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COURT OF APPEALS
DIVISION II

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40771-0-II

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

TRAVIS WADE NEWSOME

Appellant

40771-0-II.

On Appeal from the Superior Court of Lewis County

Cause No. 09-1-00571-5

The Honorable Nelson Hunt

BRIEF OF APPELLANT

Law Office Of Jordan McCabe
P.O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

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I. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The jury instructions did not correctly state the law regarding what constitutes a deadly weapon.
2. The evidence was insufficient to prove first degree burglary.
3. Appellant was denied effective assistance of counsel in violation of Const. art. 1, § 22 and the Sixth and Fourteenth Amendments.
4. Appellant was denied a fair trial by counsel's failure to object to damaging inadmissible hearsay.
5. The court denied Appellant's right to present a complete defense.
6. Counsel was ineffective for disclosing that his client was in custody for a prior DUI instead of moving for a mistrial when a juror saw him in shackles.
7. The sentencing court relied on incompetent evidence.

B. **Issues Pertaining to Assignments of Error**

1. The jury was inadequately instructed on the deadly weapon element of first degree burglary.
2. The evidence was insufficient to support a conviction for first degree burglary.
3. The evidence did not support a burglary instruction that included a permissive inference of intent to commit a crime.

4. Defense counsel was ineffective.

(a) Did not object to damaging inadmissible evidence.

(b) Disclosed that Appellant was in custody instead of seeking a mistrial.

5. The court encroached on Appellant's right to present a complete defense.

6. The sentencing court erroneously relied on unqualified opinion testimony .

II. STATEMENT OF THE CASE

Appellant Travis Wade Newsome and Renée Johnson were a couple for about four years. 2RP 70. Their relationship was characterized by frequent alcohol-fuelled breakups and reconciliations. 3RP 70-76, 111. September 24, 2009, was one of those nights. After an evening of drinking at a tavern, the pair broke up again. This time, however, Newsome ended up on trial for fourth degree assault DV (Count IV), second degree assault with sexual motivation DV (Count V), and first degree burglary DV or in the alternative residential burglary DV (Count 1). He was also charged with theft of a motor vehicle (Count II) and third degree driving with a suspended license (Count III). Second Amended Information, CP 23-29.

The testimony at Newsome's jury trial¹ established that he lived with his parents, a twenty-minute drive from Johnson's house. 1RP 72. He did not drive, and relied on rides from his parents, colleagues from work, and Ms. Johnson. 2RP 82; 3RP 14, 22, 38. Newsome's mother assumed he had a key to Johnson's house, because he always went directly inside whenever she dropped him off. 3RP 17.

¹ The verbatim report of proceedings includes a separate, individually paginated volume for each trial day May 5, 6, 7, and 10, designated herein as 1RP, 2RP, 3RP and 4RP, respectively. The sentencing hearing is designated 5/21 RP. Pretrial proceedings on 11/19/09, 12/16/09, 3/11/10 were transcribed but are not referenced.

The couple left the All In tavern in the wee hours of Friday, September 25, 2009. 1RP 67, 2RP 82, 84, 85, 170. At 1:31 a.m., Lewis County Sheriff's Deputy Michael Bailey was dispatched to the Ethel Market parking lot off of Highway 12, in response to a 911 call. 1RP 40. Deputy Jeffrey Godby arrived shortly after. 1RP 40, 52.

Renée Johnson made statements to both officers. 2RP 146. Johnson expanded on these statements a month later, on October 14, 2009. 2RP 183, 187. Both officers testified about the substance of Johnson's out-of-court statements without objection. 1RP 41, 53-55, 57-59. Johnson did not mention a sexual component to the assault until the October interview. 2RP 188. Newsome's mother testified that Johnson once told her that, "whatever happened between her and Travis it would always be Travis's fault because she knew the system and how it worked." 3RP 18.

Johnson's version of the altercation that gave rise to this prosecution was that she had broached the subject of ending the relationship with Newsome several times. (In a *tour de force* of mixed messaging, she sometimes did this while they were in bed.) 2RP 77. She said she drove to the tavern to meet Newsome there. 2RP 138. She claimed they fought that night because she again told Newsome it was over. 2RP 80, 83. Johnson said she drove Newsome home and parked in his parents' driveway. She parked close to the highway because she

preferred to avoid contact with his parents. 2RP 88. She said Newsome was angrier than she had ever seen him. 2RP 101. Nevertheless, instead of following through with her announced intention to go straight home, Johnson turned the motor off. 2RP 142. She said Newsome tried to climb on top of her and force himself on her sexually. 2RP 89. During the struggle, he applied pressure to her throat. 2RP 90, 144-45. She managed to get the door open and fell out onto the gravel. 2RP 96. She said Newsome then ordered her back in the car and made her start driving. 2RP 102-03. He made her pull into the parking lot of the Fish Country Store. Johnson came to a rolling stop, and Newsome jumped out, leaving his shoes in the car. Johnson immediately floored it and took off down the highway. 2RP 106. She pulled into the parking lot of the Ethel Market and called 911. 2RP 108.

After a couple hours of questioning, the police drove Johnson home. Her daughter, Carissa Johnson, came and stayed the remainder of that night with her. 2RP 109. The following night – Friday, September 25, 2009 – Johnson stayed with a friend. 2RP 110-111.

Johnson testified that Carissa picked her up on Saturday at the friend's where she had stayed the night and the two of them arrived at her house at around noon carrying bags of groceries and parked in the driveway. 2RP 112-13. Following police instructions, they checked the

periphery of the house before entering and noticed signs that someone had been there and might still be inside. 2RP 114-17. The police confirmed this. 2RP 175-80. Johnson said she and Carissa got back in the car, returned to the highway, and called 911.

While waiting for the police, they noticed a person they thought was Newsome crossing the fields at the back of the house and entering a neighbor's field. 2RP 117-18. The police found Newsome in the field shortly thereafter and arrested him. 2RP 167. Inside the house were various signs someone had been there. 2RP 121-22.

Newsome testified in his own defense. He denied being angry about breaking up, because it happened all the time, and he was resigned to it. 3RP 74. The defense offered a witness to whom Newsome had previously expressed his own intention to end the relationship. The court excluded that testimony, declaring: "If he wants go get his version of events before the jury, he can take the stand and testify if he wants to do that[.]" 3RP 44-45.

Newsome testified that he drove Johnson to the Fish Country Market at her own request to meet some people she met at the bar who had marijuana for sale. 3RP 80, 84. He said Johnson initiated sex, but he told her to stop out of concern they could be seen by passing cars on the highway. 3RP 87. He said he inadvertently hurt her feelings and she got

mad and left. 3RP 88. He waited for a while, expecting her to come back for him as she usually did when they fought. She did not return, however. Newsome spotted a 4x4 “quad” ATV parked with the keys in the ignition. The store owner usually left it that way. 2RP 5. Shoeless and stranded in the middle of the night, Newsome said he “borrowed” the vehicle. He abandoned it on the highway, some distance from his parents’ house. The police found the 4x4 the next day and returned it to the owner. 2RP 159. Newsome said he went back to try to return it, but it was already gone. 3RP 98-99.

Newsome testified that an old friend called him Friday morning and he joined her and her family at a remote campsite where he spent the night. 3RP 100. This explained why no-one could find him. 3RP 8, 28. He said Johnson had suggested they meet at her house Saturday at around noon so he could collect his personal items. 3RP 90. He said he went there in good faith, entered with his own key, and poked around while he waited. 3RP 91. When he saw that Carissa was with Johnson, he decided to leave to avoid a confrontation, since the two did not get along. 3RP 106. At some point, he picked up a paring knife with a 2^{7/8}-inch blade (2RP 173) from the floor near the back door and put it in his pocket. 3RP 107. It was still in his pocket when he was arrested. 2RP 168.

Newsome was charged with Count 1, first degree burglary, or alternatively residential burglary – domestic violence; Count 2, theft of a motor vehicle; Count 3, second degree driving while license suspended or revoked; Count 4, fourth degree assault – domestic violence; Count 5, second degree assault with sexual motivation, domestic violence; and Count 6, unlawful imprisonment, domestic violence. CP 23-28.

The jury convicted him of Count 1, first degree burglary; Count 2, theft of a motor vehicle; Count 3, second degree driving while license suspended or revoked; Count 4, fourth degree assault – domestic violence; and Count 6, unlawful imprisonment, domestic violence. The jury acquitted Newsome of Count 5, second degree assault with sexual motivation, domestic violence. CP 84-89.

At sentencing, the State presented testimony by Brandon Stewart, a probation officer regarding Newsome's poor performance in rehabilitation programs in the past. 5/21 RP 5, 6. Stewart testified that, in his opinion, Newsome's subjective motivation was poor and he had no desire to change. 5/21 RP 6.

The court sentenced him to the top of the standard range for the first degree burglary, which fixed the total number of months of confinement at 344 months. 5/21 RP 21-22.

Newsome filed this timely appeal. CP 94.

III. ARGUMENT

1. THE DEADLY WEAPON INSTRUCTION WAS INADEQUATE.

Defense counsel sought an instruction that a small knife was not deadly per se but only in the manner it was used. 3RP 10, 46. The court refused. This was wrong.

This Court reviews a trial court's refusal to give a proposed jury instruction for an abuse of discretion. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005), citing *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021, 969 P.2d 1065 (1998). Alleged errors of law in jury instructions are reviewed de novo. *Winings*, 126 Wn. App. at 86. Jury instructions must permit the parties to argue their theories of the case, not mislead the jury, and properly inform the jury of the applicable law. *Id.*

Defense counsel argued for a more complete deadly weapon instruction. The instructions as given permitted the State to argue that any knife, regardless of blade length, is a deadly weapon per se. 3RP 10. The State argued, and the prosecutor repeatedly told the jury, that Newsome was armed with a deadly weapon merely by having a small-blade paring knife in his pocket — that having it on him constituted a use such as rendered the knife a deadly weapon as a matter of law. 3RP 10, 45, 91.

This is simply wrong. The court adopted this argument, however, and also had a secret reason of its own for rejecting the defense position. 3RP 11.

Some weapons such as explosives and firearms are deadly per se. Others are deadly only if they are used in such a way as to render them capable of causing death or substantial bodily harm. RCW 9A.04.110(6)²; *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995), citing *State v. Carlson*, 65 Wn. App. 153, 158, 828 P.2d 30, review denied, 119 Wn.2d 1022, 838 P.2d 690 (1992). Factors to be considered include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *Shilling*, 77 Wn. App. at 171.

Since the legislature created a distinction between items that are deadly weapons per se and items that are deemed deadly solely because of the manner in which they are used, this distinction must mean something and must be given effect. If deadly per se is proved merely by having the item in one’s possession, then deadly only by manner of use must require

² RCW 9A.04.110(6) defines a “deadly weapon” as: any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.] *State v. Carlson*, 65 Wn. App. 153, 157, 828 P.2d 30 (1992).

the State to show something other than merely having the object in one's pocket.

Here, the trial court erroneously believed that whether a knife's blade length rendered it a deadly weapon was not a matter of fact subject to expert testimony, but a matter of law. 2RP 174. This was wrong.

For sentencing purposes, a knife is a deadly weapon by statutory definition as a matter of law if its blade is longer than three inches.³ But as an element of an armed offense, whether a knife with a blade shorter than three inches is a deadly weapon is a question of fact. *State v. Thompson*, 88 Wn. 2d 546, 548, 564 P.2d 323, 324 (1977), citing RCW 9.95.040.

Newsome was arrested while carrying a paring knife with a blade less than three inches long. 2RP 173. He was, therefore, 'armed,' as defined by *Chiariello*. But whether the knife was a deadly weapon depends on the manner in which it was used and was a question of fact to be determined by the jury based on the manner in which the knife was actually used. Here, there is absolutely no evidence that Newsome used

³ RCW 9.95.040(2). The words "deadly weapon," as used in this section include, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

this knife at all. He never so much as displayed it in the presence of another human being.

This is precisely the same situation as in *State v. Peterson*, 138 Wn. App. 477, 481, 157 P.3d 446 (2007). There, this Court declined to call a knife with a three-inch blade a deadly weapon when nobody else was around when it was used. *Peterson*, 138 Wn. App. at 483. That is what happened here.

Thompson is instructive. The Court gives examples of items not listed in RCW 9.95.040 as deadly weapons per se that could cause death. One would be a knife with a short blade with which the defendant did in fact actually kill someone. Another would be a metal pipe used to strangle someone, rather than as a club. *Thompson*, 88 Wn.2d at 549.

No case holds that a 2^{7/8}-inch blade constitutes a deadly weapon by its mere existence. Even a threat to use a weapon during the crime is insufficient to support a conviction of first degree burglary. *State v. Chiariello*, 66 Wn. App. 241, 243, 831 P.2d 1119 (1992). The knife must actually be used in a deadly manner.

The statute says an item may constitute a deadly weapon based upon the manner in which it is used. The statute does not say an item is deadly if the State can articulate any conceivable circumstance under which it could have been used to cause death. The prosecutor misled the

jury by telling them the knife was a deadly weapon as a matter of law and that the only manner of use to be considered was whether or not Newsome had the knife in his possession.

Newsome was prejudiced by the failure to instruct the jury as to what constitutes a per se deadly weapon because the sentencing court imposed the high end of the standard range in reliance on the fiction that a properly instructed jury deliberated on this issue and made a finding that Newsome used the knife in manner that rendered it a deadly weapon. 5/21 RP 23. This simply did not happen.

Accordingly, the Court should reverse the first degree burglary conviction.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR FIRST DEGREE BURGLARY.

The same reasoning discussed in Issue 3 supports reversal and dismissal of the first degree burglary conviction for insufficient evidence.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

Peterson, 138 Wn. App. at 481, citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn from

it. *Id.* Circumstantial evidence and direct evidence are equally reliable.

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the State relied solely on the fact that Newsome picked up a paring knife and put it in his pocket in the course of the alleged burglary. The length of the blade was 2 ^{7/8} inches. No other person was present at the scene of the crime. Therefore, the State's evidence was insufficient to prove that Newsome used the paring knife in a manner that rendered it a deadly weapon. Moreover, the jury was not even asked to consider the manner of use of this paring knife. The State erroneously argued that the mere fact Newsome had the knife in his pocket was sufficient to prove the deadly weapon element of first degree burglary. This was wrong.

Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal with prejudice is appropriate. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Court should reverse and dismiss Newsome's first degree burglary conviction.

3. THE EVIDENCE DID NOT SUPPORT A BURGLARY INSTRUCTION THAT INCLUDED A PERMISSIVE INFERENCE OF INTENT TO COMMIT A CRIME.

Due process requires the State to prove every fact essential to its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.

Ed. 2d 368 (1970). The intent to commit a crime — not actually committing a crime — is the essential element of burglary. *State v. Bergeron*, 105 Wn.2d 1, 15-17, 711 P.2d 1000 (1985); *see also* RCW 9A.52.025(1).

Newsome's counsel objected to the court's instructing the jury it was permissible to infer that Newsome entered Johnson's house with the intent to commit a crime. 3RP 46. The court nevertheless gave the following instruction:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Instr. 14, CP 57.

Generally, a trial court's choice of jury instructions is reviewed for abuse of discretion. *State v. Douglas*, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005). But a jury instruction challenged on an issue of law is reviewed de novo. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). Each party is entitled to have the court instruct the jury on its theory of the case, but only if the evidence supports that theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

The permissive inference instruction at issue here is erroneous as a matter of law because it is not supported by the evidence.

The inference is derived from statute:

In any prosecution for burglary, any person who enters or remains unlawfully in a building *may* be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040. This would be unobjectionable in a typical situation where the defendant has no connection with the premises and there is no evidence either way as to intent. It is inherently difficult to make an affirmative showing of a mental state such as intent. Therefore, the State is permitted to argue that an unlawful entry may be presumed to have been for an unlawful purpose unless there is some contrary evidence. But the prosecution is required to show “that the inference more likely than not flows from the proven fact.” *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006).

In *Cantu*, the question presented was whether the inference created by the instruction was mandatory. But the facts at least supported an argument by the State for a permissive inference instruction. In *Cantu*, the mother of a teenager living at home kept a padlock on her bedroom door. Cantu broke the lock, entered, and took some of his mother’s things.

Accordingly, the State argued that the inference of intent to commit a crime flowed from the total lack of any evidence suggesting a non-criminal reason for Cantu to be in his mother's locked room.

Here, by contrast, the inference of criminal intent does not flow from the mere fact of entry. There was contrary evidence. It was undisputed that Newsome had been coming and going freely in and out of Johnson's house for years. While this does not establish that Newsome's motives were pure, it does eliminate any statutory or constitutional basis to claim that his presence created grounds to infer that his motives were criminal. The jury was erroneously instructed it could make this inference.

Based on the evidence, due process required the jury not to infer anything, but to make an affirmative finding that, on the Saturday morning after the fight, Newsome was not expecting to meet Johnson at her own suggestion and that he did go into the house, as he claimed, for the sole purpose of collecting his four-year accumulation of personal items. Failure to so instruct the jury on these facts relieved the State of its burden to prove every essential fact beyond a reasonable doubt. Reversal is required.

4. NEWSOME RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Wash. Const. art. 1, § 22; U.S. Const. amend. VI guarantee the accused in criminal prosecutions the constitutional right to the effective assistance of counsel. To prevail, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This Court must decide (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. To prevail, Appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland*, 466 U.S. at 693-94. Performance is deficient if it falls below an objective standard of reasonableness in light of all the circumstances. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently

below an objective reasonableness standard overcomes the strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226.

(1) **Failure to Object to Inadmissible Evidence:** Counsel waives any objection to the erroneous admission of damaging evidence unless he makes a timely objection. *State v. DeSantiago*, 149 Wn.2d 402, 413, 68 P.3d 1065 (2003); *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). A claim of deficiency resting on counsel's failure to object will succeed if the appellant can satisfy this court that an objection likely would have been sustained. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). In egregious circumstances, where testimony central to the State's case is erroneously admitted, the failure to object constitutes incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). If no legitimate reason can be discerned to explain counsel's conduct, deficient performance is established. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, 262 (2010).

Officers Godsby and Adkisson testified without objection to out-of-court statements made to them by Renée Johnson. Because defense counsel did not object, the record contains no explanation why Johnson's hearsay statements might have been deemed admissible.

Washington courts have created certain limited exceptions to the evidence rules to overcome otherwise fatal reliability objections where domestic violence is alleged, but none of these exceptions applies to the out-of-court statements of Renée Johnson.

ER 404(b) Does Not Apply: Prior acts of domestic violence involving the defendant and the same alleged victim are admissible under ER 404(b) in order to assist the jury in judging the credibility of a recanting victim. *State v. Magers*, 164 Wn.2d 174, 184-85, 189 P.3d 126 (2008).

Here, Johnson did not allege any prior acts of violence between herself and Newsome, and she did not recant. Accordingly, ER 404(b) has no application in this case.

ER 803(a)(5) Does Not Apply: Out-of-court statements by an alleged domestic violence victim may be also admissible under ER 803(a)(5) as recorded recollections, if the victim claims loss of memory at trial. *State v. White*, 152 Wn. App. 173, 184, 215 P.3d 251 (2009), *review denied*, 168 Wn.2d 1015 (2010). Johnson did not claim loss of memory at trial. Therefore, ER 803(a)(5) does not apply.

Accordingly, Johnson's out-of-court statements to police were inadmissible, and defense counsel should have objected to the testimony.

(a) **Deficient Performance:** No legitimate strategy can explain counsel's failure to object to extensive damaging and inadmissible hearsay from Renée Johnson coming before the jury by way of the police testimony. The statements were not admissible under any hearsay exception. The statements added nothing to the jury's understanding of the facts other than to add an aura of legitimacy in the form of the cloak of credibility recognized by our courts as inherent in police testimony. *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (jury may be unduly influenced by opinion testimony from police officers, whose opinions carry a special aura of reliability.)

(b) **Prejudice:** Prejudice is established if there is "a reasonable probability" that, if counsel had done his job, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 335. But objection to the erroneous admission of evidence is waived unless timely made. *DeSantiago*, 149 Wn.2d at 413; *Coria*, 146 Wn.2d at 641. Thus, a claim of deficiency resting on counsel's failure to object will succeed if the appellant can satisfy this court that an objection likely would have been sustained. *Id.*; *Saunders*, 91 Wn. App. at 578.

Admitting Johnson's out-of-court statements prejudiced Newsome because the credibility of Johnson's allegations was enhanced by repetition by law enforcement officers. Reversal is required.

(2) During the trial, it came to the attention of the court that a juror saw Newsome in shackles outside the courtroom. Instead of moving for a mistrial, defense counsel accommodated the situation by proposing to inform the jury that Newsome was currently incarcerated on a prior unrelated DUI. The court agreed to do this instead of voir-diring the juror about what she saw. 3RP 4-5. Newsome did testify to this. 3RP 62.

(a) ***Ineffective Per Se***: No legitimate strategy suggests itself for informing the jury the defendant is not only a repeat offender but also a drunk driver whose offense was serious enough to result in incarceration. This was highly prejudicial because many people are highly offended by drunk driving and regard a conviction as evidence that no crime is so heinous that the offender is not capable of it.

Reversal is required.

5. THE COURT ERRONEOUSLY EXCLUDED
RELEVANT DEFENSE EVIDENCE IN THE
FORM OF ADMISSIBLE HEARSAY FROM
NEWSOME.

(a) ***This error violated Newsom's right to present a complete defense in violation of Wash. Const. art 1, § 22 and the Sixth Amendment.***

This Court generally reviews evidentiary rulings for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

But a court necessarily abuses its discretion by denying a criminal

defendant's constitutional rights. *State v. Petrina*, 73 Wn. App. 779, 787, 871 P.2d 637 (1994). Whether or not constitutional rights were violated is a question of law that this Court reviews de novo. *State v. Elmore*, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004).

As a general rule, all evidence having any tendency to make the existence of a material fact more or less probable is relevant and should be admitted. ER 401, 402.⁴ The threshold is very low. "Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Moreover, the defendant in a criminal prosecution has a constitutional right to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Washington defines this as the opportunity to present material and relevant testimony. *State v. Burri*, 87

⁴ ER 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402: "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

Wn.2d 175, 181, 550 P.2d 507 (1976); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Specifically, it is error to exclude any relevant evidence that may be deemed even slightly extenuating or exculpatory. *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006). A judge has no discretion to exclude evidence that is clearly relevant to a defense, because criminal defendants have a constitutional right to present a defense consisting of relevant, admissible evidence. *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (“Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . [T]his right is an essential attribute of the adversary system itself.”).

Defense counsel told the court he intended to ask witness Miranda Rasmussen, a co-worker of Newsome’s and a friend of his and Johnson’s, about statements Newsome had made to her regarding his intention to end his relationship with Johnson. Counsel made an offer of proof that Newsome told Rasmussen he was “tired of the drama and thinking about calling it quits with [Johnson], too much BS.” 3RP 45.

Counsel argued to admit this statement under ER 803(a)(4) to show the declarant’s state of mind, intent, etc. Counsel explained the importance of this evidence to refute Johnson’s claim that Newsome

assaulted her out of anger because she wanted to end the relationship.

3RP 45.

The prosecutor argued that no hearsay exception permitted this evidence and also that it was “self-serving.” The prosecutor used the term “self-serving” without explanation. See 3RP 17, e.g. The idea seems to be that evidence that supports the defense theory of the case is inadmissible per se. But no hearsay exception creates a blanket exclusion for favorable testimony. ER 801(d)(2) defines a party’s own statements as admissible as non-hearsay when offered against that party. But no rule applies the converse of ER 801(d)(2). That is, no rule excludes statements by a party that are hearsay, provided an exception applies.

The court was persuaded by the prosecutor’s fictional rule and decreed: “If [Newsome] wants to get his version of events before the jury, he can take the stand and testify if he wants to do that[.]” 3RP 45-46. This was reversible error.

First, defense counsel correctly argued ER 803(a)(3). That rule provides that an out-of-court statement is admissible regardless of availability to show the declarant’s then existing mental, emotional, or physical condition. This exception includes “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and

bodily health), but not including a statement of memory or belief to prove the fact remembered or believed[.]”

Here, Newsome’s statement to Ms. Rasmussen was not one of memory or belief. It was offered solely to show his then existing state of mind. As part of his constitutional right to present a complete defense, Newsome was entitled present this as substantive evidence to refute the State’s proposed motive for wanting to hurt Ms. Johnson.

Second, it was error for the court to imply that only defendants who testify are entitled to offer witnesses in their defense. It is a fundamental right of every defendant to establish a defense through witness testimony. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Moreover, the court violated the appearance of fairness by stepping into the prosecutor’s shoes and offering its own arguments to bolster the State’s otherwise inadequate evidentiary objection. Once the proposed defense evidence survived the State’s ineffectual hearsay objection, the court should simply have overruled the objection and instructed the witness to answer, unless the State came up with a valid alternative

objection. All evidence is admissible if nobody objects to it. ER 402; ER 403.⁵ Newsome's jury should have heard this evidence.

(b) *The Error Was Not Harmless.* An erroneous evidentiary ruling justifies reversal if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An erroneous evidentiary ruling results in prejudice if, within reasonable probabilities, the error materially affected the outcome of the trial. *Bourgeois*, 133 Wn.2d at 403. For an error to be deemed harmless, (a) it must be of of minor significance compared with the overwhelming evidence as a whole or (b) other evidence must establish the same facts. *State v. Yates*, 161 Wn.2d 714, 766, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008). An error resulting in the exclusion of relevant evidence cannot be harmless. "[I]t is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors." *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946).

This evidence was not of minor significance. Johnson told Newsome's mother that she knew how to work the system to incriminate Newsome in the event of a dispute. There was no evidence that Newsome

⁵ ER 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

had any violent inclinations toward Johnson or anybody else. Johnson testified that Newsome became angrier than she had ever seen him, with no explanation other than her claim that she tried to break off their relationship. Johnson embellished her story with allegations of more and more criminal conduct as time passed. If Newsome was already talking about ending the relationship, this is powerful evidence calling Johnson's credibility into question.

This error denied Newsome a fair trial, and reversal is required.

6. THE COURT ABUSED ITS DISCRETION
BY RELYING ON INCOMPETENT OPINION
TESTIMONY AT SENTENCING.

The general rule is that a standard range sentence cannot be appealed. RCW 9.94A.585; *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). But the sentencing procedure must comport with due process. *State v. Goldberg*, 123 Wn. App. 848, 852, 99 P.3d 924 (2004); *State v. Watson*, 120 Wn. App. 521, 529, 86 P.3d 158 (2004). Here, the sentencing court imposed the high end of the standard range based on facts that were barely sufficient to support the conviction, even supposing the court applied the correct standard of law. (Which it did not. Please see Issues 1 and 2.) In doing so, the court erroneously relied on unqualified speculation and conjecture in violation of due process.

ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The rules of evidence do not apply at sentencing. ER 1101(c)(3).

Nevertheless, a court must exercise some sort of meaningful discretion.

State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds. *State v. C.J.*, 148 Wn.2d 672, 700, 63 P.3d 765 (2003); *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

It is both an abuse of discretion and a violation of due process to base a sentencing decision on mere speculation and conjecture. *In re Dyer*, 157 Wn.2d 358, 365, 139 P.3d 320 (2006). That is, a sentencing court, while not strictly enforcing the evidence rules, must still require some showing of basic witness competency.

Here, a probation officer, Brandon Stewart, testified to facts within his personal knowledge regarding Newsome's compliance with previous remedial sentencing provisions such as alcohol and domestic violence treatment. 5/21RP 6-7. But Stewart grossly exceeded the scope of his competence as a lay witness when he purported not merely to testify to Newsome's record of compliance during previous periods of supervision,

but also to characterize his subjective motivation. Stewart opined that Newsome was: “Externally motivated. He seemed to, in my opinion, just want to get through it for the court’s benefit and I didn’t really see a real desire to change.” 5/21RP 6.

As a probation officer, Stewart was arguably qualified to recite facts regarding Newsome’s attendance at treatment programs. Arguably, this unsupported hearsay was not objectionable, given the relaxed evidentiary rules at sentencing. But Stewart offered no credentials qualifying him as an expert in psychology or any related discipline in which he could have acquired sufficient expertise to permit him to appear before a sentencing tribunal and offer unsupported opinions purporting to evaluate a person’s subjective motivations for the purpose of having the court rely on his incompetent musings to extend the loss of a man’s liberty.

The sentencing court violated due process by failing to exercise its discretion to exclude Stewart’s incompetent testimony. This prejudiced Newsome because we cannot be confident the court was not influenced by Stewart’s pseudo-expert speculation and conjecture in imposing a high-end sentence.

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IV. CONCLUSION

For the foregoing reasons, Mr. Newsome asks this Court to reverse
his conviction, vacate the judgment and sentence, and dismiss the
prosecution with prejudice.

Respectfully submitted this 23rd day of September, 2010.



Jordan B. McCabe, WSBA No. 27211
Counsel for Travis W. Newsome

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

Kathleen Proctor, Prosecutor's Office
City-County Building
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171

Travis Wade Newsome, DOC # 340767
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362



Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington

Date: September 23, 2010