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NO. 56318-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW R. RUTH,

Appellant.

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

THE HONORABLE DAVID F. HULBERT, JUDGE

- Statement of Additional Grounds -

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

MATTHEW R. RUTH # 879492, C-128
MONROE CORRECTION COMPLEX
P.O. BOX 777
MONROE, WA 98272-0777

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A. ASSIGNMENT OF ERRORS

1. The prosecutor violated appellant's constitutional rights when he entered into evidence extrinsic prejudicial evidence of a medical record involving Renee Woerner.

2. Counsel violated appellant's constitutional rights when he failed to object to prejudicial propensity evidence.

3. Counsel violated appellant's constitutional rights when he failed to request the lesser-included offense jury instruction of second-degree assault.

3a. Counsel violated appellant's constitutional rights when he failed to object to a photograph of a blanket containing alleged blood and a photograph of an alleged bullet hole; neither of which were accurate representations of what they depicted.

4. The trial court violated appellant's constitutional rights when it imposed an enhanced sentence which was based upon no same criminal conduct, and firearm enhancements which violated the sentence by Initiative 159.

4a. The trial court exceeded the sentencing guidelines when it imposed community placement that exceeded the guidelines sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecutor violated the trial court's order in limine and allowed highly prejudicial evidence to go back before the jury during their deliberations. This evidence consisted of a Health District Report which was a medical evaluation report disguised as an innocuous document which did contain information that Ms. Woerner had been assaulted and required

medical treatment as the result of an altercation with the appellant.

2. Counsel had failed to object during the trial proceedings to the prosecution's inferring that he had attempted to murder both the State's witnesses by making them 'disappear'. This information was entered through a jailhouse informant who appellant's attorney had tried to investigate but the witness refused.

3. Appellant received ineffective assistance of counsel when counsel failed to request a lesser-included jury instruction of second-degree assault after hearing all the trial testimony which supported the existence of second-degree assault and not first-degree assault.

3a. Appellant received ineffective assistance of counsel when counsel failed to object to the introduction of both misleading and highly prejudicial evidence of a photograph of a blanket which the prosecution maintained had blood on it, yet was not collected by the State and sent to the crime lab for analysis. And, a photograph of a hole that the prosecution maintained was a bullet hole that was lodged in appellant's headboard of his bed when, in reality, the hole was in the wall right above an electrical socket.

4. The trial court violated appellant's constitutional rights when it imposed enhancements exceeding the statutory maximum for the same criminal conduct which the jury did not find and should have under Blakely; and appellant received two sentencing enhancements for firearms which exceeded the statutory maximum and again violated Blakely and Initiative

159; and, finally, the trial court also imposed community placement at the expiration of appellant's sentence which again exceeds the statutory maximum and again violates the Blakely doctrine.

B. STATEMENT OF THE CASE

(Appellant adopts counsel's statement of the case as set forth in his brief)

C. ARGUMENT

GROUND-I

THE STATE COMMITTED PROSECUTORIAL MIS-CONDUCT WHEN IT DELIBERATELY VIOLATED THE TRIAL COURT'S ORDER IN LIMINE TO PROHIBIT THE INTRODUCTION OF PROHIBITED EVIDENCE WHICH SUBSTANTIALLY PREJUDICED THE APPELLANT IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

Appellant's defense counsel moved to prohibit the introduction of prejudicial extrinsic evidence concerning any testimony pertaining to the alleged uncharged assaults on witness Renee M. Woerner. Counsel's motion was granted prohibiting any references to said materials. See VRP 5-6.

The prosecution then violated the court's order on December 8th, 2004, when it admitted the Medical Reports of State Listed Witness, Renee Woerner, to be included as an exhibit allowing it to go before the jury during their deliberations. Counsel later objected to the introduction of this material and other related exhibits and was ignored by the court. VRP 81-83.

This information was deliberately mis-identified by the prosecution as a Health District Report, inferring that it did not contain prejudicial facts of alleged violent conduct

undertaken by appellant towards State-listed witness Renee Woerner. It was numbered as State's Listed Exhibit #46 on the exhibit list. What this document really contained was domestic violence assault information involving the defendant and Ms. Woerner, who was his girlfriend at the time. It contained information stating that there was a laceration on the back of her head and contusions covering her body that were allegedly caused when she was pushed down by the appellant one week before the shooting took place.

Defense counsel moved to specifically prohibit the introduction of this information, telling the court during the Motion in Limine hearing that:

"Mr. Stephans: There is also information in the discovery provided alleging that Mr. Ruth committed one or more -- I think two or more -- assaults against one of the State's witnesses, Renee Woerner. She is the one person who was present for this incident who was not a shooter or a shootee. Was not shot, did not participate in the shooting. She was Mr. Ruth's girlfriend at the time. These would basically be uncharged criminal matters of prior bad acts shown only for purposes of character. And obviously, would object to any testimony or evidence about these alleged domestic violence assaults.

"The Court: All right.

"Mr. Adcock: That's fine."

Appellant submits that this information was highly prejudicial and that the prosecutor should have not been allowed to back-handedly submit it before the jury. This is even more important in this case because the jury came back with several questions during their deliberations that showed they believe the defendant's version of the facts, when they requested the

the following information from the court: (1) Transcripts of the interview with Renee M. Woerner dated December 10 and 11, 2003; (2) Transcripts of interviews with Jeremy Custer dated November 24, 2003; (3) Transcripts of the interview with Drew Eden dated November 10, 2003. The request to review these documents clearly show that the jury was concerned about the truth of tghе contents of the misclassified 'Health District Report'.

"Mr. Adcock: What other items of evidence that are important to this case did you collect at the scene? You mentioned the bandana and the shell casings.

"Yes. We also collected the driver's license and the health certificate in the name of Renee Woerner.

"The Clerk: State's Exhibit 46 marked for identification.

"(By Mr. Adcock) Show you what's been marked State's Exhibit No. 46 and ask you to open that container and see if you can identify the contents.

"Driver's license we collected from the drawer. This is the Snohomish Health District Report with Renee Woerner's name on it.

"Thank you.

...

"Plaintiff's exhibit No. 46 Identified

"Mr. Stephens: I'm actually going to object as to relevance at this point. We have the photo of the ID and the other items that put it in context. I don't see the relevance of that testimony."

Counsel was overruled, and the evidence entered and thereafter, allowed to go before the jury prejudicing the appellant's chances at acquittal.

In State v. Sullivan, 69 Wn.App. 167, 847 P.2d 953 (1993), the court held the following in ruling on the violation of

a court's order In Limine:

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his representation. Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection."

The issue then turns on what the proper remedy is after a violation has occurred. Counsel must again object before the court again proceeds with the introduction of the evidence. Id. at 171. Counsel did so and was ignored by the court. VRP 82. In another case almost identical to Mr. Ruth's, the court in United States v. Martin, 960 F.2d 59, 62-63 (8th Cir. 1992), held the following:

"We must reverse a conviction unless we can conclude beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict; in other words, the error must be clearly harmless. (citation omitted). Where other evidence was not overwhelming, **and unadmitted exhibit that was sole evidence relating to a material issue was inadvertently given to the jury conviction necessarily reversed.**"

The court went on to hold that they only reverse a conviction if the appellant can show that the purported error undermined the fundamental fairness of the trial proceedings and resulted in a miscarriage of justice, citing United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1039, 1047, 84 L.Ed.2d 1 (1989).

This case presents a comparison to the above situation. Illustratively, the Martin court made the following further distinctions which **do** compare to the appellant's factual situation:

"In the present case Waughn made a general motion in limine, but made no contemporaneous objections to the specific exhibit. (**Appellant did**). Defense counsel did not ask to review the exhibit at trial when it was offered for admission. (**Appellant did and objected**). The exhibit clearly had some effect on deliberations as evidenced by the jury's questions about the white substance. (**Appellant's jury as well asked questions about this evidence**).

Further, the 'wrong' exhibit was introduced at trial, as was done in Mr. Ruth's case. And the appellant has made the argument that prosecutorial misconduct has occurred, which allowed the admission of the 'wrong' exhibit. The prosecutor was present in court when counsel made the initial motion to exclude any references to the mis-named "Health District Record", still he ignored the court's ruling to not allow the introduction of this information. This constitutes misconduct by the prosecutor as well as requiring a reversal of the conviction. See, Phillips v. Woodford, 267 F.3d 966, 984 (9th Cir. 2001) (introduction of false evidence violates due process).

In short, the jury should not have been allowed to learn of facts highly prejudicial to the appellant; the facts that Ms. Woerner had been assaulted by Mr. Ruth requiring a trip to the hospital showed prior bad acts allegedly committed by him, and went along with the State's theory of prosecution that he was an aggressive and violent person and capable of shooting unprovoked both the State's victims.

Accordingly, this conviction should be reversed due to the prejudicial nature of this information, which the prosecution clearly knew should not have been allowed to be viewed by the jury: evidence of a non-testifying witness who was not

allowed to explain the circumstances contained in the "Health District Report".

GROUND-II

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN DEFENSE COUNSEL ALLOWED THE STATE TO INTRODUCE PROPENSITY EVIDENCE WITHOUT OBJECTION WHICH RESULTED IN APPELLANT BEING CONVICTED WHEN THE JURY LEARNED THAT HE HAD ALLEGEDLY SOLICITED A JAILHOUSE SNITCH TO KILL BOTH THE PROSECUTION LEAD WITNESSES

To demonstrate ineffective assistance of counsel, the defendant must show two things: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

Where, as here, the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, State v. Mcfarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. Id., State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998).

In the instant case, counsel failed to object to damaging

and highly prejudicial propensity evidence of alleged collateral uncharged crimes. There was absolutely no reason whatsoever for this error. Nor can it be claimed it was some sort of a 'strategic' decision for the jury to learn that Mr. Ruth had allegedly tried to have both the prosecution's lead witnesses 'disappear', through the use of another party. This, in turn, allowed the prosecutor to argue that initially he had tried to murder both of them, and when that failed, he again tried to do so through the use of a third party jailhouse informant. The following exchange shows the inherent prejudice that took place. During trial defense counsel failed to object to propensity evidence. Therefore, the prosecutor got the following testimony in: (jury trial, page 185)

"Q - I believe that you told me in the conversation I had with you before court that you are a dooper and a thief?

"A - Yes, sir.

"Q - You drew the line here?

"A - Pardon me?

"Q - You drew the line here?

"A - Yes, sir.

"Q - Why is that?

"A - Because I don't kill people, sir.

"Q - That's what the defendant wanted you to do?

"A - Yes, sir.

"Q - How did he express that to you?

"A - Well, didn't exactly say the word 'kill'. He said 'disappear'.

"Q - When he said 'disappear,' who was he referring to?

"A - The witnesses.

"Q - That would be....

"A - Jeremy and Drew.

"Q - Okay. How many conversations did you have with the defendant about this?

"A - Over a period of a couple months, numerous.

"Q - Was the tenor of the conversation always the same?

"A - Yes."

A timely objection to this information would have "likely been sustained", since it was highly prejudicial untried collateral crimes evidence, propensity evidence, that is disallowed under the United State's Constitution's Sixth Amendment and the Due Process Clause of the Fifth Amendment.

It has long been held that there is no question that 'propensity evidence' would be an 'improper basis' to use for obtaining a criminal conviction. See, Old Chief v. United States, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Michelson v. United States, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

The above mandates were violated when the prosecution deliberately solicited collateral crimes evidence/propensity evidence from jailhouse snitch Jerimiah Sheridan, that appellant had allegedly requested that he makes both lead prosecution witnesses 'disappear'. He then went on to argue during closing

argument, and misstating the record at times, that appellant was guilty for the commission of the charged offenses by his solicitation of Jerimiah Sheridan to rid the trial of both Jeremy Custer and Drew Eden trial testimony, by insinuations that they be murdered: when that was never any part of the initial charges or evidence against the appellant. See, p. 313 vis-a-vis pp. 305-306 defense counsel's closing arguments.

In light of the above the third prong is established, that the result of the trial would have been different with the omission of this highly prejudicial uncharged crime evidence. And, accordingly, appellant requests the reversal of his conviction.

GROUND-III

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL IN VIOLATION OF THE SIXTH
AMENDMENT OF THE UNITED STATE CONSTITU-
TION WHEN COUNSEL FAILED TO REQUEST A
LESSER-INCLUDED JURY INSTRUCTION OF
ASSAULT IN THE SECOND DEGREE AFTER HEARING
ALL TRIAL TESTIMONY WHICH WOULD HAVE SUP-
PORTED SUCH A CHARGE

In Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), the court set forth a two-part test for determining if an appellant had received ineffective assistance of counsel. First, a defendant has to show that his counsel's performance was deficient and fell below an objective standard of reasonableness. Second, that his counsel's deficient performance prejudiced the defendant. This means that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

These two prongs are satisfied in the instant case by the following facts: Had counsel investigated the law of the case, he would have discovered that the circumstances in this case clearly fit the criteria of second degree assault, and not first degree assault. This difference means that the appellant received a twenty-two-year sentence enhancement by way of improper representation for counsel's failure to request the lesser-included-offense instruction: a difference of twenty-two years can hardly be characterized as being above the standard set forth in Strickland.

Several reasons lead to the conclusion of insufficient evidence to support a legitimate conviction of first-degree assault. First, no medical reports attesting to the severity of actual damage to the victims was introduced. No physicians testified that the victim's wounds constituted the requisite degree of damage to support such a conviction. Counsel should have compelled the hospital reports concerning the actual damage done and supporting medical testimony. Especially, as here, where the only evidence adduced to support the degree of injuries to the victim was given by the victims themselves and police reports which all attested that their wounds were non-life-threatening. The only other 'medical' testimony on this subject came from the prosecutor when he testified that:

"And you will see the medical records also. It's true the kinds of wounds they had are not the kind of wounds that say an injury to an artery or a major vein, he is not going to spurt."

VRP 312-313. The only problem with this is that there were no medical reports entered into evidence that the jury would

be able to see, except for a 'diagram' showing where the bullets went into the victims. Appellant submits that this information does not constitute sufficient evidence to allow a conviction for first-degree assault, and that counsel should have attempted to argue before the court for the use of the lesser-included second-degree assault.

In order to be convicted of first-degree assault, a person must be found to have committed the following acts:

9A.36.011(1)(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

9A.36.011(1)(c) Assaults another and inflicts great bodily harm.

This threshold was not met in the instant case. More accurately, the evidence presented during trial is defined by assault in the second degree:

9A.36.021(1)(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

9A.36.021(1)(c) Assaults another with a deadly weapon.

A review of the relevant case law on this subject discloses what constitutes a second-degree assault when determining the proper application of the 'factual test' to be applied. Starting with State v. Callahan, 87 Wn.App. 925, 943 P.2d 676 (1997), where Mr. Callahan shot Ben Manning in the hand, which is a place more probable of satisfying the "great bodily harm" requirement than in the instant case. Mr. Callahan fled the scene and was later captured and only charged with second-degree assault. In State v. Kidd, 57 Wn.App. 95, 786 P.2d 847 (1990), Mr. Kidd was initially charged with first-degree assault for

shooting two passengers on a bus in the chest and additionally shooting at the police when they arrived and tried to stop him. At jury trial, he was only found guilty of second-degree assault after counsel requested the lesser-included offense jury instruction. Finally, in State v. Rai, 97 Wn.App. 307, 983 P.2d 712 (1999), Sadhu Rai fired five shotgun shells at two people and shot a SWAT Team officer twice with a shot gun in the chest and the elbow. He was charged with first-degree assaults and found guilty of second-degree assaults as his conduct only constituted second-degree assault despite his shooting an individual in the chest.

Application of the factual test is reasonably straightforward. Had counsel requested the lesser-included offense instruction, the appellate court could then view the evidence in the light most favorable to the defendant. State v. Cole, 74 Wn.App. 571, 579, 874 P.2d 878, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994). More specifically, a requested jury instruction on a lesser-included offense or inferior degree offense should be administered "[I]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Fernandez-Medina, 141 Wn.2d at page 455-56.

The evidence in the appellant's case supports the lesser-included offense of second-degree assault.

"In Washington State, a defendant is entitled to an instruction on a lesser included offense if two conditions are satisfied: (1) each of the elements of the lesser offense must be a necessary element of the charged offense, and (2) the evidence in the case must support an inference that

the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)" State v. McJimpson, 79 Wn.App. 164, 173, 901 P.2d 354.

It is not enough that the jury might disbelieve the State's case, there must be evidence supporting the lesser-included offense to convict. There are numerous reasons in the evidence of the instant case to support the lesser-included offense, but not the finding of the jury. The first prong of the McJimpson decision is satisfied as the charge of first-degree assault necessarily includes the elements of second-degree assault. (The legal prong is satisfied); petition for review at 6 ("Every degree of assault is a lesser included offense of all higher degrees of assault")(citing State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)" State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (August 2000).

In the above case, the State charged the defendant with two counts of attempted murder. He was found guilty of the lesser-included offense of assault in the first degree although he severed a person's spine and almost killed two others. The Supreme Court later reversed his conviction on the grounds that he was entitled to a lesser-included offense instruction of second-degree assault. This substantiates even further that trial counsel in this case had a duty to investigate the law and request an instruction for the lesser-included offense. Appellant proposes that the nature of the evidence combined with such an instruction would have resulted in a very different verdict.

The incident happened in the appellant's home while his fiance was asleep in bed. The appellant shot the two invaders

who had accused him of stealing a large amount of drugs from them and his fiance of informing to the police about their activities. The invaders then forced their way into the appellee's home while armed and the appellant shot them in non-lethal areas of their bodies.

One attacker was shot in the lower back/buttocks area when he was moving toward Renee Woerner after saying he was going to rape her. The invaders' stories, police records, and trial testimony gave the jury more than enough reason to believe the appellant was not guilty of felonious behavior or, at worst, was guilty of the lesser-included offense of second-degree assault.

Jeremy Custer, for example, told everyone present after the shooting that he wanted "no cops, no cops". VRP 137 This is shown from police reports and testimony of State's witnesses including Jeremy Custer himself and shows a reason to suppress the true facts of the incident.

State witness Dru Eden stopped Sarah Bryant on her way home from work and who then made the excited utterance that: "I just got shot over dope, I am going to kill him". VRP 114-117; 167-168. And made almost identical statements to the investigator. VRP 171-175.

Finally, petitioner submits that the requisit element of "great bodily harm" to constitute first-degree assault was not proved at trial by the required evidence, which only showed that there was "substantial bodily harm".

The State maintained that because there were four shots

being fired, that that constituted the necessary element of "great bodily harm". This is incorrect as a matter of law, since there is no case law to support this proposition. This finding must be supported by competent medical evidence, doctor's reports, and testimony concerning the actual damage done. In fact, this is why the prosecution did not introduce any such evidence, since they knew that no medical evidence existed that would prove a first-degree assault had occurred.

That this case was only a second-degree assault is further supported by State v. Pierre, 108 Wn.App. 378, 386, 31 P.3d 1207 (2001), where the victim suffered "repeated kicks to the head that resulted in serious brain damage". This was sufficient for the jury to find specific intent to inflict "great bodily harm", because the injuries **were permanent**, and allowed a finding to be made from the results of the wounds. None of the victims in Mr. Ruth's case suffered any permanent injuries, and they attested that they only received non-life threatening superficial wounds. VRP 92-93; 136-139. This was especially important when case law states that:

The casual relationship of an accident or injury to the resulting physical condition must be established by **medical testimony beyond speculation and conjecture.**

See, Carlos v. Cain, 4 Wn.App. 475, 481 P.2d 945 (1971).

Simply, these facts were not established during trial.

Counsel should have endeavored after hearing all the evidence to introduce the lesser second-degree assault instruction like in State v. Walther, 114 Wn.App. 189, 192-93, 56 P.3d 1001 (2002), where it was held that even though Mr. Walther had fired

many shots at the victim, this did not constitute in and by itself a first-degree assault. Id. Nor should the prosecutor have been allowed to attest that Mr. Ruth's conduct amounted to a first-degree assault, by his "testifying as a medical expert" State v. McPherson, 111 Wn.2d 747, 761, 46 P.3d 284 (2002). In conclusion, these charges must be reduced to second degree assault, and appellant resentenced with his guideline score of 6 to 9 months, and firearm enhancements of thirty-six months.

SUB GROUND-IIIA

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO THE INTRODUCTION OF FALSE EVIDENCE WHICH CONSISTED OF TWO PHOTOGRAPHS OF THE CRIME SCENE, A BLANKET WITH A RED STAIN ON IT AND A HOLE IN THE WALL WHICH WERE NOT WHAT THEY WERE DEPICTED TO BE BY THE PROSECUTION

The Strickland test has been defined above, petitioner must meet both prongs to obtain relief. Petitioner alleges that counsel's deficient conduct was due to his failure to object to the introduction of highly prejudicial photographs that did not depict what he represented that they did to the jury. And, second, that these photographs were highly prejudicial and inflamed the passions and prejudices of the jury, and mislead them into a finding of guilt.

The first photograph was allegedly taken of a blanket that the State at trial maintained had blood covering it. The blanket was never introduced into evidence, nor were any blood samples taken and it sent to the lab for analysis. Yet the prosecu-

tion was allowed to argue the authenticity of this evidence before the jury without defense counsel's objection.

The second piece of uncollaborated evidence used to convict appellant was a "bullet hole" that was alleged to be the fourth shot fired by him at victim Jeremy Custer, and which had lodged into a headboard of the appellant's bed. The prosecution argued this before the jury without defense counsel's objection. However, the "bullet hole" was not a bullet hole, and was not a hole in the headboard. It was a close-up photograph of a hole in the wall by an electrical socket, three inches up from the ground; and where no bullet was retrieved and no exit mark existed.

These facts were a mischaracterization of the evidence by the prosecution, who knew that it was false, and that it would lead the jury to believe that the appellant had shot at the victim's head to negate the belief that there was no reasonable grounds for appellant to assert a self-defense claim. And, further, would support a finding that he had intent to cause great bodily harm, and to support a finding that appellant had committed a first-degree assault. These erroneous facts also impinged upon the appellant's credibility before the eyes of the jury.

Whenever a criminal defendant claims ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, the defendant must show two things. First, that there was an absence of legitimate strategic or tactical reasons supporting the challenged conduct, State v. McFarland,

127 Wn.2d 322, 336, 899 P.2d 1251 (1995). And second, that an objection to the evidence would likely have been sustained. Id. at 337 n. 4. then a defendant must show that the result of the trial would have been different had the evidence not been admitted. See, State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

In light of the following, there is no legitimate or strategic reasons whatsoever that would allow counsel not to object to the use of this erroneous false evidence that led to his conviction.

THE BLANKET WAS NOT COLLECTED OR PROCESSED

During trial, the detective admitted that she had failed to collect and process the blanket into evidence. Nor was it collected and sent to the crime lab for forensic blood testing. VRP 94. Yet the prosecutor spoke to the jury as if it had been sent and processed correctly and had come back positive for blood evidence. VRP 312-313. She further told the jury that "Exhibits 23, 25, 26, 27, and 28 show the appearance of a blood stain on the comforter". VRP 71-72, 74, 75. Later, in closing, the prosecutor said that "it doesn't matter whether or not the comforter was sent to the lab for analysis because everybody knows he shot these two men. He said so himself, there is no need to prove its anybody's blood." VRP 312-313.

The Due Process Clause guarantees the preservation of material evidence. State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987), not the assumption that the evidence once existed or exists. In dealing with similar issues, the court of appeals has held

that before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. See, State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002); United States v. Dickerson, 873 F.2d 1181 (9th Cir. 1988).

Moreover, it is well settled that the presentation of false and misleading evidence violates the Due Process Clause and may require the reversal of the conviction. Phillips v. Woolford, 267 F.3d 966, 984 (9th Cir. 2001). Under the above citations, it's easily apparent that had a timely objection to the evidence been entered by counsel, that the jury would not have been allowed to receive this false and misleading evidence, the introduction of which led the jury into a finding of guilt since they were under the false assumption that there was real blood on the uncollected and unprocessed blanket. Thus, the outcome of the trial would have been different had counsel properly represented appellant.

THE BULLET HOLE NOT IN THE PROPER LOCATION

During the trial, the lead detective attested to the following concerning the bullet hole:

"Q - Showing you State's exhibit No. 29, what is that?

"A - No. 29 is a hole that is in the wall just above the headboard of the bed towards the left side. It's a hole that we believe is a possible gunshot hole. This was taken after the actual--that date; when I went back to do some additional follow-up photos of it."

The above exchange conclusively shows that a photograph of this "hole" was not obtained contemporaneously with the initial

crime scene investigation. Further, it shows that no forensic investigation was conducted on it. Including one by the ballistics expert. Further, the crime scene had been contaminated by the victim after the shooting had occurred, and before the detective had returned and took the photograph of the bullet hole:

"Q - You remember telling detective Willoth that you believe you saw the bandana a few days after the shooting?

"A - Yeah.

"Q - So you actually went back into the trailer after the shooting?

"A - Um-hum.

"Q - That's yes?

"A - Yes, yes.

Further, this misleading evidence allowed the prosecutor to argue to the jury during closing argument that:

"He took a fourth shot at him, only three hit him. VRP 290. Shot at them four times in total, and claimed that is self-defense. that is not the law of this state, nor should it be. You can't allow people to shoot people, just because, and then just say, hey, it was self defense. And that's what we have. VRP 293.

Appellant submits that there is no legitimate or strategic or tactical reasons that would justify defense counsel's failure to timely enter objections to this erroneous evidence. Based on Stannard, Roche, and Phillips, supra, this information would have been prohibited had only counsel entered a timely objection.

Had the above evidence not been admitted against the appellant, the prosecution could not have argued the erroneous facts before the jury like appellant had "shot Jeremy Custer when he was sitting down", VRP 276, 292-293. Nor could it have

argued that appellant had attempted to murder them, and "by firing four shots" VRP 293 to negate his self defense claim. These facts satisfy the third requirement that the results of the proceedings would have been different had counsel only objected.

In light of the foregoing, appellant respectfully requests that this Honorable Court reverse his conviction or remand for an evidentiary hearing on ineffective assistance of counsel.

GROUND-IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN AT SENTENCING IT IMPOSED 'NO SAME CRIMINAL CONDUCT' HAD OCCURRED WHICH THE JURY SHOULD HAVE DETERMINED; AND IMPOSED TWO FIREARM ENHANCEMENTS WHICH EXCEEDED THE STATUTORY MAXIMUM AND AGAIN VIOLATED BLAKELY AND INITIATIVE 159: AND, THIRD, THE TRIAL COURT EXCEEDED THE SENTENCING GUIDELINES WHEN IT SENTENCED APPELLANT TO COMMUNITY PLACEMENT AGAIN IN VIOLATION OF BLAKELY AND INITIATIVE 159

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted by a jury, and proved beyond a reasonable doubt." Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)(quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The 'statutory maximum' is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant". Blakely, 542 U.S. at 303. This statutory maximum is now defined under a correct computation on a sentencing guideline score sheet, as the statu-

tory maximum. See, Blakely, supra.

Sub.A. At sentencing the judge imposed upon the defendant a sentence beyond that reached by the jury of 'no same criminal conduct.' This exceeded the 'statutory maximum' of 123 months for assault in the first degree with zero criminal history points. With his erroneous imposition of this enhancement, this 123-month sentence was increased to 246 months. Then the judge sentence appellant to 105 months for each assault to be served consecutively which gives the appellant a total of 210 months without the firearm enhancements. This is 87 months over the 'statutory maximum'. Therefore, this is an exceptional sentence in violation of appellant's rights defined in Blakely, and in Washington's courts, Hughes:

"the court held that Blakely's Sixth Amendment right to a jury trial violation 'can never be deemed harmless' because to do so would be to speculate on the absence of jury findings."
State v. Hughes, 154 Wn.2d 118, 148, 110 P.3d 192 (2005)

The only remedy for this is to vacate the sentence and remand for sentencing to remove the erroneous findings of the court.

Sub.B. The trial court also erred in exceeding the 'statutory maximum' with the firearm enhancements. Washington State Initiative 159 states:

"the 1998 legislature required that if the firearm enhancement or the deadly weapon enhancement increases a sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced. As a result in such a case the underlying sentence must be reduced so that the total confinement time does not exceed the statutory maximum. This takes effect for crimes committed on or after June 11, 1998." (emphasis added).

This is a violation of appellants' rights to Due Process of Law as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and his right to have the jury determine his guilt as guaranteed by the jury clause of the Sixth Amendment to the United States Constitution; see also, Washington State Constitution, Article I, section 22. In plain English, the 'statutory maximum' for any crime is only what the jury imposes or what the defendant admits to the court - in this case, 123 months.

"we specifically noted that the statute does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." Harris v. United States, 536 U.S. 545, 563 (2002) (brackets in original).

The sentence in Mr. Ruth's case exceeds the 123-month 'statutory maximum' by the two 60-month gun enhancements. The firearm enhancements were added on top of the 'statutory maximum' for the underlying offense. The enhancement cannot be reduced and, therefore, the underlying offense has to be dropped so the enhancements and sentence together do not exceed the statutory maximum of 123 months for this offense cognizant of appellant's criminal history.

"we find that the word 'maximum' most naturally connotes the greatest quantity of value attainable in a given case". United States v. LaBonte, 117 S.Ct. 1673 at 1677. "In sum, we hold that the phrase 'at or near the maximum term authorized' is unambiguous". LaBonte at 1679. (emphasis added)

The sentencing court erred in exceeding the 'statutory maximum' for the underlying offense which, in this case, is 123 months. The remedy available to the Court is to reduce the underlying sentence so the total sentence, including the

firearm enhancements, does not exceed 123 months in accord with Initiative 159 and the above cited decisions.

Sub.C. the defendant was also given 48 months of community placement to run consecutively upon his release. This exceeds the 123 months statutory maximum of his guideline sentence. Under RCW 9.94A.505(5), the trial court cannot impose such a sentence as this:

"Except as otherwise provided...a court may not impose a sentence providing for a term of confinement of community supervision, community placement, or community custody which exceeds the statutory maximum."

See also, State v. Zavala-Reynoso, 127 Wn.App. 114 (2005).

In Zavala-Reynoso the court interpreted RCW 9.94A.505(5) and held that any community placement sentence cannot exceed the statutory maximum as determined by the guidelines. Appellant is already past his guideline sentence by 207 months. It would be 253 months past his sentence with the community placement sentence being added.

Accordingly, the appellant requests that this Honorable Court do the following: 1. Remove the no same criminal conduct finding that was erroneously made by the trial court judge instead of the jury, 2. Reduce the underlying sentence so that the firearm enhancements do not exceed the statutory maximum to a total sentence amount of 123 months; and 3. Reduce the underlying sentence so that the community placement does not exceed the statutory maximum of 123 months.

D. CONCLUSION

Appellant was prejudiced as stated herein above and received ineffective assistance of counsel. It is respectfully submitted that had a second-degree assault jury instruction been requested by counsel. that he could have only been convicted and sentenced based on the evidence which supported this charge. The overall cumulative trial court errors led to a finding of first-degree assault instead of second-degree assault. Other errors resulted in the appellant being erroneously sentenced outside of the standard timeline guide-range and violated the Blakely doctrine and Initiative 159. Hence, a sentence correction is also warranted. For all these reasons this conviction and sentence should be vacated.

Respectfully submitted,

Matthew R. Ruth
Matthew R. Ruth #879492, C128

E. CERTIFICATE OF SERVICE

I, Matthew R. Ruth, do hereby certify that a true and correct copy of the foregoing has been mailed prepaid by U.S. Postal Service to: Janice E. Ellis, Prosecuting Attorney, Snohomish County, 3000 Rockefeller Avenue, Everett, WA 98201-4046 and Andrew P. Zinner, Attorney for Appellant, Nielsen, Broman & Koch PLLC, 1908 East Madison, Seattle, WA 98122, on this 30 day of January, 2006.

I, Matthew R. Ruth, declare under penalty of perjury that the foregoing is true and correct to the best of my belief and ability.

1/30/06
dated

Matthew R. Ruth
Matthew R. Ruth #879492, C128
Monroe Corrections Complex/WSR
PO Box 777
Seattle, WA 98272-0777

STATE OF WASHINGTON)

)SS

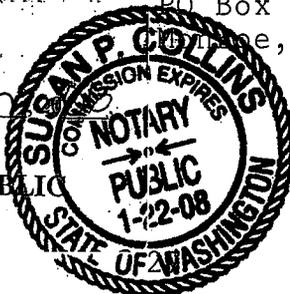
COUNTY OF SNOHOMISH)

Subscribed and sworn to, before me, this 30 day of Jan

Susan P. Collins
Susan P. Collins,

NOTARY PUBLIC

My Commission Expires January 22, 2008



Dear, clerk

Are law library will not let
us make a copy to send to
the prosecutor, and Attorney for
Appellant.

Please send them a copy -
I am trying to type another one,
and send it.

Thank you

Matthew

R.

Reese

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