NO. 45411-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAN ALLEN PHILLIPS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-01061-5

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

EMILY J. JARCHOW
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	Lise Ellner Po Box 2711 Vashon, Wa 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 17, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. Was defense counsel ineffective for failing to renew an objection to the joinder of counts when the trial court did not abuse its discretion in joining them?

3. Was defense counsel ineffective for failing to object to evidence of other counts on the grounds of ER 401,402,403, and 404(b) when the counts had been properly joined for trial?

4. Did the trial court abuse its discretion when it excluded evidence of a witness' prior conviction that was not probative of that witness' truthfulness?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Dan Allen Phillips was charged by information filed in Kitsap County Superior Court with Assault in the First Degree Domestic Violence, Unlawful Possession of a Firearm in the First Degree, two counts of Solicitation for Murder in the First Degree Domestic Violence, and Assault in the Fourth Degree Domestic Violence. CP 249-255. The Defendant moved to sever the first two counts from the latter three, and

made several other motions which are not relevant to this appeal. *Id.* at 49-60. The Court denied the motions to sever. *Id.* at 367-369. The jury found the defendant guilty of all charged offenses. *Id.* at 329-335.

B. FACTS

Kelly Lauren Contraro and the Defendant, Dan Allen Phillips had been in a relationship for nine years and shared a residence in Kitsap County. RP (9/5) 948. On May 24th, 2012, the Defendant got into an argument with Ms. Contraro about drinking with out him, and dragged her throughout the house, physically moving and shoving her, and pushing her down. *Id.* at 949-50.

On August 12th, 2012, at 1:18 am, Ms. Contraro went to the Defendant's house in order to put gas in his truck, but the two got into an argument over Ms. Contraro not having the gas cap key. RP (9/5) 951, 55-56, RP (9/3) 514. During the argument, the Defendant walked down the hallway to his bedroom, where he retrieved a .300 Savage hunting rifle and brought it back to where Ms. Contraro was, in the living room. RP (9/5) 956, RP (9/3) 486. Ms. Contraro tried to leave. RP (9/5) 956. The Defendant began screaming at Ms. Contraro and hit her with the rifle, knocking her back down to a seated position. RP (9/5) 956. He pointed the gun at her head, heart, stomach, and legs, and then shot the gun into the floor right in front of her. *Id.* at 957.

Ms. Contraro assumed the fetal position, covering her eyes, and fifteen seconds later, felt the gun shoot her in the leg. *Id.* Ms. Contraro

passed out as a tourniquet was put on her leg and she was left on the floor, where she remained for about twenty minutes. *Id.* at 958-59. During this time, the Defendant came into the living room three or four times, backhanded Ms. Contraro, and yelled at her. *Id.* at 959.

Brandon Phillips, the Defendant's nephew was also present, and testified that he saw the argument and saw the Defendant shoot into the floor. *Id.* at 920-21. He grabbed his head, turned away, heard another gunshot and Ms. Contraro's screams, and turned and saw that Ms. Contraro had been shot. *Id.* at 921. At that point he saw the gun in the Defendant's hands. *Id.* Brandon Phillips left at 1:37 am, and went to his cousin, Aaron Phillip's house, where he told Aaron "he shot her". RP (9/3) 426, RP (9/3) 515.

Eventually, the Defendant drug Ms. Contraro into the hallway of the home, to the steps outside the house, and eventually into her truck. RP (9/5) 961-64. The Defendant attempted to take Ms. Contraro to the hospital, but wrecked her truck while pulling out of the driveway. *Id.* at 964.

Aaron Phillips arrived at the scene, attempted to move the truck out of the ditch, asked Ms. Contraro how she was doing, and then followed the Defendant down to his house. *Id.* at 967. Surveillance video captured him at 2:26 am entering the residence and walking out with a rifle. RP (9/3) 519-20. The .300 Savage rifle was later recovered from Aaron Phillips' house. *Id.* at 411.

At 2:25 am, when the Defendant was away, Ms. Contraro was able to call 911. RP (8/29) 338. The Defendant returned with his truck and was attempting to tow Ms. Contraro's vehicle when officers arrived. RP (9/5) 967. The Defendant took off running through the woods. RP (9/5) 968, RP (8/29) 342-345. Later, he was apprehended and arrested. RP (9/5) 956.

While incarcerated, the Defendant told cellmate Marvin Howell that he had been the one who shot Ms. Contraro, and that he had done it with a rifle. *Id.* at 807. He offered Mr. Howell two and a half acres of property in exchange for killing Ms. Contraro. *Id.* at 809.

The Defendant told another yet cellmate, Gino Puglisi, that he was in custody for blowing his girlfriend's leg in half with a rifle while he was really drunk, and that his nephew had been there when he did it. *Id.* at 820. He then offered Mr. Puglisi a piece of land in exchange for killing Ms. Contraro. *Id.* at 821. The Defendant made contact with Mr. Puglisi to follow through with the planned murder after he thought Mr. Puglisi had been released from custody. *Id.* at 823-828.

III. ARGUMENT

A. EVIDENCE TO CONVICT THE DEFENDANT OF ASSAULT IN THE FIRST DEGREE IS SUFFICIENT BECAUSE A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE DEFENDANT WAS THE SHOOTER BEYOND A REASONABLE DOUBT.

The Defendant argues that he was deprived of his Constitutional

right to Due Process because the evidence identifying him as the shooter was insufficient to sustain a conviction for Assault in the First Degree. This argument is without merit because testimony provided that there were only three people present at the time of the shooting, and the two parties other than the Defendant testified that they saw the Defendant with the gun just before Ms. Contraro was shot, and that they did not shoot the gun. This evidence is clearly sufficient for a reasonable fact finder to determine the identity of the shooter to be that of the Defendant, beyond a reasonable doubt.

The crucial inquiry on review of the sufficiency of the evidence to support a criminal conviction is, "whether, after viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt". *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979). *Citing Johnson v. Louisiana,* 406 U.S. 356, 362, 92 S.Ct. 1620 (1972).*See also State v. Green,* 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980) *and State v. McDaniel*, 155 Wn.App. 829, 861, 230 P.3d 245 (2010). It is not for the reviewing court to determine whether *it* is satisfied beyond a reasonable doubt, instead, "deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence". *Green,* 94 Wn.2d at 221, *citing Jackson,* 443 U.S. at 318-319. (emphasis added); *State v. Carter,* 113 Wn.2d 591, 604, 781 P.2d 1308, (1989), *citing Green,* 94 Wn.2d 216 *and State v. Lawson,* 37 Wn.App. 539, 543, 681 P.2d 867 (1984).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom" and all "reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of the crime may be established by either direct or circumstantial evidence, which are to be considered equally reliable. *State v. Thompson,* 88 Wn.2d 13, 16, 558 P.2d 202 (1977) *and see McDaniel,*155 Wn.App. 829 *citing State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the Defendant challenges only the element of the identity of the person that shot Ms. Contraro, to support the charge of Assault in the First Degree. However, the evidence provided to support this charge was extensive. It included the testimony of Ms. Contraro, who stated that the Defendant retrieved the hunting rifle and brought it to the living room, the Defendant pointed it at her, the Defendant shot the gun into the ground, and the Defendant was the last person she saw with the gun before she was shot. RP (9/5) 956-957. She testified that at no time did she ever see Brandon Phillips, the only other person in the room, with the gun. RP (9/9) 1030. She testified that she called her nephew, and told him that the Defendant had shot her, which the nephew confirmed. RP (8/29) 237. Ms. Contraro testified that she told the 911 operator on the night of the incident that Brandon shot her because she loved the Defendant, but that in fact, she believed that it was the Defendant that shot her. RP (9/5) 969-970.

Brandon Phillips also testified that he saw the Defendant fire the gun into the floor, that the Defendant was the last person he saw holding the gun before Ms. Contraro was shot, and confirmed that he never held the gun. *Id.* at 921-922.

The Defendant himself testified that he had indeed retrieved the hunting rifle from the bedroom and shot it into the ground. RP (9/9) 1044, 1050. He confirmed it had only been the three of them at the scene. *Id.* at 1043. He admitted that he ran from police when they arrived at his truck. *Id.* at 1047. The Defendant testifies that Brandon Phillips was the shooter. However, testimony from Brandon Phillips directly contradicts this aspect of the Defendant's account. Additionally, two other witnesses testified that while the Defendant was in custody following the incident, he told each of them at different times that he was in fact the shooter. RP (9/5) 807, 820. He then separately offered each of these two witnesses land in exchange for killing Ms. Contraro. *Id.* at 809, 821.

Given the Defendant's obvious bias towards avoiding a conviction, and considering the testimony that the Defendant retrieved the gun and fired the first shot, it would not be unreasonable to conclude that the Defendant also fired the second shot, into Ms. Contraro's leg.

This case is unlike the *Johnson* case cited by defense, where the shooter was specifically identified by a witness. However, an eye-witness account is not necessary in every case because circumstantial evidence can be considered equally as valuable as direct evidence. Viewing the

testimony provided from both Brandon Phillips and Kelly Contraro in the light most favorable to the State, it would be reasonable to calculate by process of elimination, that the Defendant fired the gun that shot Ms. Contraro. Therefore, the evidence is sufficient, and the conviction should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENSE MOTION TO SEVER CHARGES. THEREFORE, THE CASE SHOULD NOT BE REVERSED FOR INEFFECTIVE ASSISTANCE SINCE THE DEFENDANT HAS NOT SHOWN PREJUDICE.

The Defendant's next claims are that the Court abused its discretion in denying the Defendant's motions to sever the Solicitation for Murder charges from one another, and from the Assault charges. However, the Defendant correctly points out that failure to renew a motion for severance before or at the close of all the evidence once it has been denied pretrial, waives the claim upon review. Appellant's Brief at 27. The Defendant alleges that the trial counsel's failure to renew the objection constituted ineffective assistance of counsel. This claim is without merit because even if the motion had been renewed, holding the trials together was not so manifestly prejudicial as to outweigh the concern for judicial economy, and therefore, the outcome would have been the same, resulting in no prejudice.

This situation was addressed very recently in *State v. McDaniel*, where defense counsel similarly moved pretrial to sever a charge of

Unlawful Possession of a Firearm with charges of First Degree Murder and Robbery, then failed to renew the motion during trial. *McDaniel,* 155 Wash.App. at 858. On appeal, the appellant argued ineffective assistance of counsel for failing to renew the motion. The Court cited CrR 4.4, which states in relevant part,

> If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

CrR 4.4(a)(2). Accordingly, the Court held that the issue was waived, and should be addressed "only within the discussion of ineffective counsel." *McDaniel,* 155 Wn.App. at 261.

i. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel presents a mixed question of fact and law and is reviewed do novo. *Id.* at 260, citing *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009). In order to establish ineffective assistance of counsel, the defendant must show first that his counsel's performance was deficient, and second, that it resulted in prejudice. *Strickland v. Washington,* 446 U.S. 668, 687, 104 S.Ct. 2052 (1984), *and see State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic

or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *McFarland*, 127 Wn.2d at 336-37; *State v. Hendrickson*, 129 Wn.2d 61, 77–80, 917 P.2d 563 (1996); *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

ii. Denial of the Motion to Sever.

The Court reviews the refusal of the trial court to sever counts for "manifest abuse of discretion". *State v. Bythrow,* 114 Wn.2d 713, 717, 790 P.2d 154 (1990), *citing State v. Thompson,* 88 Wn.2d 518, 564 P.2d 315 (1977). Washington law disfavors separate trials. *State v. Medina,* 112 Wn.App. 40, 52, 48 P.3d 1005 (2002). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow,* 114 Wn.2d at 718, *also see State v. Price,* 127, Wn.App. 193, 207, 110 P.3d 1171 (2005). Four factors which mitigate prejudice where counts are joined for trial are;

> 1) the strength of the State's evidence on each count; 2) the clarity of the defenses as to each count; 3) court instructions to the jury to consider each count separately; and 4) the admissibility of evidence of the other charges even if not joined for trial.

McDaniel, 155 Wn.App at 860, *citing State v. Sutherby,* 165 Wn.2d at 884-85, *see State v. Russell,* 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The absence of any of these factors is not necessarily dispositive, and even

where evidence of one count would not be admissible in a separate trial of the other count, severance is not required, and the defendant must still be able to point to specific prejudice. *McDaniel,* 155 Wn.App. at 860, *citing State v. Markle,* 118 Wn.2d 424, 439, 823 P.2d 1101 (1992). In *State v. Kalakosky*, where evidence was not cross-admissible in counts of Rape and Attempted Rape, the court found that;

> Given that the crimes were not particularly difficult to 'compartmentalize', that the State's evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy.

State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993).

In this case, defense counsel moved pre-trial to sever the counts of Solicitation for Murder from the Assault and Firearm Possession counts, and to sever the Fourth Degree Assault from all others. CP 49-61. The alleged prejudice was threefold; that the jury used evidence from the Solicitation charges to infer guilt on the Assault and other Solicitation charge, that the jury used cumulative evidence because the victim was the same in four out of the five counts, and that they inferred a criminal disposition based on the evidence of other crimes. Appellant's brief at 17-18. The four factors listed above sufficiently mitigated the risk of that prejudice in this case.

a. State presented strong evidence.

First, the State presented strong evidence of each count. The

Defendant alleges that the evidence of the Solicitation counts were stronger than the evidence of the identity of the shooter, since no one saw the defendant pull the trigger. Supporting the counts of Solicitation, the State presented one witness for each count, who provided their direct testimony of conversations with the Defendant.

As discussed above, supporting the Assault charge, the State provided two witnesses who were present and both testified they saw the Defendant shoot the gun into the ground, turned their heads, and heard another shot. RP (9/5) 921, 957. Both testified that they had not been the shooter and that they thought it was the defendant who had fired the second shot. *Id.* at 940, 970. Ms. Contraro testified that she did not have a good relationship with Brandon Phillips, and loved the Defendant, but still testified that she believed the Defendant to have been the shooter. RP (9/5) 969-970, 975 RP (9/9) 1020, 1023, 1026. The Defendant himself admitted the video evidence presented showed him retrieving his gun, and admitted that he had fired the first shot. This case is unlike *Hernandez,* where the evidence on two counts was "somewhat weak". Appellant's brief at 18-19. Instead, the evidence for the Assault charge, while circumstantial, was at least as strong as the evidence for the Solicitation charges.

b. Defenses were the same, and clear.

The next factor is the clarity of the defenses. The Defendant alleges that the defense to the Assault charge was self-defense, and since the defense to the Solicitation charges was general denial, the jury was

likely confounded by the difference. *Id.* at 20. However, the Defendant never presented any evidence of self-defense during trial, nor was the jury instructed on that defense. CP 294-327. Both defenses that were argued in fact were general denial. The Defendant challenged the identity of the shooter, and the credibility of the Solicitation ever occurring. These defenses are not mutually antagonistic, nor confusing to a jury. Since the defenses were in fact the same and very clear, this factor strongly mitigates the risk of prejudice.

c. The jury was properly instructed.

The third factor is whether the jury was properly instructed to consider the counts separately when determining guilt. While the Court did so instruct the jury according to the language approved in *Bythrow*, the Defendant alleges that this instruction did not mitigate the prejudice here because the case was sufficiently gruesome to solicit an emotional response rather than a rational decision from the jury. CP 302; Appellant's brief at 22-23.

However, "[o]ur courts have repeatedly approved and relied on essentially the same instruction in upholding decisions denying severance." *McDaniel,* 155 Wn.App 862. And we presume that jurors follow instructions." *Id., citing State v. Lough,* 125 Wn.2d 847, 864, 889 P.2d 487 (1995). This case is unlike the *Harris* case cited by the Defendant on this point, where the evidence of each count of Rape would not have been cross admissible, as discussed below.

d. Evidence was cross-admissible.

The fourth factor the court should consider is whether or not evidence of each count would have been cross-admissible in trials for the other counts. It is well-settled that evidence of other crimes is presumptively inadmissible to prove character and show that a defendant acted in conformity with this character. *State v. Powell,* 126 Wn.2d 244, 893 P.2d 615 (1995). Evidence is admissible, however, for other specific reasons under ER 404(b). This rule provides:

> 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.

The above list is not exclusive. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *State v. Grant*, 83 Wn.App. 98, 105, 920 P.2d 609 (1996). To admit evidence of other criminal acts pursuant to ER 404(b), there must be a showing that the evidence (1) serves a legitimate purpose; (2) is relevant to prove an element of the crime charged; and (3) the probative value outweighs its prejudicial effect. *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003) *citing Lough,* 125 Wn.2d at 853.

In this case, if the First Degree Assault charge were to be tried on its own, evidence of the later Solicitation for Murder acts would be admissible to prove the element of the identity of the shooter by demonstrating consciousness of guilt, and to rebut the Defendant's

testimony that Brandon Phillips was the shooter. Conduct on the part of an accused having for its purpose the prevention of witnesses appearing and testifying is relevant for the jury to consider. *State v. Kosanke,* 23 Wn.2d 211, 215, 160 P.2d 541 (1945), *State v. Arnold,* 130 Wash. 370, 374, 227 P.505 (1924), *also see State v. McGhee,* 57 Wn.App. 457, 461, 788 P.2d 603 (1990). A defendant's statements, offered against him by another party are not hearsay. ER 801. In this case, the Defendant made statements to two witnesses while in jail. After the incident, identifying himself as the person that shot Ms. Contraro. RP (9/5) 807, 820. During these conversations the Defendant offered land to each person, in exchange for them killing Ms. Contraro. RP (9/5) 809, 821. There is no argument that the identity of the shooter is not relevant, and while all evidence tending to prove the Defendant was the shooter is prejudicial, the probative value of this evidence would clearly outweigh the concern that it would be unduly so.

Evidence of the Assault in the First Degree would also be cross-admissible with the charged count of Assault in the Fourth degree. In domestic violence cases, the courts have found that evidence of a defendant's prior assaults against a particular victim can be relevant and necessary to assess the victim's "credibility and accordingly to prove that the charged assault actually occurred." *Grant,* 83 Wn.App. at 106. In *State v. Grant*, the Court held that it was proper to admit the defendant's prior assaults against the victim, reasoning that "victims of domestic violence often attempt to placate their abusers in an effort to avoid

repeated violence, and often minimize the degree of violence when discussing it with others." *Id.* at 105, 107. The Court found that a jury has the right to hear the full history of the relationship between a defendant and victim in order to understand the dynamics of a relationship that has been marked by incidents of violence. *Id.* at 108. Understanding those dynamics would allow a jury to understand why a victim may give inconsistent statements or recant. *Id.* at 109.

A later decision in *State v. Nelson* adopted the reasoning in *Grant* and admitted the defendant's violent and abusive conduct when drunk (essentially, what amounted to verbal abuse), stating that this conduct provided the jury with an alternative explanation for the victim's inconsistent statements and was a way to rebut the defendant's claim that the victim fabricated the assault. *State v. Nelson,* 131 Wn.App. 108, 116, 125, P.3d 1008 (2006).

In this case, Ms. Contraro was the victim of at least two counts of Domestic Violence Assault at the hand of the Defendant, and Ms. Contraro described other aspects of their relationship which were characterized by domestic violence. RP (9/5) 949-51, 955-57, 959-60, 962-65. Her situation seems to clearly fit within the body of cases envisioned in *Grant*. Evidence from this incident would make it understandable to the jury why the victim initially named Brandon Phillips as the shooter, in the 911 call. Conversely, the same reasoning in *Grant* and *Nelson* would make the evidence of the second Assault admissible in a trial for the first to combat the challenge that the victim fabricated the

claim.

If there were to be held separate trials for Solicitation for Murder, evidence of the previous Assaults would be admissible in each to prove the elements of intent and premeditation, and the Defendant's motive. The case would be similar to *State v. Powell*, where the defendant was convicted of second degree murder after the Court held that evidence of the defendant's hostile relationship with the deceased was admissible to prove motive. *Powell,* 126 Wn.2d at 244. The Court noted that "[s]ince establishing motive is often necessary when only circumstantial proof of guilt exists, prior misconduct evidence that demonstrates motive is of consequence". *Id.* at 960.

The *Powell* case also held that evidence of prior misconduct, such as disputes or quarrels between the accused and the victim is generally admissible in murder cases because such evidence "tends to show the relationship between the parties and their feelings one toward the other, and often bears directly upon the state of mind of the accused, with consequence bearing upon the question of malice and premeditation." *Powell,* 126 Wn.2d at 260, citing *State v. Davis*, 6 Wn.2d 696, 705, 108 P.2d 641 (1940).

Evidence of the prior assaults in this case would certainly tend to make it more likely that the Defendant had a reason to commit the Solicitation acts, namely, to get rid of the State's primary witness, and outweigh any potential prejudice.

The Defendant argues that this case is like the *Hernandez* case, where the identity of the suspect in three separate robberies was at issue, because the crimes were not unique. *See* Appellant's Brief at 25. The State does not argue the cases should be joined on the basis of their uniqueness, which is appropriate when seeking to prove identity under the modus operandi exception. *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). However, the two counts of Solicitation for Murder would be cross-admissible with each other under a separate exception for evidence of a common scheme or plan, where "[i]n contrast, the issue...was not the identity of the perpetrator, but whether the crime occurred. Although a unique method of committing the bad acts is a potential factor in determining similarity, uniqueness is not required." *DeVincentis,* 150 Wn.2d at 21.

One of the well-defined exceptions to ER 404(b) is "when an individual devises a plan and uses it repeatedly to perpetuate separate but very similar crimes." *Lough,* 125 Wn.2d at 854-55. A common design or plan can be established by evidence reflecting that the defendant committed "markedly similar acts of misconduct against similar victims under similar circumstances." *Id.* at 855-56, *citing People v. Ewoldt*, 7 Cal.4th 380, 399, 867 P.2d 757 (1994). "Sufficient similarity is reached only when the trial court determines the 'various acts are naturally to be explained as caused by a general plan'". *DeVincentis,* 150 Wn.2d 11 *citing Lough,* 125 Wn.2d 847.

In this case, Ms. Contraro was the intended victim of both Solicitations for Murder, which were committed by the same person, under the same circumstances, and offering the same reward. They are naturally to be explained by the Defendant's plan to prevent the victim from testifying about the charged Assault in the First Degree. Thus, evidence of each Solicitation would be cross-admissible with the other, based on the common scheme or plan doctrine.

Because the State presented strong evidence of each count, the defenses were the same and very clear, the jury was properly instructed, and evidence of each count would have been cross-admissible with all others, the trial court did not abuse its discretion in denying the Defendant's motions to sever. Therefore, defense counsel's performance was not deficient, because renewal of this objection would have been baseless, as the cases were clearly appropriately joined. Secondly, because the trial court did not err in denying the motion to sever, the Defendant has not established prejudice, since even if the objection had been renewed, it would have been denied. The Defendant's claim of ineffective assistance, therefore, must fail and the case should be affirmed.

C. THERE IS NO PREJUDICE AND THEREFORE NO INEFFECTIVE ASSISTANCE WHEN EVIDENCE THAT WAS NOT OBJECTED TO WAS ADMISSIBLE.

The Defendant next claims that counsel was ineffective for failing to move to suppress evidence of other crimes under ER 401, 402, 403, and

404(b). This claim is without merit because it could be considered sound trial tactic, and as discussed above, this evidence would have been admissible even if defense counsel had objected, resulting in no prejudice.

Please see the above discussion for the standards of review for a claim of ineffective assistance. In brief review, the relevant inquiry is two-fold; did counsel's performance fall below an objective standard of reasonableness, *and* did the Defendant establish that it resulted in specific prejudice. There is a strong presumption that counsel's performance was reasonable. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In this case, the Defendant first claims that evidence of the Solicitation charges was irrelevant to the charged Assault in the First Degree because it did not tend to prove intent, and that defense counsel should have objected to it on the grounds of ER 402, 403, and 404(b). Appellant's Brief at 30-33. The Defendant also argues that defense counsel was delinquent in failing to object on the grounds of these evidence rules to introduction of evidence of other counts joined for trial.

Regarding the Assault, trial counsel's defense theory was not to contest the *intent* of the person who perpetrated the crime, rather it was to deny being the perpetrator. Therefore, even *if* the evidence of the Solicitation was being offered to prove intent, (see previous discussion of multiple ways evidence of Solicitation was relevant regarding elements *other* than intent) defense counsel could reasonably choose not to object on this ground, and instead point the finger at a different perpetrator,

which they did. The Defendant attempts to distinguish this case from *Finch* stating that "evidence in support of the solicitation charges did not amount to an admission of guilt to the assault". *Id.* at 31. However, indeed evidence of the Solicitation charges did include two direct admissions of the Defendant's guilt. RP (9/5) 807, 820. Since *identity* of the shooter was the real matter at issue, these admissions would certainly be relevant, and outweigh any risk of undue prejudice. Therefore, defense counsel's actions can be reasonably explained by their theory, and even if the objection had been made, there would be no prejudice, because it would not have been granted.

Regarding the failure to object to evidence of other counts on the grounds of relevance, undue prejudice, and 404(b), these are all considerations which are taken into account when weighing whether counts are properly joined for trial. Once counts are joined, an objection on these grounds would be futile, since evidence that was admissible to prove one count would make it necessarily admissible in the entire case.

Therefore, it was a legitimate trial tactic to move to sever counts presenting a comprehensive argument based on concerns of relevance, undue prejudice, and lack of cross-admissibility, rather than to object on each of these grounds individually while the counts were still joined for trial. Once the Court held that the counts should be joined, objections on these grounds would not have been granted, and therefore, failure to make them resulted in no prejudice.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUPRESSING EVIDENCE OF A WITNESS' PRIOR BAD ACT WHEN IT WAS NOT PROBATIVE OF TRUTHFULNESS OR BIAS.

The Defendant next claims that he should have been allowed to cross-examine witness Brandon Phillips about his status as a felon. This claim is without merit because evidence which is not probative of truthfulness or bias is not admissible, and therefore within the trial court's discretion to exclude.

Determination of the admissibility of evidence for impeachment purposes is a matter within the sound discretion of the trial judge which will not be reversed absent a clear showing of abuse of discretion." *State v. Thompson,* 95 Wn.2d 888, 632 P.2d 50 (1981), *State v. Alexis,* 95 Wn.2d 15, 621 P.2d 1269 (1980). The trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds such that no reasonable person would take the position adopted. *State v. Lord,* 117 Wn.2d 829, 870, 822 P.2d 177 (1991). One method of impeachment is to introduce evidence of a prior criminal conviction of that witness during cross-examination. "The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness." *Davis v. Alaska,* 415 U.S. 308, 316, 94, S.Ct. 1105 (1974).

However, the right to cross-examine the State's witnesses is not absolute. *State v. Darden,* 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "Evidence offered to impeach is relevant only if: 1) it tends to cast doubt

on the credibility of the person being impeached, and 2) the credibility of the person being impeached is in fact of consequence to the action." *State v. Allen S.,* 98 Wn.App. 452, 459-60, 989 P.2d 1222 (1999). ER 608(b) controls admissibility of prior specific instances of misconduct and instructs that "they may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness." ER 608(b).

Prior felony convictions for crimes which do not contain an element of deceit, fraud, or false swearing may be admissible under ER 609 if the trial court makes the finding that the probative value of admitting the evidence outweighs the prejudice to the party against whom the evidence is offered. ER 609(a)(1). However, "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 witnesses' credibility" and therefore must have some relevance to the witness' ability to tell the truth. *State v. Jones,* 101 Wn.2d 113, 119-20, 677 P.2d 131 (1984) (overruled on other grounds).

Here, the Defendant sought to point the finger at Brandon Phillips as the true perpetrator of the Assault in the First Degree. The State disclosed that Brandon Phillips had a conviction from 2009 for Unlawful Possession of a Firearm in the Second Degree, which the Defendant alleged involved shooting a gun in the direction of an Ann Phillips. RP (8/21) 105-106. When questioned by the trial court about what relevance

evidence of the conviction would have, defense counsel's theory was that "it shows my – Brandon Phillips' propensity. It shows his – what he is capable of doing when he is under the influence of alcohol". *Id.* at 106. Defense counsel expanded that "I do believe that it goes to the witness -- this witness's [*sic*] credibility. He has propensity, and he has a short fuse. It's clear." *Id.* at 111.

Because this theory of admissibility had nothing to do with the truthfulness of the witness, the trial court properly excluded it. On appeal, the Defendant now argues that "Brandon had reason to fabricate because he was a possible suspect". Appellant's Brief at 39. The reviewing court should refuse to consider theories of impeachment which are raised for the first time on appeal. *State v. Ferguson,* 100 Wn.2d 131, 138, 667 P.2d 68 (1983). However, if the Court should be inclined to review the admissibility of the evidence on this theory, the trial court still did not err.

Introduction of the specific violent actions of the conduct would not meet ER 608's requirement that the evidence be probative of truthfulness. Introduction of evidence of the conviction under ER609 would require a balancing test of the probative value of the evidence versus its prejudicial effect. Here, because the conviction was for Unlawful Possession of a Firearm in the Second Degree, the conviction has no probative value as to whether Brandon Phillips would have a reason to fabricate that the Defendant was the shooter. The Defendant seems to allege that Brandon's status as a felon would give reason for him to be a suspect, and therefore reason to point the finger at the only other

possible suspect. However, having status as a felon would give no person more or less incentive to point the finger at the only other potential suspect, and since it had no probative value on the issue of truthfulness, was properly suppressed as unduly prejudicial.

This case can be distinguished from the *Davis* case, where the petitioner sought to show that because the State's juvenile witness was on probation for burglary, he may have "acted out of fear or concern of possible jeopardy to his probation" or "been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Davis v. Alaska,* 415 U.S. at 311. In that case, the defense articulated specific reasons why the witness may have been biased to be untruthful.

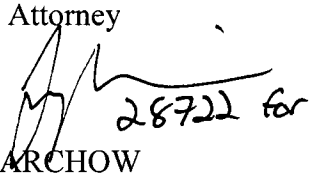
Here, the Defendant's argument rests upon the proposition that Brandon Phillip's prior history proved his propensity to commit the Assault in the First Degree charged against the Defendant. Explaining this history would not have been probative of Brandon's truthfulness, nor the reason he was granted prosecutorial immunity and was therefore properly suppressed. Since the trial court did not abuse its discretion, the conviction should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Phillips's conviction and sentence should be affirmed.

DATED October 17, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



EMILY J. JARCHOW
WSBA No. 44349
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

October 17, 2014 - 2:12 PM

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