

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38197-4-II
Clark County No. 07-1-02024-1

STATE OF WASHINGTON,

Respondent,

vs.

GERARD GRAY

Appellant.

BRIEF OF APPELLANT

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PM 4-22-09

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

I. THE IMPOSITION OF THE DEADLY WEAPON ENHANCEMENT AS TO COUNT III VIOLATES THE PROHIBITION ON DOUBLE JEOPARDY. 1

II. MR. GRAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL..... 1

III. THE TRIAL COURT ERRED IN ADMITTING THE WRITTEN STATEMENT OF TIFFANY WOOSTER..... 1

IV. MR. GRAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING. 1

V. THE TRIAL COURT VIOLATED MR. GRAY’S CONSTITUTIONAL RIGHTS TO PRIVACY AND FREEDOM OF ASSOCIATION BY REFUSING TO TEMPORARILY LIFT THE NO CONTACT ORDER SO THAT HE AND MS. WOOSTER COULD MARRY..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

I. THE IMPOSITION OF A 12 MONTH DEADLY WEAPON ENHANCEMENT ON THE ASSAULT SECOND DEGREE CONVICTION VIOLATED THE PROHIBITION ON DOUBLE JEOPARDY..... 1

II. MR. GRAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HE FAILED TO SEEK REDACTION OF THE 911 TAPE AND ELICITED TESTIMONY ABOUT MR. GRAY’S PRIOR BAD ACT OF KICKING IN A DOOR. 1

III. THE TRIAL COURT ERRED IN ADMITTING TIFFANY WOOSTER’S WRITTEN STATEMENT..... 1

IV. MR. GRAY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WHERE HIS ATTORNEY ABANDONED HIS REQUEST TO HAVE THE COURT

CONSIDER WHETHER MR. GRAY’S PRIOR CONVICTIONS FOR RAPE AND ROBBERY CONSTITUTED SAME CRIMINAL CONDUCT.	2
V. THE TRIAL COURT VIOLATED MR. GRAY’S CONSTITUTIONAL RIGHTS TO PRIVACY AND FREEDOM OF ASSOCIATION BY REFUSING TO TEMPORARILY LIFT THE NO CONTACT ORDER SO THAT HE AND MS. WOOSTER COULD MARRY.	2
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT.....	12
I. THE IMPOSITION OF A 12 MONTH DEADLY WEAPON ENHANCEMENT ON THE ASSAULT SECOND DEGREE CONVICTION VIOLATED THE PROHIBITION ON DOUBLE JEOPARDY.....	12
II. MR. GRAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HE FAILED TO SEEK REDACTION OF THE 911 TAPE AND ELICITED TESTIMONY ABOUT MR. GRAY’S PRIOR BAD ACT OF KICKING IN A DOOR.	15
III. THE TRIAL COURT ERRED IN ADMITTING TIFFANY WOOSTER’S WRITTEN STATEMENT.....	20
IV. MR. GRAY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WHERE HIS ATTORNEY ABANDONED HIS REQUEST TO HAVE THE COURT CONSIDER WHETHER MR. GRAY’S PRIOR CONVICTIONS FOR RAPE AND ROBBERY CONSTITUTED SAME CRIMINAL CONDUCT.	25
V. THE TRIAL COURT VIOLATED MR. GRAY’S CONSTITUTIONAL RIGHTS TO PRIVACY AND FREEDOM OF ASSOCIATION BY REFUSING TO TEMPORARILY LIFT THE NO CONTACT ORDER SO THAT HE AND MS. WOOSTER COULD MARRY.	27
E. CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<i>Alabama v. Smith</i> , 490 U.S. 794, 109 S.Ct. 2201 (1989)	18
<i>Anderson v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006)	36
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348 (2000).....	19, 20
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531 (2004).....	20
<i>Bruton v. United States</i> , 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968).....	27
<i>City of Kennewick v. Day</i> , 142 Wn.2d 1, 11 P.3d 304 (2000)	33
<i>Green v. United States</i> , 355 U.S. 184, 78 S.Ct. 221 (1957).....	18
<i>Meyer v. Nebraska</i> , 262 U.S. 390, 43 S.Ct. 625 (1923)	36
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 89 S.Ct. 2072 (1969).....	18
<i>Ring v. Arizona</i> , 536 U.S. 584, 122 S.Ct. 2428 (2002).....	20
<i>State v. Alexis</i> , 95 Wn.2d 15, 621 P.2d 1269 (1980)	23
<i>State v. Bandura</i> , 85 Wn.App. 87, 931 P.2d 174 (1997)	35
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	18
<i>State v. Caldwell</i> , 47 Wn.App. 317, 734 P.2d 542 (1987).....	19
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 472 (1999).....	28
<i>State v. Freeman</i> , 153 Wn.2d 735, 108 P.3d 753 (2005).....	19
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	22
<i>State v. Husted</i> , 118 Wn.App. 92, 74 P.3d 672 (2003), <i>review denied</i> , 151 Wn.2d 1014 (2004).....	19
<i>State v. Lopez</i> , 107 Wn.App. 270, 27 P.3d 237(2001).....	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251(1995).....	22
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 186 (1995).....	22
<i>State v. Nelson</i> , 74 Wn.App. 380, 874 P.2d 170 (1994).....	28, 29, 31
<i>State v. Nieto</i> , 119 Wn.App. 157, 79 P.3d 473 (2003).....	29, 31, 32, 33
<i>State v. Pentland</i> , 43 Wn.App. 808, 719 P.2d 605 (1986).....	19
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	20
<i>State v. Reinhart</i> , 77 Wn.App. 454, 891 P.2d 735 (1995)	34
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998)	36
<i>State v. Roybal</i> , 82 Wn.2d 577, 512 P.2d 718 (1973).....	18
<i>State v. Sua</i> , 115 Wn.App. 29, 60 P.3d 1234 (2003)	30
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963).....	28
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) .	21, 22, 23
<i>Troxell v. Granville</i> , 530 U.S. 57, 120 S.Ct. 2054 (2000)	36
<i>Turner v. Safley</i> , 482 U.S. 78, 107 S.Ct. 2254 (1987)	36

Statutes

RCW 9A.72.085.....	28, 29, 30
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Rules

ER 801 (d) (1) (i) 28, 29, 31, 32

Constitutional Provisions

U.S. Constitution, Amendment 5 17

Washington State Constitution, article 1, section 9 17

A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

On November 12, 2007 Deputies from the Clark County Sheriff's Department went to 1906 N.E. 98th Street in Vancouver in response to a 911 call from a neighbor of the woman who lived at that residence. RP (5-21-08), p. 125. Deputies Koch and Brannan approached the front door and Brannan knocked and announced "Sheriff's Office." RP (5-21-08), p. 127-28. A man's voice responded "Go away." RP (5-21-08), p. 128. Brannan then knocked again, stating "Come to the door." RP (5-21-08), p. 128. The same male voice responded "Go away or I'm gonna kill her." RP (5-21-08), p. 130. The man made that statement twice. RP (5-21-08), p. 130. Deputy Brannan could see through a window next to the front door. RP (5-22-08), p. 309. He could see a woman and a man. RP (5-22-08), p. 309-10. The man appeared to be holding a large stick or bat. RP (5-22-08), p. 310. Brannan also saw a young girl standing in the hallway of the home. RP (5-22-08), p. 310.

Deputy Koch took position by the corner of the garage where he could watch the front door. RP (5-21-08), p. 130-31. Above him, from the window over the garage he heard the same voice yell "Get outta here. I'm going to fuck her up. Everyone leave or I'm going to kill her." RP (5-21-08), p. 131. Koch also heard a woman's voice pleading with the man, saying "Stop doing this. Why are you doing this?" Koch also her the woman ask the man to "let us go." RP (5-21-08), p. 131. About ten minutes later a young girl emerged out of a second story window onto a small roof. RP (5-21-08), p. 132. Koch directed the girl away from the window and carried her off the roof. RP (5-21-08), p. 132. The girl was twelve year-old T.L.H. RP (5-21-08), p. 132, 153. T.L.H. was crying and upset. RP (5-21-08), p. 132. T.L.H told Koch that her mother Tiffany Wooster was inside with Gerard Gray. RP (5-21-08), p. 132. T.L.H. told Koch that Mr. Gray had a pocket knife. RP (5-21-08), p. 132. T.L.H said that Mr. Gray was holding her mother hostage. RP (5-22-08), p. 314. Koch could hear the woman inside sobbing. RP (5-21-08), p. 133. The SWAT team eventually arrived and talked Mr. Gray into coming outside. RP (5-21-08), p. 133. Koch placed Mr. Gray into Deputy Brannan's patrol car and said that Mr. Gray was cooperative. RP (5-21-08), p. 133-34.

Deputy Brannan spoke to Tiffany Wooster. She told him that she and Mr. Gray had argued that evening about a variety of things. RP (5-22-

08), p. 318-323. Eventually Tiffany tried to leave out the back door and was blocked by Mr. Gray. RP (5-22-08), p. 323. During one attempt to leave out the back door Tiffany said Mr. Gray hit her in the head three times. RP (5-22-08), p. 323. Tiffany also told Deputy Brannan that Mr. Gray threw her down to the floor, threatened to kill her and threatened to stomp the baby out of her (Ms. Wooster was five months' pregnant with Mr. Gray's child at the time of this incident). RP (5-22-08), p. 324. Tiffany said Mr. Gray was holding a wooden stick throughout the incident. RP (3-22-08), p. 324. At some point Tiffany went to the garage and called her neighbor Kathy Streifel, who called 911. RP (5-22-08), p. 326. Tiffany told Brannan that at some point after the police arrived Mr. Gray armed himself with a knife and forced her and T.L.H. into the master bedroom upstairs. RP (5-22-08), p. 327. Tiffany told Brannan that Mr. Gray made her sit in a chair next to the bed and sat near her, holding the knife, threatening to kill her. RP (5-22-08), p. 328. As time went on, Tiffany said she was able to convince Mr. Gray to let T.L.H. leave. RP (5-22-08), p. 328. Eventually Mr. Gray spoke to the police on the telephone and he released Tiffany and surrendered. RP (5-22-08), p. 329.

Kathy Streifel is Ms. Wooster's neighbor across the street. RP (5-22-08), p. 276. She received a phone call from Tiffany in which she heard arguing so she called 911. RP (5-22-08), p. 276. During direct

examination the prosecutor elicited testimony that Tiffany and Ms. Streifel had created a code word that Tiffany would use on the phone for when she wanted the assistance of the police. RP (5-22-08), p. 276. The code word was “pray.” RP (5-22-08), p. 276. Ms. Streifel testified that she couldn’t recall if Tiffany had actually used that word during the phone call and the prosecutor left it at that. RP (5-22-08), p. 277. Defense counsel asked Ms. Streifel about why Tiffany would use a code word, and Ms. Streifel replied that it would be used if she and Mr. Gray were fighting or arguing. RP (5-22-08), p. 289. On re-direct, the prosecutor asked whether, in fact, the code word was created for situations of physical violence and Ms. Streifel answered “yes.” RP (5-22-08), p. 289. (Defense counsel objected to this question and the objection was overruled). RP (5-22-08), p. 289. Defense counsel continued to ask about the code word on re-cross, asking if she had ever witnessed physical violence between Tiffany and Mr. Gray. RP (5-22-08), p. 290. Ms. Streifel testified that she hadn’t. RP (5-22-08), p. 290. On second re-direct the prosecutor asked, again, “[T]his word wasn’t created just to stop—to prevent arguing, was it?” Ms. Streifel replied “no.” RP (5-22-08), p. 291. Defense counsel persisted on this topic, asking Ms. Streifel to tell the jury about the incident that caused her and Tiffany to create the code word. RP (5-22-08), p. 292. Ms. Streifel then testified that Tiffany and Mr. Gray had broken up and Mr.

Gray had kicked in Tiffany's door trying to retrieve his possessions. RP (5-22-08), p. 292.

The tape of Ms. Streifel's 911 call was played for jury. RP (5-22-08), p. 295. The prosecutor initially played a brief portion so that Ms. Streifel could confirm it was her voice. RP (5-22-08), p. 295. Apparently believing that authentication was the only available objection, defense counsel did not object to the admission of the tape or to having it played for the jury. RP (5-22-08), p. 295-96. Exhibit 19 was played for the jury and admitted into evidence. Ex. 19, RP (5-22-08), p. 295-96. Kathy Streifel was the caller in this 911 tape. Ex. 19. During this call Ms. Streifel told the 911 operator that Mr. Gray was "knocking the hell out of her" in reference to Ms. Wooster. Ex. 19. Ms. Streifel twice stated during this call that Mr. Gray was on parole and not permitted to be in Vancouver¹. Ex. 19. Ms. Streifel twice said during this call that a few weeks prior to this incident Mr. Gray had kicked in a door and a police report had been made. Ex. 19. Ms. Streifel also said that Mr. Gray had a history of "all sorts of violent crimes." Ex. 19. Defense counsel did not seek to have the tape redacted prior to it being played for the jury. RP (5-22-08), p. 295.

¹ The inference, when listening to the tape, is that Ms. Streiffel meant that Mr. Gray was not allowed to be in Washington State, not just Vancouver (where the alleged crime occurred).

Tiffany Wooster testified that she was pregnant with Mr. Gray's child at the time of this incident and they now have a baby. RP (5-21-08), p. 173-74. Tiffany recalled that the argument between her and Mr. Gray began over the issue of where T.L.H. was going to sleep. RP (5-21-08), p. 176. Tiffany said the argument escalated because she was tired. RP (5-21-08), p. 177. She testified at one point she and T.L.H. were in T.L.H.'s room and Mr. Gray became upset and pushed a television off a desk. RP (5-21-08), P. 177. Tiffany said she asked him to leave. RP (5-21-08), p. 177. Tiffany acknowledged that she told the police that Mr. Gray threw the television at T.L.H. but said that was a lie. RP (5-21-08), p. 178. She testified that Mr. Gray threw the television toward T.L.H. but not at her. RP (5-21-08), p. 178. Tiffany acknowledged that Mr. Gray told the police that he would kill her if they came in, but testified Mr. Gray only did it to keep the police out and had no intention of hurting her. RP (5-21-08), p. 179. She testified she did not fear Mr. Gray would harm her, only that he would harm himself. RP (5-21-08), p. 180. Tiffany denied that she told the police Mr. Gray threatened to stomp her baby out of her. RP (5-21-08), p. 181. She acknowledged that Mr. Gray had a knife but denied that he threatened her with it. RP (5-21-08), p. 183. Tiffany testified that the code word with Ms. Streifel was created because of an "incident" between

her and Mr. Gray two weeks prior. RP (5-21-08), p. 187. She did not elaborate on the prior incident.

Exhibit 22 is a written statement by Tiffany Wooster. This statement was admitted as a prior inconsistent statement, commonly called a “Smith Affidavit” in domestic violence parlance. This statement was captioned as a “Domestic Violence Victim Statement.” Ex. 22, p. 1. It purported to be the statement of Tiffany Wooster. Ex. 22, p. 1. The first page of this statement contains no declaration, certification, affirmation or oath. Ex. 22, p. 1. On the second page of the statement, there is boilerplate declaration language which reads as follows: “I, _____, certify, or declare, under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct:
SIGNED: _____ PLACE _____
Date: _____ Time _____. Ex.22, p. 2. In this portion of the statement, there is nothing written on the line appearing after “I” and before “certify.” Ex. 22. It is blank. On the line after the word “SIGNED” is written what appears to be a signature of Tiffany Wooster. Ex. 22, p. 2. On the line after “PLACE” is written “County of Clark.” Ex. 22, p. 2. On the line after “Date” is written “11/12/07.” Ex. 22, p. 2. Defense counsel objected to the admission of exhibit 22 because the declaration portion of the form was not properly filled out. RP (5-21-08),

p. 201. The court overruled the objection on the basis that Ms. Wooster confirmed it was her handwriting. RP (5-21-08), p. 201. When questioned about the statement, Ms. Wooster said she didn't remember "all of that stuff happening." RP (5-21-08), p. 194. When asked about Mr. Gray holding a knife to her, Ms. Wooster said she didn't recall that although it was in her statement. RP (5-21-08), p. 199.

The Clark County Prosecutor charged Mr. Gray with two counts of kidnapping in the first degree (one count each for Ms. Wooster and T.L.H.), assault in the second degree against Ms. Wooster, and assault in the fourth degree against Ms. Wooster. CP 35-37. On counts I-III, the State alleged that Mr. Gray was armed with a deadly weapon. CP 35-37. As to counts I and III, the State also alleged the following aggravators: That the offense involved domestic violence and that the offense occurred within sight or sound of the victim or offender's minor children or the offender's conduct manifested deliberate cruelty or intimidation of the victim or that the defendant knew that the victim was pregnant at the time the violent offense was committed. CP 35-36. The jury was instructed, as to the charge of assault in the second degree, that to convict Mr. Gray they had to find beyond a reasonable doubt that he assaulted Tiffany Wooster, and that the assault was committed with a deadly weapon, to wit: a knife. CP 57. The trial court instructed the jury on each of the lesser included

offenses that Mr. Gray requested. Report of Proceedings, CP 65-69. The jury returned verdicts of guilty on each count as charged. CP 72-75. The jury returned a special verdict finding that Mr. Gray was armed with a deadly weapon as to counts I, II, and III. CP 76. The jury also returned special verdicts answering “yes” to each of the aggravating factors submitted for their consideration. CP 77-80.

The court held a sentencing hearing in which he heard argument and reviewed memoranda pertaining to Mr. Gray’s criminal history. RP (8-13-08). There were three prior felonies from the state of Oregon to which Mr. Gray challenged comparability. RP (8-13-08), p. 634-656. The three felonies were two counts of burglary in the first degree and one count of robbery in the third degree. *Id.* The court compared the crimes, both legally and factually, to Washington statutes in effect at the time the offenses were committed and concluded they were comparable. RP (8-13-08), p. 656. Specifically, the court found the first degree burglaries were comparable to second degree burglaries in Washington, and the third degree robbery was comparable to a second degree robbery in Washington. RP (8-13-08). Having reviewed the certified documentation pertaining to these convictions and the statutes in effect at the time, Mr. Gray does not challenge the court’s determination of comparability in this appeal. Defense counsel initially asked the court to consider whether his

prior convictions for first degree rape and third degree robbery under cause number 91-06-33033 constituted same criminal conduct. RP (7-18-08), p. 696. Before delving into substantially into his argument, however, Mr. Gray interrupted defense counsel and said the crimes involved different victims and were not same criminal conduct. RP (7-18-08), p. 697-98. Defense counsel accepted Mr. Gray's assertion and abandoned the request. RP (7-18-08), p. 698. Mr. Gray was incorrect. The certified copy of the indictment for cause number 91-06-33033 reveal that both the rape and robbery charge involved the same victim, P.M.W. CP 23-24.

The court imposed 24 months on top of the standard range for counts I and II based on the jury's finding of a deadly weapon, and 12 months on top of the standard range on count III based on the jury's finding of a deadly weapon. RP (8-13-08), p. 679, 682. The enhancements were ordered to run consecutively to one another (60 months) and consecutively to the base sentence, as required. *Id.* The State requested an exceptional sentence of 559 months. RP (8-13-08), p. 673. The court found substantial and compelling reasons, based on the jury's finding of multiple aggravators, to impose an exceptional sentence. RP (8-13-08), p. 680-82, CP 84. The court imposed an exceptional sentence, as well as the deadly weapon enhancements, for a total period of confinement of 360 months. RP (8-13-08), p. 682 CP 86-87. In this

appeal, Mr. Gray assigns error to the 12 months of that time period attributable to the deadly weapon finding as to count III.

Mr. Gray and requested that the court temporarily lift the no-contact order so that he could marry Ms. Wooster. RP (7-18-08), p. 708-09. Mr. Gray agreed that the order should be reinstated after the marriage ceremony. RP (7-18-08), p. 709. The court denied the request based on the fact that Mr. Gray had been convicted of two Class A and a Class B felony. RP 7-18-08), p. 709. This timely appeal followed. CP 116.

D. ARGUMENT

I. THE IMPOSITION OF A 12 MONTH DEADLY WEAPON ENHANCEMENT ON THE ASSAULT SECOND DEGREE CONVICTION VIOLATED THE PROHIBITION ON DOUBLE JEOPARDY.

The assault second degree conviction was predicated on Mr. Gray's use of a knife. This same use of that knife provided the basis for the deadly weapon enhancement. The double jeopardy clause of the United States Constitution provides that no individual shall be twice put in jeopardy of life or limb for the same offense. U.S. Constitution, Amendment 5. The Washington State Constitution, article 1, section 9 provides that no individual shall "be twice put in jeopardy for the same offense." Washington courts give article 1, section 9 the same interpretation as the United States Supreme Court gives the Fifth

Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). The double jeopardy clause protects against: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989). The double jeopardy clause was designed to prevent the government from repeatedly attempting to convict an individual for an offense, thereby subjecting him to embarrassment, expense, and anxiety. *State v. Roybal*, 82 Wn.2d 577, 579, 512 P.2d 718 (1973); citing *Green v. United States*, 355 U.S. 184, 190, 78 S.Ct. 221 (1957). While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

Washington appellate courts have previously rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon is an element of the underlying offense. *State v. Husted*, 118 Wn.App. 92, 95-96, 74 P.3d 672 (2003), *review denied*, 151 Wn.2d 1014 (2004); *State v. Caldwell*, 47 Wn.App. 317, 319-20, 734 P.2d 542 (1987); *State v. Pentland*, 43 Wn.App. 808, 811, 719 P.2d 605 (1986).

Each of these opinions pre-dated the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348 (2000), *Blakely v. Washington*, 542 U.S. 296, 306-07, 124 S.Ct. 2531 (2004), *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), and *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

What each of the above cases establishes is that factors which increase the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. This is true even when the fact is labeled a “sentencing factor” or “sentence enhancement” by the Legislature. *Blakely* at 306-07; *Apprendi* at 482-83. In light of the holdings in *Blakely* and *Apprendi* prior holdings that deadly weapon enhancements attached to crimes which are predicated upon the use of a deadly weapon do not violate the prohibition on double jeopardy are no longer persuasive. The Washington Supreme Court has accepted review of this issue in two pending cases, *State v. Aguirre*, No. 82226-3 and *State v. Kelley*, No. 82111-9.

Under the holding in *Recuenco*, which applied the principles articulated in *Blakely* and *Apprendi* to Washington’s sentence enhancement scheme, deadly weapon enhancement provisions constitute a new, greater offense for purposes of double jeopardy just as the create elements of a greater offense for purposes of the right to a jury trial. The

deadly weapon enhancement in this case is predicated on the *very same finding* the jury made to find Mr. Gray guilty of assault in the second degree. The multiple punishments here violate the prohibition on double jeopardy and this Court should reverse the deadly weapon enhancement as to count III and order that it be stricken.

II. MR. GRAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HE FAILED TO SEEK REDACTION OF THE 911 TAPE AND ELICITED TESTIMONY ABOUT MR. GRAY'S PRIOR BAD ACT OF KICKING IN A DOOR.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense

counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

The 911 recording from the call made by Kathy Streifel contained information that was extremely prejudicial to Mr. Gray and for which Ms. Streifel lacked any foundation to assert. First, Ms. Streifel stated that Mr. Gray had previously kicked in a door. Kicking in a door is an extremely aggressive and violent thing to do. Whereas Ms. Wooster maintained throughout the trial that Mr. Gray never intended to hurt her and his actions were designed merely to get the police to leave the property, a prior act of kicking in her door undercut the believability of that assertion substantially.

Second, Ms. Streifel commented that Mr. Gray had a history of many violent crimes. This, again, was extremely prejudicial to Mr. Gray. Prior convictions for crimes of violence are extremely prejudicial and may only be admitted when the court balances the probative value of their admission against their prejudicial effect. *State v. Alexis*, 95 Wn.2d 15, 621 P.2d 1269 (1980). While the jury heard that he had prior convictions for burglary and robbery because they were crimes of dishonesty used to impeach his testimony (and the trial court conducted an exhaustive hearing

on their admissibility at Mr. Gray's request), they were not entitled to hear that he had prior crimes of violence. Indeed, the jury would not have heard about those crimes if defense counsel had sought redaction of the 911 recording. The trial court clearly would have granted such a motion in light of the fact that after the recording was played he scolded both parties for failing to edit the recording or, alternatively, having it transcribed and redacted rather than playing it for the jury. Counsel should have sought redaction of this tape and it was incompetent for him to fail to do so. When seeking admission of the recording, counsel appeared to believe that the only objection available to him was as to authenticity. Counsel should have known that he was entitled to object to the contents of the recording, making the assumption that he listened to the tape prior to trial.

Third, Ms. Streifel said Mr. Gray was "knocking the hell out of" Ms. Wooster. However, Ms. Streifel did not witness what went on inside the house (beyond seeing Ms. Wooster turn on the bedroom light and Mr. Gray turn it off and close the blinds) and this comment was plainly based on her assumption. Neither Ms. Wooster's testimony nor Ms. Streifel's testimony established that Ms. Streifel saw Mr. Gray "knocking the hell out of" Ms. Wooster.

Last, Ms. Streifel twice stated that Mr. Gray was not allowed to be in Vancouver. There was no foundation for this comment. There was no evidence that Mr. Gray was not allowed to be in Washington or was violating his parole by being at Ms. Wooster's home. This accusation was prejudicial to Mr. Gray because it implied he was already breaking the law just by being at the residence.

In addition to the objectionable nature of the contents of the recording, the recording itself was not relevant to this case. The call was not made by Ms. Wooster (which would have certainly made it relevant), it was made by a neighbor with no firsthand knowledge of what was occurring beyond the fact that she heard arguing in the background when Ms. Wooster called and she saw Ms. Wooster turn on the light and Mr. Gray turn it off. The "code word" created by her and Ms. Wooster was, according to the testimony of both Ms. Streifel and Ms. Wooster, not used during Ms. Wooster's call to Ms. Streifel. Indeed, the prosecutor did not ask to play the tape until defense counsel made a motion to strike Ms. Streifel's testimony; a motion without any valid basis. Ms. Streifel had left the witness stand and was leaving the courtroom when she was recalled to testify about the tape in response to defense counsel's motion. The tape would not have been played but for the incompetent decisions of defense counsel.

Further, defense counsel was ineffective in his cross examination of Ms. Streifel. The testimony about the code word was damaging to Mr. Gray but arguably relevant. What didn't have to occur was defense counsel persisting in his ridiculous attempt to get Ms. Streifel to say that the code word was not created out of fear of violence (which defies common sense) and eliciting testimony about Mr. Gray's prior bad act of kicking in Ms. Wooster's door. Contrary to the assertion of defense counsel, kicking in a door is an act of violence. Whether the victim of the act is a door or a person, this is a violent, criminal act that the jury would not have heard about but for defense counsel's incompetent decisions. The prosecutor did not elicit this testimony. Ms. Streifel herself even tried to avoid talking about it and asked defense counsel if he really wanted to hear about why they created the code word, to which defense counsel replied "sure," and asked Ms. Streifel to tell the jury about it. Asking this question constituted deficient performance and there was no tactical reason to do it. Counsel, in his effort to get Ms. Streifel to concede that which wasn't true, namely that the code word was *not* created out of fear of violence, would not let the matter go and kept delving further despite the fact that he was not receiving good answers. He should have dropped it and moved on. Instead, he not only elicited extremely prejudicial

information from Ms. Streifel about Mr. Gray's prior act of violence but caused the 911 tape to be played.

Counsel's performance was deficient and there was no legitimate tactical reason failing to seek redaction of the 911 recording and eliciting extremely prejudicial testimony about Mr. Gray's prior bad act. Although the evidence against Mr. Gray was substantial, the result of the trial would likely have been different but for counsel's unprofessional errors. The jury was given the option of finding the lesser included offenses of kidnapping in the second degree or unlawful imprisonment as to the kidnapping charges, and the option of finding unlawful display of a weapon rather than assault in the second degree. A perception of depravity and a pre-disposition to violence on the part of Mr. Gray likely factored heavily in the jury's decision to convict on the highest charges they were offered. Mr. Gray was denied his right to effective assistance of counsel and should be granted a new trial.

III. THE TRIAL COURT ERRED IN ADMITTING TIFFANY WOOSTER'S WRITTEN STATEMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v.*

Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

ER 801 (d) (1) (i) provides that a statement is not hearsay when:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding. *State v. Nelson*, 74 Wn.App. 380, 386, 874 P.2d 170 (1994). Most of the litigation revolving around Smith affidavits concerns whether they were given under oath subject to the penalty of perjury, and/or whether they were given in an "other proceeding." In this case, Lindsey's written statement fails in regard to both of these requirements.

1. Statement did not comply with RCW 9A.72.085

Both *Smith*, and the later case of *State v. Nelson*, 74 Wn.App. 380, 874 P.2d 170 (1994), dealt with statements which were given and then notarized by a notary. *Smith* at 858, *Nelson* at 389. In *Nelson*, however, the notary did not administer an oath or read the affidavit to the declarant as is required for one to be placed "under oath. *Nelson* at 389. The *Nelson* court held that the statement was nevertheless admissible because

it complied with the requirements of RCW 9A.72.085.² Later cases have clarified that when the State seeks admission of a statement which was not given under oath, under the guise that it qualifies as a certification or declaration under 9A.72.085, the requirements of RCW 9A.72.085 must be strictly adhered to. *State v. Nieto*, 119 Wn.App. 157, 79 P.3d 473 (2003); *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003).

RCW 9A.72.085 requires that the statement (1) recites that it is certified or declared by the person to be true under the penalty of perjury; (2) is subscribed by the person; (3) states the date and place of its execution; and (4) states that it is so certified or declared under the laws of the state of Washington. Here, the statement that was admitted as exhibit 22 is fatally flawed. First, the perjury declaration appears only on page two, not page one. Second, the first part of the declaration is left blank after “I” and before “certify.” Ex. 22. There is a sentence which appears before the declaration which does not satisfy the declaration requirement and is merely surplusage. In that sentence, the word “Tiffany” appears on the fill-in line. Other than the largely illegible signature on the fill-in

² It is interesting to note that Professor Teglund consistently characterizes this portion of the *Nelson* opinion as dictum, and insists that there is no bright line rule regarding whether compliance with RCW 9A.72.085 satisfies ER 801 (d) (1) (i)’s requirement that the statement be “under oath subject to the penalty of perjury.” The *Nelson* court’s reliance on the statement’s compliance with RCW 9A.72.085 appears integral to its holding in that case, in that without such a holding the statement would have been per se inadmissible as substantive evidence.

line after “SIGNATURE,” there is no way to identify who is making the declaration here. A proper declaration identifies the person making the declaration and contains his or her signature.

2. STATEMENT WAS NOT GIVEN IN AN “OTHER PROCEEDING.”

In *Nieto*, Division I held that to determine whether a statement was given in an “other proceeding,” the court determine whether the statement is reliable. *Nieto* at 162. In determining whether a statement is reliable, the court must consider whether (1) the declarant made the statement voluntarily; (2) there were minimal guarantees of truthfulness; (3) the statement was given in one of the four legally permissible methods for determining the existence of probable cause; and (4) the witness was subject to later cross-examination.

Here, factor four is not at issue. Factor three, prior to *Nieto* and *Sua*, had been customarily breezed over so long as the State could demonstrate that a statement was taken during a police interrogation, without any regard to the details of the interrogation itself. Indeed, the *Nelson* court seems to reinforce this proposition when it stated: “...Nelson contends that a police interrogation is not an ‘other proceeding’ within the meaning of ER 801 (d) (1) (i). We disagree. As in *State v. Smith...*, Cahoon’s statement was taken as standard procedure in a police

investigation that resulted in the filing of an information. Absent other indicia of unreliability, our Supreme Court had indicated that this method for determining the existence of probable cause constitutes an ‘other proceeding.’” *Nelson* at 391.

However, as *Nieto* and *Sua* make clear, merely taking a statement at the request of the police during a police investigation does not automatically satisfy this requirement. In *Nieto*, Division I held that the State had failed to demonstrate that the statement was taken in the circumstance of a “formalized proceeding.” *Nieto* at 163. The Court distinguished *Smith* and *Nelson*, stating that while a notary was present in those cases, no notary was present in *Nieto*’s case “nor were any other formal procedures involved.” *Nieto* at 163. Further, the declarant testified that she hadn’t read the “penalty of perjury” language and she said the language had no meaning to her. *Nieto* at 163.

Likewise, here, there was no notary present and Ms. Wooster testified that she couldn’t remember writing the contents of the statement. Deputy Brannan testified that Ms. Wooster was very upset when she filled out the statement and it took her a long time. Most of the statement is information given in response to questions that are pre-printed on the form, as opposed to a spontaneous and authentic accounting of what happened. The trial court concluded the statement was admissible solely

A sentencing court may make its own determination as to whether prior sentences served concurrently constituted same criminal conduct. *State v. Reinhart*, 77 Wn.App. 454, 891 P.2d 735 (1995). Here, defense counsel initially sought a ruling from the court as to whether Mr. Gray's prior convictions for rape and robbery under Oregon cause number 91-06-3303 constituted same criminal conduct. The indictment for those charges shows that Mr. Gray was charged with using force to commit the rape, and using force to accomplish the taking of property from a person (e.g. robbery). CP 23-24. The indictment reveals that the victim in both of those charges was P.M.W. CP 23-24. Mr. Gray was evidently confused and stated that these convictions involved different victims. Counsel accepted the concession but shouldn't have. Counsel should have carefully reviewed the documents and seen that the victim was the same person. Because counsel accepted the incorrect assertion of Mr. Gray he abandoned his motion and the court was not given the opportunity to make a ruling on whether these crimes encompassed same criminal conduct.

The right to effective assistance of counsel includes sentencing. *State v. Bandura*, 85 Wn.App. 87, 931 P.2d 174 (1997). If these two crimes constitute same criminal conduct it would result in a lower offender score (substantially so, given the rule on multipliers) and defense counsel should have pursued this issue. To simply abandon it on the ill-

counseled statement of Mr. Gray was deficient performance. Mr. Gray was not his own counsel, and his counsel should have investigated whether the same victim was involved in these crimes rather than merely accepting his statement. Mr. Gray should receive a new sentencing hearing.

V. THE TRIAL COURT VIOLATED MR. GRAY'S CONSTITUTIONAL RIGHTS TO PRIVACY AND FREEDOM OF ASSOCIATION BY REFUSING TO TEMPORARILY LIFT THE NO CONTACT ORDER SO THAT HE AND MS. WOOSTER COULD MARRY.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. The clause includes a substantive component, which provides heightened protection against government interference with certain fundamental rights and liberty interests. *Troxell v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000). The rights to marry and to privacy in marriage are long-standing and fundamental constitutional rights protected by the Fourteenth Amendment. *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254 (1987); *Anderson v. King County*, 158 Wn.2d 1, 24, 138 P.3d 963 (2006). A person has a constitutionally protected right to marry, establish a home and raise children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923). While a convicted defendant's constitutional rights are subject to limitation while he is in prison or on

community placement, his constitutional right to free association may only be restrained as “reasonably necessary to accomplish the essential needs of the State and the public order.” *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998).

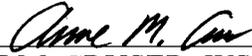
Here, Mr. Gray concedes the compelling state interest in preventing continuing contact between him and Ms. Wooster. However, Mr. Gray and Ms. Wooster have a child in common who was not a victim of this crime. Absent a marriage between Ms. Wooster and Mr. Gray, this child is an “illegitimate” child. Marriage affects rights to inheritance, the right to make medical decisions on behalf of an incompetent spouse, as well as property and contract rights. Mr. Gray simply sought a brief removal of the order for the purpose of being able to take legal vows with Ms. Wooster. The State’s compelling interest here could have been accomplished by the immediate reimposition of the order after the marriage was completed. Mr. Gray asks this Court to remand his case with an order to the trial court to temporarily lift the no contact order so that he and Ms. Wooster can get legally married.

E. CONCLUSION

Mr. Gray should be granted a new trial. Alternatively, he should be granted a new sentencing hearing. The Court should order the trial court to temporarily rescind the no contact order so that he can marry Ms.

Wooster, and then order that it be reimposed according to its original terms.

RESPECTFULLY SUBMITTED this 22nd day of April, 2009.



ANNE M. CRUSER, WSBA #27944
Attorney for Mr. Gray

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

STATE OF WASHINGTON,)	Court of Appeals No. 38197-4-II
)	Clark County No. 07-1-02024-1
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
GERARD GRAY,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 22nd day of April, 2009 affiant placed a properly stamped envelope in the mails of the United States addressed to:

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Clark County Prosecuting Attorney
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Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
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AND

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