39742-1-II

NO. ~~39741-1-II~~

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER AUSTIN PERKINS,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State's failure to disclose material evidence denied appellant a fair trial.

2. Exclusion of relevant admissible evidence denied appellant his constitutional right to present a defense.

3. Trial counsel's failure to request an instruction regarding the use of appellant's statements to the police denied appellant effective representation.

4. The trial court failed to count crimes that encompassed the same criminal conduct as a single offense in calculating appellant's offender score.

Issues pertaining to assignments of error

1. At the time of appellant's trial, the lead investigating police officer was under suspension for allegations of sexual harassment. The details of the suspension were never disclosed to the defense, although a civil suit and newspaper article published after the trial described several incidents of unprofessional conduct by the officer during the course of his duties. Where information regarding the suspension would likely lead to evidence with which the defense could discredit the police investigation and impeach the officer, must appellant be granted a new trial with access to the previously undisclosed evidence?

2. Appellant and two co-defendants were charged with attempted robbery, attempted burglary, and assault. The defense theory of the case was that only the two co-defendants committed the crimes. Where the victim testified that two men were involved in the crimes, and he positively identified one of the co-defendants, did exclusion of evidence that the second co-defendant had been convicted of the offenses deny appellant his constitutional right to present a defense?

3. Following a CrR 3.5 hearing, the trial court admitted appellant's statements to the police over his objection. Where it was crucial to the defense that the jury find appellant's statements unreliable due to the coercive atmosphere created by questionable interrogation techniques, did trial counsel's failure to request an instruction informing the jury it could consider the circumstances under which the statements were made constitute ineffective assistance of counsel?

4. Where the assault and attempted robbery occurred at the same time and place and involved the same victim, and the assault was committed in furtherance of the attempted robbery and not for a separate and distinct purpose, does the trial court's failure to count these offenses as the same criminal conduct require remand for resentencing?

B. STATEMENT OF THE CASE

1. Procedural History

On May 27, 2008, the Clark County Prosecuting Attorney charged appellant Christopher Perkins with attempted first degree robbery, attempted first degree burglary, and first degree assault. CP 1-3, 15-16; RCW 9A.28.020(1), (3)(b); RCW 9A.56.200(1)(a)(i); RCW 9A.52.020(1)(a); RCW 9A.36.011(1)(a). The State also alleged that Perkins or an accomplice was armed with a firearm in each offense. CP 1-3, 15-16.

After a CrR 3.5 hearing, the case proceeded to jury trial before the Honorable Robert Lewis. The jury returned guilty verdicts and affirmative findings as to the firearm allegations. CP 94-99. The court imposed standard range sentences with consecutive firearm enhancements, for a total of 423 months confinement. CP 120. Perkins filed this timely appeal. CP 131.

2. Substantive Facts

Just after midnight on May 17, 2008, Gary Atkinson was awakened by a loud pounding on his door. 3RP[1] 36. When he opened the

[1] The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—11/21/08, 1/23/09, 1/29/09; 2RP—2/25/09; 3RP—6/15/09; 4RP—6/16/09 (a.m.); 5RP—6/16/09 (p.m.); 6RP—6/17/09 (a.m.); 7RP—6/17/09 (p.m.); 8RP—6/18/09; 9RP—9/2/09.

door, he saw two men pointing guns at him. 3RP 37-38. One of the men told him to get down. 3RP 39. Although the man wore a bandana over his nose and mouth, Atkinson recognized him as Gary Alexander. 3RP 41. Alexander was the father of Atkinson's girlfriend's son, and he had been to Atkinson's home many times. 3RP 41. Atkinson recognized Alexander's voice, his eyes, and the teardrop tattoo under his eye. 3RP 39.

Atkinson tried to close the door when Alexander told him to get down, but the men started pushing on the door. When the door swung open, Atkinson struggled with the men as he tried to get out and they tried to get in. 3RP 43-44. When Atkinson broke free, Alexander said "we'll shoot." 3RP 45. Atkinson took another step and heard two gunshots. One of the shots hit him in the back. 3RP 45. Atkinson turned and saw Alexander and the other man run away into the carport. He then went to his neighbor's house for help. 3RP 45.

Atkinson's neighbor called 911. The police arrived first and questioned Atkinson before he received medical attention. 3RP 98. Atkinson gave a description of the men. 3RP 99. He told the first officer who questioned him that he knew who had shot him but he did not want to say who it was. 3RP 65. After a brief hesitation, however, he identified

Alexander. 3RP 100. While he was at the hospital he identified Alexander from a photo montage. 3RP 68.

Alexander was arrested on May 17 and interviewed by Officer Wilken, the lead investigator, on May 18. 5RP 345, 361. Alexander first told Wilken that he had been with his girlfriend the entire night of the attempted robbery. 6RP 458. Then he admitted leaving the house and said he noticed a lot of police cars when he drove past Atkinson's house. Not wanting to get pulled over, he walked to a store and called his girlfriend for a ride. 6RP 473-75. Wilken did not believe Alexander and threw him in jail. 6RP 478. In a later interview, Alexander changed his story, saying he waited in the car while Christopher Perkins and Lester Griffin committed the attempted robbery. 6RP 485.

Griffin was arrested on May 19, and he invoked his rights to silence and an attorney. 4RP 222. Perkins was also arrested on May 19, and he agreed to an interview. 4RP 236-37. The interview was recorded on audio cassettes, although portions were conducted off-tape. 4RP 237, 240. Perkins told Wilken he and Alexander had been at Griffin's apartment the evening of May 16, and Alexander had driven him home. 5RP 259. Wilken then told Perkins that Alexander had been arrested for a home invasion robbery that night, and he knew Perkins was involved. 5RP 283. Perkins initially denied any involvement, but by the end of the

four hour interview he gave a statement adopting Wilken's version of events.

Wilken told Perkins what he believed happened, saying that Griffin, Alexander and Perkins had left the parking lot of a convenience store just before midnight and drove to the Evergreen Park Apartments. 5RP 284-85. According to Wilken, Alexander waited in the car, while Perkins and Griffin went to Atkinson's door wearing bandanas and carrying guns. 5RP 285-86. Wilken said that Perkins ordered Atkinson to get down, and shots were fired when Atkinson tried to fight. 5RP 286. Perkins and Griffin ran back to the parking lot, found that Alexander had left, and then went to an apartment to call Griffin's girlfriend for a ride. 5RP 287. Wilken said they met back up with Alexander at Griffin's apartment, and Alexander gave Perkins a ride home. 5RP 287.

Wilken told Perkins he had the responsibility to convince him these accusations were not true, and Perkins admitted he knew something was taking place but said he did nothing wrong. He then asked to stop the recording. 5RP 296, 346. When the recording resumed, Perkins said that Alexander had proposed robbing Atkinson, and he and Griffin agreed to go along with it. 5RP 298-99. Perkins said he waited in the car while Alexander and Griffin went to the door, but when he heard sirens, he took off. 5RP 305. When he met up with Griffin and Alexander later, Griffin

said he was struggling with Atkinson when the gun went off, and so they ran. 5RP 310.

After making this statement, Perkins was placed in handcuffs and was being walked out of the room when he said he wanted to change his statement. 5RP 320. He then made a statement consistent with the facts Wilken had given him. Perkins said he was not the driver but actually went to Atkinson's door with Griffin while Alexander stayed in the car. 5RP 321. After Perkins knocked on the door, Atkinson tried to run outside, and in a struggle with Griffin, Griffin's gun went off. 5RP 323-24. Perkins and Griffin ran to where they had parked the car, but Alexander was gone, so they went to the apartment of someone Griffin knew and called for a ride. Perkins said he and Griffin stashed their beanies, gloves, bandanas and gun by a fence. 5RP 326. When they returned to Griffin's apartment, Alexander showed up and gave Perkins a ride home. 5RP 326-27.

Following his interview, Perkins agreed to show the police the apartment he said he and Griffin had gone to and the location where Griffin had hidden the clothing and gun. 4RP 177. Perkins directed an officer to the Evergreen Park Apartments, unit GG204. 4RP 178-79. He also pointed out an area along the fence surrounding the apartment complex but said he believed Griffin had already retrieved the items he

had hidden there. 4RP 182. Police later recovered a glove containing Griffin's DNA from that location. 4RP 185; 6RP 410.

Atkinson had told police that Alexander was wearing a green army-style jacket, and police located two army-style jackets during a search of Alexander's residence. 3RP 111; 4RP 215. Two .380 caliber casings were recovered from the scene just outside Atkinson's front door. 3RP 120-21. A .40 caliber gun was seized from Griffin's apartment. 4RP 212.

Alexander entered a cooperation agreement with the State, whereby he would plead guilty to lesser charges and be sentenced to 48 months, as opposed to the 208 months he faced without the agreement. 6RP 483. To receive this favorable treatment, Alexander agreed to testify against Griffin and Perkins. 6RP 483. Griffin was tried and convicted, and Perkins's trial followed.

Although Atkinson testified at trial that he was positive, with no doubt in his mind, that Alexander was at his door that night, the State rested its case on Alexander's story, adopted by Perkins during his interrogation, that he waited in the car. 3RP 65; 5RP 253; 6RP 434; 8RP 711. According to Alexander, it was Perkins's idea to rob Atkinson. 6RP 421. He said that on the night of May 16, he, Perkins, and Griffin left Griffin's apartment, stopped at a convenience store, and then proceeded to

the Evergreen Park Apartments. 6RP 430, 432. Alexander claimed that he waited in the car when Griffin and Perkins left with guns to commit the robbery. When he heard sirens, he left. 6RP 434-36. Alexander said he later met up with Griffin and Perkins at Griffin's apartment, where Perkins said he shot Atkinson. 6RP 439, 441.

Marilyn Green testified that she lived in the Evergreen Park Apartments, unit GG204. 4RP 163. She knew Lester Griffin through her ex-boyfriend. Sometime in May 2008, Griffin and another man had come to her apartment unexpectedly around 11:00 or 11:30 at night asking to use her phone because their car had broken down. 4RP 163-64. Griffin made a call, and someone came to pick them up. 4RP 167. She did not know the man with Griffin and had never seen him before or since. 4RP 168.

A surveillance video from the convenience store near Griffin's apartment showed Griffin, Alexander, and Perkins leaving the store parking lot. The time stamp on the video was 11:59 p.m. on May 16. 3RP 132. When the defense investigator examined the surveillance system some months later, however, the timing on the camera was 12 minutes fast. 7RP 550.

The defense presented testimony from friends who had seen or been with Perkins in Portland shortly after midnight on May 17, 2008.

7RP 537, 539, 571. One friend testified that he and his girlfriend had met Perkins at the WinCo parking lot in Vancouver around 12:15 and driven with him to a club in Portland. 7RP 540, 543. Another friend testified she saw Perkins outside that club between 12:30 and 1:00 a.m. 7RP 571, 576. In addition, Perkins's fiancé testified that she had talked to and texted Perkins while on her breaks at work on the evening of May 16 and 17, including her last break at 12:00 or 12:15. 7RP 559.

Perkins testified that when he was with Griffin and Alexander on May 16, he learned that they were planning a robbery, and he told them he wanted nothing to do with it. 7RP 590. Perkins made arrangements with a friend to pick him up at the WinCo parking lot around midnight, and he, Griffin, and Alexander left Griffin's apartment in Griffin's car. 7RP 594. Griffin stopped at the convenience store near his apartment, and then drove Perkins to WinCo and dropped him off. 7RP 594. His friend picked him up about five minutes later and drove him to a club in Portland. 7RP 594, 596.

The next afternoon, Alexander picked Perkins up in Portland. He told Perkins about the attempted robbery and shooting and said he was afraid he was going to be arrested. 7RP 599. Alexander came up with a story that he, Perkins, and Griffin had been together, and he said that Perkins owed him. 7RP 600. Perkins knew that Alexander was a gang

member, and he was intimidated by him. 7RP 601. When Perkins was interrogated by Wilken, he felt the only choices he had were to either lie and say he had been with Alexander and Griffin, or tell the truth and risk the lives of his family. 7RP 602. He chose to lie, and nothing he said in his statements to Wilken was true. 7RP 623.

a. Evidence regarding Wilken's suspension was not disclosed to the defense.

At the time of trial, Wilken was on administrative suspension while allegations of sexual harassment were investigated. 3RP 18. Prior to trial, the State moved to exclude any reference to Wilken's suspension. The prosecutor pointed out that the issue had come up in Griffin's trial, and the court resolved the matter by reviewing, in camera, documents provided by the chief prosecutor. The court ruled the documents irrelevant in Griffin's case and filed them under seal. The State asked the court to enter the same ruling in Perkins's case. 3RP 18.

Defense counsel explained that the details of Wilken's suspension had not been disclosed to the defense. He argued, however, that because Wilken was testifying as a law enforcement professional, his suspension was relevant, and the jury should be provided with the details. 3RP 18-19.

The court indicated that it had reviewed the materials presented at Griffin's trial. It noted that Wilken had testified as a fact witness at that

trial, not as an expert on police procedure, and therefore his credibility could not be impeached with prior misconduct. Thus, the court was satisfied that even if evidence of Wilken's suspension was disclosed to the defense, that evidence would not be admissible to impeach him. It stood by the ruling entered in Griffin's case, excluding evidence of Wilken's suspension and the reasons for it. 3RP 20-22.

After Perkins was convicted he filed a motion for arrest of judgment or a new trial, again seeking disclosure of the facts relating to Wilken's suspension. CP 100-116. By that time, a civil suit had been filed against Wilken, Wilken had resigned, and an article had been published about the lawsuit in a local newspaper. CP 108-16.

The civil suit alleged various acts of sexual harassment by Wilken against a corrections officer with whom he worked, including placing a pair of women's underwear on her head during the execution of a search warrant. CP 109. The suit also alleged that Wilken grabbed the claimant's throat on one occasion, and on another occasion Wilken handcuffed her to a chair and pushed her into an unlit men's locker room, where he left her. CP 109-110. In addition, the lawsuit alleged that several officers involved in the investigation of Perkins's case participated in or were aware of and disregarded Wilken's offending conduct. CP 109-10. The newspaper article, published July 25, 2009, reported that Wilken

had resigned from the Vancouver Police Department effective September 1. CP 113.

Defense counsel argued that the defense was entitled to the undisclosed materials regarding Wilken's suspension. These materials were necessary so that a thorough investigation could be conducted, which would likely lead to evidence that would discredit the police investigation in Perkins's case. 9RP 5-6.

The court denied the defense motion. The court noted that the allegations in the undisclosed documents were largely consistent with the allegations reported in the press. 9RP 8. Although the court found Wilken's conduct inappropriate, it did not believe that conduct would be admissible to impeach him. 9RP 9. The court noted that none of the allegations involved Perkins's investigation, interrogation, or trial. While there were allegations that Wilken engaged in boorish behavior during the execution of search warrants, that behavior was largely directed at a co-worker and had nothing to do with the technique he used to interrogate suspects. 9RP 10.

b. The court excluded evidence of Griffin's conviction.

The defense theory was that only Alexander and Griffin were involved in the charged offenses. 3RP 13; 7RP 508; 8RP 722. Atkinson

had testified he saw only two people, and Alexander was one of them. He was positive Alexander was at his door that night, with no doubt in his mind. 3RP 65. Moreover, Atkinson testified that he did not recognize Perkins and had never seen him before. 3RP 54. Counsel argued that the physical evidence supported the defense theory, as the jacket Atkinson described Alexander as wearing was found in Alexander's house, and the glove the police found bore Griffin's DNA. 8RP 721.

Also in support of the defense theory, counsel sought to present evidence that Griffin was convicted of these offenses. 3RP 12; 7RP 508. The defense argued that Griffin's conviction was admissible as other suspect evidence, in that it pointed to someone other than Perkins as the perpetrator. 3RP 13. When the issue was raised prior to trial the court indicated it believed Griffin's conviction was irrelevant. The court stated that since Alexander had claimed to be an accomplice away from the scene, Griffin's conviction did not resolve the question of Perkins's involvement. 3RP 15-16.

Defense counsel raised the issue again at the close of the State's case, offering a certified copy of Griffin's conviction[2]. 7RP 508. Counsel argued that Perkins had a constitutional right to present evidence that someone else might have committed the crime. Since there was evidence

[2] Certified copies of court documents are admissible under RCW 5.44.040.

that two people committed the crime, and Alexander was identified as one of them, evidence of Griffin's conviction would tend to establish that Griffin, rather than Perkins, was the other perpetrator. 7RP 508.

The court responded that there was already evidence that Griffin was one of the people involved in the crime, but evidence of his conviction was not admissible because it did not absolve Perkins. 7RP 509-10. The court noted that from the evidence there was a question as to whether Alexander was at Atkinson's door or in the car. It felt that in order to admit evidence of Griffin's conviction, it would have to make a finding that Alexander was at the door. 7RP 510. The court excluded evidence of Griffin's conviction, finding it irrelevant to the question of Perkins's guilt. 7RP 511.

c. Defense counsel failed to request an instruction regarding the use of Perkins's out-of-court statements.

The court ruled prior to trial that Perkins's statements during his interview with Wilken were admissible. CP 7-14. The defense maintained its objection to admission of these statements, presenting evidence at trial that they were involuntary. In cross examining the officers involved in the interview, counsel focused on Wilken's interrogation techniques, particularly his use of profanities, attempting to demonstrate that Perkins's statements were coerced by perceived threats.

4RP 224; 5RP 340-43, 380-92. Counsel also established that video recording was available for suspect interviews and had been used in Alexander's interview, but Perkins's interview was not video taped. 4RP 194-95.

In addition, Perkins testified that Wilken's demeanor changed as the interview progressed, and he became more demanding. 7RP 624. Perkins felt "pulverized" by the police by the time he gave his final statement. 7RP 624-25. Perkins testified that he was intimidated by Wilken's demeanor and found his body language threatening. 7RP 626-27.

Finally, counsel pointed out in closing that Perkins gave three different versions of events in his statements. He argued that after a long time of being browbeaten, Perkins finally gave in and said that he and Griffin committed the offenses. 8RP 722. Counsel did not request, however, and the court did not give an instruction informing the jury that it could consider the circumstances surrounding Perkins's statements when deciding the weight and credibility to afford them. See CP 62-93.

d. The court declined to treat Perkins's offenses as the same criminal conduct.

At sentencing the State noted that in Griffin's case, the court had declined to find that the attempted burglary and assault encompassed the

same criminal conduct because the attempted burglary was complete when Atkinson attempted to flee, and then he was shot in the back. The State asked the court to make the same ruling in this case. 9RP 15. Defense counsel asked the court to find that all of Perkins's offenses encompassed the same criminal conduct, however. 9RP 19.

The court ruled that it would adhere to its previous ruling that the assault and attempted burglary were separate conduct. It noted that Atkinson had broken away from two people at his door who could have let him go but instead shot him. The shooting was a separate act, unnecessary to complete the attempted burglary, and therefore those offenses did not encompass the same criminal conduct. 9RP 23. The court then found that the attempted burglary and attempted robbery appeared to be the same criminal conduct, but it applied the anti-merger statute[3] to count them separately. 9RP 23. The court did not specifically address whether the attempted robbery and assault encompassed the same criminal conduct. It simply counted each of the current offenses separately when calculating Perkins's offender score. 9RP 23.

[3] RCW 9A.52.050.

C. ARGUMENT

1. THE STATE'S FAILURE TO DISCLOSE MATERIAL EVIDENCE REGARDING OFFICER WILKEN'S SUSPENSION DENIED PERKINS A FAIR TRIAL.

The State has an obligation to disclose to the defense in a criminal prosecution all evidence in its possession which is favorable to the accused. The United States Supreme Court has held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Since Brady, the Court has held that a prosecutor's duty to reveal such evidence does not depend on a request by the defense, and the duty encompasses impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 683, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). The appellate court reviews alleged Brady violations *de novo*. United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993).

Evidence is material, and must be disclosed, if there is a reasonable probability that had it been disclosed to the defense, it would have affected the outcome of the case. Kyles v. Whitley, 514 U.S. 419, 433, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995); Bagley, 473 U.S. at 682. A "reasonable probability" does not require a showing by a preponderance that the

outcome would have been different. Kyles, 514 U.S. at 434. Rather, a reasonable probability is established when the State's suppression of evidence undermines confidence in the outcome of the case. Bagley, 473 U.S. at 678.

Here, the trial court granted the State's motion to exclude evidence that Officer Wilken, the lead investigator in this case, had been suspended based on allegations of sexual harassment, excusing the State from disclosing information about the suspension. 3RP 22. In making its decision, the court reviewed, in camera, undisclosed documents regarding the investigation into Wilken's wrongdoing. 3RP 20. The court ruled that the evidence was not material to the defense, and thus did not need to be disclosed, because it dealt with prior acts of misconduct by Wilken, unrelated to investigation of Perkins's case, which would be inadmissible to impeach his credibility. 3RP 20-21; 9RP 9-10.

Evidence need not be independently admissible to be material, however. Evidence is material when, if disclosed and used effectively, it may make the difference between conviction and acquittal. Carriger v. Stewart, 132 F.3d 463, 481 (9th Cir. 1997), cert. denied, 523 U.S. 1133 (1998). When the undisclosed evidence could have been used by the defense to uncover additional leads, develop additional defense theories, and discredit the police investigation, the State's failure to disclose

seriously undermines the jury's verdict. Bowen v. Maynard, 799 F.2d 593, 612-13 (10th Cir. 1986), cert. denied, 79 U.S. 962 (1986).

Disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable. A key element of the defense was the incompetent nature of the investigation, particularly Wilken's readiness to buy into Alexander's final version of events, despite the fact that it contradicted Atkinson's positive identification of Alexander as one of the two perpetrators who came to his door. It is a legitimate defense tactic to discredit the caliber of the investigation or the decision to charge the defendant, and undisclosed evidence must be evaluated in light of that purpose. Bowen, 799 F.2d at 613; Lindsey v. King, 769 F.2d 1034, 1042 (5th cir. 1985) (conviction reversed because State withheld evidence which "carried within it the potential . . . for . . . discrediting . . . the police methods employed in assembling the case").

Evidence of Wilken's wildly inappropriate and unprofessional conduct in the course of other investigations, as well as evidence that other officers involved in this case knew of or participated in Wilken's misconduct, would have provided the defense with opportunities to investigate and attack the thoroughness of the investigation in this case. See Kyles, 514 U.S. at 445 (undisclosed evidence would have provided opportunities to attack thoroughness and good faith of investigation).

Moreover, with full knowledge of the details of Wilken's suspension, the defense would have been able to attack Wilken's credibility, showing he had a motive to cover up any wrongdoing in this case to avoid adding fuel to the fire while he was suspended and being investigated.

When the State has failed to disclose exculpatory evidence, the due process violation may be remedied by a new trial in which the previously undisclosed information is available to the defense. See Kyles, 514 U.S. at 421. Because the documents pertaining to Wilken's suspension have never been disclosed to the defense, appellant is not able to point to specific information which would have led to exculpatory evidence in this case. The documents are under seal with this Court, however, and should be reviewed in resolving this issue. Given the nature of the defense in this case, there is a reasonable probability that the details of Wilken's suspension would have led to a different result had they been disclosed. Thus, suppression of that material undermines confidence in the jury's verdict, and Perkins is entitled to a new trial with disclosure of the material evidence.

2. EXCLUSION OF GRIFFIN'S CONVICTION DENIED PERKINS HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Both the state and federal constitutions guarantee a criminal defendant "a meaningful opportunity to present a complete defense."

California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170

(2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).

In this case, the defense offered evidence that Griffin was convicted of committing the crimes Perkins was charged with. The defense theory was that because Atkinson said he saw only two people, and he positively identified Alexander as one of them, proof that Griffin was convicted of the crimes tended to establish that Perkins could not have been one of the two people who attempted to rob and assaulted Atkinson. Because the fact of Griffin's conviction satisfied the foundational requirement of minimal logical relevancy, it could be excluded only to further a compelling state interest. See Hudlow, 99 Wn.2d at 15-16.

The State has a legitimate interest in excluding unfairly prejudicial, confusing, misleading, or cumulative evidence, even if relevant. See ER 403; Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Thus, before a defendant may present evidence that some other suspect committed the charged crime, "there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992) (quoting State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). Such other suspect

evidence may be excluded where it does not sufficiently connect the other person to the crime, as where the evidence is speculative or remote. See Holmes. 547 U.S. at 327.

Here, there can be no doubt that Griffin's conviction of attempted burglary and assault establishes a nexus between Griffin and the crime which is neither speculative nor remote. The evidence thus met the foundational requirement for admission as other suspect evidence. Nonetheless, the court refused to allow the defense to inform the jury of Griffin's conviction, ruling that fact was not even relevant. 7RP 511-12.

The court's reasoning was that, since there was a dispute as to whether Alexander participated in the crime by going to Atkinson's door or by waiting in the car, it would have to make a factual finding resolving that dispute in order to admit evidence of Griffin's conviction. 7RP 509-10. The court was simply wrong. It is not the court's place to assess the weight of the evidence, and admitting the proffered defense evidence would not have required the court to do so. To be sure, Griffin's conviction only absolved Perkins of the charges if the jury believed Atkinson's testimony that Alexander was one of the two people at the door, he had never seen Perkins before, and he saw only two people run from the scene. While it was possible for the jury to instead believe Alexander's testimony that Perkins and Griffin went to the door while he

waited in the car, admission of Griffin's conviction did not require the court to make that determination for the jury. The proper weight to give the proffered evidence was for the jury to decide. With that evidence, both the State and the defense would have been free to argue their theories of the case. See Maupin, 128 Wn.2d at 930.

In effect, the court ruled that because the State would still be able to argue that Perkins was guilty, the other suspect evidence was inadmissible. That is not the standard for admissibility. "Just because the prosecution's evidence, *if credited,* would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." Holmes, 547 U.S. at 330 (emphasis in original) (holding state rule precluding other suspect evidence where prosecution presented strong forensic evidence violated defendant's constitutional rights). Evidence of Griffin's conviction established Griffin's connection to the charged crimes which, together with Atkinson's testimony, tended to establish that Perkins was not involved. The court's exclusion of that evidence denied Perkins "a meaningful opportunity to present a complete defense." See Holmes, 547 U.S. at 330.

This constitutional error is presumed prejudicial unless the State proves beyond a reasonable doubt that the error was harmless. Maupin,

128 Wn.2d at 928-29. The State cannot meet its burden here. The State's case was not overwhelming. Atkinson testified he was absolutely positive Alexander was at his door that night. He had known Alexander for some time and recognized his eyes, his voice, and his distinctive tattoo. Atkinson also testified that he had seen only two people, and he had never seen Perkins. The State presented no evidence discrediting Atkinson, and the physical evidence supported his testimony that he had seen Alexander. While Perkins admitted involvement during the police interrogation, Perkins testified that he made the statement out of fear and intimidation from both Alexander and Wilken. Evidence that Griffin was convicted would have leant weight to the defense argument that only Alexander and Griffin were involved in the crime. The State cannot prove beyond a reasonable doubt that exclusion of that relevant evidence was harmless, and Perkins's convictions must be reversed.

3. COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION REGARDING THE CIRCUMSTANCES OF PERKINS'S STATEMENTS TO THE POLICE DENIED PERKINS EFFECTIVE REPRESENTATION.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. See State v. Thomas, 109 Wn.2d at 226 (counsel ineffective in failing to propose instruction that would allow counsel to argue defendant's intoxication

negated mens rea). In this case, despite the clear defense objective in establishing that Perkins's statements were the result of a coercive interrogation, counsel failed to propose an instruction informing the jury, "You may give such weight and credibility to any alleged confession or admission of the defendant as you see fit, taking into consideration the surrounding circumstances." WPIC 6.41.

When the trial court admits a defendant's post-arrest statements over objection that the statements are involuntary, Criminal Rule 3.5(d)(4) directs that the "jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit." This instruction is part of the confession procedure mandated by Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). State v. Smith, 36 Wn.App. 133, 141, 672 P.2d 759 (1983), review denied, 100 Wn.2d 1040 (1984). Consequently, WPIC 6.41 is normally used when the defendant challenges the voluntariness of out of court statements.

The trial court is not required sua sponte to instruct the jury regarding the voluntariness of a defendant's statements to the police, however. State v. Taplin, 66 Wn.2d 687, 690-91, 404 P.2d 469 (1965). The instruction is a procedural provision, rather than an absolute constitutional right, and the defense must request that it be given. Taplin,

66 Wn.2d at 691. When the instruction is requested, the court must give it, so long as the voluntariness issue is raised at trial. Smith, 36 Wn. App. at 141.

Here, the voluntariness of Perkins's statements was raised at trial and was indeed a crucial aspect of the defense. The defense presented evidence that Wilken used profanities, threats, and other coercive practices during the interrogation. 4RP 195, 225; 5RP 340-43, 380-92. The defense established that the interview could have been video taped but was not, suggesting an opportunity for physical intimidation. 4RP 195. And Perkins testified that he found Wilken's body language and demeanor threatening. 7RP 626-27. Given this evidence, the defense was entitled to have the jury instructed that it could consider the circumstances surrounding Perkins's statements when assessing their weight and credibility. See Smith, 36 Wn. App. at 141; CrR 3.5(d)(4). Because counsel failed to request the instruction, however, it was not given. See CP 62-93; 6RP 498; 8RP 670.

Counsel's error cannot be excused as trial strategy. While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, "tactical" or "strategic" decisions by defense counsel must still be

reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").

Although defense counsel may in some cases strategically decline to request a particular instruction to avoid highlighting harmful evidence, such a choice here would be unreasonable. The State relied heavily on Perkins's recorded statements, and the defense spent a significant amount of time establishing the conditions under which those statements were made. There was no legitimate reason for failing to request that the jury be informed it could consider those circumstances in evaluating Perkins's statements. It was crucial to the defense that the jury find Perkins's statements unreliable due to the coercive atmosphere created by Wilken's questionable interrogation techniques. Thus counsel's failure to seek an instruction suggests inattention rather than sound professional judgment. See Thomas, 109 Wn.2d at 227.

Counsel's deficient performance renders the trial outcome unreliable. Without the instruction, the procedural protections necessary to safeguard Perkins's constitutional right to be free from compelled self-incrimination were missing. The jury did not receive adequate guidance in evaluating Perkins's statements, and it is reasonably likely that counsel's unprofessional error affected the jury's verdict. Perkins received

ineffective assistance of counsel, and his convictions should therefore be reversed.

4. THE COURT'S FAILURE TO RECOGNIZE THAT THE ATTEMPTED ROBBERY AND ASSAULT ENCOMPASS THE SAME CRIMINAL CONDUCT REQUIRES REMAND FOR RESENTENCING.

Under the Sentencing Reform Act, multiple current offenses are generally counted separately in determining the defendant's offender score. If the sentencing court finds that two or more offenses encompass the same criminal conduct, however, those offenses are counted as a single crime. RCW 9.94A.589(1)(a). Crimes encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. While the sentencing court has discretion to determine whether offenses encompass the same criminal conduct, an appellate court must reverse a decision that constitutes an abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Defense counsel argued at sentencing that the court should find that all of Perkins's current offenses encompassed the same criminal conduct. 9RP 19. The court found that the attempted burglary and attempted robbery encompassed the same criminal conduct but applied the anti-merger statute to count them separately. 9RP 23. It found that the

attempted burglary and assault were not the same conduct, because the assault was a separate act not necessary to complete the attempted burglary. 9RP 23. The court did not specifically address the attempted robbery and assault, perhaps concluding that the same reasoning applied. If the court acted arbitrarily, it abused its discretion. If it determined that the attempted robbery and assault did not satisfy the definition of same criminal conduct, it misapplied the law. "Either error requires reversal and remand for resentencing." Haddock, 141 Wn.2d at 110.

There is no question that the attempted robbery and assault occurred at the same time and place and involved the same victim. These two offenses also involved the same objective criminal intent.

The relevant inquiry for the intent prong is the extent to which the criminal intent, when viewed objectively, changed from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The court must examine the statutes underlying the charged offenses to determine whether the required intents are the same or different. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). "Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan." Wilson, 136 Wn. App. at 613 (citing State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990)).

First degree assault as charged in this case required proof that Perkins or an accomplice assaulted Atkinson "with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]" RCW 9A.36.011(1)(a); CP 16. The attempted robbery charge required proof that Perkins or an accomplice attempted to take personal property from Atkinson's person or in Atkinson's presence "by the use or threatened use of immediate force, violence, or fear of injury... used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking," while armed with a deadly weapon. RCW 9A.56.190; RCW 9A.56.200(1)(a)(i); CP 15.

The assault with a deadly weapon constituted the use of force while armed with a deadly weapon necessary to establish the attempted robbery. Offenses are to be treated as a single crime when "one criminal event is 'intimately related or connected to' the other." State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (quoting State v. Dunaway, 109 Wn.2d 207, 214, 743 P.2d 1237 (1987)), review denied, 114 Wn.2d 1030 (1990). Such is the case here. The evidence showed that the two masked gunmen attempted to push into Atkinson's apartment in order to rob him. When Atkinson started to run away, one of the men warned him they would shoot and then shot him. The entire incident lasted a total of ten seconds, and the assault was committed in furtherance of the attempt to

rob Atkinson. 3RP 72. While the court reasoned that the men could have just let Atkinson leave, 9RP 22-23, the fact is they were attempting to rob him, which requires his presence. The two crimes were intimately related, and the assault was incidental to, not separate from, the attempted robbery. Compare with State v. Torngren, 147 Wn. App. 556, 565, 196 P.3d 742 (2008) (Where defendant assaulted victim for disrespecting gang member and fled, then gang member who did not flee robbed victim, objective purpose of robbery independent of purpose of assault).

Because the assault was committed in furtherance of the attempted robbery and not for a separate and distinct purpose, the objective intent did not change from one offense to the next. The trial court's failure to count the assault and attempted robbery as the same criminal conduct requires remand for resentencing.

D. CONCLUSION

The State's failure to disclose material evidence regarding Wilken's suspension denied Perkins a fair trial, exclusion of Griffin's conviction violated Perkins's constitutional right to present a meaningful defense, and counsel's failure to request an instruction regarding the use of Perkins's statements constitutes ineffective assistance of counsel. For all these reasons, Perkins's convictions should be reversed and his case remanded for a new trial. In addition, the court's failure to count the

attempted robbery and assault as the same criminal conduct requires remand for resentencing.

DATED this 13th day of March, 2010.

Respectfully submitted,

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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Christopher Perkins,* Cause No. 39742-1-II directed to:

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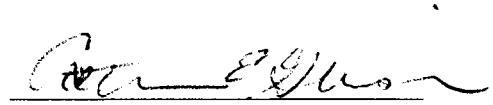
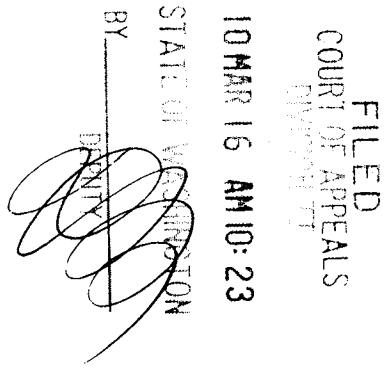
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
March 15, 2010