

11 JUL 13 PM 12:49

NO. 41596-8-II

STATE OF WASHINGTON

BY *C*

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ALAN GRAHAM,

Appellant.

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

The Honorable Edmund Murphy

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TABLES OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	3
C. <u>ARGUMENT</u>	6
GRAHAM WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL	
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994)	17
<u>In re Noble</u> , 15 Wn. App. 51, 547 P.2d 880 (1976)	11
<u>State v. Babich</u> , 68 Wn. App. 438, 842 P.2d 1053 (1993)	12
<u>State v. Bacotgarcia</u> , 59 Wn. App. 815, 801 P.2d 993 (1990)	13
<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010)	19
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	18
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987)	18
<u>State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013 (1989)	15
<u>State v. Calegar</u> , 133 Wn.2d 718, 947 P.2d 235 (1997)	16
<u>State v. Clinkenbeard</u> , 130 Wn. App. 552, 123 P.3d 872 (2005)	12
<u>State v. Flielman</u> , 35 Wn.2d 243, 212 P.2d 794 (1949)	11
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950)	13
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000)	17
<u>State v. Hancock</u> , 109 Wn.2d 760, 748 P.2d 611 (1988)	12
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	9
<u>State v. Johnson</u> , 40 Wn. App. 371, 699 P.2d 221 (1985)	11
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009)	10
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	10

TABLE OF AUTHORITIES

	Page
<u>State v. Pitts</u> , 62 Wn.2d 294, 382 P.2d 508 (1963)	11
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982)	13
<u>State v. Shaver</u> , 116 Wn. App. 375, 65 P.3d 688 (2003)	9
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239, <u>cert. denied</u> , 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)	10
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	10
<u>State v. Thompson</u> , 95 Wn.2d 888, 632 P.2d 50 (1981)	15
<u>State v. Wade</u> , 98 Wn. App. 328, 989 P.2d 576 (1999)	13

TABLE OF AUTHORITIES

	Page
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	9
 <u>RULES, STATUTES, AND OTHERS</u>	
ER 404(b)	13
WPIC 5.06	12
WPIC 5.30	15
U.S. Const. amend. VI	9
Wash. Const. art. I, section 22	9

A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel where defense counsel failed to request a limiting instruction for impeachment testimony.

2. Appellant was denied effective assistance of counsel where defense counsel failed to object to the State's improper use of impeachment testimony as substantive evidence during closing argument.

3. Appellant was denied effective assistance of counsel where defense counsel failed to request an instruction limiting the purpose of evidence of appellant's prior bad acts.

4. Appellant was denied effective assistance of counsel where defense counsel failed to request an instruction limiting the purpose of evidence of a defense witness' prior bad acts.

Issues Pertaining to Assignments of Error

Is reversal required because appellant was denied his constitutional right to effective assistance of counsel where defense counsel's performance was deficient and appellant was prejudiced by the cumulative effect of counsel's deficient performance?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On April 27, 2010, the State charged appellant, Kenneth Alan Graham, with one count of assault in the second degree domestic violence, one count of felony harassment domestic violence for threatening Jason Sullenger, and one count of felony harassment for threatening Tyson Bower. CP 1-2. The State amended the information on September 30, 2010, adding one count of intimidating a witness domestic violence, two counts of violation of a no contact order domestic violence, and one count of tampering with a witness domestic violence. CP 6-9. On November 15, 2010, the State filed a second amended information changing the dates of the offenses. CP 13-16.

Following a trial before the Honorable Edmund Murphy, on November 19, 2010, a jury found Graham guilty of the lesser included crime of assault in the fourth degree and guilty of all the other charges. CP 110-23; 4RP 355-57. On December 17, 2010, the court imposed a concurrent sentence of 54 months in confinement, 12 months of community custody, and \$1300.00 in fees and costs. CP 128-146; 4RP 375-78.

¹ There are four volumes of verbatim report of proceedings: 1RP - 11/01/10, 11/10/10; 2RP - 11/15/10, 11/16/10; 3RP - 11/17/10; 4RP - 11/18/10, 11/19/10, 12/17/10.

Graham filed a timely appeal. CP 147.

2. Substantive Facts

Jason Sullenger, Graham's brother-in-law, lived next door to Graham and they had a good relationship. 2RP 46-47. Sullenger testified that on February 13, 2010, he was out in his yard with his brother Tyson when he heard Graham talking to his friend Joe on the porch. Graham was angry and upset, "ranting that his wife was cheating on him." 2RP 48-51. Sullenger went over to calm Graham down and had a beer with him. 2RP 50-51. He tried to console Graham, but Graham told him to leave him alone and went in his house saying that he wanted to hurt himself. Sullenger followed him into the house where Graham tried to swallow a bottle of pills and then Graham walked outside toward a storage shop on the property, saying he was going to "end it." 2RP 54. When Sullenger tried to stop him from going into the shop, Graham grabbed him by the throat which made him dizzy and he could not breathe. 2RP 55-56. Sullenger's brother came to his aid by jumping on Graham's back which caused Graham to release him and he started breathing again. 2RP 56-57. He and his brother went back to his house where Graham came in and said "he would kick my butt if I called the cops." 2RP 60-61.

Sullenger's brother told him that they needed to get out of there so they drove to the Thunderbird Bar a couple blocks from his house. 2RP

60. He had a couple of drinks at the Thunderbird to calm down before the police arrived to investigate the incident. They asked him to provide a written statement and took pictures of his neck. 2RP 61-63. Sullenger recognized that he wrote in his statement that Graham threatened to kill him and his family, but could not recall Graham saying that, “by the time the police even came to the bar to have me fill out my statement, I had already been drinking.” 2RP 62.

Sullenger saw Graham twice after the incident when Graham was moving his belongings out of his home. 2RP 64. Graham came over to his house and began “muttering stuff” and told Sullenger that he was going to trial and Sullenger would be called to testify. 2RP 64-69. Sullenger spoke with an officer on September 13, 2010 about what Graham said to him. 2RP 67. He recalled telling the officer that Graham put his finger in his face and said, “You better watch your fucking mouth.” 2RP 70-71. Sullenger did not remember telling the officer that Graham used the word “snitch,” that he said to testify that Sullenger had been drinking that day so that the prosecutor’s office would drop the charges, or that Graham pointed to his pregnant wife’s stomach. 2RP 71-74. Sullenger did not take Graham’s actions as a threat but he made him feel scared and nervous about testifying. 2RP 75-76. Graham basically told him to tell the truth, tell what happened. 2RP 106.

Over defense counsel's objection, the court allowed the State to play a recording of a 911 operator calling Sullenger on February 13, 2010 after his wife contacted the police. 2RP 117-18. Sullenger acknowledged that he told the operator that Graham was going to kill him, but he did not mean "literally kill me, but maybe hurt me." 2RP 119. Sullenger said Graham had pulled on a gun on him before and that someone who told on him ended up in the river, which never happened but Sullenger made those statements to the operator because "I must have just been pissed, emotional, drunk." 2RP 131-32. On May 11, 2010, Sullenger obtained a no-contact order against Graham. 2RP 123-26.

Tyson Bower was visiting his brother Jason and they were outside when he heard some yelling at Graham's house next door. 3RP 191-92. Bower testified that Jason went to check on Graham and then he heard them arguing and Jason was trying to calm Graham down. Suddenly, Graham grabbed Jason by the neck and began pushing him while holding on to his neck until Jason was about to pass out. 3RP 193-95. Bowers jumped on Graham's back to distract him and get him away from Jason. 3RP 194-95. Graham confronted him and wanted to fight but Bowers refused and they went back to Jason's house. Minutes later, Graham barged into the house and said that if they called the cops, he would "hurt us or kill us." 3RP 195-96. After Graham left, they drove to the

Thunderbird where the police arrived and took statements from them. 3RP 196-97. Bowers recalled that Jason “seemed a little intoxicated” before the incident with Graham. 3RP 197. During cross-examination, Bowers acknowledged that he did not include in his written statement that Graham threatened to kill him. 3RP 202-04.

Edrea Sullenger received a phone call from her husband Jason about something that happened between him and Graham. 2RP 133-34. Edrea testified that he was hysterical and she could hardly understand him so she notified 911 because she did not know what was going on. 2RP 134-35. Edrea gave Jason’s phone number to the 911 operator and went to the Thunderbird where Jason had been drinking. 2RP 139-40. She was with Jason when he spoke to the police. 2RP 140. Endrea had known Graham since she was nine years old, “I love him with all my heart.” 2RP 138. She was aware that Graham had been drinking and trying to kill himself because her sister Anne was “cheating on him” and “she was lying to everybody.” 2RP 139. After the incident, Graham came over to their house once and told her and Jason that “we would have to testify if we got subpoenaed. If we did not go, we would go to jail. That’s pretty much what he was saying.” 2RP 136-37.

Deputy James Cowan reported to the Thunderbird to investigate a domestic violence incident. 3RP 165-66. Cowan testified that he spoke

with Sullenger who was scared and upset. 3RP 167. Sullenger said that he went over to Graham's house next door because he was talking about killing himself. When Sullenger tried to intervene, Graham "put both hands around his neck and was strangling him" and said "he was going to kill him." 3RP 169, 175. Graham told Sullenger and his brother, "I'm going to kill both of you and your kids." 3RP 170. While speaking to Sullenger, Cowan could smell alcohol and noticed that he was impaired to some degree. 3RP 174, 176. Sullenger and his brother who was also at the bar provided written statements. 3RP 173. Cowan went to Graham's home then went to the hospital where Graham had been admitted, but he could not speak with Graham who was unconscious and unresponsive. 3RP 177-78.

Over defense counsel's objection, the court allowed Deputy Tara Simmelink-Lovely to testify as an impeachment witness. 2RP 145, 147. She testified that she called Sullenger in September 2010 and he said that Graham told him that "he better show up for court and not pull out his snitch blade." 2RP 147. Graham wanted him to say that he was drinking on the day of the incident so that the prosecutor's office would drop the charges. 2RP 147-48. He pointed to his pregnant wife's stomach and told him to think about his family. 2RP 148.

Graham's father, mother, sister, and Joseph McGurran testified in his defense. 3RP 248-67. McGurran had known Graham for about four years and they worked together in the firewood business. 3RP 215-16. On February 13, 2010, he was at Graham's house after they had cut some firewood and made a couple of deliveries. 3RP 216. He and Graham were out on the porch having beers when Sullenger came over and asked for a beer. Graham gave him a beer but when Sullenger wanted to sit down and talk, Graham said he it was not a good time and he was not feeling well. 3RP 217- 18. McGurran was aware that Graham was having marital problems. 3RP 218-19. After Graham told Sullenger to go home several times, Sullenger finally left. 3RP 219. Graham told McGurran, "Joe, probably be better if you went home, too." 3RP 219. McGurran knew that Graham was distraught so he said he was going home but walked to an apple orchard nearby and sat under an apple tree, "just thought I would stick around for a while." 3RP 220-21.

A few minutes later, he saw Sullenger and Graham outside arguing and he heard Graham say, "Jason, you are not paying attention to what I'm trying to tell you. You are not listening to me." 3RP 222-23. When Graham put his hands on Sullenger's shoulders and shook him, Sullenger's brother came running up and jumped on Graham's back. 3RP 223. McGurran was ready to break up the fracas but they all calmed down.

Graham went back to his house while Sullenger and his brother got in a car and left. 3RP 224-25. During cross-examination, McGurran acknowledged that Graham let him stay with him for about three months when he was homeless. 3RP 246. McGurran admitted that he had a criminal history of theft in the third degree and shoplifting. 3RP 246-47.

Graham did not testify. 4RP 268.

C. ARGUMENT

GRAHAM WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL.

Reversal is required because Graham was denied his right to effective assistance of counsel where defense counsel's performance was deficient and Graham was prejudiced by the cumulative effect of counsel's deficient performance.

This Court reviews claims for ineffective assistance of counsel *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art. I, section 22. "The 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).

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel’s performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239, cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” McFarland, 127 Wn.2d at 335. “A reasonable probability is a probability sufficient to undermine confidence in the outcome,” but a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case. Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 693-94). “When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

a. Defense counsel failed to request a limiting instruction on impeachment testimony.

“Impeachment evidence affects a witness’ credibility and is not proof of the substantive facts encompassed in such evidence.” State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985)(citing In re Noble, 15 Wn. App. 51, 60, 547 P.2d 880 (1976); State v. Flieman, 35 Wn.2d 243, 212 P.2d 794 (1949)). “Where such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary.” Johnson, 40 Wn. App. at 377 (citing State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)).

The State called Deputy Tara Simmelink-Lovely as an impeachment witness and defense objected to her testimony. When the court overruled his objection, defense counsel did not request a limiting instruction. 2RP 145, 147. Simmelink-Lovely testified that Sullenger told her that Graham warned him that “he better show up for court and not pull out his snitchblade.” 2RP 147. Sullenger said Graham wanted him to testify that he was drinking on the day of the incident so that the prosecutor’s office would drop the charges. Graham pointed to his pregnant wife’s stomach and told him “to think about his family,” which Sullenger took as a threat towards him and his family. 2RP 147-48. Defense counsel’s failure to request a limiting instruction allowed the jury

to consider highly prejudicial evidence without being instructed that Simmelink-Lovely's impeachment testimony could only be considered for the limited purpose of assessing Sullenger's credibility and for no other purpose.

- b. Defense counsel failed to object when the State improperly used Simmelink-Lovely's testimony as substantive evidence during closing argument.

Given that impeachment evidence cannot be used as substantive proof of guilt, "the State may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible." State v. Clinkenbeard, 130 Wn. App. 552, 569-70, 123 P.3d 872 (2005)(citing State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993)). "The concern behind this prohibition is that prosecutors will exploit the jury's difficulty in making the subtle distinction between impeachment and substantive evidence." Clinkenbeard, 130 Wn. App. at 570 (citing State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988)).

During closing argument, the prosecutor improperly used Simmelink-Lovely's impeachment testimony as substantive evidence:

Then all the stuff [Jason Sullenger] told Deputy Simmelink. Remember, Deputy Simmelink? She told all the details that Jason Sullenger had told her. Okay. Jason Sullenger, he just couldn't remember those details when he was here at trial.

3RP 311.

The prosecutor continued and reiterated that Deputy Simmelink called Jason Sullenger and wrote down what Graham said. 3RP 320. Defense counsel failed to object to the State's repeated use of Simmelink-Lovely's testimony as substantive evidence to bolster its case.

- c. Defense counsel failed to request an instruction limiting evidence of Graham's prior bad acts to the purpose of determining whether Sullenger was placed in reasonable fear.

ER 404(b) prohibits admission of character evidence to prove a person acted in conformity with that character on a particular occasion and "forbids such inferences because it depends on the defendant's propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). "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). When evidence is admitted under ER 404(b), the trial court should explain to the jury the purpose for which the evidence is admitted, and should give a cautionary instruction that the evidence is to be considered for no other purpose. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)(citing State v. Goebel, 36 Wn.2d 367, 378-79, 218 P.2d 300 (1950)).

During pre-trial motions, the State moved to admit a recording of a 911 operator calling Sullenger after the incident with Graham. 2RP 22-23, 26-28. Defense counsel objected, arguing that Sullenger accuses Graham of prior bad acts which are more prejudicial than probative. 2RP 25-26. The court admitted the tape, finding that it was relevant to show that Sullenger was in reasonable fear of Graham and its probative value was not substantially outweighed by the danger of unfair prejudice. 2RP 28-31.

At trial, the State played the tape for the court to determine whether it contained 404(b) evidence beyond the scope of the court's ruling that it was admissible. 2RP 108-09. The State renewed its motion to admit the tape and defense counsel objected. 2RP 110-13. The court affirmed its prior ruling that the tape was relevant and admissible. 2RP 113-14.

The State played the 911 tape before the jury during Sullenger's testimony and closing argument. 2RP 117, 3RP 310. During the call, Sullenger said Graham was going to kill him, that Graham pulled a gun on him before, and that someone told on Graham a couple of years ago for conspiracy to manufacture methamphetamine and he ended up in the river. Ex. 5. Under cross-examination, Sullenger explained that Graham never pulled a gun on him and he never saw a dead body in the river. 2RP 130-31.

Defense counsel did not request a limiting instruction to caution the jury that evidence of Graham's past acts has been admitted for the limited purpose of determining whether Sullenger was in reasonable fear of Graham and it must not consider the evidence for any other purpose.²

- d. Defense counsel failed to request an instruction limiting evidence of a defense witness' prior crimes to the purpose of determining credibility.

Where evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a witness' credibility, and instruction should be given that the conviction is admissible only on the issue of the witness' credibility. State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989)(citing WPCI 5.06, which provides, "You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give the testimony of the witness, and for no other purpose."). Also see State v. Thompson, 95 Wn.2d 888, 892, 632 P.2d 50

² The Washington Pattern Jury Instructions provide an instruction for evidence limited as to purpose:

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of _____ and may] be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPIC 5.30.

(1981), overruled on other grounds, State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997).

During the cross-examination of defense witness, Joseph McGurran, the prosecutor asked him about past crimes:

Q. Okay. You have some criminal history. Right?

A. Yes, sir.

Q. You have a theft in the third degree from October of 2008?

A. That sounds about right?

Q. You have another shoplifting case from 2008?

A. Yeah.

2RP 247.

During a discussion about jury instructions, the State brought to the attention of the court and defense counsel that the instructions did not include a limiting instruction:

MR. HORIBE: I can't remember. There is no instruction in there about 609 convictions, right? Maybe we should have added the instruction that says you have heard evidence of crimes that can only be used for the limited purpose of assessing somebody's credibility or something like that.

THE COURT: Mr. Ryan, is that something that you intended to purpose?

MR. RYAN: I thought about it, Your Honor. I didn't purpose it based upon the fact we just had a couple of theft

thirds that we are talking about and an attempted burglary for one of the victims. I didn't intend to propose one.

THE COURT: All right.

3RP 284-85.

The court did not give a limiting instruction.

- d. Defense counsel's performance was deficient and Graham was prejudiced by the cumulative effect of defense counsel's errors.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The record substantiates that defense counsel's performance was deficient and Graham was prejudiced by the cumulative effect of defense counsel's errors where defense counsel 1) failed to request a limiting instruction for impeachment testimony; 2) failed to object to the State's improper use of impeachment testimony as substantive evidence during closing argument; 3) failed to request an instruction limiting the purpose of evidence of appellant's prior bad acts; and 4) failed to request an

instruction limiting the purpose of evidence of a defense witness' prior bad acts.

Due to the potentially prejudicial nature of evidence of prior crimes, limiting instructions "are of critical importance." Brown, 113 Wn.2d at 529. Evidence of other acts of misconduct "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

It is evident from the jury's request to review Sullenger's written statement, the 911 recording, Deputy Cowan's report, Deputy Simmelink-Lovely's report, and Bower's written statement that it had doubt during deliberations. Supp CP _____ (Jury Note, 11/19/10). The conflicting evidence clearly raised reasonable doubt as to whether Graham made a threat to kill thereby placing Sullenger and Bowers in reasonable fear, whether he used force in an attempt to influence Sullenger's testimony, and whether he attempted to induce Sullenger to testify falsely or withhold testimony. Consequently, there is a reasonable probability that the outcome of the charges of felony harassment, intimidating a witness, and

witness tampering would have been different but for defense counsel's failure to request required limiting instructions and failure to object to the State's improper use of impeachment testimony to shore up its case.

Reversal is required because Graham was denied his constitutional right to effective assistance of counsel. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225.

D. CONCLUSION

For the reasons stated, this Court should reverse Graham's convictions for felony harassment as charged in counts II and III, intimidating a witness as charged in count IV, and tampering with a witness as charged in count VII.³

DATED this 12th day of July, 2011.

Respectfully submitted.


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Kenneth Alan Graham

³ It should be noted that the court erred in instructing the jury that it must unanimously agree on an answer to the special verdicts. CP 108-09. However, the error was harmless beyond a reasonable doubt given the undisputed evidence that Sullenger and Graham were family members. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Kenneth Alan Graham, DOC # 785262, MCC-WSR-MSU, P.O. Box 7001, Monroe, Washington 98272-7001.

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

DATED this 12th day of July 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

COURT OF APPEALS
CLERK'S OFFICE
11 JUL 13 PM 12:49
STATE OF WASHINGTON
BY  DEPUTY