

68220-2

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IN THE COURT OF APPEAL FOR WASHINGTON STATE
DIVISION ONE

CoA No: 68220-2-1

STATE OF WASHINGTON

V

CORY LAMONT THOMAS;
SHANNON CHRISTOPHER TRAYLOR

APPELLANTS INCOMPLETE STATEMENT OF ADDITIONAL GROUNDS FOR RELIEF

RAP 10.10

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ERRORS FOR THE COURT TO CONSIDER THAT THE APPELLANT HAS NOT BEEN PROVIDED TRANSCRIPTS FOR.

- 1 The state committed reversal error, alone when it blatantly vouched for the credibility of its witness who suffered several credibility issues during trial. VRP _____ this error is submitted without case proposition as it is widely known that witness vouching is not allowed. *10-26-11 Page 238*
During closing arguments, stated plainly Mr. Anwar is "credible".
- 2 The state in its closing arguments relied heavily on notion that defendant(s) entered the store because there was glass in the car (see states closing) the state glass in the car theory was one in which the jurors could hang their conviction upon, in support of ENTRY, however as were the facts, at a post motion hearing counsel for the State in open court as well as in his briefing "States motion to transfer motion for relief from judgment" (page 10);

This court should give close attention to the fact that state agued in closing arguments that glass from the stores door glass had entered the vehicle thereby supporting "ENTRY", and Counsel for the State (Seth Fine, Appeals), subsequently and at a post sentencing motion argued to the court that no glass had entered the vehicle at all.
- 3 After nearly two and a half years of investigation(s), Defendant/ Petitioner was

initially summonsed in Snohomish County Superior Court with a single count of "Attempted Burglary in the Second Degree" RCW 9A.52.030; AND RCW 9A.28.020(1) (Criminal Attempt Statute). After having brought a challenge to a deficiency of the States charging information(s), the State without any articulable citations and absent any new evidence(s) or justifiable causes, erroneously raised defendants criminal case from attempted burglary in the second degree to a single count of Burglary Second degree without the attempt. At issue initially was the States clear failure to "specify" what crime defendant had attempted to commit while unlawfully inside a building or dwelling as required by our Washington State Criminal Attempt Statute RCW 9A.28.020(1). Defendant in an effort to have the state make this required clarification and in an effort to satisfy the Due Process prongs of "notice" thereafter moved the State Prosecution and Superior Court to furnish a "Bill of Particulars". The State without reasoning refused to furnish said Bill of Particulars and the court without making inquiry until the day of trial likewise refused to have the state furnish these requested and required information(s). Defendant noted objection to (1) the Deficient Charging Information (2) the denial of a Bill of Particulars and (3) to Prosecutorial Misconduct premised on the State having raised the charges absent any new findings since summons; and alternatively filing a more serious charge against defendant for his lawful right to exercise challenge against his deficient charging information(s).

While the above mentioned issues were perhaps the most egregious of errors pre-trial, several errors of a constitutional magnitude occurred during trial, as well as post-conviction, all to wit proper objections had been timely filed or noted in the Superior Court of Snohomish.

It is noteworthy that defendant fully recognizes that he bears the burden of producing a record or VRP's in support of his claims and for that reason has left (_____) "blank spots" in this motion so as to incorporate those portions of the VRP's into this briefing upon petitioners having obtained his Verbatim Report of Proceedings, however the State having full knowledge of the issues contained herein and objections as well, as well as all parties hereto knowledge thereof, coupled with the States duty to provide a fair criminal trial, this motion follows without incorporation of those portions at this juncture because petitioner has yet to receive them and the record [on its face] should evidence the various objections by the pleadings and objections filed by the defense and noted by the court.

Be it lastly noted that defendant did have a co-defendant in this matter and by the very nature of the cases "Tracking" and "Consolidation" petitioner's co-defendant's trial and criminal proceeding were likewise prejudicially unfair and as such any granting of this motion *should* likewise be applied to Petitioner's tracking and consolidate co-defendant's case at bar. However Defendant recognizes that such relief may only be granted by that particular co-defendants petitioning for relief.

IV. ARGUMENT(S)

1. *DEFICIENT INFORMATION ERROR*

The State Committed error of a constitutional magnitude when it summons defendant on what was a deficient information (CP_____) and then failed to correct that same deficient information upon notice thereof(Cp_____). Where the State of Washington Brought criminal allegation under the States "Attempt" statute RCW 9A.28.020(1) the states charging information was deficient insofar as it failed to state what "specific" crime the defendants intended to commit while within the building or dwelling at question.

RCW 9A.28.020 mandates:

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

Nowhere in any of the pleadings does the State specify what "specific" crime the defendant(s) were alleged to have committed. While in a Burglary Second degree prosecution alone, the State does not have to specify what specific crime was intended to be committed while therein, when the state elected to summons on the single count of Attempted Burglary Second Degree the state undertook the burden of specifying what specific crime(s) intended to be committed and thereby also undertook the

burden of proving at trial what specific crime(s) intended to be committed. RCW 9A.28.020(1). Because the clerks papers alone evidence the lack of this needed information and because it is uncontested that a criminal defendant enjoy the Due Process right to proper notice so as to properly defend against the allegations and thereafter produce a meaningful defense, coupled with the unambiguous language of RCW 9A.28.020(1), petitioner has opted not to incorporate case law in support of this specific ground, yet should the State have opposition to these widely known facts petitioner will propose case proposition in support hereof.

2. ***DENIAL OF BILL OF PARTICULARS MOTION***

Petitioner in an effort to have his deficient information (*argued supra*) properly corrected [or addressed by the court for ruling thereon] and in an effort to satisfy his own Due Process privileges and requirements thereafter timely filed a Motion for a Bill of Particulars(Cp_____).

Because the court failed to make inquiry of this matter [Bill of Particulars] until several months later on the day of trial(¹⁰⁻²⁴⁻¹¹_____VRP), and because appointed counsel failed to adopt this reasonable and necessary request, petitioner asserts it was (1) an abuse of discretion for the trial court to fail to ascertain facts relevant to this motion (2) counsels actions were deficient and ineffective for his inaction in regards to (a) the deficient information as well as (b) the bill of particulars and finally (c)

the failing to object to the filing of more serious charges. (*counsel's actions / inactions and abuse of discretion argued infra*)

Nevertheless, defendant was entitled to a Bill of Particulars not only to give the defendant proper notice of what the relevant law required, but also it would have cured any challenge of error in the lacking information required for proper charging under our criminal attempt statutes. Where and if this courts concludes that (Cp _____) "Attempted Burglary Second Degree" charging information required the state to identify with specificity what crime or crimes the defendant was allegedly going to commit while therein, it necessarily follows that due process was not afforded by the barrenness of the charging information under the attempt statute, defendant was thereby alone entitled to a Bill of Particulars and error occurred when those particulars sought was never provided.

Moreover, aside from the charging information alone requiring a Bill of Particulars furnishing, defendant had several co-defendants all charged equally and without specificity as to each individual defendant. A bill of particulars was required based on the case specific facts.

Where an information charging burglary is substantially complete but does not specify the nature and extent of the crime with sufficient exactness to enable the accused to properly defend, as where the crime intended to be committed in an allegedly burglarized premises is shown by the accused to be material to the defense of the case, the state may be required to furnish

a bill of particulars. State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). The crime intended to be committed while therein is material as it ties directly to accomplice liability, and what conduct supported such culpability or liability.

The function of a bill of particulars "is to amplify or clarify particular matters considered essential to the defense." State v. Noltie, 116 Wn.2d 831, 845, 809 P.2d 190, aff'd, 116 Wn.2d 831, 809 P.2d 190 (1991), denial of habeas corpus aff'd, 9 F.3d 802 (9th Cir. 1993). A "bill of particulars is discretionary with the trial court and its ruling will not be disturbed absent a showing of abuse of discretion." Noltie, 116 Wn.2d at 844. In passing on a motion for a bill of particulars, "[T]he test . . . should be whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided. . . . If the needed information is in the indictment or information, then no bill of particulars is required. _____.

The particulars sought in this case were nothing more than the particulars required by the charging statute, because the statute (9A.28.020(1)) required such specificity and the information required and needed was not contained in the charging information, the court abused its discretion when it failed to required the state to furnish those particulars sought in order that the defendants may properly defend against the charged conduct. Moreover aside from needing to provide a meaningful defense, it is noteworthy that prejudicial surprise did in fact occur when at trial the state

again amended the charges and in fact at trial during the instructions juncture, and after having had an opportunity to hear all the purported evidence(s), the state stated with "specificity" what crime(s) intended to be committed while allegedly unlawfully therein, that specificity specifying "theft" to be committed while therein, and went further to specify "cigarettes". Counsel was likewise ineffective for failing to seek the information as required by statute. The information as then drafted failed to provide the nature and elements of the crimes charged as it did not allege what crime intended to be committed as required by 9A.28.020(1).

"All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). When, as here, the charging document is being challenged for the first time on appeal, we liberally construe the document in favor of its validity. Kjorsvik, 117 Wn.2d at 102. In applying the liberal construction rule, the information must reasonably apprise the defendant of the elements of the crime charged. Ward, 148 Wn.2d at 813. And where "attempt" is alleged "specificity" was required RCW 9A.28.020(1).

We look at the entire charging document to determine whether it contains the necessary allegations. Kjorsvik, 117 Wn.2d at 104. If that document is found to be constitutionally defective, the remedy is dismissal without prejudice to recharge and retry the defendant. State v. Clowes, 104 Wn. App. 935, 942, 18 P.3d 596 (2001). The error here is not harmless nor moot, because of the raised charges that followed, because if not standing alone warranting reversal, it also buttresses defendants cumulative error claim argued below, and this court should so hold.

3. PROSECUTORIAL MISCONDUCT AND VINDICTIVE PROSECUTION

Petitioner is aware that in bringing an allegation that his or her prosecutor committed misconduct, that defendant carries a heavier burden than perhaps any other claim aside from judicial misconduct. Notwithstanding, the facts in this case amply meet those troublesome burdens. We are faced with a case in which there was nearly three years of investigations, rewind, the defendants were arrested and booked on a single count of "Burglary Second Degree" RCW 9A.52.030 (Cp_____), thereafter posted bail, and awaited any formal charging decision for nearly three years, at nearly the end of the states running statute of limitations, the state SUMMONSED defendants on a "LESSER" and single count of "Attempted Burglary Second Degree" RCW's 9A.52.030 and 9A.28.020(1)(Cp_____). After several pre-trial hearings and petitioner having had a chance to review and work on the charging information(s), petitioner took notice to the deficiencies lacking in the charging

information. When petitioner brought this issue to appointed counsels attention, appointed counsel informed petitioner that he would look into the matter but thought it then to be "without merit". After several weeks having past and petitioner having the clear un-ambiguous language of RCW 9A.28.020(1) backing him, he filed a pro-se motion for a Bill of Particulars, timely and properly serving all parties and then thereafter informing the court of his need for the particulars sought in his case so as to have (1) the deficient information corrected, (2) be apprised of the complete nature of the allegations and alleged conduct against him in order to prepare a meaningful defense and (3) in order to proceed without the issue of unduly surprise. Counsel in believing he possessed a "carte blanche" to waive his client's rights, when asked for the Bill of Particulars, over defendants objection and wishes, refused to bring motion on his own.

The state in recognizing the very nature of the challenge advancing that his information was deficient and likewise thereby relieving the state of its undertaken burden, in an blatant act of Prosecutorial Misconduct and with a gross disregard for the defendants having possessed the right to bring the proper challenge, opted to punish defendants by effectively removing the attempted statue and imposing the more serious charge of Burglary Second Degree. [again the state with "specificity at trial stated what crime(s) intended to be committed].

The "Punishment" and "Prosecutorial Misconduct" line of thinking finds its origins and is inherent in the facts that the defendants had

previously been arrested on the more serious charge, after several years of investigations that same prosecutor summonsed defendants on a lesser count properly reflecting the alleged conduct, and with no other triggering event save defendant having challenged the deficiency the state elected to proceed with a more serious offense that required no specificity [it is advanced that should the alleged conduct have supported the higher degree alone, defendants' would have been summonsed thereon and not the lower degree(Cp_____)].

INDEED, when re-arraigned, defendant objected to the filing of a more serious charge, informed the court that he believed the most recent filing was in retaliation for (1) bringing challenge to the charging information and (2) seeking a bill of particulars, the defendant then went so far as to move the court for the state to then and there state on the record what change in circumstances or investigation(s) had occurred that would warrant such a departure in light of the most recent challenges and prosecutorial misconduct allegations. The court erred when (a) it made no inquiry into the misconduct claim, and while the state had the ability and opportunity to produce an articulable justification, suffice it to say, without any justification the state gave no explanation whatsoever! Given the realistic appearance of unfairness, and in light of the purported chain of events, at that moment the proper thing for the state to have done right then [or any time later] would have been to make a record of what led to

this increased charging decision. Needless to say, the record today is still barren of any supporting factors for this departure.

Prosecutorial vindictiveness is the intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right. State v. Bonisisio, 92 Wn. App. 783, 790, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024, 980 P.2d 1285 (1999). A prosecutor may add a charge when a fully informed and represented defendant refuses to plead guilty to a lesser charge, but the prosecutor may not do so to punish the defendant. Bonisisio, 92 Wn. App. at 790-91 (citations omitted). There is no presumption of vindictiveness in the pretrial setting. Bonisisio, 92 Wn. App. at 791. The defendant must prove either actual vindictiveness or a "realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." Bonisisio, 92 Wn. App. at 791 (quoting United States v. Wall, 37 F.3d 1443, 1447 (10th Cir. 1994)). If the defendant meets this burden, the burden shifts to the State to "justify its decision with legitimate, articulable, objective reasons." Bonisisio, 92 Wn. App. at 791 (quoting Wall, 37 F.3d at 1447). In the trial court, the defendant not only made a showing of actual vindictiveness, but at the very least made a showing of "realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness" thereby requiring the state to "justify its decision with legitimate, articulable, objective reasons." Bonisisio, 92 Wn. App. at 791.

We acknowledge and the defendant concedes to and respects the "[B]road
ambit

to prosecutorial discretion, most of which is not subject to judicial
control." It is likewise conceded that [U]nder the Sentencing Reform Act
of 1981 (SRA), our legislature has given prosecutors great latitude in
determining what charges to file against a defendant. State v. Lewis, 115

Wn.2d 294, 299, 797 P.2d

1141 (1990). Nonetheless, the legislature did not leave the prosecutors'
discretion unbridled. On the contrary, the legislature limited prosecutors'
charging discretion as follows:

(1) The prosecutor should file charges which *adequately* describe the
nature of defendant's conduct. *Other offenses may be charged only if they
are necessary* to ensure that the charges:(a) Will significantly enhance the
strength of the state's case at trial; or(b) Will result in restitution to all
victims.(2) *The prosecutor should not overcharge to obtain a guilty
plea*. Overcharging includes:(a) Charging a higher degree;(b) *Charging
additional counts*. This standard is intended to direct prosecutors to charge
those crimes which demonstrate the nature and seriousness of a
defendant's criminal conduct, but to decline to charge crimes which are
not necessary to such an indication. [without being redundant, defendant

asserts that this standard was employed and adhered to at the summons
juncture of defendants criminal procedures]

[A] prosecutor's discretion to reindict a defendant is constrained by the
due process clause. . . . [O]nce a prosecutor exercises his discretion to
bring certain charges against a defendant, neither he nor his successor may,
without explanation, *increase the number of or severity of those charges* in
circumstances which suggest that the increase is *retaliation for the
defendant's assertion of statutory or constitutional rights*. *Hardwick v.
Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977) (emphasis added), cert.
denied, 434 U.S. 1049 (1978).

The trial court was presented with those very circumstances that "suggest
that the increase is retaliation for the defendant's assertion of statutory or
constitutional rights". However the court did not require [t]he state or its
successors to provide that *explanation* , to increase the []severity of those
charges.

The advancement of a prosecutorial vindictiveness claim brings into
conflict two antithetical interests: (1) the due process right of the
defendant to be *free of apprehension that the state might subject him to an
increased potential punishment* if he exercises his right to make a direct or
collateral attack on his conviction, and (2) the prosecutor's broad
discretion to control the decision to prosecute A court must "weigh

the extent to which allowing the second [prosecution of the defendant] will chill the exercise of the defendants' appeal rights against the extent to which forbidding the second [prosecution] will infringe on the exercise of the prosecutor's independent discretion. "Employing this calculus in Blackledge, the Supreme Court found from the circumstances that the interest of the State was completely overborne by the defendant's right to be free of the fear of vindictiveness. The Court therefore held that a due process violation was established by the accused's showing that his second prosecution posed a "*reasonable likelihood of vindictiveness*", creating an apprehension in future defendants that the state would retaliate against their exercise of constitutional or statutory rights. *No actual vindictiveness or retaliation motive was required to be shown.* Miracle v. Estelle, 592 F.2d 1269, 1272-73 (5th Cir. 1979) (emphasis added) (footnote and citations omitted).

Here the court is left with more than the appearance of vindictiveness or the realistic likelihood of vindictiveness, the facts of this case are one of those clear and undisputable cases of actual vindictiveness and of a defendant being effectively punished for his lawful exercise of a constitutional right, that being a challenge to the charging information and a request for a bill of particulars. The State could have simply remedied the problem by (1) correcting the information and/or (2) simply providing a seeking criminal defendant with a Bill of Particulars, or (3) (making a

record thereon as required in such cases where prosecutorial misconduct or vindictiveness is advanced) however that did not happen, and in its stead the state elected to compound error at even this early stage of the proceeding and proceed in the fashion that it did. A fashion that is not only frowned upon by our reviewing courts but in such a manner as to offend perhaps every criminal defendants criminal rights, and to chill every defendants right to be free from fear of retaliation. it also well infringes upon the very fibers that hold our law and American Jurisprudence together, altogether. As this review is conducted defendant still has no articulable justification for said departure, and is left with the chill of ever bringing such or any challenge again [a simple record as required could have negated this chill] . Defendant was not only charged with a higher degree with a harsher punishment imposition possibility, but was in fact convicted of that higher degree offense and imposed that stiffer and harsher penalty. Prosecutorial misconduct has been evidenced amply proven and this court should so hold.

10-24-11 page 7 V R P (7-15)

4. UNREPRESENTED AT A CRITICAL STAGE OF PROCEEDING

Defendant asserts that once past pre-trial proceedings and at trial readiness, error of a constitutional magnitude occurred when Appointed Counsel without notice failed to appear, effectively leaving defendant unrepresented. At this hearing the state attempted to negate the error by having some counsel who had not filed a Formal "Notice of Appearance"

nor who was a firm partner of Appointed Counsel "stand in" for missing counsel. (Cp _____) V RP (not provided)

Defendant noted objection to this unexcused absence and informed the court then that he was not aware of whom this supposed counsel was, that he had not filed a formal notice of appearance and that his counsel had not executed a substitution of counsel form either. Defendant further informed the court that this was the hearing to determine if the case would be assigned out and defendant was standing before the court without even having been informed of his standard, maximum nor minimum range sentences in spite of his counsel having had the case for over a year and that his appointed counsel had no other firm partners as he was a sole practitioner. (standard range informing argued infra). Nevertheless the court without that supposed "stand in " replacement counsel having not said one word further, ordered the case be assigned to trial before Judge Castleberry. (Cp _____) V RP not provided

We first acknowledged the rule that a defendant has a constitutional right to appointed counsel at all critical stages of a criminal prosecution. Harell, 80 Wn. App. at 804, citing State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984) Petitioner advances that this stage of the proceedings were critical, it was trial assignment, and defendant had not even been informed of what his consequences for a conviction would result in. However he found out only

when at trial the judge made inquiry, perhaps at the advisement of the
assigning judge.

Defendant believed this occurred only at trial because the trial
judge of his own initiative questioned if it were true that the defendant did
not know or had not been informed of his standard range. (_____ VRP)

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Counsel "Present" at this hearing informed the court that he "BELIEVED"

he had informed it to his client, yet since it was uncertain, he at that
moment informed his client of what he then "BELIEVED" it to be but was

at that point still un-certain as well. (_____ VRP).

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When a critical stage of the proceeding is upcoming, however, the court
cannot relieve present counsel and require a non-waiving defendant to

proceed without

counsel. {931 P.2d 181} Defendant did not waive his counsel presence
and in fact objected to the absence as a denial of counsel at a critical stage.

(_____ VRP). The court noted objection and proceeded with the hearing
in the absence or advisements of counsel.

not included

Defendant asserts he lacked the assistance of counsel at a
critical stage of the litigation. Under both the Washington and United
States Constitutions, a criminal defendant is entitled to the assistance of
counsel at critical stages in the litigation. U.S. Const. amend. VI; Wash.
Const. art. I, 22; {166 Wn.2d 910} State v. Everybodytalksabout, 161

Wn.2d 702, 708, 166 P.3d 693 (2007). A critical stage is one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *State v. Agtuca*, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974). A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal. *United States v. Cronin*, 466 U.S. 648, 658-59, 659 n.25, 810 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

The defendant lost plenty of rights at that hearing, the right to make an informed decision about trial or attempted negotiations, no defenses were asserted and this was the time of such assertion absent having filed a formal defense, no privileges could be claimed, and at least one was waived [the right to counsel] and we have no guide for how the outcome of the trial would have been affected because there was no counsel present to make records thereon. the denial was presumptively prejudicial and alone warrants reversal. and this court should so hold. *States v. Cronin*, 466 U.S. 648, 658-59, 659 n.25, 810 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

5. DEFENDANT NOT INFORMED OF HIS STANDARD RANGE SENTENCE UNTIL TRIAL COMMENCEMENT

Defendant asserts it was error for his appointed counsel to fail to notify the defendant of his standard range and of his direct consequences of proceeding to trial. Again as noted above the court on its own initiative asked counsel once he re-appeared, does the defendant know his standard

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range (_____VRP) counsel unbelievable yet honest response was along the very lines of "I BELIEVE I may have told him at any rate this is what it is...um...9-12 months maximum" (_____VRP). Had counsel properly informed the defendant of his standard range and direct consequences this is a matter that counsel would not have forgot informing his client of. Instead he opted for the un-truth of what he "believed" he informed his client of. Defendant asserts counsel did not lie to the courts and in-stead came with a theory that supports possibly not informing his client, [this is the same counsel who himself forged a AA meeting attendance document and thereafter lied to the courts about his attendance for a DUI offense requirement, and was thereafter sanctions by the Washington State Bar Association for that un-truth. {offered for counsel veracity to the bench}]

An accused has the right, [], to be accurately informed of each material sentencing consequence, including his or her standard range

116 Wn. App. 827; 67 P.3d 1157; 2003

A defendant need not be informed of all possible consequences [], but rather, only the direct consequences. Ross, 129 Wn.2d at 284. The maximum sentence and term of mandatory community placement are among such direct consequences [] . State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998); Where defendant was not apprised of these facts until the day of trial, it necessarily follows that the defendant was not informed of the direct consequences and in fact went into trial with eyes

"not" wide open. it was error of a constitutional magnitude affecting the right to a fair trial and the right to be properly informed so as to make intelligent and informed decisions regarding his choice to proceed to trial.

Counsel was ineffective for this omission and it was not remedied by being provided on the day of trial commencement, and this court should so hold.

6. **ERROR IN ALLOWING MULTIPLE "MANAGING WITNESS(ES)"**

JRP 10-24-11 page 14

Defendant asserts next that is was a violation of ER "Evidence Rule" 615 and a violation of the courts own order to exclude witnesses when the State had more than one and in fact (2) two managing witnesses. While objection was not made by appointed counsel, defendant voiced concern to his appointed counsel who in yet another act of ineffectiveness did not object to such violation. Defendant asserts that the court has the discretion to grant or deny a motion to exclude witnesses and that the court may exempt **ONE** witness to confer with the state prosecution, however that did not happen either, and that error violated both the evidence rule as well as the granting of the exclusion of witnesses. Defendant asserts the state manipulated the ruling by allowing one "patrol officer" to sit 1/2 way through the trial before excusing him and replacing him with the states alleged "lead detective". The explanation provided by counsel to his client was that the "lead detective" was "un-available" so a "patrol officer" who was also a witness acted as the managing witness in the absence of the "lead detective". No record of this absence was made

nor were the reasons for this supposed absence provided. Defendant asserts that in comporting to the Evidence Rules and the courts order, the appropriate measure would have been for the state to move for the case to be recessed until such time as its managing witness was able to re-appear.

For purposes of RAP 2.5(a)(3), under which a manifest error affecting a constitutional right may be raised for the first time on appeal, a constitutional error is "manifest" if it had practical and identifiable consequences in the trial of the case.

Evidence Rule 615. Exclusion of witnesses. PROVIDES:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) *a party* who is a natural person, or (2) *an officer* or employee of a party which is not a natural person designated as its representative by its attorney, or (3) *a person* whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

The trial court's discretion to permit the prosecution to have *ONE* witness remain in attendance throughout the trial has been clearly enunciated:

This court has long followed the rule that the exclusion of witnesses is a matter within the trial court's discretion which will not be disturbed except for manifest abuse. When the exclusionary rule is invoked, it is customary to exempt *ONE* witness to confer with the prosecutor during the

trial.(Footnote and citation omitted.) State v. Weaver, 60 Wn.2d 87, 90,
371 P.2d 1006 (1962).

This court has long followed the rule that the exclusion of witnesses is a matter within the trial court's discretion which will not be disturbed except for manifest abuse. 2 When the exclusionary {371 P.2d 1009} rule is invoked, it is customary to exempt *one witness* to confer with the prosecutor during the trial. State v. Whitfield, 129 Wash. 134, 224 P. 559.

Nowhere in our evidence rules nor under our exclusionary rules case law history does the court permit the exclusion of two witnesses, to act as a managing witness, the rule is concise insofar as it exempt (1) witness, while defendant asserts there is enough controversy with allowing one officer to hear all the testimony and thereafter be able to relate it to other officers "witnesses" so as to have all their testimonies mesh, this problem was compounded in defendant's case at bar as we had a "patrol officer" who was able to relay not only testimony's to the "later appearing Managing Witness" yet he was also provided the opportunity to hear the evidence, to include motions, and thereafter inform whoever he so chose to. Assuredly this exclusionary rule's purpose is designed to prevent such possible errors, and was not properly insured or provided as at the very least it was expected of this "patrol officer" to inform the "lead detective" of what all he might have missed or needed to know. While this ground may call for a lot of speculation, those speculations are

troublesome when viewed in light of the defendants theory, at the least the Exclusionary Rule was not only violated but ineffective as was the exclusion of witnesses where they were not effectively excused. It was error of a constitutional magnitude affecting the right to a fair trial, and further error when the state failed to make record of the anticipated absence and failed to make record of why (2) managing witnesses were required. The court likewise erred when it allowed such a departure absent a justifiable record, all to defendants ultimate detriment. Appointed Counsels inactions are not here exempted either. [it is noteworthy also that upon the lead detective return, the patrol officer did not remain in active attendance] the parties just proceeded as this was a normal course of business and/or practice, absent any pleadings in support hereof. It was gross error absent pleadings or records thereon and this court should so hold. State v. Whitfield, 129 Wash. 134, 224 P. 559.; State v. Weaver, 60 Wn.2d 87, 90, 371 P.2d 1006 (1962).

7. DENIAL OF RIGHT TO EFFECTIVE CROSS EXAMINATION WITHOUT JUSTIFICATION OR REASONS STATED THEREON

At trial, the state conducted "Direct Examination" of one of its witnesses, at that conclusion the defense conducted "Cross Examination" on what had just been elicited on "Direct" when the state attempted to clarify matters brought out on "Cross" the judge without any articulable justifications simply said "NO NO NO, We're not going to do that, Back and Forth and so on and so on. NO. Officer you're excused" (____ VRP)

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The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The primary guarantee of the confrontation clause is the right to effective cross-examination of adverse witnesses. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998); Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). This includes "ensur[ing] that the witness's statements are given under oath, [forcing] the witness to submit to cross-examination, and [permitting] the jury to observe the witness's demeanor."

Generally speaking, the confrontation clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985).

Defendant asserts that he was not after cross-examination that is effective in whatever way, and to whatever extent, the defense might wish, but rather an opportunity for effective cross examination which was not provided.

In Washington, a confrontation clause violation is considered harmless if "the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt." State v. Koslowski, 166 Wn.2d 409, 431,

209 P.3d 479 (2009). Defendant asserts there have been and still exist several issues with the states evidence produced and not produced, [which brings a sufficiency challenge that defendant has not yet researched how to argue and/or present] and that said evidence(s) were not so overwhelming that it necessarily led to a conviction, indeed defendants co-defendants counsel made a motion to vacate and dismiss after conviction based on the lack of evidence, while the trial court ultimately denied their motioning, it speaks at this point for the challenge of the untainted evidence being so overwhelming that it necessarily led to a conviction [if necessary defendant hereby adopts as completely drafted his co-defendants challenges to the sufficiency of evidences.] ``If there is no 'reasonable probability that the outcome of the trial would have been different had the error not occurred,' the error is harmless." Mason, 160 Wn.2d at 927 (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)). Our question becomes, then, whether there is a reasonable probability that the outcome of the trial would have been different had the court not limited the examination of the states witness.

In Washington State the "Clark test" also requires that the defendant have an opportunity for full cross-examination State v. Price, 158 Wn.2d 630; 146 P.3d 1183; 2006 It is the defendants assertion that in accord also with the "Clark Test" defendant was not able to have an opportunity for "full

cross examination" as there was effectively no effective cross examination even permitted.

Both the state and federal constitutions protect the right to confrontation, including the right to conduct a meaningful cross examination of adverse witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the witness's perception, memory, and credibility. Darden, 145 Wn.2d at 620. But the right to cross examination is not absolute. Darden, 145 Wn.2d at 620. A trial court

may deny cross examination if the evidence sought is vague, argumentative, speculative, or simply irrelevant. Darden, 145 Wn.2d at 620-21. The scope of cross examination lies within the trial court's sound discretion, and we will not disturb a trial court's decision absent a manifest abuse of that discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). Defendant asserts that abuse of discretion again occurred

when without any reasoning articulable reason provided, the judge simply went along the lines of "...NO...NO...NO." the judge in giving his "NO's"

did not make any finding that "the evidence sought was vague, argumentative, speculative, or simply irrelevant." He just simply stated "NO". This was an error of a constitutional magnitude affecting the defendants right to a fair trial and this court should hold. Darden, 145

Wn.2d at 620-21

8. ***DENIAL OF RIGHT TO SHOW WITNESS INTEREST/BIAS***

Defendant asserts error of a constitutional magnitude occurred when the state objected to admission of evidence of the alleged victims "inconsistent statements to insurance investigators" (____ VRP) ¹⁰⁻²⁴⁻¹¹ page 22 and the alleged victims prior inconsistent statements about the "amount of loss suffered" (____ VRP) ^{10-24-11 page 26} the state and court denied the defense the opportunity to make any mention of the alleged victim having made two ^{10-24-11 page 22-25} separate and drastically different insurance claims (____ VRP), and his bias insofar as he had a monetary interest in the case (____ VRP), ^{10-24-11 page 2} assuredly, the alleged victim, in the case at bar, was the subject of an "insurance fraud investigation" (____ VRP). ^{page 22 10-24-11 26}

This evidence not only had direct ties to his interest and bias, but the evidence as well as the detectives involved in the case as well as the responding officers noted "a visible lack of disturbance inside the alleged victim business" (____ VRP) ^{10-24-11 page 4 / page 49, 52} so much so that in spite of testimony reflecting that officers were "on scene" within minutes of the alarm and call, and that the "suspect vehicle had not fled the scene" and "remained under observation save maybe seconds..." the officers in searching for the allegedly stolen cigarettes that the store owner recouped nearly \$5000.00 for, the officers checked high and low "for several days to follow" the path in which the suspect vehicle was followed.

Nevertheless, because the alleged victim had recovered insurance money's had been himself the subject of an insurance fraud investigation

and had made prior inconsistent statements in his successful effort to recoup funds off of defendants criminal charges, it was error of a constitutional magnitude to exclude all of these invaluable and very relevant evidence's.

Evidence is relevant for a proper purpose if it tends to show a witness' bias. Evidence tends to show a witness' bias if it tends to show that the witness has a financial interest in the outcome of the lawsuit.

GLORAY ALSTON, v. MICHAEL JOSEPH BLYTHE, ET AL.,

88 Wn. App. 26; 943 P.2d 692;

The Sixth Amendment's confrontation clause requires that an accused be permitted to cross-examine a witness for bias. The rules of evidence do also. Bias can arise from a variety of circumstances, including civil proceedings between the victim and the defendant. Bias includes that which exists *at the time of trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy *while the witness was testifying*. STATE v. DUANE

ALAN DOLAN, JR., 118 Wn. App. 323; 73 P.3d 1011

Second, a careful reading of the law indicates that no foundation is needed

to impeach a witness's testimony with a prior statement as extrinsic

evidence of bias. Prior case law conflated two separate concepts:

impeachment by evidence of bias and impeachment by prior inconsistent statements. In *Harmon*, our Supreme Court held that regardless of whether testimony was offered "for the purpose of impeachment or for the purpose

of showing bias or prejudice of the witness," the witness should be asked about the former statements. *State v. Harmon*, 21 Wn.2d 581, 590, 152 P.2d 314 (1944). Here the court allowed none of the testimony and the state was allowed to use the lack hereof in its successful convicting of the defendant. It was a violation of the confrontation clause and this court should so hold.

9. COUNSELS FAILURE TO PRODUCE DEFENSE EVIDENCE

Error occurred when counsel over the objections and wishes of his client refused to introduce evidence most favorable to the defense. At trial the states "key" piece of evidence in "supporting" unlawful entry was (1) officer who reported in his report that "in a bin, inside the back seat of the suspect vehicle, he [the only officer] noticed what appeared to be glass shards/fragments in the bin" the states theory and arguments were that because this "glass" was inside the bin the glass entered the bin because it went through the broken door which had been broken by a rock. [it is very noteworthy that this glass was never collected, sampled, nor bagged/tagged as evidence" and it was not produced at trial.

Defendant moved his counsel to suppress the statements as related to the glass and counsel informed defendant that the officer would be allowed to testify to it as it was "his [the officers] observations".

There was one officer whose report (Cp_____) stated that when he looked inside the vehicle and inside the bins, the inside of the bins were "EMPTY", with the officers emphasis on the bins being empty, defendant

sought to introduce this highly appropriate evidence as it went to the heart of the states case in chief and in fact called into question the credibility of the single officer whom stated he observed this non-collected glass.

Against his client wishes, appointed counsel refused to ascertain this information in the states case in chief and went as far as not calling the witness in the defense case in chief. It is asserted there can be no strategy nor tactic to this catastrophic failure of counsel.

. In order to prevail on an [] ineffective assistance of counsel claim, petitioners must show that the legal issue which [] counsel failed to raise had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue. In re 314, Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994). The issue of glass being in the bin or not being in the bin, went to the core of the states case as it was the states theory that the alleged glass entered when the defendant or one of the defendants entered. Surely the issue had merit and the prejudice that resulted from counsels failure to produce this available evidence was aside from the obvious prejudices, prejudicial insofar as it would have called into question the credibility of the one officer whom states he saw glass. This officer whom allegedly saw glass was the only officer of about 12 whom responded and viewed the vehicle, not to mention the officers involved in the search warrant execution of the vehicle. There can be concluded no practical logic behind not producing evidence that controverts a lawyer's clients guilt.

Moreover, in order to prevail on the [] ineffectiveness claim, [defendant] must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice Personal Restraint of Lord, 123 Wn.2d 296,

Kimmelman v. Morrison, 477 U.S. 365, 375, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986)

The first prong of the *Strickland* test "requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of {142 Wn.2d 866} all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d

816 (1987).

The second prong requires the defendant to show there is a "reasonable probability" that, but for counsel's conduct of errors, the results of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Carter, 56 Wn. App. 217, 219, 783 P.2d 589 (1989) (quoting *Strickland*, 466 U.S. at 694).

"But for" counsels inactions on this matter too, there is a "reasonable probability" that the outcome would have been different had the jury heard only one officer state there was glass from the store in the bin or in the car of the defendants, and there is clearly " a reasonable probability sufficient to undermine confidence in the outcome" where this would have

evidenced that no glass from the alleged victim business had entered the defendant's vehicle.

It also came out in evidence at trial, through defendant's co-defendant's counsel that there was no glass on the floor board of the vehicle nor any glass in the shoes of any one of the defendants, glass that would have had to get to one of the places had the defendants stepped in the glass of the store. (10-26-11 page 250 VRP) it was highly prejudicial and below a reasonable level of representation to even think that counsel did not introduce this critical defense evidence..

Failure of defense counsel to present a [] defense where the facts support such a defense has been held to satisfy both prongs of the

Strickland test. Thomas, 109 Wn.2d at 226-2

Error of a constitutional magnitude affecting defendant's right to a fair trial and this court should so hold

10. IMPROPER TO CONVICT INSTRUCTION(S)

Without the complete record before defendant, defendant asserts that the last trial stage error occurred when the court instructed the jury and the state was permitted to argue that the "ROCK" that had broken the window could be used to convict the defendant's if the jury found that that rock was once in the defendant's hand and thereafter made it way unlawfully into the building (10-26-11 page 234 - VRP). Stated differently, the state was permitted to argue in closing, that the "ROCK" entering the building was

an "OBJECT" entering the building and that the jury could use that "ROCK'S" entry to constitute "Unlawful Entry" or in fact "Felonious Entry". (___ VRP)(Cp___)

It is defendants position that this was not only highly prejudicial and inappropriate yet also relieved the state of its burden of proving that *a defendant* entered the building unlawfully, without invitation license or privilege.

The instructions on this one speak amply for themselves.

9A.52.030. Burglary in the second degree. PROVIDES:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, **he or she** enters or remains unlawfully in a building other than a vehicle or a dwelling.

Felonious entry occurs when *a person* initially enters a building without invitation, license or privilege, and with intent to commit a crime therein. State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993).

A person is guilty of second degree burglary if, with intent to commit a crime therein, **he** enters or remains unlawfully in a building other than a vehicle or a dwelling.

STATE, v. McDONALD, 123 Wn. App. 85; 96 P.3d 468;

In Washington, burglary in the second degree requires that *the defendant have entered* . State, v. Releford, 148 Wn. App. 478; 200 P.3d

Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Automatic reversal of a conviction is, however, required "when an 'omission **or misstatement** in a jury instruction relieves the State of its burden' of proving every essential element of the crime."

"[i]n order to hold the error harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' It cannot be said that defendants jury would have reached the same verdict absent the error, as it had the "misstated" instruction before them to convict if they found the "rock" had entered from the "defendants hand"(____ VRP)

{168 Wn.2d 326} The jury instructions given in this case relieved the State of its burden to prove every element beyond a reasonable doubt. It relieved the state of this burden in allowing the jury to convict the defendants on the rock having entered the premises rather than a person or human.

It necessarily follows that a "rock" or "object" cannot enter anywhere unlawfully, and further that a "rock" or "object" cannot form the requisite "intent" to commit any crime, especially a crime while therein, we would have to give a "Rock" or "Object" "life" and this is not possible

in the realm of today's modern society, or at the very least, a "Rock" or "Object" is not considered a person in law.

If the State is relieved of that burden, the defendant's right to a jury trial is violated. Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); Neder v. United States, 527 U.S. 1, 12, 119 S. Ct. 1827,

144 L. Ed. 2d 35 (1999). This court has long held that such violation produces a constitutional error requiring automatic reversal. See State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). The lead opinion here

continues the court's recent and unwarranted departure from our established precedent protecting the right to a jury trial as inviolate, which

our state constitution requires. Const. art. I, 21. An Omission or

MISSTATEMENT of an essential element from the "to convict" instructions relieved the State of its burden to prove each element of the crime beyond a reasonable doubt and requires automatic reversal

The lead opinion correctly highlights our holding in State v. Brown: "An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." (quoting State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). Automatic reversal is also required when

any essential element is omitted. "If the instructions allowed the jury to convict . . . without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s)

charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial." State v. Stein, 144 Wn.2d 236, 241, 27

P.3d 184 (2001) (emphasis added). This protection is imperative in "to convict" instructions, which "serve[] as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." Smith, 131 Wn.2d at 263 (quoting State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). However "not every omission or misstatement in a jury instruction relieves the State of its burden, but did in the instant case because of the misstatement.

The elements of burglary in the second degree include (1) enters or remains unlawfully in a building (2) with intent to commit a crime against persons or property therein. "Enters or remains unlawfully in a building" is commonly treated as a single element in courts' "to convict" instructions to juries. See 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 60.04 (2d ed. Supp. 1998), stating in relevant part that to convict the defendant of the crime of burglary in the second degree the State must prove beyond a reasonable doubt: "(1) That on or about ____ (date) **the defendant** entered or remained unlawfully in a building [other than a dwelling]; (2) That the entering or remaining was with intent to commit a crime against a person or property therein" The "to convict" instruction in this case was based on WPIC 60.04.

State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998), (SEE Vlastimil Klimes) holding that: the defendant's conviction for second degree burglary was reversed because, having lawfully entered a car wash that

was open to the public, the defendant could not be convicted of burglary on the basis of unlawfully remaining after he broke into several coin boxes and stole money from them. The State's theory was that no business owner would allow entry for the purpose of committing a crime; therefore, any entry or remaining for a criminal purpose would violate the license, invitation, or privilege. But under this theory, every shoplifting inside a building would be elevated from a misdemeanor to a class B felony, a result that would far exceed the intent of our legislature. 90 Wn.

App. at 725, 730.

STATE , v. VLASTIMIL KLIMES, JR., 117 Wn. App. 758; 73 P.3d 416;

2003 It is defendants argument that should the state be permitted to use instructions such as the one hear containing the "rock" then the state will elevate every "Malicious Mishief or Vandalism" from a misdemeanor to a class B felony, a result that would far exceed the intent of our legislature.

90 Wn. App. at 725, 730.

Failing to object to an instruction may bar review. Scott, 110 Wn.2d at 686. But a party may raise a manifest error of constitutional magnitude for

the first time on appeal. RAP 2.5(a)(3). An instruction that shifts the burden of proof from the State to the defendant is such a constitutional

error. Scott, 110 Wn.2d at 688

It was error of a constitutional magnitude to instruct the jury as such, and likewise error for the state to be permitted in its closing

arguments to argue and make misstatements about the relevant and controlling laws. it was error for the jury to be instructed as such and this court should so hold.

11. ERROR IN USING AGGRAVATING FACTOR AT SENTENCING

Defendant asserts final error occurred when at sentencing without prior pleading, the state in its State Sentencing Memorandum (Cp_____) argued that because of the "degree of planning and sophistication" defendants deserved the high end of their ranges(____ VRP). The state furthered this error when it made oral argument to the courts at sentencing arguing the same. Thereby in violation of Due Process rights to "Notice" as well as the right to "Jury Trial" for "Aggravating Factors and Circumstances".

See State's Sent mem page 1-3

9.94A.535. Departures from the guidelines. PROVIDES:

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

(d)(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

It is undisputed that this is a Washington State Aggravating Factor, and further widely known that it is improper to argue a exceptional sentence aggravating factor without (1) due process notice to the defendant (2) the right to jury trial on issues that relate to aggravating factors. Lastly it is no surprise that a sentencing court may not rely on

facts such as these offered under these circumstances. **"In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing."** _____

There was no showing made of any degree of planning or sophistication proven at trial, acknowledged, nor admitted. Thereby rendering the states decision to introduce such arguments as highly inappropriate and again treading those very lines of "Prosecutorial Misconduct". This error was likewise an error of a constitutional magnitude affecting the defendants right to a fair trial and this court should so hold.

V. CONCLUSION

The errors in this case are gross and excessive, the state in its venture to convict defendant, went above and beyond what the necessary or normal measures would be. The court committed several errors that likewise went above and beyond or perhaps below the normal standard of procedure(s) in what can only be surmised as its attempt to help the state convict defendant. And counsel actions as evidenced above fell well below any reasonable objective standard of representation. Taking counsel's the state's and the court's inactions and actions out of the photo, we are still left with a picture evidencing numerous violations of defendants constitutionally and procedurally protected rights, all affecting the accused's ability to enjoy not a "perfect" trial but likewise not an "unfair trial". Sadly enough to suggest, defendant does not have all of the

errors before him and suffice it to say there are more errors that only appellate counsel may take notice to should this case reach the appellate level. The errors in this case have several that while standing alone warrant reversal, however in light of the totality of circumstances, all of the errors in this case in conjunction warrant reversal under our accumulative error doctrine of Washington State. They happened, they were committed and they are of record, all while defendant remains incarcerated as a result hereof. The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible error(s) materially affects the trial outcome. State v. Newbern, 95 Wn. App. 277, 297, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999).

The cumulative error doctrine applies when several errors occurred, denying the defendant a fair trial, even though no single error warrants reversal. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004)

We will reverse for cumulative error when several errors that are not sufficient standing alone may be prejudicial in their cumulative effect. State v. Korum, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

CONCLUSION At appeal this court is face with

1. Due Process Violation for deficient charging information; over objection
2. Due Process Violation for The state not furnishing; and the Court not requiring the filing of a bill of particulars due to the charging information
3. Prosecutorial Misconduct for increasing the charges for having brought challenge to the states charging information and case stature.
4. Right to Counsel Violation where Counsel as a sole practitioner fails to appear without notice to any of the parties and another counsel attempted to stand over objection; at a critical stage (proceedings VRP not Provided heavily sought after, other objections made that day
5. Due Process Violation where defendant was never informed of his standard range sentence before trial commencement
6. Prejudicially the courts allowed (2) managing witnesses both of whom conversed and testified at different junctures of the trial.
7. Confrontation Clause Violation occurred when The court without articulable justification limited the cross examination of witnesses
8. Due Process Violation occurred when the court refused to allow evidence of the alleged victims bias and financial interest in the matter
9. Due Process Violation occurred when the state at sentencing relied upon Washington State aggravating factor without notice thereof.

10. Ineffective Assistance occurred when counsel refused to introduce defense evidence where one sole officer wrote in his report that there was NO glass in the bins, (that the state argued in closing) (Report AVAILABLE by Defendant)

While defendant has not been provided the necessary transcription for a complete review on appeal, this court has before it ample evidence of not that perfect trial that defendant is not entitled, but rather that erroneously conducted proceedings from pre trial to trial to post trial, the errors standing alone warrant reversal and if not alone than clearly in combination warrant reversal under Washingtons Cumulative Error Doctrine and this court should so hold.

Respectfully Submitted

DATED THIS 07 DAY OF OCTOBER 2012

A handwritten signature in black ink, appearing to read 'Cory Lamont Thomas', written over a horizontal line.

Cory Lamont Thomas, Appellant and Petitioner.