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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

OMAR CARLOS,
Appellant.

COA NO. 32407-9-III
SUP. CRT. NO. 13-1-00726-9

APPELLANT'S OPENING BRIEF



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I. INTRODUCTION

Defendant appeals his conviction for burglary in the first degree and assault of a child in the second degree, Counts 1 and 2 of the Amended Information(s), arguing that: (1) He was prejudiced by the court's denial of his motion to continue his trial based on the State's late filing of a second amended Information the day of trial; (2) The State failed to prove the necessary elements of both crimes beyond a reasonable doubt; and (3) His trial counsel was ineffective. Defendant requests that this Court reverse his convictions and remand his case to the Superior Court for a new trial and/or for resentencing.

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II. ASSIGNMENTS OF ERROR

Pursuant to RAP 10.3(a)(4), Appellant Omar Carlos makes the following assignments of error:

- A. **THE COURT ERRED AND PREJUDICED MR. CARLOS' ABILITY TO RECEIVE FAIR TRIAL WHEN IT DENIED HIS REQUEST TO CONTINUE TRIAL ON MARCH 19, 2014.**
- B. **THE STATE FAILED TO PROVE THE NECESSARY ELEMENTS OF BOTH CRIMES BEYOND A REASONABLE DOUBT.**
1. The evidence in the record was insufficient to overcome the defendant's parental privilege or license to enter the residence based on his obligation to provide for his dependent children.
 2. Mere bruising and minor cuts do not rise to the level of substantial bodily harm.
 3. There is insufficient evidence in the record to justify a jury decision that the defendant compressed his son's neck to a degree that it would have substantially affected his ability to breath.
 4. Because a unanimity instruction was not provided, the failure of proof on either one of the two alternative means requires reversal of the conviction on Count 2.
- C. **MR. CARLOS WAS NOT AFFORDED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**
1. Defense counsel failed to make an opening statement at the beginning of trial and at the close of the State's case.
 2. Defense counsel failed to object to objectionable and prejudicial testimony.

3. Defense counsel failed to recognize and develop viable defenses and a defense theory of the case.

4. Defense counsel failed to present and argue a legitimate basis for an exceptional and mitigated sentence below the standard range at the defendant's sentencing hearing.

III. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

1. Factual Background and Testimony at Trial

This was a relatively short trial. The State called the defendant's ex-wife, Debra Gonzalez, Levi Carlos (the defendant's 12 year-old son and the alleged victim in Count 2), Rita Morfin, a neighbor, and Moses Lake Police Officer Curt Ledeboer as witnesses. The defendant's trial attorney waived his opening statement at the outset of trial and declined to give an opening at the conclusion of the State's case. RP at 352, lines 18-23; RP at 168, lines 2-6. The defense rested without calling any witnesses. Id.

Ms. Gonzalez testified that she married the defendant on December 3, 2006. RP at 47, lines 16-21. They divorced in July of 2013. Id., lines 22-23. The marriage produced two biological children: Levi Carlos, born May 28, 2001 (RP at 49, lines 13-14), and Jackson Carlos, born September 29, 2006 (Id., lines 21-22). The defendant also had an older son from a

prior relationship named Zachary Carlos. RP at 48, lines 2-4. Zachary was 23 years old at the time of the trial. RP at 50, lines 13-14.

Following completion of the divorce, the defendant had visitation with Levi and Jackson every other weekend, including overnight stays on Friday, Saturday and Sunday nights. RP at 48-49, lines 23-25 and lines 1-2. He also had several hours of visitation every Wednesday after school. RP at 49, lines 1-2. According to Ms. Gonzalez, as of November 19, 2013, the couple was getting along “fine”. RP at 49, lines 3-6. They lived separately, Ms. Gonzalez residing in the former family home at 2103 Perch Avenue in Moses Lake, Washington, with both Levi and Jackson. RP at 50, lines 1-4. The defendant was living elsewhere and did not have a key to his former residence on Perch Avenue (RP at 50-51, lines 19-25 and lines 1-5), as Ms. Gonzalez had changed the locks to the home. Id.; RP at 51-52, lines 19-25; lines 12-14. She also changed the key pad combination to the garage door in approximately the summer of 2013. RP at 52, lines 1-11 and 15-16. As of November 20, 2013, the defendant did not have permission to enter his sons’ home unless he was invited in or asked to go in. Id. at lines 17-22.

On Wednesday, November 20, 2013, Ms. Gonzalez was in Seattle for a board retreat. RP at 52-53, lines 24-25 and lines 1-5. She was scheduled to stay in Seattle through Thursday night, returning home on

Friday. RP at 53, lines 1-5; and Id. at lines 6-10. Ms. Gonzalez's mother was traveling from Quincy, Washington, to stay overnight with Levi and Jackson at their home on Wednesday and Thursday. Id. at lines 11-14. After school the defendant took Levi and Jackson out for pizza at Chico's, a local restaurant. RP at 75, lines 1-12. It was the defendant's normal visitation night with his boys. Id. The defendant consumed at least one beer with dinner. RP 75-76, lines 17-25 and lines 1-2; Exhibit 12 at 12:46 through 13:12 of the recorded statement. After dinner the defendant drove his boys straight home to their residence on Perch. RP at 77, lines 15-16. During the drive and shortly after arriving at the Perch residence, the defendant and Ms. Gonzalez had several heated telephone conversations that included vulgar name-calling. RP at 53-56, line 15, to 56, line 1; and RP at 77, line 17, to 79, line 4. The disagreement apparently resulted from the fact that Ms. Gonzalez's mother was not yet at the house to care for Levi and Jackson. RP 55, lines 5-9; RP 79, lines 7-11. Levi – age 12 – overheard his father calling his mother a “bitch” and a “whore”. RP at 78, lines 21-25. Levi repeatedly told his father that he and Jackson were fine to be alone at the house until their grandmother arrived. RP at 79, lines 14-18.

Upon arriving at the house the defendant shouted at Levi to “get the fuck out of my truck.” RP at 80, lines 1-7. Levi replied, “fuck you,

dad”. Id. at lines 8-9. Levi testified that after shouting at his father he got out the truck, shut the truck door and began walking to the front door of the house. RP at 81, lines 7-8. He testified that he heard the driver’s side door open and close. When asked by the prosecutor, “Did you do anything in response to hearing that?” he responded, “I turned around and I kind of – I braced for something, because I knew something was going to happen.” Id. at lines 15-18. Levi testified that the defendant then grabbed him by the collar of his sweatshirt and head-butted him. RP at 90, lines 15-23. After the head-butt, the defendant threw him against the garage wall. Id. at lines 20-21; RP at 82, lines 1-3; RP at 90, lines 20-23. His back and shoulders made contact with the wall. RP at 85, lines 20-21. He said he felt no pain when his body hit the wall. Id. at lines 14-19. He said that while doing this his father yelled at him, “don’t you disrespect me.” RP at 85, line 22, to 86, line 1. He said the defendant held him against the wall for about three minutes. RP at 86, lines 13-16. After about 1-1/2 minutes of that time the defendant’s hands went from Levi’s collar to his throat. Id. at lines 19-25. Levi said that when his father’s hands were on his throat it did not hurt. RP at 87, lines 8-12. He said his breathing was “Okay”. Id. at line 13-14. Still, when asked by the prosecutor whether he was able to breath normally while his father’s hand was on his neck he answered “no”. Id. at lines 15-17. Nevertheless, neither Levi nor the

prosecutor offered any further explanation of what Levi meant by the contradicting answers. After putting at least one hand on Levi's throat, Levi testified that the defendant grabbed both of his ears; the defendant then grabbed Levi again by the collar of his sweatshirt and threw him onto a gravel patch next to the garage. RP at 88, lines 1-15; RP at 86, line 18. Levi said that he landed on his back, but it did not hurt. Id. at lines 21-23; lines 16-17. The defendant stood over him holding his collar and told him, "you're just like your mother, your mother's a whore, fuck you, and don't ever disrespect me like that." RP at 90, lines 13-17. The defendant held Levi while he lay on the gravel for about a minute. Id. at lines 1-2. Levi said that his father then pulled him up, let him go and drove off. Id. at lines 12-14; RP at 91, lines 15-19. Levi and Jackson went inside the house at that time, locking the front door behind them. Id. at lines 20-23; RP at 92, lines 11-13 and 16-18.

Ms. Gonzalez testified that at about this time she received a phone call from the defendant, who stated that he had just kicked their son's ass. RP at 55, lines 17-18. He then hung up the phone. Id. at line 22, to page 56, line 1. Ms. Gonzalez then called her neighbor, Rita Morfin, to ask her to run over to her house to see what was going on. RP at 56, lines 2-14. When Ms. Morfin arrived she noticed that Levi was "a little distraught" and crying. RP at 129, line 12; 130, lines 20-24. She said that the

defendant returned to the house while she was there. RP at 129, lines 21-22. The defendant entered the house through the front door, which she said was ajar and open when the defendant arrived. RP at 130, lines 6-17. Ms. Morfin noticed that Levi seemed nervous when his father arrived. RP 130, line 25, to RP 131, line 2. She asked the defendant if everything was okay; he did not respond. RP at 131, lines 11-15. She returned to her home and telephoned Ms. Gonzalez, suggesting that Ms. Gonzalez should call 911. Id. at 16-18. After the phone call Ms. Morfin continued to watch the house and saw the defendant leave shortly thereafter. RP at 131, line 21, to RP at 132, line 4. To her knowledge, the defendant did not return to the house again that evening. RP at 132, lines 5-6.

Levi, however, testified that his father returned several times, assaulting him by throwing him to the floor during the first occasion. RP at 94, line 25, to RP at 96, line 11; RP at 103, line 16, to RP 114, line 22. Levi testified that when his father returned the first time the front door was locked and the garage door closed. RP at 103, line 6-23. He heard the defendant attempt to open the front the door. Id. Shortly thereafter he heard the garage door opening. Levi ran to the inside garage door and attempted to hold it closed to keep his father out. He was unable to do so and his father entered. Id. at line 24, to RP at 104, line 13. Levi shouted at his father to get out twenty or more times. RP at 103, line 7, to RP at

105, line 4. The defendant grabbed him by the collar of his jacket and threw him on the floor. RP at 105, lines 6-7.

As a result of the physical confrontation with his father Levi suffered a lump and bruising on his forehead (RP at 138, lines 9-11; RP at 143, lines 15-18), a lump to his left jaw (RP at 143, lines 18-19), a bruise to the right side of his face (Id. at lines 19-20), bruising on the left and right sides of his neck (Id. at 20-21), a bruise on his pectoral (Id. at 21-22), and a scrape mark to the back of an elbow (Id. at 22-23). He also had cuts to the back of both ears. RP at 144, line 24, to RP at 145, line 9.

After receiving the returned call from Ms. Morfin, Ms. Gonzalez called the police. RP at 57, line 24, to RP at 58, line 10. Ultimately, she cut her trip short and returned to Moses Lake early the next morning, Thursday, November 21, 2013. RP at 59, line 18, to RP at 60, line 19.

Officer Curt Ledebor testified that on November 20, 2013, at approximately 7:30 p.m. he and other officers responded to the Perch Avenue home after receiving Ms. Gonzalez's call for assistance. RP at 135, line 2-5. He met Levi and his paternal grandmother at the Perch residence.¹ After speaking with them briefly there, he agreed to meet them later at the paternal grandparent's house to take a statement from Levi there. RP at 137, line 24-25. He was able to talk with Ms. Gonzalez

¹ The maternal grandmother had still not arrived.

by telephone that night (RP at 140, lines 6-13), and he took pictures of Levi (Id. at 2-5).

On the afternoon of November 21, 2013, Officer Ledeboer returned to the Perch address to meet Ms. Gonzalez and take additional statements from her and Levi. RP at 140, line 17, to RP at 141, line 7; RP at 141, line 23, to RP at 142, line 4. While at the Perch residence he learned that that the defendant had arrived voluntarily at the Moses Lake Police Department and that he wanted to make a statement. RP at 142, lines 5-9. Officer Ledeboer returned to the police department and took an audiotaped statement from the defendant. Id. at lines 10-19; the audiotaped statement is contained in Exhibit 12. When asked by the prosecutor if and when he returned to the Perch residence to talk with Ms. Gonzalez and Levi, Officer Ledeboer stated, “[A]fter the completion of the conversation with Mr. Carlos.” Id. at lines 22-23. Unprompted, he also stated, “I had to take him (Mr. Carlos) to jail and then I went back.” Id., line 25. Defense counsel did not object or move to strike the unsolicited statement.

At the completion of the evidence phase of the trial the Court heard arguments on jury instructions. The State offered a “Petrich” instruction and argued that the Court should advise the jury that to return a verdict of guilty to Count 2 it must unanimously decide that the defendant

committed at least one of the two alternative means of committing the crime of second degree assault of a child. CP 54; RP at a176, line 8, to RP at 177, line 6. Defense counsel agreed that the jury should be advised that it must unanimously decide that the defendant committed at least one the two alternative means, but suggested that a Petrich instruction would not be necessary, “as long as the State gives a proper closing argument.” *Id.* at lines 13-23. The Court disagreed, holding that where each alternative means is supported by substantial evidence a Petrich instruction and special verdict form are unnecessary. RP at 177, line 24, to RP at 179, line 23. The State argued in its closing argument that:

“[I]f six of you find beyond a reasonable doubt that Omar Carlos intentionally assaulted Levi Carlos, and thereby recklessly inflicted substantial bodily harm, and the other six decide that beyond a reasonable doubt Omar Carlos assaulted Levi Carlos by strangulation ... then you don’t have to actually agree whether or not that occurred by strangulation or by substantial bodily harm.”

Defense counsel did not object.

2. Charging Documents and Jury Instructions

The State filed the original information on November 22, 2014. It alleged three counts: Count 1: Residential Burglary; Count 2: Assault of a Child in the Second Degree; and Count 3: Violation of a Court Order (Gross Misdemeanor). CP 1. Count 2 alleged three alternative means of committing the crime: by recklessly inflicting substantial bodily harm; by

assaulting the child with a deadly weapon; and by strangulation. Id. The first Amended Information (filed on March 10, 2014) changed the allegation contained in Count 1 from residential burglary to first degree burglary. CP 42. It also purported to limit the alleged alternative means of committing the crime of assault of a child in the second degree. Id. The prosecutor intended to remove the allegation that Count 2 could have been committed by the alternative means of assaulting the child by use of a deadly weapon. RP at 5, lines 1-23. Instead, the allegation of strangulation was inadvertently removed and the prong alleging the use of a deadly weapon was maintained. Id. The prosecutor offered the second Amended information to correct this scrivener's error. CP 44, 47; RP at 6, lines 2-17. Defense counsel objected. RP at 5, lines 24-25, to RP at 6, line 1. Count 3 was also intentionally excised from both the first and second amended informations. RP at 6, lines 9-13; CP 42, 47.

Reference Count 1, the jury was advised by Instruction No. 4 that to convict the defendant of the crime of first degree burglary the state had to prove beyond a reasonable doubt that the defendant "entered or remained unlawfully in a building". CP 55. Instruction No. 5 advised the jury that a person "enters or remains unlawfully" in premises when he or she "is not then licensed, invited, or otherwise privileged to so enter or remain". Id. The defense offered no instructions, testimony, or other

evidence whatsoever to suggest or establish the existence of a license or privilege by the defendant to enter or remain in his children's residence.

B. PROCEDURAL HISTORY

The charges faced by the appellant were based on allegations of an incident from November 20, 2013. CP 47. The original information charging Mr. Carlos with Count 1, first degree burglary, Count 2, second degree assault of a child, and Count 3, the misdemeanor violation of a court order, was filed on November 22, 2013. CP 1. The first Amended Information was filed on March 10, 2014. CP 42. The second Amended Information was filed on March 19, 2014. CP 47. Mr. Carlos was arraigned, entered not guilty pleas and proceeded to a jury trial on March 19, 2014. RP Vol I-II. Following jury trial Omar Carlos was found guilty of Count I: first degree burglary, and Count II: second degree assault of a child. CP 56, 57. Special verdicts were returned on both charges finding that the defendant was a member of the same family or household as his ex-wife, Debra Gonzalez, and his son, Levi Carlos. CP 58, 59 and 60.

On March 25, 2014, the Court sentenced Mr. Carlos to 31 months on Count 1; and to 46 months on Count 2. CP 63, page 5 of 18. The court ordered that both counts be served concurrently. *Id.* This resulted in a total sentence of confinement of 46 months. *Id.* Mr. Carlos filed a timely Notice of Appeal on April 11, 2014. CP 68.

C. SUMMARY ARGUMENT

Several grievous errors were committed during the course of Mr. Carlos' trial. The root cause of many of these errors was the failure of his trial counsel's performance to reach even an objective level of reasonableness. To counsel's credit, he recognized that he was unprepared for trial and argued for a continuance of the trial when the state moved to amend on the day of trial. The trial court, however, erred by denying counsel's motion to continue. Unprepared to challenge the State's theory of the case, counsel then failed to make obvious arguments against the State's case. Significantly, defense counsel waived his opening statement at the outset and then, without explanation, failed to make an opening statement at the conclusion of the State's case in chief. During trial, defense counsel failed to object to improper and prejudicial testimony. In fact, it appears from the record that counsel did not have a working defense theory of the case in mind going into the trial. As a result, he failed to offer and/or argue relevant and meaningful statutory defenses to the crime of first degree burglary (i.e., the defense set out in RCW 9A.52.090; and that the defendant had a limited license to enter his children's home due to his parental obligation to provide for his dependent children) and to the crime of second degree assault of a child. In the same

regard, he failed to propose legally relevant and necessary instructions to the jury regarding the required elements of the charges against his client.

Counsel's failure to develop or recognize a defense theory of the case resulted in his absolute ineffectiveness during trial. He failed to elicit favorable information from the State's witnesses and failed to point out and/or develop favorable information for the jury's consideration. While a viable defense theory existed, it would not have been apparent to the jury due to defense counsel's failed effort. Prejudice to the defendant is apparent by the fact that the jury did not hear what would have been a strong and favorable defense theory of the case.

Still, the State's evidence was insufficient to sustain convictions on each count. Reference Count 1, the evidence was insufficient to overcome the defendant's parental privilege or license to enter the family home based on his obligation to provide for his dependent children. As for Count 2, the evidence was insufficient to sustain a finding that Levi's injuries rose to the level of substantial bodily harm. In fact, the evidence showed that Levi suffered bruising and minor cutting. While in prior cases bruising has been held to risen to the level of substantial bodily harm the bruising described in this case does not approach the magnitude of the bruising described in the prior cases. Similarly, there was insufficient testimony and evidence to justify a conclusion that the defendant

compressed his son's neck to a degree that it would have substantially affected the boy's ability to breath.

Finally, the defendant was prejudiced by counsel's inadequate representation at his sentencing hearing because even though his theoretical, but un-argued, defense failed counsel could have argued that the failed defense nevertheless established a basis for an exceptional and mitigated sentence. Counsel predictably failed the defendant by not making this argument.

Any of these errors on their own is sufficient grounds to demonstrate that Mr. Carlos was not given a fair trial, but when they are viewed as a whole it is evident that this trial did not live up to the expectations of our adversarial system and instill any confidence in the resulting verdicts.

As a result, the defendant was not afforded a fair trial and/or sentencing hearing. This court should reverse his convictions and remand this matter to the trial court for a new trial. In the alternative, this court should vacate his sentence and remand the matter for resentencing.

IV. ARGUMENT

A. DENIAL OF CONTINUANCE

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. State v. Kelly, 32 Wn.App.

112, 114, 645 P.2d 1146. review denied. 97 Wn.2d 1037 (1982). The decision is discretionary because the court must consider various factors such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact on the result of the trial. Kelly, 32 Wn.App. at 114. The decision to deny the defendant a continuance may be disturbed on appeal upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted. Kelly. 32 Wn.App. at 114.

The defendant's request to continue trial resulted from the late filing of the second amended information on day of trial, March 19, 2014. RP at 3, line 12, to RP at 19, line 18. As set out above, the first Amended Information – filed on March 10, 2014 – had excluded the alternative means of committing the crime of second degree assault of a child by strangulation. Defense counsel argued that due to the State's apparently purposeful removal of that alternative means from the original information he was no longer prepared to defend the defendant against that allegation. RP at 7, line 18, to RP at 8, line 5. What is apparent from the entire trial transcript is that counsel was simply not prepared to put on a defense that accurately targeted the circumstances and anticipated facts of this case. The motion to continue should have been granted.

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B. INSUFFICIENCY OF EVIDENCE

1. Generally

In considering a challenge to the sufficiency of the evidence, reviewing courts view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980)); State v. McKague, 159 Wn.App. 489, 501, 246 P.3d 558 (Wash.App. Div. 2 2011). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. Salinas, 119 Wash.2d at 201, 829 P.2d 1068; McKague, 159 Wn.App. at 501.

2. First Degree Burglary

In the context of this case, a conviction for first degree burglary required the State to prove beyond a reasonable doubt that the defendant entered or remained unlawfully in his children's residence with intent to commit a crime against a person or property therein, and that in entering or while in the residence or in immediate flight therefrom, the defendant assaulted another person. RCW 9A.52.020. A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010.

The statute requires the state to prove beyond a reasonable doubt that the defendant's entry was unlawful. A person "enters or remains unlawfully" when he or she "is not then licensed, invited, or otherwise privileged to so enter or remain". RCW 9A.52.010(5). The State is required to prove beyond a reasonable doubt that the defendant was not licensed or privileged to enter or remain in his children's house. State v. W.R., Supreme Court of Washington, No. 88341-6 (October 30, 2014) (Holding that when a defense necessarily negates an element of a crime charged, the State may not shift the burden of proving that defense onto the defendant). Ms. Gonzalez's testimony showed that, in fact, Mr. Carlos did enjoy a limited privilege to enter and remain in the house. She testified that she and Mr. Carlos were co-parenting their two minor children, Levi, age 12, and Jackson, who was age 7 at the time of the incident. Ms. Gonzalez testified that their divorce had been finalized, they had a formal visitation schedule in place which they were following and they were getting along "fine". Mr. Carlos enjoyed visitation on Wednesday nights. This incident occurred on a Wednesday night after Mr. Carlos took his son's out for dinner during his regular visitation. Ms. Gonzalez was out of town that night. However, her mother (the children's maternal grandmother) was scheduled to be at the home to stay overnight with the boys. When Mr. Carlos returned the boys to their home the

maternal grandmother had not yet arrived. As a result, no adult was present at the home to watch Levi and Jackson. This fact was clearly an important factor that contributed to the fight and name-calling that occurred between Ms. Gonzalez and the defendant.

Washington law places upon a parent a statutory obligation to provide for his or her dependent children. *State v. Cordero*, 284 P.3d 773, 779 (Wash.App.Div.3 2012). Mr. Carlos recognized that obligation and was unwilling to leave his sons alone in their home not knowing if and when their maternal grandmother would arrive. Apparently in an attempt to overcome the jury's perception that Mr. Carlos was welcome in the former family home, the State offered the testimony of Ms. Gonzalez that she had changed the locks to the home and changed the keypad combination to the garage door. She said that the defendant did not have a key to the new locks and he did not have permission to enter the home unless he was invited in or asked to go in. Notably, however, there was no testimony that Mr. Carlos was not permitted inside the home during his visits with the children, or that he was otherwise excluded from the home. Ms. Gonzalez testimony simply established that as a non-resident of the home Mr. Carlos did not have a key. As a result, there was no basis from which the jury could justifiably conclude that Ms. Gonzalez would disapprove of Mr. Carlos entering the home to care for his children during

normal visitations if and when no other adult was present to supervise and care for them. In short, there was no testimony or evidence offered by the State to substantiate beyond a reasonable doubt that Ms. Gonzalez intended to exclude Mr. Carlos from her home even if that required him to abrogate his responsibilities as a father to her minor children. In conclusion, the State did not prove beyond a reasonable doubt that Mr. Carlos' entry was unlawful. If he entered with the intent to discipline and/or care for his children he did so under the flag of a parental obligation to care, supervise and/or discipline his children. The record clearly shows that the defendant knew his boys would be home alone and unsupervised when he dropped them off. Even admitting that the situation between he and Levi got out of hand outside prior to the defendant's entry into the home, the defendant still had an obligation to ensure his son's safety and welfare inside the home afterwards. This holds true even in the face of Levi's attempts to keep his father from entering, as a child's authority to exclude entry into his parent's home may yield to the parent's obligation to provide for his or her dependent children. Id. The State offered nothing to overcome the proposition that a father carrying out his parental duties to supervise minor children should be excluded from their home when they are home alone.

As a result of the above, the State did not disprove that the defendant enjoyed a license or privilege to enter his children's home when his children were known to the defendant to be home alone, unsupervised with their mother some hundreds of miles away on an overnight stay, and the maternal grandmother's location was unknown.

3. Second Degree Assault of a Child

A conviction for second degree assault of a child requires the State to prove beyond a reasonable doubt that a defendant who is eighteen years of age or older committed the crime of second degree assault against a child who is under the age of 13. RCW 9A.36.130. The jury was advised that a person commits the crime of second degree assault if the person intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or if they assault another by strangulation. RCW 9A.36.021(1)(a) and (g). The State offered a unanimity instruction and special verdict form, but the Court declined to give it. RP at 176, line 8, to RP at 177, line 9. Defense counsel did not adopt the State's unanimity instruction or offer one of his own, but he agreed that the State was obligated to argue that the jury must unanimously agree on one of the two alternative means of committing the crime of second degree assault of a child. RP at 177, lines 10-23. The Court rejected both party's arguments, indicating that a unanimity instruction and a special verdict form were

unnecessary because substantial evidence was existed to support both alternative means alleged. RP at 177, line 24, to RP at 179, line 23.

a. Substantial Bodily Harm

“Substantial bodily harm” means bodily injury that involves (1) a temporary but substantial disfigurement, or (2) which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or (3) which causes a fracture of any bodily part. RCW 9A.04.110(4)(b).

"Substantial," as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence. State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (Wash. 2011). To maintain a conviction for second degree assault under RCW 9A.36.021(1)(a), the degree of harm proved must be "considerable in amount, value, or worth." McKague, 172 Wn.2d at 806.

Mr. Carlos maintains that the State failed to prove beyond a reasonable doubt any of these three possibilities of substantial bodily harm. Specifically, Mr. Carlos contends:

- i. No testimony or evidence of any kind from the record support a finding that Levi suffered any substantial disfigurement

The only truly visible injuries suffered by Levi as described during the trial was bruising, lumps, and a few scrapes or cuts, including the cuts observed behind his ears. Supra. There was no testimony about other lingering visible injuries. While mere bruising has been found sufficient to maintain a conviction for second degree assault under this prong of the statute, the bruising in those cases was far more prominent in duration and appearance than what was described in this case. See State v. Hovig, 149 Wash.App. 1, 5, 13, 202 P.3d 318, review denied, 166 Wash.2d 1020, 217 P.3d 335 (2009) ("serious" "red and violet teeth-mark" bruising that lasted for 7 to 14 days constituted "substantial bodily injury"); see also State v. Ashcraft, 71 Wash.App. 444, 455, 859 P.2d 60 (1993) (bruises that resulted from being hit by a shoe were "temporary but substantial disfigurement"); see also State v. McKague, 172 Wn.2d at 806-807 (facial bruising and swelling lasting several days, and lacerations to victim's face, the back of his head, and his arm were severe enough to allow the jury to find substantial but temporary disfigurement).

There being no evidence of substantial disfigurement, Mr. Carlos' conviction cannot stand under this prong of the statute.

- ii. While Levi testified that the defendant put his hand on Levi's neck his testimony does not establish that this alleged act resulted in the

considerable loss or impairment of a bodily function or organ as required by the statute.

Levi testified that during the physical altercation with his father, while being held by his father against the wall of the garage he felt one or both of his father's hands on his neck. RP at 87, lines 3-6. When asked if it hurt he answered, "no". Id. at lines 11-12. He said that his breathing was "okay". Id. at lines 13-14. When asked by the prosecutor, "Were you able to breathe normally while his hand was on your neck?" Levi responded, "no." Id. lines 15-17. After being asked by the prosecutor how he was breathing after being thrown to the gravel, Levi responded, "[i]t was better than when I was standing." The prosecutor asked, "why is that?" Levi responded, "[b]ecause he didn't have his hands around my throat." RP at 89, lines 21-25. The State also offered testimony from Officer Ledboer about his observations of bruising observed on Levi's neck the following day.

The above facts are insufficient to prove beyond a reasonable doubt that Levi suffered substantial or considerable loss or impairment of a bodily function or organ. Nothing quantitative or usefully insightful was offered other than a comparison between his ability to breathe while standing versus lying on the gravel. He did not say that he was dizzy or that he otherwise could not breathe in sufficient air to maintain

consciousness. Nothing about his testimony on this point would justify a conclusion that his breathing was substantially affected.

iii. Levi did not suffer a fracture.

The record is clear from the testimony of the State's three witnesses that Levi did not suffer a fracture of a bodily part from this altercation with his father. As a result, this prong of the statute cannot support the jury's verdict.

b. Strangulation.

"Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe. Based on Levi's testimony set out above, the State failed to show that the defendant compressed Levi's neck. While Levi stated at one point in his testimony that the defendant's hands were around his throat, he also testified that he did not know if the defendant had one or two hands on his neck. He also said that his breathing at that point was "okay". Finally, he said that he felt no pain from this action. Supra. While Officer Ledeboer observed bruises on Levi's neck, he also observed bruising and/or cuts to Levi's ears – nothing in the record clarifies whether the bruising to Levi's neck could have resulted from the defendant grabbing and pulling Levi by

the ear. Supra. Thus, the State failed to establish beyond a reasonable doubt that the defendant strangled Levi.

c. Unanimity

Unanimity is an issue if this Court agrees that the evidence for either one of the two alternative means was insufficient to establish the commission of that means beyond a reasonable doubt. The Court refused the State's suggestion to provide the jury a special verdict form to express whether jurors unanimously believed that the defendant committed either one of the two alternative means. Therefore, it is impossible to know whether the jury found unanimously that the State proved either alternative means. Therefore, if the evidence is insufficient to support either alternative the defendant's conviction for Count 2 must be reversed and a new trial ordered.

C. INEFFECTIVENESS OF TRIAL COUNSEL

1. Standard of Review

The standard of review for claims of ineffective assistance of counsel is de novo. State v. Shaver, 116 Wn.App. 375, 382 65 P.2d 816 (1987). (Where the court reversed the defendant's conviction based on trial counsel's failure to object, to prejudicial evidence of a prior conviction, which could not be considered a tactical decision.), State v. Ermert, 94 Wn.2d 839 (1980), (where the court found failure to object to a

jury instruction on the grounds it incorrectly set out the elements of the offense charged to be ineffective assistance of counsel).

2. Trial counsel's performance amounted to ineffective assistance of counsel when his performance fell below an objective standard of reasonableness and that deficiency resulted in prejudice to Mr. Carlos.

Both the federal and Washington State Constitutions guarantee a defendant the right to effective assistance of counsel. U.S. Const. Amend VI; Wash. Const. art. I§ 22; Strickland v. Washington, 466 U.S. 668, 686 (1984). In Strickland, the U.S. Supreme Court held that just having "a person who happens to be a lawyer ... present at trial alongside the accused... is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 687. Counsel must participate and bring their knowledge and skill to bear on the process in such a way as to "render the trial a reliable adversarial testing process. Id. at 688, following Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

The defendant is entitled to raise the question of ineffective assistance of counsel at any point in the proceedings, and to have his conviction overturned if "counsel was so ineffective as to violate the defendant's right to a fair and impartial trial. State v. Ermert, 94 Wn.2d 839, 849 (1980). To determine whether a defendant was afforded

effective assistance of counsel the court must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Strickland, 466 U.S. at 690.

Washington State follows the U.S. Supreme Court’s test laid out in Strickland. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

This test has two prongs, first trial counsel’s performance must be determined to be deficient and second, this deficiency must be shown to have prejudiced the defendant. Strickland, 446 U.S. at 687. Both prongs must be met in order to succeed on a claim of ineffective assistance of counsel. State v. Brockob, 159 Wn.2d 311, 344-345, 150 P.3d 59 (2006).

The first prong of the test for ineffective assistance of counsel is satisfied if the defendant carries the burden of showing that trial counsel’s performance falls below an “objective standard of reasonableness.” State v. Ashue, 145 Wn.App. 492, 505 (2008), quoting Strickland, 466 U.S. at 687. Typically there will not be a finding that counsel’s actions fell below this standard when they can be characterized as a legitimate trial strategy or tactic. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, when the circumstances are egregious, and fall outside the wide range of professionally competent assistance then the first prong of the test will be satisfied. Strickland, 446 U.S. at 691.

Once a defendant has satisfied the first inquiry of deficient performance the defendant must pass the second prong of the test for ineffective assistance of counsel by showing that he was prejudiced by the deficiency. Id. at 687. This means that the defendant must show that his counsel's performance was so inadequate that there is "a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Ermert, 94 Wn.2d 839 (1980).

Mr. Carlos' trial counsel was ineffective for, (a) Failing to give an opening statement at the beginning of trial and at the close of the State's case; (b) Failing to object to objectionable and prejudicial evidence; (c) Failing to recognize and develop viable defenses; and (d) Failing to present and argue the basis for an exceptional and mitigated sentence at the defendant's sentencing hearing.

3. Failure to Make an Opening Statement

A defense counsel's decision to waive an opening statement does not constitute deficient performance under the Strickland test. In re Personal Restraint Petition of Davis, 152 Wn.2d 647, 715 (Wash. 2004). Trial counsel has the option of making an opening statement, reserving it until the conclusion of the State's case, or waiving it altogether. Competent counsel may waive an opening statement as a strategic trial tactic. Id. However, counsel's decision to waive an opening statement

might be deficient where it was not a tactical decision and where it prejudiced the defendant's defense. Id.

Here, defense counsel waived his opening at the outset of trial, but reserved the right to open at the end of the State's case. Without explanation, counsel then made no attempt to utilize the right to open after the State rested. Obvious tactical reasons can be imagined for waiving an opening statement at the beginning of trial. Perhaps the most obvious reason is that counsel may not be sure what the testimony may be from one or more of the State's witnesses. Perhaps counsel believed that anticipated testimony on an important issue might come before the jury in several different and competing ways. Perhaps he or she was uncertain about how the jury might perceive a key witness. In each of those circumstances it might benefit the defendant for counsel to know what the witness said, or to have seen how the witness came across to the jury before making his opening statement. The justification, however, for waiving both at the outset of trial and at the close of the State's case becomes less convincing unless a specific tactical reason can be identified.

Mr. Carlos maintains that no tactical reason exists in the record justifying his counsel's decision to forego making any opening statement in this case. He maintains that counsel's overall performance was obviously deficient in light of the possible defenses that could have been

raised, but were not. In this light, counsel offers the failure to open as one of several factors that reveal the overall deficiencies of his trial counsel's performance.

4. Failure to Object to Objectionable and Prejudicial Testimony.

Levi testified that after telling his father "fuck you, dad", he got out of his father's truck and began to walk to the front door of his house. RP at 81, line 7-8. He said at that time he heard a car door open and close. Id. at line 12-13. The prosecutor asked him, "Did you do anything in response to hearing that?" Levi responded, "I turned around and I kind of – I braced for something, because I knew something was going to happen." Id. at line 16-18. Defense counsel did not object or move to strike the statement. The statement was clearly speculative, as it suggested to the jury that Levi knew his father would assault him. As such, it was also a highly prejudicial statement as it inferred some sort of past bad conduct by the defendant directed toward his son.

A trial court properly excludes evidence that is "remote, vague, speculative, or argumentative ..." State v. Kilgore, 107 Wn.App. 160, 185, 26 P.3d 308 (2001) (quoting State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)), aff'd on other grounds, 147 Wn.2d 288, 53 P.3d 974 (2002). See also Mee Hui Kim, 134 Wn.App. at 42; State v. Donahue, 105

Wn.App. 67, 79, 18 P.3d 608 (2001). Additionally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b). Finally, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

Counsel's decisions regarding whether and when to object "fall firmly within the category of strategic or tactical decisions." *State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007). The failure to object constitutes counsel's incompetence justifying reversal only in egregious circumstances on testimony central to the State's case. *Johnston*, 143 Wn.App. at 19.

Here, the statement was clearly objectionable as it suggested speculative knowledge by Levi that his father was about to commit an assault. In that light it was highly prejudicial because it also suggested that the defendant had assaulted his son in the past. Given that the defendant was on trial for assaulting his son this statement was clearly central to the State's case. There is no possible tactical reason justifying counsel's failure to object to this statement – the objection clearly would have and should have been sustained with instruction by the court to the jury to disregard the statement. Additionally, the suggestion that prior bad

acts had occurred violated a pretrial motion to exclude prior or other bad acts of the defendant. CP at 48; RP at 22, lines 5-16. Counsel's failure to object fell below a reasonable standard of competence.

During Officer Ledeboer's testimony the prosecutor asked him what time he left from interviewing Mr. Carlos at the Moses Lake Police Department to return to Ms. Gonzalez' residence to interview her and Levi. Officer Ledeboer responded non-responsively by saying, "I had to take him (Mr. Carlos) to jail and then I went back." RP at 142, lines 20-25. The fact that Officer Ledeboer took Mr. Carlos to jail was completely irrelevant to the issues at hand and highly prejudicial. Defense counsel did not object and did not move to strike the statement. The fact that Mr. Carlos was arrested and booked into jail suggested to the jury Officer Ledeboer's opinion of the defendant's guilt. Such a suggestion was specifically excluded by the court pursuant to agreement of the parties. CP 48; RP at 26, lines 12-14.

For the reasons set out above, counsel's failure to object to both of these statements was ineffective and requires reversal and a new trial.

5. Failure to recognize and develop viable defenses.

As mentioned at the outset, this was a short and relatively simple case. Viewing the evidence in the light most favorable to the State, the following is a fair summary of what occurred on November 20, 2014 (as

set out supra): The defendant and Debra Gonzalez were divorced. They were operating under a parenting plan that set out a visitation schedule for Mr. Carlos. The parties were following the parenting plan with virtually no reported problems as of the date of November 20. November 20 was Mr. Carlos' normally scheduled mid-week visitation date. Mr. Carlos took his boys out for pizza that night. He expected an adult to be at the house and ready to take care of his sons when dropped them off. He learned during the car ride from the pizza restaurant to the house that no one was present to watch the boys. Ms. Gonzalez was out of town, and for that reason she was not available to take the boys. Mr. Carlos and Ms. Gonzalez had a heated exchange via telephone during the ride, with each exchanging vulgarities which were overheard by both boys due to the fact that Mr. Carlos had his telephone on speaker. The tone of the phone call between Mr. Carlos and Ms. Gonzalez upset Levi. When Mr. Carlos and the boys arrived home Levi did not want his father to stay with them. On the other hand, Mr. Carlos did not want to leave his boys unsupervised in the house. The argument between Mr. Carlos and Ms. Gonzalez spilled over to create an argument between Mr. Carlos and Levi. Mr. Carlos lashed out at Levi, telling him to, "get the fuck out of the truck". Levi replied, "fuck you, dad."

The statement by Levi to his father was clearly disrespectful. It merited some discipline even despite the defendant's poor behavior. Mr. Carlos got out of the truck to discipline his son. He admitted during his interview with Officer Ledebouer that he went too far in his attempt to discipline Levi. Exhibit 12. Still, the fact that he may have gone too far in his attempt to discipline Levi may have subjected him to a possible assault charge, but it did not abrogate his responsibility to ensure the safety and welfare of his minor children. After the physical altercation between the defendant and Levi the boys entered the home where they were unsupervised. The boys' maternal grandmother had still not arrived. The defendant left in his truck, but quickly realized that he needed to return to the home where his minor sons were home alone.

Defense counsel should have argued that Mr. Carlos had a privilege to enter the home to care for his minor children, particularly under circumstances where he knew they were alone and under the trauma of an unfortunate family crisis. Counsel should have offered an instruction advising the jury that a parent has an obligation to care for his or her minor children and that such obligation can give rise to a license or privilege to enter the residence of his minor children, even over the child's

objection.² Moreover, in light of Ms. Gonzalez testimony that she had changed the locks and the combination to the garage keypad, counsel should have cross examined her about the fact that Mr. Carlos had been welcomed in the house after their the divorce was final. In particular, she should have been asked about whether she had invited him to spend the night in the home with the boys when she had previously been out of town and he was watching the boys at her request. Exhibit 12. Counsel also should have offered an instruction consistent with RCW 9A.52.090(3) to advise the jury that it is a defense to an allegation of unlawful entry that:

“[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.”

This would have supported the argument that counsel should have made that Mr. Carlos had a reasonable belief that Ms. Gonzalez would have licensed him to enter and remain in the home that night to care for the boys and to deal with the crisis that had unfolded.

Counsel should have also offered the instruction on the defense of child discipline. Inexplicably, when the Court and the prosecutor brought up the use of the instruction, counsel mentioned that he believed it to be inapplicable and argued against it. RP at 182, line 12, to RP at 184, line 4. While the Court gave the instruction over defense counsel’s objection, the

² The law on these issues is set out above.

fact that he argued against it is indicative of his flawed thinking of this case throughout the trial. In his audiotaped statement to Officer Ledebor Mr. Carlos himself says that he was attempting to discipline his son. Exhibit 12. Even if he went too far in his actions, a desire to discipline reveals a different *mens_rea* than intent to commit an assault. Indeed, Mr. Carlos told Officer Ledebor that the head butt was accidental. Id. He also denied knowledge of having touched Levi's neck with his hands – but he certainly did not deny the better part of the unfortunate physical altercation. Id. Thus, counsel should have argued that the defendant intended to discipline his son, but the accidental head butt exacerbated an already worsening and volatile conflict between father and son resulting in a scuffle that was unintended. The record shows that counsel did not have the above arguments in mind during the entirety of the trial, including his closing argument. If counsel had this defense in mind from the outset, this theory would have helped to guide his cross-examination of witnesses and resulted in an effective closing argument. Unfortunately for Mr. Carlos, his jury never heard these arguments. Even if they were able to consider these arguments on their own they did not have the jury instructions available to them to legally support what it meant to Mr. Carlos. As a result, defense counsel's failure to reasonably recognize and formulate a

viable defense detrimentally prejudiced the defendant's ability to be fairly heard at trial.

6. Failure to present and argue the basis for an exceptional and mitigated sentence below the standard range at the defendant's sentencing hearing

Finally, even if the above described theory had failed, it would have supported a request for significant mitigation by the court at the time of sentencing. Counsel should have argued that the failed defense of child discipline and accident reference the assault conviction, and the claim that he believed that he had a license and/or privilege to enter the home based on his obligation to provide for his dependent children in reference to the burglary conviction, nevertheless – as a failed defense – justified an exceptional sentence below his standard range at the time of sentencing. State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). This is a man and father who had no significant prior record. CP 63. He and his ex-wife were apparently successfully co-parenting their two minor sons up until the night of November 20, 2013. He was working and helping to support his sons. Still, counsel made no attempt to argue for an exceptional and mitigated sentence. Instead, he recommended imposition of a sentence at the low end of the standard range – 46 months.

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V. CONCLUSION

For the reasons stated, the defendant respectfully requests that this Court REVERSE and VACATE his conviction for first degree burglary as charged in Count I, and for second degree assault of a child as charged in Count 2 of the second Amended Information; furthermore, the defendant requests that this Court REMAND this matter to the Superior Court for a new trial, or in the alternative for resentencing.

Respectfully submitted this 12th day of November, 2014.

A handwritten signature in black ink, appearing to read 'C. Bugbee', written over a horizontal line.

Chris A. Bugbee
Attorney for Appellant
WSBA # 25166