

NO. 44322-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NOEL MCDONALD,

Appellant.

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

The Honorable Michael Evans, Judge

**APPELLANT'S OPENING BRIEF
(CORRECTED)**

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A. ASSIGNMENTS OF ERROR

1. The Amended Information charging only one alternative of Tampering with a Witness did not give Mr. McDonald adequate notice of the two uncharged alternatives the jury was instructed on.

2. It was error to instruct the jury only on uncharged alternatives of Tampering with a Witness.

3. Entering a judgment on Tampering with a Witness was in error because the jury did not find Mr. McDonald guilty of a crime he was actually charged with.

4. For purposes of calculating the offender score, the Tampering with a Witness was not a felony domestic violence offense.

5. The current convictions for No Contact Order violations and Assault in the Fourth Degree were improperly included in the offender score calculation because the Tampering with a Witness was not a felony domestic violence offense.

6. Mr. McDonald's offender score was miscalculated.

7. Mr. McDonald was denied effective counsel when his trial attorney failed to object to the tampering with a witness jury instruction that included uncharged alternative means of committing the crime.

8. Mr. McDonald was denied effective counsel when his trial attorney failed to object to an offender score calculation that improperly

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State charged Mr. McDonald with only one of three alternative means of tampering with a witness. But the trial court instructed the jury it could find Mr. McDonald guilty of tampering with a witness only on the two uncharged alternatives. Must Mr. McDonald's Tampering with a Witness conviction be reversed?

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3. Did defense counsel's failure to object to the improper tampering with a witness to-convict instruction deprive Mr. McDonald effective assistance of counsel?

4. Did defense counsel's failure to object to the use of the misdemeanor domestic violence convictions to increase Mr. McDonald's offender score deprive Mr. McDonald effective assistance of counsel?

C. STATEMENT OF THE CASE

1. The Charges and Verdicts

By Amended Information, the State charged Mr. McDonald with eleven crimes: Count I - Assault in the Second Degree (strangulation);¹ Count II – Unlawful Imprisonment;² Count III - Assault in the Fourth Degree;³ Count IV – Harassment (threaten bodily injury);⁴ Count V – Tampering with a Witness;⁵ and Counts VI-XI – Violation of a No Contact Order.⁶ CP 1-6.

All of the charges including pleading language that the respective offense involved domestic violence as defined in RCW 10.99.020. CP 1-6. Each felony charge, Assault in the Second Degree, Unlawful Imprisonment, and Tampering with a Witness, also listed statutory aggravating sentencing factors.⁷ CP 1-3.

¹ RCW 9A.36.021(1)(g)

² RCW 9A.40.040(1)

³ RCW 9A.36.041(1)

⁴ RCW 9A.46.020(1)

⁵ RCW 9A.72.120(1)

⁶ RCW 26.50.110(1) and RCW 10.99.020(3)

⁷ See generally RCW 9.94A.537

The Harassment charge, Count IV, was dismissed at the end of the State's case for lack of evidence. RP 3B at 357-61. As to Count I, Assault in the Second Degree, the jury returned a verdict on the lesser offense of Assault in the Fourth Degree. CP 9. The jury returned not guilty verdicts on Unlawful Imprisonment (Count II) and Assault in the Fourth Degree (Count III). CP 11, 13. The jury returned guilty verdicts on Tampering with a Witness (Count V), and all six counts of Violation of a No Contact Order (Counts VI-XI). CP 16, 17, 19, 21, 23, 25, 27.

By special verdicts, the jury found each count was domestic violence. CP 10, 15, 18, 20, 22, 24, 26, 28. The jury found no aggravating sentencing factors on Tampering with a Witness, the only felony conviction. CP 15.

2. Trial Testimony

As of August 2012, Christopher McDonald and Julieanne⁸ Vanas had lived together in a romantic relationship for a year and a half. RP 2 at 99-100. On August 27, they were visiting friends. RP 2 at 100. Mr. McDonald borrowed Ms. Vanas' car and drove it a little aggressively. That type of driving made her mad. RP 2 at 101-03. They left the friend's house shortly thereafter. As they drove toward their home, they argued. RP 2 at 102-05. Once they got to the end of a road, Ms. Vanas told Mr.

⁸ The true spelling of Ms. Vanas' first name is unclear. It appears in the record both as "Julianne" and "Julieanne."

McDonald to get out of the car. He refused so she got out of the car. RP 2 at 104-05. A passing motorist, David Medack, said that Ms. Vanas frantically signaled him to stop, ran up to his car, was upset, tried to get in his car, and said that Mr. McDonald had choked her. He did not let Ms. Vanas into his car. RP 2 at 179-83. She returned to her car, argued with Mr. McDonald and they drove away. Mr. Medack called 911 and reported what he saw. RP 2 at 183-89.

A few minutes later, the police found Ms. Vanas parked in her car in front of a gas station. The officers described her as crying uncontrollably. She told the officers Mr. McDonald had choked her and needed to be arrested. RP 3A at 242-45, 256-263.

During her trial testimony, Ms. Vanas said that when they stopped at the stop sign, Mr. McDonald did not want her to get out of the car so he grabbed her and tried to pull her back in the car. In grabbing her, he put slight pressure on her neck but he did not try to choke her.⁹ RP 2 at 105-06.

Thereafter, Mr. McDonald was in the Cowlitz County Jail. No contact orders were entered by the Superior Court on the current charges.

⁹ Ms. Vanas also testified about an argument she and Mr. McDonald had on August 24, 2012. RP 2 at 116-21. That argument led the prosecutor to charge Harassment (Count IV) and Assault in the Fourth Degree (Count III). CP 2-3. As neither of those charges resulted in a conviction, detailed facts of the August 24 argument are not necessary for this appeal.

Supplemental Designation of Clerk's Papers, Trial Exhibits 1 and 2. The No Contact Order prohibited Mr. McDonald from having any contact with Ms. Vanas. Trial Exhibits 1 and 2. Mr. McDonald testified at trial that he chose to disregard the No Contact Orders and frequently called Ms. Vanas and spoke with her. RP 3B at 402. Those calls were recorded and provided to the prosecutor. RP 3A at 326-54. The prosecutor filed charges on six of the phone calls which occurred between September 8 and November 7, 2012.¹⁰ The content of the calls formed the basis for the Tampering with a Witness charge. RP 3A at 326-54.

At trial, the prosecutor played redacted versions of the six phone calls to the jury. RP 3A at 327-54. During one of the phone calls, Mr. McDonald told Ms. Vanas that the only way he would beat the case is if the victim would not come to court and testify against him. Ms. Vanas assured him she would not testify against him. RP 3A at 332-33. He also told Ms. Vanas that the victim needed to get in touch with the prosecutor and say that she was not going to follow through with the charges and to be persistent about that.¹¹ RP 3A at 334. In another call, Mr. McDonald told Ms. Vanas that he would go to prison for "this shit" only because nobody had done "shit" to help him. RP 3A at 348. Ms. Vanas responded

¹⁰ See Counts VI-XI

¹¹ At this point in the calls, Mr. McDonald was not acknowledging he was actually speaking with Ms. Vanas. During his trial testimony, Mr. McDonald agreed that he was speaking with Ms. Vanas during the calls.

that it took a lot of research to get “shit together.” Mr. McDonald thought that was untrue and said, “[I]t takes a phone call to the prosecutor and my attorney.” RP 3A at 348.

At no time during the phone calls did Mr. McDonald threaten physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault to Ms. Vanas. To the contrary, the couple consistently expressed a great deal of love and longing for each other during the calls. RP 3A at 327-54.

3. Tampering with a Witness Charge, Jury Instructions, and Closing Argument

The Amended Information on which Mr. McDonald was tried alleges only that Mr. McDonald encouraged Ms. Vanas “to withhold from a law enforcement agency information which she has relevant to a criminal investigation” in violation of RCW 9A.72.120(1)(c). CP 3. In the jury instructions, the jury was told they can find Mr. McDonald guilty of tampering with a witness if he attempted to induce Ms. Vanas to (1) testify falsely or to withhold testimony, or (2) absent herself from any official proceedings. Supplemental Designation of Clerk’s Papers, Court’s Instructions to the Jury (sub. nom. 39), Instructions 21 and 22.

During closing argument, the prosecutor argued Mr. McDonald was guilty of tampering with a witness because he encouraged Ms. Vanas to not show up for trial and to not testify. RP 4 at 502-03, 560.

4. Sentencing

At sentencing, Mr. McDonald disputed his criminal history. He argued that his 2008 convictions for residential burglary and assault in the second degree committed on the same day should be treated as same criminal conduct.¹² RP 4 at 582-86. The court found that it was not same criminal conduct and calculated Mr. McDonald as having an offender score of seven points prior to including the current domestic violence misdemeanors in his criminal history. RP 4 at 586-87. Defense counsel did not object to the addition of the misdemeanor convictions and the total offender score of fourteen points. RP 4 at 582-602.

The court sentenced Mr. McDonald to 51 months for Tampering with a Witness and imposed many consecutive sentences on the Fourth Degree Assault and the No Contact Violations. CP 36, 39. Mr. McDonald appealed all portions of his Judgment and Sentence. CP 46-63.

¹² RCW 9.94A.589(1)(a)

D. ARGUMENT

1. THE TAMPERING WITH A WITNESS CONVICTION MUST BE REVERSED BECAUSE THE JURY WAS INSTRUCTED ONLY ON UNCHARGED ALTERNATIVES.

The State charged Mr. McDonald with one alternative means of committing tampering with a witness but instructed the jury only on the other two alternative means. Because Mr. McDonald was given no notice of the two uncharged alternative means, the jury convicted him of a crime he was not charged with. Mr. McDonald's tampering with a witness conviction must be reversed.

The Sixth Amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation...." Washington Const. Art. 1, § 22 (Amend. 10) provides "[i]n criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him." Thus, an accused must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (error to instruct jury on a crime mischaracterized as a lesser included offense); *State v. Perez*, 130 Wn. App. 505, 507, 123 P.3d 135 (2005), *review*

denied, 157 Wn.2d 1018 (2006) (error to instruct jury on uncharged alternative means of theft); *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (reversible error to try defendant under an uncharged statutory alternative because it violates right to notice of the crime charged).

“When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to each other.” *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)). When an information charges more than one alternative means, it is error to instruct the jury on uncharged alternatives, regardless of the strength of the evidence presented at trial. *Bray*, 52 Wn. App. at 34 (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (reversible error to instruct the jury on alternative means of committing rape when only one alternative charged). Such an error is presumed prejudicial unless there is no possibility the jury convicted on the uncharged alternative. *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385, *review denied*, 113 Wn.2d 1030 (1989); *see also State v. Spiers*, 119 Wn. App. 85, 94, 79 P.3d 30 (2003) (finding instructional error harmful where no evidence was presented on alternative means).

There are three alternative means of committing Tampering with a Witness. *State v. Witherspoon*, 171 Wn. App. 271, 286, 286 P.3d 996 (2012), *review granted*, 177 Wn.2d 1007 (2013);¹³ *State v. Lobe*, 140 Wn. App. 897, 902, 167 P.3d 627 (2007).

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120.

“Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.” *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (in construing assault statute, recognizing separate subsections within a

¹³ Oral argument set for October 23, 2013, No. 88118-90

statutory section proscribing an offense represent alternative ways to commit the same offense).

Mr. McDonald was tried on the Amended Information. The amended information charged Tampering as follows:

COUNT V

TAMPERING WITH A WITNESS With Aggravating Factor

The defendant, in the County of Cowlitz, State of Washington, on, or between September 08, 2012, and November 07, 2012, did attempt to induce Julianne M. Vanas, a witness in an official proceeding, a person the defendant had reason to believe would be called as a witness in an official proceeding, and/or a person who the accused had reason to believe may have had information relevant to a criminal investigation or the abuse of a minor child to wit: Assault in the Second Degree, DV, Unlawful Imprisonment DV, Assault in the Fourth Degree DV and/or Harassment (DV) *to withhold from a law enforcement agency information which she has relevant to a criminal investigation; contrary to RCW 9A.72.120(1)(c):*

(emphasis added.) CP 3.

At trial, the court gave the following to-convict instruction which specify only the two uncharged alternatives of Tampering with a Witness.

INSTRUCTION 22

To convict the defendant of the crime of Tampering with a Witness as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 8, 2012 and November 7, 2012 the defendant attempted to induce a person to testify falsely or

withhold any testimony or absent herself from any official proceeding; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceeding; and

(3) That any of the acts occurred in the State of Washington.

Supp. Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 22. Additionally, the court gave a supporting definitional instruction.

INSTRUCTION 21

A person commits the crime of Tampering with a Witness when he attempts to induce a witness he has reason to believe is about to be called as a witness in any official proceeding or a person whom he has reason to believe may have information relevant to a criminal investigation to testify falsely or to withhold any testimony or absent herself from any official proceeding.

Supp. Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 21.

The State, and not Mr. McDonald, proposed all of the above instructions. Supp. Designation of Clerk's Papers, Plaintiff's Proposed Instructions to the Jury (sub. nom. 38); Supp. Designation of Clerk's Papers, Defendant's Proposed Instructions to the Jury (sub. nom. 35).

Mr. McDonald did not object to the trial court instructing the jury on two uncharged alternative means of committing Tampering even though the Amended Information gave him notice only of a different

alternative. However, Mr. McDonald's claim that he was improperly convicted of an uncharged alternative means implicates the constitutional right to notice and may be raised for the first time on appeal. RAP 2.5(a)(3); *Vangerpen*, 125 Wn.2d at 787 (accused cannot be tried for offense not charged).

In Mr. McDonald's case, the error was prejudicial error. An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. *Bray*, 52 Wn. App. at 34-35. Mr. McDonald's jury was never presented for consideration the Tampering alternative Mr. McDonald was actually charged with, i.e., to attempt to induce Ms. Vanas to withhold from a law enforcement agency information which she had relevant to a criminal investigation. There was no suggestion among the evidence and the prosecutor's closing arguments that Mr. McDonald had ever done that. Instead, the jury was only presented with instructions to convict Mr. McDonald of the two unchallenged and uncharged alternatives of Tampering. Accordingly, Mr. McDonald's Tampering with a Witness conviction must be reversed.

2. NEITHER THE FELONY TAMPERING WITH A WITNESS, NOR THE SIX MISDEMEANOR VIOLATIONS OF A NO CONTACT ORDER, AS PROVEN, WERE DOMESTIC VIOLENCE OFFENSES AND THUS COULD NOT BE USED TO INCREASE MR. MCDONALD'S OFFENDER SCORE.

As proved to the jury,¹⁴ Tampering with a Witness is not a domestic violence offense for offender scoring purposes under RCW 9.94A.525(21). Also as proved to the jury, none of the six misdemeanor Violations of a No Contact Order were domestic violence offenses under RCW 9.94A.525(21)(c). Because the Tampering was not proven to be domestic violence, the misdemeanor Assault in the Fourth Degree could similarly not be included in the offender score calculation. Mr. McDonald's case should be remanded for resentencing.

On April 1, 2010, the state House and Senate, unanimously passed Engrossed Substitute House Bill 2777, Chapter 274, ESHB 2777, Chapter 274, Laws of Washington (2010). During this session, the legislature enacted RCW 9.94A.030(20) and RCW 9.94A.525(21). RCW 9.94A.525(21) relates to the calculation of a defendant's offender score for felony sentencing purposes as follows:

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through

¹⁴ This is an argument in the alternative and is offered only on the chance that this Court may not grant the requested reversal of the Tampering charge as argued under Issue I.

(20) of this section; however, count points as follows:

...

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

RCW 9.94A.030(20) in relevant part, defines “domestic violence” as having “the same meaning as defined in RCW 10.99.020 and 26.50.010.”

Thus to impose an enhanced offender score under RCW 9.94A.525(21), the State was required to prove that Mr. McDonald was: (1) charged with a felony domestic violence offense as defined in RCW 9.94A.030; (2) and that Mr. McDonald was convicted of a felony domestic violence offense as defined in RCW 9.94A.030 after August 1, 2011; and (3) the six no contact violations were domestic violence as defined in RCW 9.94A.030.

RCW chapter 10.99.020, which governs the issuance of domestic violence no-contact orders, broadly defines domestic violence in relevant part as follows:

““Domestic violence” includes but is not limited to any of the following crimes when committed by one family or household member against another:

- (a) Assault in the first degree (RCW 9A.36.011);
- (b) Assault in the second degree (RCW 9A.36.021);

- (c) Assault in the third degree (RCW 9A.36.031);
- (d) Assault in the fourth degree (RCW 9A.36.041);
- (e) Drive-by shooting (RCW 9A.36.045);
- (f) Reckless endangerment (RCW 9A.36.050);
- (g) Coercion (RCW 9A.36.070);
- (h) Burglary in the first degree (RCW 9A.52.020);
- (i) Burglary in the second degree (RCW 9A.52.030);
- (j) Criminal trespass in the first degree (RCW 9A.52.070);
- (k) Criminal trespass in the second degree (RCW 9A.52.080);
- (l) Malicious mischief in the first degree (RCW 9A.48.070);
- (m) Malicious mischief in the second degree (RCW 9A.48.080);
- (n) Malicious mischief in the third degree (RCW 9A.48.090);
- (o) Kidnapping in the first degree (RCW 9A.40.020);
- (p) Kidnapping in the second degree (RCW 9A.40.030);
- (q) Unlawful imprisonment (RCW 9A.40.040);
- (r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);
- (s) Rape in the first degree (RCW 9A.44.040);
- (t) Rape in the second degree (RCW 9A.44.050)
- (u) Residential burglary (RCW 9A.52.025);
- (v) Stalking (RCW 9A.46.110); and
- (w) Interference with the reporting of domestic violence (RCW 9A.36.150).

RCW 10.99.020(5).

The definition of domestic violence in RCW 10.99.020 is provided through a non-exclusive list of exemplar crimes, while the term “domestic violence” is more narrowly defined in chapter 26.50 as follows:

““Domestic violence” means (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual

assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.”

RCW 26.50.010(1). The definition for domestic violence in RCW 26.50.010 specifically requires physical harm, bodily injury, assault, or the fear of the same, or stalking, or sexual assault. Without these elements, the State cannot prove domestic violence under RCW 26.50.010. Similarly, without these elements the State can not prove RCW 9.94A.030.

While many of the crimes specifically listed in RCW 10.99.020(5) are usually accompanied by elements that are defined as domestic violence in RCW 26.50.010(1), there are several crimes, such as the no contact violations in the instant case under subsection (r) that do not require harm, injury or threat of either, unlike in RCW 26.50.010. For example, when the crime charged is criminal trespass or violating a no-contact or protection order (the instant case) and the victim is a family or household member, but without violence, there is no crime under RCW 26.50.010(1) or RCW 9.94A.030.

This issue of divergent definitions of “domestic violence” did not exist prior to the enactment of 9.94A.030(20), or was irrelevant to practitioners and defendants alike due to the absence of a disparate sentencing scheme under RCW 9.94A.525. Currently with the inclusion

by the legislature of both definitions of domestic violence in RCW 9.94A.030(20), and that statute's direct effect on the potential length of prison sentence, this definitional divergence is critical.

As these definitions are applied to Mr. McDonalds's case, neither the Tampering with a Witness nor the No Contact Order violations were proven to be domestic violence. Contrary to the requirement of RCW 26.50.010, there was no evidence of physical harm, bodily injury, assault, or the fear of the same, stalking, or sexual assault in either the Tampering or the No Contact Order violations.

Illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Courts have the duty and power to correct an erroneous sentence upon its discovery. See *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654, review denied, 104 Wn.2d 1026 (1985); *Ford*, 137 Wn.2d at 477 (quoting *State v. Loux*, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) ("[T]his court 'has the power and duty to correct the error upon its discovery, even where the parties not only failed to object but agreed with the sentencing judge'"), overruled in part by *State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996)).

Here the court should do that by remanding Mr. McDonald's case to the sentencing court with an order to strike the six No Contact Order

violations from his offender score. The court should also order that the Assault in the Degree conviction be stricken from the offender score calculation because the Tampering charge was not proven to be domestic violence.

3. MR. MCDONALD WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel was inexplicably deficient in both the areas argued under Issues 1 and 2. The Tampering with a Witness conviction should be reversed. If it is not, Mr. McDonald's case should still be remanded for resentencing without the inclusion of the six No Contact Order violations and the Assault in the Fourth Degree.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” U.S. Const. Amend VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, § 22. The right to counsel is “one of the most fundamental and

cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasonable decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007) In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (unreasonable for defense counsel to propose self-defense jury instruction misstating the law and giving defendant a higher burden).

A counsel's failure to notice and object to an erroneous jury instruction may demonstrate a lack of effective assistance of counsel if the

defendant can show that the inaccurate jury instruction prejudiced him. *State v. Wilson*, 117 Wn. App. 1, 17, 75 P.3d 573, *review denied*, 79 P.3d 447 (2003); *State v. Howland*, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992), *review denied*, 121 Wn.2d 1006 (1993); *State v. Johnson*, 29 Wn. App. 807, 815, 631 P.2d 413, *review denied*, 96 Wn.2d 1009 (1981).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008).

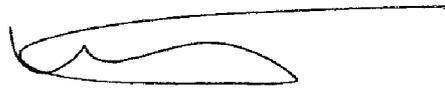
As explained in Issue 1, defense counsel's failure to object to the erroneous to-convict instruction and definition instructions permitted the jury to convict Mr. McDonald of an uncharged alternative of Tampering with a Witness.

As explained in Issue 2, defense counsel's failure to apply the appropriate interpretation of the law to Mr. McDonald's offender score, allowed the court to erroneously increase his offender score from seven points to thirteen fourteen points. At seven points, Mr. McDonald's standard range was just 33-43 months, much less than the 51 months he received on the erroneous offender score of nine or more points. RCW 9.94A.510.

E. CONCLUSION

Mr. McDonald's Tampering with a Witness conviction must be reversed. In the alternative, his case must be remanded to the trial court for resentencing without the misdemeanor convictions included in the offender score.

Respectfully submitted this 2nd day of September 2013.



LISA E. TABBUT/WSBA #21344
Attorney for Christopher Noel McDonald

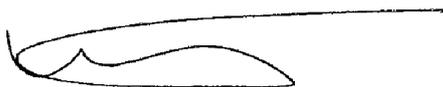
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief with: (1) Sean Brittain, Cowlitz County Prosecutor's Office, at sasserm@co.cowlitz.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to c/o Cowlitz County Jail, 1935 1st Avenue, Longview, WA 98632.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 2, 2013, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Christopher Noel McDonald

COWLITZ COUNTY ASSIGNED COUNSEL

September 02, 2013 - 2:02 PM

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