71912-2

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No. 71912-2

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

STATE OF WASHINGTON

Respondent,

v.

TRAVIS LEE LILE

Appellant.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

FOR WHATCOM COUNTY

HONORABLE DEBORAH GARRETT

BRIEF OF APPELLANT

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4. That the trial court erred in allowing the state, over objection, to develop a bias against the defendant portraying him as a violent man prone toward fighting because of his service in the United States Navy and that he was a warrior, considered himself to be a warrior and represented himself as a warrior because of a tattoo on his back.

5. The court erred in allowing the prosecution to undermine the integrity of defense counsel by suggesting he tampered with the defense witnesses.

6. That the trial court erred in permitting, over objection, the state to ask defense witness Alan Owens whether he would have thrown a punch as did defendant Lile.

7. That the trial court erred in not giving defendant a self-defense instruction on the charge of 3rd degree assault.

8. That the trial court erred in denying defendant's motion for a new trial. The defendant is entitled to a new trial based upon the cumulative error doctrine as well as the errors raised above.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Whether the status judge's adoption of an agreed order to continue the case for a week falls within the exemption in the affidavit of prejudice statute, RCW 4.12.050, which states "but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso."

2. Counts should be severed when in one event there is an episode involving a fight between non police personnel and the summoned police who do not see the fight start, and a second episode which involves defendant's flight from the scene and later assault of the pursuing police officer. Because the non police personnel assault case is a much weaker case to which a self defense instruction is given, this non police personnel assault episode should be severed from the flight and assault of a police officer episode to which no defense instruction is given.

3. Whether evidence of two previous orders of adjudication for domestic violence are admissible to impeach a critical witness, who testifies he was not a fighting person.

4. Whether a defendant who serves in the United States Navy may be depicted as a "warrior" because of the tattoo on his back, to support the state's hypothesis that the defendant started the fight.

5. Whether the prosecution undermines the integrity of defense counsel by introducing evidence and arguing that defense counsel told a defense witness not to meet with a police detective and by meeting with witnesses,

counsel helped them get their stories straight; whether such disparagement of defense counsel violates the 6th amendment.

6. Whether it is reversibly prejudicial for the State to elicit and argue irrelevant and prejudicial evidence that a witness to an assault wouldn't have thrown the punch the defendant threw.

7. Whether a defendant is entitled to a self-defense instruction on the charge of 3rd degree assault when there is evidence he did not know the victim was a police officer, and when there is evidence he believed himself about to be seriously injured.

8. Whether the combination of the various rulings, including the suppressing of evidence of Christopher Rowles' history of domestic assault after Rowles opened the door, and the presentation of the warrior theme, along with the attack upon the integrity of defense counsel, deprived Lile of a fair trial.

STATEMENT OF THE CASE

1. Procedural History

Appellant Travis Lile was charged on February 21, 2013 with the crimes of Assault in the Second Degree of Amanda Millman on February 16, 2013 in Bellingham, two counts of Assault in the Fourth Degree of Taylor Powell and Christopher Rowles respectively, and also with Assault in the Third Degree of Bellingham Police Officer Jeremy Woodard, as well as resisting the arrest of Officer Woodward. CP 0006, 0007. The incident is summarized in the Affidavit of Probable Cause. CP 0009, 0010.

Defense counsel filed an appearance on February 22, 2013 and immediately requested by motion the impoundment of the video cameras which were on a street light looking down at the altercation location. See CP00014-19. Unfortunately, the City of Bellingham was not operating the video camera at the time and, as a result, no video recordation was recovered by defense motion. RP 651-660.

The case languished for almost a year in order to allow the parties to prepare for trial. Lile, a seaman in the United States Navy and member of the crew of the USS Nimitz, was given court

authorization to deploy in this period. A motion was argued and the court order allowed Lile to continue in his duties in the Navy as the case awaited trial. When it became apparent the parties could not reach any resolution, hearings on pretrial motions commenced.

On January 22, 2014, the case came on for status review before Superior Court Judge Ira Urhig and was continued one week upon agreement of the parties. On February 26, 2014, Lile filed an affidavit of prejudice against Judge Uhrig. On February 27, 2014 the state moved to strike the affidavit because Judge Uhrig had made a discretionary ruling when he adopted the parties' agreed continuance on the previous status calendar. Judge Uhrig ruled that the agreed continuance entered on the status calendar was a discretionary motion and ruled the affidavit invalid as coming after a discretionary ruling had been made in the case,

Pretrial motions were heard just before trial. The principal motion was Lile's motion to admit ER 404 (b) evidence of prior assaultive conduct on the part of Christopher Rowles, his primary antagonist in the case. Lile claimed that Christopher Rowles was the aggressor and forced a confrontation, and that Lile acted in self defense. The trial court read all the allegations contained in Declaration in Support of Motion to Admit 404 (b) Evidence. See

CP 86-194. Lile's ER 404 (b) evidence stemmed from three personal protection actions brought against Rowles in Whatcom County District and Superior Court resulting in the issuance of two personal protection orders.

2. Statement of the Facts

This case represents a clear credibility contest pitting Christopher Rowles, the boyfriend of Amanda Millman, Ms. Millman, and their two friends, Taylor Powell and his wife, Allsya Powell, against defendant Lile and his Navy colleagues and Cameron Moore, their civilian companion. The altercation from which all charges arose took place on a downtown Bellingham Street at about midnight on a Friday night in February. Both groups had been out on the town and had been consuming alcohol, so much so that the prosecutor in final argument ruled that Taylor Powell and his wife Allsya were so intoxicated that they could offer little in terms of credible evidence to the jury. See prosecutor's opening summation, RP 1095.

It is undisputed that just before the fight, the Navy group was walking up Chestnut Street and the Rowles group was walking down. Either Amanda Millman or Allysa Powell bumped into Lile or came close, an event that spurred the back and forth of epithets.

The first bump was followed shortly thereafter by a second bump between Lile and Rowles who was following behind. After the bump between Lile and Rowles, the fight started.

Officer Jeremy Woodard observed Rowles being punched by Lile from his cruiser at Railroad and Chestnut Streets some 120 feet way, RP 206 and later observed the fight or encounter from close range. But Woodward did not see how the fight started.

How the fight started was sharply disputed. Christopher Rowles, Amanda Millman and their friends' version contradicted the testimony of Travis Lile and his companions.

ARGUMENT

1. Whether the judge's signature on an agreed order to continue on a status calendar falls within the exemption in the affidavit of prejudice statute, RCW 4.12.050, which states "but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso. "

Whatcom County has three Superior Court judges and just recently acquired a fourth. When a case such as the Lile case is continued for almost a year before trial, the case is brought before the Superior Court approximately every six weeks to two months.

This is done by an order which schedules a status hearing on a Wednesday morning at 8:30 am and a trial date one week from the following Monday at 9 am. All cases not tried or settled appear on the status calendar, are called, and the parties are asked about the status of the case. If the parties both request trial, the case is confirmed for trial and the parties appear one week from the following Monday for trial. In this scenario, the parties ready for trial appear on the Monday along with all other parties who have confirmed for trial. The presiding Superior Court judge, using rules of priority for trial, determines which case is tried first. The remaining cases are bumped for one week. This process is described in the declaration of counsel in support of motion to reconsider. CP0061.

If both of the parties agree they are not ready for trial and want a continuance, the case is continued and a new paper order with carbon copies is presented with a new status and trial date at the status hearing or shortly thereafter.

At the status hearing where one party wants trial and the other wants a continuance, the matter is set over to the criminal calendar, which is on Thursday morning at 8:30 am each week. Contested motions to continue are not heard on the status calendar

in the experience of this counsel.

In this case, Judge Ira Uhrig presided at a status hearing on January 22, 2014. At this time he continued the case for one week on agreement of the parties. On February 6, 2014, just before the status hearing on that day, Lile filed an affidavit of prejudice against Judge Uhrig, CO 0046,. Judge Uhrig considered the affidavit at the state's request to have it invalidated.

The deputy prosecutor argued that the order of continuance, although agreed to, invoked a discretionary act from Judge Uhrig barring Lile's later filing of his affidavit of prejudice. Report of Proceedings of February 6, 2014, page 7, lines 5-16. In response to the court's request for precedent, the deputy prosecutor cited State v. Parra, 122 Wn.2d 590, 859 P.2d 1231 (1993).

Defense counsel described the January 22 hearing as a Super Bowl continuance for reasons suggested by deputy prosecutor. Report of Proceedings of February 6, 2014 page 9, lines 11-15. Defense argued the agreed order of continuance came within the language of the Affidavit of Prejudice statute. The prosecutor's remarks to Judge Uhrig explain the brief court appearance February 3, 2014. On that date, the prosecutor presented a written order reflecting the earlier agreement from the

January 22, 2014 status calendar. Report of Proceedings of February 6, 2014, page 12, lines 21-25, page 1-5.

The court adopted the state's argument. The rationale for the court's decision is found at Report of Proceedings of February 6, 2014, page 12, lines 21-25, page 13- to top of 15. Essentially Judge Uhrig ruled that because he had previously denied agreed continuances presented at status hearings in other cases, his adoption of an agreed continuance in Lile's case was a discretionary act.

Lile moved to reconsider and filed a declaration. CP 60-63 and memorandum in support of his request. The motion was denied.

Lile contends that the agreed pushing of the trial date for a week to accommodate the litigants fails within the ambit of activity within the proviso of RCW 4.12.050: "but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso. "

Lile recognizes there is case law stating that the granting or denial of a motion for a continuance is a discretionary act, but those

cases apply only where there is a bona fide *contested* motion to continue. Donaldson v. Greenwood, 40 Wash.2d 238, 242 P.2d 1038 (1952); State v. Maxwell, 46 Wn.2d 822, 285 P.2d 887 (1995); State v. Guajardo, 50 Wn.App. 16, 746 P.2d 1231 (1987). In all these cases the request for a continuance was contested. In contrast, orders continuing trials presented at status hearings are merely calendaring changes arranged by the litigants by agreement and acquiesced in by the status calendar judge. If the status calendar judge does *not* want to enter the order, or the parties *cannot* agree and want to change the trial date, the status calendar judges transfers the case to the criminal calendar on Thursday morning at 8:30 am for argument.

The state argued below that the dispositive case is State v. Parra, 122 Wn2d 590, 859 P.2d 1231 (1993). In that case, the Supreme Court ruled that an agreed omnibus application order approval by a Superior Court Judge constituted a discretionary ruling.

Parra is inapposite because it plainly involved the court's decisions on *multiple* motions in an omnibus application. The omnibus application is set forth in detail in CrR 4.5. It encompasses 22 separate motions for the defendant and 20 for

the State. Parra, 122 Wn.2d at 591. The gamut of motions in the omnibus application range from asking for dismissal for failure to state an offense, to informing the defendant of information indicating entrapment, to requiring the results of scientific tests, and to supplying the names of witnesses. Parra, 122 Wn.2d at 598.

State v. Dixon, 74 Wn.2d 700, 446 P.2d 329 (1968), is the case closest to the facts of the instant case. In Dixon, the defendant filed a motion to suppress and dismiss and noted it for hearing on October 9, 1968 before the motions judge. The opinion took care to point out that King County had (at that time) 22 superior court judges who were rotated monthly to serve as motions judge. Dixon, 74 Wn.2d at 701 n.1. In Dixon, the prosecutor moved to renote the time of the defense suppression motion from October 9 back to September 27. The prosecutor's motion to renote was granted by the September motions judge. On September 26, 1968, after the motions judge had ruled on the motion to renote, Dixon filed an affidavit of prejudice against the September motions judge. The motions judge ruled that the earlier decision on the State's motion to move the date for hearing of the suppression motion involved a discretionary act warranting striking of the affidavit of prejudice. Dixon appealed from this ruling.

The Washington Supreme Court granted Dixon's request for a writ to prohibit the September motions judge from hearing his motions to dismiss and suppress, stating that the decision granting the State's notion to renote was a calendaring action that did not amount to a discretionary decision for purposes of the affidavit of prejudice statute:

> Furthermore, it is our view that the setting and/or renoting and resetting of a cause or motion for hearing on the merits is a preliminary matter falling squarely within the ambit and contemplation of the proviso to RCW 4.12.050. This proviso specifically excludes from the discretionary classification otherwise referred to therein those orders and/or rulings relating to 'the arrangement of the calendar' or 'the setting of an action, motion or proceeding down for hearing or trial.' This language, in our view, clearly embraces the calendaring action taken by the motion calendar judge in resetting petitioner's motions pursuant to the state's motion.

Here Lile just presented an agreed order at status hearing. Nobody quibbled about it. The order merely adjusted the trial commencement time by one week. There was nothing to argue about as the parties had agreed on the continuance before the status calendar.

Just as the motions calendar judge changed the date for the argument in Dixon on the defendant's motions to dismiss from October 9, 1968 back to September 27, 1968, Judge Uhrig pushed

the time for trial forward one week when the parties presented an agreed order. What took place was a calendar adjustment setting the case for trial, not a contested motion for continuance.

2. That the trial court erred in denying defendant's motion for severance.

Lile moved to sever the two counts of 3rd degree assault and resisting arrest involving his post assault flight from the scene and his ensuing struggle with Bellingham Police Officer Woodward, from the assault charges against Christopher Rowles, Amanda Millman and Taylor Powell. Judge Uhrig ruled on Lile's motion to sever after he had rejected Lile's affidavit of prejudice.

Lile argued that the incident should be severed into two trials. The first would be a trial encompassing Lile's alleged assault of Amanda Millman, Christopher Rowles and Taylor Powell.[1] The second trial would focus on Lile's flight from the scene and his arrest by Bellingham Police Officer Woodward.

Severance of offenses shall be granted when "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR. 4.4(b). A

[1] The assault charge against Lile involving Taylor Powell was dismissed on the eve of trial for lack of evidence.

defendant seeking severance bears the burden of demonstrating that the prejudice of trying the counts together outweighs any concern for judicial economy. State v. Bythrow, 114 Wash.2d 713, 718, 790 P.2d 154 (1990); State v. Cotten, 75 Wash.App. 669, 686, 879 P.2d 971 (1994), review denied, 126 Wash.2d 1004, 891 P.2d 38 (1995). The denial of a motion to sever offenses will be reversed on appeal only upon a showing that the trial court manifestly abused its discretion. Bythrow, 114 Wash.2d at 717, 790 P.2d 154.

Joinder may result in prejudice if it allows the jury to "cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find." Bythrow, 114 Wash.2d at 718, 790 P.2d 154, (quoting State v. Smith, 74 Wash.2d 744, 755, 446 P.2d 571 (1968), overruled on other grounds, State v. Gosby, 85 Wash.2d 758, 539 P.2d 680 (1975)). In determining whether potential prejudice exists "a trial court must consider (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 Wash.2d 24, 63, 882 P.2d 747 (1994) (citing Smith, 74

Wash.2d at 755–56, 446 P.2d 571), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

All of these factors supported the defense motion to sever. The police officer in this case was just trying to apprehend one of the persons involved in fighting in the city streets of Bellingham. His testimony that he was assaulted and that Lile also resisted arrest was supported by the testimony of other police officers. The evidence supporting the counts involving the police officer was distinct. Trying all counts together allowed the jury to cumulate the evidence and find guilt both as to the Rowles group and as to the officer when, if tried separately, the jury may well not have so found.

As to the fight involving Lile and Rowles and Powell, the adversary parties disputed the facts. This case was considerably weaker than the State's case in the police assault case. Lile got the benefit of self-defense instructions with respect to the assault charges against Millman Rowles and Powell. Lile's request for a self-defense instruction regarding his involvement with Officer Woodward was rejected.

The joinder of all the charges prejudiced Lile because the strength of the state's case in the assault of the non-police persons

was considerably weaker than the state's case charging Lile with assault of a police officer and resisting. There is no significant police or non-involved third person testimony relating to how the fight between Rowles and Lile started. Officer Jeremy Woodward did not see how the fight started. If severance was granted, evidence of the untried event (Lile's encounter with Officer Woodward) would not have been admissible in the severed trial on charges of assaulting the non-police persons. The allegations that Lile resisted arrest and in the process assaulted the police officer has no relevance as to whether Lile had earlier acted in self defense or not.

Judge Uhrig erred in his ruling on the severance motion. Not only did he err, but he should have disqualified himself due to the affidavit of prejudice, and this would have allowed a different judge to rule on the severance motion.

3. That the trial court erred in refusing to permit evidence of Christopher Rowles' two previous orders of adjudication for domestic violence, after Rowles testified on cross examination that he was not a fighting person.

Lile moved pretrial to admit evidence of Rowles' prior adjudications and charges of harassment under ER 404(b). CP 86-194. Pretrial motions were heard just before trial. The principal

motion was Lile's motion to admit ER 404 (b) evidence of prior assaultive conduct on the part of Christopher Rowles. The trial court read all the allegations contained in Declaration in Support of Motion to Admit 404 (b) Evidence and refused to allow them in for impeachment, on the basis that Rowles' prior assaults were not similar in fact pattern to the assaultive behavior Rowles exhibited in the instant case.

The record, CP 86-194, shows that in Whatcom County District Court Cause No. DV 11-45, a woman, Nicole Foster, filed for a personal protection order against Christopher Rowles on July 11, 2011. This petition resulted in an uncontested order by default. These allegations were primarily of Rowles stalking Ms. Foster.

On June 20, 2012, Nicole Foster filed another harassment petition in Whatcom County Cause No. 12-2-01493-7. She complained "any time we have a disagreement Chris gets really mad and he gets right in my face, looming over me and blocking me with his body so I can not get away." Petition for Order for Protection, page 5. The allegations involve Rowles blocking Ms. Foster's exit and grabbing her by the wrist after an argument. This allegation was dismissed when the allegation was withdrawn by Nicole Foster.

On November 12, 2012 in Whatcom County Cause No. 12-2-02787-7, Superior Court Commissioner Martha Gross heard testimony of an incident on October 14, 2012 and an accusation that Rowles had grabbed away a phone that Nicole Foster was going to use to call 911 and grabbed her by the wrist and threw her down on the bed. A personal protection order was issued against Mr. Rowles.

The trial court here decided pretrial not to allow this evidence in. However, later during the trial, Lile raised the issue again when Rowles' testimony opened the door to it. During cross examination, Rowles testified that Lile and his associates shouted profanities toward Amanda Millman. When asked whether the shouting of profanities caused him concern, Rowles answered that he was "not a fighting guy." RP 528.

Ten pages later in the cross examination, Rowles testified he was punched three times by Lile but did not punch back. When pressed as to why he did not punch back, Rowles testified, "I didn't [punch back], I'm not a fighter. I did not want to be a fighter." RP 538.

Defense counsel raised the matter in the absence of the jury: "I think twice in his testimony he testified that he does not fight, he's

not a fighting man, giving the impression he is a man of peace. We think that opens the door to bring up the harassment incidents because those constitute fighting, those three events." RP 543.

The prosecutor minimized the evidence of the protective orders and argued "that the only alleged aggression is he is to have stood up and loomed over her at one point," and that the conduct was not similar enough. RP 544, lines 8-10.

Defense counsel offered Exhibit 21. The Superior Court construed the facts in Whatcom County Cause No. 12-2-02787-7 as not relevant, concluding taking a phone forcibly and "alleging that he Rowles would beat the asses out of two guys at work if she (victim) was to talk to them," RP 548, was not relevant. This was prejudicial error. The critical fact for the jury to decide was whether Lile or Rowles started the fight. When the trial court refused to allow Lile to impeach Rowles' statements that he was a peaceful person, the court denied Lile key evidence challenging the credibility of Rowles' denial that he got aggressively in Lile's face before the fight started.

The prejudice was heightened when, later, the trial court gave the state leave to cross examine Lile as to his status as a warrior and to suggest that his naval service predisposed him to

fighting. See argument 4, below. It was unfair to withhold from the jury the facts about Rowles' domestic assaults, to counter Rowles' testimony that he was not a fighting man. The offered impeachment evidence was proper, essential to the defense and admissible under State v. York, 28 Wn.App. 33, 621 P.2d 784 (1981).

In York, the Court of Appeals reversed a criminal conviction because of improper restriction of the defendant in cross examining Mr. Smith, the state's most important witness in that case. York wanted to present on cross examination evidence that Smith, the state's star and only witness, had previously been fired by a Montana sheriff for dishonesty. Failure to allow the Montana Sheriff to impeach Smith violated York's right to cross examination. The reasoning for the York court's decision was a constitutional one expressed as follows:

> A criminal defendant's right to cross-examine witnesses against him is a fundamental constitutional right. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This right is not absolute and may in appropriate cases bow to other legitimate interests in the criminal process; but denial or diminution calls into question the integrity of the fact-finding process and requires the competing interests be closely examined. Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

> Here, the state introduced Smith's background as a military policeman investigating drug usage, the fact he had held numerous jobs as a laborer and his previous work for the Wenatchee Police Department as an undercover agent. But the state sought pretrial suppression of his employment as a Montana deputy sheriff trainee, engaged in the same type of undercover work, and his subsequent dismissal. Although the state tried to minimize the relevance of this fact, it was of sufficient importance to obtain pretrial suppression. State v. Jones, 26 Wash.App. 1, 8-9, 612 P.2d 404 (1980), quoting from State v. Gefeller, 76 Wash.2d 449, 455, 458 P.2d 17 (1969), is apropos: "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." State v. Gefeller, supra at 455, 458 P.2d 17.
>
> We conclude, as a matter of fundamental fairness, the defense should have been allowed to bring out the only negative characteristics of the one most important witness against York. If the elicited testimony had no substantial bearing upon the witness's credibility, we would not be offended by the trial court's action. However, we find this area of impeachment to be of considerable importance to the defense and cannot in good conscience condone the trial court's action. We are unable to state, beyond a reasonable doubt, that error was not prejudicial. State v. Davis, 27 Wash.App. 498, 506, 618 P.2d 1034 (1980).

York, 28 Wn. App. At 37.

The instant case is similar to York. Here, Rowles is a comparable figure to Smith because he was the critical witness for the State's position that Lile started the fight with no provocation from Rowles. Bellingham Police Officer Woodward was not a critical witness because he did not see the beginning of the fight.

He did not see either the bumps of Lile and Millman (if they in fact bumped) or the second bump of Lile and Rowles, which immediately preceded the outbreak of the fight. The state argued to the jury that Lile was the aggressor and the defense argued that Rowles was the aggressor.

The jury had to decide who was the aggressor here, Christopher Rowles or Travis Lile? Because Officer Woodward did not see how the fight started, it was a credibility contest between Amanda Millman, her boyfriend Christopher Rowles and their friends, versus Lile and his Navy colleagues. Rowles opened the door when he professed he was not a fighting person. It is more than ironic that Lile, who had a spotless record, was asked and required to answer over objection whether he had been in fights and answered no. RP 911.

By persuading the court to suppress evidence of Rowles' history of domestic assault resulting in personal protection orders being entered against him, the state was able to successfully portray Rowles to the jury as a person who has never had a fight or does not participate in fights. At the same time, the state was allowed extreme latitude to portray Lile, who had a spotless record, as a "warrior" prone to violence because of his service in the United

States Navy and to exploit the tattoo on his back as evidence that he was a violent "warrior".

Christopher Rowles' portrayal of himself as someone who remains cool and peaceful in the face of what he himself described as a violent unprovoked physical assault was a fabrication. It opened the door to general impeachment by cross examination as to his prior adjudications for harassment in Whatcom County courts. At trial, the state argued that because the testimony came in on cross examination, case law says the open the door rule does not apply. This is incorrect.

Lile had argued for admission earlier of these acts under ER 404 (b). Barring admission of this evidence at trial even after Christopher Rowles opened the door at trial violated Lile's rights under the 6th amendment. In State v. Gefeller, 76 Wash.2d. 449, 458 P.2d 17 (1969), cited in York as noted above, the Washington Supreme Court affirmed a conviction in which defense counsel brought up the fact on cross examination that the defendant had taken a polygraph and gotten an inconclusive result. The state exploited this on redirect and the challenged evidence was allowed because of the open door.

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced. State v. Stevens, 69 Wash.2d 906, 421 P.2d 360 (1966); State v. Hunter, 183 Wash. 143, 48 P.2d 262 (1935); State v. Ward, 144 Wash. 337, 258 P. 22 (1927); State v. Hempke, 121 Wash. 226, 209 P. 10 (1922); State v. Anderson, 20 Wash. 193, 55 P. 39 (1898).

The insulation of prosecution witness Rowles from attack on cross examination by impeachment, combined with the court's allowing the State to cross-examine Lile as to his perception of himself as a warrior and to exploit the tattoo on his back as evidence that he was a violent warrior, resulted in a distortion being presented to the jury. The jury should have heard all about the prior assault by Rowles. This would have been proper rebuttal to Christopher Rowles opening the door. Once Rowles boldly asserted that he was not a fighting man, he should not have been allowed to escape direct answers to questions on cross

examination about how he could proclaim himself a non-fighter in view of his domestic violence record. Also, the jury should have heard nothing about the warrior issue, developed further below in Issue No. 4.

For these two reasons alone—refusing impeachment evidence showing violence by the State's key witness while allowing the State to portray the defendant as a warrior—a new trial is warranted, and this court should provide express direction to the trial court as how to proceed in the retrial.

> 4. That the trial court erred in allowing the state to develop a bias against the defendant portraying him a violent man prone toward fighting because of his service in the United States Navy and that he was a warrior, considered himself to be a warrior and represented himself as a warrior because of a tattoo on his back, which was displayed to the jury in the context that the defendant was a warrior. The connation given and intended was that by virtue of his service as a Second Class Petty Officer in the US Navy and his tattoo, the defendant was a warrior and his status as a warrior explained the state's hypothesis as to how the defendant attacked first Christopher Rowles and Taylor Powell and then, a defenseless woman, Amanda Millman.

During cross examination, the prosecutor impugned Lile's service in the United State Navy:

Q. And you're proud of your ability to function in the military, right?

A. I would like to think so.

Q. And you are proud that you are a warrior, aren't you?

Mr. Johnston, Well, I object. The implication.

The court: Sustained.

Then the deputy prosecutor asked Lile if he had been in a lot of fights, which was allowed despite objection and to which Lile answered no. RP 911, lines 1-9.

After changing the topic of his cross examination, the deputy prosecutor, at recess in the absence of the jury, raised again his desire to pursue the warrior cross-examination line of inquiry. RP 919, lines 14-25. The prosecutor argued strenuously that it was essential and proper that he be allowed to inquire about Lile's status as a warrior to impeach Lile's claim that he was afraid when Rowles and Powell got in his face. RP 921, lines 1-5.

The court ultimately allowed the State to question Lile about the tattoo on Lile's back and also about whether or not he perceived himself as a warrior. RP 923. The court stated, "Mr. Johnston, I am not going to tell you how to try your case, I would think you would want this opportunity because of the testimony that has already come in, I believe without objection, has covered the issue of the tattoo on Mr. Lile's back and I believe the meaning of

the tattoo. So that door has been opened but that's why the words, I don't think that the word "warrior" when applied to a person in the armed services is a prejudicial word. I think in common parlance we talk about our wounded warriors. It's not a pejorative term in the Court's view and that's why the court will permit Mr. Hulbert to make the limited inquiry he wants to make." RP 924, lines 1-20.

Thus, the deputy prosecutor was permitted to ask Lile if he was a warrior, to which he answered no. After that, Lile was asked what the Latin on his back said, and he answered that it said "eternal warrior of God and that I am to carry out his works whether I fall short or not." RP 926.

The prosecutor's cross examination, "are you a warrior and what does your tattoo say" was motivated and designed to provoke to the jury's passions. The insinuation was that Lile was an aggressive fighter, prone to attack people, based upon evidence of his service in the Navy and his tattoo. This evidence was prejudicial because it portrayed the defendant as having a character trait for fighting because he was in the United States Navy. What was the relevance of forcing the defendant to answer the question of whether he was a warrior? The actions of the state

in creating this status of defendant as a "warrior" was misconduct and improper cross examination.

Tattoos are generally thought to be prejudicial because a lot of jurors, especially older people, simply don't like them. For some people, there is a tendency to associate tattoos with gangs and convicts. The general rule should be not to admit them unless relevance is demonstrated. The purpose and effect of allowing the State to exploit the "Warrior" tattoo in this case was to introduce evidence of character, that is, that the defendant acted like a warrior, which is impermissible evidence of character. The objection is irrelevance; impermissible character evidence; impermissible prior acts evidence under ER 404(b); or more prejudicial than probative.

This evidence was not relevant. The American Heritage Dictionary of the English Language, Third Edition defines warrior as follows:

> n. One who is engaged in or experienced in battle (Middle English warrior from Old North French werreieur, from werreier, to make war, from were, war.

On cross examination, the deputy prosecutor asked defendant if he considered himself a warrior, which drew an

objection. After argument, the trial court allowed the question and the court announced that if the defendant answered "no, " the prosecutor could cross examine defendant on the meaning of the tattoo across defendant's back. When the prosecutor asked in front of the jury if defendant considered himself to be a warrior, defendant answered "no". The prosecutor then asked what the tattoo on defendant's back said. Over objection, defendant answered " Aeternus Proeliator, old English for eternal warrior.

The defendant was asked again what did it mean if the word Eternal Warrior was on his back? The defendant answered to the effect that he got the tattoo because of his religious beliefs and that he feels like he is an eternal warrior for the Lord.

Lile had no criminal record. Lile did not put his character into issue and nevertheless was cross-examined as if he had. In imputing Lile to be a member of a warrior class, the State was saying that he was a fighting violent man with a proclivity to start fights, thus contrasting him with Christopher Rowles, the supposedly non-fighting man. The State was thus allowed to counter the defense theory that Rowles, not Lile, provoked the fight. Lile testified that when facing backwards down the hill, he was

struck in the shoulder and turned to find Rowles up close to him getting in his face in an intimidating manner. See RP 867-70.

In addition, in categorizing Lile as a member of a "warrior" class with the above-mentioned negative proclivities, the State of Washington was disparaging service in the military forces of the United States. In every case where a member of the armed forces stands trial in a civilian court, does the state get to force the serviceman to answer the question of whether he/she considers herself to be a warrior? Or was this cross examination only proper because of the tattoo on defendant's back? This was pure and simple unpatriotic character assassination.

5. The court erred in allowing the prosecution to undermine the integrity of defense counsel by suggesting he tampered with the defense witnesses.

Disparagement of defense counsel violates the Sixth Amendment. Such an error is presumed prejudicial. Bruno v. Rushen, 721 F.2d 1193 (1883).

In this case the state deliberately developed a theme to undermine the integrity of defense counsel. The State suggested that two defense witnesses lacked credibility because they met with defense counsel. The state also, without any evidence, insinuated

that defense counsel instructed one of those witnesses not to meet with the detective who was investigating the incident.

The two defense witnesses in question were Sean Duff, a friend and fellow crew member of Lile, and Allen Owens, also a member of the Nimitz crew.

The fighting incident occurred on February 16, 2013. On February 21, 2013, these two witnesses came to Bellingham together to meet with defense counsel. They travelled to the fight scene and discovered the camera on the utility pole looking down on the location of the fight.

About this same time, detective Ferguson was also trying to arrange a meeting to interview these witnesses.

The theme of improper conduct by defense counsel was initiated at the trial when Ferguson testified. Ferguson first opined that it is important to meet with witnesses early, suggesting that otherwise the stronger personality will tell the weaker personality what to say. RP 576-579. Ferguson went on to say that he called Duff on February 21 and said he wanted to meet with him immediately. Ferguson said he told defense counsel this also. RP 584 -586.

A defense objection prompted a colloquy out of the jury's

hearing. The objection was to the officer testifying about his conversations with defense counsel. The prosecutor responded that because the defense was impugning the effectiveness of the police investigation, the state should be able to counter by getting into what defense counsel did. RP 587-589. (As noted earlier, defense counsel had tried to preserve the videotapes from cameras near the fight scene, but was unsuccessful, and it came out that it took detective Ferguson days to check out the video. RP 652-55.)

Ferguson was allowed to testify over objection that he told defense counsel William Johnston he wanted to meet with Duff that day, February 21. Ferguson testified that he told defense counsel that he wanted to meet with Duff that day, February 21 "regardless of whether or not, what Mr. Johnston's feelings were on the topic." RP 587. Ferguson then testified that he did not meet with Duff on that day.

The State's clear purpose of eliciting Ferguson's testimony in this manner was to present defense counsel as a person frustrating the police investigation.

Leaving this line of inquiry, the State elicited Ferguson's concern about the defense witnesses being together because they were friends.

This theme was enlarged upon later during the State's cross examination of Duff, the first defense witness, beginning at RP 704. In cross examining Duff, the prosecutor attempted to establish that Duff refused the officer's demand for a meeting on February 21 because Mr. Johnston told him not to. The prosecutor first focused on a discrepancy between what Duff told the Navy investigator and what he said at trial about the direction Rowles was going when he and Lile bumped into each other. "So that's one of the things that you remember more from your discussion with Mr. Johnston, isn't it?" RP 725, lines 22-25. Objections were sustained, RP 726, but the jury heard the theme develop.

Soon the prosecutor returned to the topic of why Duff did not immediately meet with Ferguson. See RP 742-52. Again the prosecutor clearly announced his intention to have the jury infer that defense counsel told Duff not to talk with Ferguson. The court erroneously permitted this line of questioning on the theory that it merely went to chronology and the jury was told not to infer causation. This was error. The only reason for establishing the chronology was to have the jury infer that defense counsel was tampering with Duff.

> Q. (BY MR. HULBERT): So it was after, at some point after speaking with Mr. Johnston, you changed your mind about wanting to see Detective Ferguson, is that right?
> A. It wasn't that I changed my mind, there was a set time we were supposed to meet and that time changed and I had to get back to work so that's the reason why.

RP 753. More of the same insinuations about defense counsel's role went on in the State's cross examination of Cameron Moore. See RP 814.

Finally in closing argument, the prosecutor reflected on how two of the witnesses used the same specific phrase, "shoulder check", and in effect told the jury that it was because they had both met with Mr. Johnston and he was helping them get their stories to match. The prosecutor commented on the defense witnesses' use of the phrase "shoulder check" to describe the initial impact between Rowles and Lile. The prosecutor then argued:

> The testimony was developed in this way: When the statements were made to the Naval investigator Allen Owens the tv guy did not use the words "shoulder check." That is a pretty specific term, isn't it? It is maybe not a shove or push, it is a pretty specific term. In his statement to the Naval investigator however Sean Duff did use the term "shoulder check." Okay. So one of them did, one of them didn't. And then the next day they go and see Mr. Johnston together, and then in a subsequent interview all of a sudden Allen Owens is using the term shoulder check.
> MR. JOHNSTON: I'd object to that, going to see Mr. Johnston for an interview, Your Honor.
> MR. HULBERT: After the interview of Mr. Johnston's—

MR. JOHNSTON: It sounded improper.
THE COURT: I'll simply instruct the jury that witnesses and parties meet with lawyers frequently in the development of the case so the fact that a witness or lawyer meet with another lawyer is not to be taken by you to make an adverse inference.

RP 1095-1097. Thereafter the prosecutor continued with his argument that the witnesses all changed their stories after they met. RP 1098. And of course the prosecutor had already brought out that they did meet with defense counsel.

None of this questioning and argument impugning the integrity and professionalism of defense counsel should have been allowed in the trial. The State's attack was carefully planned and carried out to make Lile and his attorney look like conspirators to distort the truth.

Such conduct by the State is harmful per se. United States v. McDonald, 620 F.2d 559 (5th Cir. 1980) (prosecutor's comment that defendant's lawyer was present when search warrant was executed implied defendant was guilty and interfered with his right to counsel).

6. That the trial court erred in permitting over objection the state to ask defense witness Alan Owens the following questions:

> Q. And you wouldn't have thrown a punch in a similar situation, would you have?
> A. In a similar situation?
> Q. Right.
> A. I would have tried to get out of it first.
> Q. Right. You told Detective Ferguson that if you were in Mr. Lile's situation that you wouldn't have thrown that punch, didn't you?
> A. I mean is that what it says here?

Deposition of Allan Owens, at 58.

Defense witness Allan Owens' testimony was presented by deposition. During the deposition, Lile objected to the State's line of inquiry and pointed out it is improper to ask witnesses who observe a fight break out, to opine what they would have done if they were in the defendant's shoes. Deposition of Owens, 56-58.

Because Owens' testimony was presented to the jury by way of a deposition that was partly redacted, the record is unclear as to whether the jury actually heard the above-quoted exchange. The trial court seemed to rule it out at one point. RP 850-54.

What is clear is that in final argument, the prosecutor argued, "And Allen Owens also said he wouldn't have thrown the punch if he were in Mr. Lile's shoes but—

> Mr. JOHNSTON: I object to that. I don't know if that came in, but I have to just. That's it, I just want to make it be known.
> THE COURT: Your objection is noted.

RP 1048, line 17-25.

Washington self defense cases have spoken about the subjective element, that the defense must be viewed from the perspective of the defendant. Self defense must be viewed from the perspective of the defendant. State v. Fisher, 23 Wash. App. 756, 598 P.2d 742 (1979); State v. Despensa, 38 Wash. App. 645, 689 P.2d 87 (1984); State v. Wanrow, 88 Wash2d 221, 559 P.2d 548 (1977).

This component of self defense, that the jury views the incident from the particular perspective of the defendant, is undermined if the jury hears witnesses' opinions about whether they would have thrown the preemptive punch. The State should not have elicited evidence from defense witness, Alan Owens, that if he had been in Lile's situation he would not have "thrown that punch". This testimony was irrelevant because the issue for the jury was whether Lile subjectively perceived that he was in danger when Rowles and Powell came up to him, bumped him, and got in his face in a threatening manner.

In argument, over objection, the State was allowed to repeat

Owens' supposedly excluded remark that "he wouldn't have thrown the punch if he were in Mr. Lile's shoes." RP 1048.

No witness can give an opinion, much less on the ultimate fact, which is whether Travis Lile was entitled to act in self defense, i. e. throw punches. Self defense was the heart of the defense and the State's argument presenting Owens' testimony (offered over objection) was highly prejudicial.

7. That the trial court erred in not giving defendant a self-defense instruction on the charge of 3rd degree assault.

The trial court erred in not giving defendant a self-defense instruction on the charge of 3rd degree assault, as requested. CP 249. Lile testified that he did not know the person on top of him was a policemen. RP 872-880. Lile was entitled to have his version of the facts presented to the jury with an appropriate self defense instruction. Alternatively, even if the jury found that Lile did know the person on top of him was a police officer, Lile was entitled to a self defense instruction because Officer Woodward was applying a chokehold. It was undisputed that sometimes a person can be seriously injured or even die when a chokehold is applied.

Lile was entitled to resist, even if he knew they were police, because he could not breathe.

Lile proposed a self defense instruction to the charge of Third Degree assault against Officer Woodward. CP 0249. The state presented an elements of the crime instruction for third degree assault which left out any element that the defendant was aware that the person involved was a police officer, per State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000). See court's instruction 11, CP 0470. The court gave self defense instructions with respect to the assault charges involving Christopher Rowles and Amanda Millman but this defense did not apply to the 3rd degree assault charge involving Bellingham Police Officer Jeremy Woodward. See court's instruction 16, CP0475.

Washington law on self defense with regard to third degree assault charges of assault on police officers in the performance of their duties is predicated on the defendant knowing that the person involved in the assault was a police officer. While Brown relieves the state from proving that the defendant knew that he was assaulting a police officer, nevertheless where there is evidence that the defendant testifies he was acting in self defense and was

not aware that he was dealing with a police officer, the defendant is entitled to the normal self defense instruction.

An arrestee's resistance of excessive force by a *known* police officer effecting a lawful arrest is justified, and may provide a basis for self-defense claim, if the arrestee was actually about to be seriously injured. State v. Bradley, 96 Wash.App. 678, 683, 980 P.2d 235 (1999), review granted 139 Wash.2d 1009, 994 P.2d 845, affirmed 141 Wash.2d 731, 10 P.3d 358. A person who is being arrested has the right to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, although that person may not use force against arresting officers if he or she is faced only with loss of freedom. State v. Valentine, 132 Wash.2d 1, 21, 935 P.2d 1294 (1997), overruling State v. Rousseau, 40 Wash.2d 92, 241 P.2d 447 (1952).

These cases make the point that when the Washington Supreme Court circumscribed the right of self defense and the right to resist an arrest for citizens involved in an altercation with a law enforcement officer, the Washington Supreme Court did so on the clear criterion that the defendant knew that he or she was dealing with a law enforcement officer.

In this case, there is conflicting evidence as to whether Travis Lile knew he was resisting the efforts of a law enforcement officer. Lile testified he resisted a person grabbing him and choking him before he became aware that the person was a policeman. This evidence entitles him to the normal self defense instruction which gives him the right to use reasonable force to resist a person inflicting injury upon him.

The court rejected defendant's proposed self-defense instruction by reliance on Brown. Brown holds that the defendant's knowledge that the victim is a police officer is not an element that the State has to prove. But it does not rule out allowing the defendant to have a self-defense instruction making his lack of knowledge an affirmative defense.

In addition to Lile's version of the facts that he was not aware of the fact that the person on top of him who he was resisting was a policeman, this case also involves the police trying to get Lile in a chokehold. A defendant who is being choked by a policeman, and testifies that he did not know that he was being choked by a policeman, may resist and raise self defense under the State v. Valentine standard.

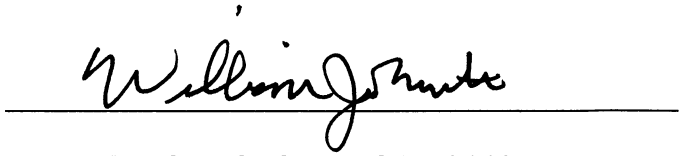
8. That the trial court erred in denying defendant's motion for a new trial. The defendant is entitled to a new trial based upon the cumulative error doctrine as well as the errors raised above.

Under the cumulative error doctrine, the court may reverse a defendant's conviction when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless. State v. Weber, 159 Wash.2d 252, 279, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). The combination of all the erroneous rulings, and particularly the ruling suppressing evidence of Christopher Rowells' history of domestic assault after Rowles opened the door, and the ruling allowing the State to characterize Lile as a warrior, and the failure to prevent the State's attack upon the integrity of defense counsel, deprived Lile of a fair trial.

V. CONCLUSION

Defendant Travis Lile was denied his right to a fair trial. This court should reverse and remand for a new trial.

DATED this 16th day of March, 2015



WILLIAM JOHNSTON, WSBA 6113

Attorney for the Appellant TRAVIS LEE LILE

INSTRUCTION NO. _____

It is a defense to the charge of Assault in the Third Degree that the force used was lawful as defined in this instruction.

The use of force upon or towards another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force used is not more than is necessary.

The person using the force may employ such force and means as a reasonable prudent person would use under the same or similar circumstances as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The state has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the state has not proven the absence of this defense beyond a reasonable doubt, it is your duty to return a verdict of not guilty.

WPIC 17.02