

NO. 89568-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
MICHAEL D. COOMBES,
Petitioner.

PETITION FOR DISCRETIONARY REVIEW

Petitioner,

MICHAEL D. COOMBES, # 841276
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

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SUPREME COURT
STATE OF WASHINGTON
2019 FEB 18 A 8 20
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I. IDENTITY OF PETITIONER

The Petitioner, Michael D. Coombes, asks this court to accept review of the Court of Appeals decision terminating review designated in Section II below.

II. COURT OF APPEALS DECISION

The Petitioner, Michael D. Coombes, seeks review of the Unpublished Opinion of the Court of Appeals, Division III, filed in State v. Coombes, No. 30550-3-III (June 18, 2013). A copy of this decision is attached as Appendix "A" and which is hereby incorporated fully by this reference.

III. ISSUES PRESENTED FOR REVIEW

This case arises from the Spokane County Superior Court's evidentiary rulings that encroach upon the right to a fair trial through a fundamentally unfair application of the Court Rules. Because Washington Courts must ensure that innovation does not override the requirements of due process and fundamental fairness,³ the issues presented for review are:

1. Should this court review the Court of Appeals decision because it conflicts with decisions of this court and other Court of Appeals decisions on issues affecting State and Federal constitutional rights?

³ The due process clause of the 14 Amendment, § 1 and Article I, § 3 requires that an accused receives a fair trial where all his fundamental rights are observed. Gladin v. Weimeright, 327 U.S. 400 (1972); Winter v. New York, 333 U.S. 507, 514 (1948). This standard requires criminal prosecutions to comport with "prevailing notions of fundamental fairness." California v. Trombetta, 567 U.S. 479, 486 (1994); Estelle v. McGuire, 502 U.S. 67, 75 (1991). Thus, the right of an accused to due process includes the right to a fair opportunity to defend against the State's prosecution on an even playing field. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

2. Should this Court Review the Decision of the Court of Appeals because it raises a significant question under the State and Federal Constitution?
3. Should this Court grant review because this Petition involves issues of of substantial public interest?

IV. STATEMENT OF THE CASE

Coombes's Statement of the Facts and Prior Proceedings in the Appellant's Brief (Section C) sets forth the complete procedural and factual background in this matter and which is hereby incorporated fully by this reference.

In summary, the State charged Michael D. Coombes in Count I with First Degree Murder and in Count II with First Degree Unlawful Possession of a firearm. The pretrial discovery indicated that Mr. Coombes was under the influence of narcotics at the time of the incident and that a .38 caliber pistol was used in the commission of this crime.

On June 9, 2008, the State successfully negotiated an agreement for Coombes's guilty plea in exchange for a 25 year sentence with Count II being dismissed. The trial court accepted the guilty plea and honored the agreement by imposing a 25 year sentence and dismissing Count II. Coombes was then remanded to the Washington Department of Correction to carry out the terms of his confinement wherein it is undisputed that he received a tattoo memorializing this agreement. RP 199-200.

Thereafter, Mr. Coombes filed a Personal Restraint Petition directly in the Court of Appeals, Division III, under case No. 28036-5-III challenging the legality of the plea. On June 27, 2011, the Court of

Appeals entered an order granting the Petition, remanding the matter back to the trial court for further proceedings. This order appears at In re Coombes, 159 Wn.App. 1044 (2011).

On remand, Mr. Coombes withdrew his guilty plea and elected to proceed to trial. The Case was set for trial on August 11, 2011 and trial commenced on December 12, 2011. The State made the conscious decision not to pursue the First Degree Unlawful Possession charge in the second trial. Mr. Coombes successfully exercised his privilege to remain silent and did not take the stand in his own defense.

Pre-trial, the trial court ruled that evidence of the tattoo Mr. Coombes received in prison was admissible to establish Coombes's identity as the shooter. RP 199-200. Initially, the court determined that the unfair prejudice of the evidence outweighed any probative value because it was symbolic "of the original agreement," however, would allow the state to tweak the evidence to remove the recognized prejudice inherent within the tattoo's memorialization of the original agreement. RP 64; RP 199-200. The State accomplished this by cropping Mr. Coombes's tattoo to represent only the gun. Id. It was this version of Mr. Coombes's tattoo that was admitted, over objection, at trial. RP 199-201.

At trial the State admitted an Iver Johnson revolver as Exhibit #33. While the State's expert could not conclusively identify that particular gun as the murder weapon, this witness did testify that the "evidence bullet" matched the FBI's General Rifling Characteristics for a weapon

manufacture named Iver Johnson and "other revolvers with similar characteristics." RP 632-635. It was only upon this witness stretching the parameters of this data base was he able to include a Smith & Wesson firearm as an "other revolver" where otherwise it would have been excluded for purposes of this search. Id.

Trial testimony reveals that the Iver Johnson revolver is not the Smith & Wesson revolver depicted in Coombes's tattoo, RP 542; RP 627-629. The State's own expert confirmed that the Iver Johnson revolver is a type of gun that is distinguished from that of a Smith & Wesson. RP 628-629. At no time did the State offer any testimony regarding Coombes's tattoo, despite its assurances that it would. As a consequence, the State was permitted to introduce the picture of Coombes's tattoo cropped down to the gun without confrontation; leaving the jury to speculate as to its meaning.

A jury convicted Coombes of the murder as charged in Count I. The sentencing Court imposed a standard range sentence of 492 months.

On Appeal, Coombes challenged, among other things, the admission of his tattoo. Coombes argued that the trial court abuse its discretion in admitting the tattoo because it was irrelevant unduly prejudicial. Coombes argued that he was entitled to a reversal because the error was not harmless and violated his right to a fair trial.

The Court of Appeals limited its resolution to this issue to the State's contention that the tattoo was relevant, ignoring the fact that

the trial court found the evidence relevant under the identity exception to ER 404(b). On June 18, 2013, Division III affirmed Coombes's conviction. The Court, relying on State v. Nelson, 152 Wn.App. 775 (2009), reasoned that the tattoo evidence was relevant because "...it depicted the identical type of gun used in the murder" corroborating "...Coombes as the shooter" and that Coombes had the opportunity to offer a "benign reason" to neutralize any prejudice resulting from its admission. Slip Opinion at 11-12.

On September 26, 2013, Coombes filed a Motion for Reconsideration that was denied on October 22, 2013.

Coombes now petitions for this Court's review of that decision.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case primarily involves an important problem in the administration of our criminal justice system in the State of Washington: whether the admission of irrelevant and unduly prejudicial character evidence designed to coerce Coombes's testimony was reversible error because it was accompanied by an application of the Court Rules in a fundamentally unfair manner. The negative answer given by the Court of Appeals is in conflict with the decisions of this Court and other Court of Appeals decisions. RAP 13.4(b)(1)-(2).

The majority affirmed the trial court's decision to admit Coombes's tattoo as substantive evidence in the State's case-in-chief solely on the State's contention that it was relevant. This decision is in conflict

with long established principles and rules of appellate procedure because it ignores the basis of the trial court's ruling by resolving this appeal on a basis that was not argued at trial.² Therefore, the majority's decision raises a significant question of law and involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3)-(4).

Finally, the decision below creates an irreconcilable conflict about important questions concerning evidentiary rulings encroaching upon the right to a fair trial. Resolution of this conflict is necessary because the conflict chills and threatens to violate constitutional rights essential to the guarantee to a fair trial. RAP 13.4(b)(3)-(4).

A. THE COURT OF APPEALS COMMITTED ERROR IN AFFIRMING THE TRIAL COURT'S APPLICATION OF THE COURT RULES THAT DENIED COOMBS HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND FUNDAMENTAL FAIRNESS CONTRARY TO THE ESTABLISHED AUTHORITY.

While due process does not guarantee every person a perfect trial, Brunton v. U.S., 391 U.S. 123, 135 (1968), both our state and federal constitution do guarantee all defendant's a fair trial untainted from inadmissible, prejudicial evidence. State v. Swenson, 62 Wn.2d 259 (1963); Alford v. U.S., 282 U.S. 687 (1931). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. State v. Ford, 137 Wn.2d 472 (1990).

The conflict created by the Court of Appeals decision in affirming the trial court's admission of tampered evidence that was irrelevant and unduly prejudicial not only denied Coombs his constitutional right to

a fair trial, Estell v. Mcquire, 502 U.S. 62, 75 (1991), but resulted in a "denial of fundamental fairness." Walker v. Engle, 703 F.2d 959, 962-63 (1983); Dickerson v. Wainwright, 683 F.2d 348, 350 (1982).

- (1) The Court of Appeals Decision is internally inconsistent with the rational of its decision in State v. Nelson and in substance with State v. Hutchins and rest on a factual basis which is contradicted by the record.

The Court of Appeals committed error in affirming the trial court's decision to admit evidence of Coombes's tattoo under State v. Nelson, 152 Wn.App. 755 (2009). In issuing its decision herein, Division III rejected its own reasoning in State v. Hutchins, 73 Wn.App. 211 (1991) to impermissibly expand the rational of Nelson. RAP 13.4(b)(2).

The record in this case does not support the majorities conclusion that Coombes's tattoo "...depicted the identical type of gun that was used in the murder" corroborating "Mr. Coombes's identity as the shooter," because the State's theory identified the Iver Johnson as the murder weapon. The record show that Coombes's tattoo depicted a Smith & Wesson revolver and not an Iver Johnson. Indeed, the State's evidence distinguishes these two weapons from one another. The State's own expert, in effect, excluded a Smith & Wesson as the weapon used in the commission of this crime while inferring that the rifling characteristics indicated the Iver Johnson. In fact, this is what formed the basis of the State's theory ^{on} culpability which it had advanced to the jury.

The Majorities determination that Coombes's tattoo was relevant is clearly erroneous within the meaning of ER 401 as understood in Nelson.

Nelson does not stand for the general proposition that tattoo evidence is per-se admissible. The Nelson case presented a unique set of circumstances making the the tattoo evidence in that case relevant warranting its conditional admission.

In Nelson, the defendant was prosecuted for dog fighting. The defendant had a tattoo of two dogs fighting at the time of his arrest. 152 Wn.App. at 762-769. The court found the evidence of the defendant's tattoo was admissible to the extent that it furthered the experts opinion. Id. at 765-768.

The Nelson Court was mindful that "most jurors would be unfamiliar with the world of dog fighting." 152 Wn.App at 768. While the court also recognized that the evidence was prejudicial to Nelson, it reasoned that it was proper to allow the State's expert to use "his specialized knowledge" to bring the evidence together into a "coherent picture for the jury" to understand the tattoo in the context of the case. Id. at 766-769.

The rationale applied by the Nelson Court was intended to assist the jury in understanding that "other animal fighting investigations have demonstrated that having a tattoo depicting dogs fighting makes it more likely that one is connected to an animal fighting operation." 152 Wn.App. at 772. The implicit assumption underlying this decision is that Nelson's tattoo would have inadmissible had not this unique set of circumstances existed.

The Circumstances presented in this case does not fall within the Nelson paradigm. There is nothing unique or uncommon about Coombes's tattoo that made it more likely that Coombes was connected to this crime or the requirement that there be some type of expert testimony to avoid jury confusion. The expert testimony that was offered actually supports Coombes's position that evidence of his tattoo should have been excluded.

The majorities reasoning fails to recognize that, unlike Nelson, Coombes did not have the tattoo at the time of his arrest and it did not depict the actual act. Instead, Coombes did not receive the tattoo until "after negotiations" and "he was sentenced, and went to prison." RP 63. This is consistent with the trial court's initial determination that the tattoo was inadmissible because it was symbolic of "the original agreement." RP. 199-200. Indeed, the trial court permitted the State to "tweak[]" the tattoo to remove the recognized prejudice inherent within the tattoo's memorialization of the "original agreement." ER 410; RP 64; RP 199-201.

The majorities impermissible expansion of Nelson conflicts with its previous holding in State v. Hutchins, 73 Wn.App. 211 (1994). In that case, Hutchins was prosecuted for possession with intent to deliver. Division III held that where intent to deliver is inferred from possession of large quantities of controlled substances, some other additional factor is needed. Id. at 216. A police officer's opinion that the quantity exceeded what would be expected for personal use was insufficient to establish an intent to deliver, rather, "it assumed the very facts the State had the burden of Proving." Id. ---

Hutchins is applicable to Coombes's case and helps explain why Coombes's tattoo was inadmissible unless coupled with other evidence tending to connect that tattoo with the actual commission of the crime. In other words, corroborating something other than the mere fact that Coombes received a tattoo.

As previously discussed, the State's evidence identified the Iver Johnson revolver as the logical match to the murder weapon. The State offered literally no evidence tying the weapon depicted in Coombes's tattoo (Smith & Wesson) to the murder with which Coombes was charged. The gist of the State's argument was not that the tattoo displayed the act or weapon, but instead the tattoo was evidence of "Coombes's knowledge of intimate details." This argument fails to recognize that Coombes's did not obtain this intimate knowledge until after the State had fulfilled its obligations under the constitution and laws of this state to disclose those facts to him.

Given the asserted significance of the evidence and the experts opinion, Coombes's tattoo did not add any direct or circumstantial evidence. Rather, it assumed the very facts the State had the burden of proving.

This conflict is highlighted by this Court's decision in State v. Gregory, 158 Wn.2d 759 (2006), declaring that 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 probable or less probable than it would be without the evidence." Id. at 835 (quoting ER 401).

The central issue facing the jury in this case was whether or not Coombes was guilty of the charged murder. Because there is no nexus between the tattoo and the issues being tried, the evidence does not make it more or less probable that Coombes was involved in this murder. Absent that nexus, the tattoo does not lead to the logical inference that it "corroborated Mr. Coombes's identity as the shooter." ER 401; State v. Harris, 97 Wn.App. 865, 869 (2000).

The Court of Appeals decision is not only internally inconsistent, but is based on facts that are not supported by the record. Division III's decision to ignore its own previous authority should be reviewed by this in order to promote uniformity and to clarify the conflict. RAP 13.4(b)(2).

(ii) The Court of Appeals decision to affirm the Trial Court's decision to introduce character evidence under the guise of identity evidence conflicts with the established authority on this issue.

While the Court of Appeals acknowledges the basis for admitting the tattoo evidence, Division III asserts the it was Coombes who addressed the tattoo under ER 404(b) when discussing the relevance of the tattoo within the context of the trial court's ruling on admissibility of the identity evidence. This assertion misstates the argument and the record. Coombes's opening brief notes that it was the trial court that introduced this issue in its ruling to broaden the rationale of Nelson by deciding to admit Coombes's tattoo under the identity exception to ER 404(b). This is consistent with the majorities reasoning that the tattoo was relevant to identity because it depicted the "identical type of gun that was used in the murder." Coombes's argument is a recognition of the ground rules for determining relevance established by the court below and insistence those rules be fairly applied.

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. State v. Holmes, 43 Wn.App. 397, 400 (1986). Evidence, however, relevant to identity is a recognized exception to this prohibition to the extent that identity is at issue. State v. Devincentis, 150 Wn.2d 11, 21 (2003); State v. Eastbrook, 58 Wn.App. 805, 813-814 (1990). In doubtful cases, the evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776 (1986). The admission or refusal of ER 404(b) evidence is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 262 (1995).

There is no issue of identity in this case because, under the states version of events, Coombes never disputed the fact that he was present when Mr. Nichols was killed or that he was the one who pulled the trigger. Thus, identity was of no consequence to the outcome of this case and the trial court's ruling is clearly erroneous. State v. Rundquist, 79 Wn.App. 786, 793 (1995).

Notwithstanding the fact that Coombes's tattoo was inadmissible to establish identity, this is precisely the type of character evidence to establish a propensity expressly forbidden under ER 404(b). State v. Everybodytalksabout, 145 Wn.2d 456, 464 (2002). Specifically, it invited the jury to convict Coombes based upon the inference that he had a propensity to be armed with the particular type of firearm used in the commission of this crime and, therefore, by deduction must have been on the night in question. In other words, the effect of the evidence was to demonstrate that Coombes was a dangerous person who used firearms in the furtherance of crime, then argue that he was not only guilty because he was acting in conformity with his bad character but received a tattoo glorying the shooting of Mr. Nichols. Holmes, 43 Wn.App at 400.

Federal courts are equally protective of a defendant's right to a trial untainted by such evidence. By comparison with the present case, the court in Bretts, where drug dealing was the propensity at issue, reasoned that 404(b) could not be more clearer in proscribing character evidence that is "introduced circumstantially to prove character." U.S. v. Bretts, 16 F.3d 748, 759-760 (1994).

There are numerous other federal cases which recognize that the improper admission of inflammatory evidence violates a defendant's due process right to a fair trial. Sims v. Stinson, 101 F.Supp. 187, 196 (2000)(citing Michelson v. U.S., 335 U.S. 469, 475 (1948); Drowling v. U.S., 493 U.S. 342 (1990); Bringer v. U.S., 338 U.S. 160 (1949)). Because the use of such evidence is contrary to "firmly established principles of Anglo-American jurisprudence," McKinney v. Reese, 993 F.2d 1378, 1380 (9th cir), cert. denied, 510 U.S. 1020 (1993), especially when, like here, there is no proper influence the jury can draw from the evidence. Sims, 101 F.Supp.2d at 194-95.

The same consideration underlying ER 404(b) exclusions apply equally to the prohibitions described in ER 410(a). Coombes's tattoo expressed--what many prisoners manifest throughout the prison system--a visual reminder of a past act that he remedied through withdrawing his plea. Coombes's tattoo taken holistically memorialized that plea through the representation of the prison walls, the number 25 and the Smith & Wesson. It is irrelevant that the majority finds that the State did not argue Coombes's tattoo as an "act" related to his guilty plea, it does not change the fact that it is evidence of his prior conviction in this case that should have been excluded pursuant to ER 410(a).

It is fundamentally inconsistent to suggest, as the majorities opinion now suggest, that the State can not introduce prior conviction evidence unless it is a evidence of a prior conviction on the current charge and the defendant is provided an opportunity to "offer a benign reason." Assuming Coombes's would testify truthfully, he would be forced to acknowledge the prior agreement; inviting the jury to speculate that since he was convicted of the crime before he must be guilty of the crime. State v. Burton, 101 Wn.2d 1, 18-19 (1984); State v. Nelson, 109 Wn.2d 69, 73-74 (1984); State v. Jones, 101 Wn.2d 113, 120 (1984).

Divisions III's judgment rests on an erroneous view of Washington's Evidence Rules and conflicts with decisions of this Court and other Court of Appeals decisions, and raises important questions of law warranting this Court's plenary review. RAP 13.4(b)(1)-(2).

(iii) The Court of Appeals Decision Conflicts Sharply among the authorities regarding the question of prejudice.

ER 403 directs the Courts to exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. The rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury, or by consideration of undue delay, waist of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court

should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is in dispute, the availability of alternative means of proof, and the potential for jury confusion. State v. Kendrick, 47 Wn.App. 620, 629 (1987) (quoting M. Graham, Federal Evidence § 403.1, at 180-81 (2d ed 1986)); State v. Dunn, 125 Wn.App. 582, 588 (2005).

For example, in Robinson, this Court reaffirmed its holding in State v. Lloyd, 138 Wash. 8 (1876) that weapons and other articles not used in the commission of a crime is not relevant and unduly prejudicial because it tends to cause jury confusion. State v. Robinson, 24 Wn.2d 909, 915-916 (1946); Lloyd, 138 Wash. at 17; see also State v. Hiatt, 187 Wash. 226, 236-237 (1936).

Here, the trial court allowed the State to introduce evidence of Coombes's tattoo that was cropped down to something it was not intended to be: a picture of a revolver legally unconnected with the commission of this crime. 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. Taken together, these two facts permitted the prosecutor to create this false impression that Coombes received a tattoo to glorify his shooting of Mr. Nichols.

In reality, Coombes's tattoo memorialized the 25 year sentence he received for a crime he did not commit. The altered version of Coombes's tattoo depicting only the Smith & Wesson was immaterial. As indicated elsewhere, this evidence was intended to compel Coombes's testimony on issues inherently prejudicial. ER 410(a).

Coombes's exercise of his privilege to remain silent severely prejudiced him at trial. The jury would undoubtedly require a response from Mr. Coombes which he was unable to give. This predicament allowed the prosecutor to admit the tattoo without confrontation which assumed the very facts he had the burden of proving: that the tattoo depicted the "identical type of gun used in the murder" and that Coombes was the "shooter."

As previously argued, the jury's assessment of the tattoo without explanation or confrontation necessarily resulted in the propensity consideration that the evidence was designed by the State to achieve.

The State's evidence was equivocal on the issue of guilt. It had extreme difficulty in producing evidence that Coombes's was the shooter and if so his intent. The State was able to overcome this difficulty by the very evidence that should have been excluded. Coombes's tattoo was not unique to any stage of the investigation nor did it provide a different perspective on the facts that lead to Mr. Nichols death. Instead, it was a needless presentation of cumulative weapons evidence intended to confuse and mislead the jury. This prejudice was enhanced by removing any fair opportunity Coombes had to confront the evidence without agreeing to invite even more prejudicial ER 410 evidence to show criminal propensities.

The Majorities assessment of the prejudice in this case conflicts sharply with the established authority on this issue which all conclude that such evidence should be excluded under ER 403 and ER 410, warranting this Court's review and correction. RAP 13.4(b)(1)-(2).

- (iv) The decision below affirms Coombes's conviction based on tampered and/or altered evidence and therefore conflicts with the Court of Appeals decision in State v. Roche.

In State v. Roche, 114 wn.App. 424 (2001), Division I reversed a conviction after it was discovered that a state chemist had been tampering with evidence to hide his own heroin addiction. Id. at 431, 440. Although it was never determined whether that chemist had tampered Roche's evidence, Division I determined that the conviction must be overturned in the interest of maintaining the integrity of our criminal justice system so that:

...the public, the defense bar, the prosecuting attorneys, and the Courts of Washington will clearly understand that we will not tolerate criminal convictions based on tainted evidence...

Id. at 439-440, 447 (adopting the reasoning of the Snohomish County Prosecutor's Office).

In this case there is no question that the State was permitted to tamper with the picture of Coombes's tattoo by tweaking it to represent only the gun. An ordinary understanding of the word "tweak" means to twist sharply. Riverside, Webster II New Collage Dictionary, (1995), pg. 1191. In turn the definition of the word twist is to alter the normal appearance of; Contort: to distort the intended meaning. Id. at 1192. This is synonymous to the legal definition of the term "tamper" which is to meddle so as to alter (a thing); To interfere improperly to meddle. Black Laws Dictionary, Seventh Edition, (1999), pg. 1468.

Initially, the trial court determined that the prejudice inherent in the tattoo outweighed any probative value because it was symbolic of "the original

plea agreement." RP 199-200. It was only after the State was allowed to alter material aspects of the tattoo and distort its meaning did the trial court reverse its position and find the picture of Coombes's tattoo, cropped down to the revolver, admissible and no longer symbolic of "original agreement."

It should be emphasized that Coombes does not dispute that our adversarial system compelled the state's antagonistic posture to extrapolate its theory on the evidence, however, either the evidence supports a certain theory or it does not. In this case the evidence of Coombes's tattoo did not fit the State's asserted theory until after it underwent significant alterations.

Clearly, the trial court abused its discretion in permitting the State to substitute the picture of Coombes's tattoo with its altered version. The Due Process right to a fair trial and fundamental fairness should be understood to prohibit the State from the practice of customizing evidence to suit whatever theory it chooses to pursue.

Thus, this case falls squarely within the conduct the Court of Appeals proscribed in Roches. This sharply different treatment of Coombes and similarly situated persons by Division III creates intolerable conflict-and severe unfairness- that this Court should resolve. RAP 13.4(b)(2).

B. THE DECISION BELOW, RAISING SIGNIFICANT QUESTIONS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS, SUBSTANTIALLY UNDERMINES THE TRUTH SEEKING FUNCTION OF TRIALS AS TO OFFEND THE DUE PROCESS RIGHT TO A FAIR TRIAL.

- (i) The decision below creates an objective chill on the due process right to petition for post conviction relief and the right to remain silent.

The "State can take no action which will unnecessarily chill or penalize the assertion of constitutional rights." State v. Wallins, 166 Wn.App. 364, 372 (2012) (quoting State v. Rupe, 101 Wn.2d 664, 705 (1984)).

- (a) The decision below chills the right to seek post conviction relief by affirming the trial court's actions penalizing Coombes for successfully withdrawing his plea.

The First Amendment protects the right to petition the courts. Washington authorizes such petitions in the form of post conviction challenges under RCW 10.73.090. In re Cashaw, 123 Wn.2d 138, 145 (1994); Hewitt v. Helms, 459 U.S. 460, 466 (1994). This right is of vital importance in our criminal justice system, In re Bailey, 141 Wn.2d 20, 25 (200), and is protected by due process of law. State v. Smith, 144 Wn.App. 860, 863-864 (2008) (quoting City of Seattle v. Klein, 166 Wn.2d 554, 566 (2007)).

It is fundamentally unfair for the State to fulfill its obligations of disclosure, negotiate an agreement that sent Coombes to prison for 25 years where he receives a tattoo memorializing this agreement, then penalize Coombes for successfully vacating that agreement by allowing the State to use the tattoo in its case-in-chief as substantive evidence that Coombes was "the shooter."

Coombes respectfully submits that this Court's supervisory jurisdiction is necessary in order to address the objective chill on the due process right to petition for post conviction relief created by the decision below. RAP 14.4(b)(3).

(b) The Court of Appeals holding follows from Coombes's exercise of his Article I, § 9 and 5th Amendment right to remain silent. This decision not only represents an unconstitutional burden upon the privilege against self incrimination but condones burden shifting.

The State is constitutionally obligated to prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487 (1983); In re Winship, 387 U.S. 358, 364 (1970). This standard compels the State to establish guilt by evidence independently and freely secured, and not by coercion prove a charge against an accused out of his own mouth. The State cannot do indirectly what the constitution forbids it to do directly. Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 607 (1926).

The majorities reasoning that Coombes could have offered a "benign reason" to neutralize any prejudice resulting from his tattoo impermissibly focusses on Coombes's exercise of his constitutional right not to testify. State v. Easter, 130 Wn.2d 228, 235 (1996); Huffman v. U.S., 341 U.S. 479, 486 (1951). Coombes had no obligation to assist the State in producing evidence against himself nor was he required to rebut any inference of guilt from his tattoo with a "benign reason." U.S. Const. amends V & XIV; Wash. Const. art. I, §§ 3, 9.

In the same manner that the constitution proscribes confessions extracted through inducements that "fall short of 'compulsion by torture,'" it follows that it also forbids the State from coercing testimony by admitting testimonial evidence that only the defendant, who attempts to exercise his right, may answer with a "benign reason." Malloy v. Hogan, 378 U.S. 1, 8 (1964); see also Spano

v. New York, 350 U.S. 315, 323 (1953) (quoting Haynes v. Washington, 373 U.S. 503 (1963)).

It was unreasonable for the trial court to introduce evidence tailored to coerce Coombes's testimony. Permitting the State to compel a "benign reason" forced Coombes to choose between inviting the jury to consider his prior conviction or allow the State to introduce testimonial evidence without confrontation. This policy is unconstitutional because "[the inference] is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Portuncido v. Agard, 5129 U.S. 61, 76 (2000) (Griffin v. California, 380 U.S. 609, 614 (1965)). Such a proposition undermines the principles of our fair trial because it poses a risk of chilling basic constitutional rights.

Perhaps more importantly, the tattoo evidence had no bearing on any of the statutory elements or circumstances and is in no way relevant on whether Coombes, by statute, was guilty. This evidence, however, assumes the very facts the State had the burden of proving while simultaneously shifting the burden to Coombes to prove that it does not.

Coombes respectfully submits that unless corrected immediate and irreparable harm will befall not only Coombes, but all others who are chilled and deterred from exercising their constitutionally protected right to remain silent and meet minimal requirements of due process. Additionally, it would ensure that criminal prosecutions are accusatorial and not inquisitorial, Rogers v. Richmond, 365 U.S. 534, 541 (1960), preserving the "truth seeking function of our adversary process." Agard, 529 U.S. at 76. RAP 13.4(3).

(ii) The Court of Appeals decision, in effect, holds that testimonial evidence may be admitted without confrontation when the only witness to confront is the defendant who has exercised his constitutional right to remain silent.

The majority ignores the confrontational issues implicated by the nature of the evidence at issue. Crawford v. Washington, 541 U.S. 36, 51-56 (1951); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2538-40 (2004). Coombes's constitutional right to a compulsory process does not relieve or substitute the State's obligations under the Confrontation Clause. Id. 129 S.Ct. at 2540.

The decision below substantiates that Coombes's tattoo was admitted for purposes of proving that "it depicted the identical type of gun used in the murder" and that Coombes was "the shooter." The fact that Coombes successfully exercised his right to remain silent does not change the fact that the tattoo was subject to confrontation, placing the burden on the State to produce some witness for Coombes to confront. U.S. Const. Amends. VI & XIV, §1; Wash.Const. art. I, §§ 3, 22.

This Court should review that decision because it leads to the absurd conclusion that the State is prohibited from introducing testimonial evidence unless the only witness to confront is the defendant who has successfully exercised his privilege not to take the stand at trial. RAP 13.4(b)(3).

(iii) The Court of Appeals decision necessitated a Hobson's Choice.

There is a fundamental unfairness about the proceedings involving Coombes. The choice imposed upon Coombes, the choice between incrimination and confrontation, is not one which the State may constitutionally impose. No State may force an individual to "choose between the rock and the whirlpool" or "impose conditions which require the relinquishment of constitutional rights." Frost, 271 U.S. at 593-594. Such an alternative deprived Coombes of "the right to remain silent unless he chooses to speak in the unfretted exercise of his own will and to suffer no penalty." Hogan, 378 U.S. at 8. The Hobbsen's Choice imposed upon Coombes should be reviewed and corrected by this Court. RAP 13.4(b)(3).

**C. THE COURT OF APPEALS DENIED COOMBES
A RIGHTFUL REMEDY.**

In this case the evidence was extremely weak on the question of Coombes's guilt. The State's case rested almost entirely on the alleged confession that consisted of the conflicting testimony of Detective Burbridge's Madsen's interview of Mr. Coombes. See Motion for Reconsideration at p.10. The only way the State attempted to stretch criminal liability was by creating this unsupported theory that the tattoo established a "link" sufficient to corroborate Coombes's identity as "the shooter." The State did not present any further argument to the court how Coombes's tattoo mane any fact at issue even slightly more or less likely. The issue at trial was whether or nor Coombes committed this murder. The State's expert inferred that the rifling characteristics of the Iver Johnson established this fact. If the State's allegations were proven, and its theory on the evidence correct then the jury would have to accept that the Iver Johnson established that Coombes was the shooter not a picture of a Smith & Wesson.

Clearly, Coombes's tattoo was immaterial to any issue at trial. The trial court's ruling admitted a photo of Coombes's tattoo cropped down to a revolver. Any reasonable jury would have reached one of two conclusions from this altered evidence. First, the jury could conclude that Coombes received the tattoo to glorify the shooting of Mr. Nichols. Or, the jury could conclude that Coombes had a bad general character with criminal propensities while armed with firearms and thus must have been acting in conformity with his bad character on the night in question.

Notwithstanding the fact that Coombes exercised his privilege not to take the stand, the trial court admitted evidence of Coombes's tattoo as substantive evidence in the State's case-in-chief to prove that Coombes was "the shooter." There can be no doubt that Coombes's tattoo was subject to confrontation, however, since Coombes exercised his privilege the State was not required to produce a witness to confront this evidence. This negatively impacted defense counsel's ability to perform effectively, leaving the process presumptively unreliable. U.S. v. Cronin, 466 U.S. 648, 656 (1984).

When a defendant's constitutional rights, such as the right to a fair trial, are violated, the conviction must be reversed unless the reviewing court is convinced beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24 (1976); State v. Maupin, 128 Wn.2d 918, 928-929 (1996). The ruling at issue here removed any genuine level of adversity or quality of advocacy to this issue. Given the lack of physical or circumstantial evidence the jury's assessment of Coombes's credibility was absolutely essential to the verdict. It is impossible to conclude, beyond a

reasonable doubt, that evidence of Coombes's tattoo to establish this so called "link" to corroborate his identity as "the shooter" did not bolster the police investigation and contribute to that determination.

In the alternative, the erroneous admission Of ER 404(b) and ER 410(a) evidence required reversal if there is a reasonable probability that the error materially affected the trial. State v. Rouge, 104 Wn.App. 981, 988 (2001); Wainwright, 683 F.2d at 350 (1982). The evidence of Coombes's tattoo not only told the jury that he was the type of person who had a propensity to use firearms in the furtherance of crime but permitted the State to create this false impression that Coombes received the tattoo to glorify the shooting of Mr. Nichols.

As previously discussed, the evidence of Coombes's guilt was equivocal at best. In these circumstances the admission of a single piece of irrelevant, unduly prejudicial evidence is sufficient to turn an acquittal into a conviction. Coombes argues that is precisely what happened in this case. The evidence of Coombe's tattoo cropped down to the revolver bolstered the State's investigation casting Coombes in an extremely unfavorable light and was the piece of evidence that convinced the jury to believe the detective's testimony and convict. Thus, under the facts of this case it more likely that but for the admission of this improper evidence the jury would have acquitted.

**D. THIS PETITION INVOLVES ISSUES OF
SUBSTANTIAL PUBLIC INTEREST.**

The facts of this case leads to the inescapable conclusion that the mandates of the Fourteenth Amendment and Article I, § 3 has been violated. Because the

public has an interest in maintaining the integrity of our criminal and appellate justice system, this Court should take this opportunity to correct the error below, resolve the uncertainty and conflict generated by the decision of State v. Combes, and clarify that the individualized findings of the type made by the trial and appellate court in the instant case violates the due process right to a fair trial. In so doing, the courts will necessarily provide guidance to the many cases that will undoubtedly be processed through Division III and other appeal courts that are attempting to ensure that an accused receives his due process process in a manner that satisfies the constitutional guarantee of the right to a fair trial. RAP 13.4(b)(4).

VI. CONCLUSION

For all of the foregoing reasons, this Court should grant review.

RESPECTFULLY SUBMITTED this 5 day of February, 2014.


Michael D. Coombes, # 841276
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

I, Gregory L. Hyde, state that on the 5th day of February 2014, I deposited a true copy of the document to which this certificate is attached to into the United States Mail, postage pre-paid, processed as legal mail at the Airway Heights Corrections Center, as per GR 3.1, addressed to Hon. Renee S. Townsley, Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99203, Spokane County Prosecutor's Office, County-City Public Safety Building, West 1100 Mallone, Spokane, WA 99206.


Gregory L. Hyde, #777665
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APPENDIX A

FILED
JUNE 18, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 30550-3-III
)	consolidated with
Respondent,)	No. 30551-1-III
)	
v.)	
)	UNPUBLISHED OPINION
MICHAEL DUKE COOMBES,)	
)	
Appellant.)	

KULIK, J. — Michael Coombes appeals his convictions for first degree murder and tampering with a witness. He argues the trial court improperly joined three separate charges and erred in admitting evidence of his gun tattoo. He also contends that the trial court erred by instructing the jury it could convict him on alternate means of committing the crime of tampering with a witness when the State only charged him with one means. He also alleges ineffective assistance of counsel based on trial counsel's failure to object to the defective jury instructions. The State concedes that the trial court incorrectly instructed the jury.

We affirm the conviction for first degree murder and reverse and remand the tampering with a witness conviction.

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FACTS

During the afternoon of September 3, 2007, a woman spotted a person lying in the bushes in Spokane's Beacon Hill neighborhood. A teenage boy volunteered to take a closer look and discovered that the person, a man, was deceased. When police arrived, they discovered the man had a gunshot wound behind his right ear. The man was later identified as William Nichols. An autopsy confirmed that his cause of death was a brain injury caused by the entry of a bullet into his skull.

Police identified Michael Coombes as a suspect. When police contacted Mr. Coombes, he spontaneously stated, "You got me. It's no big deal. I'm going back where I belong, and I'll die in prison." Report of Proceedings (RP) (Dec. 14, 2011) at 447. A detective removed a revolver from Mr. Coombes's pocket. At a nearby residence, police found ammunition for the revolver in Mr. Coombes's backpack. During interviews with detectives, Mr. Coombes stated he was angry with Mr. Nichols for threatening his nephew and that he, therefore, shot him.

The State charged Mr. Coombes with first degree murder while armed with a firearm and first degree unlawful possession of a firearm. In 2008, he pleaded guilty to those charges. He later filed a personal restraint petition alleging his plea was invalid because he had not been informed at sentencing that he faced a mandatory minimum

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sentence without eligibility for earned early release during the first 20 years. In an unpublished opinion, this court concluded that Mr. Coombes's guilty plea was not knowing and voluntary and remanded to the trial court to permit him to withdraw his plea. *In re Coombes*, 159 Wn. App. 1044, 2011 WL 240687. Mr. Coombes withdrew his plea, and the case was set for trial.

Before trial, the State moved to join and consolidate the intimidation and tampering with a witness charges with the first degree murder charge under CrR 4.3 and CrR 4.3.1(a). The State argued that the separate charges were of a "similar character" and, if tried separately, would include a significant amount of overlapping and cross admissible testimony and evidence. Clerk's Papers (CP) at 143. It specifically pointed out that the offenses were related because after being incarcerated on the murder charge, Mr. Coombes made a threatening call to a witness and conspired with an inmate in the county jail to "either let me (Mr. Coombes) know where he is at, or shut him up before I go to trial." CP at 139.

Defense counsel argued that the offenses were dissimilar because one involved interference with the judicial process and the other with physically harming another. He also argued that there was a substantial danger of prejudice, arguing, "whenever you're adding an allegation that somebody is interfering with the judicial process, interfering

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with the witness, I think the mere allegation is going to taint any trier of fact.” RP (Aug. 25, 2011) at 10. He also argued, “when you start piling on the charges, there’s always a concern that the jury’s [going to] start cumulating evidence.” RP (Nov. 3, 2011) at 3.

The court granted the State’s motion for joinder and consolidation, finding the facts in the separate cases were of a similar character. It reasoned, “if these matters were to be tried separately, there would be significant overlap and testimony that would clearly be cross-admissible and likely admitted into evidence in both proceedings.” CP at 137. In its oral ruling, it explained that the different charges “play[ed] into the same set of facts.” RP (Nov. 3, 2011) at 6. The court also stated that it could not discern any prejudice from joining the offenses.

At trial, the State moved for admission of a gun tattoo Mr. Coombes obtained after the entry of his guilty plea in 2008, asserting it was relevant to demonstrate his connection to the crime. The court admitted the photograph of the tattoo, reasoning that its relevance outweighed the prejudice.

Several witnesses testified that Mr. Coombes admitted killing Mr. Nichols. Jamie Hall testified that Mr. Coombes told her that he killed Mr. Nichols. Jason Pletcher testified that he and Mr. Coombes acquired a .38 revolver and that the two of them

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purchased ammunition for the gun. He also testified that Mr. Coombes told him that he had killed someone. Eric Nelson testified that he heard Mr. Coombes say, in reference to Mr. Nichols, “[h]e’s done.” RP (Dec. 13, 2011) at 244.

Tevan Williams, who was housed with Mr. Coombes in the same unit at the Spokane County jail, testified that Mr. Coombes told him that he killed someone and asked him to find Eric Nelson, a witness, and urge him not to testify. He testified that Mr. Coombes “asked me if I could contact some of my associates and make sure [Eric Nelson] didn’t come to court.” RP (Dec. 14, 2011) at 425. Mr. Williams also read a note that Mr. Coombes gave him in the jail, which stated in part that he hoped “‘you can either let me know where [Eric Nelson] is at or shut him up before I go to trial.’” RP (Dec. 14, 2011) at 426.

Mr. Coombes did not testify. The jury found Mr. Coombes guilty of first degree murder while armed with a firearm and tampering with a witness. It acquitted him of the charge of intimidating a witness.

ANALYSIS

Joinder. Mr. Coombes first contends that the trial court denied his right to a fair trial when it granted the State’s motion to join for trial the charges arising from three separate incidents. He asserts that the joinder unfairly prejudiced him at trial and that the

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court erred in failing to consider the mandatory *Watkins* factors in evaluating prejudice.
State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989).

The question of whether offenses are properly joined is a question of law we review de novo. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Joinder allows the State to combine two or more offenses in one charging document when the offenses: “(1) [a]re of the same or similar character, even if not part of a single scheme or plan; or (2) [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” CrR 4.3(a). We construe the rule expansively to promote the public policy of conserving judicial and prosecutorial resources. *State v. Hentz*, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), *rev’d in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Once a trial court properly joins offenses, the charges remain joined for trial unless the trial court severs them. CrR 4.3.1(a); *State v. Williams*, 156 Wn. App. 482, 501, 234 P.3d 1174 (2010). CrR 4.4(a)(1) requires a defendant to make a pretrial motion to sever and, if overruled, to renew the motion “before or at the close of all the evidence.” If a party does not bring a motion to sever charged offenses during trial, it waives the right to later challenge that issue on appeal. *State v. Henderson*, 48 Wn. App. 543, 551, 740 P.2d 329 (1987); CrR 4.4.

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Here, Mr. Coombes did not move to sever the offenses, so the issue is waived on appeal. *Bryant*, 89 Wn. App. at 864. Nonetheless, as pointed out by the *Bryant* court, because joinder and severance “are based on the same underlying principle, that the defendant receive a fair trial untainted by undue prejudice[,] the ‘pure’ legal issue of joinder” cannot be decided without considering prejudice. *Id.* at 865. Thus, even if joinder is permissible, “the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant.” *Id.*

To lessen the chance of prejudice, courts consider four factors: “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.” *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Mr. Coombes contends the first factor weighs in his favor because the evidence supporting the charges was weak as evidenced by the jury’s returning of a not guilty verdict on the charge of intimidating a witness. However, Mr. Coombes’s posttrial reliance upon the jury’s verdict is hindsight; at the time the trial court weighed the evidence for purposes of resolving the motion, the anticipated evidence was strong enough to support the decision to join the charges. Mr. Coombes fails to demonstrate

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how his case was unduly prejudiced by a decision to join a weak charge with a stronger one.

As for the second factor, the likelihood that a jury will be confused by a defendant's defenses is slight when the defenses are identical. *Russell*, 125 Wn.2d at 64. Mr. Coombes's defense on each count was denial. Mr. Coombes does not explain how joining the counts would confuse the jury as to his defenses or how those defenses are inconsistent with each other.

The next factor is whether the trial court properly instructed the jury to consider each count separately. Here, the court properly instructed the jury: "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." CP at 122. However, Mr. Coombes contends that this instruction was inadequate because "[i]t did not direct the jury to segregate the evidence to determine whether it supported each count individually." Br. of Appellant at 23.

His argument is without merit. The evidence of each count was sufficiently distinct that the jury could follow this instruction, and we presume the jury did so. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). When the trial court has instructed the jury to consider each count separately and the jury then convicts on some, but not all

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counts, it is clear that the jury followed the instruction; and the defendant can demonstrate no prejudice from failure to sever the counts. *State v. Wilson*, 71 Wn. App. 880, 887, 863 P.2d 116 (1993), *rev'd in part on other grounds*, 125 Wn.2d 212, 883 P.2d 320 (1994).

Here, the jury acquitted Mr. Coombes of the intimidation of a witness charge. Under *Wilson*, this is sufficient to show that the jury followed the instructions.

The final factor in determining whether the potential for prejudice requires severance is the admissibility of the evidence in one charge in a separate trial of the other charge. Here, the trial court found that if the matters had been tried separately, there would be “significant overlap and testimony that would clearly be cross-admissible.” CP at 137. Mr. Coombes asserts that the trial court was required to conduct an ER 404(b) analysis on the record in evaluating this factor. However, he cites no authority for this proposition. Moreover, even if the court erred in this finding, “[t]he fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law.” *State v. Kalakosky*, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). ““When evidence concerning the other crime is limited or not admissible, our primary concern is whether the jury can reasonably be expected to “compartmentalize the evidence” so that evidence of one crime does not taint the jury’s consideration of another crime.”” *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154

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(1990) (quoting *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir. 1987)). Here, the trial court could reasonably conclude that the jury would be able to compartmentalize the various counts. In this case, it was not a particularly difficult task to keep the testimony and evidence of each count separate.

Given that the crimes were not particularly difficult to compartmentalize and that the court instructed the jury to consider the crimes separately, the court did not err in concluding that the potential prejudice did not outweigh the concern for judicial economy.

The trial court did not err in joining the three separate charges.

Photograph of Gun Tattoo. Mr. Coombes contends that the court erred in admitting evidence of his gun tattoo because it is irrelevant and prejudicial under ER 402 and ER 404(b). He also asserts that because the tattoo memorialized his guilty plea, it should have been excluded under ER 410, which bars the admission of evidence relating to a previous guilty plea.

The trial court has discretion to admit or exclude relevant evidence. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). We reverse only for an abuse of that discretion. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Abuse requires a showing that the trial judge's decision is based on untenable grounds or untenable reasons. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.” ER 401. Even if evidence is relevant, however, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403.

Citing ER 404(b), the court found the tattoo relevant and noted that Mr. Coombes could offer a benign reason for having the tattoo. The State argues that the tattoo is relevant because it establishes Mr. Coombes’s knowledge of intimate details of the murder that could only be known by a participant and, therefore, corroborates Mr. Coombes’s identity.

Mr. Coombes addresses the tattoos under ER 404(b), which applies to “[e]vidence of other crimes, wrongs, or acts,” and ER 410(a), which applies to evidence of withdrawn guilty pleas. However, the State introduced the evidence, not as an “act” or related to a guilty plea, but as corroborative evidence that Mr. Coombes was involved in the murder. ER 410 does not apply because the gun tattoo was not offered as evidence of a previous guilty plea. The applicable evidentiary rule is ER 403, which provides for the exclusion of evidence if its probative value is outweighed by the danger of prejudice.

The tattoo was relevant because it depicted the identical type of gun that was used

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in the murder. As such, it corroborated Mr. Coombes's identity as the shooter. Also, as the trial court pointed out, Mr. Coombes was not precluded from offering a benign reason for the tattoo. *State v. Nelson*, 152 Wn. App. 755, 772, 219 P.3d 100 (2009).

There was a tenable basis for admitting the tattoo evidence. The trial court did not abuse its discretion in admitting the tattoo evidence.

Alternative Means Instruction. Finally, Mr. Coombes contends that the trial court erred by instructing the jury on uncharged alternatives to the crime of tampering with a witness. Whether a jury instruction accurately states the law without misleading the jury is reviewed de novo. *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). Mr. Coombes did not object to the instruction at trial. But because this issue involves the omission of elements of the charged crime, it is a “‘manifest error affecting a constitutional right,’” and this court may consider the issue for the first time on appeal. *Chino*, 117 Wn. App. at 538 (quoting RAP 2.5(a)(3)).

“It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). When an information alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

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Such an error is presumed prejudicial unless it affirmatively appears that the error was harmless. *Id.* at 34-35.

There are two alternative means of tampering with a witness. RCW 9A.72.120(1) provides that “[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 believe . . . may have information relevant to a criminal investigation . . . to: (a) [t]estify falsely or . . . withhold any testimony; or (b) [a]bsent himself or herself from such proceedings.”

However, the State charged Mr. Coombes with just one means of tampering with a witness. The information provided:

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 at 5. When it instructed the jury on tampering with a witness, the court gave an instruction that included both alternative means of tampering:

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.

CP at 119.

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And instruction 13 stated:

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 proceeding to testify falsely, or to withhold any testimony, or to absent himself or herself from any official proceedings.

CP at 118.

The trial court erred in providing the jury with instructions that contained alternative means of committing the crime when only one means was specified in the information. The manner of committing an offense is an element, and the defendant must be informed of this element in the information. *Bray*, 52 Wn. App. at 34. Where the instructional error favors the prevailing party, it “is presumed [to be] prejudicial unless it affirmatively appears . . . the error was harmless.” *Id.* at 34-35. Here, the State presented evidence of both alternative means of tampering with a witness. Mr. Williams testified that Mr. Coombes told him he had a witness “that need[] not to come to court.” RP (Dec. 14, 2011) at 424. However, Mr. Williams also testified that Mr. Coombes asked him to get Mr. Nelson to “‘shut . . . up’” and “‘say he made it up.’” RP (Dec. 14, 2011) at 426. In view of this testimony, we cannot say the jury did not convict Mr. Coombes on the basis of the uncharged alternative. The error was not harmless.

Given our resolution of the issue, we need not address whether counsel was

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ineffective for failing to object to the instruction.

It was reversible error to instruct the jury on an uncharged alternative to tampering with a witness when the jury could have convicted Mr. Coombes on the basis of the uncharged alternatives.

Statement of Additional Grounds for Review. In his statement of additional grounds for review, Mr. Coombes alleges defense counsel was ineffective during opening statement by promising testimony regarding the lack of fingerprint evidence. Citing *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), he contends counsel renders ineffective assistance of counsel as a matter of law when evidence promised in an opening statement is not delivered at trial.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Trial conduct that can be characterized as legitimate trial strategy or tactic cannot serve as a basis for a claim of ineffective assistance of counsel. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In *Anderson*, the defendant's trial counsel promised in opening statements that he would produce the testimony of a psychologist and a psychiatrist to support the assertion

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that the defendant's mental state rendered him guilty of a lesser offense. Trial counsel went forward with this defense, but did not produce the promised testimony. The court stated, "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson*, 858 F.2d at 17. The court held it is "prejudicial as [a] matter of law" to promise and not produce "such powerful evidence." *Id.* at 19.

This case is easily distinguishable from *Anderson*. Whereas, the *Anderson* court characterized the promised testimony as "dramatic" and "strikingly significant,"¹ the promised testimony here was of relative unimportance to Mr. Coombes's defense. Defense counsel here stated in opening statement: "No one will say that they saw [Mr. Coombes] at the scene, and, in fact, you'll hear that there's no prints come back to Mr. Nichols on the particular automobile that was used in this particular case." RP (Dec. 13, 2011) at 221. Defense counsel did not produce this testimony during trial. The promised testimony regarding the absence of Mr. Nichols's fingerprints was of relative insignificance to Mr. Coombes's defense.

However, even if we were to conclude that trial counsel's performance was somehow deficient, Mr. Coombes cannot point to any prejudice that, within a reasonable probability, affected the outcome of the case. *Strickland v. Washington*, 466 U.S. 668,

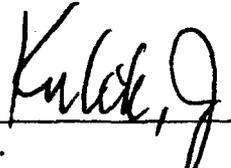
¹ *Anderson*, 858 F.2d at 17.

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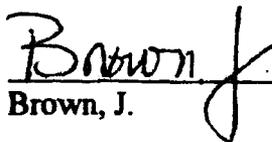
687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We look to the circumstances of each case to determine whether a broken opening statement promise to present particular testimony is ineffective assistance of counsel. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 898-99, 952 P.2d 116 (1998). Here, unlike *Anderson*, trial counsel did not make the promised testimony the centerpiece of the defense's case in opening statements; thus, there is no ineffective assistance of counsel.

We affirm the first degree murder conviction. We reverse and remand the tampering with a witness conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Kulik, J.

WE CONCUR:


Brown, J.


Siddoway, A.C.J.