No: 49592-9
Lewis County Superior Court No: 16-1-00177-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

TYLER M. WALLACE,

Petitioner.

---

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

The Honorable Nelson Hunt

---

# APPELLATE COUNSEL'S MOTION TO WITHDRAW AS COUNSEL AND DISMISS APPEAL PURSUANT TO RAP 18.3

---

BRET ROBERTS
Attorney for Appellant
LAW OFFICE OF BRET ROBERTS, PLLC
624 Polk Street
Port Townsend, WA 98368
(360)379-6991 - phone
(360)385-4012 – fax

## TABLE OF CONTENTS

Table of Authorities ..... ii-iii

A. IDENTITY OF MOVING PARTY ..... 1

B. STATEMENT OF RELIEF REQUESTED ..... 1

C. FACTS RELEVANT TO MOTION ..... 1

D. GROUNDS FOR RELIEF ..... 1-2

E. STATEMENT OF THE CASE ..... 2-6

F. RAP 18.3(2) IDENTIFICATION OF ISSUES ..... 9-12

1. Was there Sufficient Evidence to Convict Mr. Wallace of Second Degree Assault? ..... 9

2. Did the Trial Court Err by Admitting an Exhibit of Facebook Messages During Testimony about Prior Inconsistent Statements? ..... 10

3. Did Defense Counsel Provide Ineffective Assistance by Failing to Object on Fifth Amendment Grounds to the Introduction of Testimony Regarding Mr. Wallace leading Officer Humphrey to the Knife? ..... 11

G. CONCLUSION ..... 13

Certificate of Service ..... 14

## TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

*Anders v. California*
386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) ..... 2

WASHINGTON CASES

*City of Seattle v. Stalsbroten*
138 Wn.2d 227 (1999) ..... 11

*Rice v. Offshore Systems, Inc.*
167 Wn.App. 77 (2012) ..... 10

*State v. Bird*
136 Wn.App. 127 (2006) ..... 10

*State v. Campos-Cerna*
154 Wn.App. 702 (2010) ..... 12

*State v. Danielson*
37 Wn.App. 469 (1984) ..... 10

*State v. Gefeller*
76 Wn.2d 449 (1969) ..... 11

*State v. Goodman,*
150 Wn.2d 774 (2004) ..... 9

*State v. Hairston*
133 Wn.2d 534 (1997) ..... 2

*State v. Horton*
116 Wn.App. 909 (2003) ..... 11

*State v. Moreno*
21 Wn.App. 430 (1978) ..... 12

*State v. Ohlson*
131 Wn.App. 71 (2005) ..... 10

*State v. Spearman*
59 Wn.App. 323 (1990) ..... 12

*State v. Stevens*
69 Wn.2d 906 (1966) ..... 11

*State v. Wethered*
110 Wn.2d 466 (1988) ..... 12

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5 ..... 7, 12

ER404(b) ..... 7

ER 613 ..... 11

ER 901 ..... 10

RAP 15.2(i) ..... 2

RAP 18.3(a) ..... 2, 9

RCW 9.94A.535(3)(h)(ii) ..... 7

## A. IDENTITY OF MOVING PARTY

Bret Roberts, of the Law Office of Bret Roberts, PLLC., appointed as counsel for the appellant, respectfully requests the relief designated in section "B" of this motion.

## B. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant, Tyler Wallace, requests permission to withdraw pursuant to the terms of RAP 15.2(i) and RAP 18.3(a).

## C. FACTS RELEVANT TO MOTION

By letter dated November 16, 2016, this Court appointed the undersigned counsel to review Mr. Wallace's conviction for Second Degree Assault – Domestic Violence. In the process of handling Mr. Wallace's appeal, undersigned counsel performed the following tasks:

1. Read and reviewed the Verbatim Report of Proceedings, Trial Record, and attempted contact with trial counsel, Christopher Baum, on a number of occasions.

2. By written correspondence, invited Mr. Wallace to make contact to discuss his case and any issues he wanted considered on appeal.

3. Researched the relevant legal issues.

4. Conferred with other experienced attorneys regarding the legal issues presented by Mr. Wallace's case.

## D. GROUNDS FOR RELIEF

The Rules of Appellate Procedure establish guidelines for the withdrawal of attorneys who have been appointed for indigent defendants.

RAP 15.2(i). The rules set forth a process that should be observed by counsel before this Court will grant a motion to withdraw from a pending appellate matter. RAP 18.3(a).

Pursuant to the due process principles announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and examined in *State v. Hairston*, 133 Wn.2d 534 (1997), appointed counsel seeks to withdraw and allow Mr. Grubb, at his discretion, to decide whether to proceed pro se. The following brief is offered to satisfy counsel's obligations under RAP 15.2(i), RAP 18.3(a), *Anders*, and *Hairston*, and to facilitate this Court's independent review of the case before it rules upon counsel's motion to withdraw.

E. STATEMENT OF THE CASE

Tyler Wallace was dating Kimberly Nolan, and was the father of her young son. (VRP 27-28). Mr. Wallace and Ms. Nolan lived together at the home of Mr. Wallace grandmother, Betty Gross. (VRP 105). On April 7, 2016, according to Kimberly Nolan, she and Mr. Wallace were having a fight which started via text messages and continued when Mr. Wallace returned home from work. (VRP 30-31). According to Ms. Nolan, the argument escalated to yelling after his grandmother left the house. (VRP 33). Ms. Nolan claimed that Mr. Wallace was yelling at her and saying mean things. (VRP 35). She testified that she told him he should not talk to her

like that in front of the children, who were present. (VRP 35). At this point, she claimed that Mr. Wallace "smacked" her with his open right hand while their eight-month-old child in common was in her arms and another child of hers from a previous relationship was standing nearby. (VRP 35-36).

Ms. Nolan testified that she told Mr. Wallace that she was going to call police after he slapped her, but that he prevented her from doing so at first by confiscating the living room phone, her cell phone, and a phone in his grandmother's room. (VRP 37-39). She further testified that she "kept asking him for the phones" and was finally given a phone after saying she was going to her mom's house and starting preparations to leave. (VRP 39). When she received the phone, she dialed 911 but then hung up "because [she] didn't feel safe." (VRP 39). She testified that the 911 operator called back, but she lied and said that her small child had accidentally dialed. (VRP 39, 44). Immediately after the testimony about the phones, Ms. Nolan backtracked in terms of the chronology of the incident, claiming that Mr. Wallace had threatened to kill her and then gone to the kitchen to get a knife before she had tried to get any of the phones. (VRP 39-40). She further testified that Mr. Wallace came at her with the knife, holding it at his side but with the blade facing toward her. (VRP 41).

According to Ms. Nolan, she was standing near the front door when Mr. Wallace approached her with the knife. (VRP 42). She testified that her

youngest son was in her arms and the other son was standing next to her. (VRP 42). She testified that Mr. Wallace got to within five or six feet of her before she opened the door so that the neighbors may be able to hear what was happening. (VRP 42). Mr. Wallace told her to be quiet so the neighbors would not hear them, so she closed the door and then tried to get the phones to call 911. (VRP 43-44).

Ms. Nolan testified that she called 911 after Mr. Wallace gave her one of the phones, hung up immediately because she did not feel safe, and told the 911 operator that her young son had called. (VRP 44). She then packed some belongings and put her youngest son in the car to leave, but Mr. Wallace got in the front passenger seat of the car. (VRP 44-45). As she was putting her other child in the car, a police officer showed up and Ms. Nolan claimed that Mr. Wallace told the officer everything was fine and that the child had called 911. (VRP 45). Ms. Nolan never talked to the police officer, and left for her mother's house where she would again call 911 to report the incident.

On cross-examination, Mr. Wallace's attorney asked Ms. Nolan about two conversations she allegedly had about the incident. He asked Ms. Nolan whether she had told Tiffany Cummings, Mr. Wallace's sister, that a knife was not involved in the incident and she only alleged that because she was mad. (VRP 67). Mr. Wallace's attorney also asked Ms. Nolan whether

she said that she was going to go to DSHS to get money because she was a battered woman. (VRP 67). Ms. Nolan denied the substance of both alleged statements, and indicated that she spoke to Betty Gross about going to DSHS for assistance with finding a place for her and her children to live. (VRP 68).

When Ms. Nolan called 911 from her mother's house after the alleged incident, officer Angie Humphrey of the Centralia police department responded. (VRP 75-76). Upon arrival, officer Humphrey contacted Ms. Nolan and testified that she was behaving calmly. (VRP 76). Officer Humphrey testified that she could tell Ms. Nolan had been upset, that her eyes were red and puffy, and that there was a red mark on her left cheek and it was slightly puffy as compared to the other side of her face. (VRP 76-77).

Officer Humphrey took a taped statement from Ms. Nolan then went to contact Mr. Wallace. (VRP 77). Officer Humphrey found him at the residence, smoking on the porch. (VRP 78). She placed him under arrest and handcuffed him. (VRP 78). When asked about the knife, Mr. Wallace showed officers where it was. (VRP 78). The knife was approximately 12 inches long with a tapered blade and a red polymer handle. (VRP 78). There was no testimony about whether Officer Humphrey read *Miranda* warnings prior to obtaining the knife or made any sort of formal efforts to secure consent before entering the residence with Mr. Wallace to locate the knife.

Tiffany Cummings, Mr. Wallace's sister, testified during the defense case that Ms. Nolan told her that there was no knife used in the incident and that she was going to claim status as a battered woman to get financial assistance through DSHS. (VRP 94). During Ms. Cummings' testimony, the State introduced an exhibit of Facebook messages between Ms. Cummings and Ms. Nolan. (VRP 100-102). The State impeached Ms. Cummings with an exhibit depicting the Facebook messages between her and Ms. Nolan. Ms. Cummings testified that her interaction with Ms. Nolan included Facebook messaging, text messaging, and telephone conversations. (VRP 102).

Betty Gross was called as a witness by the defense, and testified that Ms. Nolan told her that Mr. Wallace had never pulled a knife on her. (VRP 107). She testified that Ms. Nolan told her Mr. Wallace had slapped her. (VRP 107). She further testified that Ms. Nolan told her that she was going to go to DSHS to try to get money. (VRP 107). Mr. Wallace did not testify during the defense case-in-chief.

## Procedural History

Mr. Wallace was charged by information, dated April 8, 2016, with Second Degree Assault Domestic Violence with a Deadly Weapon. (CP 1-2). At Omnibus on June 16, 2016, Mr. Wallace's attorney indicated that he may offer self-defense in addition to a denial. (CP 8). The omnibus order

also indicated the need for a non-dispositive CrR 3.5 hearing that would be conducted on the morning of trial. (CP 9). On July 7, 2016, the State amended the charge to include an aggravator that the offense occurred within sight or sound of the victim's minor children under RCW 9.94A.535(3)(h)(ii). (CP 10). On October 16, 2016, the defense emphasized the potential for a self-defense claim by filing notice of self-defense and intent to seek reimbursement under RCW 9A.16.110. (CP 13).

On October 17, 2016, the State filed motions in limine. (CP 15). The trial record does not reflect that the defense ever filed any pretrial motions in limine, and the defense stipulated on the morning of trial that there was no CrR 3.5 issue. (VRP 6). The possibility of ER404(b) evidence related to violence by the alleged victim against Mr. Wallace was raised. (VRP 12-16). The trial court was openly critical of defense counsel for not bringing the motion to admit ER404(b) evidence prior to the morning of trial, but understood that the evidence's admissibility depended on whether Mr. Wallace testified to establish self defense. (VRP 15-16).

After the State rested its case-in-chief, there was a discussion about two defense witnesses, Tiffany Cummings and Betty Gross, who would be called regarding alleged inconsistent statements by Ms. Nolan. (VRP 82). The State asked the trial court for a limiting instruction about the testimony. (VRP 84). The trial court prepared a limiting instruction that the testimony

about inconsistent statements could only be considered as to Kimberly Nolan's credibility, rather than proof of the facts in the statement, and read it as a preview for the litigants prior to the defense calling the witnesses who would testify about inconsistent statements. (VRP 87-88). Neither the prosecution nor the defense took exception to the trial court's limiting instruction. (VRP 88).

The only objection of substance by defense counsel was an objection to the State's effort to admit, as an exhibit, photographs of the Facebook messaging conversation between Ms. Cummings and Ms. Nolan. (VRP 100-102). Defense counsel objected that it was "improper extrinsic evidence" and the trial court overruled the objection. (VRP 102).

At the close of evidence, the State asked the trial court for an instruction on Fourth Degree Assault. (VRP 116). The trial court appeared to lean toward not instructing the jury on Fourth Degree Assault because it was not a lesser included offense of Second Degree Assault. (VRP 124-125). But, defense counsel met with his client and decided to agree and have the trial court instruct on Fourth Degree Assault as a lesser included offense. (VRP 125-126).

When the jury came out to render its verdict, the presiding juror handed up forms, but did not include the general verdict form. The trial

court sent the jury back to continue its deliberation without any further comment and no objection or argument from either party. (VRP 167-168).

When the jury returned with all the verdict forms, Mr. Wallace was convicted of Second Degree Assault; and the jury answered in the affirmative regarding special verdicts establishing findings of domestic violence and aggravated domestic violence. (CP 42-44)(VRP 169).

F. RAP 18.3(2) IDENTIFICATION OF ISSUES

The following is a discussion of issues which may have been raised on appeal, but which appointed appellate counsel for Mr. Wallace believes would not have been availing. They are offered with a brief citation to applicable law and relevant areas of the record, pursuant to the instruction of RAP 18.3(a)(2):

1. Was there Sufficient Evidence to Convict Mr. Wallace of Second Degree Assault?

When a defendant challenges a conviction for sufficiency of evidence, appellate courts consider the evidence in a light most favorable to the prosecution and consider whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Goodman*, 150 Wn.2d 774, 781 (2004).

Mr. Wallace did not testify, and effectively did not present any substantive evidence. His only witnesses were Tiffany Cummings and Betty

Gross; each of whom were called to impeach the victim, Kimberly Nolan, with prior inconsistent statements. (VRP 92-104; 105-107).

Ms. Nolan's testimony was the only direct evidence regarding the elements of Second Degree Assault with a Deadly Weapon and the aggravator. She testified that Mr. Wallace held a knife at his side, but pointed at her. (VRP 41). Testified that he came at her while holding the knife. (VRP 41-42). She testified that she was afraid. (VRP 47). Ms. Nolan also testified that one son was in her arms during the assault, and the other standing next to her. (VRP 42).

2. Did the Trial Court Err by Admitting an Exhibit of Facebook Messages During Testimony about Prior Inconsistent Statements?

A trial court's ruling on admissibility of evidence is reviewed for abuse of discretion. *State v. Bird*, 136 Wn.App. 127, 135 (2006) (citing *State v. Ohlson*, 131 Wn.App. 71, 76 (2005)). "'A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons.'" *Id.* (quoting *Ohlson*, at 76). ER 901 requires that exhibits be properly authenticated as an antecedent to admissibility. Such a burden is carried when the proponent makes "a prima facie showing that the evidence is authentic—it is what it purports to be." *Rice v. Offshore Systems, Inc.*, 167 Wn.App. 77, 86 (2012) (citing *State v. Danielson*, 37 Wn.App. 469 (1984)). Ms. Cummings testified that the exhibit offered by the State

consisted of photos of a Facebook conversation between her and Ms. Nolan on April 7. (VRP 100).

Extrinsic evidence of prior inconsistent statements is only admissible if proper foundation is laid. ER 613(b); *State v. Horton*, 116 Wn.App. 909, 914 (2003). The trial court allowed the defense to introduce testimony of Tiffany Cummings regarding statements attributed to Kimberly Nolan which were inconsistent with Ms. Nolan's testimony at trial. "When a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455 (1969) (citing *State v. Stevens*, 69 Wn.2d 906 (1966)).

3. Did Defense Counsel Provide Ineffective Assistance by Failing to Object on Fifth Amendment Grounds to the Introduction of Testimony Regarding Mr. Wallace leading Officer Humphrey to the Knife?

The right against self-incrimination, which is enumerated by the Fifth Amendment, "protects a defendant from being compelled to provide evidence of a 'testimonial or communicative nature.'" *City of Seattle v. Stalsbroten*, 138 Wn.2d 227, 978 P.2d 1059 (1999) (en banc). Stated another way, where a police officer's questioning induces a subject to reveal the location of incriminating evidence, the nonverbal act of

revealing said evidence is testimonial in nature; therefore such an act should be suppressed if done while in custody in the absence of *Miranda* warnings. *State v. Wethered*, 110 Wn.2d 466, 471 (1988).

In *State v. Moreno*, a defendant was asked, "do you have something you shouldn't?" 21 Wn.App. 430, 432 (1978). In response, the defendant asked, "What?" *Id.* The officer further inquired, "Snorting stuff." *Id.* The defendant responded by producing three baggies of cocaine. *Id.* The Court of Appeals held that the production of the cocaine was testimonial in nature and subject to the safeguards of the Fifth Amendment. *Id.* It noted that "[the] act served more graphically than words to convey the incriminating fact" that he had contraband. *Id.* at 433.

"To preserve a *Miranda* waiver advisement issue for appeal, a defendant must raise the issue at his 'CrR 3.5 hearing or the fact-finding portions of the proceedings.'" *State v. Campos-Cerna*, 154 Wn.App. 702, 710 (2010) (citing *State v. Spearman*, 59 Wn.App. 323, 325 (1990)).

After being arrested by officer Angie Humphrey, Mr. Wallace led her to the knife. (VRP 78). There was no testimony about whether *Miranda* warnings were read before, during, or after the arrest process. But, defense counsel waived a CrR 3.5 hearing, purportedly after talking to Mr. Wallace and determining that *Miranda* warnings were given and Mr. Wallace's statements were voluntary. (VRP 6-7).

## G. CONCLUSION

Counsel respectfully requests the Court's permission to withdraw from the appeal and representation of Mr. Wallace in this matter. Counsel believes that the Court's independent review of the record and legal authority in appellate counsel's brief will lead it to the same conclusion: there is no genuine appealable issue; and proceeding with the appeal would be frivolous.

Respectfully Submitted this 17 day of April, 2017.

LAW OFFICE OF BRET ROBERTS, PLLC.

BRET ROBERTS, WSBA No. 40628
Attorney for Appellant

## PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I filed Appellate Counsel's Motion to Withdraw electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the same through the Court's filing portal to:

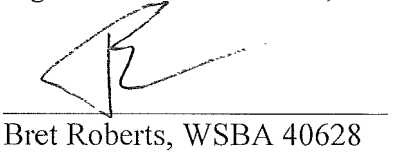
Sara I. Beigh
Lewis County Prosecutor's Office
Sara.beigh@lewiscountywa.gov

I delivered a true and correct hard copy of Appellate Counsel's Motion to Withdraw in the U.S. mail, postage prepaid, to:

Tyler Wallace
201 Oakview #17
Centralia, WA 98531

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

Signed at Port Townsend, Washington, on April 17, 2017.



Bret Roberts, WSBA 40628
Attorney for Tyler Wallace

# JEFFERSON ASSOCIATED COUNSEL
# April 17, 2017 - 8:35 AM
# Transmittal Letter

Document Uploaded: 5-495929-Other.pdf

Case Name: State of Washington v. Tyler M. Wallace

Court of Appeals Case Number: 49592-9

**Is this a Personal Restraint Petition?** Yes ■ No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

■ Motion: Other

Answer/Reply to Motion: ___

Brief: ___

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

Please find Appellate Counsel's RAP 18.3(a) Motion to Withdraw

Sender Name: Bret A Roberts - Email: bretjacpd@gmail.com

A copy of this document has been emailed to the following addresses:

sara.beigh@lewiscountywa.gov