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Court of Appeals
Division III
State of Washington

31572-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER A. STOKER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Stoker guilty of second degree assault as an accomplice, where the evidence was insufficient.
2. Defense counsel violated Mr. Stoker's Sixth Amendment right to effective assistance of counsel by calling Spokane Police Officer Michael Roberge as a witness.
3. The trial court erred in instructing the jury on an uncharged alternative means of committing first degree burglary.
4. The judgment and sentence erroneously states that Mr. Stoker was found guilty of counts 1, 2, and 3, rather than counts II, III, and IV.

B. ISSUES

1. Ms. Pruitt stabbed Mr. Paz. Mr. Stoker was fighting Mr. Tate when the stabbing occurred. There was no evidence that Mr. Stoker knew he was facilitating an assault of Mr. Paz, or that he was aware of any plan to stab Mr. Paz. Mr. Stoker discouraged the commission of any crime against Mr. Paz. Under these facts, was the evidence sufficient to support a finding that Mr. Stoker acted as an accomplice to the stabbing of Mr. Paz, as required to find Mr. Stoker guilty of second degree assault?

2. The State presented evidence that the confrontation between Mr. Eakle and Mr. Paz was motivated by gang affiliation. The State did not present evidence of Mr. Stoker's gang affiliation. Defense counsel called Spokane Police Officer Michael Roberge as an expert witness in the area of gangs. Officer Roberge testified that Mr. Stoker was affiliated with the Norteno gang. Was Mr. Stoker's Sixth Amendment right to effective assistance of counsel violated?
3. The State charged Mr. Stoker with first degree burglary, under the alternative means of "assaults any person." The to-convict jury instruction included both alternative means of committing first degree burglary, "assaults any person" and "armed with a deadly weapon." Did the trial court err in instructing the jury on an uncharged alternative means of committing first degree burglary?
4. The jury found Mr. Stoker guilty of counts II, III, and IV. On two pages of the Judgment and Sentence, the counts of conviction are referred to as counts 1, 2, and 3. Should this error be corrected?

C. STATEMENT OF THE CASE

On November 19, 2011, James Sprayberry drove Christopher A. Stoker, Christopher Eakle, and Shanteek Pruitt to the home of Willie Sprayberry, Justin

Paz, and Kelley Tate. (RP¹ 24-26, 177, 428-431, 597-599, 602-605). According to James Sprayberry and Mr. Stoker, they went to this house to buy marijuana from Mr. Tate. (RP 428-430, 594, 597-598, 602-605).

When Mr. Stoker, Mr. Eakle, and Ms. Pruitt arrived, they entered the house through a basement window. (RP 49, 198, 448-449, 505, 514, 607-608, 610-611). Mr. Eakle had a gun, and Ms. Pruitt had a knife. (RP 31, 620, 648, 661-662). Mr. Stoker had given this knife to Ms. Pruitt earlier that evening. (RP 648, 661).

Mr. Stoker, Mr. Eakle, and Ms. Pruitt went upstairs, where Mr. Tate's and Mr. Paz's bedrooms were located. (RP 27, 612-613). According to Mr. Tate, Mr. Eakle and Ms. Pruitt took property from his bedroom, while Mr. Stoker stood in the hallway. (RP 30-34, 83-84, 100).

Mr. Eakle and Ms. Pruitt went into Mr. Paz's room. (RP 36, 83-84, 182-184, 211, 215, 618-619). Ms. Pruitt began to go through Mr. Paz's property. (RP 186-187, 192-193, 224, 618-619). Mr. Stoker told Ms. Pruitt to stop. (RP 186, 191, 224, 619). Mr. Stoker did not go into Mr. Paz's room. (RP 84, 221, 232, 618).

¹ The Report of Proceedings consists of five consecutively paginated volumes, and two separate volumes, one containing a pretrial hearing, and one containing the sentencing hearing, held on March 28, 2013. References to the "RP" herein refer to the five consecutively paginated volumes. References to the sentencing hearing include the date.

Mr. Eakle left Mr. Paz's bedroom. (RP 190-191, 620-622). Mr. Tate slammed Mr. Eakle into the wall in the hallway between the two bedrooms. (RP 37, 53-54, 67, 89, 190-191, 621-622). Mr. Stoker and Mr. Tate then engaged in a fight. (RP 37-38, 54, 82-83, 89-90, 623-628).

While Mr. Stoker and Mr. Tate were fighting, Ms. Pruitt and Mr. Paz were also engaged in a fight. (RP 38, 186-187, 189-190, 200, 228-229, 629). Ms. Pruitt stabbed Mr. Paz with the knife Mr. Stoker had given her earlier that evening. (RP 186-187, 189-190, 193, 204-210, 229, 662).

Several minutes later, Mr. Stoker, Mr. Eakle, and Ms. Pruitt left the house. (RP 40-42, 68, 92-93, 432-433, 630, 633-634). They left the scene in James Sprayberry's car. (RP 40-42, 433, 630, 633-634). The police stopped this car. (RP 251-254, 434-437, 640). Officers found the knife on Mr. Stoker's belt. (RP 254-258, 270-271, 321-323, 662). The blade of the knife was later tested, and found to contain the DNA (deoxyribonucleic acid) of Mr. Paz. (RP 477, 483-484).

The State charged Mr. Stoker, as the principal or an accomplice, with first degree robbery of Mr. Tate (count II), first degree burglary (count III), and first degree assault of Mr. Paz (count IV).² (CP 2-3, 146-147).

² The State also charged Mr. Stoker, in Count I, with first degree robbery of Mr. Paz. (CP 2, 146). Mr. Stoker was acquitted of this charge. (CP 198; RP 767).

For the first degree burglary, the Information alleged, in relevant part:

That the defendant, CHRISTOPHER ALBERT STOKER, as actor or accomplice to another, in the State of Washington, on or about November 19, 2011, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of WILLIE R. SPRAYBERRY, JUSTIN L. PAZ, and KELLEY LEE TATE . . . and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime, did assault WILLIE R. SPRAYBERRY, JUSTIN L. PAZ, and KELLEY LEE TATE, a person therein

(CP 147).

The case proceeded to a jury trial. (RP 23-103, 174-694). Mr. Paz told the court he was sleeping, and that Mr. Eakle woke him up by putting a gun to the back of his head. (RP 181-183). He testified that Mr. Eakle told him he was going to kill him because of his tattoos. (RP 187-189, 222). Mr. Paz told the court he had previously been a member of the Sureno gang. (RP 188-189, 216-217). He testified he has a “Sur” tattoo on his chest, which is short for Sureno. (RP 188-189). Mr. Paz told the court North-sider and Sureno are rival gangs. (RP 220). He testified that Mr. Eakle said something about the North side gang. (RP 223).

Mr. Paz told the court that he saw Mr. Stoker standing in the hallway, and that Mr. Stoker did not go into his bedroom. (RP 184, 221, 225, 232). He testified that when Ms. Pruitt was going through his property, Mr. Stoker told Ms. Pruitt “to not grab anything.” (RP 186, 224-225). Mr. Paz told the court Mr.

Stoker said “[w]hat are you doing, what are you doing.” (RP 186, 224-225). Mr.

Paz stated:

I don't - - I don't even know if they were there to steal anything. I think they were solely there for Mr. Tate and I guess that wasn't part of the - - what she was supposed to do, I guess.

(RP 191).

Mr. Paz testified that the stabbing occurred after Mr. Tate slammed Mr. Eakle into the wall. (RP 186-187, 190-191, 227-228).

The State called several police officers in its case-in-chief, but none of the officers testified regarding Mr. Stoker's involvement in a gang. (RP 247-406, 490-536).

Spokane Police Department Detective Marvin Hill testified regarding statements Mr. Stoker made to him during an interview after the incident. (RP 500-521, 529-536). Detective Hill testified that Mr. Stoker told him he did not see the stabbing of Mr. Paz occur. (RP 516). Detective Hill told the court that Mr. Stoker stated he was fighting Mr. Tate at the time the stabbing occurred. (RP 509-510).

Defense counsel called Spokane Police Officer Michael Roberge as an expert witness in the area of gangs. (RP 14-16, 551-572). Prior to calling Officer Roberge as a witness, defense counsel was aware that the State's cross-examination would include questioning regarding an admission by Mr. Stoker of

Norteno (North-side) gang membership during a prior jail booking process. (RP 15-16).

Officer Roberge told the court there was a feud between the Sureno and Norteno (North-side) gangs. (RP 557, 561-562). Defense counsel questioned Officer Roberge, on direct examination, about Mr. Stoker's gang membership. (RP 566-567). Officer Roberge testified that "Mr. Stoker, from the information that I have, he falls into an affiliate or an associate category for the Nortenos." (RP 566). On cross-examination, Officer Roberge told the court that the reports of someone yelling "this is Norte" during the incident in question was a reference to being a North-sider, and that this is the group that Mr. Stoker has indicated an association with. (RP 571-572).

Mr. Stoker testified in his own defense. (RP 591-689). Mr. Stoker told the court he did not go into Mr. Paz's room. (RP 618). He testified that going into Mr. Paz's room was not part of their plan in going over to this house. (RP 619). Mr. Stoker told the court, "[a]t that point I told Mrs. Pruitt, [w]hat are you doing, what are you doing? Put his stuff back. And grabbed Mr. Eakle by the back of his sweater." (RP 619). Mr. Stoker testified he pulled Mr. Eakle out of Mr. Paz's room, and then "[w]e were both confronted by Mr. Tate from the back and Mr. Eakle was slammed into the wall." (RP 620-621).

Mr. Stoker testified that Mr. Tate hit him and Mr. Eakle at the same time. (RP 622). Mr. Stoker stated that he hit Mr. Tate, and that they "engaged in a very

intense fistfight.” (RP 623). Mr. Stoker told the court he was defending himself against Mr. Tate. (RP 676-677). He testified he was not wearing brass knuckles, but that he was wearing three rings on his fingers. (RP 627).

Mr. Stoker told the court he did not know what was going on in Mr. Paz’s room while he was fighting Mr. Tate. (RP 628-629, 652-653). He testified he did not know about the stabbing until after the incident, while riding in James Sprayberry’s car. (RP 647-648). Mr. Stoker told the court that Ms. Pruitt returned his knife to him after the incident, testifying that “[s]he dropped it in my lap and I proceeded to clip it to my waist.” (RP 662). Mr. Stoker testified he did not encourage the stabbing, but instead, “I was actually trying to stop anything from violence [sic] - - any kind of violence happening in the situation.” (RP 653).

Mr. Stoker testified that he had given Ms. Pruitt the knife while at a party prior to the incident, because she was nervous when some rival gang members arrived at the party. (RP 648). Mr. Stoker told the court that Ms. Pruitt was a member of the Crips gang. (RP 648).

Mr. Stoker testified he never told anyone at the jail that he was affiliated or associated with the Norteno (North-side) gang. (RP 643-644). He told the court he is not in a gang. (RP 659).

The trial court instructed the jury on accomplice liability. (CP 166; RP 710). The trial court instructed the jury that in order to convict Mr. Stoker of first degree burglary, it had to find:

- (1) That on or about the 19th day of November, 2011, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person; and
- (4) That any of these acts occurred in the State of Washington.

(CP 175; RP 713-714).

The trial court defined the crime of first degree burglary as follows:

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

(CP 174; RP 713).

Also, with respect to the first degree assault charge, the trial court instructed the jury on the lesser-included offense of second degree assault of Mr. Paz. (CP 181-183; RP 716-717).

In its closing argument, with regards to the first degree burglary count, the State argued that Mr. Stoker, Mr. Eakle, and Ms. Pruitt entered the house while armed, and that the stabbing of Mr. Paz occurred while they were inside. (RP 725-726, 734, 735, 739-740).

The jury found Mr. Stoker guilty of first degree robbery, first degree burglary, and the lesser-included offense of second degree assault.³ (CP 200, 203, 209; RP 767-768). He was sentenced as a persistent offender, to life in prison without the possibility of early release. (CP 246-255; RP (March 28, 2013) 19). On two pages of the Judgment and Sentence, the counts of conviction are referred to as “Count 1, 2, 3.” (CP 247, 250).

Mr. Stoker appealed. (CP 259-270).

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT FOR SECOND DEGREE ASSAULT AS AN ACCOMPLICE.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable

³ The jury also returned special verdicts on the first degree robbery and first degree burglary counts, finding that Mr. Stoker was armed with a deadly weapon and armed with a firearm during commission of the crimes. (CP 201-202, 204-205; RP 768).

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

The jury was given the following accomplice liability instruction:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, *more than mere presence and knowledge of the criminal activity of another must be show to establish that a person present is an accomplice.*

(CP 166); *see also* RCW 9A.08.020 (defining accomplice liability) (emphasis added).

To prove that Mr. Stoker was an accomplice to the second degree assault of Mr. Paz, the State needed to show that Mr. Stoker knowingly promoted or

facilitated the crime “(1) by soliciting, commanding, encouraging, or requesting another person to commit the crimes; or (2) by aiding or agreeing to aid another in the planning or committing of the crimes.” *State v. Knight*, -- Wn. App. --, 309 P.3d 776, 783 (Wash. App. 2013) (citing RCW 9A.08.020(3)(a)). “A person aids or abets a crime by associating himself with the undertaking, participating in it as in something he desires to bring about, and seeking by his action to make it succeed.” *Id.* (citing *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)).

Accomplice liability requires more than “physical presence at the scene and assent to the crime committed.” *State v. Roberts*, 80 Wn. App. 342, 355, 908 P.2d 892 (1996). “[T]he defendant must be ready to assist in the crime.” *Id.* at 356 (citing *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993)). “[A]n accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.” *Sarausad v. State*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001).

Ms. Pruitt stabbed Mr. Paz. (RP 186-187, 189-190, 193, 204-210, 229, 662). Therefore, in order for the jury to find Mr. Stoker guilty of second degree assault of Mr. Paz, it had to find that Mr. Stoker acted as an accomplice to Ms. Pruitt’s stabbing of Mr. Paz.

Mr. Stoker was not an accomplice to the second degree assault of Mr. Paz. Instead, he was merely present at the house when the assault occurred. *See Roberts*, 80 Wn. App. at 355. Mr. Stoker was not ready to assist with the assault, because at time when Ms. Pruitt stabbed Mr. Paz, Mr. Stoker was engaged in a fight with Mr. Tate. (RP 38, 186-187, 189-191, 200, 227-229, 509-510, 516). Mr. Stoker did not go into Mr. Paz's bedroom. (RP 184, 221, 225, 232).

There was no evidence that Mr. Stoker knew he was facilitating an assault of Mr. Paz. *See Sarausad*, 109 Wn. App. at 836. Mr. Stoker did admit he had given Ms. Pruitt the knife that she later used to stab Mr. Paz. (RP 648, 661). However, Mr. Stoker testified he gave Ms. Pruitt the knife while at a party prior to the incident, for protection from rival gang members. (RP 648). There was no evidence presented that Mr. Stoker gave Ms. Pruitt the knife in order to assault Mr. Paz.

There was no evidence that Mr. Stoker was aware of any plan to stab Mr. Paz. *See State v. Asaeli*, 150 Wn. App. 543, 569-70, 208 P.3d 1136 (2009) (finding there was insufficient evidence that a co-defendant acted as an accomplice, where there was no evidence he was aware of any plan to commit the crime). Mr. Stoker testified that going into Mr. Paz's room was not part of the plan in going over to the house. (RP 619). Ms. Pruitt and Mr. Eakle did not testify, so there is no evidence that the three individuals planned the stabbing of

Mr. Paz. Also, Mr. Paz testified that he thought the three individuals were there “solely for Mr. Tate. . . .” (RP 191).

Also, rather than “soliciting, commanding, encouraging, or requesting another person to commit the crimes[,]” Mr. Stoker discouraged the commission of any crime against Mr. Paz. *See Knight*, 309 P.3d at 783 (*citing* RCW 9A.08.020(3)(a)); *see also* (RP 186, 191, 224-225, 619). Mr. Paz testified that when Ms. Pruitt was going through his property, Mr. Stoker told Ms. Pruitt “to not grab anything.” (RP 186, 224-225). Mr. Paz told the court Mr. Stoker said “[w]hat are you doing, what are you doing.” (RP 186, 224-225). Mr. Stoker testified to the same. (RP 619).

The evidence presented as trial was insufficient for the jury to find that Mr. Stoker acted as an accomplice to the second degree assault of Mr. Paz. The evidence only shows Mr. Stoker’s mere presence at the house when the assault occurred. Mr. Stoker’s second degree assault conviction should be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating “[r]etrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”) (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

2. DEFENSE COUNSEL VIOLATED MR. STOKER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY CALLING SPOKANE POLICE OFFICER MICHAEL ROBERGE AS A WITNESS.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, “strategy must be based on reasoned decision-

making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). “Deciding whether to call a witness is a matter of legitimate trial tactics that presumptively does not support a claim of ineffective assistance of counsel.” *State v. Davis*, 174 Wn. App. 623, 639, 300 P.3d 465 (2013) (citing *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981)). This presumption can be overcome by showing that defense counsel “failed to adequately investigate or prepare for trial.” *Id.* (citing *Byrd*, 30 Wn. App. at 799).

Defense counsel called Officer Roberge as an expert witness in the area of gangs. (RP 14-16, 551-572). Prior to calling him as a witness, defense counsel was aware that the State would cross-examine Officer Roberge regarding Mr. Stoker’s affiliation with the Norteno (North-side) gang. (RP 15-16). Defense counsel questioned Officer Roberge about Mr. Stoker’s gang membership, and Officer Roberge testified that Mr. Stoker is affiliated with the Norteno gang. (RP 566-567).

Defense counsel’s performance, in calling Officer Roberge as a witness, was deficient. *See McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26). The State did not present evidence of Mr. Stoker’s gang affiliation in its case-in-chief. (RP 247-406, 490-536). Further, Mr. Stoker denied being involved in a gang. (RP 643-644, 659). The State, in its case-in-chief, presented evidence that the confrontation between Mr. Eakle and Mr. Paz was motivated by gang affiliation. (RP 187-189, 216-217, 220, 222-223). It was

unreasonable for defense counsel to present evidence of Mr. Stoker's gang affiliation, where the State presented evidence that the other actors in the incident were motivated by gang affiliation. Because Mr. Stoker's alleged involvement in the charged crimes was as an accomplice, it was deficient performance for defense counsel to present testimony that strengthened the link between Mr. Stoker and the other actors in the incident.

Defense counsel did not make a tactical decision by calling Officer Roberge as a witness. *See Grier*, 171 Wn.2d at 33. Defense counsel's strategy to put Mr. Stoker's gang affiliation into evidence was not based on reasonable decision-making. *Hubert*, 138 Wn. App. at 928. Submitting this gang evidence to the jury increased the likelihood that it would find that Mr. Stoker was involved in the gang rivalry between Mr. Eakle and Mr. Paz, and thus, that he acted as an accomplice to the charged crimes. Also, Mr. Stoker denied any gang affiliation. (RP 643-644, 659). There was no strategic reason for defense counsel to present evidence in direct contradiction to his client's testimony. The fact that defense counsel did so shows that he "failed to adequately investigate or prepare for trial." *Davis*, 174 Wn. App. at 639 (*citing Byrd*, 30 Wn. App. at 799).

Defense counsel's deficient performance prejudiced Mr. Stoker. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that, absent this error, the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*,

109 Wn.2d at 225-26). Mr. Stoker was, at most, an accomplice to Mr. Eakle and Ms. Pruitt. Absent evidence that Mr. Stoker had a gang affiliation, like Mr. Eakle and Ms. Pruitt, the likelihood that Mr. Stoker assisted in the charged crimes weakens. Both Mr. Tate and Mr. Paz testified that Mr. Stoker did not enter their bedrooms. (RP 27-34, 83-84, 100, 221, 232). Without the link of Mr. Stoker to the other actors by gang affiliation, there is a reasonable probability that the jury would not have concluded that he acted as an accomplice in the charged crimes.

Mr. Stoker has proved the two-prong test for ineffective assistance of counsel. His trial counsel's calling Officer Roberge as a witness was deficient performance, and he was prejudiced thereby. Therefore, this court should reverse his convictions.

3. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE BURGLARY.

A person commits first degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, *or* (b) assaults any person." RCW 9A.52.020(1) (emphasis added). The State charged Mr. Stoker with committing first degree burglary by the second alternative means, "assaults any person." (RP 147); *see also*

RCW 9A.52.020(1)(b). However, the to-convict jury instruction included both alternative means of committing first degree burglary, “assaults any person” and “armed with a deadly weapon.” (CP 175; RP 713-714); *see also* RCW 9A.52.020(1).

The sufficiency of a to-convict jury instruction is reviewed *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007); *see also State v. Aguilar*, 153 Wn. App. 265, 278-79, 223 P.3d 1158 (2009).

“It is error to instruct the jury on alternative means that are not contained in the charging document.” *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013). Here, the trial court erred in instructing the jury on the uncharged alternative means in RCW 9A.52.020(1)(a), being “armed with a deadly weapon.” (CP 147, 175; RP 713-714); *see also Brewczynski*, 173 Wn. App. at 549.

Instructing the jury on an uncharged alternative means of committing a crime is harmless “if other instructions clearly limit the crime to the charged alternative.” *Brewczynski*, 173 Wn. App. at 449 (*citing State v. Severns*, 13 Wn.2d 542, 549, 125 P.2d 659 (1942); *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003)). Here, none of the remaining jury instructions, including the instruction defining first degree burglary, limited the jury to consider only the “assaults any person” alternative of committing first degree burglary. (CP 174; RP 713); *see also Brewczynski*, 173 Wn. App. at 549. Also, in closing argument,

the State asked the jury to consider both alternative means of committing first degree burglary, by arguing that Mr. Stoker, Mr. Eakle, and Ms. Pruitt entered the house while armed, and that the stabbing of Mr. Paz occurred while they were inside. (RP 725-726, 734, 735, 739-740); *see also Brewczynski*, 173 Wn. App. at 550. Therefore, because it is possible that the jury convicted Mr. Stoker on the basis of the uncharged alternative means, being “armed with a deadly weapon,” the error is not harmless. *See Brewczynski*, 173 Wn. App. at 550.

Mr. Stoker challenges the first degree burglary to-convict jury instruction for the first time on appeal. “The constitution requires the jury be instructed on all essential elements of the crime charged.” *Chino*, 117 Wn. App. at 538 (*citing State v. Linehan*, 147 Wn.2d 638, 653, 56 P.3d 542 (2002); U.S. Const. Amend. VI; Const. Art. I, § 22). A party may raise a “manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3). To establish that the error was manifest, a defendant must make a plausible showing that the error had a practical and identifiable consequence in the trial of his case. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Because it is possible that the jury convicted Mr. Stoker on the basis of the uncharged alternative means of committing first degree burglary, “armed with a deadly weapon,” the error meets this standard.

Mr. Stoker's conviction for first degree burglary must be reversed due to the error in the to-convict jury instruction. *See Brewczynski*, 173 Wn. App. at 550 (citing *Severns*, 13 Wn.2d at 548; *Chino*, 117 Wn. App. at 540-41).

4. THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.

The jury found Mr. Stoker guilty of first degree robbery (count II), first degree burglary (count III), and the lesser-included offense of second degree assault (count IV). (CP 146-147, 200, 203, 209; RP 767-768). On two pages of the Judgment and Sentence, the counts of conviction are erroneously referred to these counts as "Count 1, 2, 3." (CP 247, 250). Therefore, this court should remand this case for correction of the judgment and sentence to list the crimes of conviction as counts II, III, and IV, rather than counts 1, 2, and 3. *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence).

E. CONCLUSION

The evidence was insufficient to support Mr. Stoker's conviction for second degree assault. The conviction should be reversed and the charge dismissed with prejudice.

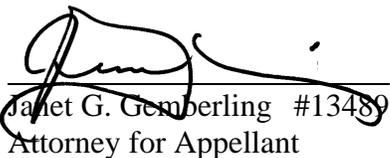
In addition, Mr. Stoker's convictions should be reversed because he was denied his Sixth Amendment right to effective assistance of counsel. Mr. Stoker's first degree burglary conviction should also be reversed due to the error in the to-convict jury instruction.

Finally, the case should be remanded for correction of the judgment and sentence, to state that Mr. Stoker was convicted of counts II, III, and IV, rather than counts 1, 2, and 3.

Dated this 8th day of November, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) No. 31572-0-III
)
 vs.)
)
CHRISTOPHER A. STOKER,)
)
 Appellant.)

CERTIFICATE
OF MAILING

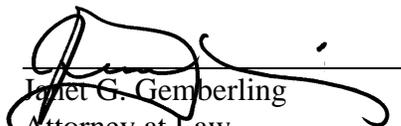
I certify under penalty of perjury under the laws of the State of Washington that on November 8, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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and

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Signed at Spokane, Washington on November 8, 2013.


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