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COUNTERSTATEMENT OF FACTS

Jay Calderon, the appellant, was charged with the crimes of Harassment by threat to kill and Assault in the Fourth Degree arising out of a physical altercation that occurred between him and his sister.

Prior to the Pretrial Hearing, the appellant wrote a letter to Judge Godfrey asking for a new attorney. He cited as justification a lack of “help, co-operation or professional assistance.” At the pretrial the appellant stated that he “would like to get rid [of his] attorney. RP (09/28/09) 1. The court asked appellant’s attorney, Mr. Badeau, if he was ready for trial. Mr. Badeau explained that “we were heading that direction, and Mr. Calderon informed me he wanted a different attorney.” He then clarified “with that said, um, I suppose communications have broken down somewhat.” *Id.*

After this, the judge spoke with the appellant about the matter. The appellant claimed that he would hire his own attorney, and informed the judge that he had the ability, through family, of obtaining private counsel. The court concluded that it would not appoint new counsel if the appellant could hire his own.

At trial, Jennifer Calderon testified that she and her brother, Jay Calderon, live in their mother's home on South Bank Road in Grays Harbor County, Washington. RP (10/15/09) 5. The two had a history of fighting, and the appellant had injured her in the past. RP at 6. The last time she saw him there was an altercation between the appellant and herself.

The appellant was asking her for money and she refused him. He started to become aggressive and she believed that he might be on drugs. RP at 6. In the past when the appellant was on drugs she observed him to be "very agitated, aggressive, . . . and violent." RP at 7. He had previously attempted to injure her, but she was always able to escape.

After asking Ms. Calderon for money a number of times and being refused, the defendant threatened to hurt her if she did not give him money. RP at 8. He then pulled out a knife and threw it on the ground, threatening to puncture her tires. Ms. Calderon still refused to give him the money he requested. RP at 8.

Later, Ms. Calderon was folding clothes when the defendant grabbed her around the neck and put his knife to her throat. He stated that he was going to "f'ing kill you if you don't give me money. You know what I can do with this knife, right? You know I can kill you with it." RP at 9. Ms. Calderon testified that she believed that she might be stabbed.
Id.

The mother of the appellant also testified at trial. She confirmed that the defendant did have his arm around Ms. Calderon's neck and that he had a knife in his hand. RP at 23.

Before the sheriff's deputies were able to respond to the residence the appellant was apprehended by tribal police. RP at 27, 28. When contacted the defendant blurted out: "I'm going to kill that bitch as soon as I get out of jail. I am going to gut and skin her ass. RP at 28.

**FAILURE OF THE COURT TO PROPERLY
INSTRUCT THE JURY WAS HARMLESS ERROR.**

The appellant first argues that the jury instructions were insufficient to maintain a conviction for the crime of Harassment by threat to kill. *State v. Mills*, 154 Wn2d. 1, 109 P.3d 415 (2005), is on point but can be distinguished. *Mills* involved a telephonic threat where no physical assault occurred. In this case a knife was put to the throat of the victim and a direct and immediate threat was made that she would be killed if she did not comply with the appellant's demand.

Morning Mills was involved with a man who cheated on her with a woman named Jonikka Lawrence. When Mills found out about this she retaliated with malicious mischief and threatening phone calls. *Id.* at 5. Among other things Mills made the following statement during a phone call to Lawrence: [b]itch, you fuckin' bitch. I'm tired of playin' around with you. Watch, I'm going to get a year tops when I murder your ass. I stabbed

someone for messing with Bill, I got 33 days. Now watch what I'm going to get for murder.” *Id.*

The jury instruction, as to the threat to kill, given in *Mills* is similar to the instruction given in the case at bar. Any difference is inconsequential to this analysis. The Court of Appeal held that the instruction was improper, because the jury was not instructed that Lawrence must have been placed in reasonable fear the threat to kill would be carried out apposed to a general threat to injure.

The instruction a issue in this case has the same defect, but that does not end the analysis. A constitutionally faulty jury instruction that omits an element of the offense is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) Constitutional error is harmless when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In *Mills*, the threat was made by telephone. Such a threat can be idle and only meant to vent anger. Because of this truth, the Harassment statue in Washington requires a finding be the jury that the defendant placed the victim in reasonable fear that the threat would be carried out.

In this case the evidence is overwhelming that the defendant by words and actions placed the victim in reasonable fear that he may have killed her. He wrapped his arm around her neck, placed a knife to her

throat and threatened to kill her with the knife. The outcome of this case would not be any different if the proper instruction was given.

**THE COURT DID NOT ERR BY NOT APPOINTING
NEW COUNSEL AFTER THE APPELLANT
EXPLAINED THAT HE INTENDED TO HIRE NEW
COUNSEL.**

The appellant cites *State v. Lopez*, 79 Wn App. 755, 904 P.2d 1179 (1995) to support his argument that the trial court was obligated to inquire into basis for the request of new appointed counsel before denying that request. Antonio Lopez was charged with two counts of unlawful possession of cocaine with intent to deliver and one count of delivery of cocaine to a person under age 18 (Mr. Hernandez) in a public park. Prior to trial, Lopez asked for a new attorney, and was summarily denied. The Court of Appeals stated the trial court was required to inquire into the nature of the appellant's complaint before denying this request. *Id.* at 767. The Court of Appeals held that "by failing to inform itself of the facts on which to exercise its discretion, the court abused its discretion." *Id.*

Ultimately the court found the error harmless. Such a denial of an accused request for new counsel is harmful only if counsel's performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel. *Id.* Representation was unconstitutionally ineffective, when (1) considering all the circumstances, the attorney's performance was deficient, i.e., that it fell below an objective standard of

reasonableness; and (2) when the defendant was prejudiced, i.e., there is a reasonable probability that the result would have been different but for the attorney's deficient performance.

The Court of Appeals believed that overturning a conviction in the case eliminated any prejudice in the case, therefore the error was harmless.

In the case at bar, the defendant did not ask the trial court, when given the opportunity to speak, for the appointment of new counsel. The defendant informed the court that he had the means and intended to hire his own attorney. Therefore, *Lopez*, is not on point. The court refused to appoint new counsel because the defendant had the ability to hire his own attorney.

THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS JURY TRIAL.

The Washington State Supreme Court has adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable

standard, but also that his attorney's failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversarial process that renders the result unreliable. *Id.* at 687.

The appellant first claims that his counsel was inadequate because he failed to ask for an instruction pertaining to voluntarily intoxication and argue this defense. The appellant relies on *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003) and *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816

(1987). These cases are distinguishable, as there was evidence in *Tilton* and *Thomas* that the defendants had “blacked out” from intoxication. *Tilton*, at 779, *Thomas*, at 225. Moreover, in *Tilton* an expert testified at sentencing that the defendant had a “history of blackouts from marijuana.” *Id.* at 780. No such evidence was presented in this case, in fact, no evidence was presented in this case that the appellant was extremely intoxicated. There is no indication that he was displaying unmotivated behavior or was operating without consciousness.

Officer Robert Strader testified at trial that, from a distance it was hard to tell if the appellant was intoxicated. RP at 17. Appellant’s mother did not mention his intoxication during her testimony. *Id.* at 22. A written statement signed by the appellant was offered to the jury. In the statement the appellant recounted his version of events and did not mention his intoxication. He made no claim that he could not remember the events.

The appellant’s defense was that he did not threaten his sister. Given these facts it would be unwise to argue in the alternative a diminished capacity defense. Appellant suggests that trial counsel should have argued that his client statement to the police was false and he was in fact so intoxicated that he was not in control of his actions.

It also must be remembered that the defendant did not testify. It would be unprofessional of his attorney to do anything to cast a light on this fact. He is the only person that knows how intoxicated he was at the time of the incident. Given that there seems to be a conflict between the

his statement presented and the appellant's supposed extreme intoxication, the jury may begin to wonder why the appellant did not take the stand to explain the situation. A statement of the appellant was before the jury; it explained his theory of the case. Appellant counsel criticizes trial counsel for not arguing another theory of the case on the slimmest of evidence and where the defendant did not testify. What appellant counsel suggests would have been extremely inappropriate in this case..

Appellant further claims that trial counsel failed to object to testimony at trial. It has been stated that "[t]he decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763; 770 P.2d 662 (1989). But, only in the most egregious circumstances when the testimony is central to the State's case, will the failure to object to testimony justify reversal. *Id.*

The first statements, to which appellant now objects, pertained to the appellants drug use. These are the statements that appellant counsel, previously, argued form the basis for a diminished capacity defense.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with that character, but the evidence may be admissible for other purposes. ER 404(b). In determining admissibility of such evidence, the trial court must determine that the evidence meets two distinct criteria: 1) it is logically relevant to a material issue before the

jury, and 2) the probative value of the evidence outweighs its prejudicial effect. *State v. Ragin*, 94 Wash.App 407, 411, 972 P.2d 519 (1999).

Prior bad acts are admissible to prove “reasonable fear that the threat will be carried out,” in case that charge harassment. *Id.* The victim’s prior experience with the appellant form the basis of her apprehension that his threat may be carried out. This is particularly true of how he acted when he was previously under the influence of drugs. A limiting instruct would have been proper form, but the failure to object to the lack of limiting instruction is not an egregious failure of counsel.

Finally, the appellant objects to testimony pertaining to statements he made when he was apprehended, shortly after the incident. Particularly, the statement that he attend to threaten to kill and skin his sister. This is part of the *res gestae* of the crime. *Res gestae* evidence is evidence that provides the jury with a more complete picture of events surrounding the crime. *State v. Elmore*, 139 Wash.2d 250, 286, 985 P.2d 289 (1999). The appellant’s defense was that he was simply kidding around with his sister. This clearly shows that he was not in a playful mood toward his sister. In the short time it took to find and arrest him his homicidal thought toward his sister had not subsided. This is highly probative evidence.

CONCLUSION

The State ask this Court to find any error in this case to be harmless. But, if the Court finds it necessary to overturn the felony

conviction due the error in the jury instruction, the state ask that the Court to affirm the validity of the other verdicts and remand for entry of judgment on misdemeanor Harassment and Assault in the Fourth degree.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Senior Deputy Prosecuting Attorney
WSBA #33270

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COURT OF APPEALS

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STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

No.: 39945-8-II

v.

DECLARATION OF MAILING

JAY CALDERON,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 22nd day of June, 2010, I mailed a copy of the Brief of Respondent to Jodi R. Backlund; Manek R. Mistry; Attorneys at Law; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189, and Jay Calderon; 6 White Oak Lane; Oakville, WA 98568 dep by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 22nd day of June, 2010, at Montesano, Washington.

Barbara Chapman