Supreme Court No. 99739-0

(Co. App. No. 52505-4-II)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Plaintiff,

v.

JERRY C. THOMPSON,

Petitioner/Defendant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITINER

Petitioner, JERRY THOMPSON, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition

B. COURT OF APPEALS DECISION

Petitioner THOMPSON requests this Court review the Court of Appeals' unpublished opinion entered April 6, 2021, pursuant to RAP 13.4 A copy of the opinion is attached hereto as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

The violation of defendant’s guaranteed right to effective assistance of counsel can be demonstrated when, in a child sex case, there is no conceivable legitimate tactic explaining counsel's performance when counsel fails to object to the joinder of different victims who made significantly different allegations. The Court of Appeals opinion concluding that it could not determine from the record if trial counsel’s decision lacked a particular strategic or tactical choice, when there is no conceivable legitimate tactical reason for the choice, is, therefore, inconsistent with the decisions of this Court and presents an important constitutional question.

D. STATEMENT OF THE CASE

1. Procedural History

On January 17, 2017, Mr. Thompson was arraigned under Pierce County Superior Court cause 17-1-00171-8. CP 3-5. He was charged with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree pertaining to alleged victim A.T. CP 15.

On February 7, 2017, Mr. Thompson was arraigned on another case, Pierce County Superior Court cause 17-1-00577-2, charging him with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree pertaining to alleged victim D.W.

On March 6, 2018 the State moved to join the all the charges alleged in the two informations, and on March 20, 2018 the trial court granted the motion when the defense did not object. CP 39. On March 29, 2018 the State filed a Third Amended Information under cause 17-1-00171-8 (CP 40-45) charging Mr. Thompson with four sex offenses with respect to A.T. and seven sex offenses with respect to D.W.

The case was tried to a jury and Mr. Thompson was convicted. He was sentenced to 600 months in prison on July 16, 2018. CP 311-29. The Court of Appeals affirmed the conviction and sentence. Appendix A.

2. Trial

By the time the case came to trial Mr. Thompson was a 66 year old retired man. RP 5/10/18, pp. 15, 17. He had been married to Peggy Thompson for more than 35 years before they had recently divorced. RP 5/10/18, pp. 15-16.

A.T. is the daughter of Mr. Thompson's daughter Shauna Thompson. Id. Mr. and Ms. Thompson raised A.T. for the first four years of A.T.'s life. Id., at 21-22. Mr. Thompson would give Peggy money to give to Shauna. When Mr. Thompson decided to terminate this support, Shauna decided she would no longer let Mr. Thompson and Peggy see A.T. Id. at 26.

Shauna testified A.T. was four years old when A.T. first mentioned any kind of abuse. RP 802-03. About a month after the initial accusation, A.T. told Shauna that it did not happen. RP 819.

D.W. was 14 years old when she testified. RP 906. D.W. is the daughter of Bethany Orr, who married Mr. Thompson's stepson Jason Orr on November 14, 2014. RP 908-09, 1018-19. While Bethany and Jason spent the first two nights after their wedding at a hotel, D.W. spent two nights at the Thompson home with Jerry and Peggy. RP 1021. D.W. testified that on the second night she fell asleep in Mr. Thompson's bedroom while watching TV. RP 924. She testified that she woke to Mr.

Thompson coming into the room. RP 925. D.W. testified that he got on the bed, pulled out a knife and said, "If you make a sound, I'll cut out your fucking vocal cords." RP 927. D.W. testified that Mr. Thompson then raped her. RP 928-31.

D.W. testified that the next morning she was to meet her mother at church and Mr. Thompson drove her to church. RP 935. D.W. testified that Mr. Thompson forced her to perform oral sex on him while they were stopped at a stoplight. RP 939-41. When she got to church, she did not tell either her mother, nor Jason Orr about anything that had happened that weekend. RP 943.

D.W. testified that the next time she saw Mr. Thompson was in August, 2016, at the Outback Steakhouse. RP 962, 1275. She told the jury that Mr. Thompson raped her in the restaurant bathroom. RP 968-70.

E. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' OPINION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW.

When there is no conceivable legitimate tactic explaining counsel's deficient performance in failing to object to joinder, particularly when the State moves to join child sex allegations involving different victims who assert different types of assaultive behavior, the absence of an explanation

does not prevent the appellate court from concluding the defendant received ineffective assistance of counsel.

In affirming Mr. Thompson's convictions, the Court of Appeals concluded that "when the record does not show counsel's reasons for making a particular strategic or tactical choice at trial, we are unable to determine whether counsel's decision lacked a legitimate strategic basis." (citing *State v. Linville*, 191 Wn.2d 513, 525-26, 423 P.3d 842 (2018)).

This conclusion fails to take into consideration the long-standing principle that "a criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn. 2d 17, 33, 246 P.3d 1260, 1269 (2011) (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

A defendant is guaranteed the right to effective assistance of counsel. *U.S. Amend. VI and XIV*; *Wash. Const. Art. 1 Sect. 22*. Courts presume counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient

> representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). "Competency of counsel is determined based upon the entire record below." *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003).

> To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that there is a reasonable probability he would have been acquitted at a separate trial.

State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

The Supreme Court of Washington has long recognized the "'great potential for prejudice inherent in evidence of prior sexual offenses'". *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154, 157 (1990) (quoting *State v. Harris*, 36 Wn.App. 746, 752, 677 P.2d 202 (1984) and *State v. Ramirez*, 46 Wn.App. 223, 227, 730 P.2d 98 (1986).

Washington courts "have recognized that joinder is inherently prejudicial." *Ramirez*, 46 Wn. App. at 226. This risk is especially pronounced in cases where multiple sex offenses are charged. *Bythrow*, 114 Wn.2d at 718-19 (*See also State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Joinder of charges can impact a defendant's right to a fair trial in many ways. For example:

> (1) a defendant may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

Harris, 36 Wn. App. at 750 (quoting *Drew v. United States*, 331 F.2d 85, 88 (D.C.Cir.1964)); *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). *Harris* involved sexual offenses where the court recognized the " 'great potential for prejudice inherent in evidence of prior sexual offenses' " and held that despite a proper instruction to consider each

count separately, prejudice could not be cured. *Harris*, 36 Wn. App. at 752.

The Washington Supreme Court recently reaffirmed its precedent and held trial courts must consider whether joinder of charges will result in undue prejudice to a defendant.

> Ever since Washington first allowed for the joinder of offenses, our courts have recognized the close relation of joinder and severance, and have held that joinder should not be allowed in the first place if it will clearly cause undue prejudice to the defendant.

State v. Bluford, 188 Wn.2d 298, 307, 393 P.3d 1219 (2017). "[B]oth prejudice to the defendant and judicial economy are relevant factors in joinder decisions, but judicial economy can never outweigh a defendant's right to a fair trial[.]" *Id*. at 305.

Because trial counsel agreed to consolidate the cases, the trial court never balanced the likelihood of prejudice to Mr. Thompson against the benefits of joinder.

There is no fathomable reason why trial counsel would strategically agree to join the cases when it would result in the jury being presented with two victims alleging multiple counts of sexual misconduct by Mr. Thompson.

Trial counsel's failure to object to the State's motion to join was

deficient performance. As the courts above noted, the prejudice for a defendant facing multiple victims is overwhelming. No strategic or tactical basis can justify counsel's acquiescence to joinder. Had trial counsel objected to the State's motion to join the two cases involving A.T. and D.W., the trial court likely would have denied joinder to avoid undue prejudice.

Four factors are considered to determine whether joinder would cause undue prejudice: (1) the strength of the State's evidence on each count; (2) the clarity of 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. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017). Each factor is considered separately, because the absence of even one mitigating factor may require separate trials. See, e.g., *State v. Ramirez*, 46 Wn. App. at 228; *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984).

When reviewing pretrial joinder, appellate courts review "only the facts known to the trial judge at the time, rather than the events that develop later at trial." *Bluford*, 188 Wn.2d at 310. Here, the record lacks sufficient information to analyze the first factor – the strength of the State's evidence for each case. More problematic is the proffer made by

the State in its brief supporting joinder of the offenses. The State's brief told the court that "the court need not consider the overall strength of the State's case. Rather, the question is whether the strength of the State's case on each count is similar." CP 20. This is not the law.

In fact, the strength of the counts differed dramatically, as did the nature of the accusations. A.T. was a four-year-old when the alleged abuse began. The accusations, made primarily via child hearsay witnesses, were that Mr. Thompson used A.T.'s love for her grandfather to get her to commit sexual acts and to submit to him.

In contrast, the allegations regarding D.W. were dramatically different. The State's theory was that Mr. Thompson forcibly raped her on three occasions, threatening to kill her and degradingly calling her his "whore". RP 933. There were no child hearsay witnesses with respect to D.W.'s accusations. The allegations related to D.W. were based entirely on D.W.'s testimony.

With respect to the second factor, it appears from the record the defense for all counts was the same – general denial. While conflicting defenses increase the prejudice flowing from a joint trial, incompatible defenses are not a requirement for severance. For instance, although denial was the defense for two counts of indecent liberties, it was nevertheless an abuse of discretion not to sever the charges in *State v. Ramirez*, 46 Wn.

App. 223, 225-26, 730 P.2d 98 (1987). *See also State v. Harris*, 36 Wn. App. 746, 748-49, 677 P.2d 202 (1984).

The third factor relates to whether the jury can be instructed to consider each count separately. Under this factor, the trial court should: (1) instruct the jury that evidence of each count is to be considered for that count only, and (2) consider the extent to which the jury could be expected to compartmentalize such evidence across the different charges. *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). "When the issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence." *Id*. at 721 (citing *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978)). However, in this case, the issues were not simple because of the lengthy charging period and the emotionally-charged nature of the sexual assault allegations. It was unreasonable to expect a jury to separate the evidence corresponding to each charge. Cross-contamination was inevitable under such circumstances.

In a trial that lasted almost two weeks, and had more than twenty witnesses testify, a jury cannot be expected to compartmentalize these different types of sexual assault allegations.

Finally, the fourth factor required the motion for joinder be denied. The evidence in this case was not cross-admissible under ER

404(b). ER 404(b) provides that evidence of other crimes, wrongs, or acts "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, under ER 404(b), evidence from the other alleged incidents would not admissible against Mr. Thompson to prove character or criminal propensity. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court must "begin with the presumption that evidence of prior bad acts is inadmissible." *Id*. "In doubtful cases, the evidence should be excluded." *State v. Bluford*, 188 Wn.2d at 312 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

In its pre-trial brief to the court moving the court to join the cases, the State argued the allegations related to A.T. and D.W. were cross-admissible to show common scheme or plan, opportunity as well as motive and intent. CP 25-31.

To be admissible as a common scheme or plan the State must establish a sufficiently high-level of similarity between the prior bad act and the current charge:

> To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan to which the charged crime and the prior misconduct are the individual manifestations.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The need for a high degree of similarity was reaffirmed in *State v. DeVincentis*, 150 Wn.2d at 20.

The allegations made by A.T. and D.W. were not similar enough to be cross-admissible under ER 404(b). A.T.'s allegations were that Mr. Thompson groomed and assaulted her over a long period of time, starting when she was four years old. D.W.'s allegations were that Mr. Thompson violently raped her even though he barely knew her. RP 1123. A.T.'s allegations were that Mr. Thompson assaulted her in his home, away from any prying eyes. While one of D.W.'s allegations involved an assault in the home, it included a threat to cut D.W. with a knife, a far cry from the allegations related to A.T. The other two rape allegations related to D.W. were out in public, in his car at a stop light and in a restaurant bathroom. The brazen risk taking of a person sexually assaulting a girl in public is wholly inconsistent with a common scheme or plan to abuse a child in the privacy of a bedroom.

> One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan. There are two instances in which evidence is admissible to prove a common scheme or plan: (1) "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" and (2) where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes."

State v. Gresham, 173 Wn.2d 405, 421–22, 269 P.3d 207, 214 (2012) (internal citations omitted).

These were not similar crimes. Evidence of the allegations related to D.W. would not have been admissible in a trial related to A.T.'s allegations and vice versa. To be admissible to show a common scheme or plan, evidence of prior child sexual abuse must show more than a general "plan" to molest children. *State v. Slocum*, 183 Wn. App. 438, 453, 333 P.3d 541 (2014).

How different the two cases were was made clear in the prosecutor's closing argument.

> [A.T.] and [D.W.], they don't have a lot in common, but there is one sad fact they do share, that their innocence was shattered and quite literally stolen by that man sitting right there, the defendant, Jerry Thompson, when he raped and molested both of them multiple times.
>
> For Ava, her papa was supposed to be somebody who loved her, somebody who cared for her, somebody who protected her from the evils in this world. Instead, he was the person who spirited her away into his room in the dark of night, into his bed, where he touched her, he fondled her, he sucked her breasts, he digitally penetrated her, he made her sit on his face, and he performed oral sex on her, or he made her perform oral sex on him, time after time, year after year.
>
> Instead of being her protector, her hero, instead of being her sidekick, the defendant abused the position of trust that is supposed to exist between a grandparent and grandchild when he violated his little Ava bug in the worst possible ways.

> For Danielle, the weekend of November 2014 where her mother got married was the first time that she'd ever spent time with the defendant, and for her, she was alone in a big house with two adults that she barely knew, and she was forcibly and violently raped by the defendant, who held a knife to her throat and told her, "I'm going to cut out your fucking vocal cords," and then he proceeded to vaginally rape her.

RP 1481-82.

These two cases were drastically different in so many ways, there is no excuse for not objecting to their joinder, and it obviously prejudiced Mr. Thompson.

With respect to ER 404(b)'s "opportunity" prong, there is nothing about the D.W. allegations that show Mr. Thompson had an opportunity to assault A.T. The fact that the two girls were in Mr. Thompson's home was undisputed. There is nothing about either of the girls' allegations that shows Mr. Thompson's opportunity to assault the other was increased.

The State's brief to the trial court in support of joinder cites several cases with respect to the "motive" prong of ER 404(b), but several of those cases do not reference ER 404(b) at all, or do so in entirely different contexts. The State cited *In Re Aqui*, 84 Wn. App. 88, 929 P.2d 436 (1996) in support of its argument that ER 404(b) "motive" element was satisfied. However, in that case the court did allow evidence of non-sex offenses, but did no ER 404(b) analysis. The State also cited In *State v.*

Quigg, 72 Wn. App. 828, 838-39, 866 P.2d 655 (1994), and *State v. Schimmelpfennig*, 92 Wn.2d 95, 594 P.2d 442 (1979) for the proposition that "motive" under that ER 404(b) "motive" was applicable. However, there was no ER 404(b) analysis in either of those cases

Further, in it's brief to the trial court in this case the State cited *State v. Halstien*, 122 Wn. 2d 109, 857 P.2d 270 (1993). In *Halstien* the Supreme Court concluded that the trial court did not err when it permitted the State to introduce evidence of the defendant's prior contacts with the victim of a burglary in order to show he committed the burglary with sexual motivation. *Id*., at 126. This is a far cry from admitting evidence of other sexual assaults of **a different victim**.

If defense counsel in the instant case had raised an objection to joinder, the trial court would have found these deficiencies in the State's briefing and not joined the cases.

Additionally, the State faced a steeper hurdle when seeking to admit sex offense evidence under ER 404(b). An ER 403 analysis was required. See *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 745 (1984) (403 analysis required before 404(b) evidence may be admitted). ER 403 states:

> 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.

This inquiry is vital where sex offenses are involved. ER 403 application must be "careful and methodical" because "an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). The Washington Supreme Court emphasized several times throughout the *Saltarelli* opinion that prejudice reaches its "loftiest peak" when evidence of prior sexual offenses is introduced. *Id*. at 364 (citation omitted).

Separate trials are required when prejudice stands unmitigated. *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017); *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1987); *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

The final step in the analysis required the trial court to weigh the prejudice against the need for judicial economy. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). In this case, judicial economy was not significantly furthered by a joint trial. Each purported claim was distinct and victim testimony could easily have been divided between separate trials.

The testimony of most of the witnesses only applied to one or the other girls. Peggy Thompson would have testified in both trials, but beyond that there was little cross-over between the witnesses. D.W. did testify that A.T. told her something happened in the house, but given the extensive child hearsay admitted related to A.T.'s accusations, it is unlikely this testimony would have been elicited in a separate trail. Neither of the girls testified they witnessed the charged abuse allegedly perpetrated upon the other by Mr. Thompson. Judicial economy was not significantly furthered by combining trials into one large spectacle.

> [B]ecause the evidence was not cross admissible, the interest in judicial economy loses much of its force because the State would not have been required (or allowed) to call all of its witnesses in each separate trial.

State v. Bluford, 188 Wn.2d at 315-16.

Because trial counsel agreed to joinder, the court never did a full ER 404(b) analysis. In determining whether evidence of other crimes, wrongs, or acts is admissible under ER 404(b), a trial court must undertake the following analysis on the record: (1) identify the purpose for which the evidence is sought to be admitted; (2) determine whether under ER 402 the evidence is relevant to the purpose; and (3) decide whether under ER 403 the danger of unfair prejudice substantially outweighs its probative value. *State v. Lough,* 70 Wn. App. 302, 853 P.2d 920, *affirmed*

125 Wn.2d 847, 889 P.2d 487. By failing to challenge joinder, counsel failed to force the court look at the issue of joinder in light of the prejudice to Mr. Thompson.

Counsel's performance fell below an objective standard of reasonableness and resulted in prejudice to Mr. Thompson. Her failure to object to joinder was clearly detrimental to Mr. Thompson. There is no legitimate justification for trial counsel's failure to act. There is no reasonable argument that allowing all counts to be tried together could have furthered Mr. Thompson's interests.

While the defense was general denial, and defense counsel's primary means of challenging the charges was to attempt to attack the credibility of A.T. and D.W., there was no benefit to Mr. Thompson's case to have both girls testify about the allegations. This is not a case in which the girls were alleged to have conspired to make these allegations. They were not close and rarely saw each other. RP 912, 1058.

Any prosecutor knows the powerful impact second victim evidence has in a child sex abuse trail. Jurors are loathed to believe any person could commit such a crime and will give a defendant every benefit of the doubt when there is only one victim. This dynamic is drastically altered if a second alleged victim is marched before the jury. A defendant goes from a man accused of a horrible crime, to a pedophile before opening

statements are done. Jurors will understand the idea that a person can be wrongfully accused of a crime by one person, but when they hear that two people are making allegations, they cannot be expected to compartmentalize the testimony.

Because Mr. Thompson has rebutted the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's failure to object to joinder, the Court of Appeals reliance on *State v. Linville* is misplaced.

F. CONCLUSION

For the reasons stated above, Mr. Thompson requests this court accept review of the Court of Appeals decision that affirmed his convictions.

Dated: May 6, 2021

John M. Sheeran

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John M. Sheeran, WSBA # 26050
Attorney for Jerry C. Thompson

CERTIFICATE OF MAILING
I certify that on 5/6/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jerry C. Thompson, DOC# 408107, MCC – WSR, Post Office Box 777, Monroe, WA 98272.

John M. Sheeran

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John M. Sheeran, WSBA # 26050

LAW OFFICES OF JOHN SHEERAN

May 06, 2021 - 8:47 AM

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Appellate Court Case Title:	State of Washington, Respondent v. Jerry Carroll Thompson, Appellant
Superior Court Case Number:	17-1-00171-8

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