NO. 30550-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DUKE COOMBES,

Appellant.

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

The Honorable Michael P. Price, Judge
The Honorable Annette Plese, Judge

APPELLANT'S BRIEF

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3. The joinder of the intimidating a witness charge and the tampering with a witness charge with the first degree murder charge denied Mr. Coombes a fair trial.

4. The trial court abused its discretion when its allowed the state to present evidence of Mr. Coombes' gun tattoo.

5. The admission of the gun tattoo evidence over Mr. Coombes' objection prejudiced Mr. Coombes.

6. The Information charging tampering with a witness did not give Mr. Coombes adequate notice of the uncharged alternatives the jury was given to consider.

7. The tampering with a witness conviction must be reversed because the jury could have reached a verdict on an uncharged alternative to the charge.

8. Mr. Coombes was denied effective counsel when his trial attorney failed to object to the tampering with a witness jury instruction that includes uncharged alternative means of committing the crime.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it joined charges of intimidating a witness and tampering with a witness charges to Mr. Coombes' pending murder charge?

2. To be admissible, relevant evidence must be probative and not unduly prejudicial. In trying to make a photo of Mr. Coombes' gun tattoo relevant, the state cropped the photo such that the tattoo lost its true context and was only prejudicial. Did the trial court err in admitting the tattoo photo?

3. The state charged Mr. Coombes with only one of two alternative means of tampering with a witness. But the trial court instructed the jury it could find Mr. Coombes guilty of both means resulting in a guilty verdict based on prejudicial error. Must Mr. Coombes' tampering with a witness conviction be reversed?

4. Based on the evidence, the jury could have found Mr. Coombes guilty of an uncharged alternative means of tampering with a witness. Defense counsel failed to object to the tampering to-convict instruction thus allowing the jury to premise guilt on the uncharged alternative. Did defense counsel's failure deny Mr. Coombes effective counsel?

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. Mr. Coombes pleaded guilty to first degree murder but later withdrew his plea.

In 2008, Mr. Coombes pleaded guilty to first degree murder and first degree unlawful possession of a firearm. Supp Designation of Clerk's Papers, Statement of Defendant on Plea of Guilty to Non-Sex Offense (sub. nom. 34, file no. 07-1-03527-4). He subsequently challenged the legality of the plea. This court found the trial court failed to notify Mr. Coombes that first degree murder has a 20-year mandatory minimum sentence. As a mandatory minimum sentence is a direct consequence of a guilty plea, Mr. Coombes' plea was not knowing, intelligent, and voluntary. This court remanded Mr. Coombes' case to the trial court. *In re Coombes*, (unpublished) 159 Wn. App. 1044, 2011 WL 240687 (2011).

On remand, the trial court appointed attorney Jeffrey Compton of the Spokane County Public Defender's Office to represent Mr. Coombes. After consulting with his counsel, Mr. Coombes chose to withdraw his first degree murder guilty plea. The trial court accepted Mr. Coombes' request to withdraw his guilty plea and reset the case for trial. CP ("Clerk's Papers") 3-4. RP ("Report of Proceedings") August 11, 2011, at 2-6.

2. The trial court denied Mr. Coombes' request to appoint different defense counsel.

Mr. Coombes asked the trial court to appoint new counsel. CP 6, 7; RP October 27, 2011, at 2. Mr. Coombes complained attorney Compton would not file certain suppression motions and he did not get along with attorney Compton. Id. at 2-3. Mr. Compton did not refute or challenge Mr. Coombes' complaints. Id. at 5.

Mr. Coombes also asked that outside counsel be appointed. RP October 27, 2011, at 3-4. A Spokane County Public Defender's Office attorney represented Mr. Coombes on the 2008 guilty plea that was later withdrawn. Id. at 3-4. Mr. Coombes felt the previous attorney did a poor job. Consequently, Mr. Coombes did not trust the abilities of the public defender's office attorneys. Id. at 2-5.

The trial court denied both requests. The trial court found no evidence of a specific conflict with attorney Compton or of a general conflict with the public defender's office. RP October 27, 2011, at 5-6. The court put its findings and conclusions in a written order. CP 8. Mr. Coombes did not renew his request for different counsel.

3. Over Mr. Coombes' objection, the trial court joined the murder charge with charges of intimidating a witness and tampering with a witness.

The state twice moved to join other charges with the first degree murder charge. In the first instance, the state moved to add an intimidating a witness charge.[1] RP August 25, 2011, at 9-10. In the second instance, the state moved to join a tampering with a witness charge. RP November 3, 2011, at 2.[2] CP 5. Mr. Coombes objected to the joinder of both the intimating and the tampering charges. In both instances, the trial court granted the state's request over Mr. Coombes' objection. RP August 25, 2011, at 9-11;[3] RP November 3, 2011, at 3-4. As to the intimidation charge, the court took argument, deferred ruling, and later filed a written order. RP August 25, 2011, at 9-12; CP 11-12. As to the tampering charge, the court heard argument, granted the joinder motion, and later entered a written order. RP November 3, 2011, at 3-8; CP 9-10.

[1] The intimidating a witness charge was filed under Spokane County Superior Court Cause No. 11-1-00443-1. That file is not part of the appellate record because the jury acquitted Mr. Coombes of that charge.

[2] At the second joinder motion, the state mistakenly says the court previously joined another tampering with a witness charge. The previously joined charge was intimidating a witness.

[3] In the verbatim report of proceedings, the court reporter mistakenly refers to defense counsel Mr. Compton using the name of the prosecutor, Mr. Garvin.

4. The court held a CrR 3.5 hearing and found Mr. Coombes' statements to Spokane police detectives admissible.

The court heard a CrR 3.5 hearing on the first day of trial. RP December 12, 2011, at 6-58. The state presented testimony from Spokane police detectives Burbridge and Madsen. Both testified about their training and experience in recognizing people under the influence of drugs or alcohol. Neither detective felt Mr. Coombes was under the influence when they interviewed him. Id. at 10-12, 25, 32-33. Both detectives testified Mr. Coombes made statements after signing a written waiver of his *Miranda* rights. Id. at 7-14, 22-27. When the detectives asked Mr. Coombes to make a recorded statement, Coombes invoked his right to counsel. Id. at 13, 26-27.

In its findings, the trial court found that Mr. Coombes was not under the influence of alcohol or drugs when he made a written knowing and intelligent waiver of his *Miranda* rights. As such, his statements to the detectives were admissible. Also admissible were certain spontaneous statements Mr. Coombes made to Detective Burbridge while being arrested.

The court later entered written findings of fact and conclusions of law. CP 16-18.

5. The trial court refused to grant Mr. Coombes' motion in limine to exclude evidence of his gun tattoo.

After his 2008 guilty plea, Mr. Coombes got a tattoo of a gun with walls in the background, the number "25," and a needle. RP December 12, 2011, at 9; RP December 15, 2011, at 540-41. At trial, the state wanted to show the jury a picture of the tattoo. RP December 12, 2011, at 59-61. Mr. Coombes objected. Id. at 60-61, 64. He argued the tattoo memorialized his 2008 plea and 25 year sentence. Showing the tattoo to the jury was a backdoor way of getting the plea before the jury in violation of ER 410. Id. at 61. Also, the tattoo was prejudicial and unnecessary because of "plenty of other potential evidence in this case." Id. at 61, 64. The state offered to crop its photo of the tattoo to only show the gun. Id. at 63. Mr. Coombes argued that a cropped photo would destroy the context of the tattoo and leave him with no ability to explain its true meaning in light of ER 410. RP December 12, 2011, at 63-64.

Ultimately, the court granted the state's motion to admit a cropped photo of the tattoo. RP December 13, 2011, at 199-201; RP December 15, 2011, at 540-41.

6. The trial court refused to grant Mr. Coombes' motion in limine to exclude his alleged statement at the time of arrest that he would have shot the arresting officers.

Mr. Coombes made a motion in limine to exclude specific post-*Miranda* statements attributed to him. RP December 12, 2011, at 78. Mr. Coombes anticipated testimony that he told detectives Burbridge and Madsen that he would have shot officers while being arrested had the officers not gotten the jump on him. Id. Mr. Coombes argued the statements were not relevant to any issue before the court and were highly prejudicial. Id. at 79. The trial court disagreed and found the statements relevant to Mr. Coombes' state of mind. Id. at 81. The detectives testified about the statements at trial. RP December 14, 2011, at 483-84.

7. Other than the shooter, there were no witnesses to the shooting of William "Red" Nichols.

On the afternoon of September 3, 2007, Linda Biggers was out foraging for her floral supply business in Spokane's Beacon Hill neighborhood. RP December 13, 2011, at 230; RP December 14, 2011, at 451. She stopped long enough to browse at a garage sale. She looked up on a hillside and saw what she thought might be a person lying in the bushes. A teenage boy volunteered to take a closer look. RP December 13, 2011, at 230. The teenager confirmed that the person was a man and he was dead. Id. at 231.

The Spokane police arrived in the late afternoon. RP December 14, 2011, at 451-52. Because it was late afternoon, they did what they could before dark and then preserved the scene overnight. RP December 15, 2011, at 544-46. The man's body was on a hillside just off a long residential driveway. RP December 14, 2011, at 451-52; RP December 15, 2011, at 545. The condition of the body suggested it had been there for some time. RP December 15, 2011, at 545. The man had a gunshot wound behind his right ear. RP December 15, 2011, at 501.

Findings at the autopsy lead to an identity of the man as William "Red" Nichols, age 53. RP December 15, 2011, at 501. He died of a brain injury caused by the entry of a single bullet into his skull. Id. at 517. It was estimated he had been dead three to five days. Id. at 497. During the autopsy, that bullet was collected and preserved for additional testing. Id. at 506.

The police found Mr. Nichols' Datsun station wagon parked outside a bar about a mile away from the hillside where Mr. Nichols' body was found. RP December 14, 2011, at 450.

Mr. Nichols was staying at the Spokane home of Lloyd Clark. RP December 13, 2011, at 293; RP December 14, 2011, at 349-50. It was described as a "drunk house." RP December 13, 2011, at 257. Bickering

and fights were common. RP December 13, 2011, at 240; RP December 14, 2011, at 385. There was also a lot of drug use at the house. Id. at 310.

Various other people lived at Lloyd Clark's house around this time including his daughter, Jamie Hall. RP December 14, 2011, at 349. Chris Landis was Ms. Hall's boyfriend. RP December 14, 2011, at 309, 347. Mr. Landis is Mr. Coombes' nephew. Id. at 308. Ms. Hall and Mr. Landis had various friends who they hung out with and used meth with to include Mr. Coombes, Jason Pletcher, and Eric Nelson. RP December 13, 2011, at 235-36, 259, 268; RP December 14, 2011, at 310, 319.

Mr. Coombes and Mr. Pletcher acquired a revolver. RP December 13, 2011, at 261, 338. They kept the revolver in a car parked in Lloyd Clark's yard. RP December 14, 2011, at 352. In late August 2007, Mr. Coombes and Mr. Pletcher bought revolver ammunition at Spokane's General Store. RP December 13, 2011, at 261. Both Mr. Coombes and Mr. Pletcher went to the "sticks" and fired the gun at a tree. RP December 13, 2011, at 269.

The last time anyone saw Mr. Nichols at Lloyd Clark's house, Mr. Nichols was drunk. RP December 14, 2011, at 312. Mr. Nichols and Mr. Landis argued. RP December 13, 2011, at 240, 265. Mr. Coombes got between them. RP December 13, 2011, at 266; RP December 14, 2011, at

313. Subsequently, Mr. Nichols grabbed his dog, a few possessions, and headed to his Datsun wagon. Id. at 271.

The Datsun had a bad starter and would not start without being pushed. RP December 13, 2011, at 270. Mr. Coombes and Mr. Pletcher helped Mr. Nichols with a push start. Mr. Coombes got in the car with Mr. Nichols as he drove away. Id. at 273. Days later, Mr. Nichols' body was found on the hillside.

8. The police arrested and interviewed Mr. Coombes.

The police identified Mr. Coombes as a suspect. On September 5, 2007, Mr. Coombes was seen walking down a Spokane street with Eric Nelson.[4] RP December 14, 2011, at 444-45. Detectives Peterson and Burbridge moved in to contact Mr. Coombes. Id. at 444-45, 463. Mr. Coombes was put on the ground. Mr. Coombes told Detective Burbridge he had a gun in his pocket. Detective Burbridge removed a revolver from Mr. Coombes pocket. Id. at 463. Detectives Peterson and Burbridge testified Mr. Coombes made several spontaneous statements: "You got me. It's no big deal. I'm going back where I belong. I'll die in prison." Id. at 447, 465.

At a nearby residence, the police found ammunition for the revolver in Mr. Coombes' backpack. RP December 15, 2011, at 521-24.

[4] Eric Nelson is also sometimes referred to as Eric Claasen. RP December 13, 2011, at 234-35; RP December 14, 2011, at 444.

Detectives Burbridge and Madsen interviewed Mr. Coombes. RP December 14, 2011, at 466-84; RP December 15, 2011, at 597-613. Although there were certainly inconsistencies between the detectives' testimony, each testified that Mr. Coombes, in essence, said the following:

He was mad at Mr. Nichols for threatening his nephew Chris Landis. He helped push-start the Datsun and got into it as Mr. Nichols drove away. It was just himself, Mr. Nichols, and the dog in the car. Mr. Nichols was very drunk. Mr. Nichols said he used methamphetamine intravenously and wanted to get some. He told Mr. Nichols he would take him to a meth dealer. But he had no intent to take Mr. Nichols to a dealer. Instead, he directed Mr. Nichols to drive to a rural area close to town. He told Mr. Nichols he needed to urinate but he really did not need to. Mr. Nichols stopped. The car stalled. Mr. Nichols got out of the car to help push-start it. He pulled the revolver out of his pocket and shot Mr. Nichols behind the ear. Mr. Nichols never saw it coming. He rolled Mr. Nichols' body down an embankment. He let the dog loose. He parked the Datsun at a biker bar and left it there. He smoked methamphetamine residue and drank vodka earlier in the evening but he was not high or drunk when he shot Mr. Nichols. RP December 14, 2011, 466-84; RP December 15, 2011, at 597-613.

9. Mr. Coombes purportedly said things to his friends.

Some of Mr. Coombes' friends and associates from 2007 testified at trial.

Jamie Hall testified Mr. Coombes told her he killed Mr. Nichols. RP December 14, 2011, at 356.

Jason Pletcher testified later in the evening after Mr. Coombes left with Mr. Nichols, Mr. Coombes walked up to him, gave him a hug, and told him he killed someone. Mr. Pletcher assumed Mr. Coombes was talking about Mr. Nichols but that he was only joking. RP December 13, 2011, at 271, 276.

Eric Nelson testified he heard Mr. Coombes say, in reference to Mr. Nichols, "he's done." RP December 13, 2011, at 243-44. Like Mr. Pletcher, Mr. Nelson assumed Mr. Coombes was talking about Mr. Nichols.

10. Tevan Williams received a great plea deal in exchange for his testimony against Mr. Coombes on the tampering with a witness charge.

In July 2011, Tevan Williams was in jail in Spokane pending serious felony charges. RP December 16, 2011, at 689. He was facing a sentence of at least 52 months. RP December 14, 2011, at 428. He never met Mr. Coombes before. Id. at 428. He was in a restricted housing unit. That meant he did not have free access to other inmates to include inmates

in the same restricted housing unit. Mr. Coombes was in the same restricted housing unit awaiting trial. RP December 16, 2011, at 689-90. Mr. Williams was no stranger to jail or prison. RP December 14, 2011, at 429. He did not like being locked up. Id. at 429-30. He freely admitted that he would do dishonest and violent things if he got a benefit from it. Id. at 431.

Mr. Williams testified Mr. Coombes approached him and wanted him to make sure Eric Nelson did not appear at trial and testify against him. RP December 14, 2011, at 425. Later, Mr. Coombes purportedly gave Mr. Williams a note providing information about Eric Nelson. Id. at 425. The note told Mr. Williams to either get Mr. Nelson to not show up for trial or to testify falsely if he did show up. Id. At trial, no one identified the note as being in Mr. Coombes' handwriting.

Mr. Williams made no effort to contact Mr. Nelson. Instead, Mr. Williams gave the note to the police and later worked out a great plea deal. RP December 14, 2011, at 424-26. In exchange for testifying against Mr. Coombes, Mr. Williams pleaded guilty to a "pistol charge" with a year and a day sentence. Id. at 428. It saved him "like 40 months" in prison. The state also dismissed a residential burglary charge and a number of counts of second degree possession of stolen property. Id. at 430.

11. The court instructed the jury on an uncharged alternative means of tampering with a witness.

Based upon Mr. Williams' testimony, the state charged Mr. Coombes with tampering with a witness by attempting to induce a witness to absent himself from an official proceeding. CP 5. However, the trial court instructed the jury they could find Mr. Coombes guilty if he either attempted to induce a witness to testify falsely or to withhold any testimony or to absent himself from an official proceeding. Supp. Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 13 (sub. non 123). Mr. Coombes did not object to the court's instructions adding an alternative means of committing tampering with a witness.

12. Mr. Coombes denied killing Mr. Nichols.

Although Mr. Coombes did not testify and rested without putting on any defense witnesses, Mr. Coombes maintained his innocence. Mr. Coombes defended the charge by arguing state's witnesses succumbed to police pressure and made untrue statements to the police during their investigation. Mr. Coombes also argued that Detectives Burbridge and Madsen were so inconsistent in their retelling of Mr. Coombes' "confession" that little credence should be given to their testimony. RP December 16, 2011, at 729-49.

13. After the jury returned verdicts of guilt, Mr. Coombes filed a motion for a new trial.

The jury found Mr. Coombes not guilty of intimidating a witness but guilty of both first degree murder with a firearm enhancement and tampering with a witness. CP 19-22.

Mr. Coombes filed pro se motions for a new trial and to arrest judgment. CP 24-29. After sentencing Mr. Coombes to 476 months, the court denied both motions. RP December 16, 2011, at 784-86; CP 30.

D. ARGUMENT

1. THE TRIAL COURT DENIED MR. COOMBES A FAIR TRIAL WHEN IT JOINED THE INTIMIDATING A WITNESS AND TAMPERING WITH A WITNESS CHARGES WITH THE FIRST DEGREE MURDER CHARGE.

The trial court denied Mr. Coombes a fair trial when it granted the state's motion to join first, the intimidating a witness charge, and second, the tampering with a witness charge, with Mr. Coombes' pending first degree murder charge. Both the intimidating and the tampering allegations arose years after Mr. Coombes was charged with the murder. The added charges invited the jury to see Mr. Coombes as a person with a criminal predisposition. Because the errors were prejudicial, Mr. Coombes' convictions must be reversed.

(a) Standard of review.

A trial court's decision on a motion to sever is a question of law reviewed de novo for manifest abuse of discretion. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

(b) Joinder of charges is prohibited when it will deny an accused a fair determination of guilt or innocence on each charge.

A criminal defendant has the constitutional right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. To protect this right, the court rules governing joinder, CrR 4.3, and severance CrR 4.4(b), "are based on the same underlying principle, that the defendant receive a fair trial untainted by undue prejudice." *Bryant*, 89 Wn. App. at 857.

CrR 4.4(b)[5] provides the court "shall" sever counts when severance will promote a fair determination of the defendant's guilt or innocence on each offense. The term "shall" creates a mandatory duty. *State v. Krall*,

[5] CrR 4.4(b) provides:
The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Although CrR 4.3[6] permits joinder of offenses for purposes of trial, "[a] risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendant." *United States v. Sutton*, 605 F.2d 260, 271 (6th Cir. 1979). The risk is tolerated for purposes of judicial economy, but only so long as prejudice does not result. *Drew v. United States*, 331 F.2d 85, 88 (D.C Cir.1984).

> To the extent that the distinction between review of joinder and severance issues may have become blurred, we believe it is because the potential for prejudice must be considered in determining, in advance of trial, whether joinder is proper as a matter of law, and because actual prejudice must be considered in determining, at the appellate level, whether joinder was proper as a matter of law.

Bryant, 89 Wn. App. at 865.

While the decision to grant or deny a motion to join is discretionary, Washington courts have recognized that joinder is inherently prejudicial. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 406 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds*, *State v. Gosby*, 85 Wn.2d 758, 539

[6] CrR 4.3 provides:
(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
(1) Are of the same or similar character, even if not part of a single scheme or plan; or
(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

P.2d 680 (1975). "[E]ven if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant." *Bryant*, 89 Wn. App. at 864.

"Joinder of counts should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him a substantial right." *State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994) (citing *Smith*, 74 Wn.2d at 745-55). A defendant may be prejudiced if he is embarrassed or confounded in presenting separate defenses, or if a single trial invited the jury to cumulate evidence to infer a criminal disposition or to find guilt when, if considered separately, it would not so find." *Id*. at 62l; *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (quoting *Smith*, 74 Wn.2d at 755). When determining whether the inherent prejudice of a single prosecution for multiple offenses requires severance, a trial court must consider the following "Watkins factors"[7]: (1) the strength of the state's evidence on each count; (2) the clarity of defenses as to each count; (3) if an instruction can properly guide the jury to consider the evidence of each count; and (4) the cross-admissibility of evidence of the counts even if the offenses are not joined. *Russe*ll, 125 Wn.2d at 63; *accord State v. MacDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004), *review denied*, 153 Wn.2d 1006 (2005).

[7] *State v. Watkins*, 53 Wn. App. 264, 269, 766 P.2d 484 (1989)

(c) The joinder of the intimidating a witness and the tampering with a witness with the murder charge was in error.

The trial court erroneously failed to consider the *Watkins'* factors when ruling on the state's motion to join the intimidating a witness charge with the murder charge. The court took the state's joinder motion under advisement and later granted the motion through a written order. CP 11-12. In the order, the court gives little consideration to the *Watkins'* factors. Essentially, the court found that the evidence of the murder and the intimidation of a witness would be cross-admissible, judicial economy favored joinder, and there would be little prejudice to Mr. Coombes. CP 11-12. In so doing, the court all but left out consideration of the *Watkins*' factors.

The same holds true for the tampering with a witness charge. There too, the trial court erroneously failed to consider the *Watkins'* factors when ruling on the state's motion to join the tampering with a witness charge with the murder charge. In its written joinder order, the court fails to reflect upon the *Watkins'* factors or the relevance of judicial economy, cross-admissibility of evidence, or prejudice to Mr. Coombes. CP 9-10.

The *Watkins'* factors are, in fact, lacking.

(i) Strength of evidence. As to the intimidating charge, the state failed to explain to the court what they really could prove. As it turned out, it was really nothing. The jury acquitted Mr. Coombes. CP 21.

As to the tampering charge, the evidence consisted exclusively of the testimony of Tevan Williams. RP December 14, 2011, at 423-33. Mr. Williams never met Mr. Coombes before. Id. at 428. It is arguable they never met at all even though they were housed for a time in the same secure unit at the Spokane County Jail. Id. at 432-33. Mr. Williams claimed to have a note from Mr. Coombes. Id. at 426. However, no one who would recognize Mr. Coombes' handwriting testified that it was Mr. Coombes' handwriting. Mr. Williams acknowledged he would do anything – lying, violence - to reduce any time in confinement. Id. at 430-31. And he successfully did just that. The state knocked at least 40 months off of his sentence to secure Mr. Williams' uncorroborated testimony against Mr. Coombes. Id. at 424, 428.

(ii) Clarity of defenses. The defenses on both the intimidating and the tampering were the same. Mr. Coombes denied committing the murder so there was no need for him to intimidate or tamper with any witness.

(iii) Court's instructions. The trial court instructed the jury as follows:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Supp. Designation Clerk's Papers, Court's Instructions to the Jury, Instruction 17 (sub. nom. 123). This instruction is identical to the Washington Pattern Jury Instruction 3.01. Washington Pattern Jury Instructions, Criminal, 3rd Edition (2008). However, in *State v. Bradford*, 60 Wn. App. 857, 860-61, 808 P.3d 174, *review denied*, 153 Wn.2d 1006 (1991), the court ruled the above pattern instruction did not sufficiently limit the jury's consideration of evidence for one drug charge as proof of an element of a second drug charge. The court noted:

> It may be that some modification of the instruction consistent with this opinion is in order. We note that the Washington Supreme Court Committee on Jury Instructions modified WPIC 3.01 to delete the phrase "as if it were a separate trial" from the second sentence of the instruction to eliminate confusion. Similarly, some additional language informing the jury that in the absence of a limiting instruction, all evidence is applicable on all counts, providing it meets relevance requirements, as needed.

Bradford, 60 Wn. App. at 860-61.

Here, too, although Instruction No. 17 was a proper statement of the law, the instruction did not sufficiently mitigate the prejudice of joinder of the three offenses. The instruction simply prohibited the jury

from allowing its verdict on one count to dictate its verdict on the other counts. It did not direct the jury to segregate the evidence to determine whether it supported each count individually. Thus, the instruction left the jury to follow the state's invitation to lump all the evidence together to impute criminal intent, regardless of the strength of evidence to support each separate offense.

The instruction did not mitigate the prejudice to Mr. Coombes.

(iv) Cross-admissibility.

Prior to admitting evidence of other wrongs, a court must:

> (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (*citing State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)); *accord State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). This analysis must occur on the record. *State v. Everybodytalksaboutit*, 145 Wn.2d 456, 465, 39 P.3d 294 (2002). Any doubt regarding admissibility must be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here the trial court did say, without explanation, that the evidence was cross-admissible but the court did not conduct an ER 404(b) analysis

on the record. Instead, the court generally concluded that the charges should be joined for judicial economy. CP 9-10, 11-12.

By contrast, in *Russell*, the defendant moved to sever two of three counts of murder in the first degree where each offense occurred at a different time and place. *Russell*, 125 Wn.2d at 62. In determining the cross-admissibility of the evidence, the trial court identified the purpose for which the evidence would be admissible under ER 404(b), identified the relevance of this purpose, and set forth its analysis in written findings and conclusions. *Russell*, 125 Wn.2d at 66-67. The Washington Supreme Court affirmed this reasoning and concluded the trial court properly balanced the resulting prejudice with the relevance. *Russell*, 125 Wn.2d at 66-68.

Here, the trial court erroneously failed to conduct an on-the-record balancing of the probative value with the prejudicial effect. As such, it was error to join either or both the intimidating a witness or the tampering with a witness charge with the murder charge.

(d) Reversal is the proper remedy.

Where charges are improperly joined for trial, the defendant is denied his constitutional due process right to a fair trial. *Adamson v. California*, 332 U.S. 46, 57, 67 S. Ct. 1672, 91 L.Ed.2d 1903 (1947). "If joinder was not proper but offenses were consolidated in one trial, the

convictions must be reversed unless the error is harmless." *Bryant*, 89 Wn. App. at 864. Wrongful admission of evidence is harmless only "if the evidence is of minor significance in reference to the evidence as a whole." *Neal*, 144 Wn.2d at 611.

Here the trial court abused its discretion in granting the state's joinder motion when it failed to adequately consider all four of the *Watkins* factors. The error was not harmless. Had the jury not heard the otherwise inadmissible witness intimidation and tampering evidence, the likelihood of a conviction on the murder charge was appreciably diminished.

The proper remedy is reversal and remand for separate trials on the murder and the tampering with a witness.

2. A PHOTOGRAPH OF MR. COOMBES' GUN TATTOO WAS IRRELEVANT AND HIGHLY PREJUDICIAL AND SHOULD NOT HAVE BEEN ADMITTED.

Between the time Mr. Coombes pled guilty to first degree murder and when he withdrew that plea, he got a tattoo of a gun with walls, a needle, and the number "25." The gun tattoo was relevant to nothing with respect to the murder but it was highly prejudicial. The trial court erred when it allowed in a photo of the gun tattoo over Mr. Coombes' objection.

(a) Standard of review.

The trial court has discretion to admit or exclude evidence. *State v. Swan*, 114 Wn2d 613, 658, 790 P.2d 610 (1990). Errors in admitted evidence are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 869, 83 P.3d 970 (2004).

(b) To be admissible, evidence must be both relevant and not unduly prejudicial.

Generally, all relevant evidence is admissible. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." ER 401. Even if the evidence is relevant, a trial court may still exclude it if the danger of undue prejudice substantially outweighs it's probative value. ER 403; *State v. Norlin*, 134 Wn.2d 570, 583-84, 951 P.2d 1131 (1998).

While not admissible to prove a witness's character or to show that he acted in conformity with that character, evidence of other crimes, wrongs, or acts may be admissible for other purposes, for example, to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

The trial court must identify the purpose for which the evidence is sought to be introduced, and determine whether the evidence is relevant to prove an essential element of the crime charged. *State v. Smith*, 106

Wn.2d at 776; *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982); ER 402.

The relevancy determination requires that the purpose for which the evidence is sought to be introduced is of consequence to the outcome of the action and that the evidence tends to make the existence of the identified fact more probable. *Smith*, 106 Wn.2d at 776; *Saltarelli*, 98 Wn.2d at 362-63. If the court finds the information relevant, it must then weigh on the record the probative value of the evidence against its prejudicial effect.

(i) Mr. Coombes' gun tattoo was irrelevant.

Mr. Coombes' gun tattoo was relevant to nothing. Before it was cropped down to just the gun, it was surrounded by a wall, a needle, and the number "25." The tattoo was a visual reminder of his original plea. Mr. Coombes received a 25 year sentence on his guilty plea to first degree murder and first degree unlawful possession a firearm.

In admitting the tattoo evidence, the trial court relied on *State v. Nelson*, 152 Wn. App. 755, 771-772, 219 P.3d 100 (2009), *review denied*, 168 Wn.2d 1028 (2010). That reliance was misplaced. *Nelson* holds that a tattoo worn concurrent with and depicting the criminal act makes it more likely a person is engaged in that particular criminal act. The Humane Society investigated Nelson for dog fighting. Specifically, Nelson owned

and used pit bulls in dog fighting. An officer photographed a tattoo on Nelson's back depicting two pit bulls fighting. *Nelson*, 152 Wn. App. at 763.

By contrast, Mr. Coombes obtained his tattoo after pleading guilty to murder. The tattoo memorializes the guilty plea and sentence, not the act of shooting Mr. Nichols. Mr. Coombes withdrew the guilty plea that lead to the prison walls and the 25 year sentence. Mr. Coombes maintains his innocence. His tattoo is a visual reminder of a past act he remedied by withdrawing his guilty plea.

(ii) Mr. Coombes' tattoo was highly prejudicial.

The tattoo was cropped down to something it was not intended to be: a picture of a revolver. What the jury heard is that Mr. Coombes had a revolver in his pocket when he was arrested. The gun that killed Mr. Nichols was a revolver. Those two facts, when put together, invited the jury to believe Mr. Coombes got a tattoo of a revolver to glorify his shooting Mr. Nichols. Or so that is what the state wanted the jury to believe by its cropped tattoo photo.

But the tattoo as a whole memorialized something entirely different: 25 years behind walls for a crime with a gun that Mr. Coombes did not commit. The only way the state came close to making the tattoo relevant was to alter it.

ER 410 excluded any use of Mr. Coombes' tattoo at trial.

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The trial court should have excluded the tattoo. Put in its proper context, the tattoo was inadmissible under ER 410.

Cropped and allowed to be taken out of context, the tattoo photo was prejudicial and not probative of reality. The trial court erred in admitting it.

3. THE TAMPERING WITH A WITNESS CONVICTION MUST BE REVERSED BECAUSE THE JURY WAS BOTH INSTRUCTED USING AN UNCHARGED ALTERNATIVE AND GIVEN FACTS TO SUPPORT THAT ALTERNATIVE.

At trial, the state presented evidence of both of the two alternative means of tampering with a witness. The jury instructions told the jury they could find Mr. Coombes guilty on both alternative means. However, the state, by its Information, charged Mr. Coombes with only one of the two alternative means. Because Mr. Coombes was given no notice of the uncharged alternative means, yet the jury could have convicted him of the

uncharged alternative mean, Mr. Coombes' tampering with a witness conviction must be reversed.

(a) Standard of review.

An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. *State v. Bray*, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988).

(b) The trial court instructed the jury on two alternative means of tampering with a witness even though the state only charged Mr. Coombes with one alternative mean.

The Information put Mr. Coombes on notice that he was charged with only one alternative mean of tampering with a witness.

> That the defendant, MICHAEL DUKE COOMBES, in the State of Washington, on or about August 25, 2011, did attempt to induce ERIC L. NELSON, a witness in an official proceeding to absent himself/herself from such proceedings[.]

CP 5.

There are two alternative means of committing tampering with a witness however.

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believed is about to be called as a witness in an official proceeding or a person who he or she has reason to believe may have information relevant to a criminal investigation…to;

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceeding[.]

RCW 9A.72.120(1)(a) and (b).

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). RCW 9A.72.120 articulates a single criminal offense: tampering with a witness. Subsections (1)(a) and (1)(b) represent alternative means of committing the offense. *See Smith*, 159 Wn.2d at 784-85 (in construing assault statute, recognizing separate subsections within a statutory section proscribing an offense represent alternative ways to commit the same offense.)

At trial, the court gave the following to-convict instruction. It specifies both alternative means of tampering.

INSTRUCTION 14

To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 25th day of August, 2011, the defendant attempted to induce a person to testify falsely or withhold any

testimony or absent himself or herself from any official proceeding; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceeding; and

(3) That any of the acts occurred in the State of Washington.

Supp. Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 14 (sub. nom. 123). Additionally, the court gave supporting definitional instructions.

INSTRUCTION 11

"Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath.

Supp. Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 11 (sub. nom. 123).

INSTRUCTION 13

A person commits the crime of tampering with a witness when he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceedings to testify falsely, or withhold any testimony, or to absent himself or herself from any official proceeding.

Supp. Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 13 (sub. nom. 123). And,

INSTRUCTION 15

> A person commits the crime of attempted Tampering with a Witness when, with intent to commit the crime, he or she does any act that is a substantial step toward the commission of the crime.

Supp. Designation of Clerk's Papers, Court's Instruction to the Jury, Instruction 15 (sub. nom. 123). The state, and not Mr. Coombes, proposed all of the above instructions. Supp. Designation of Clerk's Papers, Plaintiff's Proposed Instructions to the Jury (sub. nom. 116); Supp. Designation of Clerk's Papers, Defendant's Proposed Instructions to the Jury (sub. nom. 122).

(c) **Providing both alternative means in the to-convict instruction when Mr. Coombes was only charged with one alternative mean is reversible prejudicial error.**

Mr. Coombes did not object to the trial court instructing the jury on two alterative means of committing tampering even though the Information only gave him notice of a single means. CP 5. RP December 16, 2011, at 671-72. However, Mr. Coombes' claim that he was improperly convicted of an uncharged alternative means implicates the constitutional right to notice and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (accused cannot be tried for offense not charged). U.S. Const. amend. 6 provides in part: "In all criminal prosecutions, the accused shall…be informed of the nature and cause of the accusation..." Washington Const. art. 1, § 22 (amend. 10) provides "[i]n criminal

prosecutions the accused shall have the right…to demand the nature and cause of the accusation against him." Thus, an accused must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged. *Vangerpen*, 125 Wn.2d at 787; *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (error to instruct jury on a crime mischaracterized as a lesser included offense); *State v. Perez*, 130 Wn. App. 505, 507, 123 P.3d 135 (2005), *review denied*, 157 Wn.2d 1018 (2006) (error to instruct jury on uncharged alternative means of theft); *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (reversible error to try defendant under an uncharged statutory alternative because it violates right to notice of the crime charged).

"When a statute provides that a crime may not be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to each other." *Bray*, 52 Wn. App. at 34. When an information charges more than one alternative means, it is error to instruct the jury on uncharged alternatives, regardless of the strength of the evidence presented at trial. *Bray*, 52 Wn. App. at 34 (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (reversible error to instruct the jury

on alternative means of committing rape when only one alternative charged).

Such an error is presumed prejudicial unless there is no possibility the jury convicted on the uncharged alternative. *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385, *review denied*, 113 Wn.2d 1030 (1989); *see also State v. Spiers*, 119 Wn. App. 85, 94, 79 P.3d 30 (2003) (finding instructional error harmless where no evidence was presented on alternative means).

In Mr. Coombes' case, the error was prejudicial error. The jury was presented with evidence of both alternative means of tampering with a witness.

Tevan Williams was incarcerated with Mr. Coombes at the Spokane County Jail. Mr. Williams testified Mr. Coombes told him he shot someone named Red and "that he had a witness that needed not to come to court." RP December 14, 2011, 424. The witness was "Eric Nielsen or Nelson." Id. at 425.

Additionally, Mr. Coombes supposedly gave Mr. Williams a note. RP December 14, 2011, at 424-26. Mr. Williams gave the note to the police and later read it to the jury. The note encouraged Mr. Williams to get Eric Nelson to (1) withhold testimony - "shut [Eric Nelson] up" – and/or (2) testify falsely - "say he made it up."

> TEVAN WILLIAMS: He said, "Do you know Eric Nelson last name, also. He is a wanna be northsider. Dad key lines at 2717 North Martin. His mom's named Ella lives at 6007 North Wall. He is 22 now, was 18 in September '07. Here are his two interviews. He wants – he went to require --" I can't even read it, "to talk so all of it was voluntary. He wasn't required to talk, so all of it was voluntary. I'll show you this in hopes you can either let me know where he is at or shut him up before I go to trial. His aunt, Leaona, told then said she lied and didn't get in trouble. He just asked to say he made it up, and I'm home free.

Id. at 426.

The jury was not given a special interrogatory. As such, it did not specify which alternative means it relied on in reaching a verdict. CP 19-22.

The jury heard facts supporting both alternative means of the tampering with a witness charge. Only the "absent himself from such proceeding" alternative was charged. Prejudice is presumed. Mr. Coombes' tampering with a witness conviction must be reversed.

4. MR. COOMBES WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

(a) Standard of review.

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008).

(b) The Sixth and Fourteenth Amendments guarantee an accused person the right to effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." U.S. Const. Amend VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel…" Wash. Const. Article I, § 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning " a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption of adequate performance, though it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. Any trial strategy "must be based on reasonable decision-making…" *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (unreasonable for defense counsel to propose self-defense jury instruction misstating the law and giving defendant a higher burden). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of … prior convictions has no support in the record.")

(c) Defense counsel provided ineffective assistance by failing to object to the tampering with a witness to-convict instruction that allowed the jury to convict Mr. Coombes of an uncharged alternative to that crime.

A counsel's failure to notice and object to an erroneous jury instruction may demonstrate a lack of effective assistance of counsel if the defendant can show that the inaccurate jury instruction prejudiced him. *State v. Wilson*, 117 Wn. App. 1, 17, 75 P.3d 573, *review denied*, 79 P.3d

447 (2003); *State v. Howland*, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992), *review denied*, 121 Wn.2d 1006 (1993); *State v. Johnson*, 29 Wn. App. 807, 815, 631 P.2d 413, *review denied*, 96 Wn.2d 1009 (1981).

As explained in Issue 4, defense counsel's failure to object to the erroneous to-convict instruction and definition instructions permitted the jury to convict Mr. Coombes of an uncharged alternative of tampering with a witness.

Mr. Coombes was only charged with tampering by attempting to induce witness Eric Nelson to absent himself from trial. CP 5. The flawed to-convict instruction allowed the jury to find Mr. Coombes guilty of attempting to induce a person to testify falsely or withhold any testimony. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction No. 14 (sub nom. 123). Based on Tevan Williams' testimony, the jury could have based a guilty finding on the uncharged alternatives. RP December 14, 2011, at 426. It is error to instruct the jury on uncharged alternatives, regardless of the strength of the evidence presented at trial. *Bray*, 52 Wn. App. at 34. Defense counsel's failure to object to the to-convict instruction was not based on any reasonable trial strategy. It is never a reasonable trial strategy to invite the jury to convict a defendant on an uncharged crime with the possible exception of guilt on a lesser included offense. See *State v. Grier*, 171

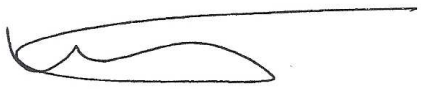
Wn.2d 17, 246 P.3d 1260 (2011). Defense counsel's failure to object to the instruction caused Mr. Coombes prejudice because it allowed the jury to convict him of an uncharged alternative means crime.

Because he received ineffective assistance of counsel, Mr. Coombes' tampering with a witness conviction should be reversed.

E. CONCLUSION

For the foregoing reasons, Mr. Coombes convictions must be reversed and remanded to the trial court for further action.

Respectfully submitted this 28th day of September 2012.



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CERTIFICATE OF SERVICE

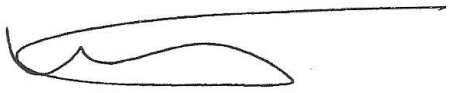
Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Mark Lindsey, Spokane County Prosecutor's Office, at by sending it to his staff person at KOwens@spokanecounty.org; and (2) the Court of Appeals, Division III; and (3) I also mailed it to Michael D. Coombes/DOC#841276 Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.

Note: I have standing permission from the appellate division at the Spokane County Prosecutor's Office to efile an Appellant's Brief.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 28, 2012, in Longview, Washington.



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