

No. 34451-3-II

Pierce County 04-1-05086-5
04-1-03902-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 JUN 15 PM 12:27
BRYAN CHUSHCOFF
DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Bryan Chushcoff,
The Honorable James Orlando, and
The Honorable Lisa Worswick, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel at trial.
2. Trial counsel was so utterly ineffective that appellant was deprived of his due process rights to a fair trial.
3. Appellant was deprived of his Article 1, § 22 and Sixth Amendment rights to confrontation as a result of trial counsel's failures.
4. Jury Instructions 25 and 28 violated the Article 4, § 16 prohibition against comments on the evidence. CP 137, 140.¹
5. The trial court erred as a matter of law in consolidating the two separate informations for trial.
6. Appellant's due process rights to a fair trial and his right to testify on his own behalf were violated by the improper consolidation.
7. Appellant was deprived of his rights to effective assistance at the new trial motion and sentencing.
8. The sentencing court erred by using an incorrect standard range for the court order violation offense.
9. The sentence for the court order violation offense exceeded the statutory maximum.
10. The arson and court order violation offenses were the same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. No guns were alleged to have been used in the crimes.

¹Copies of the instructions are attached as Appendix A.

Was counsel ineffective in failing to move to exclude evidence that his client was arrested driving a van which contained two loaded guns, ammunition and a holster, even though that evidence was irrelevant and highly prejudicial? Further, was counsel ineffective in waiting until after the jury had heard about the evidence before objecting?

2. Counsel planned to impeach a crucial state's witness with the statements he made in a defense interview a month before trial. He was precluded from doing so because he failed to prepare a transcript of the interview even though he was on notice one could well be required. Was he ineffective and were appellant's rights to meaningful cross-examination violated?

3. To prove the court order violation offense, the prosecution had to prove that the protection order prohibited the conduct which occurred. Were the instructions an improper comment on the evidence where they told the jurors that the order did prohibit such restraints? Further, was counsel ineffective in failing to object to the instructions?

4. Was counsel ineffective in opening the door to admission of improper, prejudicial evidence?

5. Was counsel ineffective in failing to review all of the evidence, photographs, and exhibits prior to trial so that he was surprised throughout the trial by what the state produced? Further, was ineffective in failing to request time to become prepared when he learned of "new" discovery or evidence?

6. Was counsel ineffective in proposing a jury instruction which would have allowed the jury to convict on uncharged means?

7. Were appellant's due process rights to a fair trial violated by counsel's ineffectiveness where that ineffectiveness was so pervasive and widespread that adversary system effectively broke down?

8. Did the court err in consolidating two informations for trial where they were not "related" under CrR 4.3.1(b)(2)? Further, was counsel ineffective in handling this issue?

9. Was appellant deprived of his rights to effective assistance in his motion for a new trial and sentencing where counsel admitted he was unprepared but did not request a continuance?

10. Did the sentencing court err by using an incorrect standard range and imposing a higher sentence than authorized? Further, did it err in imposing a sentence and term of community custody which were greater than the statutory maximum of 5 years for the offense?

11. Was appellant deprived of his rights to effective assistance where the court refused to provide new counsel a transcript of the entire trial at public expense even though the motion counsel was appointed to argue was based upon trial counsel's errors throughout trial and the transcript was necessary for the motion?

12. Were arson and no-contact order violations the "same criminal conduct" for sentencing purposes where the claim was that appellant entered a house to start a fire and in doing so committed both crimes?

13. Was counsel ineffective in failing to ask the court to exercise its discretion and refuse to apply the burglary "anti-merger" statute where there were strong reasons which would have supported such

a refusal?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant James Douglas was charged by amended information with second and fourth-degree assault and bail jumping, and in a separate amended information with first-degree arson, residential burglary and felony violation of a domestic violence court order. CP 12-13, 370-73; RCW 9A.36.021(1)(a), RCW 9A.36.041(1) and (2), RCW 9A.48.020(1)(a), RCW 9A.52.025, RCW 9A.76.170(1), RCW 26.50.020, RCW 26.50.110. The cases were consolidated and tried by jury before the Honorable Judge Bryan Chushcoff on June 8, 13-17 and 20-22, 2005. CP 20, 144-46, 367, 533-35; 3RP 1102-1104.² Mr. Douglas was found guilty as charged. CP 20, 144-46, 367, 533-35.

Counsel withdrew and new counsel was appointed for a motion for a new trial, heard by Judge Chuschcoff on December 29, 2005, January 13 and February 10, 2006. RP 1111-28; CP 165-66, 201-16, 544-46, 564-65. After denying the motion, the judge then imposed what were calculated as standard-range sentences. RP 1247-48; CP 225-36, 240-44, 648-59. Mr. Douglas appealed, and this pleading follows. See CP 324-43, 740-59.

²The volumes of the verbatim report of proceedings will be referred to as follows:
October 12, 2004, as "1RP";
March 9, 2005, as "2RP";
the 14 chronologically paginated volumes of June 8, June 13-17, 20-22, July 8,
December 16 and 29, 2005, and February 10, 2006, as "3RP";
September 23, 2005, as "4RP";
January 13, 2006, as "5RP."

2. Overview of facts relating to incidents

a. Alleged assaults during child exchange

The second and fourth degree assault and bail jumping charges stemmed from the same incident on July 25, 2004. See 3RP 285-86. On that day, Pauline and Carroll Pederson,³ whose daughter, Debra, was separated from her husband, James Douglas, went to meet James at a police station so he could get his child and start court-ordered visitation.⁴ See 3RP 285-86. According to the Pedersons, James assaulted both of them during that exchange.

The incident was not the first time there had been tension at the child exchanges. 3RP 856. The Pedersons said the first incident happened at church, on a day when the child, “A,”⁵ was going to be dropped off at James’ home in the afternoon. 3RP 662-63, 856. In the late morning, James showed up at church and started speaking with Debra about A. 3RP 798-99.

There was no restraining order or anything making it improper for James to speak to Debra there or anywhere else. 3RP 799. When Carroll heard James was at the church, however, he decided James was not supposed to be there because he was not supposed to get his child until later. 3RP 816. Carroll therefore decided to intrude upon his daughter’s

³Because the Pedersons share the same last name, for clarity they will be referred to by first names, with no disrespect intended.

⁴Because the Douglas’ share the same last name, for clarity they will be referred to by first names, with disrespect intended.

⁵Due to the child’s age, she will be referred to only by first initial.

conversation even though he saw no indication anything was wrong and the conversation was not even “heated.” 3RP 816, 853. Carroll did not believe his 43 year-old daughter was capable of “handling” speaking with James, because she had postpartum depression and was recovering from a c-section. 3RP 853. Carroll also said Debra’s counselor had suggested she not have verbal contact with James for a time, for unspecified reasons. 3RP 853.

At the church, Carroll went over to where the couple was speaking, took his daughter’s arm, told her, “you need to leave,” and declared that Debra was not supposed to be talking to James. 3RP 816. Debra and James had been discussing a possible change in plans for when James would start his visitation. 3RP 799. James wanted to have his child with him for church services, but Debra had wanted the same and had already taken the child to services with her. 3RP 663, 816.

Pauline Pederson heard Carroll tell James he was not supposed to be at church because he was not supposed to get the child until later. 3RP 663. James then explained that he was trying to make arrangements so he could take his child to church with him, and Debra said she did not want the child to sit through two services because of her age. 3RP 663-65.

A “confrontation” then ensued between Carroll and James, with Carroll accusing James of being someone whose word they could not “believe” because he was asking to change visitation after it had been arranged. 3RP 663, 816. When James said the Pedersons had not been honest with him themselves, Carroll then argued about that. 3RP 815-17.

Ultimately, Carroll threatened James. 3RP 817. Carroll claimed

James had said some verbally abusive things to Debra's children by an earlier marriage. 3RP 817. Carroll said James would have Carroll "to deal with" if it happened again. 3RP 817. James responded that he had treated the girls with love, and Carroll disagreed, stating his belief that things James had said to the girls were "absolutely abuse." 3RP 817.

At some point, Pauline heard James say he would like to "beat the shit" out of Carroll. 3RP 664. Pauline then walked over, grabbed James by the hand and started praying over him. 3RP 664. After a few moments, she stopped and went to get her pastor. 3RP 664-65. James was already walking away before the pastor arrived. 3RP 664-65. The child exchanged was ultimately made early, despite the Pedersons' efforts, because Debra had decided it was okay. 3RP 855.

Pauline did not believe she and her husband were unreasonably interfering by not letting Debra work things out with James herself. 3RP 801. Pauline thought their involvement was proper because James was asking to change something already arranged. 3RP 801. She conceded that the custody exchanges were not her "business" at the time, but said she and her husband were "very protective" of Debra. 3RP 801.

Pauline agreed that her interference in her daughter's relationship might have caused confrontations with James. 3RP 801. That interference or involvement apparently extended even to their marriage counseling, as the counselor asked to speak to Pauline and Carroll directly. 3RP 848-50. There was no testimony about what was discussed. 3RP 848-50.

The Pedersons eventually took over doing the child exchanges, either because of Debra's working hours, because it was "too difficult for

Debra and James to get along,” or because of “verbal abuse” Debra claimed James subjected her to. 3RP 659, 752-53. Indeed, Debra said she had moved in with her parents two weeks after the birth of A because of “verbal and emotional abuse.” 3RP 154-55. She denied that James had asked her to move into her parents because he had to work during the day and could not be home to take care of her and the new baby while Debra was suffering from postpartum depression. 3RP 183-87. She admitted, however, that her depression had strained the relationship. 3RP 183-87.

When the Pedersons started doing the exchanges, at first everything was fine. Pauline admitted that James was “attempting to be reasonable with them.” 3RP 754-55, 873. The parties met at various places including the Pederson’s home and an AM/PM gas station about equal distance between their homes. 3RP 873. There was some unpleasantness only once when the Pedersons refused to give James his daughter after he had driven to their house to get her. 3RP 662. According to Pauline, she would not give James his child because Debra had not said anything about James getting A and was not there to authorize it. 3RP 662. James became frustrated and upset, at some point using the “f” word.” 3RP 662.

Carroll Pederson admitted both he and his wife “take offense” whenever anyone uses profanity, including the “f” word. 3RP 860. While he conceded it was not up to him to decide what words other people should be allowed to use, he maintained that they would continue to “take offense” if such language was used around them. 3RP 860. Indeed, after James used the “f” word that day, Pauline got “very angry.” 3RP 662.

She pounded on the trunk of his car, telling him he was not getting A. 3RP 662. He left without further incident at what Pauline deemed a “high” rate of speed. 3RP 662.

Exchanges continued without incident after that but at some point the Pedersons decided they wanted to start meeting at a Safeway much closer to their home. 3RP 873-74. They had a Bible study group that was going to meet at their house and it would be more convenient and save them time to have the exchanges closer. 3RP 661, 754, 873-74. James agreed to meet at Safeway, at their request. 3RP 873-74.

After a few exchanges there, however, James asked to meet at a Fred Meyer closer to his home. 3RP 660. Carroll refused, stating that was not “the agreement.” 3RP 884. Carroll objected to the inconvenience to himself and his wife and thought they would have to break up their meeting early to travel the additional 5 or so miles involved. 3RP 884.

Carroll also apparently believed it was not necessary to accommodate James’ needs once in awhile. 3RP 884. Carroll would not explain why. 3RP 884. Pauline said they refused James’ request not because of the problems it would cause them but because they were “not giving in to him.” 3RP 754.

James told them he was tired of being the one spending the most time and gas to facilitate the child exchanges between parties. 3RP 662. The argument escalated and at some point James used profanity, calling the Pedersons “f-ing. . . dumb people.” 3RP 661. At trial, Carroll said that Pauline said she did not “have to listen to that kind of language, so she asked a man walking by to call police. 3RP 858. Carroll also testified,

however, that he himself asked someone to call police later, when Carroll thought James got in his “face.” 3RP 858, 871-72.

Pauline denied telling James he would not get his child again if he did not drop her off at Safeway. 3RP 794. But she admitted trying to take A away from her father that day. 3RP 794, 815. Once James had put A in her car seat, he told the Pedersons they should be at the Fred Meyer at the scheduled time, because that was where he and A would be. 3RP 794, 814.

At that point, Pauline may have physically grabbed James. 3RP 806-816. She went to James’ truck, planning to remove the child and take her away from James. 3RP 794, 806-816. James said “no,” and Pauline backed away, let him close his truck door and watched him drive off. 3RP 806. According to Carroll, after James put A in the car seat and said where he wanted to meet, Carroll told James that was not the agreement and that James did not get to be “in control.” 3RP 814. James then “got in” his face, made two “jabs” and said, “I hate you, you son of a bitch. I’d like to knock you on your ass and stomp and kick the living shit out of you.” 3RP 814-15. James then “took off” in his truck, allegedly failing to strap his child in properly. 3RP 806, 815.

Pauline knew there was no court order authorizing her to take the child away from her father that day. 3RP 809. She claimed she had the authority to do so because of the “language” James was using and what she perceived as threats to Carroll. 3RP 661, 809. She did not explain how that was consistent with her starting to try to take A out of the truck right after James said where they would meet, rather than after the alleged

threats were made. 3RP 661, 800-815.

When it came time to pick up A that day, the Pedersons called police when James was not at the Safeway right at the appointed time. 3RP 757-59, 795. The Pedersons then went to a police station and had officers go to James' home with them. 3RP 795. James and A were not there. 3RP 795. They were at the Fred Meyer, still waiting, when an officer and the Pedersons finally arrived. 3RP 759.

After that day, the Pedersons tried to get a police officer to attend the exchanges. 3RP 286. Police instead suggested that the exchanges occur in a police station parking lot. 3RP 286, 896. Again, when asked, James accommodated the Pedersons' desires about where to meet. 3RP 286, 892.

Things went fine for awhile, except for one verbal confrontation. 3RP 666. Pauline admitted that her husband started it. 3RP 759-60. A was teething and James reported giving her Tylenol. 3RP 666. Carroll then told James he was not supposed to give A Tylenol because Debra wanted to be able to do it later. 3RP 66. James said the child had been screaming for an hour and a half, so he had given her medicine. 3RP 666, 760, 892. An argument ensued, with James saying he was not going to just listen to his child scream "her fricking head off" for so long without trying something, and Carroll arguing about whether the child might not just have been hungry. 3RP 666, 760, 892. James did not like Carroll "butting in" and told him he was the "dumbest, stupidest man he'd ever met." 3RP 892-93. He said other unpleasant things as well. 3RP 894.

At trial, Carroll admitted that it was responsible for James to tell

them he had given A medicine. 3RP 892.

Pauline got involved in the incident when “the profanity started.” 3RP 666, 760. At that point, she called police. 3RP 667. The officer who responded spoke to James and everything was then fine. 3RP 667.

At some point, the Pedersons decided to start secretly tape-recording the exchanges. 3RP 669. Carroll said he and his wife decided to make the recordings because they wanted to catch James using profanity and record his “attitude and abusiveness” towards them. 3RP 882-83. Debra, however, testified that it was she who decided to make the recordings, because she thought James was going to seek full custody of A and Debra wanted to get evidence to show the guardian ad litem of a “side to James” she thought they did not “realize.” 3RP 194-95.

Debra claimed that she never told her parents to try to get James upset or make him react for the tapes. 3RP 195. She admitted that, despite taping James numerous times, the Pedersons had not gotten what they wanted and they had erased the tapes as “uneventful.” 3RP 196, 770.

On the day of the alleged assaults, Debra had forgotten to pick up two boxes of her stuff so James arranged to bring them to the exchange for her. 3RP 668, 823. Debra was seeking possible evidence for the divorce and believed James had “destroyed” many of her “collectibles.” 3RP 162. She and her parents decided they would bring a camera to take photos of what was in the boxes. 3RP 668, 812.

Carroll and Debra admitted that the plan was to take the pictures “before we gave A[] to James.” 3RP 196-97, 812, 907-908. Debra denied telling her parents to refuse to give A to James if he did not allow them to

take the photos. 3RP 196-98. She testified that she knew no court order authorized that. 3RP 196-98. Pauline also knew the court order said nothing about withholding visitation in order to take the photos. 3RP 772.

Nevertheless, when the Pedersons met James at the police station, they asked if he had brought the boxes and Pauline told James, “we are going to take pictures before we give you A[.]” 3RP 670.

Carroll did not think he and his wife were interfering James’ court-ordered visitation in making this demand. 3RP 911. Pauline said she thought it was necessary to do what they did, in order to see what was in the boxes. 3RP 763-64. At one point, however, she also claimed that she did not want to give A to James because of his “anger.” 3RP 761. She testified that he seemed angry when he arrived that day. 3RP 761, 806. At the same time, however, she admitted having no concerns for the child at all when James arrived and that it was only later that she became concerned about the “anger.” 3RP 761, 806. Carroll also raised the specter of “anger” and said it made them concerned about A’s safety. 3RP 911.

At trial, Carroll admitted that James had never caused any physical harm to the child. 3RP 912. And although he claimed James was “agitated” when he arrived, Carroll admitted that any such agitation “really didn’t have any bearing” on whether he and his wife were going to give James his daughter, or when. 3RP 911-14.

According to Pauline, when Carroll took the first box and started going through it, taking pictures, James used some profanity and started “going into” the Pedersons “personally.” 3RP 670, 813. They all argued

and James became more agitated, saying, “you guys just really have to make this difficult, don’t you?” 3RP 1006. At that point, A, who was still in the Pederson’s car, started crying. 2RP 671, 818, 924-25.

When Pauline heard what James was saying, she decided she did not “have to take that,” so she told Carroll to go call police. 3RP 670, 761, 814. While he did so, Pauline got A out of the car. 3RP 670-71, 761, 814-18, 924-25.

James kept asking the Pedersons to give him his child and they kept refusing. 3RP 671, 818. James used profanity again, called the Pedersons names and made comments like that they thought they were “holier than thou” and what they were doing was pretty “sad.” 3RP 671-818. The Pedersons would not let James have his child to start his visitation, having now decided that he would not be given the child until police arrived. 3RP 671, 818. They were no longer focused on taking the photos, although it was not clear whether they had completed that task. 3RP 671, 818.

Carroll was aware that James had a right to court-ordered visitation, which the Pedersons had no right to “preempt.” 3RP 903. He admitted they had no authority to deny James visitation, but claimed they had no intention of keeping the child from James, despite their actions. 3RP 903.

By now Carroll had returned and was holding A. 3RP 373, 819, 928. James again asked for his child., but Carroll refused, then turned away. 3RP 373, 819, 928. According to the Pedersons, James then hit Carroll several times, causing him to fall and let A go. 3RP 373, 819, 928.

The incident lasted only a few moments but the Pedersons claimed that James followed Carroll down, hitting him again while A lay on the ground. 3RP 373.

James was not the only one angry and using profanity that day. 3RP 673. Pauline had gotten involved in the argument herself and said that when James hit her husband she started “pounding” him on the back with both hands. 3RP 783-84.

A man heard yelling and came over to investigate. 3RP 675. He shouted, “[w]hat’s going on?” after seeing James hit Carroll in the face and kick him in the stomach or ribs. 3RP 616, 619. At that point, everything stopped, and the man came over and helped Carroll up. 3RP 619, 621.

James picked up his crying child and Pauline then went “after” James physically. 3RP 620-21, 782. He pushed her away and she grabbed him again, this time so hard that she ripped his shirt. 3RP 674. She admitted she was not thinking about how what she was doing was endangering A, who was in James’ arms. 3RP 782. She was still grabbing James when he finally turned and hit her on the forehead, then went to his truck with his child. 3RP 620, 674.

Once in the truck, James held his screaming child to himself while sitting in the driver’s seat. 3RP 674. At trial, Pauline faulted James for not having put the child in her car seat right away. 3RP 807. It never occurred to Pauline that James might be trying to comfort his very upset child for a moment. 3RP 807-809. Instead, she just assumed James was going to drive away like that. 3RP 809.

James did not have the key in the ignition at that time. 3RP 675.

An officer who responded came to the driver's side door of the truck, telling James to "stop." 3RP 295. The officer did not think James was listening to him and said James' "emotional state" seemed "distant." 3RP 295-96. It is unclear whether A was still screaming and crying at the time. 3RP 295-99. The officer then opened the driver's side door and asked James to give him A and work things out before leaving. 3RP 295-96. James eventually complied and was arrested based upon the Pedersons' claims about how the incident had occurred. 3RP 295-301. Police admittedly had no idea who threw the first punch or if there was an issue of self-defense. 3RP 300-301.

Carroll suffered a swelling face, head and ear, tearing of his ear and inner ear damage, a facial fracture and some vertigo. 3RP 227-28, 676, 821-23. At trial he said his hearing was now deteriorating. 3RP 676, 821-23. James was charged with two counts of assault and a subsequent count of bail jumping for allegedly failed to appear for a hearing on those charges. CP 12-13. After the incident, the Pedersons got a "no contact" order against James. 3RP 719.

b. Allegations relating to fire in October

On October 10, 2004, the Pedersons returned home at about 11:30 a.m. to find their house on fire. 3RP 177. Firefighters were already there and inside the home, having gotten in through the garage door, which the Pedersons had left open 18 inches for the dog. 3RP 166-67, 537. From the garage, the firefighters kicked in the door into the house. 3RP 536.

After the fire was extinguished, several gas cans were found

throughout the house, which was “saturated” with a gasoline smell and had “pour” patterns on some floors and beds. 3RP 40-47, 56, 73, 76, 428, 556. There was damage to several rooms, including the room A’s crib was in. 3RP 64-65. The fumes had created a “fireball” which went through part of the house and blew the living room window, undamaged, into the front yard. 3RP 64-65, 108.

A fire marshal saw matchsticks on the floor leading toward cardboard, something which could have been a “delay device” for the fire. 3RP 56, 556. Inside the garage, a vehicle had its gas cap off and sticks were shoved inside. 3RP 82, 424.

The fire marshal estimated that it took some “time” for the perpetrator to pour the gas, at least five minutes. 3RP 104-11. Anyone nearby when the explosion occurred would likely have gotten burned or seriously injured depending on where they were standing. 3RP 93. There was no evidence, however, of blood or torn clothing anywhere. 3RP 105-106.

Aside from the firefighters kicking in the door from the garage to the home, there was no evidence anyone had broken in or forced entry. 3RP 95, 789, 939. The fire marshal stated his opinion that, based upon where the cans were located and the “pour pattern” inside the house, the entry and exit for the person who started the fire was likely the locked door going into the garage, which the firefighters had kicked in. 3RP 107. That door had no usable fingerprints, and the garage door was not tested, although officers knew whoever started the fire might well have touched it on the way in. 3RP 530-32. Other doors and windows were not tested,

because of the fire marshal's determination that the "most probable point" of entry was through the garage. 3RP 532. An officer admitted that someone trying to enter a house would likely have tried windows to see if they were open, so fingerprints could well have been left which would have been useful. 3RP 532-33.

After police had finished their investigation, Carroll pointed out a can of model airplane fuel in his living room, saying it was not his. 3RP 96-102-11. No useful fingerprints were ultimately found on the can and no attempt was made to find out where it, or the gas used in the house fire, were bought. 3RP 515, 604, 610.

Several neighbors saw a white or "lighter color" small SUV, pickup truck or sedan, go by after the explosion. 3RP 171-78, 262, 283. One neighbor saw a truck with a canopy while another saw one without. 3RP 262, 283, 325-33.

Another neighbor said he got a good look at the vehicle and said it was a white truck. 3RP 454-73. He also saw the license plate and reported that the first three numbers on it were "A," "2," and "9," and the next numbers, he was "pretty sure," were "4" and "7." 3RP 454-73.

According to the Department of Licensing, on the date of the fire, there were 230,000 license plates for trucks, SUVs and vans starting with "A2." 3RP 861-65. More than 39,000 of those were white, and 2,654 of them were registered in Pierce County. 3RP 866. James' truck had a license plate number of "A25206P," with no 9, 4 or 7. 3RP 566, 864-69.

Nevertheless, an officer testified that the neighbors' descriptions of the "suspect" vehicle "matched" descriptions of James' truck. 3RP 438-

39. The officer only recalled police having the "A2" from the license plate, but claimed that the neighbors had described the "very, very unique" kind of truck that James drove. 3RP 445. Carroll admitted that, at some point in the past, he had described James' truck to his neighbors and told them to be on the lookout for it. 3RP 950.

Actually, the neighbor who gave the officers the license numbers first described the truck as "[p]robably a late model '90s Ford with a white canopy that matched." 3RP 453. In other words, he said, it was just "your standard white Ford truck." 3RP 453. It was only after he was shown a picture of James' unique truck that he started saying he had seen a white Ranger truck with a "quad," just like in the picture. 3RP 454-58. When challenged about his changing description, the neighbor admitted that he had never said anything about seeing a "quad" truck before being shown the picture at trial, and that he only used that description because of being shown the picture at trial. 3RP 458-59. Ultimately, that neighbor admitted that what he actually remembered seeing that day was "what the side of the front fender looked like, the white street as it went by, and [that] there was a canopy," not anything about the vehicle being an unique "quad." 3RP 459.

There had been no contact between the Pedersons, Debra and James since July. 3RP 933. James had not called, stopped by or written, and, at the time of the fire, there were no pending legal proceedings between them and had been no "encounters" of any kind. 9RP 933-35.

Officers nevertheless sought James as a suspect. 3RP 576-77. Five days after the fire, they told his parents they were looking for him.

3RP 576-78. Police waited for him at court one day when he was scheduled to appear, but did not see him. 3RP 580-81.

On October 20th, in Pasco, an officer responded to a report that someone with an outstanding warrant had been seen getting into a van. 3RP 335-39. The officer and a backup followed the van and ultimately stopped to and arrested James, who was driving. 3RP 339.⁶

Five days later, when police saw James' truck at his parents' home, they made no effort to impound, secure or seize it and did not contact anyone who might have been home to tell them to keep it there. 3RP 598-99. Three days later, when officers came back with a search warrant for it, the truck was gone. 3RP 599. James' mom told them it had been repossessed. 3RP 600. The "repo man" said that when he took the car it had clearly been sitting there awhile, as it was covered in pollen. 3RP 566-69. Although he thought it was a "voluntary" repossession he had no idea if there were any payments which had been missed and it was the bank which had called for the repossession to occur. 3RP 567-70.⁷

An officer who saw the truck after repossession found no matches, receipts for anything flammable or other evidence of fire starting activity. 3RP 607-608. He did not smell even a hint of the lingering odor of the strong scent of gasoline inside. 3RP 607-608. No tests were done to see if there were any gas spills in the truck which might result from carrying

⁶A discussion of the evidence admitted regarding the circumstances of the stop and items found in the van is contained in the argument section, *infra*.

⁷In closing argument, however, the prosecutor claimed that James told his mom to have his truck repossessed, implying the motivation was to hide something. 3RP 1060. Counsel's objection was sustained. *Id.*

enough gas to have started the fire. 3RP 607-608.

After James' arrest, officers made no check of his credit card records to see if there were any purchases of plastic gas cans, gas or other incriminating items, which might place him anywhere near the home at the time of the fire. 3RP 609-10. No one took James' picture to nearby hobby shops to see if he could be identified as having bought model airplane fuel, either. 3RP 604.

There were photos of tire tracks or tread marks in the gravel parking area of the home but no plaster casts or other impressions were taken. 3RP 425, 509, 608. No comparison was done between the marks and the tires on James' truck, which were not photographed due to a camera malfunction. 3RP 608.

D. ARGUMENT

1. COUNSEL WAS UTTERLY INEFFECTIVE AT TRIAL

Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. Further, the due process guarantee of a fair trial can be denied when counsel fails to live up to minimum standards and thus fails to serve his crucial role. See State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). In this case, reversal is required, because counsel was so wholly, completely and prejudicially ineffective that appellant was denied both his rights to effective assistance and to a fair trial.

a. Failures re: irrelevant, prejudicial gun evidence

First, and most egregious, counsel was completely ineffective in his handling of irrelevant, inadmissible and prejudicial gun evidence.

i Relevant facts

Prior to trial, counsel had police reports which stated that guns, ammunition and holsters were in the van when James was arrested. 3RP 346. Counsel made no motion to exclude that evidence. See 3RP 346.⁸ Indeed, he declared himself unaware of any “bad acts” evidence the prosecution might be intending to use. 3RP 16.

In opening argument, counsel did not object when the prosecutor told the jury that James had two loaded handguns when arrested. 3RP 33-34. Then, during trial, counsel did not object when an officer testified at length about the guns, holsters and ammunition, including a graphic description of what the guns looked like, that it seemed one loaded gun had “just” been thrown into the cooler in the front seat, and that there were two boxes of ammunition with 500 rounds each, as well as a holster, with the guns. 3RP 332-42.

Finally, when the prosecutor began establishing the chain of custody to introduce the guns as exhibits at trial, counsel objected. 3RP 343. With the jury out, he stated he was not objecting to the evidence but complained that “it was never indicated in any of the discovery that was going to be produced at trial.” 3RP 344-45. The prosecutor then pointed out that the police reports disclosed the information and that she had left a

⁸Indeed, counsel apparently made no pretrial motions whatsoever, nor did he file a trial brief.

telephone message that morning to remind counsel the officers were going to be there that day with the evidence. 3RP 345.

Counsel admitted the police reports indicated that James was “picked up with two pistols,” but complained he had “no indication” the guns were going to be “produced in evidence.” 3RP 346. He had not gotten any message that morning and he expected to be notified in advance which items the prosecution were going to submit into evidence. 3RP 345-46.

The judge questioned counsel’s claim of surprise, stating from his experience as a trial lawyer:

The police would routinely give me a police report. They would give me - - sometimes they would give me a separate report that would indicate what was booked into property. I may or may not make arrangements to go view it in property, but I certainly wasn’t surprised when the thing would show up in court. I knew that it was there. I knew that it was a possibility that they were going to bring it. I’m finding your protestation of surprise surprising in itself.

3RP 346-47.

At that point, counsel finally raised a relevance objection. 3RP 347-48. He established in voir dire that the guns were not brandished, displayed or pointed at any time. 3RP 352. He then argued the evidence was inflammatory, prejudicial and would be used by the jury as proof that “this guy must really be bad because he had two pistols.” 3RP 352. The held that the objection was too late and admission of the physical evidence was not important because the jury had already heard the testimony about the evidence, without defense objection. 3RP 352. When counsel protested, the court explained:

[Y]ou have not objected to this through this point. That information is in front of the jury. This simply verifies the officer's encounter of the events. It seems to me that this objection comes to[o] late.

3RP 353-54. The court also found that the gun evidence was relevant to show "willingness to violet the court's order" which included a prohibition against possessing firearms, and for "consciousness of guilt." 3RP 358.

With the jury back in, the officer detailed finding the guns and described the guns, talking about one as a "derringer," the other a black .32 "auto" handgun. 3RP 361-66. He also gave detailed testimony about finding the two boxes of .32 "auto" ammunition and holsters, as well as a "magazine." 3RP 361-66. Those items were admitted into evidence despite counsel's repeated objections it was not relevant and was "inflammatory." 3RP 361-66.

Just before the end of initial closing argument, the prosecutor reminded the jury about the gun evidence, telling the jury about James "turn[ing] up" in his brother's van with "two of his [dad's] guns, loaded with him inside the van." 3RP 1061-62.

ii. Counsel was prejudicially ineffective

Counsel was ineffective in his failures regarding the gun evidence. To show ineffective assistance, a defendant must show that counsel's representation was deficient and the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" of effectiveness, it is overcome where counsel's conduct fell below an objective standard of reasonableness. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Here, that presumption was overcome by counsel's failures. As an initial matter, any reasonably competent counsel would have moved prior to trial to exclude the gun evidence, because it was completely irrelevant and highly prejudicial. Evidence is only relevant if it has a tendency to make a fact which is of consequence either more or less likely. ER 401, 402; see State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). Further, even relevant evidence is inadmissible if it is more prejudicial than probative. ER 403.

In addition, evidence of prior crimes, wrongs or acts is inadmissible to prove the defendant's "character" or "propensity." ER 404(b). Such evidence is prohibited because it is so likely to cause the jury to "prejudge" the defendant and "deny him a fair opportunity to defend" himself against the state's case. Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948). A defendant is entitled to be tried based on the evidence rather than being convicted because the jury believes he is a bad person who "is by propensity a probable perpetrator of the crime." Id.; see also, State v. Perrett, 86 Wn. App. 316, 319-20, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). Put another way, ER 404(b) evidence is likely to cause the jury to try a defendant not for what he is accused of doing but rather for who they think he is. See State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

For these reasons, a court admitting ER 404(b) evidence is required to take careful steps to ensure that it is only admitted when the prosecution can show it is material and necessary for a legitimate purpose, such as proving motive or opportunity. See id. The court must first "identify the

purpose for which the evidence will be admitted,” second “find the evidence materially relevant to that purpose,” and third, “balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.” State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Here, because of counsel’s unprofessional failures, the prosecution did not have to meet its burden. Nor did the court have to make any of the required findings. But the evidence was inadmissible under ER 404(b). First, it was simply not “materially relevant” to any proper purpose. There was no evidence or claim that any guns, holsters or ammunition were used in any of the crimes. Nor did the trial court so find. Instead, the court admitted the gun evidence because 1) counsel had failed to object until the jury had already heard it, 2) it was relevant to prove the “bail jumping” offense, and 3) it proved “consciousness of guilt.”

The first reason is not a finding of relevance. It is a finding that counsel did not timely object and that any harm had already been done. But counsel’s failure to object until after the jury had heard about the evidence did not render harmless the subsequent admission of the actual, physical evidence. The court did not have to exacerbate the extreme prejudice James had already suffered. Admitting the guns, ammunition and holsters, piece by piece, for the jurors to view and possibly hold only emphasized it. Counsel’s ineffective failure to object until it was too late was grounds for failing to strike the already admitted testimony, not admit *additional* improper evidence.

Nor was the evidence admissible to prove “consciousness of guilt.”

Evidence of acts such as flight may be admitted to prove such “consciousness” if the evidence is “substantial and sufficient so as to create a reasonable and substantive inference” that the defendant has engaged in a deliberate effort to evade arrest and prosecution. See State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965). To be admissible, however, such evidence must be “*necessary* to “prove an essential ingredient of the crime.” State v. White, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986) (emphasis added).

Indeed, because of its inherent prejudice, ER 404(b) evidence is only admissible if it has “substantial probative value” to a necessary part of the state’s case, not simply if it meets the minimum standard of “relevance.” State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court deciding whether to admit such evidence must examine the other available evidence and admit only the quantum of ER 404(b) evidence required. White, 43 Wn. App. at 587-8.

Thus, evidence that the defendant was in possession of a loaded gun when arrested was not admissible as “consciousness of guilt.” State v. Freeburg, 105 Wn. App. 492, 502, 20 P.3d 989 (2001). In Freeburg, the gun was not alleged to be involved in the crime, and the defendant was caught after having fled the country. The prosecution argued the evidence was admissible as evidence of “flight,” relevant to consciousness of guilt. The Court disagreed, finding that the evidence was not only irrelevant to the charged crimes but also not “necessary” under ER 404(b), because there was already substantial evidence of “flight” upon which the prosecution could rely. 105 Wn. App. at 502.

Similarly, here, the gun evidence was not relevant to the crimes and there was already substantial evidence from which the prosecution could argue “consciousness of guilt.” That evidence was that James 1) failed to stop the van right away after officers’ signals, 2) had to be boxed in by the police cars to stop and 3) had to be ordered out of the van at gunpoint. See 3RP 340-41. Given the other evidence admitted at trial, the highly prejudicial ER 404(b) evidence of guns, holsters and ammunition was neither necessary nor admissible under White and Freeburg.

Nor was the gun evidence relevant to the bail jumping. To prove that offense, the prosecution had to show that 1) James was released on bail, 2) he knew he was required to later personally appear, and 3) he failed to do so - not “willingness to violate a court order.” RCW 9A.76.170. Further, proof such “willingness” was only “relevant” to bail jumping as proof of character and propensity, i.e., to make the jury believe that, because James had violated one court order provision, he was likely guilty of having violated another by knowingly failing to appear. See, e.g., Perrett, 86 Wn. App. at 319-20. But proof of “character” is not admissible to prove “conformity therewith.” ER 404(b).

The gun evidence was inadmissible to prove any element of the offense, “consciousness of guilt” or bail jumping. And its prejudice was extreme. As our highest court has noted:

Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as “dangerous.” A third type of these individuals might believe that defendant was a dangerous individual. . . just because he owned guns.

State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

Indeed, courts have “uniformly condemned” admission of the fact that the defendant was in possession of dangerous weapons when those weapons are irrelevant to the crime charged. Freeburg, 105 Wn. App. at 491-92; United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967) (evidence of gun unrelated to charge was irrelevant and prejudicial as a jury would likely use the evidence as proof the defendant was a “bad man”); see also, State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1004 (1980) (evidence of a knife unrelated to murder knife was of highly questionable relevance). Notably, it was not alleged that James was not entitled to enjoy the Second Amendment and Article 1, § 24, rights guaranteed to all citizens. See State v. Hancock, 109 Wn.2d 760, 767, 748 P.2d 611 (1988); CP 12-13, 370-73. It is a violation of those rights and due process for a prosecutor to draw an adverse inference from their exercise. Hancock, 109 Wn.2d at 767.

Reasonably competent counsel would have made a motion to exclude such completely irrelevant, prejudicial and inflammatory evidence. Counsel’s initial failure was only compounded by his failure to move to exclude the evidence once the prosecution had mentioned it in opening argument. The decision not to object *during* opening could certainly be tactical, i.e., to avoid drawing further attention to the evidence. There could be no legitimate tactical reason, however, to fail to move to exclude further reference to the evidence once the jury was later removed. Indeed, even if counsel mistakenly thought the court would deny the motion he still had a duty to make it. See State v. Dawkins, 71

Wn. App. 902, 863 P.2d 124 (1993).

And once the first question was asked of the officer, counsel should have taken some action. Even if he did not wish to object in front of the jury, he could have asked for a sidebar. He could - and should - have done *something*, not just sat mute while his client was linked with dangerous weapons completely irrelevant to his case.

Counsel's excuses for his pretrial failure and failures up until he objected were 1) he believed the prosecution was required to inform him what specific items of evidence it would be trying to introduce at trial, and 2) he thought the testimony regarding the finding of the guns was probably relevant and not something to which he could object. 3RP 354. But these beliefs were wrong. As the trial court noted, when counsel is given discovery, he is on notice that any evidence mentioned in things like police reports may be sought to be introduced by the prosecution at trial. 3RP 346-47; see, Kimmelman v. Morrison, 477 U.S. 35, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); see also, State v. Smith, 15 Wn. App. 716, 721, 552 P.2d 1059 (1976) (prosecution is not required to disclose to the defense its "intended use" of certain exhibits; CrR 4.7(a)(1)(v) requires the prosecution to reveal the existence and nature of tangible evidence intended for possible use at trial but is not required to disclose its "strategy").

Indeed, nearly 20 years ago, the Supreme Court condemned an attorney for holding essentially the same belief. In Kimmelman, supra, counsel failed to move pretrial to suppress incriminating evidence seized without a search warrant. 477 U.S. at 369. He claimed he had only heard

of the seizure and evidence after trial began. A month before trial, however, the prosecution had sent counsel a copy of the lab report from tests done on the evidence, and the police reports also referred to it. 477 U.S. at 369. Further, counsel had never requested discovery. 477 U.S. at 369.

Kimmelman's counsel tried to justify his failure to make a pretrial motion to exclude the evidence by saying he was not required to figure out in advance what the state's evidence would be, because the prosecution had an obligation to "inform him of its case against his client." 477 U.S. at 369. The trial court did not accept this claim, finding counsel "remiss" in failing to make himself aware of the evidence and make appropriate motions pretrial. 477 U.S. at 369. This was especially so because the evidence was "there and available" for counsel "for examination and inquiry." 477 U.S. at 369.

The Supreme Court agreed with the trial court. It found that the "adversarial testing process" does not work unless defense counsel "has done some investigation into the prosecution's case and into various defense strategies." 477 U.S. at 384-85. Further, the Court stated its serious concern with counsel's belief that the prosecution had to "take the initiative and turn over all of its inculpatory evidence to the defendant." 477 U.S. at 385. These claims, the Court held, "betray a startling ignorance of the law - - or a weak attempt to shift blame." 477 U.S. at 385. Failing to inform himself of the possible evidence against his client was below the prevailing professional minimums and fell far below an objective standard of reasonableness, and the Supreme Court so held. *Id.*

Here, as in Kimmelman, counsel tried to justify his failures in relation to the gun evidence by relying on the flawed belief that the prosecution was required to tell the defense in advance what evidence it would seek to introduce at trial. But here, unlike in Kimmelman, counsel claimed he was aware of the evidence and had read about it prior to trial. If that claim of preparation can be believed,⁹ counsel knew the gun, holsters and boxes of ammunition had been seized. Any reasonably competent counsel would have known to take steps to exclude this irrelevant, highly prejudicial evidence. And any reasonably competent counsel would have known the prosecution was not required to notify him in advance which items mentioned in discovery may be introduced at trial.

Even once he had finally objected, counsel was still ineffective. He did not point out to the court that the “willingness to violate court orders” theory of relevance was nothing more than improper “propensity” evidence under ER 404(b). Nor did he ever propose a limiting instruction. But absent such an instruction, the jury was free to speculate and use the evidence for the improper purpose. See Freeburg, 105 Wn. App. at 501-502.

The gun evidence was highly prejudicial, improper character evidence which was irrelevant to any legitimate purpose. The only reason to admit the evidence was to sway the jury into believing James was a “dangerous” or “violent” man and thus more likely to be guilty of committing an unprovoked assault, an arson, a burglary and the other

⁹Counsel’s lack of preparation in many other areas of trial is discussed, *infra*.

crimes. Counsel's failures were the reason that evidence was admitted against his client. Had he brought a proper motion, the court would have erred in denying it. And counsel's efforts to minimize the impact of the evidence once the physical evidence was admitted was too little, too late. While counsel elicited testimony that no gun was brandished at police the night of the arrest, that did not somehow erase the emotional impact that the gun evidence had already had. See 3RP 367, 370-71. Counsel was utterly ineffective in failing to properly deal with this highly prejudicial, irrelevant evidence.

b. Failures re: cross-examination and important rights

Counsel also failed to prepare to properly cross-examine a crucial state's witness and lost the opportunity to do so, resulting in violations of not only James' rights to effective assistance but also confrontation.

i. Relevant facts

At trial, Carroll Pederson testified that James was already angry and agitated when he arrived the day of the assaults. 3RP 913. Counsel tried to impeach Carroll about a defense interview in which counsel said Carroll had reported that "the reason that [James] got agitated or shook up" was because the Pedersons "wouldn't let him have his daughter" before they took pictures. 3RP 913. The prosecutor objected that the "witness should have an opportunity to review that statement," and also said that counsel had promised to provide the prosecution with a copy of the transcript of the interview "if he was going to do this." 3RP 913-14. Counsel continued trying to impeach with the prior statement until, after several objections, he asked for a sidebar and told the court he had

“anticipated this little problem” because he knew there was “a difference” between what Mrs. Pederson had testified about and what Carroll, her husband, said at the interview. 3RP 915. Counsel had not, however, gotten the interview tape transcribed. 3RP 915-16. During the discussion, counsel kept trying to play the tape for the court to make his points, but the court would not agree. 3RP 917-22.

In ruling, the court cited ER 613 and said the prosecutor was entitled to a transcript of the entire interview before the defense used any of it to impeach. 3RP 918-23. Not content, counsel kept arguing about whether he was “obligated” to prepare a transcript, complaining the interview was long and only a portion of it was relevant. 3RP 918-23. He tried to get approval to produce only a partial transcript and let the prosecutor listen to the rest of the tape herself, but the prosecutor did not agree. 3RP 920. She noted counsel had ample opportunity to get a transcript made as the interview was done more than a month before trial. 3RP 920.

During the discussion, counsel interrupted the court so often that the court reporter finally told him to stop. 3RP 917-19. At one point, counsel suggested the court recess the entire trial so that counsel could prepare the transcript, and the court responded, “I don’t think so.” 3RP 919. Counsel’s tone was apparently such that, at one point, the court asked if he was suggesting that it was the *court’s* fault that he was “not prepared.” 3RP 921.

Ultimately, counsel said he would get the transcript done that night and recall Carroll as a witness the next day. 3RP 923. Counsel continued

with cross-examination without using the prior interview. 3RP 923-57.

When the matter was raised that next day, counsel did not have a transcript. 3RP 981. He had not even copied the tape for the prosecutor. 3RP 981. Instead, he asked to use the tape “like a note” to refresh Carroll’s memory. 3RP 981. After some argument, the prosecutor agreed just to get the case moving forward. 3RP 981-90.

Further problems arose once the tape was played, however, because it showed that counsel had not asked the same question of Carroll at the interview and at trial. 3RP 990-93. The court noted that, in the interview, Carroll had said that James got agitated when they wanted to photograph the boxes, while at trial counsel had asked if Carroll had said James got agitated when they refused to turn the child over before dealing with the boxes. 3RP 993.

Counsel then said he was not trying to impeach *why* James became agitated but just *when*, because Carroll had testified that James arrived agitated but in the interview had said James only became agitated after arriving and dealing with the Pedersons’ demands. 3RP 994-95, 1000. The court agreed that Carroll had made such statements in the interview, but said counsel had misstated the interview question at trial. 3RP 994-95. Argument ensued even after the transcript was read back, with the court noting several times that, if counsel had made a transcript, they would not be having such difficulties. 3RP 1000.

Ultimately, the court held that, because counsel had failed to prepare the transcript in order to take the “opportunity to impeach,” he would not be allowed to use anything Carroll said at the interview to

impeach his testimony at trial. 3RP 1003-1004. The court said counsel could only ask about what happened the day of the incident, not what was said in the interview, because of the failure to get the transcript. 3RP 1003.¹⁰

When recalled, Carroll testified both that James seemed unhappy before the Pedersons insisted on taking pictures and that his “temperment” was still “okay” until that point. 3RP 1005-1006. A moment later, however, Carroll said James had not become “agitated” but had become “*more* agitated” when the Pedersons refused to turn over the child before taking photographs. 3RP 1006 (emphasis added). Carroll also said he and his wife did not refuse to turn the child over because of the need to take photos but that they were concerned about ten-month old A’s “safety” because James was “getting very agitated.” 3RP 1007.

ii. Counsel was again ineffective

Counsel again failed to adequately prepare for trial. A defendant is deprived of his right to counsel if counsel is not given a “reasonable” time to prepare. See State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). The logical corollary is that counsel has a duty to *take* such time and *get* prepared. Indeed, counsel must “make a full and complete investigation” of both the facts and the law in order to “prepare adequately and efficiently to present any defense.” Id; see State v. Boyd, ___ Wn.2d ___, 158 P.3d 54 (May 17, 2007); State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976). The requirement of “reasonable investigation”

¹⁰In fact, the court thought it was being generous in allowing counsel so much leeway. 3RP 1003.

ensures that counsel is able “to make informed decisions about how to best represent” his client. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Further, reasonably competent counsel is expected to be aware of the rules and relevant law. See State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The rule regarding impeachment with a prior inconsistent statement, ER 613, requires first that the relevant witness be asked if he made the prior statement. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). If he admits it, impeachment is complete. Id. If, however, he denies it, extrinsic evidence of the statement may - and in some cases, must - be introduced. Id. Indeed, the rule specifically provides that, when there is an examination of a witness regarding a prior statement, “the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.” ER 613(a). And the rule prohibits counsel from using extrinsic evidence of a prior statement unless the opposing party “is afforded an opportunity to interrogate” the witness about the statement. ER 613(b).

Thus, under the rule, any attorney planning to impeach a witness with a prior statement is on notice that the court may require the statement be shown or “its contents disclosed” to the witness during examination. He is further on notice he can be required to provide the statement to the prosecutor before extrinsic evidence it could be used. Yet here, despite having a month within which to arrange for transcription of the interview of one of the prosecution’s most important witnesses, counsel did not do

so. 3RP 920.

As a result, when the witness gave inconsistent testimony, counsel was unprepared. He did not have the transcript which he was on notice could be required. Because of that, he was precluded from properly, fully impeaching one of the most crucial of the state's witnesses, named as a victim for both crimes.

Further, even after learning he would be held to the requirements of providing a transcript in order to impeach, counsel failed. Despite his promises and even though he had some time outside of trial, he failed to get the transcript made, apparently spending that time on other things. There is no question that trial is a busy time and there is not much time at the end of a trial day to do such things as draft instructions. But that is why reasonably competent counsel would have arranged the transcription of such a crucial interview prior to trial. He would have known such a transcript would be necessary to ensure an opportunity to conduct meaningful cross-examination, and that it was likely to be required under ER 613. If he did not know, he would have checked. And he certainly would not have failed to do whatever was necessary to get such a transcript when ordered to do so by the court if that is what was required in order to be permitted to impeach his client's main accuser. Even if he could not have the full transcript made that quickly, he could have asked to set the witness over in order to have the time to get it made.

Counsel's failures prejudiced Mr. Douglas. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct.

1105, 39 L. Ed. 2d 347 (1974). Further, James had a state and federal right to confrontation which included the right to meaningful cross-examination and impeachment. State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); 6th Amend.; Art. 1, § 22.

In fact, the right to cross-examination is so important to the process of justice that criminal defendants are given “extra latitude” in cross-examining or impeaching crucial prosecution witnesses. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1981). Because cross-examination tests perception, memory and credibility, it helps ensure the accuracy of the fact-finding process. Darden, 145 Wn.2d at 620; Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). And when the right is denied, the very “integrity” of the fact-finding process is called into question. Chambers, 410 U.S. at 295.

Here, because of counsel’s failures, James was precluded from impeaching the credibility of one of the state’s most crucial witnesses. The prejudice from that stems not from the fact that James was not permitted to introduce evidence on whether he arrived “angry,” although that certainly fit the prosecution’s portrayal of James as abusive, angry and out-of-control as contrasted with the Pedersons, painted as reasonable and simply trying to take care of their child and grandchild. 3RP 1053.¹¹

Instead, the value in impeaching with an inconsistent statement is not that the statement provides evidence of the facts to which it refers, but

¹¹For example, in closing argument, the prosecutor told the jury James was so full of hate and rage at the Pedersons that he “didn’t care who he hurt” trying to get to them. 3RP 1050-51. James was portrayed as getting “angry” and making “threats” under “mild circumstances,” while the Pederson were just acting with “courtesy.” 3RP 1052-53.

that it provides evidence of the witness' credibility and perceptions as presented at trial. See State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987). The prejudice here was to James' ability to raise questions about Carroll's credibility and perceptions. And faith in that credibility and those perceptions was essential in order to believe James committed the assaults the way the Pedersons claimed. It was extremely important for the jury to be shown that Carroll's versions of events at trial was not what he had always said, especially in relation to whether James fit the prosecution's theme. Counsel's failure to prepare to cross-examine a crucial state's witness resulted in depriving James of his rights to meaningful cross-examination and confrontation. This Court should so hold.

c. Failures re: comment on the evidence

Counsel was also ineffective in failing to object to the instructions on the court order violation offense, because they were an unconstitutional comment on the evidence. Such comments are prohibited under Article 4, § 16¹² of our constitution. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). A comment is made when a judge either conveys a personal attitude towards the merits of a case or instructs the jury that matters of fact have been established as a matter of law. Id.; see State v. McDonald, 70 Wn.2d 328, 330, 422 P.2d 838 (1967). A judge need not expressly convey her personal feelings on an element of the offense. Even where such feelings are "merely implied" there has been an improper

¹²Article 4, §16 provides, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

comment. State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

Where there has been an improper comment on the evidence, the error is presumed prejudicial and the state bears the heavy burden of showing that the record “affirmatively shows that no prejudice could have resulted.” Levy, 156 Wn.2d at 725. Thus, in Jackman, supra, the defendant was charged with a crime that required proof of victims’ age. 156 Wn.2d at 742-43. The “to convict” instructions were all set out using the same kind of language, telling the jury that to convict the defendant they had to find as elements of the crime, in relevant part:

(1) That on or about . . . [dates] . . .the defendant aided, invited employed, authorized or caused B.L.D., *DOB 04/21/1985* to engage in sexually explicit conduct;

(4) That B.L.E, *DOB 04/21/1985*, was a minor[.]

156 Wn.2d at 741 n. 3 (emphasis in original).

These instructions were found to be improper comments on the evidence. 156 Wn.2d at 744-75. By including the birth dates the way it had, the trial court had “conveyed the impression that those dates had been proved to be true.” 156 Wn.2d at 744-45. Further, the instructions removed from the jury’s consideration the question of whether the date was correct. 156 Wn.2d at 744. Absent the instructions, the jury would have had to make a decision about whether it believed the victims’ claims about their birthdates, after evaluating all of the relevant evidence and such things as credibility. 156 Wn.2d at 744.

Similarly, in this case, the jury instructions on the protection offense were improper comments on the evidence. The base (misdemeanor) offense is defined in RCW 26.50.110(1), which provides,

in relevant part:

Whenever an order is granted [under the relevant restraining order statutes]. . . and the . . . person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence. . . is a gross misdemeanor, except as provided in subsections (4) and (5) of this section.

RCW 26.50.110(4) and (5) set forth “elevating” circumstances which, if charged and proven, increase the seriousness of the crime by making it a Class C felony. For example, here, it was alleged that the conduct was “reckless and creates a substantial risk of death or serious physical injury to another person[,]” thus raising the offense to a felony under RCW 26.50.110(4). See CP 12-13.

Thus, to prove its case, the prosecution had to prove, *inter alia*, that James committed an act which was prohibited by the restraint provisions of the no-contact order. See State v. Miller, 156 Wn.2d 23, 26-27, 123 P.2d 827 (2005). This requires proof not only that the order existed but also that some specific provision prohibited the conduct which occurred. 156 Wn.2d at 26-27; see, also, State v. Stinton, 121 Wn. App. 569, 574, 89 P.3d 717 (2004) (courts crafting protection orders have options and “specifically tailor” the restraint provisions depending on each situation); RCW 26.50.060 (listing the many options for restraint provisions a court may choose to include in an order). Because James was charged with having committed the crime by “wilfully having contact with [the Pedersons] . . . or their residence” as prohibited by the court order “04-2-02188-5,” the prosecution therefore had to show that the contact it claimed James had was prohibited by that order.

The “to-convict” instruction, Instruction 28, provided, in relevant

part

To convict the defendant of the crime of domestic violence court order violation, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 10th day of October, 2004, the defendant violated the provisions of a protection order *that excluded him from the residence or premises of Carroll and Pauline Pederson, that restrained him from committing acts of domestic violence against Carroll and Pauline Pederson, and that restrained him from having contact with Pauline and Carroll Pederson;*

(2) That the defendant had actual notice of the existence of the protection order, number 04-2-02188-5; and

(3) That the acts occurred in the State of Washington.

CP 140 (emphasis added). Another instruction for the offense provided:

A person commits the crime of domestic violence court order violation when he or she, after having had actual notice of the existence of a protection order, willfully violates the terms of the order *by having contact with the protected person's residence or premises or by committing acts of domestic violence against them or by having contact with them.*

CP 138 (emphasis added) (Instruction 25).

These instructions were improper comments on the evidence.

With the “to-convict,” the court told the jury that the provisions of the protection order *did* exclude James from the residence and premises, *did* restrain him from committing certain acts, and *did* restrain him from having contact. With Instruction 25, the court told the jury that a person is guilty of the crime if that person had contact with someone’s residence or premises, had contact with them, or committed certain acts against them - thus relieving the prosecution of having to prove that the specific order in this case actually *had* such restraint provisions. Both instructions removed an essential question from the jury’s consideration, i.e., whether the

conduct James was alleged to have committed was in fact in violation of the relevant court order.

After considering recent federal caselaw on harmless error, our state Supreme Court has adopted a specific test to be used in deciding cases such as this. Levy, 156 Wn.2d at 725-26; Jackman, 156 Wn.2d at 745. To demonstrate that a comment on the evidence was “harmless,” the prosecution must show that the record “affirmatively show[s] that no prejudice could have resulted.” Jackman, 156 Wn.2d at 745.

This burden is hard to meet. In Jackman, it was not met even though the prosecution noted there was sufficient evidence to prove the “fact” commented on and it was “never in dispute.” 156 Wn.2d at 745. The Supreme Court agreed that the defendant did not challenge the fact of the victims’ minority but also pointed out he did not admit or stipulate to their age. 156 Wn.2d at 745. Because it was still “conceivable” that a jury “could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions,” the error compelled reversal. 156 Wn.2d at 745.

Here, as in Jackman, there is nothing in the record indicating that counsel challenged whether the conduct was prohibited by the order. But also as in Jackman the comments went directly to an element of the crime and removed from the jury’s consideration whether the prosecution had met its full burden. Further, the comments were *wrong*. The restraining order *did not* contain a provision regarding “committing acts of domestic

violence” against the Pedersons. Supp. CP ____ (Exhibit 48).¹³

Counsel was ineffective in failing to notice that the instructions amounted to unconstitutional comments on the evidence. Had he noticed and objected to the instructions, it would have been error for the court to give them. This Court should so hold.

d. Failures: inviting improper evidence

Counsel’s failures also resulted in admission of evidence prejudicial to his client.

i. Relevant facts

A detective testified about being called the day of the “Safeway” incident. 3RP 291-92. He had arrived and spoken to the Pedersons after James had left with A. 3RP 291-93. As the officer recalled, no crime had occurred. 3RP 291-93.

In cross-examination, counsel asked the detective to “give. . . the gist of what it was that” the Pedersons were “complaining about” that day. 3RP 298-99. The officer testified that the complaints were about “behavior.” 2RP 299. Counsel then asked about the police report and if the officer recalled “at all” what he had put in the report. 3RP 299. The officer ultimately said the Pedersons “may have alleged” that James threatened them,” but did not recall, however, without his report. 3RP 299.

On redirect, the prosecutor produced the report. 3RP 302. Counsel questioned whether he had a copy and asked for a “[t]imeout” to

¹³A supplemental designation of clerk’s papers in being filed herewith.

see it. 3RP 302-304. After some comments were exchanged, the court excused the jury and admonished counsel about “bickering.” 3RP 302-304. The court said the evidence was inadmissible hearsay anyway, noting that counsel had not raised that objection. 3RP 305. An argument then ensued about whether counsel had invited admission of the hearsay by asking for the “gist” of the Pedersons’ complaint. 3RP 305-306. Counsel objected that the evidence was improper under ER 404(b) because it showed the Pedersons had claimed James had threatened to “beat the F-ing crap” out of them at Safeway. 3RP 307-308. He also said it was irrelevant, collateral, and remote. 3RP 308.

At one point, counsel’s tone was so inappropriate that the court said if counsel “yelled” at the court again, the court would “get upset about it.” 3RP 307.

Ultimately, after consulting the transcript, the court concluded that counsel had “opened the door” with his questions, even though the evidence would not normally be admitted. 3RP 308-311. The prosecutor was then allowed to elicit testimony from the officer that both Pedersons had reported James threatening to “beat the fuck out of Mr. Pederson” at some point during the exchange at Safeway, and that he did so because he was “unhappy with the meeting location.” 3RP 312. Counsel established on cross-examination that the Pedersons had reported the same threat “[i]ndependently of each other.” 3RP 313.

ii. Counsel was ineffective

Again, counsel was ineffective in multiple ways. From the record it appears he did not read the police report before trial. See 3RP 302-303.

Yet he asked about it, deliberately, not once in passing but several times in an effort to elicit the “gist” of the Pedersons’ complaints. It is an “elementary maxim” of trial practice that counsel must “never ask a question without knowing what the witness will answer.” See Merton, Vanessa, *Symposium: Law and Psychiatry Part II: Confidentiality and the “Dangerous Patient,”* 31 Emory L. J. 263, 324 (1982). The theory behind the maxim is that counsel should be prepared enough to know or at least have a good sense of what each opposing witness will say, in order to make appropriate decisions about the defense. Without such a sense, he cannot know what to ask the witness (or avoid), whether to move to preclude certain testimony or whether to bring other motions on his client’s behalf. See id.

Here, because of his failure to read the report prior to trial, counsel could not make any informed decisions about the evidence. He did not even know what the evidence *was*. He nevertheless went forward, asking repeatedly what the Pedersons had said without knowing what the answer would be. As a result, the prosecution was permitted to introduce the highly prejudicial hearsay statements, accusing counsel’s clients of *threatening to beat up* the very people he was charged with later assaulting.

There can be no question that counsel’s ineffectiveness prejudiced his client. Counsel himself recognized the magnitude of his error and the prejudice he had invited, once he actually looked at the report. Indeed, his behavior in yelling at the court and his unwillingness to stop arguing about what he had actually asked the witness betray a sense of panic which

reflects not just a proper desire to exclude prejudicial evidence but also the more self-serving concerns of an attorney who suddenly realizes he has made a grave, unprofessional error. See 3RP 306-307. Without counsel's unprofessional failures, the officer could not have testified about the Pedersons' claims of prior threats - claims which supported the prosecution's theory at trial and made it more likely the jury would convict on the assaults. Counsel was again prejudicially ineffective and this Court should so hold..

e. Other failures

In addition to the failures already cited, counsel committed many others.

i. Relevant facts

Counsel went to trial without reviewing all of the exhibits, relevant evidence and discovery. 3RP 4, 52, 70-72, 393-94. As a result, during trial, he repeatedly admitted being "surprised" by the evidence. 3RP 144, 152, 398, 408-409. After several incidents where counsel claimed "surprise," the court expressed concern that it had "the impression" that counsel was "not that familiar with this discovery." 3RP 144, 152, 398, 406.¹⁴

Early in trial, counsel had learned that he did not have all the discovery. 3RP 52, 70-72. He found out when a witness started testifying about an exhibit counsel said he had never seen. 3RP 71. It turned out

¹⁴One of those incidents resulted in admission of evidence of guns, ammunition and a holster irrelevant to the crimes. See 3RP 409. Counsel's ineffectiveness in relation to that evidence is discussed, *infra*.

counsel was missing at least 23 pages of discovery. 3RP 52, 70-72.

Ultimately, counsel said he would try to figure out what he was missing and remedy the problem. 3RP 71. He did not, however, ask for time to secure and review the missing discovery, nor did he ask to have time to review and digest the report the witness was discussing, prior to further testimony. 3RP 72.

After several incidents where counsel claimed “surprise,” the court expressed its concern that it had “the impression” that counsel was “not that familiar with this discovery.” 3RP 144, 152, 231-32, 398, 406.

At one point early in trial, after a “surprise,” counsel said he was willing to “sit now and look at every item. . . on the bar” in the courtroom to ensure he had copies. 3RP 152. The court told him to do so at the “noon hour.” 3RP 153.

Apparently, he did not. He continued to claim surprise about evidence, including photographs. 3RP 231-32, 393-94. A couple of photos had just been found by the prosecution and provided that day. 3RP 236-37. For all other photos, however, counsel believed the prosecution was required to give him copies before trying to admit them at trial. 3RP 393-94. Based upon that belief, counsel had taken no steps to view the photos even though the police reports disclosed them. 3RP 393-94.

The court rejected counsel’s claim that the prosecution had somehow fallen down on its duty to disclose by failing to provide copies, instead holding that counsel had an obligation to ask for copies if he wanted them. 3RP 398. The court also reminded counsel the items had been available on the “bar” in the courtroom since the beginning of trial.

3RP 410.

Counsel did not then ask for a recess to review the other items on the “bar” to see what evidence the prosecution might have against his client. 3RP 410.

Several times during trial counsel admitted he was not familiar with relevant facts. He had “no idea” what the prosecutor was talking about regarding statements James allegedly made during the assaults. 3RP 7-8. He could not explain why Debra’s drug use was relevant, saying “I don’t know” and eventually just speculating. 3RP 127-28. Indeed, fairly early in trial, counsel had already said “I don’t know” so often in relation to the facts and the defense that the court said it would not accept that answer from him anymore. 3RP 189.

Another item counsel failed to review before trial was an audiotape the Pedersons had made during the alleged assaults. 3RP 139. At trial, counsel said he did not have a copy and had been trying to get it for four months. 3RP 143. As with many of the other discovery issues, counsel made it sound as if the prosecution had done something improper. 3RP 143-45.

Counsel was planning to ask the Pedersons about the making of the tape even though he had never heard it. 3RP 146-47.

When the judge learned counsel did not have the tape, he was concerned that counsel should get and listen to it because “[m]aybe there’s something exculpatory on it.” 3RP 148. Counsel did not think he needed to do so unless the prosecution was going to introduce the tape at trial. 3RP 146-47. He said previous counsel had described it to him but just not

turned it over as it was misplaced. 3RP 146-48.

When counsel admitted previous counsel had received the tape from the state, the court then accused counsel of making “somewhat bogus” claims implying the prosecution had not complied with discovery requirements. 3RP 148-50. The court was also not happy counsel never asked for court assistance to get this important evidence if, as he claimed, the prosecution was not providing it. 3RP 149-50.

The next day, the prosecution tried to introduce the tape at trial. 3RP 680. Counsel objected that his client had not heard the tape yet because counsel had not gone to the jail and played it for James the night before after getting it. 3RP 680-81. Counsel also objected that he had not had a chance to “brief” issues relating to the tape’s admissibility. 3RP 680-81. To the court, it was “very clear” that counsel was himself responsible for any lack of time for preparation or review of the tape. 3RP 686. Counsel had known about the tape, knew he did not have it, and never moved to get it prior to trial. 3RP 686. In addition, the court told counsel, “[y]ou say this is powerful and important stuff, and you haven’t gone over it with your client.” 3RP 687.

One of the things counsel had been busy doing instead of playing the tape for his client was talking to the Department of Licensing “to find out about license plates.” 3RP 686.¹⁵ Counsel had apparently made no effort to conduct this defense investigation prior to trial. 3RP 636, 686. When he tried to submit an affidavit about the licensing facts mid-trial, the

¹⁵The other task he said he worked on, writing instructions, is discussed in more detail, *infra*.

prosecutor objected that the issue of the license plate was not new and the information should have been found and provided in advance of trial. 3RP 636-37. Counsel was ordered to instead get a witness who would testify about the facts. 3RP 636-37. The prosecution repeatedly claimed about counsel's failure to conduct the investigation and disclose the results before trial, but the court decided to allow the testimony. See 3RP 637, 734.

ii. Counsel was ineffective

These errors again highlight the depth of counsel's failure to prepare. Far from making a "a full and complete investigation" of both the facts and the law in order to "prepare adequately and efficiently to present any defense" as required, counsel repeatedly made the choice *not* to prepare. See Hartwig, 36 Wn.2d at 601. He failed to review the evidence and exhibits the state was going to use against his client, even while admitting he could not object to evidence about which he did not "know." 3RP 16. And he failed to make appropriate, necessary pretrial motions to address that evidence or exhibits - logically, because he never took the time to see it and thus could not know what he should do. Further, he failed to investigate the possible defenses, such as the evidence from DOL prior to trial, leaving it to the last minute and risking exclusion of this crucial evidence in so doing.

Counsel attempted to justify some of his failures by placing the blame on the prosecution. For example, he let the court think that the prosecution had failed to turn over the audiotape to the defense, when it had not. Similarly, he did not ask to see any photos because he thought the

prosecution was required to give him copies before they could be introduced at trial. 3RP 393-94.

But counsel could have taken steps to secure the missing evidence and review it before trial. Further, CrR 4.7(a) only requires the prosecution to provide copies of evidence in cases where copies are necessary because of the “nature of the case.” Boyd, supra. In Boyd, the “nature of the case” was that the evidence against the defendant was on a computer hard drive and he was being denied a “mirror image” copy of the drive. Because of the investigation which would need to be done on the drive by computer experts in order to determine potential matters of defense, the defendant was entitled to the copy, pretrial, as part of his right to effective assistance.

Here, there was no unique need for copies of the photos to conduct investigation, as in Boyd. Further, unlike in Boyd, counsel did not request copies and get refused. He *assumed* the prosecution would give him copies without request. But he knew from the police reports that photographs had been taken, and he must have known, if he reviewed the discovery, that he had been provided no copies. Yet he never asked for them, again laboring under a mistaken belief similar to the one in Kimmelman.

Notably, in Boyd, the Court pointed out that a motion available to the defense at omnibus was to be allowed “inspection *and copying* of any books, papers, documents, photographs or tangible objects” which the prosecution obtained from the defendant or would be used at trial.

Further, with respect to the tape, counsel *knew* he did not have a

copy and that the prosecution had already turned it over as required. Yet he took no steps to ensure that he had a copy, so that he could investigate possible issues of admissibility and provide appropriate briefing. It is unfathomable that such a tape would exist and counsel would fail to review it prior to trial. Even with the tape being described to him by another attorney, no reasonably competent counsel would fail to review a recording of *the crime itself*. Certainly he would know that such a tape was likely to be used by the prosecution if favorable to the state and could be useful to the defense if not.

In any event, even if counsel's initial failures could somehow be justified, the subsequent ones could not. Again and again, upon being "surprised," counsel took no steps to ensure it would not recur or to mitigate the harm. After complaining about not having seen items on the "bar," he apparently did not look at them, again being surprised by them later. After finally getting a copy of the tape of the alleged assaults, he did not take the time to play it for his client or brief any issues relating to it. After finding out he did not have all of discovery, he did not ask for time to secure or review it. He even continued and cross-examined a witness who was testifying about a report he did not have, without asking for an opportunity to read it.

Finally, counsel proposed improper instructions which, if given, would have violated his client's constitutional rights. Where a statute sets forth multiple alternative means for committing a crime but only one is charged, a defendant may not be convicted based upon another alternative without violating his due process right to notice. State v. Bray, 52 Wn.

App. 30, 34, 756 P.2d 1332 (1988).

There are multiple alternative means of committing first-degree arson, including by causing a fire or explosion which “damages a dwelling” (RCW 9A.48.020(1)(b)) or one which occurs in a building where there was a “human being. . . not a participant” in the arson (RCW 9A.48.020(1)(c)). In this case, James was charged with committing the crime under RCW 9A.48.020(1)(a), by causing a fire or explosion which was “manifestly dangerous to any human life.” CP 370-73. Counsel’s proposed “to-convict” for the crime, however, provided that the jury should convict if it found he caused a fire or explosion and

That the fire or explosion was manifestly dangerous to human life, including fire fighters *or damaged a dwelling or was in a building in which there was at the time a human being who was not a participant in the crime*[.]

CP 418 (emphasis added). Another instruction he proposed, #27, similarly told the jury someone committed first-degree arson if they caused a fire or explosion which was

manifestly dangerous to any human life, including fire fighters *or which damages a dwelling or is in any building in which there is at the time a human being who is not a participant in the crime.*

CP 417 (emphasis added).¹⁶ Thus, counsel proposed instructions which would have allowed the jury to convict his client based upon uncharged means, in violation of his due process rights. Once again, counsel’s performance on behalf of his client was defective.

Some of these failures, standing alone, might not compel reversal.

¹⁶Copies of these instructions are attached as Appendix B.

For example, despite counsel's unprofessional errors relating to the tape made of the assault, the tape was not ultimately introduced and thus those errors would not likely be deemed "reversible" on their own. But trial counsel's ineffectiveness is evaluated based upon the record as a whole. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001); State v. Bonisisio, 92 Wn. App. 783, 798, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999). Further, counsel had no way of knowing, when he failed to get a copy of the tape and review it, that the evidence would end up excluded. He had no way of knowing, when he failed to conduct timely defense investigation, that the court would exercise its discretion to let in the DOL evidence despite its lateness. He had no way of knowing that the unconstitutional instructions he proposed would not be given. In short, he had no way of knowing that his failures would *not* result in serious prejudice to his client. It was sheer luck - not strategy, not tactics, and not skill - that the prejudice to his client was not worse.

f. Reversal is required

Counsel's overwhelming ineffectiveness compels reversal. He had a duty to adequately prepare. He did not. He had a duty to reasonably investigate. He did not. He had a duty to take steps to ensure he was sufficiently aware of the evidence against his client to provide whatever defense might be available. He did not. He had a duty to know all the law relevant to his client's case, or learn it. He did not. As a result of his failures, the jury heard extremely prejudicial, irrelevant gun evidence likely to incite their passions against his client in a way which played directly into the prosecution's "abusive, angry man" theory of guilt. Also

as a result of his failures, his client was deprived of meaningful cross-examination of one of the most important of the prosecution witnesses, whose credibility was crucial, especially as to the assaults. Counsel's failures resulted in a conviction based upon an unconstitutional comment on the evidence and the admission of inadmissible hearsay evidence supporting the prosecution's theory, and more.

The result was not only a deprivation of the right to counsel. It was a deprivation of the fundamental principles of our justice system, and the right to a fair trial. The entire purpose of having counsel is for the accused to have an advocate - someone who stands with him and for him, against the heavy resources wielded by the state. The right to effective assistance is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 655, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Indeed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). As a result, when counsel is ineffective, the process "loses its character as a confrontation between adversaries" and thus loses its ability to produce reliable results. Cronin, 466 U.S. at 656-57. Counsel's failures were so numerous in this case that Mr. Douglas was deprived of his right not only to effective assistance but to a fair trial. This Court should so hold and should reverse.

2. THE COURT ERRED IN CONSOLIDATING THE CASES FOR TRIAL AND COUNSEL WAS AGAIN INEFFECTIVE

Reversal is also required because the court erred in consolidating the cases for trial.

a. Relevant facts

Before trial, the prosecution moved to “join” the separately charged assaults with the arson, burglary and no-contact order violation for trial, citing CrR 4.3(a). CP 362-66. When the parties appeared to argue the issue, neither counsel nor the court had received the motion. 2RP 2-3. Counsel nevertheless did not ask for time to review it. 2RP 2.¹⁷

The prosecutor then argued that the two actions were “related,” that there was “basically a common scheme or plan,” that the evidence was “cross-admissible,” that the motivation for the arson was the prior assault and charges, and that there was “strong” evidence of identity for the arson case because the truck seen matched James’ and the prosecutor had “some evidence” he had bought gas in the area. 2RP 1-8.¹⁸ Counsel argued that the offenses were not “the same, similar character,” or “part of a single scheme or plan,” that there were identity issues for the arson but not the assaults, and that James would be unduly prejudiced in presenting his different defenses if the charges were “joined.” 2RP 5-7. Counsel also

¹⁷Notably, had counsel asked for sufficient time to review the prosecution’s motion to join offenses, he would have seen that the prosecution had a clear intent to introduce the improper gun evidence into the trial, as the prosecution specifically cited the “two loaded handguns” and “multiple bottles of prescription medication” Mr. Douglas was found with when arrested. CP 364-65.

¹⁸No evidence of such purchases was presented at trial.

stated that James “probably most assuredly” would be testifying in the assault case on his own behalf but would not want to testify on the arson. 2RP 6-7. In granting the motion, the court relied on the fact that the incidents were “close in time,” that James was “awaiting trial under the first case” when the other offenses occurred, and that issues of “whether or not he’s going to take the stand” could be dealt with by the trial court. 2RP 8-9.

b. Consolidation was improper and counsel ineffective

Joining or consolidating offenses for trial is, in general, “inherently prejudicial,” because of the risk of the jury believing that a defendant being tried for multiple offenses is more likely to be guilty of *something*. See State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Nevertheless, under CrR 4.3.1(b)(2), consolidation of separate informations for trial may occur if the defendant has been charged with “two or more related offenses” and the motion is “timely.” See State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999).

Here, the offenses were not “related” under the rule. Offenses are only “related” if they are within the jurisdiction and venue of the same court and “based on the same conduct.” CrR 4.3.1(b)(1).¹⁹ Offenses involve the “same conduct” when, for example, they all arise from the same physical act or omission. See State v. Lee, 132 Wn.2d 498, 503-504, 939 P.2d 1223 (1997) (defining the term for the rule in the context of

¹⁹This same definition applies to mandatory joinder, which is also included in CrR 4.3.1(b)(1).

mandatory joinder). Offenses which stem from separate incidents on different days, however, are not based on the “same conduct.” Lee, 132 Wn.2d at 503-504.

At the time of consolidation, one information charged Mr. Douglas with fourth- and second-degree assaults for acts on July 25, and “bail jumping” for failing to appear on October 12th for proceedings involving the assaults. CP 1-3. The other information charged arson, committed on October 10. CP 350-52. The offenses charged in the separate informations were thus not for the “same conduct” under the rule. Consolidation was improper.

Again, here, counsel’s failure to prepare prejudiced his client. If he had asked for time to read the prosecution’s motion, he would have seen that it relied on the wrong rule. If he had taken sufficient time to prepare, he would have been able to point the court to the *correct* rule and the proper standard. Had he done so, the court would have erred if it had then granted consolidation under Cr 4.3.1(b)(2).

Counsel’s failures relating to consolidation prejudiced his client in several ways. First, the improper consolidation prevented him James from having a fair trial. Again, one of the risks of consolidation of counts for trial is that the jury will use the fact of multiple counts as evidence the person is likely guilty. See Ramirez, 46 Wn. App. at 226; see also, Leipold, Andrew D., *How the Pretrial Process Contributes to Wrongful*

Convictions, 42 Am. Crim. L. Rev. 1123, 1145 (2005).²⁰

In addition, the improper consolidation infringed upon James' free exercise of his right to testify on his own behalf. That right is guaranteed under Article 1, § 22²¹ as well as the Fifth, Sixth and Fourteenth Amendments. See State v. Robinson, 138 Wn.2d 753, 759, 982 P.2d 590 (1999); Rock v. Arkansas, 483 U.S. 44, 49-51, 107 S. Ct. 2704, 87 S. Ct. 1920 (1967). Indeed, the right is considered "fundamental," and cannot be abrogated by counsel or the court. See State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

The decision of a defendant whether to testify reflects a balancing of several factors: "the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination." Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964). When cases are joined for trial, a defendant must not only conduct that balancing but also the further weighing of the potential prejudice testifying on one count might cause on another. See id.

Thus, consolidation has a potential impact on the defendant's free exercise of his right to testify on his own behalf. That impact is effectively deemed outweighed by the benefits of judicial and prosecutorial economy

²⁰The authors conducted a statistical analysis and found that defendants who go to trial on multiple counts are more likely to be convicted of *something* and to be convicted of the highest crime charged as compared with defendants who face fewer counts. Leipold, supra, 42 Am. Crim. L. Rev. at 1145.

²¹Article 1, § 22 provides, in relevant part, that "[i]n criminal prosecutions the accused shall have the right to . . . testify in his own behalf."

which occur when consolidation or joinder is proper. See e.g., State v. Lee, 81 Wn. App. 609, 612, 915 P.2d 1119 (1996), reversed on other grounds by, Lee, supra.²² But where, as here, the consolidation or joinder was *not* proper, the resulting impact is not justified by law.

Further, in this case, the improper consolidation was not just an error of law, because it also improperly infringed upon a constitutional right. It “cannot be doubted that a defendant in a criminal case” has a federal constitutional “right to take the witness stand and to testify in his or her own defense.” Rock, 483 U.S. at 49. The framers of our state constitution even chose to specifically guarantee such a right. State v. Hill, 83 Wn.2d 558, 563-64, 520 P.2d 618 (1974); Art. 1, § 22. Indeed, the right is considered even more fundamental than the right to self-representation. See Thomas, 128 Wn.2d at 556-67; Rock, 483 U.S. at 52.

Here, there was never any question that James was at the scene of the assaults. He had a very strong motive to testify regarding those crimes, because, without his testimony there was no one to explain his version of what occurred that day. No police or other witnesses saw who threw the first punch or if there was an issue of self-defense. See 3RP 300-301. The only witnesses who testified on that point were the Pedersons - the very people who had a motive to point a finger at James rather than themselves. James’ testimony was his only opportunity to explain his side of the events.

He had an equally strong motive, however, not to testify on the

²²Lee construed the mandatory joinder provision which is also contained in CrR 4.3.1(b)(3) and uses the same definitions as the consolidation portion, CrR 4.3.1(b)(2).

arson, burglary and protection order offenses. The prosecution's evidence on those counts was wholly circumstantial and relatively weak. There was no evidence that James had bought gas cans or lots of gas any time, let alone near the incident. His fingerprints were not found anywhere. He was not seen. There was no evidence presented of any gas spills or residue in James' truck. There was not even a recent conflict, as the Pedersons admitted they had not had any kind of contact with James for months. 3P 933.

Nor were the descriptions of the truck strong. The witness who was sure he saw the license plate remembered numbers which did not match those of the plate on James' truck. 3RP 454-73. The other identifications were vague and general and could have applied to any white truck.

Even the testimony of the neighbor who described at trial seeing the unique "quad" white Ranger was weak. That witness had *first* described the truck as just "your standard white Ford truck." 3RP 453-58. He admitted he never said anything about a "quad" to police. 3RP 453-58. In fact, he conceded, he only testified that it was a "quad" he had seen *because* he had been shown the picture of James' truck, a "quad," at trial 3RP 458-59. And he admitted his memory of what he had seen was "what the side of the front fender looked like, the white street as it went by, and there was a canopy," not anything about the vehicle being this unique "quad." 3RP 459.

Thus, because of the improper consolidation, in order to exercise his constitutional right to testify on his own behalf on the assaults, James

would have had to submit to being subjected to cross-examination on the weaker case.

Reversal is required. In a different context, where cases are properly joined for trial and the defendant moves to sever based upon prejudice to his right to testify, he must make a “convincing” showing that he had important testimony to give on one count and a “strong need” to refrain from testifying about others. State v. Weddel, 29 Wn. App. 461, 629 P.2d 912, review denied, 96 Wn.2d 1009 (1981). That standard makes sense, because review of denial of a motion to sever properly joined counts is for abuse of discretion. And that is the most forgiving standard, requiring affirming the trial court unless no reasonable court could have reached the same conclusion. State v. Elmore, 139 Wn.2d 250, 284-85, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).²³

Here, however, the trial court erred as a matter of *law* in consolidating the cases under CrR 4.3.1(b)(2). And that error of law infringed upon James’ ability to freely and voluntarily choose whether to exercise his constitutional right.

In Hill, supra, the defendant wanted to testify but chose not to after the trial court improperly ruled that, if he testified, prior convictions which had been reversed could nevertheless be used to impeach him. 83 Wn.2d at 561. The Court reversed on that basis alone, because the trial court’s

²³Indeed, as one commentator has noted, the “abuse of discretion” standard of review is “a virtual shield from reversal.” Medwed, Daniel S., *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 709 47 Ariz. L. Rev. 655 (2005) (quoting, Park, et. al, Evidence Law 12.01, at 540-41 & n. 6 (1998)).

ruling improperly infringed upon the defendant's "free and voluntary choice" about whether to exercise his right to testify on his own behalf. 83 Wn.2d at 561.²⁴

Similarly, here, the court's ruling improperly consolidating the cases for trial infringed upon James' free and voluntary choice to testify on his own behalf about the assaults but not the other crimes. And he was the *only* witness who could have rebutted any of the Pedersons' claims on the assaults. Further, the most "persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961).

The charges were improperly consolidated for trial, and that consolidation deprived James of a fair trial and infringed upon his right to testify. Further, trial counsel was again ineffective in failing to take sufficient time to prepare to represent his client. This Court should reverse based upon the improper consolidation, or, in the alternative, on counsel's further unprofessional failures.

3. COUNSEL WAS INEFFECTIVE AT THE NEW TRIAL MOTION AND SENTENCING

After trial, James moved for a new trial, pointing out many of trial counsel's failures. CP 201-16. The court then appointed new counsel for that motion and sentencing. 3RP 1116-20. Unfortunately for James, that

²⁴In contrast, where it is not the court but defense counsel who takes steps preventing his client from testifying, the issue is reviewed as a claim of ineffective assistance and prejudice must be proved. See State v. Robinson, 138 Wn.2d 753, 767, 982 P.2d 590 (1999).

counsel was also constitutionally ineffective.

a. Relevant facts

In appointing new counsel, the court said it would wait to rule on the new trial motion until James had a chance to discuss the issues with new counsel. 3RP 1116-20. The court also said it would only rule on the motion if counsel somehow “affirm[ed]” it. 3RP 1120-25.

On July 13, 2005, new counsel filed a notice of appearance. CP 566. More than two months later, he still had not conducted any investigation into James’ claims. 4RP 1-6. He also had made no efforts to get the record of the trial, and did not even know how long the trial had been. 4RP 6-10. In light of this, the court cautioned that the motion was “going to take longer than your normal kind of deal,” then granted a continuance for about three months. 4RP 8-9.

Then, just days before the hearing was scheduled to begin, counsel still had not gotten the transcript. 3RP 1133. He appeared ex parte and asked for a continuance, saying he had not gotten funding from the Department of Assigned Counsel (DAC) for the whole trial transcript because it was too expensive. RP 1133. He also said he was trying to get James to identify the portions of trial - short of the whole thing - which needed to be transcribed for the motion. 3RP 1134.

Counsel still did not move for the transcript to be produced for several weeks, until the date the hearing was rescheduled to begin. CP 198-200. The motion counsel finally filed detailed the need for the transcript of the entire trial, based upon the many errors about which James was concerned, including “negligent errors in the conduct of the

trial itself.” CP 199. Counsel also stated that it was impossible to effectively present the motion without the trial transcripts “or at least a substantial portion thereof.” CP 198-200. He needed it in order to “be able to see and understand what transpired at trial,” communicate with his client and “effectively question” trial counsel about his conduct of the case. Id.

He also needed additional time because he had not even tried to get a transcript of the prosecution interview with prior counsel, which he was too busy to attend. 3RP 1142-47. Even after getting a copy of that transcript handed to him, he still needed time to review it and use it to question prior counsel. 3RP 1142-47.

The prosecutor argued the entire transcript was not necessary because prior counsel had only “misspoke” a few times at trial. 3RP 1154.

The court was concerned about the delays since new counsel’s appointment in July. 3RP 1157-60. The court asked why counsel was “only just now learning” about evidence relating to the motion, given how thorough James’ pro se motion had been. 3RP 1157-61. James was also concerned that new counsel was not prepared, had not looked at any evidence and had not been communicating with him. 3RP 1164. Counsel admitted he was “somewhat deficient” in not trying earlier to get the trial transcripts earlier. 3RP 1165. After some discussion, James agreed to continue with counsel, and the court reluctantly continued the motion again. 3RP 1174-75.

When the parties met again, on February 10, 2006, counsel had done nothing on the case since just after the last hearing, because James

had sent a letter “firing” him. 3RP 1186. The court nevertheless refused to dismiss counsel for either the motion or sentencing. 3RP 1187-90.

In arguing the motion and sentencing, counsel said he was at a “tremendous” disadvantage because he had not had meaningful communication with his client and had not even had time to review the affidavit of former counsel, which he received only moments before. 3RP 1187-90. He did not, however, ask for time to get prepared. 3RP 1187-90. Instead, he gave a halfhearted recitation of some of the concerns he thought James had, without providing caselaw, argument or evidence. 3RP 1187-90.

James was concerned that new counsel had done “nothing” on the motion and that it was unreasonable to expect new counsel to know what happened at trial when he was not present and not given the full transcript. 3RP 1191-94. James was not prepared to represent himself but, as the proceedings continued, was allowed to relate a number of his concerns about trial counsel’s performance and ineffectiveness. 3RP 1191-1204. Ultimately, the court cut him off and moved into sentencing. 3RP 1214.

For sentencing, counsel argued the court should use “sort of a psychological issue” as “mitigation” and should impose a mid-range sentence. 3RP 1237-38. When the court asked if James had anything to say before sentencing, he asked to be allowed to represent himself, but the court said, “[t]he question is sentencing.” 3RP 1240. James said he felt his rights had been violated at trial and were being violated at the hearing and sentencing. 3RP 1240-46. The court then imposed the sentences.

b. Appellant was again deprived of his right to effective assistance

A defendant who seeks to move for a new trial prior to sentencing is entitled to counsel for that motion and sentencing. State v. Robinson, 153 Wn.2d 689, 609 n. 7, 107 P.3d 90 (2005), citing, Rupe, 108 Wn.2d 741. Here, the court's rulings deprived James of his right to effective assistance, in several ways.

i. Denying the resources to be effective

First, James was deprived of effective assistance when the court denied new counsel the entire trial transcript. In general, an indigent defendant challenging a prior proceeding is constitutionally entitled to a "record of sufficient completeness" to have effective review of his claims. See State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993); Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). This right is rooted not only in the right to effective assistance but also the constitutional guarantees of due process and equal protection. Thomas, 70 Wn. App. at 299. More specifically, equal protection requires providing indigent defendants the same tools of defense as those available to others for a price. Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). Indeed, the Supreme Court has declared "there can be no doubt that the State must provide indigent defendants with proper transcripts of the prior proceedings, or ready access thereto, when such are needed for an effective defense." State v. Williams, 84 Wn.2d 853, 856, 529 P.2d 1088 (1975).

In this case, James was appointed new counsel to assist him with

sentencing and his new trial motion - a motion predicated on prior counsel's ineffectiveness throughout trial. Where, as here, new counsel is involved, an adequate record is especially important because without it he will have no way of knowing what issues to raise. See State v. Larson, 62 Wn.2d 64, 67, 381 P.2d 120 (1963). This is so regardless of what was contained in the pro se motion. As the Supreme Court has noted, "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance." Kimmelman, 477 U.S. at 378. While many of trial counsel's errors were so obvious and egregious that they were easy for James to identify, it was incumbent upon new counsel to review the record regarding those errors in order to present them and any other issues on his client's behalf.

Further, trial counsel's ineffectiveness is evaluated based upon the record as a whole. Townsend, 142 Wn.2d at 843; Bonisisio, 92 Wn. App. at 798.

Thus, at a minimum, new counsel needed a significant portion of the trial transcript in order to be effective at the motion. He needed it 1) to evaluate the strength of the pro se claims about a trial where he was not present, 2) to provide support for the motion with actual evidence of trial counsel's behavior, 3) to inform himself so he could properly research the issues and law relevant to his client's claims and any other claims his trained legal mind saw but a pro se defendant might have missed, and 4) to show that trial counsel's failures were so significant that they tainted the entire proceeding and a new trial was required. Indeed, in this case, it is highly questionable whether he could have been effective without the

entire trial transcript, because, as noted *infra*, counsel's failures were not isolated to one or two incidents but permeated the entire trial.

Federal courts look at several "factors" in determining when a defendant is entitled to a transcript in order to have an adequate defense. Those factors include 1) whether counsel for the motion was trial counsel or there is a new attorney, 2) whether the trial was lengthy, 3) the grounds for the new trial motion, 4) the potential "usefulness" of the transcript in substantiating the defendant's allegations, and 5) the likelihood of a dispute between the parties over what actually occurred, which could be resolved by transcripts. United States v. Banks, 369 F. Supp. 951, 955 (Dist. P.A. 1974). Applying those guiding factors here, there is no question that James needed - and was entitled to - a full trial transcript. Counsel was new, was not present at trial. The trial was lengthy. The new trial motion was based upon counsel being ineffective throughout trial, not based on just one or two errors. And trial counsel's failures were actually discussed by the parties on the record, rather than based on off-the-record failures or acts.

Further, there was an extreme likelihood of a "dispute" by the prosecution over what had occurred. By the time of the new trial motion, the prosecution had either forgotten or decided not to acknowledge counsel's failures, despite its frustration with those failures during trial. Indeed, the prosecutor was claiming at the new trial that the "worst" trial counsel did was misspeak a few times. See 3RP 1154.

The trial court erred in denying the request for the full transcript. If there is a "colorable need for a complete transcript" it must be prepared at

public expense unless the prosecution proves either 1) only a portion of the proceeding is needed or 2) that some alternative method of reporting the proceedings was used and will suffice. See State v. Jackson, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976). There was no such proof here, save for the prosecutor's self-serving declaration trying to minimize trial counsel's behavior.

There is no doubt that providing new counsel with the necessary transcript would cost money. That is why DAC refused to provide it even while agreeing it was needed. But the constitution requires that the state "bear the risk" of the cost of constitutionally deficient counsel. Kimmelman, 477 U.S. at 378-79. And the cost of protecting a right cannot justify its deprivation. See Whitney v. Buckner, 107 Wn.2d 861, 869, 734 P.2d 485 (1987).

James is *not* claiming that every defendant who moves for a new trial at any point is entitled to a complete transcript of their trial at public expense. But where, as here, the court itself noted concerns about counsel throughout trial, new counsel is appointed for the motion for a new trial, the ineffectiveness claimed is not based upon an isolated incident but rather multiple incidents throughout trial and the claims of ineffectiveness are so uniquely based upon acts *on the record*, the entire trial transcript was necessary for counsel to adequately represent James. Indeed, without out counsel could not possibly have countered the claims in former counsel's self-serving declaration which tried to explain away James' claims as just the complaints of an ungrateful - and guilty -client. CP 681-88.

There is no doubt that every attorney has dealt with such a case and such a client, at least if they practice in criminal law. But here, had counsel seen the record, he would have known James' concerns were largely valid. Without that evidence, the court was left without sufficient information to give James' motion the proper consideration it deserved. The court erred in denying the request and, as a result, deprived James of effective assistance of counsel at the motion.

ii. Going forward with unprepared counsel

James was also deprived of his rights to effective assistance at the motion and sentencing when the court forced him to go forward with unprepared counsel, and when counsel failed to ask for time to become prepared. Counsel *admitted* that he was not ready to adequately represent his client. 3RP 1187-90. He said it was because he believed he had been fired by James when he received the letter.

But reasonably competent counsel would not have stopped working on his client's case based on such a letter. Counsel for an indigent defendant cannot just decide to "withdraw" or be "fired." Instead, a request to withdraw or a defendant's request to fire counsel at this stage of a trial must be approved by a court before effective. See State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); State v. Hegge, 53 Wn. App. 345, 350-51, 766 P.2d 1127 (1989). Further, the court has significant discretion about whether to grant or deny such a request. DeWeese, 117 Wn.2d at 376.

Given those well-settled legal principles, reasonably competent counsel would have known he needed to prepare for the motion and

sentencing, despite the letter. See, e.g., Thomas, 109 Wn.2d at 229 (counsel is expected to know the relevant law). Even if he was unsure of the letter's effect, reasonably competent counsel would have at least researched the issue and seen the clear law on this point.

In addition, because the court had already once talked James out of firing new counsel, new counsel *knew* that the "firing" could well be taken back and that the court appeared to prefer keeping counsel on. See 3RP 1174-75. Yet counsel stopped preparing to do his job despite knowing he might well be required to do it.

This failure might have been redeemable, however, had counsel not abdicated his responsibility to James at the hearing. By his own admission, counsel had stopped doing any preparation more than a month before. 3RP 1186. This was *after* he had already admitted to having delayed on preparation, as the trial court itself had noted with frustration. 3RP 1157-65; 4RP 1-10.

Yet when counsel was told he was still going to be representing James for the motion and sentencing, he made no motion to continue. Instead, he simply went forward, trying to excuse his inability to advocate for his client by citing a "lack of communication" but *never once* asking for time in order to become prepared. It was as if counsel figured that he no longer owed his client a duty to do his best or even be adequate, because his client did not want him.

Regardless whether James was being forced to accept counsel he did not want, however, he was entitled to have that counsel who was at least adequate. When the court did not excuse counsel, counsel retained

his duties to James, including the duty of being prepared to adequately assist him with the relevant proceedings. See Burri, 87 Wn.2d at 180-81. What he gave James instead was repeated continuances and, ultimately, a pro forma argument with no support and no chance of winning, for both the motion and sentencing.

New counsel's failures prejudiced James in many ways. As noted *infra*, trial counsel was so ineffective that James was deprived not only of his right to counsel but also due process. James had very serious, legitimate claims about trial counsel's performance - claims which could and *should* have been brought before the trial court effectively on his behalf. Counsel's failure to do this job resulted in improper denial of the motion for a new trial.

Further, counsel's failures resulted in an illegal, improper sentence far longer than that which should have been imposed. The court relied on a standard range of 33-43 months for the no-contact order violation. CP 648-59. That range was not correct. Even using the offender score of 5, which the prosecution advanced, with a seriousness level of IV, the standard range would have been 22-29 months, not 33-43 months. Former RCW 9.94A.515 (2004); former RCW 9.94A.525; former RCW 9.94A.510 (2004). Counsel failed to notice this serious error, which resulted in a sentence 14 months longer than proper.

Counsel also failed to note that the sentence imposed exceeded the statutory maximum. Under RCW 9.94A.505(5) and RCW 9.94A.599, except in circumstances inapplicable here, a court may not impose a sentence which exceeds the statutory maximum for the offense. The

relevant sentence includes not only confinement but also community custody. See State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Santiago, 149 Wn.2d 402, 68 P. 3d 1065 (2003); State v. Sloan, 121 Wn. App. 220, 887 P.3d 1214 (2004).

Here, the court order violation was a Class C felony, with a statutory maximum of 5 years. RCW 9A.20.021; RCW 26.50.110. The sentence imposed, however, was 43 months in prison plus 9-18 months of community custody, for a total sentence of 52-61 months. CP 648-59.

As a practical matter, this error will be corrected even if the same offender score is reused on resentencing, because the top end of that range will not result in a sentence possibly over 60 months.²⁵ Nevertheless, this error again shows counsel’s lack of preparedness and ineffectiveness at sentencing.

In addition, counsel failed in his duties to James by failing to argue two relevant issues which would have further reduced the sentences. The standard ranges used depended upon the offender scores calculated by counting the offenses against one another, save for the assault 2 and arson 1, “violent” offenses which counted as “2” in each other’s offender scores. CP 225-236, 648-59. The offender score and ranges used by the court were:

Assault 2	5	22-29 months
Bail Jumping	4	12-16 months
Arson 1	5	46-61 months
Residential Burglary	4	15-20 months

²⁵In fact a different offender score should have been used. See infra.

CP 225-236, 648-59..

At a minimum, however, the arson and court order violations should have been counted as one point in the scores. Under RCW 9.94A.589(1)(a), multiple offenses which encompass the “same criminal conduct” are counted as a single offense in the offender score. See State v. Lessley, 118 Wn.2d 773, 779, 827 P.2d 996 (1991). Offenses are the same criminal conduct if “they require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Criminal intent is the same for crimes if the defendant’s intent, when viewed objectively, did not change from one crime to the next. State v. Anderson, 72 Wn. App. 453, 464, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994). Thus, in Anderson, a defendant was convicted of assaulting a police officer in order to escape from custody. Because the assault was committed to further the escape, the defendant’s criminal intent was the same from one offense to the other and they were the same criminal conduct. 72 Wn. App. at 464.

Similarly, here, the court-order violation and the arson were the same criminal conduct. They occurred at the same time and place, to the same victims. And they shared the same criminal intent, because the court order violation furthered the arson. Indeed, the two crimes were for the same *acts*, as the court order violation was alleged to have been committed not by simply entering the premises but rather by conduct which was

²⁶As noted herein, the correct range for this offense was actually 22-29 months.

“reckless and creates a substantial risk of death or serious physical injury to another person” i.e., the arson.

Had counsel properly argued that the protection order violation and arson were the same criminal conduct, the offender scores would have been reduced by one point, with corresponding reductions in the standard ranges.²⁷ It is ineffective assistance to fail to argue “same criminal conduct” when it applies. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.2d 232 (2004).

Counsel was also ineffective in failing to ask the court to exercise its discretion to count the burglary as the “same criminal conduct” as the arson and the court order violation. The burglary anti-merger statute provides that everyone who “in the commission of a burglary shall commit any other crime, *may* be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.” RCW 9A.52.020 (emphasis added). The statute serves the SRA’s proportionality function by allowing the trial court to exercise its discretion in deciding whether to apply “burglary anti-merger.” Lessley, 118 Wn.2d at 781; State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998).

That discretion is so broad that a court may reasonably decline to merge a burglary and crimes committed once inside the home even if they

²⁷The resulting offender scores and standard ranges would have been:

Arson 1	4	41-54 mos.
Resid. Burg.	3	13-17 mos.
Assault 2	4	15-20 mos.
Bail Jumping	3	9-12 mos.
Court order violation	3	15-20 mos.

See former RCW 9.94A.510 (2004); former RCW 9.94A.030 (2004); former RCW 9.94A.525 (2004).

amounted to the “same criminal conduct.” Lessley, 118 Wn.2d at 779. In Lessley, the defense argued it was an abuse of discretion to apply anti-merger in such a situation. The Court disagreed, holding that the trial court properly decided not to allow the defendant to escape the full consequences of his acts merely because the crimes were all “same criminal conduct.” 118 Wn.2d at 779. Because the burglary involved a separate “breach of privacy and security” different from the crimes committed once inside, the Court found no abuse of discretion in deciding to apply anti-merger. 118 Wn.2d at 779.

Here, however, unlike in Lessley, the burglary was merely incidental to the arson and court order violation. The burglary had no independent purpose - it was simply to commit the arson. And again, the arson itself *was* the conduct Mr. Douglas was charged with committing which amounted to the court-order violation. Indeed, the severity of the arson and resulting sentence was already increased based upon the fact that it was at a “dwelling.” Compare RCW 9A.48.020(1)(b), with, RCW 9A.48.030 (second-degree). Further, without the arson or the domestic violence court order violation, the prosecution could not have proved burglary, because the only crime it could then have shown was criminal trespass. See RCW 9A.52.070.

There was a strong argument in this case for the trial court to have declined to apply the anti-merger rule. If counsel had asked the court to exercise its discretion to do so, the court would likely have refused to apply anti-merger under the unique circumstances of this case. The offender scores and standard ranges would thus have been further

reduced.²⁸ A reasonably competent lawyer would not fail to make an argument asking the court to exercise its sentencing discretion to his client's benefit. See, e.g., Saunders, 120 Wn. App. at 825.

Because counsel failed to even ask for sufficient time to prepare to adequately represent his client at sentencing, however, he failed to note anything about the sentences his client was being ordered to serve. He did not notice that the court was using the wrong range for one offense. He did not notice a sentence which exceeded the statutory maximum. He did not argue "same criminal conduct" where it clearly applied. And he failed to make a very strong available argument against application of the burglary anti-merger rule. Counsel's feeble attempt to argue "mitigation" aside, his presence at sentencing was little more than that, with the result that his client received an illegal sentence and sentences far longer than should have been imposed. There is more than a reasonable probability that counsel's failures at sentencing prejudiced his client. This Court should so hold and should reverse.

²⁸The resulting offender scores and standard ranges would have been:

Arson 1	3	36-48 mos.
Resid. Burg.	2	12-14 mos.
Assault 2	3	13-17 mos.
Bail Jumping	2	4-12 mos.
Court order violation	2	13-17 mos.

See former RCW 9.94A.510 (2004); former RCW 9.94A.030 (2004); former RCW 9.94A.525 (2004).

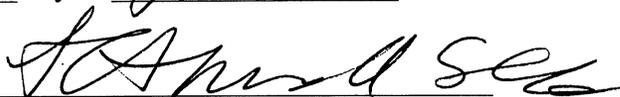
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. James Douglas, at his current address in DOC.

DATED this 14th day of June, 2007.



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E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 14th day of June, 2007.

Respectfully submitted,



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INSTRUCTION NO. 25

A person commits the crime of domestic violence court order violation when he or she, after having had actual notice of the existence of a protection order, willfully violates the terms of the order by having contact with the protected persons' residence or premises or by committing acts of domestic violence against them or by having contact with them.

INSTRUCTION NO. 28

To convict the defendant of the crime of domestic violence court order violation, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 10th day of October, 2004, the defendant violated the provisions of a protection order that excluded him from the residence or premises of Carroll and Pauline Pederson, that restrained him from committing acts of domestic violence against Carroll or Pauline Pederson, and that restrained him from having contact with Pauline and Carroll Pederson;

(2) That the defendant had actual notice of the existence of the protection order, number 04-2-02188-5; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

(27)

A person commits the crime of arson in the first degree when he or she knowingly and maliciously causes a fire or explosion which is manifestly dangerous to any human life, including fire fighters or which damages a dwelling or in any building in which there is at the time a human being who is not a participant in the crime.

WPIC 80.01

INSTRUCTION NO. 28

28

To convict the defendant of the crime of arson in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 10th day of October, 2005, the defendant caused a fire or explosion;

(2) That the fire or explosion was manifestly dangerous to human life, including fire fighters or damaged a dwelling or was in a building in which there was at the time a human being who was not a participant in the crime.

(3) That defendant acted knowingly and maliciously; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 80.02