

FILED
CRIMINAL DIVISION
JUL 14 2011 10:32
STATE OF WASHINGTON
BY ca

NO. 40256-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK DOCKERY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before the Honorable Gordon Godfrey, Judge (Suppression Hearing)
Before the Honorable F. Mark McCauley, Judge (Jury Trial)

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural facts:</u>	2
2. <u>Testimony at trial:</u>	3
D. ARGUMENT	7
1. <u>EVIDENCE REGARDING MR. DOCKERY'S FAILURE TO REMAIN AT THE SCENE UNTIL POLICE ARRIVED CONSTITUTED AN IMPERMISSIBLE COMMENT ON HIS FIFTH AMENDMENT PRIVILEGE TO PRE-ARREST SILENCE</u>	7
2. <u>THE TRIAL COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION</u>	12
E. CONCLUSION.....	16

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	14
<i>State v. Bacotgarcia</i> , 59 Wn. App. 815, 801 P.2d 993 (1990)	13
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	8
<i>State v. Claflin</i> , 38 Wn. App. 847, 690 P.2d 1186 (1984), <i>review denied</i> , 103 Wn.2d 1014 (1985).....	8
<i>State v. Donald</i> , 68 Wn. App. 543, 844 P.2d 447 (1993)	13
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	9, 10, 11
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)	13
<i>State v. Fricks</i> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	10
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986)	11
<i>State v. Gutierrez</i> , 50 Wn. App. 683, 749 P.2d 213 (1988).....	9
<i>State v. Hess</i> , 86 Wn.2d 51, 541 P.2d 1222 (1975)	14
<i>State v. Johnson</i> , 80 Wn.App. 337, 908 P.2d 900 (1996).....	9
<i>State v. Jones</i> , 71 Wn. App. 798, 963 P.2d 85 (1993), <i>review denied</i> , 124 Wn.2d 1018 (1994).....	9
<i>State v. Keene</i> , 86 Wn. App. 589, 938 P.2d 839 (1997)	11
<i>State v. Knapp</i> , 148 Wn. App. 414, 199 P.3d 505 (2009).....	10
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	10
<i>State v. Romero</i> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	10
<i>State v. Russell</i> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 11292 (1995)	9
<i>State v. Rupe</i> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	8
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982)	12, 13
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	14

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Chapman v. California</i> , 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).....	10
<i>Doe v. United States</i> , 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).....	9
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).....	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9A.36.021(1)(a)	2

<u>EVIDENCE RULES</u>	<u>Page</u>
ER 404(b).....	1, 12, 13
RAP 2.5(a)(3).....	9

<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
Wash. Const. art. 1, § 9.....	1
Wash. Const. art. 1, § 22.....	8, 13
U. S. Const. Amend. V	1, 8
U. S. Const. Amend VI	8, 13
U. S. Const. Amend. XIV	8

<u>COURT RULE</u>	<u>Page</u>
CrR 3.5.....	2

A. ASSIGNMENTS OF ERROR

1. Appellant Patrick Dockery's Fifth Amendment and Article I, § 9, rights to remain silent prior to arrest were violated during the prosecutor's cross-examination and closing argument.

2. The prosecutor committed flagrant, prejudicial misconduct and violated Mr. Dockery's right to remain silent prior to arrest by suggesting that he left the scene of the incident to avoid talking to law enforcement.

3. The prosecution cannot meet its burden of proving that the testimony that Mr. Dockery left the scene of the incident without talking to police was harmless, because Mr. Dockery asserted self-defense, requiring the jury to evaluate his credibility.

4. The court erred in failing to give a limiting instruction for evidence that falls within the scope of ER 404(b).

5. Ineffective assistance of counsel violated Mr. Dockery's due process right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

At trial, the prosecutor cross-examined Mr. Dockery about his failure to remain at the scene of the incident and wait for the arrival of police. In initial closing argument, the prosecutor again used this as evidence of Mr. Dockery's guilt. Assignment of Error 1.

1. Does this cross-examination and argument amount to improper comments on Mr. Dockery's exercise of his state and federal rights to pre-arrest silence, requiring reversal? Assignment of Error 2.

2. Can the State show its cross-examination and argument regarding Mr. Dockery's failure to remain at the scene of the incident were constitutionally harmless given that that credibility was the crucial issue? Assignment of Error 3.

3. Did the court commit reversible error in failing to fulfill its obligation to give a limiting instruction for evidence of prior misconduct and bad acts, where such instruction was needed to prevent the jury from considering Mr. Dockery's prior misconduct and bad acts as evidence of his propensity to commit assault? Alternatively, was defense counsel ineffective in failing to ensure the court issued the instruction? Assignments of Error 4 and 5.

C. STATEMENT OF THE CASE

1. Procedural facts:

Appellant Patrick Dockery was charged by amended information filed in Grays Harbor County Superior Court with one count of second degree assault, contrary to RCW 9A.36.021(1)(a). Clerk's Papers [CP] 4.

Pursuant to CrR 3.5, Mr. Dockery moved to suppress statements

made to law enforcement on May 18, 2009. 1Report of Proceedings [RP] at 2-12.¹ Following a hearing on September 28, 2009, the Honorable Gordon Godfrey granted the suppression motion. 1RP at 12. Findings of Fact and Conclusions of Law were entered October 19, 2009. CP 5-7.

The matter was tried to a jury on January 14, 2010, the Honorable F. Mark McCauley presiding. The trial court instructed the jury on second degree assault, third degree assault, and fourth degree assault. CP 14, 15, 16, and 17. Neither exceptions nor objections were taken to the jury instructions. RP at 153. The jury returned a verdict of guilty to the inferior degree offense of third degree assault. CP 20, 21. Mr. Dockery was given a standard range sentence and timely notice of this appeal followed. CP 37-45, 49.

2. Testimony at trial:

Larry Morrison was driving a car eastbound on Main Street in Elma, Washington, at approximately 1:00 p.m. on May 18, 2009. 2RP at 23, 24. Near the high school he encountered a male skateboarding down the middle of the street. 2RP at 24. Mr. Morrison is a sixty-five year old veteran who uses a crutch to walk. He described himself as being disabled with a bad

¹ The record of proceedings is designated as follows: 1RP – Suppression Hearing, September 28, 2009; Sentencing Hearing, January 25, 2010; 2RP Jury Trial, January 14, 2010.

back and “a shot up leg.” 2RP at 23. From his car, Mr. Morrison yelled at the male to get out of the road. 2RP at 23, 24. He stated that the skateboarder threatened him and that he drove away and stopped his car a block away and waited for the skateboarder. 2RP at 25. The skateboarder approached and then stood in the street about twenty feet from Mr. Morrison, and threatened him and spit at him. 2RP at 25, 26. Mr. Morrison said that the male was “acting like he was going to hit me with the skateboard” 2RP at 25. Mr. Morrison testified that Mr. Dockery came across the street from the high school toward Mr. Morrison, and was also holding a skateboard like a baseball bat. 2RP at 26, 27, 36. Mr. Morrison stated that he pushed Mr. Dockery back with his crutch. 2RP at 38. He stated that Mr. Dockery swung the skateboard, hitting him with it and knocking him down. 2RP at 27, 38, 39. When he was on the ground, he stated that Mr. Dockery hit him the ribs, and then picked up his crutch and started hitting him with it. 2RP at 27, 39. Mr. Morrison stated that they said they were only seventeen and that “you can’t do anything to us.” 2RP at 28.

Elma Police Chief Jeff Troumbley stated that when he arrived at the scene, he noted that Mr. Morrison’s cane was bent, his wrist watch was broken, that he had an abrasion to both forearms, and a welt about four inches in length on his back. 2RP at 13.

Mr. Morrison was examined by Dr. Mitchell Cohen the following day, who testified that Mr. Morrison had a large bruise on his thigh, bruising around his ribs, bruising on his arm, and two broken ribs. 2RP at 82, 83.

Brenda Krausse, an Elma School District employee, stated that on May 18 Mr. Dockery entered the school and asked a teacher's assistant if a student had left keys for him. 2RP at 48. She heard this and walked around the corner and said that no keys were left for him and that he then became "a little argumentative" and asked her to get the student. 2RP at 48. She testified that she refused to do so. 2RP at 48. She stated that he became angry that she would not get the student and stated that "his body language was very aggressive" 2RP at 49. She stated that Mr. Dockery then left the school through front door and "kicked the front door open" as he left. 2RP at 50.

Mr. Dockery testified that he was skateboarding with two other males on May 18, and that one of them, who was skateboarding in the street, and that Mr. Morrison started yelling at them. 2RP at 139. He stated that Mr. Morrison did a u-turn and then got out of his car and was "calling us over there." 2RP at 140. He stated that Mr. Morrison was not holding a cane in his hand. 2RP at 140. He testified that they at first ignored him and that he then told him to get back into his car because "I heard him yelling at friend." 2RP at 140. He stated that his friend and Mr. Morrison were yelling at one

another, and that he left to go into the high school to get some keys. 2RP at 140, 141. Mr. Dockery testified that in the school, he spoke with Ms. Krausse and she would not give him the keys he requested. 2RP at 141. He stated that he was “not threatening or anything like that.” 2RP at 142.

He testified that after he left the high school his friend and Mr. Morrison were “still yelling at each” 2RP at 142. He stated that he skateboarded over, got off his skateboard and that Mr. Morrison looked “really, really upset and angry” and said “[’]Do you want to start shit, too? [’]” 2RP at 142. He stated that Mr. Morrison, who was holding a cane at that time, came approximately five steps toward him and hit him in the chest with his cane. 2RP at 143. Mr. Dockery stated that that he grabbed it to keep from falling. 2RP at 143, 144. He stated that Mr. Morrison then “went to swing and punch at” him, and that he grabbed the back of his head and pulled him close to him, and that Mr. Morrison tried to swing at him again and that Mr. Dockery “had his cane out of his hand at this time.” 2RP at 143. He stated that Mr. Morrison was still trying to swing at him so he hit him with the cane, and then dropped it on the ground. 2RP at 143. He stated that Mr. Morrison picked up his crutch and came at him with it, so he picked up his skateboard and “kind of threw it,” hitting him with it, and then he left. 2RP at 143. He stated that he felt threatened and scared by Mr. Morrison and that

defense, the prosecutor reminded the jury that the other witnesses “were told that the police were coming and they waited for the police to arrive” but that Mr. Dockery “even says that they weren’t informed that the police were coming and they just walked off.” 2RP at 158.

Prosecutors are required to refrain from engaging in conduct at trial that is likely “to produce a wrongful conviction.” *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985). The words of a prosecutor carry great weight with the jury, so that a prosecutor’s misconduct may deprive the defendant of his state and federal constitutional due process rights to a fair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); 5 Amend.; 6 Amend.; 14 Amend.; Art. I, § 22. When a prosecutor’s comments invite the jury to draw a negative inference from a defendant’s exercise of a constitutional right, those comments is constitutionally offensive misconduct because they “chill” the defendant’s free exercise of that right. *State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988). As a result, it is misconduct for the prosecutor to make such arguments. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

In this case, reversal is required, because the prosecutor committed prejudicial misconduct and violated Mr. Dockery’s rights to pre-arrest silence when the prosecutor commented on his exercise of those

constitutional rights. Further, the prosecution cannot meet its heavy burden of showing that this misconduct was harmless beyond a reasonable doubt because the case depended upon a credibility determination of whether Mr. Dockery acted in self defense.

Where the prosecution elicits testimony infringing upon the exercise of a constitutional right, that involves a “claim of manifest constitutional error, which can be raised for the first time on appeal” under RAP 2.5(a)(3). *State v. Gutierrez*, 50 Wn. App. 683, 588, 749 P.2d 213 (1988). Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 11292 (1995).

"The purpose of the right [to remain silent] is to make the government obtain evidence on its own, and 'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.'" *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (quoting *Doe v. United States*, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)). It is error to permit the State to ask the jury to draw negative inferences from the exercise of any constitutional right. See *State v. Johnson*, 80 Wn.App. 337, 339-340, 908 P.2d 900 (1996); *State v. Jones*, 71

Wn. App. 798, 810, 963 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

As a constitutional error, the error in permitting the State to present evidence of Mr. Dockery's exercise of his right to remain silent should be presumed to be prejudicial and not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

It is impermissible misconduct for the prosecution to even suggest that a negative inference be drawn from the defendant's pre-arrest silence. *Easter*, 130 Wn.2d at 243; see *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); *State v. Fricks*, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). This prohibition applies not only to closing argument but also to testimony, whether deliberately or unintentionally elicited by the State. *Romero*, 113 Wn. App. at 787; see also, *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

It is not required that the State deliberately exploit an improper comment for reversal to be required. See *Romero*, 113 Wn. App. at 787. Put simply, "[a]n accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded" by permitting the prosecution to "call the attention of the trier of fact the accused's pre-arrest silence to imply guilt." *Easter*, 130 Wn.2d at 243; see *State v. Knapp*, 148 Wn. App. 414, 199 P.3d 505 (2009).

Therefore, even unemphasized mention of and allusion to a defendant's exercise of his right to remain silent may be constitutionally offensive. *See State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997).

Here the prosecutor's argument plainly conveyed the message that if Mr. Dockery had acted in self-defense, he would have spoken to police by staying when they arrived. 2RP at 158.

In addition, reversal and remand for a new trial is required because this constitutional error cannot be proven harmless by the prosecution. Where, as here, the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove that constitutional error harmless. *Easter*, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result, absent the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). That standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. *Guloy*, 104 Wn.2d at 425. Here, the prosecution cannot meet that burden for the constitutionally offensive misconduct. The testimony and argument regarding Mr. Dockery's failure to remain at the scene, and by implication failure to talk to law enforcement, is a comment on his exercise of his right to remain silent and requires reversal of the conviction.

2. **THE TRIAL COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION.**

The prosecution elicited testimony by Brenda Krausse that on the day of the incident, Mr. Dockery went into the high school and asked about keys left by a student, and that he became “mad” and “angry” when she would not get the student from class. 2RP at 48, 49, 50. Ms. Krausse stated that Mr. Dockery’s body language was “very aggressive” and that he kicked the school’s front door open when he left the building. 2RP at 49, 50. Counsel did not object to the testimony pursuant to ER 404(b). The prosecution argued that Mr. Dockery was

already agitated because his high school girlfriend didn’t leave his-her car keys for him at the front desk. And the lady at the front desk didn’t drop everything to go down to get her from her class so he storms out, slams the door, he’s mad. He goes up, he confronts the old man, and words get exchanged. It’s pretty clear that everybody is aggravated, the old man fears for his safety, puts the cane up and pushes him back.

2RP at 156.

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. To be relevant under ER 404(b), the identified fact "must be of consequence to the outcome of the action" and "necessary to prove an essential ingredient of the crime charged." *State v. Saltarelli*, 98

Wn.2d 358, 362-63, 655 P.2d 697 (1982). The fact that Mr. Dockery was angry on May 18 was relevant and properly admitted. Regardless of admissibility, however, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. *Saltarelli*, 98 Wn.2d at 362. Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). The Supreme Court has held that "a limiting instruction must be given to the jury" if evidence of other crimes, wrongs, or acts is admitted. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The court erred in failing to issue a limiting instruction in this case, and defense counsel did not request a limiting instruction. 2RP at 150-53. Some courts hold the failure to request a limiting instruction waives the error. *See, e.g., State v. Hess*, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975). If this Court finds defense counsel waived the error by failing to request a limiting instruction or in failing to object to its absence, then counsel's failure constitutes ineffective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. *Thomas*, 109 Wn.2d at 226. A reasonable probability is a probability

sufficient to undermine confidence in the outcome. *Id.*

Defense counsel was deficient for failing to ensure the trial court gave a limiting instruction that would have prevented the jury from considering Mr. Dockery's prior act of causing Ms. Krausse be fearful of "anymore aggression"² and his kicking the school door as evidence of his propensity to be assaultive. There was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of this propensity evidence. Allowing the jury to convict Mr. Dockery on the basis of bad character or propensity toward anger and aggression did nothing to advance his defense.

Regardless of whether the court erred in failing to fulfill its obligation to issue a limiting instruction or counsel was ineffective in failing to ensure the court gave one, the dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of his aggression and anger shortly before the incident with Mr. Morrison as evidence of Mr. Dockery's propensity to commit assault.

There is a reasonable probability the outcome of the trial would have been different had the instruction been given because the absence of a limiting instruction allowed the jury to consider evidence of prior misconduct as evidence of Mr. Dockery's propensity to commit assault. Reversal of the

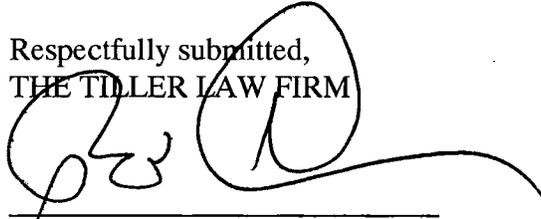
conviction is therefore required.

F. CONCLUSION

For the reasons stated, this Court should reverse the conviction and remand for a new trial.

DATED: August 17, 2010.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over the printed name of the law firm.

PETER B. TILLER-WSBA 20835
Of Attorneys for Patrick Dockery

ATTACHMENT

STATUTE

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

Mr. Patrick Dockery
5172 State Rt. 12
Elma, WA 98541

Dated: August 17, 2010.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828