

NO. 49058-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARL BRUCE, JR.,

Appellant.

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

The Honorable Christine Schaller, Judge

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OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in ordering that Richard Bruce be shackled with a mechanical leg restraint throughout trial; this denied him the trial rights and due process of law guaranteed by the state and federal constitutions and offended the dignity of the judicial process.

2. The trial court erred in allowing the state to introduce evidence that Bruce had a prior conviction for assaulting the same complaining witness in his trial for assault in the second degree.

3. The prosecutor violated the limitations of the court's ruling permitting evidence of a prior assault, but excluding facts about the prior crime.

4. The prosecutor impermissibly commented on Bruce's invocation of his right to remain silent in violation of the Fourteenth Amendment's guarantee of due process of law.

5. The trial court erred in denying a defense request for a one-court-day continuance so that the defense investigator could testify at trial; this denied Bruce his rights to present a defense and to the effective assistance of counsel guaranteed by the state and federal constitutions.

6. Cumulative error denied Bruce a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion by ordering that Bruce be shackled with a leg brace throughout trial without a finding that he posed a danger to anyone in the courtroom, would be disruptive in court or might escape and without giving sufficient consideration to less intrusive alternatives?

2. Was the error in shackling Bruce not harmless where jurors might have drawn negative inferences from the fact that, when he testified in his own behalf at trial, Bruce was already seated when they entered and was not excused until after they exited?

3. Did the error in shackling Bruce offend the dignity of the court?

4. Did the trial court err in ruling that the defense had opened the door to evidence that Bruce had a prior conviction for assaulting the complaining witness, Elizabeth Sanchez, where the fact that Bruce and Sanchez were arguing about the prior assault before the alleged charged crimes was not part of the res gestae of the crimes; where the record did not support the state's grounds for arguing that the door was opened and where the evidence was substantially more unfairly prejudicial than probative?

5. Did the trial court's providing a different basis for arguing that the defense opened the door to evidence of a prior assault conviction than the grounds argued by the state, result in the trial court's entering the fray and improperly assuming the role of prosecutor?

6. Did the prosecutor commit flagrant and ill-intentioned misconduct and reversible error by questioning Bruce about other alleged bad acts related to his prior conviction, in violation of the court's ruling admitting evidence of the prior assault for the purpose of explaining why Sanchez was so angry during her argument with Bruce, and expressly excluding details about the prior crime?

7. Did the prosecutor commit constitutional error, flagrant and ill-intentioned misconduct and reversible error by commenting on Bruce's invocation of his right to remain silent both to impeach his credibility and as substantive evidence of his guilt?

8. Did the trial court commit reversible, constitutional error by not granting a one-court-day continuance, or some other relief such as telephonic testimony, and thereby excluding the relevant testimony of the defense investigator without a showing that the continuance would be disruptive of the fairness of the fact-finding process?

9. Did the trial court deny Bruce the effective assistance of counsel guaranteed by the state and federal constitutions by denying a

one-court-day continuance and thereby excluding the testimony of the defense investigator, a critically-important witness?

10. Did the cumulative errors of all of the above errors deny Bruce a fair trial?

## **C. STATEMENT OF THE CASE**

### **1. Procedural history**

The Thurston County Prosecutor's Office charged appellant Richard Bruce, by amended information, with burglary in the first degree, assault in the second degree, violation of a no-contact order and interfering with reporting domestic violence. CP 60-61. All counts included a special domestic violence allegation. CP 60-61. The jury acquitted Bruce of the first degree burglary and interfering with reporting domestic violence charges after a trial before the Honorable Christine Schaller. CP 91, 97.

On June 19, 2016, Judge Schaller imposed standard range sentences for the assault and violation of a no-contact order convictions.<sup>1</sup> CP 121-130. A timely Notice of Appeal followed. CP 131-141.

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<sup>1</sup> The defense conceded in closing argument that Mr. Bruce was guilty of violation of a no-contact order. RP 299

## **2. Imposition of a leg restraint**

At the request of the prosecutor, the trial court ordered that Bruce be shackled with a mechanical leg restraint throughout trial. RP 17, 28. Because the restraints changed his gait and affected his ability to walk, the court further ordered that if Bruce testified, he would need to be seated in the witness chair before the jury entered the courtroom and leave the stand after the jury left the courtroom. RP 26, 28.

Before ruling, the court heard the testimony of Thurston County Corrections Office Ricardo Gordon and the argument of counsel. Gordon testified that while Bruce was in maximum custody in the jail, this was because of the nature of his charges; Bruce had not created any disciplinary problems or disturbances while in jail. RP 15-18. According to Officer Gordon, other means of shackling Bruce would be more restrictive and noticeable to others. RP 18-21. Two corrections officers would be in the courtroom, and if Bruce were unshackled, a third officer would probably be used. RP 20.

The court's ruling was based on findings that: (a) Bruce's charges were serious, (b) the court knew little of Bruce's temperament and character, (c) there was no evidence of disruptive behavior, but his prior charge was "inherently disruptive," (d) there were no other less restrictive restraints, (e) Bruce was six feet tall and of average build, (f) Bruce had

not been in compliance with his DOC supervision, (g) he had made no threats to create harm or engage in disruptive behavior, nor was he self-destructive, (h) there was no evidence of possible mob violence or of a planned rescue attempt, (i) there was no reason to anticipate that a large number of people would be attending trial, (j) witnesses would have to walk between counsel tables, and (k) an extra guard would be necessary if Bruce were not restrained. RP 24-28.

Defense counsel objected to the use of restraints and pointed out that there was no evidence of disruptive or antisocial behavior on Bruce's part during the proceedings. RP 23.

### **3. Ruling in limine**

The court granted Bruce's motion in limine to exclude evidence of prior crimes, wrongs or bad acts, in particular to exclude his prior conviction for second degree assault, domestic violence, of the same complaining witness, Elizabeth Sanchez. RP 11-12; CP 19-20. The state, in fact, agreed that, unless defense counsel opened the door during cross-examination, Sanchez would not testify that the argument which gave rise to the current charges grew out of a discussion of the prior conviction. RP 12.

#### **4. Trial facts**

##### **a. Direct and cross-examination of the complaining witness**

Sanchez testified that she had been in a relationship with Richard Bruce for about a year and had lived with him for several months in the past. RP 48. On March 17, 2016, she lived alone in her travel trailer on the rural property of Cindy and Rob McBride, where she worked taking care of Cindy McBride's horses and stable. RP 49-50.

Sanchez said that on March 17, she had a disagreement with Bruce, it got a "little physical," she called 911, and the police came to arrest him; their discussion got out of hand.<sup>2</sup> RP 51-55. As recounted in her trial testimony and statements to the police and the defense investigator, however, the details of her allegations were far from clear.<sup>3</sup>

Sanchez testified on direct examination that she had picked up Bruce from a mutual friend's house earlier in the day and brought him to the property, she believed a couple of hours before they argued. RP 53-54. She described fixing dinner while Bruce watched TV during these peaceful hours. RP53. After the argument got heated, she recalled him

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<sup>2</sup> The 911 tape was played to the jury at trial and, at their request, during deliberations. RP 84, Trial Exhibits Nos. 2 and 17. Undersigned counsel found the tape difficult to understand.

<sup>3</sup> The following facts do not include all of the inconsistencies or variations in the record of Sanchez's testimony and other statements.

coming after her, tripping over a heater in the trailer, and putting his hand over her mouth to keep her from screaming. RP 54. She described being on the bed with Bruce's hand over her mouth, him telling her to shut up and her having trouble breathing. RP 54. She described Bruce as then realizing what he was doing and leaving the trailer. RP 55. Once he left, she could not find her phone and called 911 on an older phone that no longer worked for other calls. RP 54. While she was talking to the 911 operator, Bruce came back to the trailer and returned her phone to her and left again. RP 56. Rob McBride also came to the trailer during the 911 call to return Sanchez's dog which had gotten loose; a short time later, deputies from the Thurston County Sheriff's Office arrived. RP 57-58.

Sanchez declined to give a recorded statement to Deputy Jordan Potis, but spoke with him and provided a short written statement.<sup>4</sup> RP 58, 62. She told Potis that she became upset, Bruce wouldn't let her leave and he licked her face. RP 61. She said to Potis that Bruce had his hands around her neck and started to squeeze, but tripped and they both fell. RP 62. But, when questioned about this statement at trial, she – at one point – denied that Bruce ever touched her neck. RP 63. A short time later, she

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<sup>4</sup> The written statement was admitted as a trial exhibit 17, and is designated as such in the Clerk's Papers.

testified that the only time he put his hands on her neck was when he was tripping over the heater. RP 64-65.

The prosecutor asked Sanchez about her interview with the defense investigator, Dave Matthews. RP 65-66. The prosecutor asked Sanchez to confirm, among other things, that she told Matthews that they were arguing about her ex-husband, and Sanchez affirmed that this was “part of” the argument. RP 66. The prosecutor asked Sanchez if she told Matthews that she had a seizure after Bruce tripped and knocked them both to the floor. RP 67. Sanchez responded that she didn’t think that she had a seizure until later, but confirmed that, because of a past head injury, she did have seizures when under stress. RP 67-69.

On cross examination, defense counsel also asked Sanchez about the Matthews interview. RP 109-119. Sanchez agreed with counsel that she told Matthews that she picked Bruce up at a friend’s house on March 16, 2016, and that she had been to her ex-husband’s before picking him up, and was upset. RP 110. She told Matthews that they returned to her home, ate dinner and went to bed. RP 111. The following morning, March 17, Sanchez had gone to work; she returned around lunchtime. RP 111-112. She told Matthews that at some point things got heated and she was furious at Bruce, screamed and yelled at him and got in his face. RP 112. She denied, however, saying that Bruce got upset and walked to the

front of the trailer and licked her as he passed by, but agreed her memory was foggy. RP 113. She did not believe that she told Matthews that Bruce acted like he was going to hit her, but didn't, or that she "threw an elbow" at him causing him to wrap his arms around her to protect himself.<sup>5</sup> RP 115. Sanchez did not recall what she told Matthews about Bruce putting his hands on her throat, but agreed that she never said he restricted her air. RP 116. She recalled talking to Matthews about having a seizure, but not when she had it. RP 117. Then she recalled saying that Bruce was beside her when she came to from the seizure and, although she did not recall saying he had put his coat under her head, that was what he usually did. RP 119-120. She recalled throwing a cup of water on Bruce when he started smoking a cigarette. RP 123.

**b. Ruling that the door had been opened to ER 404(b) evidence**

Prior to redirect examination of Sanchez, the court granted the state's motion to introduce the evidence excluded pretrial by motion in limine -- evidence that Sanchez and Bruce were arguing about his prior conviction for assaulting her. RP 138-139. The court ruled that the defense opened the door to this evidence, by asking on cross-examination

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<sup>5</sup> At the request of defense counsel, the court gave self-defense instructions to the jury to negate the assault element of the burglary charge. CP 83; RP 231-238.

about the fact that there was an argument and the intensity of Sanchez's response:

It is clear to the Court that by questioning about the argument ["it was about this time that you got into the argument?"], by questioning about her response [heated, yelling, screaming, in his face]. . . . it's really at this point unexplained as to how she could have gotten so upset over just an argument, and that the information related to what the argument was about and why she would get so upset and agitated and have such an extreme response is the *res gestae*, and, therefore, could be admissible with the door being opened pursuant to that theory.

RP 131- 133. The court then concluded that testimony that Bruce had been convicted of the exact same crime against Sanchez in the past would be more unfairly prejudicial than probative, but that evidence that he had previously been convicted of assaulting her, without specifying the exact charge, would not be. RP 138. The court clarified that only the fact that they were arguing about the prior crime would be allowed and not the fact that it was a second degree assault charge or other facts about the charge. RP 139.

The state's argument had been that defense counsel opened the door by asking Sanchez "about the substance of the argument prior to the assaultive acts, specifically that Ms. Sanchez was unhappy about her husband and that she was discussing that and she was discussing that with the defendant and that she became upset and he became upset." RP 126.

To this, defense counsel responded that he had not asked what the

argument was about, nor asked about any issues having to do with Sanchez's ex-husband arising on the day of the argument. RP 129. In fact, only the prosecutor asked Sanchez if she told the defense investigator Matthews that they were arguing about her ex-husband. RP 66. Defense counsel had asked no questions about the subject of the argument. RP 109-123.

**c. Redirect examination of Sanchez**

On redirect, the prosecutor elicited from Sanchez that Bruce had said something about possibly beating the prior charge against him, that she knew that this prior charge was of having assaulted her and that she knew that he had been convicted of that charge. RP 142-143. She was upset because it was like he did not do anything wrong. RP 143.

The prosecutor also elicited from Sanchez that the defense interview had not been taped and that she had not seen a report of the interview or what version of her account Matthews had written. RP 142. Sanchez testified that she believed from the questions asked of her about it at trial, that the report had been pretty accurate. RP 142.

**d. Other state's witnesses's testimony**

Robert McBride confirmed that Sanchez lived on his property and worked for his wife. RP 71-51. He confirmed that he went to the trailer while Sanchez was crying and trying to call 911 about some kind of a

confrontation. RP 72. He had not seen the confrontation and did not enter the trailer. RP 72.

Deputy Jordan Potis testified that Sanchez was very upset when he contacted her around 6:30 p.m. on March 17, 2016, and had difficulty explaining the situation. RP 147-151. She declined the opportunity to give a taped statement, but filled out a form which included her written statement. RP 155. He took photos of Sanchez's neck and shoulders to show any redness or swelling. RP 158-159. In his report, Potis described a "slight redness" over her neck and shoulders and did not mention any swelling, as he did in his trial testimony. RP 168, 170.

**e. Defense motion for a continuance**

At the close of the state's case in chief, on May 25, 2016, defense counsel informed the court that an important rebuttal witness, investigator Dave Matthews, would not be available until the next evening, and asked for a continuance of one court day. RP 172. Because court did not meet on Fridays and Monday was a holiday, if the continuance were granted, trial would resume on Tuesday. RP 179. Defense counsel indicated that the witness was critical to the defense and that counsel would not be providing effective assistance if he failed to request the continuance. RP 173-174.

Counsel had not known of the witness's unavailability when he confirmed for trial, and had also been told that the case would not be going out to trial as scheduled; Bruce did not want a continuance because of speedy trial issues. RP 172, 180. At the time counsel learned that the witness would be out of town, he believed the need for a continuance would become moot. RP 172, 180. Once counsel learned that Matthews would not be available for trial, he decided to wait to ask for a continuance until he knew that Matthew's testimony would be critical, and it became critical. RP 173. Counsel "put on the record" that Bruce was not informed about Matthews's unavailability until the previous day. RP '80-181,

Although opposed to the continuance, the prosecutor agreed that she had been told by administration in the late afternoon of Thursday May 19, 2016, that the trial would not be proceeding and she had called off the state's witnesses. RP 181. The prosecutor also raised the possibility of inquiring of the jurors of their availability. RP 175.

The trial court denied the continuance, ruling that counsel could have sought a continuance the day before when trial began and that it was not appropriate to continue the trial at that point. RP 182.

**f. Richard Bruce's testimony**

Bruce testified that he had been staying with Sanchez for over two weeks by March 17, 2016. RP 186-187. On that day, he woke up, turned on the TV, ate breakfast and waited for her to come home from work. RP 187. Sanchez returned at 12:00 or 1:00, around lunchtime. RP 188. At some point, they began talking about getting the no-contact order removed, and he commented that it would have been easier if it had never been entered and maybe he should not have taken a deal on the earlier charge. RP 188. Sanchez became very upset and began yelling. RP 189.

When Sanchez came to the bedroom area, he walked to the front, sat on the passenger seat of the travel trailer and lit a cigarette. RP 190. She threw a glass of water on him because she did not permit smoking. RP 190. Bruce went to get his things, and as he passed Sanchez, she threw her elbow back and hit his face; he tried to grab her arms and tripped over the cord of the heater and they fell to the floor. RP 190-191.

Bruce noted that there was something obviously wrong and she was hurt or injured. RP 192. As he took his coat off, she started having a seizure. RP 192. He put his coat under her head. RP 192. When Sanchez recovered and woke, she was disoriented and started kicking and scratching to get away. RP 193. He tried to calm her and put his arms around her, but when this didn't work he took his coat and phone and left.

RP 194. When he tried to call someone to get a ride, he saw that he had the wrong phone and returned it to the trailer. RP 195. Bruce had not seen any indication when he decided to leave that Sanchez would call law enforcement. RP 195.

Because Bruce lived an hour and a half away and had no way to get home, he walked in the woods behind the trailer. RP 196. When he returned to the trailer, he was covered in mud. RP 196. He went to the shower, waiting for Sanchez to return and help him with a change of clothing. RP 196-197. Deputy Potis found him there. RP 153, 196. Potis arrested him and read him his rights; Bruce testified that he was not given an opportunity to make a statement before the arrest and felt that his side of the story did not matter. RP 197-198. He invoked his right to remain silent after arrest and warnings. RP 198.

Bruce denied that he tried to choke Sanchez and did not believe he ever put his hands over her mouth; he did not restrict her breathing or intend to restrict her breathing. RP 198-199.

On cross-examination, the prosecutor asked Bruce whether he was upset with Sanchez for reporting the prior incident to the police and if he asked her not to cooperate with the police, both of which accusations he denied. RP 215. Bruce indicated that he felt he was pressured into “taking a deal that I shouldn’t have.” RP 215. He indicated that he was

not happy with having the no-contact order and was discussing it with Sanchez, but that she was the one who was getting upset. RP 215.

The prosecutor elicited from Bruce that he declined to talk to Deputy Potis after Potis arrested him and read him his Miranda rights. RP 219-220. The prosecutor asked Bruce to confirm that by exercising his right to remain silent, he declined or waived the opportunity to tell Potis about Sanchez's seizure, or that he left so she could calm down or that he was just out walking around and not hiding. RP 219-220.

Q. Isn't it true when you talked to Dep. Potis, you never told him that Elizabeth had a seizure?

A. No, ma'am.

Q. But he advised you of your constitutional rights under Miranda, correct?

A. Yes.

....

Q. And he asked you, "Having these rights in mind, would you like to talk to me," didn't he?

A. I asked him what I was being charged with.

Q. My question isn't what you asked him. My question is: Isn't it true, after asking if you understood these rights, he said, "Having these rights in mind do you wish to speak to me?"

A. I asked him a question immediately following that.

Q. We will talk about what you asked him in a minute.

But right now I'm asking you, isn't it true that he asked you whether or not you wished to talk to him.

A. He did.

Q. So you had the opportunity to talk to him about Elizabeth having a seizure, isn't that true?

A. That's true.

Q. You had the opportunity to talk to him about how you needed to get out of there because she was angry at you and she just needed to calm down; isn't that true?

A. Sure

Q. [You had opportunity to tell him just walking around, not trying to hide] And you waived that opportunity?

A. I guess.

Q. And the reason you did that is because you knew that you had strangled her?

A. Not true.

Bruce denied the prosecutor's allegation that he asked Potis what Sanchez told him. RP 221.

**g. Closing arguments**

In closing the prosecutor argued that Bruce was not credible because he had had the opportunity to hear all of the testimony before he testified. RP 265. The prosecutor reminded the jury that Bruce did not give a statement to Deputy Potis, which she said was "totally fine" because everyone has the right to remain silent. RP 266. But, she argued,

it was important that Bruce did not talk to the arresting officer because “you don’t know what account he would have given.” RP 266.

## **5. Sentencing**

Sanchez spoke at sentencing, describing herself as not the victim, but “just the other person in the argument on the said day of the argument.” RP(sentencing) 4. She told the court that Bruce was not violent, but had come home “angry, messed up and mentally confused” after returning from serving in Aghanistan. RP(sentencing) 5. He had, she said, never received the counseling he needed to deal with his PTSD. RP(sentencing) 5. She described his many positive attributes and the ways in which he had helped her. RP(sentencing) 6-7.

Defense counsel reiterated that Bruce had spent 13 months in Afghanistan and suffered from PTSD. RP(sentencing) 7-8. Counsel expressed hope that Bruce would be able to get the resources and help he needed. RP(sentencing) 9.

## **D. ARGUMENT**

### **1. THE TRIAL COURT ERRED IN ORDERING BRUCE TO BE SHACKLED DURING TRIAL AND THIS DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE, TO TESTIFY IN HIS OWN BEHALF, AND TO DUE PROCESS OF LAW.**

To ensure a fair and impartial trial under the Sixth and Fourteenth

Amendments to the United States Constitution and article I, sections 3 and 22 of the Washington Constitution, except in extraordinary circumstances, a criminal defendant in Washington is entitled to appear at trial free from all bonds or shackles. State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). See, e.g., Illinois v. Allen, 387 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). Holbrook v. Flynn, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.ED.2d 525 (1986).

The trial judge must exercise discretion based on a factual record before ordering shackling; imposing a physical restraint on an accused person merely because of the charges and because he or she may be “potentially dangerous” is an abuse of discretion:

“A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record. A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be ‘potentially dangerous’ is a failure to exercise discretion.”

Finch, 137 Wn.2d at 847 (quoting Hartzog, 96 Wn.2d at 400). “Restraints should ‘be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.’” Id. (quoting Hartzog, at 398). The trial court may authorize restraints only

if they are justified by an essential state interest specific to that trial. In re Pers. Restraint of Davis, 152 Wn.2d 647. 694-95, 101 P.3d 1 (2004). Reliance on a general policy is a failure to exercise discretion. Hartzog, at 400.

**a. Ordering shackling was an abuse of discretion.**

Here, the court properly held a pretrial hearing before ordering that Bruce be shackled during trial, and properly considered relevant factors.<sup>6</sup> RP 24-28. Like the trial court in Finch, however, the court here abused its discretion in ordering shackling based essentially on the charges themselves and general concern for safety. RP 24-28. The trial court's findings beyond the seriousness of the charges and a past conviction were that there was no evidence of disruptive behavior, no threats to harm or disrupt the proceedings, no self-destructive behavior, no escape plans or threat of mob violence, or no large number of people anticipated to attend trial. RP 25-28. In contrast to Finch, the court did not even find Bruce to

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<sup>6</sup> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and the mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Finch, 137 Wn.2d at 848 (quoting Hartzog, 96 Wn.2d at 383).

be physically imposing or menacing or to be threatening in temperament or character. RP 26.

In Finch, the trial court relied on his size and threatening comments about certain witnesses to justify shackling him. Finch, at 850-852. The Washington Supreme Court reasoned, however, that Finch had no history of being violent or attempting to escape while in custody and had not been disruptive in pretrial court proceedings. Id., at 852. Under these circumstances, the Supreme Court found Finch’s shackling an abuse of discretion—a “clear error” – notwithstanding his size and comments. Id., at 862. There was far less justification for shackling in Bruce’s case.

State v. Donery, 131 Wn. App. 667, 128 P.3d 1262 (2006), is instructive. The appellate court, in that case, upheld an order permitting shackling of the defendant against a claim that the order was based on “generalized concerns based about safety.” Unlike this case, Donery had a history of disrupting prison discipline proceeding, displayed a “propensity for outbursts during court,” and had threatened prison and court officials. ¶¶ 39-40. Bruce exhibited none of these characteristics or actions.

If restraints were justified in Bruce’s case, they would be justified in virtually every case involving a serious crime, a crime against a person or a crime alleging domestic violence. They would be justified on a generalized concern rather than facts related to the case and accused. This

would violate the state and federal constitutional rights to a fair and impartial trial.

**b. The court did not adequately consider alternatives.**

While the court found that the mechanical leg restraint was the least restrictive alternative, in doing so, the court rejected the less restrictive alternative of possibly having an extra guard in the courtroom. RP 26. In fact, the court found that the possible need for a third guard was a reason favoring shackling, rather than an alternative to it.<sup>7</sup> RP 26. The court did not consider other alternatives such as removing the restraint while Bruce testified or while Sanchez was not in the courtroom. Removing the leg restraint at either of these times, would have lessened the likelihood that the jurors would know or suspect Bruce was shackled. Certainly he could have been unshackled for his testimony. The error in shackling Bruce and not considering less intrusive alternatives was constitutional error.

**c. The error was not harmless.**

As constitutional error, the abuse of discretion in shackling the accused is presumed to be prejudicial. Finch, at 859. The State may overcome this presumption only when an examination of the record shows

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<sup>7</sup> Officer Gordon testified only that a third guard would “probably” be necessary if Bruce were not shackled. RP 30.

that the error was harmless beyond a reasonable doubt. State v. Clark, 143 Wn.2d 731, 775, 24 P.2d 1006, cert. denied, 534 U.S. 1000 (2001). The error was not harmless in this case.

The court found that the restraints affected Bruce's walking gait, and when he testified he would have to be seated in the witness chair before the jury entered and remain seated until after the jurors were excused. RP 26, 28. Bruce did testify and he was seated before the jury entered, and the jury was excused with him still seated on the witness stand. RP 184, 222. The jury may well have inferred from this unusual procedure that Bruce was not walking on his own because he shackled. Certainly that possibility cannot be excluded sufficient to establish the error was harmless. As noted by the court in Hartzog, jurors might draw negative inferences if a defendant is seated at a greater distance from the jury and others when testifying. Hartzog, at 403.

Bruce's convictions should be reversed because the error in shackling him was not harmless and because, if convictions are not reversed where a defendant is shackled as a general matter rather than as an appropriate action in light of the relevant facts, then defendants will be routinely tried in shackles in violation of their constitutional rights to the presumption of innocence, assistance of counsel, and right to testify in their own behalf. Such a policy "offends the dignity of the judicial

process” itself. Finch, at 844-84.

Bruce’s convictions should be reversed because the trial court abused its discretion in ordering shackling and did not give serious consideration to less restrictive alternatives such as removing the restraints while he testified.

**2. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT BRUCE HAD A PRIOR CONVICTION FOR ASSAULTING THE SAME COMPLAINING WITNESS IN HIS TRIAL FOR SECOND DEGREE ASSAULT.**

ER 404(b) “is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” State v. Gresham, 173 Wn.2d 405, 420-421, 269 P.3d 207 (2012) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)); State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Evidence of other crimes or bad acts may be admissible for other limited purposes, however, including under a res gestae exception, in which evidence of prior or other crimes is admissible if it is “so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged.” 5 Karl B. Tegland, Wash. Prac., Evidence, sec. 115 at 398 (3d ed.1989); State v. Tharp, 96 Wn.2d 591, 584, 637 P.2d 961 (1981) (“[e]ach offense was a piece in the mosaic necessarily admitted in order that a complete

picture be depicted for the jury”). Even where relevant, evidence sought to be admitted under the res gestae exception remains inadmissible unless the proponent of the evidence establishes that its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 .2d 487 (2002); ER 403.

Here, the trial court ruled that the evidence that Bruce had a prior second degree assault conviction, excluded prior to trial by agreement of the prosecutor, would be admissible because the defense opened the door. The court ruled that the defense opened the door by asking Sanchez about her statements to the defense investigator that she became furious during her argument with Bruce, yelled and screamed at him and got in his face – “why she would get so upset and agitated and have such an extreme response is the res gestae and, therefore, could be admissible with the door being opened.” RP 131-133. The state had argued that the defense had opened the door by asking Sanchez about the substance of the argument, and argument that the court implicitly rejected. RP 126.

The court erred in this ruling both because knowing the reason for the argument between Sanchez and Bruce was not part of the res gestae of the charged assault, and because defense counsel did not open the door by asking questions about the reasons for the argument. Moreover, in finding a different basis for admitting the evidence than requested by the state, the

trial court improperly entered the “fray of combat” and acted as prosecutor rather than judge.

**a. The prior conviction was not part of the res gestae.**

Tharp is instructive on the distinction between what is an essential part of the res gestae of the crime and what is not. In Tharp, the court held that evidence of the series of crimes committed over the course of two days – all but one of which was uncharged – was necessary to give a complete picture of the murder:

In this instance, the uncharged crimes were an unbroken sequence of incidents tied to Tharp, all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening. Each crime was a link in the chain leading up to the murder and the flight therefrom. Each offense was a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.

Tharp, 96 Wn.2d at 594. The court then distinguished evidence that Tharp had been convicted of a prior auto theft and was on furlough from the Department of Corrections at the time of the crime spree from the crime spree itself, and held it not be necessary to give a complete picture:

The prior conviction for auto theft and the furlough status from the Department of Institutions at the time of the murder are another matter. They had no direct connection with the crime charged.

Id. The auto theft and furlough status were not part of the res gestae of the crime. Id.

In State v. Lillard, 122 Wn. App. 422, 431-432, 93 P.3d 969

(2004), the case cited by the trial court, the court held that evidence of the defendant's other conduct was relevant to explain a complicated fraud scheme involving misuse of gift cards; a defendant, the court held, "cannot insulate himself by committing a string of connected offenses and then argue evidence of other uncharged crimes is inadmissible because it shows bad character."

Here, the evidence of Bruce's prior conviction was akin to the prior theft conviction in Tharp. It simply was not a necessary part of the jury's determination of whether Bruce assaulted Sanchez, nor did it uniquely explain why Sanchez might be furious with Bruce. Couples may fight over a myriad of things – including suspected infidelity, money and perceived insensitivity. The trial court erred in finding Bruce's prior conviction was part of the res gestae of the crime.

**b. Defense counsel did not open the door.**

The ruling that defense counsel violated the terms of the court's pretrial ruling and opened the door was not supported by the record. The state agreed pretrial that, unless the defense opened the door, it would not introduce evidence that Bruce had a prior conviction for second degree assault or that the argument which gave rise to the current second degree assault charge arose from an argument about the prior assault. RP 12. The trial court granted a motion in limine excluding the evidence on that

basis. RP 11-12.

During cross examination of Sanchez, defense counsel abided by the ruling and asked no questions about the subject of the argument on March 17, 2016, and asked one unrelated question about whether Sanchez had visited her ex-husband before picking Bruce up the previous day and was upset then. RP 109-123. Defense counsel elicited from Sanchez that on March 17, she and Bruce had a heated argument and she was furious with him, screamed and yelled at him and got in his face – but asked nothing about the content of the argument or whether they discussed her ex-husband. RP 112. The state, nonetheless, asked the court to rule that the defense had opened the door by asking “about the substance of the argument prior to the assaultive acts, specifically that Ms. Sanchez was unhappy about her husband and that she was discussing that and she was discussing that with the defendant and that she became upset and he became upset.” RP 126. Defense counsel properly denied that this testimony was elicited. RP 129. In fact, only the prosecutor asked Sanchez if she had told the defense investigator that she and Bruce were arguing about her ex-husband. RP 66. The court implicitly recognized that the state’s basis for arguing the door was open was not supported by the record, and ruled on other grounds.

Given that the state's representations were not valid, the court erred in ruling that the door was opened to evidence of Bruce's prior conviction.

**c. The trial court improperly entered the fray in ruling.**

The court improperly assumed the role of prosecutor by providing grounds, not urged by the state, for admitting the evidence, and this denied Bruce a fair trial. State v. Ra, 144 Wn. App. 688, 175 P.3d 609 (2008).

In Ra, as in this case, the state asked the court to allow evidence – in Ra it was gang evidence – on the theory that the defense had opened the door to the evidence. Ra, 144 Wn. App. 695-696. The trial court denied the motion on the state's theory of why the door was opened in Ra, but went on to suggest other possible theories for admitting the evidence. Id. The Ra court found that, in doing so, the trial court improperly assumed the role of counsel:

Moreover, we find inappropriate the trial court's proposal of theories for the State to use in admitting improper ER 404(b) evidence. A trial court should not enter into the "fray of combat" or assume the role of counsel. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980), (regarding court's interjection of itself into trial in front of the jury). . . . [enumerating another example of the judge's improper comments] Because we reverse for admitting the gang evidence, we need not consider whether the trial court's appearance of partiality alone would warrant reversal. But on remand, we direct that the case be assigned to another judge.

Ra, at 616-617.

Under Ra, the trial court's granting the state's motion to introduce evidence of Bruce's prior conviction on grounds it provided should be reversible error. The evidence of a prior conviction for a similar crime against the same complaining witness was overwhelmingly prejudicial and the court should not have entered the fray to justify its admission.

**d. The evidence was more prejudicial than probative.**

The trial court found that evidence of a prior assault conviction would be unfairly prejudicial if the jury were to hear that this conviction was the same exact crime as the current charge (second degree assault), but not if it just heard that it was an assault charge. RP 138, This is a distinction without a difference. Indeed, the jurors may have concluded that Bruce committed a more serious assault. In any event, the jury's hearing that a person accused a crime of violence had committed a similar prior act of violence is the kind of irregularity that has been deemed too prejudicial to be cured even by an instruction by the court. State v. Escalona, 49 Wn. App. 251, 255, 74 P.2d 190 (1987) (surprise testimony that the defendant charged with an assault with a knife had stabbed someone on a prior occasion); State v. Hopson, 113 Wn.2d 273, 284, 778 P.3d 1014 (1989); State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

[W]hile it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

Miles, 73 Wn.2d at 71. See also, Escalona, 49 Wn. App. at 255 (same).

Even if the evidence of Bruce's prior conviction for assault was part of the res gestae of the crime and the trial court did not improperly provide the basis for the ruling, the unfair prejudicial impact of the evidence far outweighed its probative value. Admitting the evidence should require reversal of Bruce's conviction.

**3. THE PROSECUTOR'S MISCONDUCT IN VIOLATING THE COURT'S RULING THAT ONLY THE PRIOR CONVICTION AND NO OTHER FACTS ABOUT IT WOULD BE ADMITTED AND IN COMMENTING ON BRUCE'S INVOCATION OF HIS RIGHT TO REMAIN SILENT DENIED BRUCE A FAIR TRIAL.**

When a prosecutor fails to act in the interest of justice, he or she commits misconduct. This denies the accused a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed.2d 1314 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant). Where there is a "substantial likelihood" that a prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde,

110 Wn.2d 504, 508, 755 P.2d 174 (1988). Further, where the prosecutor's misconduct is flagrant and ill-intentioned and it is unlikely the prejudice could be cured, failure to object does not waive the issue on appeal. In re Glassmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2004).

Here, the prosecutor committed flagrant and ill-intentioned misconduct which denied Bruce a fair trial.

**a. The prosecutor elicited details about the prior conviction.**

The court granted the state's motion to introduce Bruce's prior conviction for the limited purpose of showing what the argument was about to explain why Sanchez got so upset. RP 131-132. At defense counsel's request, the court clarified that only the fact of the prior charge and Bruce's saying he could have beat the charge would be admissible, not any details or facts about the prior charge. RP 139-140. The prosecutor did not ask Sanchez about the details of the prior assault during redirect examination. RP 142-143. However, the prosecutor improperly asked Bruce, on cross-examination, about facts surrounding the prior conviction.

The prosecutor asked Bruce if he was upset that he had been convicted of the prior crime, and then asked a series of questions about his actions related to the prior crime: "And you were upset with her because she had reported the previous incident to the police, isn't that true?"; "And

you tried to ask her to not cooperate with the police, didn't you?"; and "You never asked her not to talk to the police?" RP 215.

All of those questions were beyond the scope of what the trial court admitted, the purpose for which the evidence was admitted and beyond the res gestae of the crime. The questions were to communicate to the jurors, in violation of ER 404(b), that Bruce was acting consistently with his bad character in committing the charged crimes. The questions communicated to the jury that Bruce was the type of person who would assault Sanchez and then try to evade responsibility for his actions by asking her not to cooperate with the police – akin to the prosecutor's argument that Bruce listened to all the other testimony and fabricated his testimony to conform to it. RP 265. The questions were, therefore, highly and unfairly prejudicial. Escalona, supra; Mack, Supra.

The prosecutor's misconduct was deliberate and therefore "flagrant and ill-intentioned," because it was in clear violation of the trial court's ruling.

**b. The prosecutor improperly commented on Bruce's invocation of his right to remain silent.**

The Fifth Amendment applies to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1984). Due process under the Fourteenth Amendment prohibits

impeachment based on silence after Miranda warnings are given, whether or not the accused testifies at trial. Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L.Ed2d 91 (1976).

[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, at 618; State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008);

State v. Belgarde, 110 Wn.2d 504, 511-512, 755 P.2d 174 (1988).

Here, the state impermissibly commented, in violation of the Fourteenth Amendment, on Burke's invocation of his right to remain silent after receiving Miranda warnings. RP 219-220. The prosecutor unambiguously asked Bruce whether, after receiving the warnings, he had waived the opportunity to tell Deputy Potis that Sanchez had a seizure, how he needed to get out of the house because she was angry and needed to calm down, or how he walked around, not trying to hide. RP 221.

The prosecutor then made it clear that these questions were meant as substantive evidence of guilt as well as impeachment by asking, "And the reason you did that [waived the opportunity] is because you knew that you had strangled her." RP 221.

Then in closing, the prosecutor again directly commented on Bruce's invocation of his right to silence. RP 265-266. After saying that it was "totally fine" for him to have done so because everyone had the

right to remain silent, she argued that it was important because “you don’t know what account he would have given.” RP 266.

Because the prosecutor used Bruce’s invocation of the right to remain silent as both impeachment and substantive evidence of guilt, the error is constitutional and reviewable as a manifest error affecting a constitutional right. RAP 2.5(a)(3). The questioning and argument were also flagrant and ill-intentioned; the prosecutor certainly was or should have been aware of the rule of Doyle v. Ohio, that invocation of the right to remain silent cannot be used either as substantive evidence of guilt or impeachment, irrespective of whether the defendant testifies at trial. As noted by the court in State v. Charlton, 90 Wn.2d 657, 663, 585 P.2d 142 (1975), where a prosecutor comments in violation of a well-established rule of law – in that case the spousal privilege – the comment is flagrant and ill intentioned.

**c. The misconduct was not harmless.**

The issue for the jury to decide centered on the credibility of Sanchez and Bruce, and the jury must have had doubts about Sanchez’s evidence because they acquitted Bruce of both the burglary and interference with reporting counts. The jury did, however, convict of the assault count.

The introduction of the prior conviction was prejudicial in the extreme for the assault count, and the prosecutor's use of that prior conviction to introduce other evidence of bad character virtually assured that the jury would consider that Bruce was acting consistently with that character in committing the charged assault. The jury likely also considered Bruce less credible because he did not tell Deputy Potis the things he testified to on the witness stand. The prosecutor's deliberate misconduct denied Bruce a fair trial and should result in the reversal of his assault in the second degree conviction.

**4. THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A ONE-COURT-DAY CONTINUANCE SO THAT THE DEFENSE INVESTIGATOR COULD TESTIFY AT TRIAL; THIS DENIED BRUCE THE RIGHT TO PRESENT A DEFENSE AND THE EFFECTIVE ASSISTANCE OF COUNSEL.**

The Fifth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution guarantee that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” The right to due process includes the right to be heard and to offer testimony in one's own behalf. Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L.Ed.2d 682 (1948). “Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony,

he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.” Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 E.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 296, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (the right “to call witnesses in one’s own behalf [has] long been recognized as essential to due process”).

Further, as held, in State v. Cayetano-Jaimes, 190 Wn. App. 286, 296-298, 359 P.3d 919 (2015), even court rules such as ER 611, which give the court the right to control the presentation of evidence and “avoid needless consumption of time,” “may not prevent a defendant from presenting highly probative evidence vital to the defense.” “[N]o state interest can be compelling enough to preclude its [relevant defense evidence] introduction consistent with the Sixth Amendment and Const. art. I, Section 22.” Cayetano-Jaimes, at 298 (quoting State v. Jones, 168 Wn.2d 713,723-724, 230 P.3d 576 (2010) (quoting State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983))).

To justify excluding relevant evidence offered by the defense, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Cayetano-Jaimes, at 297-298 (quoting Jones, at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3 1189 (2002))).

In Cayetano-Jaimes, the court held that the trial court's refusal to allow the defendant to present the testimony of the victim's mother by telephone violated his constitutional right to present a complete defense. Cayetano-Jaimes, at 289. The denial of a one-court-day continuance in this case similarly violated Bruce's right to present a complete defense.

**a. The court erred in denying a continuance.**

Without doubt the testimony of investigator Dave Matthews was relevant to the defense. Matthews conducted the interview of Sanchez that formed the basis of extensive testimony on direct, cross, and redirect examination. RP 65-66, 109-119. On cross-examination, Sanchez denied telling Matthews matters which were critical to the defense: that Bruce walked to the front of the trailer to avoid conflict with Sanchez, that he acted like he was going to hit her but didn't, that she "threw an elbow" at him, and that she told Matthews that she had a seizure and when, and that Bruce had put his coat under her head to protect her during the seizure. RP 113-130. Most importantly, the state challenged Matthew's methods and integrity on cross-examination and challenged the reliability of the interview because it was not recorded or approved by Sanchez. RP 142.

Defense counsel believed until mid-afternoon on Friday that trial would not be held the following week, and, when he learned that it would start on Tuesday of that week, he didn't want to ask for a continuance

before he knew if Matthew's testimony would be critical. RP 173. The court denied the continuance because counsel had not raised the issue at the start of trial, because jurors had been told the deliberations would start by Friday and because the defense had not ensured their witnesses would be available. RP 179-180. The trial court denied the continuance in spite of the obvious importance of the witness, defense counsel's assertion that he would be providing ineffective assistance of counsel without the continuance, and Bruce's not learning of Matthew's unavailability until the previous day. RP 174, 180-181. The trial court denied the continuance without asking the jurors about their availability and without making any efforts to find an alternate means of obtaining the testimony.

The trial court's denial of the motion to continue denied Bruce his fundamental right to defend at trial and call witnesses on his own behalf. Rock v. Arkansas, *supra*; Washington v. Texas, *supra*; Cayetano-Jaimes, *supra*. While defense counsel may have been remiss, it was Bruce's constitutional rights at issue, and the court gave no apparent attention to affording him those rights. It was not shown that the jurors could not have returned for the testimony on the following court day, nor that alternatives such as telephonic or video testimony could not have been used to present the testimony. Matthews was only as far away as Oregon. RP 174.

The failure to grant the continuance or explore other alternatives

should, as in Cayetano-Jaimes, result in reversal of Bruce's second degree assault conviction.

**b. The denial of a continuance denied Bruce the effective assistance of counsel guaranteed by the state and federal constitutions.**

Defense counsel informed the court of his erroneous decision to wait to determine whether Matthews testimony would be critical in time for the trial court to correct counsel's error. RP 172-173. Defense counsel made it clear to the court that counsel would be ineffective if the continuance were not granted, that Matthew's testimony was critical to the defense. RP 174. If counsel's actions justified the court's denial of a continuance and denial of Bruce's fundamental constitutional right to present a defense at trial, then Bruce was denied the effective assistance of counsel to which he was entitled.

As held by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2053, 80 L.Ed.2d 674 (1984), "the proper standard for attorney performance is that of reasonably effective assistance." The Court held, more specifically, that to sustain a claim of ineffective assistance of counsel the accused need only make two showings:

First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 487. The Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness judged by "prevailing professional norms." Strickland, 466 U.S. at 687-688. In determining the prejudice of defense counsel's deficient performance, the defendant need only show a "reasonable probability" that counsel's performance prejudiced the outcome; the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id., at 695.

Here, by counsel's own admission, Matthews's testimony was critical to the defense, and counsel felt he could not effectively represent Bruce without it. Within reasonable probabilities this deficient performance altered the outcome of trial. The resolution of the case depended on the jury's assessment of the credibility of Sanchez and Bruce; what Sanchez told Matthews was important to that determination. In the interview, it appears from the questions asked, that she admitted her own aggressive behavior, RP 115, 123, that Bruce never restricted her breathing or hit her, RP 116, and that he had helped her when she had a seizure during the incident, RP 117. Had Matthews been available to confirm this and answer the state's implicit allegations that he had not properly memorialized Sanchez's statements, the outcome of trial might have been different. The jury acquitted of two of the three contested charges and may well have acquitted of the second degree

assault charge too had Matthews been available to clarify what Sanchez said during the interview.

Bruce's conviction for second degree assault should be reversed because he was not provided with the effective assistance of counsel guaranteed by the Sixth Amendment.

#### **5. CUMULATIVE ERROR DENIED BRUCE A FAIR TRIAL.**

The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d.297 (1973); Parle v. Runnels, 505 F.3d 922 (9<sup>th</sup> Cir., 2007). The combined effects of error may require a new trial even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996).

Here, the errors individually and certainly cumulatively denied Bruce a fair trial. Those errors included judicial errors, including the error of the trial judge acting as a prosecutor; prosecutorial misconduct and

possible ineffective assistance of counsel. Bruce should, at the least, be granted a new trial based on cumulative error.

**E. REQUEST FOR RULING ON APPELLATE COSTS**

The appellate court has discretion not to impose appellate costs on a defendant who is unsuccessful on appeal, pursuant to the recoupment statute, RCw 10.73.160(1). State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The court can direct that costs not be awarded in its decision terminating review. State v. Nolan, 161 Wn.2d 620, 626, 8 P.3d 300 (2007).

Costs should not be imposed where the appellant lacks the ability to pay. Sinclair, at 389-390. The fact that an order of indigency has been entered creates a presumption that indigency continues throughout the appellate review. Sinclair, at 393 (citing RAP 15.2(f)). Other non-exclusive factors relevant to the ability to pay include the age of appellant, length of sentence, other debts, family and employment history and criminal history. Sinclair, Wn. App. at 390-391.

Here, the trial court, at sentencing, declined to impose a discretionary \$115 domestic violence assessment because the court “did not find that you will have the funds to pay the expense now or likely to have the money to pay in this [sic] the future once you are released.” RP(sentencing) 14. The trial court also granted a Motion for Indigency

allowing Bruce to appeal at public expense. See Confidential Clerk's Papers at 147-150.

At sentencing, both Sanchez and defense counsel spoke of Bruce's military service and the resulting emotional trauma and need for treatment. RP(sentencing) 5-9. This factor, too, should be considered when deciding whether to impose costs.

Bruce will file a further affidavit in support of this request within 60 days of the filing of this brief.

**F. CONCLUSION**

Appellant respectfully submits that his sentence for second degree assault should be reversed and remanded for a new trial.

DATED this 11th day of October , 2016.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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I certify that on the 11th of October , 2016, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following by e-mail

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Rita Griffith      DATE      at Seattle, WA

**GRIFFITH LAW OFFICE**

**October 11, 2016 - 11:28 AM**

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