

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FILED
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DIVISION II

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STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 MONTIAE C. MCHENRY)
 (your name))
)
 Appellant.)

STATE OF WASHINGTON
BY Omme
DEPUTY

No. 36321-6-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, MONTIAE, MCHENRY, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITONAL GROUND 1

The State did not prove the defendant had knowledge or possession of the firearm found inside the residence. UNITED STATES V SANTERANO 45 F.3 622,624 (2nd CIR) "cannot have possession unless person knew of its existence".

State V Gorman 312 F.3d 1159 1163- 10th CIR 2002 "the government must prove that the defendant knowingly possessed a firearm under section 922"".

The defendants conviction for being a felon in possession of a firearm was improper where the trial court failed to instruct the jury that knowledge was an element of the crime and where the evidence of knowledge was disputed State v Shouse 119. Wn.App.793,83 P 3d 453 (2004. U.S.V Herring 133 Fed Appx 385 supplemented 143 fed.appx 18 "defendant did not know a firearm was present" Citing West RCWA 9.942.040

State V Cuble 35 P.3 404,109 Wash App 362. The State has the burdon to pled, to insruct and to prove knowledge in addition to other statutory elements of Unlawfull Possession of a Firearm.

There was insufficient evidence for the purpose of proving the defendant was armed in counts three and five. RCW 9.94 125 State V Valobinos 122 Wn. 2d 270,282,858 P.2d 199 (1993) the test for determining rather a defendant is armed. The State is required to prove proximity to the weapon and show that a sufficient nexus between the weapon, the crime, and the victim existed to establish that the defendant was armed. State V Johnson 94 Wn. App.882 (1999).

The trial courts instructions is deficient and the jury should have recieved additional instructions regaurding when a defendant is armed. State V Green 94 Wn. 2d 216,220-22,616 P.2d 628 2980. Cite State V Mchenry.

Winship 397 U.S 358,90 S CT 1068,251. ED 2d 368 1970 presupposes that as an essential of the due process gaurenteed by the 14th amendment that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offence."

In this case the court did not prove the element of knowledge and violated the defendants 14th amendment right by convicting him in counts 3,4,and 5.

There was no ballistic evidence to corroborate the victims testimony that the defendant fired a shot from the weapon found in the residence. There was no bullet holes found inside the residence other than the one that was put there months prior by the victims boyfriend,RP(2/22/07) page 201,2-4. RP (2/20/07) page 82,8-17 detective Krause testified that he looked all over for any other bullet holes and found nonethat he belived was made by the rifle found.

The victim testified that there was a scope on the rifle found and that she had seen the rifle before,however the rifle found did not have a scope on it. There was no spent shell casing found,the defendant was not tested for powder residue to show evidence he fired a firearm,there was no finger prints on the firearm found,the magazines or bullets. The defendant never possessed the weapon found inside the residence and the lack of evidence proves this fact.

THE DETECTIVES TESTIMONY FURTHER PROVES THAT THE WEAPON FOUND HAD NOT BEEN FIRED. THERE WAS A LIVE ROUND JAMMED "STOVE PIPED" IN THE RECIEVER OF THE RIFLE, AS WAS SHOWN IN THE PHOTOGRAPH TAKEN BY TONI MARTIN.

RP (2/20/07) PAGE 80, 5-15.

DETECTIVE KRAUSE TESTIFIED THAT HE REMOVED THE BULLET FROM THE RECIVER OF THE RIFLE. THE RIFLE WAS NEVER FIRED AND CANNOT BE FIREID WITH A SHELL JAMMED OR "STOVE PIPED" IN THE RECIEVER. RP (2/20/07) Page 72, 7-12.

THE STATES WITNESS TEAISHA JACKSON, TESTIFIED THAT THE WEAPON FOUND WAS THE VICTIMS BOYFRIENDS. ALSO THAT THE BASEMENT WHERE THE WEAPON WAS FOUND WAS THE VICTIMS "HANG OUT". SHE ALSO TESTIFIED THAT SHE SAW A CLIP ON THE

TABLE AND QUESTIONED THE VICTIM ABOUT IT. THE DEFENDANT HAD NO KNOWLEDGE OF A FIREARM. THE DEFENDANT SHOULD HAVE BEEN ENTITLED TO AN INSTRUCTION UNWITTING POSSESSION INSTRUCTION BECAUSE THE MAIN ISSUE AT TRIAL WAS THE ACTS OF ASSAULT AND THE FACT THAT THE DEFENDANT DID NOT FIRE A WEAPON, NOR OWN OR POSSESS THE RIFLE FOUND AND WHETHER HE KNOWINGLY POSSESSED THE FIREARM. A REASONABLE ATTORNEY WOULD HAVE PROPOSED AN UNWITTING POSSESSION INSTRUCTION, THEREBY PLACING THE BURDON OF DISPROVING THAT DEFENSE, OR PROVING KNOWING POSSESSION, ON THE STATE.

THE STATE FAILED TO PROVE THE DEFENDANT HAD DOMINION AND CONTROL OVER THE AREA IN WHICH THE WEAPON WAS FOUND. STATE V ALVAREZ 105 WN. APP. 215.

IT IS NOT A CRIME TO HAVE
DOMINION AND CONTROL OVER A AREA
WHERE CONTRABAND IS FOUND, STATE V
OLIVAREZ 63, 484, 820 P2 d 66 1991
DIV III, CITING JONES 45 P3d 1062
146 WASH 2d 328 2002.

"A PERSONS DOMINION AND CONTROL
OF A PREMISES RAISES ONLY A REBUTTABLE
INFERENCE OF DOMINION AND CONTROL"
STATE V CONTABRANA 83 WN. APP. 204, 921
P. 2d 572.

THE STATE DID NOT PROVE THE WEAPON
THE WEAPON WAS ACCESSIBLE AND READILY
AVAILABLE FOR OFFENSIVE OR DEFENSIVE
PURPOSES. STATE V GURSKE 120 Wn. APP.
63, 83 P.3d 1051 2004. THERE WAS NOT
A NEXUS BETWEEN THE WEAPON DEFENDANT
AND THE CRIME CITE SCHELIN 147 WN. 2n
AT 568 3.

THE STATE DID NOT PROVE THE
DEFENDANT WAS ARMED DURING THE
COMMISSION OF THE CRIME IN
COUNT III, COUNT V FAILS.

IN REGARDS TO COUNT III THE TRIAL
COURTS INSTRUCTION IS DEFICIENT AND
THE JURY SHOULD HAVE RECIEVED ADDITIONAL
INSTRUCTIONS REGAURDING WHEN A DEFENDANT
IS ARMED. "FAILURE TO GIVE ANY INSTRUCTION"
STATE V MCHENRY 13 WASH APP 421,537
P.2d 842, WA. APP 5/7/75.

THE STATE DID NOT PROVE EACH
ELEMENT OF THE CRIME BEYOUND A
REASONABLE DOUBT IN COUNT III AND IV.
STATE V GREEN 94 WN. 2d 216,220-22,616
P.2d 628 (1980). THERE WAS NO FINDINGS
OF FACTS TO SUPPORT THE ELEMENTS OF
THE CRIMES BEYOND A REASONABLE DOUBT.

THE FINDINGS OF FACTS MUST
SUPPORT THE ELEMENTS OF THE CRIME
BEYOND A REASONABLE DOUBT STATE
V TADEO - MARES 86 Wn. App. 813, 815-16
939 P.2d 220 (1997).

THE COURTS FINDINGS DO NOT
SUPPORT THE CONCLUSIONS OF LAW RAP
10.3 (6) IN RE HABEAS CORPUS OF SANTORE
28 WN. APP. 319, 323, 623 P.2d 702 (1981).

THE COURTS ALSO ERRED IN COUNT
III BY ADDING A SENTENCE INHANCEMENT
WITHOUT PROVING A NEXUS OR IF THE
DEFENDANT WAS ARMED BEYOND A REASONABLE
DOUBT. VALDOBINOS 122 WN. 2d at STATE
V TONGATE 93 WN 2d 751, 754, 613 P.2d
121 (1980). CITE STATE V BARNS 153 WASH
2d 378, 103 P.3d 1219 (2005).

"AN APPELLATE COURT WILL CONSIDER ERROR RAISED FOR THE FIRST TIME ON APPEAL WHEN THE GIVING OR FAILURE TO GIVE AN INSTRUCTION INVADDES A CONSTITUTIONAL RIGHT OF THE ACCUSED" STATE V MCHENRY 88 WN. 2d 211, 213, 558 P. 2d (1977).

THE LACK OF FINGER PRINT EVIDENCE AND THE LACK OF EVIDENCE PROVING THE WEAPON WAS FIRED CLEARLY SHOWS THAT THE RIFLE FOUND AT THE CRIME SCENE WAS NOT HANDLED BY THE DEFENDANT. WITHOUT A NEXUS BETWEEN THE DEFENDANT, THE CRIME, AND THE WEAPON, COURTS RISK PUNISHING A DEFENDANT FOR HAVING A WEAPON UNRELATED TO THE CRIME. GURSKE, 155 WN. 2d at 141. THIS IS CLEARLY WHAT HAPPEND IN COUNT III AND V.

THE WEAPON IN THIS CASE WAS FOUND IN THE BASEMENT OF THE RESIDENCE. THE DEFENDANT WAS NOT IN CLOSE PROXIMITY TO THE WEAPON WHEN IT WAS FOUND.

THE SUPREME COURT FOUND NO NEXUS BETWEEN A DEFENDANT AND A RIFLE WHEN HE WAS NOT IN CLOSE PROXIMITY TO THE WEAPON AT THE TIME OF ITS DISCOVERY AND WHEN THERE WAS NO EVIDENCE THAT HE HAD BEEN IN SUCH PROXIMITY WHEN ITS AVAILABILITY FOR OFFENSIVE OR DEFENSIVE USE WAS IMPORTANT, SEE STATE V VALDOBINOS, 122 WN.2d 270,281-82, 858 P.2d 199 (1993).

IN THIS CASE THE DEFENDANT WAS ALREADY IN JAIL WHEN THE WEAPON WAS FOUND. THE STATES EVIDENCE IS INSUFFICIENT TO CONVICT

THE DEFENDANT ON COUNTS III AND

V.

THE MERE PRESENCE OF A WEAPON
AT THE SCENE OF THE CRIME MAY BE
INSUFFICIENT TO PROVE A NEXUS.

GURSKE, 155 WN. 2d at 142.

"ONE SHOULD EXAMINE THE NATURE
OF THE CRIME, THE TYPE OF WEAPON,
AND THE CIRCUMSTANCES UNDER WHICH
THE WEAPON IS FOUND (eg. WHETHER IN
THE OPEN, IN A LOCKED OR UNLOCKED
CONTAINER, IN A CLOSET ON A SHELF, OR
IN A DRAWER". SHELIN, 147 WN. 2d at 570.

HERE THE WEAPON WAS FOUND IN
THE BASEMENT BEHIND A DRESSER.

A FIREARM ENHANCEMENT MUST BE PROVED
BEYOND A REASONABLE DOUBT. SEE STATE
V TONGATE, 93 WN. 2d 751, 754, 613

TO MEET THAT BURDEN, THE STATE HAD TO ESTABLISH THE DEFENDANT WAS WITHIN THE PROXIMITY OF AN EASILY AND READILY AVAILABLE FIREARM, FOR OFFENSIVE OR DEFENSIVE PURPOSES AND THAT A NEXUS EXISTED BETWEEN HIM, THE CRIME, AND THE FIREARM. SEE STATE V. BARNES, 153 WN.2d 378, 383, 103 P.3d 1219 (2005).

IN THIS CASE THE STATE ONLY HAS THE ~~RIGHT~~ UNCORROBORATED TESTIMONY OF THE VICTIM, THAT THE DEFENDANT POINTED THE WEAPON AT HER AND THEN FIRED A WARNING SHOT TOWARDS THE BACK OF THE HOUSE.

THE STATE ALSO HAS THE TESTIMONY OF DETECTIVE KRAUSE WHO STATED HE HEARD A GUN SHOT, HOWEVER THERE WAS NO EVIDENCE SHOWING THAT THE WEAPON FOUND WAS FIRED. THERE WAS NO BULLET HOLES OR SPENT SHELL CASING. THE ONLY HOLE FOUND WAS THE BULLET HOLE PUT THERE BY THE VICTIMS BOYFRIEND. RP(2/22/07) PAGE 201, 2-4.

THERE IS CLEARLY INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT FOR UNLAWFUL POSSESSION OF A FIREARM AND ASSAULT 2^o WITH A FIREARM. THE LACK OF SUPPORTING EVIDENCE FURTHER PROVES THE DEFENDANT WAS NOT ARMED IN CHIEF RESPECT TO COUNT III.

THIS CONVICTION IS ILLEGAL AND THE DEFENDANT WAS MADE TO SUFFER THE ONUS OF A CRIMINAL CONVICTION WITHOUT SUFFICIENT PROOF AS DEFINED AS EVIDENCE

THIS CONVICTION VIOLATES THE DEFENDANTS 14TH AMENDMENT.

THE VICTIM TESTIFIED THAT SHE DID NOT KNOW HOW THE BULLET HOLE GOT PUT IN THE WALL, THAT WAS FOUND BY THE SEARCHING OFFICERS IN THE RESIDENCE. RP(2/21/07) PAGE 169, AND 170.

HOWEVER DURING THE PROSECUTORS REDIRECT EXAMINATION THE VICTIM SAID THE DEFENDANT CAUSED THE HOLE. RP(2/21/07) PAGE 175, 17-19. THIS WAS A CLEAR CONTRADICTION AND THE VICTIM WAS SHIFTING THE BLAME FROM HER BOYFRIEND TO THE DEFENDANT.

THE DEFENDANT NEVER HANDLED A FIREARM. THE DEFENDANT HAD NO KNOWLEDGE OF THE FIREARM FOUND INSIDE THE HOUSE. CONSIDERING ALL OF THE ABOVE, WITH THE INSUFFICIENT EVIDENCE, FROM A DUE PROCESS STANDPOINT, BEING THAT THE ADVERSARIAL TESTING PROCESS REQUIRES THE STATE TO PROVE EVERY ELEMENT OF THE CRIME, BEYOND A REASONABLE DOUBT, AND WITH THE STATES FAILURE TO CONVICT UPON THE GROUNDS OF THIS STANDARD SET FORTH BY OUR FOREFATHERS WHO WROTE THE CONSTITUTION AND AMENDMENTS TO PROTECT THE RIGHTS, FREEDOMS, AND LIBERTIES OF ALL MANKIND, REGARDLESS OF COLOR, RELIGION, OR CREED.

THE DEFENDANT ASKS THE COURT TO REVERSE HIS CONVICTIONS FOR ASSAULT 2° WITH A FIREARM, AND UNLAWFUL POSSESSION OF A FIREARM COUNT V. FOR VIOLATING

HIS 14TH, 5TH, 6TH, AND 8TH AMENDMENTS, INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO PROVE GUILT BEYOND A REASONABLE DOUBT.

EVERY MATERIAL ELEMENT OF THE CHARGE, ALONG WITH ALL ESSENTIAL SUPPORTING FACTS MUST BE PUT FORTH WITH CLARITY. STATE V. BERGON 105 WN. 2d 1,187 11 P.2d 1000 (1985).

THIS CLEARLY WAS NOT THE CASE IN RESPECT TO THE DEFENDANTS CONVICTIONS ON COUNTS III AND V. THE DEFENDANT CLEARLY PROVES HIS CLAIM OF INSUFFICIENT EVIDENCE, AS WELL AS HIS CLAIM OF VIOLATIONS OF HIS AMENDMENTS.

THE DEFENDANT PRAYS THE COURTS WILL DISMISS COUNTS III AND V, OVER ~~TURN~~ TURN THE CONVICTIONS AND VACATE HIS SENTENCE ENHANCEMENT ON COUNT III.

END OF ADDITIONAL GROUND #1

ADDITIONAL GROUNDS 2

INSUFFICIENT EVIDENCE IN COUNT 4 ASSAULT 2

The State did not prove assault 2 in count four to wit a knife. The defendant cut the victims hair without felonious intent. The defendant was acting in accord with his constitutionally protected right to practice his religion. In the defendant's religion the male can cut the hair of his wife or daughter if it is used to promote their promiscuity. Ms Jackson testified to this fact of practice.

The victim testified that she was not 'afraid' when the defendant cut her hair. There was no evidence of assault with a deadly weapon. The state did not show that the defendant had the requisite intent to inflict bodily harm nor create fear and apprehension. The knife was used strictly for the purpose of cutting hair and was not a deadly weapon under the circumstances in which it was used citing State V Skenandore 99 wn app 494,994 p 291.

The State failed to prove there was felonious intent in count 4. Assaults in the first and second degree are committed with a felonious intent.' State V. Hamilton 69 wash 561,125 p 950 1912. State V. Skenandore 99 wn 494,994 p2d 291 RCW 9A.04.110 (6) defines item as 'deadly weapon' if under the circumstances in which it is used the item is readily capable of causing death or substantial bodily harm. For purposes of this statute whether an item constitutes a deadly weapon depends on the circumstances surrounding its use including the intent and present ability of the user, the degree of force, the part of the body to which it was applied, the physical injuries inflicted and the potential of substantial bodily harm.

ADDITIONAL GROUNDS 2 CONT...

There was no force used when the defendant cut his daughter's hair. The victim testified that she sat down after the defendant told her to sit in a chair to get her hair cut. There was no bodily harm to the victim nor did the defendant threaten the victim with the knife.

State V. Skenandore 99 wn app 494,994 p 2d 291, the courts held that based on the evidence in the record before them no rational trier of fact could hold that the appellants weapon was readily capable of causing death or substantial bodily harm under the circumstances in which it "the weapon" was used. The courts erred by refusing to allow the lesser included offence of reckless endangerment. There is no evidence to support assault 2 .

Second degree assault, assault with a deadly weapon, may be committed three ways (1) an attempt with unlawful force to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (actual battery) and (3) putting another in apprehension of harm whether or not the action intends to inflict or is capable of inflicting that harm (common law assault). State V. Wilson 125 wn 2d 212,218,883 p.2d 320 1994 RCW 9A.36.021 (1) C.

The defendant's intent was to cut his daughter's hair only in accord with his religious beliefs and practice. The conviction in count 4 infringes on the defendant's 1st amendment Freedom of Religion, press and expression. It also goes against the Washington state constitution section 11 Religious Freedom, 'absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on acco

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ADDITIONAL GROUNDS 2 CONT...

unt of religion. The defendant ask the court to dismiss and reman
d for new trial for all errors and constitutional violations and
insufficient evidence.

END OF ADDITIONAL GROUNDS 2...

HTWSSTKS

ADDITIONAL GROUND 3

PROSECUTORIAL MISCONDUCT

The prosecutors statements of uncharged offenses prejudiced the jury. The prosecutor in her opening statements told the jury that the defendant punched, kicked, dragged, and broke a chair over the victims head. The defendant was not charged with these allegations nor were the victims injuries consistent with the actions described in the uncharged offenses. The irrelevant evidence produced in the prosecutors opening caused prejudice and denied the defendant's right to a fair trial. *State v. Stevenson* 16 app 341, 555 p2d 1004 1976. The courts erred by allowing the prosecutors opening statements to include uncharged events. They were a clear assault on the defendant's character. The prosecutors constant reference towards the defendant's religion was prejudicial. The prosecutor told the jury that the defendant had two wives and that this was illegal in the state of Washington without explaining that the defendant was not legally married to both women led the jury to believe the defendant committed the crime bigamy. The defendant was not legally married to both women he was only legally married to Taraja Mchenry and Ms Jackson was through the mosque as practiced in Al Islam. The prosecutor led the jury to believe the defendant committed a crime.

State v. Evans 114 p.3d 627, 154 wash 2d 438 "if evidence is before a jury and the State argues that the defendant's participation in the uncharged crime triggered liability for the crime charged, there may be actual and substantial prejudice as required for reversal".

The prosecutors opening statements about the defendant's alleged uncharged assaults on the victim led the jury to believe the defendant committed the other offenses as charged and the defendant did not receive a fair trial as a result .

"MERE APPEALS BY THE PROSECUTOR TO A JURYS PASSIONS AND PREJUDICE ARE INAPPROPRIATE". STATE V SMITH 30 P.3d 1245 ,144 WASH 2d 655.

THE PROSECUTOR SHIFTED THE BURDON ON THE DEFENDANT BY TELLING THE JURY "YOU HAVE TO ASK YOURSELVES WHERE IS THE OTHER MRS MCHENRY?" RP (2/26/07) PAGE 290 , 23-24

THE PROSECUTORS STATEMENTS IN HER OPENNING AND CLOSING ARGUMENTS WERE IMPROPER. THE PROSECUTOR MENTIONING THE UNCHARGED EVENTS, STATING THAT THE DEFENDANT PUNCHED, KICKED AND BROKE A CHAIR OVER THE ~~DEFENDANTS~~^{VICTIMS} HEAD WAS PREJUDICIAL AND INAPPROPRIATE. STATE V SMITH. RP. (2/26/07) Page 278, 12-16.

IT WAS IMPROPER FOR THE PROSECUTOR TO MISTATE FACTS TO THE JURY. THE PROSECUTOR TOLD THE JURY THAT THE POLICE FOUND THE FIREARM ON TOP OF THE DINING ROOM TABLE DURING HER CLOSING ARGUMENTS. THIS LED THE JURY TO BELIEVE THE WEAPON WAS IN PLAIN SIGHT WHICH PREJUDICED THE DEFENDANT WHO BY MAKING IT SEEM AS IF HE HAD KNOWLEDGE OF THE WEAPON AND IT WAS IN HIS CONTROL. RP (2/26/07) PAGE 279, 12-15.

THE PROSECUTOR SHIFTED THE BURDON ON THE DEFENDANT BY STATING SEVERAL TIMES DURING TRIAL AND IN CLOSING THAT IN ORDER TO BELIEVE THE DEFENSE YOU HAVE TO BELIEVE MRS MCHENRS TESTIMONY. RP (2/26/07) Page 280, 18-20.

THE PROSECUTOR SHIFTED THE BURDON
ON THE DEFENDANT BECAUSE THE STATES
WITNESESS TESTIMONY WAS UNFAVORABLE.
MRS MCHENRY WAS LISTED ON THE STATES
WITNESS LIST , WAS NEVER NAMED AS A
WITNESS BY THE DEFENSE BEFORE OR DURING
TRIAL.

IT WAS IMPROPER FOR THE PROSECUTOR
TO USE THE UNFAVORABLE TESTIMONY OF
THIER WITNESS AND IMPLY TO THE JURY
THAT THE DEFENDANT RELIED SOLEY ON THE
TESTIMONY OF THE STATES WITNESS TO
BE VINDICATED. THIS WAS PREJUDICIAL
AND BURDON SHIFTING BY THE STATE CLEARLY.
THIS DENIED THE DEFENDANT A FAIR TRIAL
AND VIOLATED HIS 5TH AND 14TH AMENDMENTS.

THE DEFENDANT HAD THE RIGHT TO
FACE HIS ACCUSOR IN THIS CASE THE

4 DEFENDANTS WIFE WAS NAMED AS THE STATES

WITNESS. IT WAS IMPROPER FOR THE
STATE TO ASSUME TO THE JURY
OTHERWISE BY MAKING THIER WITNESS
THE DEFENSES WITNESS DURING TRIAL.

THE PROSECUTOR VIOLATED THE
DEFENDANTS 5TH AMENDMENT AND SHIFTED
THE BURDON BY TELLING THE JURY WHAT
THE DEFENDANT WANTED THEM TO BELIEVE
WHEN THE DEFENDANT NEVER TESTIFIED.

RP (2/26/07) PAGE 279, 22-25.

THE PROSECUTORS REMARKS ABOUT WHY
THE STATES WITNESS TESTIMONY WAS
UNFAVORABLE WAS PREJUDICIAL TO THE
DEFENDANT. RP (2/27/07) PAGE 280, 1-25.

THE PROSECUTOR CONTINUED TO TELL THE
JURY WHAT THE DEFENDANT WANTED THEM
TO BELIEVE DISPITE THE FACT THAT THE
DEFENDANT NEVER TESTIFIED.

THE PROSECUTORS CLOSING IN CHIEF
WAS IMPROPER WHERE SHE CONTINUALLY
TOLD THE JURY WHAT THE DEFENSE WANTED
THEM TO BELIEVE THROUGH THE TESTIMONY
OF MRS. MCHENRY. THE DEFENDANT NEVER
TESTIFIED NOR DID THE DEFENSE NAME
MRS MCHENRY AS A WITNESS FOR THE
DEFENSE. RP (2/26/07) PAGE 288, 12-24.

THE PROSECUTOR SHIFTED THE BURDON
BY TELLING THE JURY "IN ORDER FOR
YOU TO BELIEVE THE DEFENSE'S STORY,
YOU HAVE TO BELIEVE MRS. MCHENRY"
RP (2/26/07) PAGE 288, 20-21. THE
PROSECUTORS COMMENTS WERE PREJUDICIAL.

STATE V MCKENZIE 157 WN. 2d 44, 52, 134
P. 3d 221 (2006).

THE PROSECUTORS COMMENTS DURING
AS
HER CLOSING ^ TO THE TESTIMONY OF MRS

6 MCHENRY WAS IMPROPER AND BURDON SHIFTING

STATE V FRENCH 101 WN. APP. 380, 385,
4 P.3d 857 (2000).

THE PROSECUTOR MISSTATED THE
~~LAW~~
LAW AND PREJUDICED THE DEFENDANT
BY TELLING THE JURY " IF YOU BELIEVE
THAT WHAT DETECTIVE KRAUSE HEARD WAS
A GUNSHOT AND NOT A FIRECRACKER, THE
DEFENDANT IS GUILTY OF UNLAWFUL
POSSESSION OF A FIREARM". RP (2/26/07)
PAGE 294, 20-21. THE PROSECUTOR WAS
CLEARLY UNETHICAL, THE DEFENDANTS
CLAIM OF PROSECUTORIAL MISCONDUCT
PREVAILS STRONGLY. THE STATE CLEARLY
DENIED THE DEFENDANT THE EQUAL PROTECTION
OF THE LAW!

THE PROSECUTOR'S CLOSING ARGUMENT
IN CHIEF WAS IMPROPER, PREJUDICIAL AND
VIOLATIVE OF THE DEFENDANT'S CONSTITUTIONAL
7 RIGHTS UNDER THE 6TH, 5TH, AND 14TH AMENDMENTS.

THE PROSECUTORS QUESTION WAS IMPROPER WHERE SHE ASKED THE VICTIM WHO CAUSED THE ~~HOLE~~ BULLET HOLE IN THE WALL AFTER THE VICTIM ALREADY STATED THAT SHE DID NOT KNOW HOW THE HOLE WAS CAUSED IN EARLIER TESTIMONY. RP (2/21/07) PAGE 179, 6-11 RP (2/21/07) PAGE 169 AND 170. THE ~~DEFENDANT~~ VICTIM TESTIFIED THAT SHE DID NOT KNOW HOW THE BULLET HOLE GOT PUT IN THE WALL.

THE PROSECUTOR MISTATED THE EVIDENCE AND PREJUDICED THE JURY AND THE DEFENDANT BY TELLING THE JURY INSIDE THE RIFLE WAS A BULLET READY FOR DISCHARGE. THE EVIDENCE PRODUCED BY THE PHOTO CLEARLY SHOWS A BULLET STOVE PIPED (JAMMED) IN THE

CHAMBER OF THE RIFLE. RP(2/26/07) Page 288, 4-5.

THE PROSECUTOR WAS RUBBING DETECTIVE KRAUSE'S ARM AND HAND INFRONT OF THE JURY PRIOR TO HIM TAKING THE STAND TO TESTIFY. THE COURTS FAILED TO ADD THIS PORTION OF THE TRANSCRIPTS AND SHOULD HAVE, BECAUSE THE PROSECUTOR ADDRESSED THIS ISSUE WITH THE DETECTIVE BEFORE SHE BEGAN TO EXAMINE HIM.

SHE ASKED HIM IF HER ACTIONS WOULD AFFECT HIS TESTIMONY. SUCH A PUBLIC DISPLAY OF AFFECTION INFRONT OF THE JURY WAS UNPROFESSIONAL AND LED THE JURY TO FAVOUR THE DETECTIVES TESTIMONY BECAUSE OF THE RELATIONSHIP BETWEEN HE AND THE PROSECUTOR.

THE PROSECUTOR COMMENTED ON THE DEFENDANTS FAILURE TO TESTIFY IN TRIAL, VIOLATING HIS RIGHT TO REMAIN SILENT. THE PROSECUTOR FURTHER COMMENTED ON THE DEFENDANTS FAILURE TO CALL HIS OTHER WIFE TO TESTIFY. THIS WAS CLEARLY SHIFTING THE BURDON ON THE DEFENDANT. THE DEFENDANTS WIFE WAS ON THE STATES WITNESS LIST NOT THE DEFENSES.

"THE SUPREME COURT HELD THAT ALLOWING A PROSECUTOR TO COMMENT ON THE DEFENDANTS FAILURE TO TESTIFY VIOLATED THE 5TH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION", GRIFFIN V. CALIFORNIA 380 U.S 609, 85 S CT 1229, 14 ED 2d 106 (1965).

"COMMENTING ON AN ABSENT WITNESS IS IMPERMISSABLE WHEN THE JURY WOULD NATURALLY AND NECESSARILY VIEW THE COMMENT AS A REFERENCE TO THE DEFENDANTS FAILURE

TO TESTIFY." US V. MERRYMAN 630 F
2d 780, 6 FED R EVID SERV 1128
10TH CIR (1980).

THE PROSECUTOR FAILED TO USE THE
MISSING WITNESS DOCTRINE. SUCH A
MOTION WOULD HAVE BEEN ERRONEOUS IN
LIGHT OF THE FACT THAT THE STATE
FAILED TO SOPENA TRARAJA PRATER
TO TESTIFY ON THE DATE THAT TRIAL
WAS TO BEGAN.

THE PROSECUTORS MISCONDUCT VIOLATED
THE DEFENDANTS DUE PROCESS, 14TH, 5TH,
6TH, AND 8TH AMENDMENTS.

FOR THE FOREGOING REASONS THE
DEFENDANT RESPECTFULLY ASKS THIS COURT
TO DISMISS HIS CONVICTIONS ON COUNTS
III AND V. IN ADDITION, THE DEFENDANT
ASKS THIS COURT TO REVERSE HIS CONVICTIONS
FOR PROSECUTORIAL MISCONDUCT AND
REMAND THE REMAINDER OF THE CASE FOR
A NEW TRIAL.

ADDITIONAL GROUNDS 4

INEFFECTIVE ASSISTANCE OF COUNSEL

The defendants counsel failed to move to dismiss for insufficient evidence at the end of the States case in chief respect to UPF 1 and assault 2, counts 3 and 5. State V Green, State v Lopez 107 wn.app.270,27 p.3d 237 Div iii 04/17/01, citing State v Jackson and Strickland v Washinton.

The defendants counsel failed to request a nexus finding in the jurys special verdict instructions. State v Schlin 147 wn 2d 562,574,55 p3d 632 2002. State v Green counsels error to requeust such instructions prejudi ced the defendant and was violitive of his due process.

Strickland V Washington 466 US 688,687-89,104 sct 2052 80 led 2674 (1984), counsel for defendant failed to challenge the sufficiency of the states evidence. Counsel did not object to the states failure to carry the burdon of proving out of state conviction or produce proper documentati on of the conviction. Counsel for the defendant failed to request the out of state conviction be compared to a washington state crime. Counsel failed to object to the victims testimony that the defendant ran into the basement with ~~A~~ ^{when} firearm ~~whn~~ there was clear evidence that there was no line of sight from where the victim was standing in the livingroom. There is a wall betwee n the livingroom and the kitchen were the basement door is .Counsel's ~~failure~~ ^{failure} e to object to the victims lie was prejudicial. Counsel had evidence to prov e theres no line of sight from the livingroom to the kitchen there was phot os of the whole house.

Counsel failed to call a latent print examiner for the defense, to rely on the states examiner was prejudicial for the states expert was for the prose cution not the defense and therefore would be prone to give a biased opinion in favour of the state. Counsel did not cross examine the print examiner in or der to rebutt testimony as to the difficulty of obtaining finger prints from objects.

ADDITIONAL GROUNDS 4 Cont...

Counsel for the defendant failed to object to the detectives improper opinion testimony. The detective stated that he heard a gun shot . There was no evidence of a gun being discharged inside the residence . The defendants wife testified that they were popping fireworks ,there was fire works on the table (see photos)the detective was mistaken and his opinion was wrong and his testimony prejudiced the jury.The detective testified that there was a 911 call with a complaint but there was no evidence to back his statement .There was no transcripts of a 911 call and the 911 caller did not testify in trial.Counsel should have objected to the detectives whole line of questioning in respects to the alleged 'gun shot ' and the 911 call. State V Thach 106 p3d 782,126 wash app 297,and State v Wang 964 f.2d 811 814 8th cir 1992.

Counsel failed to raise the issue of the States abuse of discretion and improper opinion testimony and statements made not backed by evidence. Counsel for the defense failed to protect the defendants right to a jury trial and the invasion of the fact finding province of the jury State V Dolan '3 p3d 1011,118 wash app 323.

Counsel failed to object and raise the issue that evidence cannot be presented that an event occurred in absense of a witness with personal knowledge,ER602 Yurkovich V Rose 847 p 2d 925,68 wa app 643.

Counsel for defense failed to request the jurys instructions to include unwitting possession of a firearm at the end of the states case were it was clear there was a firearm ~~was~~ inside the residence but there was insufficient evidence to prove the defendant was guilty of UPF 1.

ADDITIONAL GROUNDS 4 CONT....

Counsel failed to object to several prejudicial and improper remarks made by the prosecutor during trial *Eure V State 764 so 2d 798,801 (fla dist ct app 2000)* cite *State v Horness 600 nw 2d 294,300 (IOWA)1999*. Counsel failed to protect the defendants due process interest by challenging the states failure to prove essential elements of the charged crimes in counts 3 and 5.

Counsel failed to ~~object~~^{object} to the prosecutors statements and the victims testimony about uncharged events. Counsel failed to object to the prosecutors improper remarks about the defendants religion and the misleading remark about the defendants marriage. The prosecutor stated to the jury that the defendants religion says he can have two wives but that it was illegal in the state of washington, the defendants counsel should have objected on the grounds that this statement was prejudicial and led the jury to believe the defendant committed the crime of bigamy.

Counsel failed to submit into evidence letters from the victim to the defendant stating that she was a liar and just wanted the freedom to do what she wanted and was sorry for her lies to the police. The victim also violated the no contact order by writing the defendant while he was in pcj awaiting trial.

Counsel failed to suppress the states evidence. The defendant asked his lawyer to submit a motion to dismiss the UPF1 and the assault 2 counts 3 and 5 before trial for insufficient evidence but the defendants counsel refused to file the motion. Counsel violated RPC 3.2 and RPC 1.2 see *State V Steverson 16 Wn APP 341,555 p. 2d 1004 (1976)*.

Counsel should have requested the trial court to give as a jury instruction WPIC 50.03 *State v Gurske 155 wash 2d 134, 118 p.3d 333 (2005)*.

ADDITIONAL GROUNDS 4 CONT...

Counsel failed to challenge the absence of a nexus finding for purpose of sentencing enhancements, cit State v Volivarez and State v Gurske.

Counsel failed to fully protect the defendants speedy trial rights the courts violated the defendants right to a speedy trial and counsel should have filed a motion to dismiss for this violation.

Counsel failed to raise the parent discipline defense in respect to count 4 assault 2 State v Singleton 41 wn app 71 1985,RCW9A.16.020(5)

Counsel failed to request that the jury be instructed that the defendant intended to create fear and apprehension of bodily harm State V byrd 125 wn 2d 707 1995. In respects to count 4 assault 2.

Counsel failed to request a unanimity instruction State V Hanson 59 wn app 65 1990.

The defendant ask that the court ~~to~~ dismiss his convictions for the foregoing reasons, in addition, the defendant ask the court to reverse his convictions for ineffective assistance of counsel.

In addition counsel for the defense failed to file a motion to dismiss after the state violated the defendants speedy trial right over the order of judge Beverly Grant that there be no more continuances.

COUNSEL WAS INEFFECTIVE BY NOT
HIRING A NEW PRIVATE INVESTIGATOR
AFTER RECEIVING KNOWLEDGE THAT THE
P.I WAS INEFFECTIVE IN HER WORK
BY NOT WRITING DOWN THE FULL
STATEMENTS GIVEN TO HER BY THE
DEFENDANTS WIVES.

THE DEFENDANTS CONSTITUTIONAL
RIGHT TO EFFECTIVE ASSISTANCE OF
COUNSEL WAS VIOLATED WHEN HIS
ATTORNEY FAILED TO PROPOSE AN
UNWITTING POSSESSION INSTRUCTION
RELEVANT TO THE UNLAWFUL POSSESSION
OF A FIREARM COUNT V.

TO PROVE A CLAIM OF INEFFECTIVE
ASSISTANCE, A DEFENDANT MUST SHOW
THAT THE COUNSEL'S PERFORMANCE WAS
DEFICIENT AND THAT THE PERFORMANCE,

THE DEFICIENT PERFORMANCE PREJUDICED
THE DEFENSE. STATE V BOWERMAN,
115 WN. 2d 794, 808, 802 P.2d 116 (1990).
(CITING STRICKLAND V. WASHINGTON,
466 U.S. 668, 687, 104 S. CT. 2052,
80 L. Ed. 2d 674 (1984)).

A DEFENDANT ALLEGING INEFFECTIVE
ASSISTANCE BEARS THE BURDEN OF SHOWING
DEFICIENT REPRESENTATION BASED ON
THE RECORD ESTABLISHED IN THE
PROCEEDINGS BELOW. STATE V. MCFARLAND
127 WN. 2d 322, 335, 899 P.2d 1251 (1995).

THE DEFENDANTS COUNSELS FAILURE
TO HIRE A NEW PRIVATE INVESTIGATOR
WAS VIOLATIVE OF HIS 6TH AMENDMENT
AND PREJUDICED HIS DEFENSE AND
HAMPERD THE FACT FINDING PROVINCE
OF THE JURY.

THE DEFENDANTS COUNSEL FAILED TO
MOTION FOR A MISTRIAL BASED ON THE
PROSECUTORS MISCONDUCT AND THE STATES
ABUSE OF ITS DISCRETION DURING
TRIAL. ALSO FOR INSUFFICIENT EVIDENCE.

COUNSEL FOR THE DEFENDANT FAILED
TO HIRE A LATENT PRINT EXAMINER FOR
THE DEFENSE. COUNSEL WAS AWARE
THAT THE EXAMINER WAS ONE OF
THE ON SCENE OFFICERS AT THE CRIME
SCENE AND ANY REASONABLE ATTORNEY
WOULD NOT HAVE RELIED ON THE EXPERT
TESTIMONY OF AN EXAMINER WHO WAS
DIRECTLY INVOLVED WITH THE CRIME
SCENE. SUCH A EXAMINER CLEARLY
WOULD HAVE A PREJUDGEMENT AND
PREJUDICE TOWARDS THE DEFENDANT.

THE EXAMINER ALSO WORKED IN THE

SAME OFFICE AS FORENSIC SPECIALIST

RENEE CAMBEL WHO TOOK THE ACTUAL

FINGER PRINTS FROM THE WEAPONS

FOUND AT THE CRIME SCENE, RP (2/21/07) PAGE
108, 109, 110, 111, 112.

TONI MARTINS EXPERT TESTIMONY

WAS INTRODUCED TO THE JURY THROUGH

HER TESTIMONY ABOUT THE DIFFICULTY

OF OBTAINING FINGER PRINTS OFF

OF CERTAIN WEAPONS AND MATERIALS.

THE DEFENDANT CLEARLY PROVES

INEFFECTIVE ASSISTANCE OF COUNSEL.

THE ATTORNEY SHOULD HAVE HIRED A LATENT

PRINT EXAMINER TO REBUTT THE STATES

EXPERT WITNESS.

PREJUDICE IS ESTABLISHED IF

THERE IS A REASONABLE PROBABILITY

THAT, ~~EXCEPT~~ EXCEPT FOR COUNSELS ERRORS,

THE RESULT OF THE PROCEEDING WOULD

HAVE BEEN DIFFERENT. MCFARLAND, 127 W.N.
2d at 335.

HERE THE PRINT EXAMINATOR WAS
CLEARLY ON THE SIDE OF THE STATE
AND THE DEFENDANT SUFFERED GREAT
PREJUDICE DUE TO HIS COUNSEL'S
INEFFECTIVENESS. IN NO WAY COULD
THE COURT ARGUE THIS AS LEGITIMATE
TRIAL STRATEGY OR TACTICS. COUNSEL
FOR THE DEFENDANT WAS INEFFECTIVE.

TONY MARTIN WAS ONE OF THE
SEARCHING OFFICERS AND HER EXPERT
TESTIMONY WAS PREJUDICED BY HER
DIRECT INVOLVEMENT IN THE CASE.

COUNSEL FAILED TO STRIKE OR
OBJECT TO TONI MARTIN'S READING OF
RENEE CABEL'S REPORT ON HER PRINT
FINDINGS, BEFORE MRS MARTIN GAVE HER

EXPERT OPINION TESTIMONY. RP (2/21/07)

PAGE 112 , 2-15 AND PAGE 113 , 16-17.

THIS CLEARLY PREJUDICED HER OPINION
AND THE DEFENDANTS ABILITY TO HAVE
A FAIR TRIAL .

COUNSEL FOR THE DEFENSE VIOLATED
THE DEFENDANTS 6TH AMENDMENT BY NOT
OBTAINING WITNESSES IN HIS FAVOR
IN RESPECT TO EXPERT WITNESSES AND
COUNSELS FAILURE TO CROSS EXAMINE
THE STATES EXPERT WITNESS VIOLATED
THE DEFENDANTS RIGHT TO CONFRONT
WITNESSES AGAINST HIM.

THE DEFENDANTS RIGHTS WERE
FURTHER VIOLATED BY COUNSELS FAILURE
TO CROSS-EXAMINE BRENDA LAWRENCE,
JEFF THIRY AND ~~BREN~~ TONI MARTIN .
DEFENDANT WAS UNABLE TO CONFRONT

THE WITNESSES AGAINST HIM, DUE TO
COUNSELS INEFFECTIVE ASSISTANCE.

COUNSEL FOR DEFENSE WAS INEFFECTIVE
WHERE COUNSEL FAILED TO OBJECT TO THE
VICTIMS IMPROPER OPINION TESTIMONY
STATING THAT THE DEFENDANT DID NOT
LIKE PEOPLE LYING TO HIM, IN REFERENCE
TO THE DEFENDANT ALLEGEDLY POINTING
A FIRE ARM AT HIS WIVES AND THE
VICTIM PRIOR TO THE INCIDENT MAY
18 2006. RP (2/21/07) PAGE 142, 12-15.

COUNSEL FOR THE DEFENSE WAS
INEFFECTIVE WHERE THE ATTORNEY FAILED
TO ADDRESS THE VICTIMS CONTRADICTION,
BY STATING THAT, SHE DID NOT KNOW
HOW THE BULLET HOLE WAS CAUSED THAT
WAS DISCOVERED IN THE HOME, WHICH
WAS CAUSED A YEAR BEFORE.

HOWEVER WHEN THE PROSECUTOR, IN
HER REDIRECT EXAMINATION, QUESTIONED
THE VICTIM ABOUT THE BULLET HOLE
THE ~~DEF~~ VICTIM STATED THAT THE
HOLE WAS CAUSED BY THE DEFENDANT.

COUNSEL FAILED TO OBJECT FOR
RELEVANCY BECAUSE THE VICTIM ALREADY
TESTIFIED THAT SHE DID NOT KNOW
HOW THE HOLE WAS CAUSED. RP (2/21/07)
PAGE 169 - 170 , AND RP (2/21/07) PAGE
175 , 17-19. AS A RESULT THE DEFENDANT
WAS PREJUDICED BY THE VICTIMS CONTRADICTORY
TESTIMONY ALONG WITH THE PROSECUTORS
IMPROPER QUESTIONING OF THE VICTIM.

THE HOLE WAS CAUSED BY THE VICTIMS
BOYFRIEND A YEAR PRIOR TO THE INCIDENT
ON MAY 18 2006 , RP (2/22/07) PAGE 201 ,
2-4.

RP (2/21/07) PAGE 176, 3-10. THE
DEFENSE COUNSEL FURTHER PREJUDICED
THE DEFENDANT BY NOT ONLY FAILING
TO OBJECT TO THE VICTIMS CONTRADICTION,
AND THE STATES IMPROPER QUESTIONING,
BUT DURING HIS RE-CROSS-EXAMINATION
THE ATTORNEY CONTINUED TO INFLAME
THE PREJUDICE BY ASKING THE VICTIM
"WAS YOUR DAD MAD ABOUT SOMETHING
WHEN THAT ~~HOLE WAS CAUSED, THAT~~
BULLET HOLE IN THE WALL WAS CAUSED?"

RP (2/21/07) PAGE 176, 3-10. "A: YES;

COUNSEL, Q: WHAT WAS HE ANGRY ABOUT ?

A: VICTIM, I'M NOT SURE, COUNSEL Q:

BUT YOU KNOW HE WAS ANGRY ? VICTIM

A: YES ; COUNSEL Q: WAS IT YOUR BEHAVIOR ? ;

VICTIM A: NO. RP (2/21/07) 12-13 .

COUNSEL ARE YOU PRETTY SURE ABOUT THAT ?.

THE COUNSEL FOR THE DEFENSE CLEARLY CAUSED THE DEFENDANT MORE PREJUDICE WITH HIS LINE OF QUESTIONING. COUNSEL SHOULD HAVE OBJECTED TO THE STATES QUESTION ONCE IT HAD ALREADY BEEN ESTABLISHED THAT THE VICTIM DID NOT KNOW HOW THE BULLET HOLE WAS CAUSED. RP (2/21/07) PAGE 175, 17-19.

THE VICTIM ALREADY TESTIFIED THAT SHE DID NOT KNOW HOW THE HOLE WAS CAUSED. RP (2/21/07) PAGE 170, 2-3.

A REASONABLE ATTORNEY WOULD HAVE TIMELY OBJECTED AND CHALLENGED THE VICTIMS DISCREPANCY IN ORDER TO SHOW THE JURY THE DEFENDANT DID NOT FIRE THE RIFLE AND TO SHOW REASONABLE DOUBT. ALSO THAT THE BULLET HOLE WAS IN FACT CAUSED BY THE VICTIMS BOYFRIEND.

COUNSELS INEFFECTIVENESS PREJUDICED THE JURYS FACT FINDING PROVINCE AND ALLOWED THE DEFENDANT TO BE PREJUDICED BY THE VICTIMS CONTRADICTIONARY STATEMENT.

FURTHERMORE THE DEFENDANTS 6TH AMENDMENT WAS VIOLATED DUE TO HIS COUNSEL'S FAILURE TO STRIKE ANY AND ALL TESTIMONY OF A 911 CALL. THE DEFENDANT WAS UNABLE TO CONFRONT HIS ACCUSOR AND THE STATE NEVER PRODUCED TRANSCRIPTS OF THE 911 CALL. THE TESTIMONY OF A 911 CALL WAS HEARSAY AND COUNSEL FAILED TO OBJECT.

EVIDENCE CANNOT BE PRESENTED ~~IN ABSEN~~ THAT AN EVENT ACCURED IN ABSENSE OF A WITNESS WITH PERSONAL KNOWLEDGE. ER 602 YORKOVICH V. ROSE 847 P. 2d 925, 68 WA. APP 643.

COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO INFORM THE DEFENDANT THAT THE STATE WAS SEEKING AN ENHANCEMENT, UNTIL THE DAY TRIAL STARTED AND THE PROSECUTOR PRESENTED AMENDED INFORMATION.

AN ACCUSED HAS A CONSTITUTIONALLY PROTECTED RIGHT TO BE INFORMED OF A CRIMINAL CHARGE AGAINST HIM, SO HE ~~CAN~~ WILL BE ABLE TO PREPARE AND MOUNT A DEFENSE AT TRIAL. STATE V. MCCARTY 140 WN. 2d 425.

COUNSEL FAILED TO REBUTT VICTIMS TESTIMONY, THAT THE DEFENDANT WENT TO THE FRONT PORCH TO GET A HAMMER FROM A TOOL BOX. THE VICTIM TESTIFIED THAT SHE WAS ON THE KITCHEN FLOOR AND THERE IS NO LINE OF SIGHT FROM THE KITCHEN TO THE FRONT DOOR LEADING TO THE PORCH. THE VICTIM HAD THE HAMMER FIRST RP 196.

THE DEFENDANT ASKS THIS COURT TO DISMISS HIS CONVICTIONS FOR THE FOREGOING REASONS AND TO REVERSE HIS CONVICTIONS ON ALL COUNTS FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

ADDITIONAL GROUNDS 5

TRIAL COURT ERRORS

The lower court erred by sentencing the defendant to two consecutive enhancements. The court found that counts 3 and 4 constituted the same course of conduct. *State v Desantiago* 108 Wn App. 855, 33 p.3d Div III 04/03/2001, the court of appeals held that because the plain words of RCW 9.94A.310 (3) and (4) demonstrate an intent to add an enhancement based on whether any of the offenders is armed; the provisions must be read to impose either a deadly weapon enhancement or a firearm enhancement, but not both, when only one offense is committed with both a deadly weapon and a firearm. Impermissible double counting occurs when a court imposes two upward enhancements premised on the same conduct.

The trial court erred by not giving the jury instructions on unintentional possession. The defendant's wife testified that no one in the house knew there was a weapon inside the residence and that she only saw a clip on the table. Further, the court's evidence was insufficient to convict the defendant for UPF 1; the element of knowledge of the firearm was not proven beyond a reasonable doubt.

The court erred by using the defendant's juvenile conviction for assault 2 as an offense committed when the defendant was 14 years old. See *State v Summers* 107 Wn App 373, 28 P.3d 780 Div III (4.20.01) citing *State v Cruz* WN. @d 186 1999.

The trial court violated the defendant's speedy trial rights, there were several continuances granted and one was against the order of the honorable Beverly Grant who ordered that there be no more continuances in my case. Court congestion is insufficient to extend ~~trial~~^{trial} beyond expiration date. *State v Mack* 89 Wn 2d 788, 793 1978.

The lower courts erred by including the defendant's out-of-state conviction for assault 3. Also, the state did not compare the conviction to a Washington State crime and the conviction was washed and should not have been calculated, there was impermissible fact finding. *State v*

ADDITIONAL GROUNDS 5 CONT...

Morely 134 WN 2d 588,606,952,P2d 167,Cite State V Weland 66 WN App 29 1992.

The defendant's Oregon conviction was over 5 years old.

State V Gyerrero-Melchor No 55637-1-1 Wash App Div I. The state's proof of out of state conviction was insufficient, for purposes of sentencing a defendant proof of prior conviction requires some kind of documentary evidence or a transcript of the prior conviction, State V Lopez !07 Wn.App 270,27 P.3 d 237 Div III 04/17/01.

The trial court erred by allowing the jury to consider the deadly weapon issue in counts 3 and 4. State v Johnson 94 WN App 882,974 P.2d 855 1999.

The court erred by not proving a nexus for the purpose of sentencing enhancement Gurske 120 Wn App 63,83 P 3d 1051 2004,citing state v Schelin 147 WN 2d at 568,3.

The court erred by not instructing the jury that it had to unanimously agree on the facts supporting each conviction State V Kitchen 110 Wn 2d 403 411,756.

The trial court erred by not giving the jury additional instructions regarding when a defendant is armed. The trial court's instructions are deficient, State V Green 94 Wn 2d 216,220-22,616 P.2d 628 1980.

The court erred by allowing testimonial evidence which prejudiced the defendant and jury, State v Gorbel 40 Wn 2d 18,240,P 2d 251 1952. The detective's testimony was opinionated as to what he thought was a gun shot and the sound of a gun being caulked. The testimony of uncharged events should not have been allowed by the courts ,it was prejudicial to the defense.

The trial court abused its discretion by allowing improper opinion testimony from the detective who testified that he heard a gunshot, where the evidence clearly does not back his claim and the evidence proves he was mistaken. Further the court abused its discretion by allowing testimony from the fingerprint examiner to discredit the defense by giving an improper opinion as to the difficulty of obtaining latent impressions off of certain materia

ADDITIONAL GROUNDS 5 CONT....

The examiners testimony invaded the fact finding province of the jury and was violative of the defendants 6th ammendment U.S.C.A Const. Amend 6 State V Thach 106 P.3d 782,126 wash app 297.The examiners testimony was misleading and put doubt in the jurys mind that the defendant did have a firearm dispite there not being any prints. In respect to the time frame and the events discribed by the victim and the detectives testimony of there bieng a gun shot if this were correct there should have been fresh prints on the weapon and the magazines and bullets,there should have been some physical evidence of some kind to back this testimony.

The courts erred by not allowing the defendant to face his accuser in respect to the 911 caller and the testimony of a 911 call should not have been allowed without any transcripts of call or testimony from the caller. ER 602 V Rose 847 P.2d 725,68 Wash App 645.

The courts abused it discretion by allowing more continuances of the defedants trial date after Judge Beverly Grant ordered that there be no more continuances in this case,8/21/06 was the date of the judges order. Granting a continuance beyond the expiration date is abuse of discretion,mandating dismissal State V Kokot 42 Wn App 733 1986. State V Smith 103 Wn App 244 2001 'routine court congestion is not grounds to continue or extend beyond expiration date. The courts continued the defendants trial date 11 times!!the defendant objected each time the defendants counsel objected to only one.

The courts violated the defendants speedy sentencing rights State V Halgren 87 Wn App 525,537-8 1997 sentencing should be held 40 court days after conviction,this was not the case for the defendant counsel failed to object an the court again abused its discretion.

State V Beal 100 Wn App 189,195-97 (2000)'before using an out of state conviction,state must offer certified copy of the judgement or comparable transcripts or documents,sentencing court must then properly classify the conviction by comparing the elements of the offence with the elements of

POTENTIALLY COMPARABLE WASHINGTON CRIMES.
IN THIS CASE THE COURTS FAILED TO DO SO AND
IS CLEAR ERROR BY THE COURT. STATE V. FORD
137 WN. 2d 472, 480-82 (1999).

THE COURTS ABUSED ITS DISCRETION BY ALLOWING
DETECTIVE KRAUSE TO TESTIFY ABOUT A HOLE IN
THE DINING ROOM WINDOW CEIL AFTER HE
ALREADY TESTIFIED HE DIDNT KNOW IF THE
HOLE WAS CAUSED BY THE WEAPON, AGAINST
COUNSELS OBJECTION. THE STATEMENT WAS PREJUDICIAL
TO THE DEFENDANT.

THE COURT ERRED BY ALLOWING OFFICER
THIRY'S HEARSAY TESTIMONY AS TO WHY HE WENT
TO THE DEFENDANTS RESIDENCE, OVER DEFENSE
COUNSELS OBJECTION. ALSO THE OFFICER WAS
ALLOWED TO COMMENT MORE HEARSAY TESTIMONY
ABOUT STATEMENTS THE VICTIM MADE BEFORE
THE VICTIM TESTIFIED. THIS PREJUDICED THE
DEFENDANT AND THE JURYS FACT FINDING PROVINCE.

THE COURTS ABUSED ITS DISCRETION BY
ALLOWING THE STATE TO ASK MRS JACKSON^{SON} ABOUT
MRS PRATERS PLACE OF EMPLOYMENT, AS A POTENTIAL
WITNESS FOR THE STATE, THIS SHIFTED THE
BURDON ON THE DEFENSE TO PRODUCE THE STATES
WITNESS AGAINST COUNSELS OBJECTION.
RP (2/22/07) PAGE 210, 1-14.

THE COURTS ABUSED ITS DISCRETION BY
ALLOWING IMPERMISSABLE HEARSAY. RP.(2/22/07)
PAGE 213, 9-25; PAGE 214, 1-6.

THE COURTS ABUSED ITS DISCRETION BY ALLOWING
MRS MARTIN TO READ RENEE CAMBELS REPORT
BEFORE TESTIFYING, IN WHICH SHE GAVE OPIONION
TESTIMONY. THIS CLEARLY PREJUDICED HER
TESTIMONY AND MRS RENEE CAMBEL WAS NOT
PRESENT TO BE EXAMINED BY THE DEFENSE.

RP (2/21/07) PAGE 108, 109, 110, 111, 112. THE COURTS ABUSED ITS DISCRETION BY ALLOWING TONI MARTIN TO GIVE EXPERT TESTIMONY ABOUT FINGER PRINTS IN THE STATES FAVOR. SHE WAS DIRECTLY INVOLVED WITH THE DEFENDANTS CASE AND HAD PRIOR PREJUDICE. SHE WAS ONE OF THE OFFICERS WHO SEARCHED THE CRIME SCENE. THE DEFENDANT WAS NOT GIVEN A FAIR TRIAL.

THE COURT ERRED BY ALLOWING THE PROSECUTOR TO MAKE STATEMENTS ABOUT WHAT THE DEFENSE WANTED THE JURY TO BELIEVE. THE DEFENDANT NEVER TESTIFIED AND THE PROSECUTORS STATEMENTS WERE IMPROPER AND PREJUDICIAL.

THE STATE SHIFTED THE BURDON ON THE DEFENDANT BY COMMENTING ON THE FACT THAT THE DEFENDANT DID NOT TESTIFY AND TELLING THE JURY THAT THE DEFENDANTS WIFE TESTIFIED IN THE MANOR SHE DID BECAUSE THE DEFENSE KNEW THAT THE STATE HAD TO PROVE CERTAIN ELEMENTS OF THE CRIME OF UPF 1. THE DEFENDANTS WIFE WAS A WITNESS FOR THE STATE AND IT WAS IMPROPER FOR THE STATE TO TELL THE JURY WHY HER TESTIMONY WAS UNFAVORABLE TO THE STATE AND IMPLY THAT SHE KNEW THE ~~LAW~~ AND ELEMENTS OF THE CRIME OF UPF 1. AND THATS WHY SHE TESTIFIED IN THE MANOR SHE DID. SHE WAS NOT TRAINED TO HAVE THAT LEGAL KNOWLEDGE.

THE COURT ERRED BY ALLOWING THE PROSECUTOR TO CONTINUE IMPROPER CLOSING ARGUMENTS OVER THE DEFENSES OBJECTION. RP PAGE 288, 2. THIS PREJUDICED THE DEFENDANT.

THE DEFENDANT WAS DENIED A FAIR TRIAL. THE PRIVATE INVESTIGATOR DID NOT TAKE ANY STATEMENTS FROM THE DEFENDANTS WIVES DISPISTE THE FACT THEY BOTH GAVE HER ONE. THE PI WAS AN EX-POLICE OFFICER AND THE DEFENDANT HAS REASON TO BELIEVE THAT THIS CAUSED THE P.I TO ACT PREJUCIALLY.

THE COURT ERRED BY COMMENTING ON THE DEFENSE NOT CALLING THE DEFENDANTS OTHER WIFE TO TESTIFY. SHE WAS THE STATES WITNESS. THE STATE AGAIN SHIFTS THE BURDON ON THE DEFENDANT.

THE COURT ERRED BY CALCULATING DEFENDANTS JUVINLE CONVICTIONS FOR ASSUALT 2 AND UPCS THE DEFENDANT WAS 13 YEARS OLD ON THE UPCS AND 14 YEARS OLD ON THE ASSAULT 20. THEY SHOULD NOT HAVE BEEN COUNTED.

FOR THE FOREGOING REASONS THE DEFENDANT RESPECTFULLY ASKS THE COURT TO DISMISS HIS CONVICTIONS ON COUNTS 3, 4, AND 5. IN ADDITION THE DEFENDANT ASKS THE COURT TO REMAND HIS CONVICTIONS FALL ALL TRIAL COURT ERRORS THAT VIOLATED HIS DUE PROCESS AND DENIED HIM A FAIR TRIAL, AND FOR THE COURTS ABUSE OF DISCRETION.

FURTHERMORE THE DEFENDANT ASK THE COURT TO CORRECT HIS SENTENCING POINTS AND DISMISS HIS ENHANCEMENTS FOR THE COURTS FAILURE TO PROVE THE DEFENDANT WAS ARMED * FOR THE PURPOSE OF ENHANCEMENT AND WHERE A NEXUS WAS NOT FOUND.

ADDITIONAL GROUNDS 6

ILLEGAL SEARCH/SEIZURE AND ARREST

THE SEARCH WARRANT FOR THE DEFENDANT'S RESIDENCE WAS PLAINLY INVALID. THE WARRANT WAS DEFICIENT; IT PROVIDED NO DESCRIPTION OF THE TYPE OF EVIDENCE SOUGHT. THERE WAS NO PROBABLE CAUSE TO SEARCH THE RESIDENCE. THE SEARCH VIOLATED THE DEFENDANT'S FOURTH AMENDMENT. A VALID WARRANT MUST DESCRIBE THE PERSON OR THE PLACE TO BE SEARCHED AND THE ITEMS TO BE SEIZED MARRON V. US 275 192,196,48 S.CT 74,72 L.ED. 2D 564 (1921). CITING ~~COLLIER V. NEWHAMPSHIRE~~, 403 US 443,467,91 S CT 2022,29L. ED. 564 (1971).

THE ARRESTING OFFICER HAD NO PROBABLE CAUSE TO ARREST OR DETAIN THE DEFENDANT. THE DEFENDANT EXITED THE REAR DOOR OF THE RESIDENCE TO TURN OFF HIS VEHICLE, LEFT RUNNING AND WAS INSTRUCTED TO GET ON HIS KNEES AND TO PLACE HIS HANDS ON HIS HEAD, WAS HANDCUFFED AND PLACED INSIDE THE OFFICER'S CAR. "A PERSON'S MERE PRESENCE OR MERE PROXIMITY TO CRIMINAL ACTIVITY ALONE DOES NOT SUPPORT PROBABLE CAUSE TO SEARCH OR ARREST THAT PERSON" US V. BUCKNER, 179 F.3d 834,838(9TH CIR. 1999). CITE KUEL V. BURRIS, 173 F.3d 646,650 (8TH CIR.(1999)).

THE OFFICER'S SEARCH OF THE DEFENDANT'S VEHICLE WAS ILLEGAL. THE OFFICERS SEARCHED THE DEFENDANT'S VEHICLES WITHOUT A WARRANT OR PROBABLE CAUSE. THE SEARCH OF THE VEHICLES TOOK PLACE BEFORE THERE WAS EVEN A WARRANT ISSUED TO SEARCH THE RESIDENCE. "A WARRANTLESS SEARCH IS UNREASONABLE AND THEREFORE UNCONSTITUTIONAL", US V. ROBY, 122 F. 3d 1120,1123 (8TH CIR.1997). THE DEFENDANT ASKS THE COURT TO DISMISS HIS CONVICTIONS FOR FALSE ARREST ILLEGAL SEARCH AND SEIZURE AND VIOLATION OF HIS AMENDMENTS AND POLICE MISCONDUCT. THE DEFENDANT WAS ILLEGALLY ARRESTED AND THE ARREST WAS A VIOLATION OF HIS 4TH AND 14TH AMENDMENTS. THE FOURTH AMENDMENT PROHIBITS UNREASONABLE SEIZURES OF A PERSON CALIFORNIA V. HODARI D. 499 U.S 621 (1991).

03/20/08

To the court of appeals,

In all truth, I don't want to demonize my daughter. However it is important that you know what me and my wife were going through with my daughter. We were dealing with an out of control teen. My daughter was doing drugs, sneaking men in our home to have sex, constantly skipping school and running with gangmembers.

Many times we were called to her school to meet with her principle about her behavior in school and her sneaking off campus with other kids. I set up a daily progress report form with all my daughters teachers in order to keep up with her daily progress and to make sure she no longer skipped class or the school. This method failed.

My wife and I have found drugs in my daughters room a few times and this led to us seeking counseling for my daughter and drug treatment. My daughter would not participate nor would she cooperate. She got caught having sex with a 19 year old man, she was 12 years old at this time I had the man arrested and he was charged with rape and convicted. My daughter became very upset over this and began to still from my wife and sneak out at night to buy drugs and run with her gang friends.

When my daughter was 15 I caught her having sex with a 22 year old man in my livingroom. I held him until the police came he was arrested and never charged with this crime and he was on probation and didnt even get a violation for what he did to my daughter. I have his full name and the case no to prove this. The procecutor still has not brought this man to justice !

I tried getting mental help for mu daughter and again she would not work with the provider. There was nothing More I could do but prayfor her. Life was hell dealing with her. A month after I had the 22 year old man arrested one of my daughters gang friends or the man I had arrested shot into our house. The bullet struck a lamp and went into the wall.

We did not call the police for fear of further retaliation. My wife and I have five small children and we did not want to get them killed. My daughter got worst. Her behavior at home was violent she would throw things and hit her brothers and sisters. This caused a lot of problems between me and my wife. My daughter is not my wifes biological child. My daughters mother is a crack addict and my daughter was originally living with her grandmother untill she was 11 and became out of controll. Then she came to live with me and my wife.

Jan 1 2005 I caught my daughter having sex with a 20 year old man named Leron Dawkins. He was arrested for rape and then released with no charges filed ! The state didnt prosecute this man. On May 18 2006 my daughter had two men in my home one named Buddah a known gangmember and the other man I did not know. My wife and I began to question my daughter about who the man was and what they were doing inside our home and she began to get loud and violent.

She yelled at me and my wife to leave her alon,and my wife noticed a clip to a gun on our dinner table and she began to grill my daughter about the clip. My daughter took off running into our kichen and slung open our basement door and slid half way down the stairs on her side. I went to grab her and she snatched away from me and ran back up the stairs and grabed a hammer off of the fridge and charged me with it . I wrestled the hammer from her and we fell on the floor. I slammed the hammer down on our kitchen counter and I told my wife to talk to her because I was very upset at what she just did to me.

I went into our dining room and I did slam a chair down on the floor and it broke. My daughter began to yell at my wife and I ordered my daughter to go sit down . I told her she was not grown she was being to fast and I was going to cut her hair so she would stop being so flirtacious . I tried to cut her hair with some sisors and her hair was too greasy so I cut her ponytail off with a knife from the kitchen.

I never threatend my daughter with the knife,I never had a gun , I did not know there was a gun in my house and was shocked to hear the TPD had found one. Me and my wife are a religious people . I thought mabe if I cut my daughters hair she would were a hijab and start to cover herself and I wanted to slow her down from being with somany men for sex. In all this after going to jail for this matter my daughter ends up pregnant by a 24 year old man at 15 years old and again the state did not charge this man!

My daughter has a 22 month old son by a now 16 year old man! and im very upset that the prosecutor did not file charges on this rapist. The 20 year old man Leron was on probation hanging around Foss Highschool when he met my daughter and took her off campus and had sex with her in his car! This happened befor he was caught inside my house Yet and still the state let it all go .

The point in bringing this to your awarness is the fact that all this mess that went on with my daughter I never once laid a hand on her ! I only talked to her and tried to get her help and My wife and I prayed for her.

My wife and I dont own any weapons nor have we ever had one in our home. My daughter we believr was covering for her gang friends and we bekieve the gun found in our home belonged to Buddah or the other man who ran from our house that day. This has been a nightmare for our family. Ive never been away from my children this long. I truly deserve a retrial at minimum ,at best my charges dismissed for the errors addressed in this matter.

Thank you for your time.

Sincerly,

Montiae C. Mchenry

Montiae C. Mchenry 7

HIWSSTKS

