

NO. 34351-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROY STILLWAGON,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
JAN 25 11:32 AM '07
BK STATE OF WASHINGTON
INTEGRITY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01351-4

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED January 23, 2007, Port Orchard, WA RAH

Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in refusing to give an accomplice-testifying instruction where the codefendant's testimony was substantially corroborated at trial with evidence including Stillwagon's confession to several friends that he had shot the murder victim?

2. Whether Stillwagon failed to preserve for review his claim that the trial court erred in not giving a ER 404(b) limiting instruction where he did not request one below, and whether he further fails to show either prejudice from the alleged error or that counsel was ineffective for not requesting the instruction?

3. Whether counsel was ineffective for not requesting an expanded cautionary instruction regarding the use of evidence that Stillwagon's cousin had called his girlfriend after Stillwagon was arrested?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Roy Kenneth Stillwagon and Lucas Johnson were in Kitsap County Superior Court with the murder of Leonard Brown and related offenses. CP 142. Johnson pled guilty during the voir dire process and agreed to testify against Stillwagon. 1RP 6-39. Stillwagon went to trial and was found guilty as charged of the first-degree felony murder of Brown, predicated upon

assault, robbery and burglary. 9RP 1378-79. The jury also found him guilty of the first-degree robbery of Brown, the first-degree burglary of Brown's home, the first-degree assault of Johnson, who was shot during the incident, based on transferred intent, and first-degree unlawful possession of a firearm. 9RP 1378. The jury also found he used a firearm in the commission of the robbery, assault and burglary. 9RP 1379-80. The trial court sentenced him to a standard-range sentence of 773 months. RP (sentencing) 31.

B. FACTS

1. Witnesses other than Stillwagon and Johnson

Christopher Swan was Stillwagon's friend and roommate. 6RP 896. Stillwagon lived with him for a few months before August, but had never paid his share of the rent. 6RP 897. Swan also sold Stillwagon a truck for a few hundred dollars. 6RP 898. Stillwagon never paid him for the truck, either. 6RP 899. Stillwagon had a black Smith and Wesson .40 caliber semiautomatic. 6RP 899. Stillwagon had a holster and an extra clip. 6RP 900. Swan never saw Stillwagon lend the gun to anyone. 6RP 902.

Thursday, August 25

Stillwagon and Heather McEntee have dinner with the Murrietas.

Heather McEntee testified that August 25, 2005, she had been dating her then-boyfriend Stillwagon for about two to three months. 2RP 81. On that day, they had gone to Seattle and took the ferry home, and walked to

Stillwagon's apartment in Bremerton, arriving there around 4:30 p.m. 2RP 74-75. Around 7:00 they went to the home of Stillwagon's cousin April and her husband Efren Murrieta for dinner. 2RP 75.

Efren Murrieta testified that he was Stillwagon's cousin by marriage, and that they were close friends. 6RP 856. Stillwagon and McEntee came over for dinner around 7:00 and they watched a movie. 6RP 857. They left around 11:00 or 11:15. 6RP 858.

Johnson, Murkins & Buchin try to buy drugs from Brown.

Antoine Murkins testified that on that same date he met Lucas Johnson and Brian Buchin around 8:30 to 9:00 at the Horse and Cow. 3RP 298. They drove to Leonard Brown's house, arriving around 9:00 p.m. 3RP 298. They were there to buy cocaine. 3RP 299.

Murkins stated that when they arrived, Brown was not pleased that Murkins had brought the others with him. 3RP 299. Brown and Murkins went into the bedroom alone. Brown started to hand over the drugs, but then changed his mind because he was concerned that Buchin and/or Johnson might be working with the police. 3RP 300.

Back in the living room, Brown announced that because they showed up late, he had run out. 3RP 300. Johnson and Buchin smiled like they did not believe him, but said, "okay." 3RP 301. They left. 3RP 301. As they left, Brown's roommate and the roommate's girlfriend arrived. 3RP 301.

They discussed it a bit, and then Johnson decided to have Buchin stay in the car and to try to talk Brown into selling it to just Johnson and Murkins. 3RP 301.

Buchin went up and waited at the top of the stairs by the road, and they went back and knocked on the door. 3RP 302. Johnson asked Brown if they could talk. 3RP 302. The three of them went straight back to Brown's bedroom. 3RP 302. Brown told Johnson it had nothing to do with some past issues they had; it was just because Brown did not have a good feeling about the situation. 3RP 303. Brown then gave them a each a line of cocaine to do, and after they did it, he gave Johnson a little bit in a baggie "for the road." 3RP 304. Then they left. 3RP 305.

Johnson was upset after they left, and proposed forcibly taking the cocaine from Brown. 3RP 305. Murkins declined to participate in that, and they went up the stairs. 3RP 305. They went back to Johnson's house, arriving around 9:30, and Murkins had a beer while Johnson and Buchin went into the bedroom, presumably to do the cocaine. 3RP 306-07. Then they went to the Horse and Cow, where Murkins had one beer. 3RP 306. During the time Murkins was with him, Johnson made a number of phone calls trying to locate someone who would buy some cocaine from Brown for him. 3RP 306. They left the bar, and dropped Murkins at his house around

10:00 or 10:30. 3RP 306-07.

Stillwagon and Johnson decide to rob Brown.

McEntee testified that after dinner, Efren drove them back to Stillwagon's apartment, and they got in around 11:00. 2RP 75. Swan was not there; he spent Thursday night visiting a friend in Tacoma. 6RP 906.

McEntee and Stillwagon were watching television when Lucas Johnson called Stillwagon. 2RP 79. She heard Stillwagon talking about going to Leonard Brown's house. 2RP 79. Stillwagon mentioned bring his gun. 2RP 79. She asked Stillwagon what was going on and he told her that Johnson wanted them to go to Brown's house. 2RP 80. Johnson had gone over earlier, but Brown would not sell him any drugs, and called Johnson a snitch. 2RP 80. So Johnson wanted to Stillwagon to go to Brown's with him and intimidate Brown into giving Johnson some drugs. 2RP 80.

Murkins testified that Stillwagon called him around midnight. 3RP 309. In response to Stillwagon's inquiry, Murkins explained what had happened earlier at Brown's. 3RP 309. Stillwagon asked him if he knew whether Brown kept any weapons at home. 3RP 310. Murkins told him he did not know, but most likely not. 3RP 310. Stillwagon said that if he ever decided to rob Brown he did not want to go in there and get shot. 3RP 311.

After getting off the phone, Stillwagon told McEntee he was going to get his gun for Johnson. 2RP 82. After a while, around 12:15 a.m.,

Stillwagon called Johnson and asked him why he had not shown up yet, because he wanted to get it over with. 2RP 82. Johnson finally showed up around 1:00 or 1:30. 2RP 83. He was wearing a white "wife-beater" tank top, a gray vest and khaki shorts. 2RP 84.

Stillwagon asked Johnson if he had anything for self-protection, and Johnson replied that he had a baseball bat in the car. 2RP 85. They went into the bedroom, and when they came out they had changed clothes. 2RP 85. Johnson was now wearing jeans, a dark blue long-sleeved shirt and a jacket. 2RP 86. Stillwagon still had jeans on, but had exchanged his T-shirt for a dark sweater. 2RP 86. Stillwagon also produced a black and white mask and a dark blue bandana. 2RP 87. Johnson put on the bandana, and Stillwagon tried on the ski mask. 2RP 88.

McEntee asked Stillwagon why he had to take the gun, and Stillwagon told her he was not going to use it, he just wanted it for protection in case Brown pulled a gun. 2RP 90. It was a Smith and Wesson .40 caliber black handgun. 2RP 90. She had seen it a dozen times during the time they dated. 2RP 91.

Stillwagon and Johnson leave.

They left shortly after Stillwagon got the gun out. 2RP 92. Johnson told him he did not need to bring the gun because he did not think Brown had a gun. 2RP 92. Stillwagon responded that "it was not going to come out."

Johnson said okay to the gun as long it was not going to come out. 2RP 92. Stillwagon had a shoulder holster for the gun. 2RP 92. They two men left the apartment around 2:00. 2RP 93. Just before they left, McEntee asked Stillwagon not to take the gun, but he shoved her down on the couch and told her nothing was going to happen. 2RP 93. McEntee spent some time looking at the internet, and then fell asleep. 2RP 93.

Brown's roommate Patrick Crowthers testified that he and his girlfriend were in his bedroom watching a movie and fell asleep during it sometime after 9:30 or 10:00. 5RP 653. He was awakened by a loud noise in the middle of the night but did not think much of it since there were frequently noises. 5RP 653. He heard someone in the house, but assumed it was Brown. 5RP 654. He went back to sleep. 5RP 654. The noise had to have been later than 11:30. 5RP 655.

Stillwagon and Johnson return.

McEntee testified that Stillwagon woke her up and told she was going to need to be calm and not "freak out." 2RP 94. Johnson came in and took off his shirt and showed her a bullet wound through his arm. 2RP 94. She started "freaking out." 2RP 94. She asked what happened. 2RP 94.

They told her they had knocked on the door and Brown tried to close it after he answered it. 2RP 94. They pushed it open and Brown punched Johnson in the face. 2RP 94. Johnson had fallen backward and was getting

back up when Stillwagon pulled the trigger and the bullet had gone through Johnson's arm and hit Brown in the chest. 2RP 94. She asked if Brown was okay, and they said it looked like he was breathing. 2RP 95. She started crying and then went into the bathroom and threw up. 2RP 95. Johnson was also in the bathroom, trying to stop the bleeding. 2RP 96.

McEntee went into the dining room and grabbed her cell phone. 2RP 96. Stillwagon took it from her and told her she was not going to call the police. 2RP 96. He told her everything would be fine because the police were not going to find out. 2RP 96. She felt horrible, but he had previously grabbed her, and she was concerned about him having a gun. 2RP 96. She had wanted to tell the police that Stillwagon and Johnson had gone to Brown's and that Brown had been shot. 2RP 97.

They continued trying to get Johnson's wound to stop bleeding. 2RP 97. They poured peroxide through it and wrapped it in a white thermal shirt. 2RP 97. Johnson lay down on the couch, and Stillwagon went to Johnson's house to get him some muscle relaxants. 2RP 97. Johnson came back with the drugs about twenty minutes later. 2RP 98.

Before Stillwagon went to Johnson's house to pick up the painkillers, they had split some money, each receiving \$350.00. 2RP 101. They said they had gotten it from Brown's house. 2RP 101. They were unable to find

any drugs, but got the money from a shoebox under his bed. 2RP 101-02.
Stillwagon never told her he had walked home before the shooting. 2RP 102.
He said he was there with Johnson. 2RP 102.

While Stillwagon was gone, Johnson told her he did not want her to be involved and that if anyone asked she should just say she did not know anything about it. 2RP 98. Later, not that day, after Johnson had wrapped the wound with an Ace bandage, he asked her to tell people that he had sprained his elbow playing basketball. 2RP 98.

After Stillwagon returned, he and Johnson were joking around. 2RP 98. Stillwagon said he had never shot a friend before. 2RP 98. Johnson said it was a story he could tell the grandkids. 2RP 99. Johnson bled through the shirt and onto the pillow he was laying on. 2RP 99. Around 4:00 or 5:00 a.m., they all went to sleep, Johnson and McEntee on different couches and Stillwagon in his bedroom. 2RP 100.

Stillwagon had the gun when they came back after the shooting. 2RP 172. McEntee had never seen him lend it to anyone. 2RP 173.

Friday, August 26

Brown's body is found.

Crowthers testified that his girlfriend awakened him around 7:00 after seeing Brown's body. 5RP 656.

When the police arrived, Brown's body was just inside the front door.

3RP 406. Brown was face down on his right side and wearing a pair of boxer shorts. 3RP 407. The deputy coroner estimated the time of death as about 2:00 a.m. 3RP 410. The police found two pieces of paper in the bedroom with fresh blood on them. 5RP 725. Drugs, which later were determined to be cocaine, on a trunk at the foot of the bed. 5RP 726, 801. There was more blood in the bedroom where the papers were. 5RP 735. Also on bed and comforter. 5RP 735. Brown's wallet was on container where drugs were, with money in it. 5RP 736. No usable prints were found. 5RP 737.

Johnson get patched up and Stillwagon gets rid of their clothes

Stillwagon woke McEntee up around 7:00 a.m. to tell her they were going to Johnson's house where Johnson's mother was going to help bandage him up. 2RP 116. She went back to sleep. 2RP 116.

Stanton Purser, Johnson's mother's boyfriend of 10 years testified that he, the mother and Johnson's 14-year-old sister Chelsea went to Johnson's house on Friday morning. 6RP 953. At first he waited outside while the mother went inside to tend to Johnson's wound. 6RP 955. Then the mother asked him to go to the drugstore to get some supplies. 6RP 955.

When Purser returned 30 minutes later, Johnson's sister had left with Stillwagon. 6RP 957. They came back about 20 minutes later. 6RP 957.

McEntee got up around 11:00 and showered. 2RP 116. Before they

had gone to bed, they had put the clothes that Johnson and Stillwagon had been wearing, including their shoes, in a big black plastic bag. 2RP 117-18. When McEntee got up, the plastic bag was gone. 2RP 118. The bloody pillow was gone as well. 2RP 118. Stillwagon came home with Johnson's sister to get the pain relievers. 2RP 116. Stillwagon told her that he heard Brown had died. 2RP 116. He only stayed for about five minutes. 2RP 117. She did not see him take anything besides the drugs. 2RP 117.

Later, Purser went out to the living room and heard Stillwagon telling the sister, Chelsea, that the shooting was an accident. 6RP 968. He apologized to Chelsea for shooting Johnson. 6RP 968. Then Johnson came from the bathroom where his mother had been treating the wound, and said, "I told him, dude, I can't believe you shot me." 6RP 969.

They went out back to have a smoke, and they mentioned some bags that needed to be disposed of. 6RP 971. They had asked them to bring gasoline when they came. 6RP 971. They did not bring any gas. 6RP 972. Then they asked them to take the stuff out to the reservation and burn it for them. 6RP 973.

Stillwagon brought him two 33-gallon garbage bags. 6RP 973. Johnson and Stillwagon had a discussion about whether everything, including the shoes was in the bags. 6RP 973. They were full and tied shut. 6RP 974

Purser said he would take them. 6RP 976. Purser put the bags in the back of his car. 6RP 976.

After bringing out the bags, Stillwagon produced a box with a gun in it. 6RP 974. He tried to hand it to Purser, but he did not want to touch it. 6RP 975. Then Stillwagon said that the gun was just going to disappear. 6RP 976. He did not see where the gun went. 6RP 976. That day was the first time he met Stillwagon. 6RP 979. He had never heard of him before. 6RP 979.

Johnson's roommate commits suicide

At some period during the day, McEntee heard from a one of her fellow employees that Johnson's roommate, Fred Work, had hanged himself. 2RP 127. Murkins also related that Stillwagon had called him and said that Work, had hanged himself, and that Brown was dead, too. 3RP 313.

Stillwagon and Johnson discuss what happened with their friends.

Murkins got a ride from a friend and arrived at Stillwagon's house around 10:30 p.m. 2RP 126, 3RP 314. McEntee was there too when they arrived. 3RP 314. They all talked a bit about Work's death. 3RP 314.

Then Stillwagon told Murkins that he needed to talk about something serious, and the two of them went out onto the roof. 3RP 315. Stillwagon said that he had made a mistake and that it had gone wrong. 3RP 315. When Brown answered the door, Johnson and Brown had gotten into a scuffle. 3RP

316. Brown punched Johnson, who fell back into Stillwagon. 3RP 316. When Johnson hit him, the gun went off shooting Johnson in the arm and Brown in the chest. 3RP 316. Stillwagon was holding the gun. 3RP 317.

Stillwagon said that after Brown fell to the ground, they started looking for the drugs, which they did not find. 3RP 318. They did find cash, \$700. 3RP 318. Murkins told Stillwagon that if the police asked him he would have to tell them what he said. 3RP 320. Stillwagon was quite stressed out by the situation. 3RP 321. Stillwagon never suggested that Johnson had shot Brown during any of the conversations Murkins had with him. 3RP 347. Nor did he ever say that Johnson had his gun. 3RP 347.

They were waiting for Johnson, but McEntee would not stop crying, so Stillwagon, and his friends went to the Horse and Cow, where Johnson eventually joined them. 2RP 129, 3RP 321. McEntee stayed at Stillwagon's apartment. 2RP 129. About an hour later Stillwagon called and asked to come to the bar, if she could stop crying. 2RP 129. She went. 2RP 129.

While at the bar, Murkins asked Johnson about the bandage on his arm, and they went outside to talk about it. 3RP 322. While they were outside, Buchin joined them. 3RP 322. Johnson told Murkins that both he and Buchin had been contacted by the police. 3RP 322. Johnson said they should all follow his story so they "would be compatible." 3RP 322. The

story was that they went to Brown's house to see if he wanted to go out with them, but Brown said he was too tired and they went without him. 3RP 322. Johnson had told the police that he had sprained his elbow playing basketball. 5RP 686.

Saturday, August 27

The police told Johnson that they already knew about the attempted drug deal at Brown's and did not care. 5RP 697. Johnson then admitted to them that they had gone over to try to buy cocaine. 5RP 697. Johnson did not mention returning later with Stillwagon. 5RP 697.

McEntee woke up around 5:00 p.m. 2RP 130. She and Stillwagon went to a casino where Stillwagon gambled and lost \$190.00. 2RP 130. They left the casino and went to Stillwagon's father's house for a barbecue. 2RP 131. Murrieta next saw Stillwagon at the barbecue. 6RP 858. They went to a movie afterwards, then back to Murrieta's house, where McEntee joined them. 6RP 859. Between when they left his father's house and before they got to the cousin's apartment, Stillwagon asked McEntee to pick up a shoebox from Johnson's house. 2RP 134. She asked what was in it, and he said the gun. 2RP 134. She refused. 2RP 134.

Murrieta and Stillwagon went out and did not return until 7:00 in the morning. 2RP 132. McEntee and April had a few drinks and McEntee slept on the couch. 2RP 132.

Murkins was at Troy's house around 9:00 that evening when Stillwagon showed up with Murrieta. 3RP 323. They decided to go to the Horse and Cow again. 3RP 324. Before going, Murkins stepped outside with Stillwagon and asked him what he was going to do "about the whole situation." 3RP 324. Stillwagon said he was not a suspect, but that his gun was still at Johnson's house, and he was going to go get it in the morning. 3RP 325. Stillwagon said that if anyone asked they would say that Work did it. 3RP 326. Murkins did not think that was a great idea because Work had been a good person. 3RP 326.

After they talked, Murkins and Stillwagon, along with Jackson and Murrieta went to the bar, where they stayed until closing time. 3RP 327. Then they went back to Troy's house. 6RP 860. Murrieta passed out on the couch watching a movie. 6RP 861. Murkins passed out around 3:30. 3RP 328. Stillwagon was still there when Murkins passed out. 3RP 328. When Murkins woke up in the morning, Stillwagon had already left. 3RP 323. He did not see Stillwagon again until the trial. 3RP 328.

Sunday, August 28

On around 6:00 or 6:30 a.m., Murrieta and Stillwagon left Troy's house and went to Johnson's house in Murrieta's truck. 6RP 862, 864. Murrieta waited while Stillwagon knocked on the door and then climbed over the fence to the back yard. 6RP 865. After about ten minutes,

Stillwagon came out the door carrying a black bag. 6RP 865.

When they got there back to Murrieta's he placed the bag in the bed of the truck under the locked fiberglass tonneau cover. 6RP 866. Later that day or the next day, Murrieta looked in the bag and saw that it contained a pistol, a cleaning kit, a box of rounds and a couple of clips. 6RP 867.

When the police contacted him, Murkins told them Johnson's story about going over to see if Brown wanted to go the bar. 3RP 342. Swan saw Stillwagon briefly again Sunday evening after he got home, from about 7:00 to 9:00, when Swan went to bed. 6RP 906.

Monday, August 29

Swan got up around 9:00 on Monday and went to work at the furniture store downstairs at 10:00. 6RP 907. Some police came by the store asking about the apartment. 6RP 907. He called Stillwagon at home to ask about it. 6RP 907. Detective Sergeant Lawrence Hill was in the alley when he saw Stillwagon exit onto the roof and drop down into the alley. 5RP 812. He ordered Stillwagon to the ground at gunpoint. 5RP 812. He complied. 5RP 813. A short while later, Swan saw Stillwagon in handcuffs on the ground in the alley. 6RP 908. When a detective informed Stillwagon he was being arrested for murder and robbery, Stillwagon shouted "Robbery!" like that charge surprised him. 5RP 689.

After he was arrested, Johnson gave the police a version of the

shooting that was the same as his trial testimony. 5RP 687.

When he was driving in Mason County, Murrieta pulled over and hid the bag in the woods. 6RP 868. He did not mention it the first time the police talked to him. 6RP 870.

The police contacted Purser on Monday. 6RP 986. He did not tell the police anything at that point. 6RP 987.

The police contacted McEntee at work. 2RP 107. They told her they had arrested Johnson and Stillwagon for Brown's murder and needed to talk to her. 2RP 108. She said she did not know anything about it, and that Johnson had told her that he had hurt his arm playing basketball. 2RP 108. She did not tell them the truth because she did not know if they were going to get out, and was scared. 2RP 109.

Wednesday, August 31

Purser left the bags with the clothing in them in his car for about a week. 6RP 982. He never opened them during that period. 6RP 982. He kept them because he was not sure what to do with them. 6RP 984. He was afraid to destroy them once he had heard someone had been murdered. 6RP 984. On Wednesday he hid them in the woods. 6RP 984.

Thursday, September 1

Murkins talked to the police again. 3RP 343. This time he told them what actually happened. 3RP 343. He did not originally tell them about the

attempt to buy cocaine because it would have been a violation of his parole. 3RP 343. In between the two contacts, Murkins had left an anonymous tip with the police that Johnson and Stillwagon were involved in the murder. 3RP 344.

Friday, September 9

Murrieta led the police to the gun after they told him they knew he had hidden it, and said that he could be arrested. 6RP 871. After making the statement to the police he entered into an agreement with the State that he would not be charged if he cooperated. 6RP 873. He went with the police to show them where he had hidden the bag. 6RP 876. It was where he had left it and did not appear to have been altered. 6RP 876. In the bag, the police recovered three loaded magazines, the gun, a cleaning kit, a box of live Winchester rounds, and the shoulder holster. 5RP 759, 767, 771.

Saturday, September 10

The police contacted Purser again after on September 10, after Johnson's mother reported that they had some evidence. 6RP 988, 7RP 1016. Purser led them to where he had hidden the clothes. 6RP 990. They were undisturbed from when he had hidden them. 6RP 992. In the bags the police found the mask, the bandana, the bloody pillow, pill bottle, a jacket, a sweater, a shirt with a hole in the sleeve and the logo "Economy Heating." 7RP 1022-23. The pill bottle said "relaxers" on it. 7RP 1031.

Sunday, September 11

The police visited McEntee at her parents house. 2RP 109. She was not home, and the police told her parents that they knew of her involvement and that if she did not talk to them, they would get a warrant. 2RP 109.

Monday, September 12

McEntee went to the Bremerton police department. 2RP 110. He attorney met her there. 2RP 110. The attorney told the police that she was just scared. 2RP 110. They assured her that she would be safe. 2RP 110. Eventually McEntee talked to the police and told them everything she knew. 2RP 110. McEntee had missed a court hearing in a misdemeanor case. 2RP 111. She was charged with bail jumping. 2RP 111. That charge was dropped after she spoke to the police. 2RP 112.

The Lab Work

The medical examiner found that Brown died of a single gunshot wound to the chest. 2RP 203. The gun was fired at close range. 2RP 204. He estimated that the barrel of the gun would have been eight to ten inches away. 2RP 209. Based on a photo of Johnson's wound the M.E. determined that the gun was less than six inches away or more than 18 inches away when it fired, or the wound had been cleaned. 2RP 211. The wounds could have been caused by the shot going through Johnson's arm before striking Brown's chest. 2RP 213.

Brown had an injury to his hand that was consistent with him having

punched someone in the face. 2RP 214. The bullet lodged in Brown's chest. 2RP 215. The bullet punctured Brown's aorta and he would have bled to death within three to four minutes. 2RP 218-19. The gun would have to have been close to point blank to Johnson's arm to have produced the stippling on Brown's chest if it went through Johnson's arm first. 3RP 253.

The ballistics expert from the Washington State Patrol crime lab examined Stillwagon's gun. The gun had both a manual external safety switch as well as an internal safety that would prevent the gun from firing unless the trigger were pulled and held for a short period of time. 6RP 925. The gun was also double-action meaning when the hammer was cocked back, i.e. in single-action mode, the trigger required much less pressure than when the hammer was not cocked, or in double action mode. 6RP 926. The gun required seven to eight pounds of pressure on the trigger to fire in single action and 16 to 17 pounds in double action. 6RP 933. Seven to eight pounds is about the pressure required to leave a dent in an empty pop can by squeezing it. 6RP 934. He also determined that the casing found at the scene was fired from Stillwagon's gun. 6RP 935. All the bullets recovered with the gun were Winchester hollow-point bullets. 6RP 939. The bullet from Brown's body was also a hollow point. 6RP 940. That bullet was fired from Stillwagon's gun. 6RP 941.

A DNA analysis concluded that the blood on the living room table, the comforter and the two pieces of paper from the bedroom was Johnson's. 7RP 1077. The probability was one in 96 quadrillion of it belonging to another person, or more than 100,000 times the population of the planet. 7RP 1080. The blood on the Economy Heating shirt was also Johnson's. 7RP 1082, 1086, 1092. They also did a DNA swab of the shirt's collar. 7RP 1086. Three persons' DNA was present. Neither Johnson and Stillwagon could be excluded as having contributed DNA to the mixture. 7RP 1088.

Trace DNA on gun and ammo was too slight to make a useful comparison. 7RP 1094. One of the magazines had a mixed profile that excluded both Johnson and Brown. 7RP 1095. Stillwagon could not be excluded. 7RP 1096.

The bandana was tested. 7RP 1100. A comparison with Stillwagon's DNA came up with an "inclusion," meaning that it was not a match, but that his overall profile fit. 7RP 1101. A second swab from the bandana produced a sample from which Stillwagon could not be excluded. 7RP 1101. Both Johnson and Brown were excluded from the bandana samples. 7RP 1102. A red possible blood stain on the outside of the mask was also mixed, but the major component matched Stillwagon. 7RP 1103. The probability was one in 1.9 quadrillion.

2. *Lucas Johnson's testimony*

On August 25, Buchin had broken up with his girlfriend so they planned to get some cocaine and go out to drink and play pool. 4RP 505. His story was essentially same as Murkins'. 4RP 506-11.

Johnson and Buchin dropped Murkins at his home and proceeded to another bar, Romeo's. 4RP 512. After dropping Buchin off, Johnson went to Stillwagon's house. 4RP 513. Before leaving the bar, Johnson had called Stillwagon and told him what happened at Brown's house. 4RP 514. There were several phone conversations. 4RP 522-24. Johnson suggested that they go and rob him. 4RP 514. Stillwagon agreed. 4RP 515.

When Johnson arrived, Stillwagon told him he needed to change his clothes, which he did. 4RP 516. Stillwagon asked if Johnson thought Brown had a gun. 4RP 518. Johnson did not think he did. 4RP 518. While they were in the bedroom changing, Stillwagon got his gun. 4RP 520. Johnson had previously told Stillwagon he did not think they needed the gun, but did not say anything when Stillwagon got it out and tucked it into the back of his pants. 4RP 521. Johnson had a bat in the car. 4RP 531. Stillwagon also took a ski mask, and Johnson had a bandana and some snowboarding goggles. 4RP 533.

They drove to Brown's in Johnson's car. 4RP 534. They parked

about a block away. 4RP 537. Because the street was well-lit and very close to the police station, he decided to leave the bat in the car. 4RP 538. He also left his mask in the car. 4RP 538. The plan was to first try to see if he would sell them some cocaine, and try to see how many people might be in the house. 4RP 537. Brown's roommates had come home when they were leaving earlier in the evening. 4RP 540.

Stillwagon agreed to let Johnson talk to Brown. 4RP 541. Brown was a little upset when he answered the door because he had already told Johnson he was not selling to him. 4RP 541. Johnson told him he hoped he would now that Buchin was not with him. 4RP 541. Stillwagon was a behind Johnson on the stoop when he knocked on the door. 4RP 542.

After Brown refused to sell, Johnson threatened him that he could come in and take it if he wanted to. 4RP 543. Brown punched Johnson in the face, and the gun went off. 4RP 543. Johnson spun around and Stillwagon went by him. 4RP 543. When he turned again, Stillwagon was standing in the doorway and Brown was on the floor. 4RP 543. Johnson went in and looked under the bed where he thought the cocaine was. 4RP 544. He could not find it, so he went back out and asked Brown where it was. 4RP 545. He appeared to be conscious; Johnson could hear him breathing, but he did not respond. 4RP 545.

Stillwagon never went beyond the doorway of the house. 4RP 546. Stillwagon said "We have to go," and they left. 4RP 549. On the way back to the car, Johnson told Stillwagon that he had been shot. 4RP 550. Johnson asked Stillwagon why he shot, and Stillwagon said he did not know, that everything got crazy. 4RP 550. Johnson did not know if he said anything at the time about it being an accident. 4RP 550.

After leaving, they went straight back to Stillwagon's apartment. 4RP 551. They were gone half an hour at most. 4RP 551. Stillwagon went in first. 4RP 551. McEntee was still there and "freaked out" when she saw Johnson's arm. 4RP 551. Johnson went into the bathroom to attend to his arm. 4RP 552. McEntee came in and looked at it and got sick and threw up. 4RP 553. Johnson felt sick so he laid down on the couch. 4RP 553. McEntee asked Stillwagon how Johnson got shot, and Stillwagon replied that it was an accident. 4RP 554. Stillwagon went to Johnson's house to retrieve some muscle relaxants for Johnson's pain. 4RP 554. At some point Johnson changed back into his own clothes. 4RP 554. At some point Stillwagon put the clothes they were wearing into a large black garbage bag. 4RP 555. Stillwagon took the bag with him when he went to get the pain relievers. 4RP 556.

They got \$700.00 from Brown during the robbery. 4RP 582.

Stillwagon took it. 4RP 583. Johnson did not see the money until they were back at Stillwagon's apartment. 4RP 583. Stillwagon pulled it out and asked Johnson if getting shot was worth \$350.00. 4RP 583.¹

Johnson and Stillwagon went to Johnson's house around 7:00 a.m. 4RP 556. Johnson called his mother, who used to be a nurse, to come and look at his arm. 4RP 556. He only told her that he had been shot. 4RP 556. She arrived at Johnson's house around 11:00 or noon. 4RP 557. Purser and Johnson's sister were with her. 4RP 557. Stillwagon was still there. 4RP 558. Johnson did not hear their conversation. 4RP 558. Johnson slept for a while and then got up and told Stillwagon that he had to go to Tacoma, so Stillwagon should have McEntee pick him up. 4RP 559. He went to Tacoma to get some painkillers from a friend. 4RP 559.

He next saw Stillwagon at the Horse and Cow after 10:00 p.m. 4RP 559-60. Johnson found Work when he returned from Tacoma. 4RP 560. He talked to the police at the time. 4RP 560. They also asked him about Brown, and Johnson told them that he heard that Brown had been shot. 4RP 560.

While at the bar, Johnson and Murkins went outside and talked. 4RP 561. Murkins asked him what he had told the police, and Johnson told Murkins that he told the police about the three of them trying to buy drugs

¹ McEntee testified that Johnson was the one who produced the cash before they divided it

from Brown. 4RP 561. Johnson did not know at the time that Murkins knew he and Stillwagon had gone back to Brown's house. 4RP 562. Johnson did not recall telling anyone that evening about why his arm was bandaged. 4RP 562.

Eventually Johnson and Buchin went back to his house. 4RP 563. They did a significant amount of cocaine that Johnson had gotten from a friend in Belfair. 4RP 563. Johnson did not really sleep that night. 4RP 563.

The following day, Johnson and Buchin went to the police station and told them about the earlier visit to Brown's house. 4RP 564. Johnson did not tell the police about his return with Stillwagon. 4RP 564. They left the station after giving their statements. 4RP 564.

Stillwagon came over early on Sunday and took the bag that had his gun in it and left. 4RP 565. It was early, around 5:00 a.m. 4RP 568. Stillwagon said he had been out drinking with Murrieta. 4RP 568. Johnson did not see Stillwagon again until they appeared in court. 4RP 569. On Monday, the police woke him up around 11:00 a.m. and asked him to come to the station and speak to them again. 4RP 569. After this interview the police arrested Johnson. 4RP 569.

up. 2RP 136.

While they were in the holding cell at the beginning of the trial, before Johnson pled guilty, Stillwagon told him that he would testify that he was not at Brown's at the time of the shooting. 4RP 581. Stillwagon also said that if Johnson had not been shot they would not have gotten caught. 4RP 582.

Johnson entered a plea agreement that his reduced charges to second-degree murder. 4RP 573-75. He also had a pending case for delivery of cocaine. 4RP 575. The plea agreement stipulated that the State would recommend that the drug sentence be served concurrent with murder sentence. 4RP 576. In exchange Johnson had to testify truthfully. 4RP 578.

3. *Stillwagon's testimony*

Stillwagon's testimony opened with a recitation of his criminal history: a first-degree burglary, a first-degree robbery, a second- or third-degree theft and a second-degree possession of stolen property. 7RP 1142-43.

He described Efen Murrieta, his cousin's husband, as a good friend. 7RP 1143. He did not know Stan Purser. 7RP 1144. McEntee was his girlfriend. He averred that they were not exclusive, but that she did not know that. 7RP 1144. Murkins and Johnson were also his good friends. 7RP

1145. He had known Murkins longer, but was closer to Johnson. 7RP 1146.
He admitted that he drank and used cocaine in August 2005. 7RP 1146.

In his testimony, Stillwagon described the day and evening of August 25 consistently with McEntee. 7RP 1146-50. He stated that Johnson called and asked if Stillwagon could get some cocaine from Brown. 7RP 1150. Stillwagon did not know Brown and had not previously bought from him. 7RP 1150. Stillwagon told Johnson he did not know Brown enough to buy from him. 7RP 1151.

Johnson later called and said he wanted to go to Brown's house and rob him and take his cocaine. 7RP 1152. Stillwagon said "Okay if you want to go, let's go." 7RP 1152. He agreed to help because Johnson was his friend. 7RP 1153.

After Johnson arrived, they went into Stillwagon's room and talked. 7RP 1153. Johnson believed Brown had a significant amount of cocaine, a quarter to half an ounce. 7RP 1153. Stillwagon gave Johnson clothes to change into. 7RP 1154.

Stillwagon asked Johnson if he had a weapon, and Johnson said he had a bat in the car. 7RP 1154. Stillwagon retrieved his gun from his dresser and put it in his waistband. 7RP 1154. He did not take the holster. 7RP 1154. The magazine was in his pocket. 7RP 1154. Stillwagon knew it was

illegal for him, as a convicted felon, to possess a gun. 7RP 1154. They went back out to the living room, and Stillwagon told McEntee that they were going over to take Brown's cocaine from him. 7RP 1155. McEntee did not say anything about it. 7RP 1155.

They left in Johnson's car, with Johnson driving. 7RP 1156. They made it to just past Naval Avenue, which was about a quarter of the distance between Stillwagon's house and Brown's. 7RP 1158. After they got in the car Stillwagon started thinking that maybe he should not be there, since he already had two "strikes." 7RP 1159. He told Johnson to pull over. 7RP 1160. Johnson briefly tried to persuade him to go, but he refused and got out of the car. 7RP 1161. He had put the gun under the seat when he got in the car, and left it there when he got out. 7RP 1161. He did not discuss the gun with Johnson before he got out. 7RP 1161.

He walked back to his apartment, but had left his keys in the car. 7RP 1162. So he climbed in the kitchen window, grabbed a beer and went back out and sat on the bumper of his car. 7RP 1162. He did not see McEntee when he was in the kitchen. 7RP 1162. He went back out because Johnson said he would be right back and to wait for him. 7RP 1163.

Johnson arrived fifteen to twenty minutes later. 7RP 1163. Johnson said there had been a scuffle and the gun went off, shooting Johnson in the

arm and Brown in the chest. 7RP 1164. Johnson said he looked for the drugs, but could not find any, but he got some money. 7RP 1165.

Stillwagon saw the money after he helped Johnson "patch himself up." 7RP 1166. Before going into the apartment they decided to tell McEntee that Stillwagon had accidentally shot Brown. 7RP 1167. Stillwagon's testimony regarding what occurred after their return to the apartment was largely consistent with McEntee's, except concerning the division of the money. 7RP 1167-74. According to Stillwagon, Johnson pulled the money from his pocket, but Stillwagon did not see how much it was. 7RP 1169.

They also agreed to tell Johnson's mother that Stillwagon accidentally shot Johnson, but not about the robbery. 7RP 1177. They day after the incident, Stillwagon told Murkins that they had gone to Brown's to rob him, and that Brown and Johnson had accidentally gotten shot. 7RP 1189.

III. ARGUMENT

- A. **THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AN ACCOMPLICE-TESTIFYING INSTRUCTION WHERE THE CODEFENDANT'S TESTIMONY WAS SUBSTANTIALLY CORROBORATED AT TRIAL WITH EVIDENCE INCLUDING STILLWAGON'S CONFESSION TO SEVERAL FRIENDS THAT HE HAD SHOT THE MURDER VICTIM.**

Stillwagon argues that the trial court erred in refusing Stillwagon's requested "accomplice testifying" instruction.² This claim is without merit because the testimony of the accomplice, Lucas Johnson, was substantially corroborated and because Stillwagon cannot demonstrate prejudice.

Where the testimony of an accomplice is wholly uncorroborated, a cautionary instruction must be given. *State v. Harris*, 102 Wn.2d 148, 153, 155, 685 P.2d 584 (1984), *overruled on other grounds*, *State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). Where the accomplice testimony is substantially corroborated by independent evidence, failure to give the instruction will not be error. *Harris*, 102 Wn.2d at 153. On appeal, the Court first looks to whether the failure to give the instruction prejudiced the defendant before making this determination. *Harris*, 102 Wn.2d at 153.

Here, Johnson's testimony was substantially corroborated, largely by

² WPIC 6.05.

Stillwagon's friends. The scientific evidence was also consistent with Johnson's testimony.

Stillwagon's girlfriend Heather McEntee testified that Stillwagon told her he had agreed to rob Brown with Johnson. She watched them change into dark clothes at Stillwagon's suggestion. She saw Stillwagon take his gun, over the objections of both her and Johnson, and leave. She saw him come back with Johnson not long after, and Johnson had been shot. Stillwagon told her then that he had fired the gun, and the bullet went through Johnson's arm and into Brown's chest. Stillwagon had the gun when they returned. She watched them split up the \$700.00 they stole from Brown's house. She saw them pack up the clothes and presumably the bloody pillow and take them away.

Antoine Murkins, who was primarily Stillwagon's friend, fully corroborated Johnson's testimony regarding Johnson's first visit to Brown's house earlier in the evening. This testimony was also consistent with what Stillwagon told McEntee before he left to rob Brown. Murkins related a phone call from Stillwagon before the murder in which Stillwagon asked him whether he thought Brown was armed. Stillwagon told Murkins at the time that if he ever decided to rob Brown he did not want to go in there and get shot.

The day after the murder Stillwagon told Murkins a version of the events that was completely consistent with Johnson's trial testimony. According to this account, Stillwagon accidentally shot Brown through Johnson's arm after Brown punched Johnson. Notably, at trial the State had to practically drag this testimony out of Murkins, who was "more than reluctant" to testify and "somewhat hostile." 3RP 316. Nevertheless, Murkins testified that at no point in any of his conversations with him did Stillwagon ever suggest that Johnson had had the gun or had shot Brown.

Several witnesses identified the murder weapon as Stillwagon's gun. None of them had ever known Stillwagon to lend the gun to anyone.

Stillwagon asked Johnson's parents, whom he did not know, to dispose of the clothing they wore the night of the shooting. Stillwagon's cousin, Efren Murrieta hid the gun in the woods in a remote part of Mason County, presumably at Stillwagon's request.

The forensic evidence was consistent with Johnson's testimony. Only one slug and one casing was found. They were fired from Stillwagon's gun. The stippling patterns and the final resting place of the bullet, which did not exit Brown's body, were consistent with the bullet having passed through Johnson's arm and into Brown's chest. Stillwagon offers no plausible theory for how Johnson could have shot himself through the back of his arm with

the bullet then striking Brown in the chest.

Moreover, even Stillwagon's testimony at trial was largely consistent with Johnson's and with the other witnesses'. The only difference was what occurred during the few minutes between when he and Johnson left his apartment and when they returned. He gave the story that even though he initially agreed to help Johnson rob Brown, he suddenly thought better of it on the way because if they were caught it would be his third strike, so he went home, but waited outside until Johnson returned. This theory is utterly inconsistent with his claim that he confessed to shooting Brown to several people to protect Johnson because he did not understand the felony-murder rule would make him guilty of murder. Regardless of that, his admitted participation in a robbery would still have exposed him to the third-strike liability he supposedly wanted to avoid. His story simply makes no sense.

Finally, Stillwagon's counsel devoted a significant amount of effort to pointing out the alleged inconsistencies between Johnson's testimony and the forensic evidence, the testimony of other witnesses, and Johnson's own prior statements. He also repeatedly pointed out the "deal" Johnson was getting in exchange for his testimony, including the reduction of the main charge from first- to second-degree murder, the dismissal of several counts and enhancements in an unrelated drug case, and the State's agreement to

recommend that the drug sentence run concurrent with that for the murder. And even the State in its rebuttal closing argument invited the jury to disregard Johnson's testimony, because the evidence was sufficient to convict Stillwagon without it. 9RP 1368.

In *State v. Johnson*, 40 Wn. App. 371, 699 P.2d 221 (1985), this Court applied the standards that had then been recently set forth in *Harris*. The Court found that evidence, including eyewitness testimony placing the defendants together before and after the incident, a consistent injury to one of the defendants, the defendant's subsequent admissions to having committed the crime, and the defendant's possession of a gun were sufficiently corroborative to obviate the need for an accomplice-testifying instruction. *Johnson*, 40 Wn. App. at 379-380. This case is no different. The trial court did not err in declining to give the instruction, and Stillwagon cannot show prejudice in any event. This claim should be rejected.

B. STILLWAGON FAILED TO PRESERVE FOR REVIEW HIS CLAIM THAT THE TRIAL COURT ERRED IN NOT GIVING A ER 404(B) LIMITING INSTRUCTION WHERE HE DID NOT REQUEST ONE BELOW, AND HE FURTHER FAILS TO SHOW EITHER PREJUDICE FROM THE ALLEGED ERROR OR THAT COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING THE INSTRUCTION.

Stillwagon next claims that the trial court erred in not giving a

limiting instruction regarding brief testimony admitted pursuant to ER 404(b) that Stillwagon had shoved his girlfriend a few weeks before the murder. He also asserts counsel was ineffective for not proposing an instruction. This claim is without merit because counsel did not request an instruction despite being on notice that it was his decision to make, and because Stillwagon cannot show any prejudice even if counsel should have asked for a limiting instruction.

1. Stillwagon has not preserved this issue for review.

RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

To establish that the error is “manifest,” an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The purposes underlying RAP 2.5(a) were addressed in *State v. McFarland*:

[C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. On the other hand, “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited

resources of prosecutors, public defenders and courts.” *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” *i.e.*, it must be “truly of constitutional magnitude.” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

Alleged error relating to the admission of evidence under ER 404(b) is not of constitutional magnitude and cannot be raised for the first time on appeal per RAP 2.5(a)). *State v. Elmore*, 139 Wn.2d 250, 283, 985 P.2d 289 (1999). Although Stillwagon opposed the admission of the evidence below, he never asked for a limiting instruction or objected to the introduction of the evidence without one. On appeal, he concedes that the evidence was properly admissible under ER 404(b). Brief of Appellant at 27. Objection to evidence on one ground at trial is insufficient to preserve for review an alternative claim of error. *See State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). Since this claim does not present an issue of constitutional magnitude this Court should decline to consider it.

Even were evidentiary claims of constitutional magnitude, Stillwagon

fails to show actual prejudice, as required under RAP 2.5(a). *Cf. State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) (even where preserved such error would require reversal only if the evidence materially affected the outcome of the trial).

The evidence simply was not that devastating. First, the testimony was introduced in the context of why she was afraid and obeyed Stillwagon when he told her not to call the police:

A. I had went back out into like the dining -- like the dining room area. My cell phone was sitting on the table and I grabbed it. And Kenny grabbed it from me and told me that I couldn't call the police.

Q. How did he tell you this?

A. He said: You can't call the police. It is okay. Everything is going to be fine. They are not going to find out.

Q. How did that make you feel?

MR. KELLY: Objection, relevance.

THE COURT: Mr. Tornabene, relevance?

MR. TORNABENE: Your Honor, this will go to her credibility. I believe we talked about this in the 404(b).

THE COURT: Overruled, go ahead.

Q. [Mr. Tornabene] How did this make you feel?

A. I felt, you know -- I felt horrible. I couldn't do anything. Kenny had previously grabbed me and stuff, and I didn't -- I didn't know him having a gun if -- like I would have called if something was going to happen to me.

2RP 96. Moreover, the entire subsequent testimony was that Stillwagon

became jealous of Johnson and pulled her hair and bit her on the neck, but the bite was not "hard enough to break skin or anything." 2RP 103. They did not see each other for a week afterward, but she forgave him after he apologized. 2RP 103-04.

In a closing argument that spanned more than 40 pages of transcript, the State mentioned the incident only once. The State in no way suggested that the jury should infer that Stillwagon had any propensity for violence. Instead the discussion was solely that Stillwagon's story that he lied about the shooting Brown to protect Johnson was improbable in light of him having been so upset three weeks earlier about Johnson's relationship with McEntee.³

What the defendant got up there and said is insulting to any sense of reality, of common sense. A few examples. Defendant would have you believe that he lied to Heather McEntee. Does anybody remember the defendant giving any reason for this other than Johnson is a good friend? No. He's telling you that he is confessing to a crime. Your common sense says people typically don't implicate themselves in crimes that they didn't commit. And here the defendant is blithely confessing to three different people and it starts with Heather McEntee. And that's an interesting person to start with, because you will remember from the testimony this is a person that he is dating. This is a person who, not three weeks before, he pulled her hair, grabbed her by the throat,

³ Stillwagon did not object to this argument below, and has not assigned error to it on appeal. Although this argument was not the purpose for which the evidence was admitted, this evidence would also surely have properly been admitted for the purpose of weighing the credibility of Stillwagon's testimony that he lied to protect his friend Johnson. *See* ER 404(b).

and bit her neck. Why? Why did he do this? Heather McEntee told you. He did it because she called Johnson. The defendant is aware of the long-time relationship between Johnson and McEntee. It is on-again, off-again romantic. She's calling him or wanting to call him two or three weeks prior, and he beats her for it.

Now, in the defendant's fantasy world, three weeks later, not only is he totally fine with this, but he's willing to confess to a crime he didn't commit to make his buddy look good to the defendant's own girlfriend. It is nonsensical.

9RP 1299-1300. The evidence was not mentioned at all in the defense closing, 9RP 1322-57, nor in the State's rebuttal. 9RP 1358-73.

There was thus less than a page of testimony about the incident, and less than a page of entirely proper argument about it. Yet the evidentiary portion of the trial spanned 11 days, from December 18 through December 29, 2005.

Moreover, Stillwagon himself testified that he armed himself with a gun and was prepared to participate in the robbery of an acquaintance. According to his version of the events, he supposedly bailed out at the last moment not because of any crisis of conscience, but because he was afraid of a "third-strike" conviction. Stillwagon's good friend Antoine Murkins testified that Stillwagon specifically asked whether the victim was armed beforehand, because he did not want to get shot. After the murder, Stillwagon told Murkins that Stillwagon was hoping to lay the blame on suicide victim Fred Work, an idea that even Murkins was uncomfortable with

because he thought Work was a “good guy.” In short, far more evidence of Stillwagon’s bad character came from Stillwagon’s own mouth both before and at trial. It is preposterous to suggest that the jury would not have convicted him had it been told to consider this extremely brief evidence only for credibility purposes.

2. *Stillwagon’s counsel was not ineffective.*

In order to overcome the strong presumption of effectiveness that applies to counsel’s representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State*

v. *Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

A decision not to obtain a limiting instruction can be a legitimate trial tactic, because such an instruction may reemphasize damaging evidence. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). The record fully supports the likelihood that counsel chose not to emphasize this evidence seeking a limiting instruction.

At the pretrial hearing where the admissibility of this evidence was argued, the State specifically pointed out that Stillwagon would be entitled to a limiting instruction. RP (11/15) 207. In a similar context, both the State and the court put on the record that they expected any proposed limiting instructions to come from the defense:

MR. TORNABENE: Your Honor, to be clear for the record, the State would assume that goes for all these statements. I realize the strategic implication for each counsel -- the State would defer to each counsel taking on that burden, or decline to do so for strategic reasons.

THE COURT: I believe that is clear and impose that on both defense, their decision on what to impose on instructions rests with their team.

RP (12/2) 185-86. Counsel for Johnson, who had not yet pled guilty at the

time, noted that he was not sure he would want one, but would ask for one if he did. RP (12/2) 185. Although counsel for Stillwagon remained silent, given that the State had just indicated that it believed that it was “upon defendant Stillwagon then to propose the proper limiting instruction,” RP (12/2) 185, it must be assumed that Stillwagon’s counsel recognized his responsibility to propose a limiting instruction if he wanted one.

It is also notable that during trial, when the court ruled that evidence that Efren Murrieta had called McEntee about whether Stillwagon could contact her,⁴ Stillwagon’s counsel specifically noted that he frequently did not want limiting instructions because they highlighted the testimony:

MR. KELLY: No, your Honor, I think that sometimes I don’t want that because it does tend to call more attention to the testimony.

2RP 189. Stillwagon fails to show counsel’s performance was deficient.

Moreover, even if counsel should have requested a limiting instruction, Stillwagon fails to establish prejudice. For the same reasons discussed above with regard to manifest constitutional error, the record fails to support the notion that the outcome of the trial would have been different had a limiting instruction been given. This claim should be rejected.

⁴ This ruling is the subject of Stillwagon’s third claim.

3. *The proper remedy would not be reversal of all counts.*

Stillwagon broadly asserts that he is entitled to a new trial should the Court find reversible error. In his brief, however, he only alleges prejudice vis-à-vis the assault charge. *See* Brief of Appellant at 29-30 (error claim), 33 (ineffectiveness claim). He utterly fails to in any way suggest how he could have been prejudiced with regard to the burglary, robbery, or firearms charges. Since the jury specifically found first-degree felony murder based on the robbery and burglary, 9RP 1379, the murder charge would survive even without the assault. Since Stillwagon only argues that the alleged error affected the assault conviction, even if the Court accepts that prejudicial error occurred, the case should be remanded for retrial only on the assault charge, and the remaining convictions should be affirmed.

C. COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING AN EXPANDED CAUTIONARY INSTRUCTION REGARDING THE USE OF EVIDNCE THAT STILLWAGON'S COUSIN HAD CALLED HIS GIRLFRIEND AFTER STILLWAGON WAS ARRESTED.

Stillwagon next claims that counsel was ineffective for not requesting the trial court to give a more extensive cautionary instruction when it allowed Heather McEntee to testify that Stillwagon's cousin Efren Murrieta had contacted twice after Stillwagon's arrest. This claim is without merit because counsel could well have not wanted to plant the seed in the jury's

mind by telling them not to consider it as bearing on Stillwagon's guilt, and because it is highly unlikely that any expanded instruction would have affected the outcome of the trial.

The relevant legal standards for establishing that counsel was ineffective are set forth above at Point B-2. Again, Stillwagon fails to show either deficient performance or prejudice.

After ruling that McEntee could testify that Murrieta had contacted her twice since Stillwagon's arrest, and that it scared her, the trial court gave the following instruction, with counsel's approval:

Members of the jury, we're going to continue with Mr. Tornabene's redirect of this witness. He is about to elicit some hearsay from her; that is, she is going to testify about what someone else said. You are not to consider what she tells you this other person said as offered for the truth of the matter that was asserted, but rather *only for its effect or impact on her as the listener* to those statements.

2RP 192 (emphasis supplied). Stillwagon now faults this instruction as inadequate because it allegedly does not limit the use of the statement.

Stillwagon relies on *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) for the proposition that "where there is no connection established between the defendant and the witness's reluctance to testify, the jury should be instructed to consider the evidence only as to the witness's credibility." Brief of Appellant at 35.

Bourgeois actually holds that it was error for the State to bolster the credibility of witnesses by eliciting testimony that the witnesses were fearful of testifying where (1) the credibility of the witnesses was not challenged, and (2) where they did not testify who or what they feared. *Bourgeois*, 133 Wn.2d at 401. Although the Court noted that the trial court gave a limiting instruction, it nevertheless concluded that the evidence was erroneously admitted. *Bourgeois*, 133 Wn.2d at 401. The Court further concluded, however, that a witness whose credibility was challenged *was* properly allowed to testify about his fear. *Bourgeois*, 133 Wn.2d at 402-03. The Court did not even mention whether such testimony required a limiting instruction.

Here, despite the fact that Stillwagon largely corroborated McEntee's testimony with his own, he did attack her credibility on cross-examination. He harped on her long-time relationship with Johnson. 2RP 141-42. He inquired at length about her drug and alcohol use. 2RP 143-45, 162. He suggested that after she agreed to tell the police what she knew, the State agreed not to file bail-jumping charges against her. 2RP 145-48, 159-60. He accused her of lying to the police. 2RP 146, 158. He questioned how she could have fallen asleep knowing that her boyfriend and close friend were off committing a robbery. 2RP 153. He questioned how she could be afraid of Stillwagon when he was in jail with a million-dollar bail. 2RP 159. Because

Stillwagon did attack McEntee's credibility, it was proper to bring out why she was still afraid, even though Stillwagon was in jail. The evidence itself was thus properly admitted under *Bourgeois*, as Stillwagon appears to concede.

Stillwagon fails to cite any authority that actually *requires* a limiting instruction. Nor does he explain why the instruction given, which informed the jury that it was to consider the statements "only for its effect or impact" on McEntee, was legally inadequate. While counsel certainly *could have* asked for an instruction that further, and somewhat redundantly, instructed the jury that in addition to considering the evidence only for its effect on McEntee, it should not consider it as evidence of his guilt, Stillwagon fails to cite any authority that holds that he was required to.

Moreover, counsel may well have *not* wanted to bring that idea into the jurors' minds. Telling them not to consider the testimony as evidence of Stillwagon's guilt would be not unlike telling them not to picture a pink elephant: it could have the opposite effect from that desired. Counsel himself noted his trepidation regarding cautionary instructions at the time the instruction was given:

MR. KELLY: No, your Honor, I think that sometimes I don't want that because it does tend to call more attention to the testimony. But I think a brief oral instruction by your Honor to that effect will be fine.

2RP 189.

Further the State would submit that the evidence was sufficient to tie the phone calls to Stillwagon such that the jury could properly have considered them as evidence of Stillwagon's guilt. *See Bourgeois*, 133 Wn.2d at 400. Murrieta testified that he had been Stillwagon's cousin by marriage for six years, and that they had been good friends for the past four. He, presumably at Stillwagon's request, hid the murder weapon in the woods in Mason County for Stillwagon. Murrieta and McEntee did not have any relationship except through Stillwagon. It would be reasonable to infer that if Murrieta wanted to visit McEntee, with whom he had no personal relationship, in the middle of the night it would be at the behest of his good friend and "cousin by marriage."

Because Stillwagon fails to show that any instruction was required here at all, and because even if one was required, the instruction was adequate, he fails to meet his burden of showing deficient performance.

Further, even if counsel should have requested an expanded instruction, Stillwagon fails to demonstrate prejudice. He maintains that the jury disregarded his explanation for why he told McEntee that he had shot Brown because they would not believe that he had threatened McEntee unless he were guilty. This rather overblown contention is not plausible.

First, this evidence was brief and inconsequential. In the first conversation, Murrieta simply asked McEntee if she wanted to attend Stillwagon's court hearing, and if he could have her phone number so Stillwagon could call her. In the second, he simply asked to come over and talk to her, which she declined to have him do. 2RP 193-94. There was no evidence of any overt threat. Moreover, on re-cross-examination she testified that Murrieta never said that Stillwagon had asked him to contact her, that Stillwagon had called the home number in the past, and that Stillwagon had been to the house before and knew where it was. 2RP 196. Counsel also elicited from her that there was nothing that made her think Stillwagon had anything to do with the calls. 2RP 195-97. The evidence plainly reflected more on McEntee's state of mind than Stillwagon's.

Further, as noted with regard to the previous issue, this evidence was a very small part of the evidence introduced over a period of eleven days. Neither the State nor the defense even mentioned it in closing argument.

Stillwagon's contention also ignores all the other significant evidence of guilt discussed with regard to the previous claim, including his confession to Murkins, his efforts to dispose of the evidence, his contradictory decision to abandon the plan for fear of "striking out" and then telling several people he did the shooting, the improbability that Johnson could have shot himself

and Brown with one bullet, etc. As Stillwagon notes, his own testimony was entirely consistent with McEntee's. And finally, it is just as plausible that Stillwagon would be pressuring McEntee not to relate his confession if he were innocent. In short it is simply not reasonable to presume that if in addition to being told to consider this evidence only for its effect on McEntee, the jury had also been explicitly and redundantly not to consider it as evidence of Stillwagon's guilt, he would have been acquitted.

This claim should be rejected.

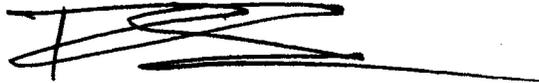
IV. CONCLUSION

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

DATED January 23, 2007.

Respectfully submitted,

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