

FILED  
Court of Appeals  
Division II  
State of Washington  
9/20/2019 11:54 AM  
No. 53421-5-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAY MARIA CHRISTENSEN,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 16-1-04322-6  
The Honorable Kathryn Nelson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its constitutional burden of proving beyond a reasonable doubt all of the essential elements of the crime of harassment.
2. The trial court erred by allowing the State to elicit prior bad act testimony that should have been excluded under ER 404(b).
3. The trial court erred by finding that the evidence concerning Jay Christensen's drug use was admissible under ER 404(b) to establish his motive for the charged crimes.
4. The trial court erred by finding that the evidence concerning Jay Christensen's drug use was admissible under ER 404(b) to establish a defense witness' potential bias.
5. The trial court erred by finding that testimony implying that Jay Christensen had committed multiple robberies was proper impeachment of a defense witness.
6. The cumulative effect of the trial court's evidentiary errors denied Jay Christensen a fair trial.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the individual who overheard Jay Christensen's threat never testified that she was fearful he would carry out that

threat, which is an essential element of the crime of harassment, did the State fail to meet its constitutional burden of proof? (Assignment of Error 1)

2. Where past drug use by the defendant is inadmissible to establish motive in cases where identity is the primary issue, and where identity was the primary issue in this case, did the trial court commit reversible error by allowing evidence of Jay Christensen's drug use to establish his motive for the charged crimes? (Assignments of Error 2 & 3)
3. Where past drug use is not properly admissible to attack a witness' credibility or bias, did the trial court commit reversible error by allowing evidence of Jay Christensen's drug use to establish a defense witness' potential bias or attack her credibility? (Assignments of Error 2 & 4)
4. Where the defense witness never testified that Jay Christensen did not commit any robberies, and where the trial court failed to weigh the probative value of evidence that the witness had knowledge that Jay Christensen committed other robberies, did the trial court err by finding that such testimony was proper impeachment of the defense witness? (Assignments of Error 2 & 5)

5. Did the cumulative effect of the trial court's evidentiary errors deny Jay Christensen a fair trial? (Assignment of Error 6)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Jay M. Christensen by an amended information with 12 charges relating to two incidents occurring about a month apart. For the first incident on September 15, 2016, the State charged Christensen with first degree robbery, unlawful possession of a firearm, and unlawful possession of a short-barreled shotgun. (CP 185-86)

For the second incident on October 19, 2016, the State charged Christensen with first degree robbery, unlawful possession of a firearm, unlawful possession of a short-barreled shotgun, two counts of harassment (threat to kill made against S. Sommer and against unnamed Denny's restaurant customers), first degree kidnapping, attempting to elude a pursuing police vehicle, second degree assault, and obstructing a law enforcement officer. (CP 1886-92)

The State further alleged that Christensen was armed with a firearm during all but the firearm possession offenses. (CP 185-92) The State alleged several other aggravating factors that would

support an exceptional sentence. (CP 185-92)

Over defense objection, the State was allowed to elicit evidence of Christensen's prior drug use. (RPXIV 1587-1593)<sup>1</sup> The trial court found the evidence more probative than prejudicial. (RPXIV 1592-93) The court also denied Christensen's motion for mistrial brought after the State elicited testimony implying that Christensen had committed multiple uncharged robberies. (RPXIV 1656-1662)

The jury found Christensen guilty on all counts except one harassment charge, found that he was armed with a firearm, and answered yes to the aggravating factors. (RPXVII 1938-46) However, the trial court declined the State's request for an exceptional sentence and imposed a standard range sentence plus firearm enhancements, totaling 414 months. (RPXVIII 1962-63, 1999-2000; CP 396) Christensen filed a timely Notice of Appeal. (CP 409)

#### B. SUBSTANTIVE FACTS

Esther Kani was on duty as a cashier at a Gig Harbor Shell gas station in the early morning hours of September 15, 2016.

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<sup>1</sup> The trial transcripts labeled with Roman numerals I thru XVIII will be referred to by their Roman numeral volume number. The pretrial transcripts labeled with Arabic numerals are not referred to in this brief.

(RPV 405, 406-07, 421) A man approached the register wearing a sweatshirt with the hood covering his head, a blue and white bandana covering the lower part of his face, and unique athletic shoes. (RPV 408, 458) He told Kani to give him the money in the register, and that if she followed his directions she would not get hurt. (RPV 409) The man was also holding what appeared to be a short-barreled shotgun. (RPV 409, 427, 440, 458; Exh. 1) Kani gave the man the money from the register, and the man left. (RPV 425, 426)

Exterior surveillance video shows a Toyota Camry drive onto the lot, then a short time later drive off of the lot. (Exh. 1; 01/16/19 RP 457; RPXII 1452) A blue handicapped placard can be seen hanging from the rearview mirror. (Exh. 1; RPV 457; RPXII 1452-53) A piece of blue tape appears to be covering the rear license plate. (Exh. 1; RPV 461-62; RPXII 1454) Investigators later found a balled-up piece of blue painters tape in the gas station parking area. (01/16/19 RP 465, 501)

Sarah-Lynn McCollum is a waitress and manager at a Denny's restaurant in the South Hill area of Puyallup. (RPV 511) Around 2:00 AM on October 19, 2016, a man entered the restaurant wearing a black jacket and a bandana over the bottom

part of his face. (RPV 511-12; RPVII 687) He was also carrying a gun. (RPVII 687) The man approached McCollum at the register and ordered her to give him money. (RPVII 695) McCollum was nervous and struggled to open the till. (RPVII 696) The man told her that if she did not hurry he would kill the customers in the restaurant, and then he began counting down from 10. (RPVII 696-97)

Once McCollum was able to open the till, the man reached over and grabbed the money. (RPVII 702) As he did this, McCollum darted out the door. (RPVII 702) A few moments later she saw the man walk out of the restaurant and get into a waiting truck, which immediately pulled away. (RPVII 703, 721-22, 724)

Several Puyallup Police units responded to the 911 call reporting the robbery. (RPVI 544, 603) Officers observed a truck exiting the Denny's parking lot just as they arrived. (RPVI 542-43, 550, 605) The truck was the only other vehicle observed in the immediate area. (RPVI 565, 606) The truck fled at a high speed when the officers attempted to conduct a traffic stop. (RPVI 564, 566, 606-07) Several units gave chase, with lights and sirens activated, as the truck sped down Highway 512. (RPVI 569-70, 607, 613)

When the truck exited the highway onto Meridian Avenue, the driver appeared to lose control and the truck ran headfirst into a cement pillar. (RPVI 614-15; RPIX 969) One of the officers maneuvered his vehicle to pin the truck against the pillar so it could not move. (RPVI 618; RPIX 969-70) Several other units arrived and surrounded the truck. (RPVI 577, 618; RPVIII 862)

According to the officers, the driver attempted to comply with commands to make their hands visible outside the windows, but the passenger grabbed the driver and held him back. (RPVI 578, 620, 621, 623; RPVIII 867, 868, 871, 917, 918; RPIX 1025-26) The officers saw the passenger holding a gun and possibly pointing it at the driver. (RPVIII 868; 919; RPIX 1027) One of the officers fired his weapon and struck the passenger in the head. (RPVI 632, RPVIII 920)

The driver, Steven Sommer, and the passenger, Jay Christensen, were removed from the truck. (RPVI 628, RPVIII 836) Christensen was transported to the hospital for medical treatment, but not before the officers removed a wad of cash from his pockets, and noted a bandana tied around his neck. (RPVI 587, RPVIII 876; RPXI 1345, 1358; RPXV 1738) The officers also found a short-barreled shotgun on the front seat of the truck. (RPVI 628; RPX

1147)

At the time, Christensen lived in a trailer on property in Puyallup owned by Vickey Judd. (RPX 1118) Steven Sommer was also living on the property at the same time. (RPX 1239) In exchange for a reduction in charges and a significantly shorter sentence, Sommer testified for the State. (RPXI 1268-71, 1295)

Sommer claimed that he agreed to drive Christensen to the store to purchase cigarettes, but once in the truck Christensen hit Sommer with a gun on the side of his head and ordered him to drive to the Denny's. (RPX 1243-44, 1246, 1247, 1248) According to Sommer, once they arrived at the Denny's parking lot, Christensen took the car keys and told him he would kill Sommer and his family if he tried to leave. (RPX 1248-49) Christensen then went into the Denny's. (RPX 1249)

Christensen came out a few minutes later, got into the truck, put the keys into the ignition, and ordered Sommer to drive. (RPX 1249, 1250) When they saw police cars arriving, Christensen told Sommer, "If the cops catch me, I'm going to shoot you." (RPX 1252-53) Sommer testified he followed Christensen's instructions on where to drive, but eventually decided to end the chase by purposefully driving into the cement pillar on Meridian Avenue.

(RPX 1252-53, 1254; RPXI 1321) Sommer claimed Christensen held the shotgun to Sommer's head and yelled to police, "I've got a hostage." (RPXI 1260, 1264)

After the Denny's incident, detectives executed a search warrant on Christensen's trailer. They found, among other things, a roll of blue painters tape, shotgun shells, a blue bandana, and sneakers that resembled those worn by the Shell robbery suspect. (RPXI 1376-77, 1379, 1380, 1391-92; RPXII 1428, 1433)

Detectives also found a Toyota Camry parked near the trailer. (RPX 1123; RPXII 1455-56) There was a blue handicapped placard hanging from the rearview mirror and blue masking tape in the trunk. (RPXII 1457) The Camry's owner, Marcus Thorne, was present but refused to talk to the officers. (RPX 1123; RPXII 1466)

A fingerprint left on the ball of tape found in the parking lot of the Shell station shared several distinctive characteristics with Christensen's fingerprint. (RPX 1199, 1200, 1201, 1241) The shotgun was inspected and found to have been altered; the barrel had been shortened to 15 and 1/8 inches. But it was still operable. (RPXII 1483-84, 1490-91, 1495, 1496, 1501)

Sandra Whitehead-Morrell was in a romantic relationship and living with Christensen at the time of the robberies. (RPXIV

1595, 1596) She testified that Christensen was restoring an old van and had painters tape and blue gloves for use when he painted the van. (RPXIV 1602-04) The bandanas were to keep sweat off his face while he worked. (RPXIV 1610)

Whitehead-Morrell also testified that their friend called Christensen from Denny's on the night of that robbery, and encouraged Christensen to come down there because the "register was full" and the restaurant was not crowded. (RPXIV 1617-18) She testified that Sommer agreed to drive Christensen, that Sommer discussed committing a robbery with Christensen, and that Sommer was ready and willing to go with him. (RPXIV 1620-21)

#### **IV. ARGUMENT & AUTHORITIES**

##### **A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING THAT CHRISTENSEN WAS GUILTY OF HARASSMENT OF DENNY'S CUSTOMERS.**

Christensen's conviction for harassment of Denny's customers should be vacated and dismissed because the State's evidence did not prove that anyone who overheard his threatening language was actually fearful that the threat would be carried out.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvone*, 118 Wn.2d 826,

849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The State charged Christensen in count seven with first degree harassment of persons in the Denny’s restaurant other than waitress Sarah-Lynn McCollum. (CP 188-89; 271) To convict Christensen of this charge, the State had to prove that he threatened to kill someone other than McCollum and that the other person was placed “in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1)(b), .020(2)(b)(ii). The State clarified in closing arguments that customer Tiffanie Christensen heard Jay Christensen’s threat to kill customers and was fearful the threat would be carried out.<sup>2</sup> (9RP XV 1838, 1840) However, Tiffanie did

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<sup>2</sup> Tiffanie Christensen is not related to Jay Christensen (RPVII 738-39). For the sake of clarity, Tiffanie will be referred to in this brief by her first name.

not testify to these essential facts.

At trial, Tiffanie testified that she and her co-worker Heather Moler were sitting in a booth eating a meal. (RPVII 740) She saw Christensen standing at the register, and noticed he had something covering his face. (RPVII 742-43, 746) She realized there was a robbery going on because she heard McCollum saying something about opening the register. (RPVII 747)

Tiffanie told a passing employee to call 911, then continued to watch events unfold. (RPVII 847) When Christensen turned to leave, Tiffanie saw that he was holding a gun. (RPVII 748) At that point, Tiffanie “decided to get out of there,” so she ran to the back of the restaurant and hid. (RPVII 748-49)

At first Tiffanie testified that she could not hear anything Christensen said to McCollum and did not hear him make any threats. (RPVII 745-46, 749, 752) She was later reminded that she told responding officers that she heard Christensen say he would start killing people if McCollum did not give him money. (RPVII 754)

In this day and age, most people would be understandably fearful if they saw someone walk into a public place carrying a gun. But that generalized fear is not what the State must prove to convict

Christensen of harassment. It must prove that Tiffanie's fear was a reaction specifically to Christensen's verbal threat. And the State failed to do that here.

Tiffanie never testified that she heard the threat and was placed in fear that it would be carried out. It was not until Christensen turned to leave the restaurant that she saw his gun and became fearful. (RPVII 748) She testified that she was stressed because there was a person in the restaurant with a gun. (RPVII 749, 758, 760)

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The State failed to prove that Tiffanie feared Christensen's threat would be carried out. Therefore this harassment conviction, and its firearm enhancement, must be reversed and dismissed.

B. THE TRIAL COURT IMPROPERLY ALLOWED IRRELEVANT BUT HIGHLY PREJUDICIAL EVIDENCE OF CHRISTENSEN'S PRIOR DRUG USE AND TESTIMONY SUGGESTING THAT HE COMMITTED UNCHARGED ROBBERIES.

The trial court committed reversible errors when it allowed the State to elicit testimony regarding Christensen's prior drug use and uncharged robberies, because the relevance of this evidence was minimal at best and the prejudicial impact of the evidence denied Christensen a fair trial.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). But the trial court should not admit the evidence unless its probative value outweighs its prejudicial effect. ER 403; *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). A trial court's decision to admit evidence of other crimes or misconduct is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995).

1. Testimony Regarding Christensen's Drug Use

Over defense objection, the State was allowed to question

Whitehead about her own drug use, about how she introduced Christensen to heroin and methamphetamine, and about how as a result he began using these drugs regularly. (RPXIV 1587-93, 1612, 1613, 1629-31, 1637, 1652, 1701) The stated purposes for admitting the evidence was to show Christensen's motive to commit the robberies (that he needed money to buy drugs) and to attack Whitehead's credibility (that her guilt over introducing Christensen to drugs would cause her to alter her testimony in his favor). (RPXIV 1592-93; CP 254) The evidence was improperly admitted for either purpose.

First, motive evidence is admissible only if it is relevant, making the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401; ER 402. Our State Supreme Court has specifically held that, when identity is the primary issue at trial, it is prejudicial error to admit evidence of drug use or drug addiction as proof of motive for a robbery. *State v. LeFever*, 102 Wn.2d 777, 785, 690 P.2d 574 (1984).<sup>3</sup>

The *LeFever* Court quoted with approval an Alaska case

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<sup>3</sup> Overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

where the reviewing court had also found such evidence inadmissible:

The Supreme Court of Alaska held it was error to admit evidence of defendant's heroin habit due to the absence of any "affirmative link" between the robbery and Gould's alleged heroin addiction. The only possible relevance of this evidence goes to the hotly contested issue of identification. The state's argument for relevance is based on reasoning that because Gould was unemployed and had a \$300 a day heroin habit, he had to commit the robbery to support his habit.... [W]e find the proffered inference too attenuated and possessing "too many gaps" to show motive and thus the identity of the robber.

We concur in the views expressed by the ... Alaska courts in their refusal to admit evidence of heroin addiction to show a link between the robberies and the addictions where the issue was identification.

*LeFever*, 102 Wn.2d at 784 (quoting *Gould v. State*, 579 P.2d 535, 539 (Alaska 1978)). The *LeFever* Court concluded that "[t]he resultant prejudice to one accused of a crime completely overwhelms any possible relevance or probativeness." *LeFever*, 102 Wn.2d at 785.

Here, Christensen did not dispute that he committed the Denny's robbery. (RPXVI 1867) But identification of the Shell gas station robber was the key issue for charges related to that incident.

Furthermore, Whitehead testified that she and Christensen

were both unemployed, so the evidence already implied that they may be having money troubles. (RPXIV 1601) Whether Christensen intended to spend the stolen money on basic necessities or on drugs was irrelevant, and did not aid the jury in determining whether or not Christensen was the person who committed the robberies. Christensen's drug use should not have been admitted to establish motive.

The State also used Whitehead's and Christensen's drug use to attack Whitehead's credibility. But drug use is not probative of truthfulness, as it has little to do with a witness's credibility. *State v. Stockton*, 91 Wn. App. 35, 42, 955 P.2d 805 (1998). Evidence of drug use is admissible to impeach a witness if there is a reasonable inference that the witness was under the influence of drugs either at the time of the incident or at the time she or he testified at trial. *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). Evidence of drug use on other occasions is generally inadmissible because it is impermissibly prejudicial. *Tigano*, 63 Wn. App. at 344-45; *State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974).

Finally, the State suggested that the drug evidence was relevant to Whitehead's credibility because she introduced

Christensen to heroin and now regretted it. The State suggested that Whitehead's regret would cause her to commit perjury in the hope that Christensen would be acquitted. (RPXIV 1593) Similar to drug use and motive, the suggested link between Christensen's drug use and Whitehead's motive to lie is too attenuated and possesses "too many gaps." *Gould*, 579 P.2d at 539.

Even if evidence of Christensen's drug use had any relevance, it was far outweighed by the prejudicial nature of the evidence. *LeFever*, 102 Wn.2d at 783 (noting that evidence of narcotics addiction can have a significant impact on a jury of laymen). The limiting instruction (CP 254) given to the jury at the same time as the other 56 instructions is not sufficient to cure the overwhelming prejudice.

## 2. Testimony Regarding Uncharged Robberies

Also during Whitehead's testimony, the State asked her whether she and Christensen argued about him committing multiple robberies, and whether she lied to detectives about how many robberies Christensen had committed. (RPXIV 1656-57, 1658) Christensen moved for a mistrial because the State's questions and Whitehead's answers implied that Christensen had committed robberies in addition to those charged in this case. (RPXIV 1658-

1661) The trial court denied the motion, stating that it was proper “impeachment.”<sup>4</sup> (RPXIV 1661-62)

The purpose of ER 404(b) is to prohibit the admission of evidence that suggests the defendant is a “criminal type” and thus likely guilty of committing the crime with which he is charged. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). When ER 404(b) evidence is admitted, the trial court is required to state its reasoning on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984).

The trial court here did not explain what part of Whitehead’s testimony made this impeachment inquiry relevant, and did not balance the probative value of the evidence against its potential prejudice. But obviously, the only reason for asking Whitehead about these conversations was to place in the mind of the jurors the idea that Christensen had repeatedly committed other uncharged armed robberies and was therefore a dangerous serial criminal.<sup>5</sup> This is the exact situation that ER 404(b) is meant to prevent. It would be impossible for the jury not to consider this evidence for an

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<sup>4</sup> A trial court’s decision to deny or to grant a motion for mistrial is reviewed for abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

<sup>5</sup> The State originally charged Christensen with four separate robberies, but it later dismissed charges relating to two incidents because it lacked sufficient proof. (CP 8-11, 206-08: RPI 4-6)

improper purpose, especially because it was not accompanied by any limiting instruction.

### 3. Prejudicial and Cumulative Error

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). Where it appears reasonably probable that the cumulative effect of the trial errors materially effected the outcome of the trial, reversal is required. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

Each of the trial court's evidentiary errors severely prejudiced Christensen's right to a fair trial and materially effected the outcome of trial. But if either one of the above issues standing alone does not warrant reversal of Christensen's convictions, the cumulative effect of these errors certainly materially effected the outcome of the trial.

Steven Sommer and Marcus Thorne both resided or frequented the property where Christensen lived. (RPIX 1123, 1127; RPX 1239; RPXIV 1599-1600) The Toyota Camry used in the Shell gas station robbery belonged to Thorne. (RPIX 1123) Blue masking tape was found in the trunk of the Camry. (RPXII 1457) Thorne refused to talk to the police officers. (RPX 1123;

RPXII 1466) Whitehead-Morrell testified Sommer willingly went with Christensen to the Denny's knowing the plan was to commit a robbery. (RPXIV 1621)

The weight and impact of this testimony on the jury's decision depended in large part on how they viewed Christensen. Did Thorne and Sommer commit the Shell station robbery together? Was Sommer a willing participant in the Denny's robbery who minimized his involvement in order to secure an advantageous plea bargain from the State? Or was Christensen a drug addict willing to do anything, even aggressive and violent things, to get money to buy drugs? Was he a serial robber who presented a danger to society?

The prior bad act evidence improperly presented to the jury could only make the jurors see Christensen in this negative light, and make the jurors more likely to believe he committed the Shell gas station robbery and all of the crimes against Sommer after leaving the Denny's restaurant. The impact of this highly prejudicial but totally irrelevant testimony deprived Christensen of a fair trial, and his convictions must be reversed.

## **V. CONCLUSION**

The State failed to prove that any Denny's customers were

put in fear that his threat to kill would be carried out. That count of harassment must be reversed and dismissed with prejudice. Additionally, each of the trial court's evidentiary errors alone denied Christensen a fair trial, but the cumulative prejudice of the errors cannot be denied. Christensen's remaining convictions must all be reversed and his case must be remanded for a new trial.

DATED: September 20, 2019



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**CERTIFICATE OF MAILING**

I certify that on 09/20/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jay Maria Christensen, DOC# 412972, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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September 20, 2019 - 11:54 AM

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53421-5  
**Appellate Court Case Title:** State of Washington, Respondent v. Jay Maria Christensen, Appellant  
**Superior Court Case Number:** 16-1-04322-6

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