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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to present evidence of a shooting in Pierce County on April 11<sup>th</sup> involving Tieskotter where this evidence was irrelevant under ER 403 in establishing Tieskotter's involvement in the current Thurston County charges and inadmissible under ER 404(b) as it merely established propensity even though the same firearm was used in both shootings.
2. The trial court erred in allowing Tieskotter to be represented by counsel who failed to prevent the State from introducing inadmissible propensity evidence.
3. The trial court erred in improperly commenting on the evidence in giving Instruction No. 27 over Tieskotter's objection.
4. The trial court erred in failing to grant Tieskotter's motion for a new trial.
5. The trial court erred in giving Instruction No. 23, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of the essential element of knowledge for the crime of unlawful possession of a firearm in the first degree (Count III).
6. The trial court erred in allowing Tieskotter to be represented by counsel who provided ineffective assistance in failing to object to instruction No. 23 as it is an inaccurate statement of the law that relieved the State of its burden of proof of the essential element of knowledge for the crime of unlawful possession of a firearm in the first degree (Count III).
7. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to prove beyond a reasonable doubt that Tieskotter was guilty of assault in the second degree (Count I) and unlawful possession of a firearm in the first degree (Count III).

8. The trial court erred in failing to dismiss Tieskotter's case where the cumulative effect of the claimed errors materially affected the outcome of the trial.
9. The trial court erred in sentencing Tieskotter as the court imposed a sentence including community custody in excess of the statutory maximum.
10. The trial court erred in allowing Tieskotter to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated and that the sentence imposed exceeded the statutory maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing the State to present evidence of a shooting in Pierce County on April 11<sup>th</sup> involving Tieskotter where this evidence was irrelevant under ER 403 in establishing Tieskotter's involvement in the current Thurston County charges and inadmissible under ER 404(b) as it merely established propensity even though the same firearm was used in both shootings? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Tieskotter to be represented by counsel who failed to prevent the State from introducing inadmissible propensity evidence? [Assignment of Error No. 2].
3. Whether the trial court erred in improperly commenting on the evidence in giving Instruction No. 27 over Tieskotter's objection? [Assignment of Error No. 3].
4. Whether the trial court erred in failing to grant Tieskotter's motion for a new trial? [Assignment of Error No. 4].
5. Whether the trial court erred in giving Instruction No. 23, the to-convict instruction, as it is an inaccurate statement of the law that relieved the State of its burden of proof of the essential element of knowledge for the crime of unlawful

possession of a firearm in the first degree? [Assignments of Error Nos. 5 and 6].

6. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Tieskotter was guilty of assault in the second degree (Count I) and unlawful possession of a firearm in the first degree (Count III)? [Assignment of Error No. 7].
7. Whether the trial court erred in failing to dismiss Tieskotter's case where the cumulative effect of the claimed errors materially affected the outcome of the trial?? [Assignment of Error No. 8].
8. Whether the trial court erred in sentencing Tieskotter as the court imposed a sentence including community custody in excess of the statutory maximum? [Assignment of Error No. 9].
9. Whether the trial court erred in allowing Tieskotter to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated and that the sentence imposed exceeded the statutory maximum? [Assignment of Error No. 10].

C. STATEMENT OF THE CASE

1. Procedure

Jeremy R. Tieskotter (Tieskotter) was charged by information filed in Thurston County Superior Court with one count of assault in the second degree (Count I), one count of drive by shooting (Count II), and one count of unlawful possession of a firearm in the first degree (Count III). [CP 3-4]. The information also included deadly weapon sentence enhancement allegation on Counts I. [CP 3-4].

Prior to trial, Tieskotter's case was joined with that of Charles C. Hartzell, IV (Hartzell), who represented himself throughout trial. [CP 10, 15-17, 18; 1-17-08 RP 8-9]. No motion to sever was made during the trial, nor did Tieskotter make any motions regarding 3.5 or 3.6. On the day of trial, the court heard the State's motion regarding the use of ER 404(b) evidence—Tieskotter's alleged involvement in a shooting incident in Pierce County which ballistic evidence matched ballistic evidence recovered from the current Thurston County charge—with Tieskotter acquiescing to the State presenting the evidence in a limited form. [CP 19-21, 22-52; Vol. I RP 9-15]. Tieskotter and his co-defendant were tried by a jury, the Honorable Chris Wickham presiding. Tieskotter stipulated to having a prior offense that precluded his possession of a firearm for purposes of Count III (unlawful possession of a firearm in the first degree). [RP 63]. Tieskotter objected to the court's limiting instruction on the ER 404(b) evidence, Instruction No. 27, and took exception to the court's failure to give his proposed limiting instruction. [CP 57, 61, 72, 107; Vol. IV RP 626-656]. The jury found Tieskotter guilty of assault in the second degree (Count I), failing to enter a verdict on drive by shooting (Count II) with the court declaring a mistrial regarding this count, guilty of unlawful possession of a firearm in the first degree (Count III), and entered a special verdict finding Tieskotter was armed with a deadly

weapon during the commission of Count I for purposes a sentence enhancement. [CP 74, 75, 76, 77; Vol. IV RP 751-757].

Tieskotter filed a motion for new trial based on the court's comment on the evidence in giving Instruction No. 27, the limiting instruction regarding ER 404(b) evidence. [CP 121-125]. On March 11, 2008, the matter came before the court for hearing on Tieskotter's motion for a new trial and sentencing. [3-11-08 RP 3-29]. After hearing from Tieskotter and the State, the court denied Tieskotter's motion for a new trial holding that the instruction did not unfairly prejudice Tieskotter. [3-11-08 RP 3-19]. The court then sentenced Tieskotter to a standard range sentence of 84-months on Count I plus 36-months for the sentence enhancement (120-months), and to a standard range sentence of 116-months on Count III with the sentences running concurrently for a total sentence of 120-months the statutory maximum as both crimes for which Tieskotter was convicted were class B felonies. [CP 110-120, 126-129; 3-11-08 RP 26-28]. In addition, the court imposed 18 to 36-months of community custody on Count I. [CP 115; 3-11-08 RP 26-28].

Timely notice of appeal was filed on April 7, 2008. [CP 130].

This appeal follows.

2. Facts<sup>1</sup>

On April 7, 2007, in the early morning hours, Kimberly Hoage (Hoage) was awakened to what she believed was pounding on the walls of her home. [Vol. II RP 380; Vol. III RP 405-406]. Later that day, she realized that her home had been shot. [Vol. II RP 380]. The police recovered 11 bullets/casings fired from two distinct firearms—two from a 9 mm and nine from a .357 SIG. [Vol. I RP 67-86, 98, 153; Vol. II RP 381-384].

Michael Vernam (Vernam), Hoage's neighbor, testified that he had seen two men, one standing outside a red car and the other standing through what appeared to be the sun roof of the red car, firing guns at Hoage's home. [Vol. I RP 129-137, 140, 150]. After shooting, Vernam saw the men get into the red car and drive off. [Vol. I RP 129-137]. He couldn't identify the two men he had seen because it was dark and they had been some distance away. [Vol. I RP 129-137].

On April 11, 2007, a shooting occurred in Lakewood, Pierce County. [Vol. II RP 323-330, 332-335]. The police recovered a 9 mm bullet and shell casing. [Vol. II RP 323-330, 332-335]. Two witnesses positively identified Tieskotter as the shooter. [Vol. II RP 323-330, 332-335; Vol. III RP 484-491, 493-495]. Tieskotter was later interviewed by

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<sup>1</sup> This court should note that the facts set forth herein pertain to Tieskotter's case.

the police and admitted to having a 9 mm gun but had destroyed it. [Vol. II RP 362-364].

Johan Shoeman, a firearms and tool mark examiner with the Washington State Patrol Crime Lab, conducted ballistic examinations of the 9 mm bullets/shell casings recovered from the April 7<sup>th</sup> and April 11<sup>th</sup> incidents determining that they had been fired from the same gun. [Vol. III RP 451-454].

Ashley Rochelle, Tieskotter's former girlfriend, testified that she owned a red car and allowed Tieskotter to drive the car around the time period to the Thurston County shooting. [Vol. II RP 214-217, 229-230]. However, the car did not have a sun roof. [Vol. II 224-225]. In addition, she testified that Tieskotter and Hartzell were friends, but had had a "falling out" having no contact with each other during March and April of 2007. [Vol. II RP 215-217, 220, 224, 230-231].

Hoage testified that she had met Tieskotter once at Tieskotter's home in Lakewood, Pierce County, and was aware that Tieskotter and Hartzell were friends, but the two had had a "falling out." [Vol. II RP 386-388; Vol. III RP 546]. Tieskotter had never been to Hoage's home. [Vol. II RP 387]. Hoage also testified that she had allowed Hartzell to stay at her home and he stayed there with his girlfriend and his friend, Juan Copin. [Vol. II RP 387, 390; Vol. III RP 408-410]. After a short

stay, Hoage asked Hartzell to leave her home. [Vol. II RP 391, 395-397]. Hartzell moved out of Hoage's home and the shooting occurred two days later. [Vol. II RP 391-397; Vol. III RP 409-410]. Finally, Hoage testified that she had sold a red Camaro with a T-bar but refused to pass on title since she had not been paid which upset the buyer's nephew, Will. [Vol. III RP 411-412, 425].

James Rocha, Tieskotter's friend, testified that on April 7, 2007, he had accompanied Tieskotter to a Park and Ride in Tacoma, Pierce County, where Tieskotter bought a 9 mm gun from Juan Copin. [Vol. III RP 581-588].

Neither Tieskotter nor Hartzell testified in their defenses.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT PREJUDICIAL EVIDENCE THAT TIESKOTTER WAS INVOLVED IN A SHOOTING IN PIERCE COUNTY FOUR DAYS AFTER THE THURSTON COUNTY SHOOTING WHERE THIS EVIDENCE WAS IRRELEVANT IN ESTABLISHING HIS INVOLVEMENT IN THE THURSTON COUNTY SHOOTING UNDER ER 403 AND INADMISSIBLE UNDER ER 404(b) EVEN THOUGH THE SAME GUN WAS USED IN BOTH SHOOTINGS.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence.

ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

The admission of other crimes, wrongs or acts is governed by ER 404 (b). Under the rule, “(e)vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Additionally, evidence admissible under ER 404(b) requires proof by a preponderance of the evidence of the commission of the alleged wrong or act and the defendant’s connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here, the State elicited testimony that Tieskotter had been involved a shooting on April 11, 2007 using a firearm that had fired two of the shots at Hoage’s home on April 7, 2007. [Vol. II RP 323-330, 332-335, 362-364; Vol. III RP 451-454, 484-491, 493-495]. The State argued that the admission of this evidence was proper to show Tieskotter’s

connection/association/identity with the firearm used in the April 7<sup>th</sup> shooting in Thurston County.

This rationale is unpersuasive. First, the State did not provide proof by a preponderance of the evidence that Tieskotter was actually involved in the April 7<sup>th</sup> shooting. As the State acknowledge, its case against Tieskotter was circumstantial and the only evidence regarding the April 7<sup>th</sup> shooting in Thurston County consisted of a witness seeing two men, neither of whom he could identify, shooting at Hoage's home from a red car and the fact that Tieskotter's former girlfriend allowed him to use her red car. The evidence, regarding the Pierce County shooting on April 11<sup>th</sup>, is not relevant to show any element of the crimes for which Tieskotter was charged in Thurston—it does not establish that Tieskotter was the person who was one of the shooters on April 7<sup>th</sup> let alone that he was even in Thurston County on that date. Any claim of relevancy as contrasted to the prejudicial effect fails when considering that this testimony only served to establish in the jury's mind that because Tieskotter was involved in shooting on April 11<sup>th</sup> in Pierce County and the same gun was used in the shooting on April 7<sup>th</sup> in Thurston County that Tieskotter must have been one of the shooters in the Thurston County incident. Despite any claim to the contrary, this evidence merely

established propensity with any claimed probative value being outweighed by danger of unfair prejudice under ER 403.

If the only logical relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in Pogue's trial for possession of cocaine, the court allowed the State to elicit Pogue's admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue's) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Similarly, here, the only logical relevancy of the evidence at issue was through a propensity argument; i.e., since Tieskotter was involved in a shooting in Pierce County on April 11<sup>th</sup> he must be involved in the shooting in Thurston County on April 7<sup>th</sup> as the same firearm was used in both incidents.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome

of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence the jury would have acquitted Tieskotter given the lack of evidence otherwise.

The prejudice resulting from the introduction of this evidence denied Tieskotter his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). The evidence materially affected the outcome and the error in admitting this evidence was of major significance and not harmless.

- (2) TIESKOTTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PREVENT THE STATE FROM PRESENTING INADMISSIBLE PROPENSITY EVIDENCE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853

P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Here, both prongs of ineffective assistance are met. First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to prevent the State from introducing inadmissible propensity evidence of another shooting incident where the evidence of the charged Thurston County crimes was so lacking, and had counsel done so, the trial court would not have allowed the evidence's admission.

Second, the prejudice is self evident. Had counsel properly objected to the admission of the inadmissible propensity evidence it would not have been before the jury and given the lack of actual evidence against Tieskotter on the current offenses, the jury would not have been able to find Tieskotter guilty.

- (3) THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN GIVING INSTRUCTION NO. 27 OVER TIESKOTTER'S OBJECTION.

Art. 4, sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution prohibits judges from conveying to the jury their personal attitudes towards the merits of the case. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). A judge comments on the evidence if the court's attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable. *See* State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court has been communicated to the jury. State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977). An instruction constituting an improper comment on the evidence is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Tili, 139 Wn.2d 107, 126 n.9, 985 P.2d 365 (1999) (*citing* State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d at 838. In such a

case, “[t]he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment”. *Id.* (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), *aff’d in part, rev’d in part*, 83 Wn.2d 485, 519 P.2d 249 (1974)). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

Here, the court gave a limiting instruction regarding ER 404(b) evidence which it had allowed the State to introduce over Tieskotter’s objection. [Vol. IV RP 626-656]. Instruction No. 27 states:

Evidence from other jurisdictions has been admitted that you may consider as establishing an association of the defendants to the crimes charged. You must not consider this evidence for any other purpose.

[CP 107].

First, by instructing the jury in this manner—“establishing an association of defendants,” the court linked the defendants, Tieskotter and Hartzell, together, which was the State’s burden to prove beyond a reasonable doubt as it had charged the two as co-defendants. More

importantly by instructing the jury that “evidence from other jurisdictions has been admitted that you may consider as establishing an association...to the crimes charged,” the court endorsed a position contrary to the rules of evidence allowing the jury to convict based on propensity not the actual evidence presented on the Thurston County charges. In addition, the wording of this instruction implies that both defendants were involved in each others crimes from “other jurisdictions.” Finally, the court’s improper comment in giving Instruction No. 27 is particularly troubling given the contradictory admonishment contained in Instruction No. 8—“A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other counts or as to the other defendant.” [Emphasis added]. [CP 88]. Given the wording of Instruction No. 27, the court improperly expressed its belief that the State had proved Tieskotter and Hartzell were co-defendants and guilty of the crimes charged based on their involvement in other crimes. As this is prohibited by Art. 4, sec. 16, the trial court erred in giving Instruction 27, and it cannot be said that the court’s improper comment in Instruction 27 did not influence the jury given the State’s own admission to a lack of evidence and that the evidence available was merely circumstantial. The State cannot

sustain its burden of rebutting the presumption that the court's comment was prejudicial. Tieskotter's convictions should be reversed.

(4) THE TRIAL COURT ERRED IN FAILING TO GRANT TIESKOTTER'S MOTION FOR A NEW TRIAL.

Tieskotter filed a motion for a new trial based on the court's improper comment on the evidence in giving Instruction No. 27. [CP 122-125]. The court denied Tieskotter's motion for a new trial. [3-11-08 RP 3-19].

A trial court's ruling on a motion for a new trial will not be disturbed absent abuse of discretion. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). An abuse of discretion occurs when a trial court makes a decision not supported by the facts or makes a decision that is contrary to law. *See* State ex rel Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) (a trial court's discretion is abused when the trial court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.)

Here, the trial court did abuse its discretion in failing to grant Tieskotter's motion for a new trial. As argued in the preceding section of this brief and adopted and incorporated herein by reference, the court did improperly comment on the evidence in giving Instruction No. 27, the State failed to overcome the presumed prejudice of this comment, and the

comment most assuredly influenced the jury's decision given the lack of evidence against Tieskotter for the two crimes for which he was convicted. The court's denial of Tieskotter's motion for new trial was error. This court should reverse Tieskotter's convictions for assault in the second degree and unlawful possession of a firearm in the first degree.

- (5) THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 23, THE TO-CONVICT INSTRUCTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNT III), AS IT IS AN INACCURATE STATEMENT OF THE LAW THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF ON THE ESSENTIAL ELEMENT OF KNOWLEDGE.

A criminal defendant has the right to have the jury base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). The omission from an instruction of an element of the crime at issue produces a "fatal error" by relieving the State of its burden of proving every essential element beyond a reasonable doubt. State v. Eastmond, 129 Wn.2d 497, 502-504, 919 P.2d 577 (1996). Failure to instruct on each essential element of the crime charged constitutes manifest error of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a). State v. Eastmond, 129 Wn.2d at 502. The failure to instruct on an element of an

offense is “automatic reversible error.” State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997).

Under our State Supreme Court’s decision in State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000), knowledge is an essential element of unlawful possession of a firearm in the first degree. The trial court was required to instruct the jury on this element and failed to do so. In instruction No. 23, the court instructed the jury as follows:

To convict the defendant, JEREMY RYAN TIESKOTTER, of the crime of unlawful possession of a firearm in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 7, 2007, the defendant had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the possession or control of the firearm 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.

[CP 103].

Nowhere in this instruction is the jury instructed that in order to convict Tieskotter of unlawful possession of a firearm in the first degree

that they must find that he knowingly possessed the firearm. Absent the jury being instructed on this element Tieskotter's conviction cannot stand as it cannot be said the jury found all the essential elements of the crime charged beyond a reasonable doubt.

While the invited error doctrine may preclude review of any instructional error—including, as here, one of constitutional magnitude—where the instructions is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), *citing*, State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d

223, 225, 500 P.2d 1242 (1972), *citing*, State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Since the trial court's Instruction No. 23 [CP 103] omits the essential element of knowledge and Tieskotter's attorney failed to object to this instruction, both elements of ineffective assistance of counsel have been established. Counsel's failure to exercise due diligence in failing to object to this instruction, which fails to contain an essential element of the crime charged, falls below an objective standard of reasonableness and was prejudicial in that it allowed Tieskotter to be convicted on proof of less than all the elements of the crime. This court should reverse Tieskotter's conviction for unlawful possession of a firearm in the first degree.

- (6) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT TIESKOTTER WAS GUILTY OF ASSAULT IN THE SECOND DEGREE (COUNT I) AND UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNT III).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, Tieskotter was charged and convicted of one count of assault in the second degree (Count I) and one count of unlawful possession of a firearm in the first degree (Count III). [CP 3-4, 74, 76, 93, 103]. In order to sustain these charges and convictions, the State bore the burden of

proving beyond a reasonable doubt that Tieskotter in fact fired a gun (unlawful possession of a firearm—Count III) at Hoage’s home (assault—Count I) on April 7, 2007, in Thurston County.

The sum of the State’s evidence on these crimes consists of the fact that gunshots were fired at Hoage’s home located in Thurston County on April 7, 2007, that a witness saw two men firing guns at Hoage’s home from a red car, that Tieskotter’s former girlfriend, Ashley Rochelle owned a red car and allowed Tieskotter to use the car during this time period, and the fact that Hartzell and Tieskotter were friends.

However, the witness could not identify either shooter, the witness testified that the red car had a sun roof from which one of the shooters was firing and Rochelle’s red car does not have a sun roof, and Tieskotter and Hartzell had had a “falling out” and had no contact during March and April of 2007. The State’s evidence does not constitute proof beyond a reasonable doubt that Tieskotter either possessed a firearm or assaulted Hoage by shooting at her home on April 7, 2007. Nor does the fact that Tieskotter was involved in a shooting in Pierce County on April 11, 2007, which firearm was involved in the shooting at Hoage’s home. All this evidence establishes that Tieskotter had the weapon involved in the Hoage shooting on April 11<sup>th</sup> not that he had the weapon and shot at Hoage’s home on April 7<sup>th</sup>. This is particularly true when considering the

testimony of James Rocha who witnessed Tieskotter obtain the weapon after the shooting at Hoage's home.

Absent any evidence that Tieskotter, actually possessed a firearm and fired shots at Hoage's home on April 7<sup>th</sup>, the State did not sustain its burden of proof on these charges (Counts 1 and II)—the State cannot prove beyond a reasonable doubt that it was Tieskotter, or for that matter anyone else to whom he was acting as an accomplice, who committed these crimes. The State's evidence on these counts constitute nothing more than the improper pyramiding of inferences condemned by Bencinga, supra.

This court should reverse and dismiss Tieskotter's convictions for assault in the second degree (Count I) and unlawful possession of a firearm in the first degree (Count III).

(7) THE CUMMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF TIESKOTTER'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997).

The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390

(2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Tieskotter's convictions, the cumulative effect of these errors materially affected the outcome of his trial, and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

(8) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE THE COURT IMPOSED A SENTENCE INCLUDING COMMUNITY CUSTODY THAT EXCEEDED THE STATUTORY MAXIMUM.

Where a defendant's presumptive sentence exceeds the statutory maximum, the statutory maximum will be the presumptive sentence. *See* former RCW 9.94A.310 and current RCW 9.94A.510 and 9.94A.533. To hold otherwise would be a violation of RCW 9.94A.505. Under these principles, a defendant's sentence including the time period required by community custody/placement as well as any sentence enhancement imposed on any count subject to a single sentencing cannot exceed the statutory maximum for the greatest offense for which guilt was found. *See State v. Thomas*, 150 Wn.2d 666, 671 and 674, 80 P.3d 168 (2003); *State v. Sloan*, 121 Wn. App. 220, 223-224, 87 P.3d 1214 (2004).

Here, Tieskotter was given a sentence of 120-months (84-months for the underlying conviction plus a consecutive 36-months deadly weapon enhancement) on Count I a class B felony, and 116-months on Count III a class B felony for a total sentence of 120-months. [CP 110-120]. Tieskotter was also sentence to 18 to 36-months of community custody. [CP 110-120]. Thus, Tieskotter's sentence was actually 138 to 156-months. However, the Tieskotter was convicted of class B felonies with a statutory maximum of 120-months. Under the principles set forth above, the court could not lawfully order community custody in any amount of time given Tieskotter's sentence to the statutory maximum. As the court imposed a sentence that exceeds the statutory maximum of 120-months, this court must remand for resentencing.

(9) TIESKOTTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS SENTENCE EXCEEDED THE STATUTORY MAXIMUM.

Should this court find that trial counsel waived or invited the errors claimed and argued in the preceding section of this brief by failing to properly object to a sentence that exceeds the statutory maximum, then both elements of ineffective assistance of counsel have been established.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the

representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *See State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (*citing State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Here, both prongs of ineffective assistance are met. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to be sentenced beyond

the statutory maximum, and had counsel done so, the trial court would have imposed a sentence within or at the statutory maximum.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding section, had counsel properly objected to a sentence exceeding the statutory maximum, the trial court would have imposed a lawful sentence.

E. CONCLUSION

Based on the above, Tieskotter respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 18<sup>th</sup> day of November 2008.

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Attorney for Appellant  
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18<sup>th</sup> day of November 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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STATE OF WASHINGTON  
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DEPUTY

Signed at Tacoma, Washington this 18<sup>th</sup> day of November 2008.

Patricia A. Pethick  
Patricia A. Pethick