1

I, Russell A. Harrington, pro-se, certifies that on August 22, 2013, I deposited by First Class Mail, the following documents under Court of Appeals, #309341

ADDITIONAL GROUNDS FOR REVIEW, RAP 10.10

TO:

COURT OF APPEALS, DIV. II)
500 N. CEDAR St.,)
Spokane, WA., 99210-2159)

BENTON COUNTY PROS. ATTY. OFFICE
7320 W. QUINAULT
KENNEWICK, WA., 99362

I declare that the foregoing is true, correct, and complete and based upon my personal knowledge.

DATED This 22nd. day of August, 2013.

/s/Russell A. Harrington
Stafford Creek corr. Ctr.
191 Constantine Way
Aberdeen, WA., 98520