

658476

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65847-6-7  
NO. 65847-1-T

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

STATE OF WASHINGTON,

Respondent

v.

TERR MacMILLAN

Appellant

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

The Honorable John M. Meyer, Judge

ADDITIONAL GROUNDS FOR REVIEW

TERR MacMILLAN

Appellant, Pro Se

Coyote Ridge Correction Center

P.O. Box 769

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## ADDITIONAL GROUNDS FOR REVIEW

1. Counsel ineffectively assisted defendant on charge of witness tampering
2. The court erred in regard to question of law posed by jury during deliberations.
3. The evidence does not support the verdict on the charge of witness tampering.
4. Counsel ineffectively assisted defendant in regard to evidence presented showing victims injury.
5. Counsel ineffectively assisted defendant in jury selection resulting in gender bias of jury.

## ISSUE 1

Counsel ineffectively assisted defendant on charge of witness tampering.

### ISSUE OVERVIEW

Marie Shelman testified that the defendant said words that might result in charges of either witness tampering or some lesser charge. The evidence suggests a possible attempt to either intimidate or tamper with the witness, or the criminal attempt to commit other crimes, although the act of doing so was never accomplished.

### ARGUMENT

Marie Shelman's testimony recorded in the Verbatim Report of Proceedings , Volume One, at page 89 and 92 (1-VRP-89, 92) suggests a possible attempt to tamper with or intimidate a witness but does not clearly and positively establish an attempt to do so, and may in fact have simply been the stated opinion of the defendant. The witness further testified that she immediately told the defendant that she (Mrs. Shelman) would not deliver the message to Ms. Elliott. Of note is the fact that the defendant made no further statement or argument in an attempt to persuade Mrs. Shelman to deliver the message to Ms. Elliott, and in the end the message was never delivered. Also of note is the conflicting

testimony as to whether or not Ms. Elliott was present and able to hear the defendants' phone conversation with Mrs. Shelman which gave rise to the charge of witness tampering. (1-VRP-47, 48, 78, 79 vs. 1-VRP- 89, 92, 93). The indefinite nature of the testimony raises the questions (1) was it an attempt, (2) was the witness actually tampered with, and (3) were defendants words to Mrs. Shelman simply a statement with no request for action, all of which lead to the larger questions of innocence or guilt to be decided by the jury. Washington law provides for the charging and prosecution of inchoate offenses under RCW 9A.28 titled Anticipatory Offenses. RCW 9A.28.010 defines inchoate offenses as being the attempt, solicitation or conspiracy to commit a felony. RCW 9A.28.020 (1) provides that a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step towards the commission of that crime. This language is repeated in the tampering with a witness statute RCW 9A.72.120 and was repeated in the jury instructions 20A, 20B. The result is the grammatically confusing and intellectually impossible statement that a person attempted to attempt to tamper with a witness. This ambiguity in law cries out for clarification and guidance by the court and legislature. If an attempt is a crime of failed completion of a crime, then that crime cannot be judged to be a completed crime as RCW 9A. 72.120 states, but rather is an attempt

to commit a crime as stated in RCW 9A.28.020(1). Additionally, criminal attempt to commit the Class C felony of witness tampering results in a Goss Misdemeanor charge under RCW 9A.28.020(3)(d). MacMillan was charged with and convicted on a Class C felony contrary to statute. If the evidence concerning the defendant's words to Mrs. Shelman is to be perceived as anything more than a stated opinion with no request for action, then that same evidence contains the same elements as the crimes of attempted witness tampering or a lesser crime or criminal attempt to commit a crime. Under the Workman test, a defendant is entitled to a lesser included offense instruction to the jury when (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal prong) and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). State v. Grier, 167 Wn. 2d 1017, 224 P.3d 773(2010) citing State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382(1978). Defendant MacMillan satisfies both the legal and factual prongs of the Workman test. The legal prong is satisfied in that the elements of the lesser offense of attempted witness tampering or criminal conspiracy are necessary elements of the greater offense of witness tampering. The factual prong is satisfied in that the evidence shows that only a lesser offense was committed. The State's witness, Mrs. Shelman, testified that she never conveyed the defendants'

words to Ms. Elliott, and that Ms. Elliott was not present to hear them. Attempted witness tampering would be a lesser offense of witness tampering under RCW 9A.28.020(1), (3)(d) were it not for the ambiguity of law previously discussed as being a Gross Misdemeanor. Jury instruction 20 did not include the option of a finding of guilt on any lesser offense, but rather required the jury to either be unanimous for a finding of guilt, and failing that, to acquit the defendant entirely of the charge of witness tampering. This denied the jury of the option of a finding of attempted witness tampering or any other lesser offense. Jury instructions 20A and 20B describe the elements of attempted witness tampering, but give no instruction that the jury must or must not be unanimous in order to convict on the greater charge or to convict on a lesser charge or acquit on any charge. A jury is presumed to follow the instructions given by the court. State v. Gamble, 168 Wn. 2d 161, 178, 225 P.3d 973(2010); State v. Kirkman, 159 Wn. 2d 918, 937, 155 P.3d 125(2007). Being provided with no other instruction other than to convict or acquit on the charge of witness tampering, the jury could not consider a verdict that included any lesser offense. This all or nothing strategy prejudiced the defendants' ability to receive a fair trial. That defendants counsel failed to include instructions to the jury regarding all possible lesser offenses containing the same elements as that of the charged offense is indicative of a failed trial

tactic or error of omission that cannot be excused. The courts will not find ineffective assistance of counsel if the action complained of is a legitimate trial tactic. State v. Garrett, 124 Wn. 2d 504, 520, 881 P.2d 185(1994). Counsel's actions, or lack thereof, created a substantial risk that the jury would convict on the only option presented. There was no legitimate reason to fail to request the lesser included offense instruction. Where the trial tactic is unreasonable, the court should reverse. State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670(2004). The courts previously held in some cases that a jury instruction error was harmless. In order to hold that a jury instruction error was harmless, the court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. State v. Brown, 147 Wn. 2d 330, 341, 58 P.3d 889(2002) citing Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999). The jury in MacMillan's case was clearly confused by the lack of instruction by the court evidenced by the jury question requesting clarification concerning attempted witness tampering. A different or more expository instruction might well have resulted in a different verdict. Jury instruction 20 is a flawed instruction in that it does not contain any instruction regarding the crime of attempted witness tampering or any other lesser charge, but rather gives a confusing mix of the preamble to and instruction on witness tampering followed by instructions on what

attempted witness tampering would be. Instruction 20 states that “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 April 30, 2010, the defendant attempted to induce a person to testify falsely...”. A proper instruction for the charge of witness tampering would not include the word attempted, followed by instructions 20A and 20B which describe the elements of attempted witness tampering. This confusing mix of instructions undoubtedly led to the deliberating jury’s question to the court concerning attempted tampering. Not all jury instruction error has its effect in the here and now. Washington law provides for the enhancement of punishments for crime based on a criminal defendant’s criminal history through the use of a “point” system computed to arrive at an “offender score” for the purposes of sentencing. RCW 9.94A.525 provides that defendants with numerous historical “points” receive greater sentences as points accumulate, and can even receive exceptional sentences for having accumulated a number of points greater than shown on the sentencing grid. The possibility of a future enlargement of one’s sentence based on a defendant’s offender score makes any error leading to conviction harmful, especially since points are subject to a “multiplier” for repeated same offenses. What a

defendant gets convicted of is very important relative to any future convictions of like kind.

## ISSUE 2

The court erred in regard to question of law posed by jury during deliberations.

## ISSUE OVERVIEW

During deliberations the jury asked the court a question of law concerning the crime of attempted witness tampering. The court declined to answer the question.

## ARGUMENT

The record is sparse concerning this issue. The presumption is that the deliberating jury became confused due to a flaw in jury instruction 20. Unable to come to an understanding on what action constituted what crime, the jury sent the following question to the court: “Does the delivery of a message by a second party constitute an attempt.”. In this question the jury appears to be wrestling with the elements of the crime of *attempted* witness tampering despite the fact that the jury instruction in its preamble required the jury to come to a verdict on the different crime of witness tampering. Given this situation, it requires quite a leap to believe the jury

could produce a verdict fairly addressing the evidence before it. According to the document “Question From Deliberating Jury”, a trio consisting of the judge and opposing counsel returned an answer to the jury requiring them to make their decision based on the erroneous instruction. This error by court and counsel cannot be laid at the feet of any one person as each and every one of the three had the opportunity to clarify the instruction. Without a doubt defense counsel was deficient in regard to jury instruction 20, although the presiding judge is at fault as well. Presumably the court when posed with the question of law by the jury examined the instruction from which the question arose. There appears not to be a well founded reason why the court would refuse to make an attempt to answer the jury’s question by either providing further instructions or clarification of the existing ones. A trial court abuses its discretion when it makes its decision on untenable grounds or for untenable reasons. Coggle v. Snow 56 Wn. App. 499, 507, 784 P.2d 554(1990). The unrelieved confusion of the jury prejudiced the defendants’ ability to receive a fair trial, and so reversal is the only remedy available to the court.

### ISSUE 3

The evidence does not support the verdict on the charge of witness tampering.

### ISSUE OVERVIEW

Marie Shelman testified that the defendant said words that might result in charges of either witness tampering or some lesser charge. The evidence suggests a possible attempt to either intimidate or tamper with the witness, or criminal intent to commit other crimes, although the act of doing so was never accomplished. During deliberations the jury asked the court a question of law concerning the crime of attempted witness tampering. The court declined to answer the question.

### ARGUMENT

In this case the evidence is insufficient to support the jury verdict. Defendants' words to the State's witness Marie Shelman are contradicted by Mrs. Shelman herself. Shelman testified on direct that Macmillan had "asked me if I would go out and tell Tracie that she would have to change her story" (1-VRP-89), and then testified on cross that she did not remember MacMillans precise words and that MacMillan did not say she (Shelman) "had to do it" (tell Tracie to change her story). A comparison of

the two pieces of testimony does little to define MacMillan's intent, but raises the larger issue of the clarity of Mrs. Shelman's memory, especially when taken in consideration with Mrs. Shelman's testimony that the victim was not present for the phone call versus the victim's testimony that she was present and overheard the phone conversation. (1-VRP-93, 47, 79). An attempt to induce a witness does not depend entirely on the literal meaning of the words used. The State is entitled to rely on the inferential meaning of the words and the context in which they were used. State v. Rempel, 114 Wn. 2d 77, 84, 785 P.2d 1134(1990) citing State v. Scherck, 9 Wn. App. 792, 514 P.2d 1393(1973). The conflicting and indefinite nature of the testimony does not prove the essential elements of the charged crime and therefore does not support the jury's finding of guilt on the charge of witness tampering. The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. Rempel at 83 citing State v. Green, 94 Wn. 2d 216, 221, 616 P.2d 628(1980); Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed. 2d 560, 99 S. Ct. 2781(1979); accord, e.g., State v. Aver, 109 Wn. 2d 303, 310-11, 745 P.2d 479(1987); State v. Guloy, 104 Wn. 2d 412, 417, 705 P.2d 1182(1985), cert. denied 475 U.S. 1020(1986). The conflicting evidence from the only witnesses, both of whom testified for

the State, lack any reasonable inference meeting the test that any rational trier of fact could have found guilt beyond a reasonable doubt. Sufficiently bolstering this argument is the obvious confusion of the jury shown in the question of law concerning attempted witness tampering which the court failed to answer or otherwise address. Additionally, the witness alleged to have been tampered with gave no positive testimony that might indicate that Macmillan's words had any effect on her, especially since the witness was fully cooperative with the on scene police investigators and appeared as a witness against MacMillan at trial. MacMillan's words, which of ever of them taken as true, do not lead to a reasonable inference that MacMillan actually attempted to influence the witness, or witnesses for that matter, to withhold testimony, and so the conviction must be overturned.

#### ISSUE 4

Counsel ineffectively assisted defendant in regard to evidence presented showing victims injury.

#### ISSUE OVERVIEW

Shortly after the altercation between MacMillan and Elliott, photographs were taken documenting Elliott's alleged injuries. Those photographs were entered into evidence at trial, and several persons testified as to the

meaning and contents of the photographs. Defense counsel did not object to the testimony or retain a medical expert to testify on defendants behalf.

## ARGUMENT

Defense counsels closing argument at 2-VRP-46, 47 asks the jury to examine photographs entered into evidence that show several different types of injuries to Ms. Elliott that appear to have occurred at different times and so were likely inflicted with two (2) or more different instruments. Despite defense counsels stated knowledge of this as a defense, counsel did not retain any medical expert to examine the contents of the photographs and testify concerning these injuries. Instead defense counsel without objection allowed Deputy Harrison (1-VRP-130) and Mr. Gasho (1-VRP-144) to give testimony of a medical nature regarding the contents of the photographs. Neither Harrison nor Gasho are medically qualified and so could not honestly call a mark a bruise caused by any specific instrument at any specific time. In order to provide effective assistance, counsel should have objected to any testimony of a medical nature by a medical non-professional, and should have required that the photographic evidence be supported by a medical professional's opinion on exactly what that evidence represented. A medical expert would have pointed out that all the testimony by all party's concerning a bruise was

inconsistent with the timeframe limitation on how much time must expire for an epidermal impact to result in a bruise. Deputy Harrison's testimony although containing no timeframe suggests that about one (1) hour expired between the time Ms. Elliott was injured and the photographs taken. This more reasonably explains the "one rather long red mark" (2-VRP-47) as being the only injury attributable to the altercation between MacMillan and Elliott and just as reasonably excludes all the witnesses testimony describing Elliott's injuries as being bruises, especially since none of these witnesses describe any "red mark" on Elliott or in the photographs. That being the case, it is clear that the defendant was convicted based on injuries to Elliott receive prior to the altercation. Defense counsel was clearly ineffective for failing to pursue a defense that would have resulted in a different outcome for the defendant.

#### ISSUE 5

Counsel ineffectively assisted defendant in jury selection resulting in gender bias of jury.

#### ISSUE OVERVIEW

The venire consisted of thirty-six persons equally divided as to gender. The prosecution used its challenges to strike six men and one woman from

the venire. The defense struck five women and two men. Thirteen jurors were chosen leaving a jury of ten women and three men. One man became the alternate juror leaving a jury of ten women and two men to decide the fate of the defendant in a case involving violence against a woman.

Opposing counsels challenges were not made part of the record, nor was any participation by the defendant in selecting the jury made part of the record.

#### ARGUMENT

The Voir Dire of the jury as recorded in the Verbatim Report Of proceedings Jury Voir Dire (JVD) appears to be well conducted and reasonably exhaustive. The defendant was present for the entire proceeding and per counsels instruction took notes in order to add his (defendants) input into the process. Upon completion of the Voir Dire the defendant presented his picks for the jury to defense counsel. At the bench and out of hearing of the defendant, the opposing counsel gave their jury picks to the court who announced the thirteen jurors. The defendant was not part of the actual selection process and none of the defendants picks were selected as jurors. To the defendants surprise and dismay, the jury consisted of a super-majority of women who would be deciding the defendant's fate regarding an alleged violent offense against a woman.

The defendant voiced concern over the situation to his attorney but was unsuccessful in obtaining any remedy. Defense counsel failed to inform the court regarding defendant's concern over the gender disparity of the jury. In this issue being argued, the defendant first raises a Batson challenge and then reaches the issue of ineffective assistance of counsel in selecting a non-gender biased jury. The defendant puts forth the assertion that the prosecution systematically struck from the jury as many men as possible in order to obtain a jury whose predominant gender was female, thus prejudicing the defendant's ability to receive a fair trial in a case where violence against a woman was the allegation on all charges. "The only right the criminal defendant has is that the selection process which produced the jury did not offer it to systematically exclude distinctive groups in the community.....this right is subject to the commands of the Equal Protection clause of the Fourteenth Amendment which prohibits systematic exclusion of otherwise qualified jurors....." State v. Rhone, 168 Wn. 2d 645, 660, 229 P.3d 752(2010) in pertinent part. In Batson v. Kentucky the court developed a three prong test to determine whether circumstances exist that would point to "something more" than a peremptory challenge against a member of a cognizable group. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69(1986). A Batson challenge must (1) establish a prima facie case of purposeful

discrimination. To establish this prima facie case, the court held that the defendant must provide evidence that raises an inference that a peremptory challenge was used to exclude a venire member from the jury on account of the venire members race, (2) if a prima facie case is established, the burden shifts to the prosecutor to come forward with a race neutral explanation for challenging the venire member, and (3) the trial court must determine whether the defendant has established purposeful discrimination. Batson at 126. In the present case MacMillan asserts discrimination by gender in the jury selection process rather than that of race. In J.E.B. v. Alabama the court determined that race or gender cannot be used as criteria to eliminate a potential juror. “Defining the scope of Batson involved alleged racial discrimination in the exercise of peremptory challenges. Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.” J. E. B. v Alabama, 511 US 127, 129,128 L Ed 2d 89, 114 S Ct 1419(1994); State v. Burch, 65 Wn. App. 828, 840, 830 P.2d 357(1992). The Burch court concluded that the exclusion of a prospective juror on the basis of group membership or on a stereotypical assumption about members of certain groups does not constitute a neutral explanation.

Burch at 840. In order to show the prima facie case that the prosecutor discriminately exercised his peremptory challenges to exclude as many male members of the venire as possible, the defendant has made as an exhausting a comparison as the record will allow concerning the backgrounds and responses of both the venire members who were struck and those who were selected as jurors. The State struck six men and one woman. Although the striking of that one woman seems in small part to contradict the defendant's Batson claim, evidence suggests the State had well founded reasons to do so. Venire member number 11 (V-11) revealed during Jury Voir Dire at page 91 (JVD-91) that she had previously served on a jury that reached a verdict in a felony criminal proceeding, but she did not reveal what that verdict was. It can be assumed that the prosecutor in this case having the resources to do so, investigated that verdict and found it to be contrary to the State's ultimate goal of acquiring a jury who would be predisposed to securing a conviction. Supporting defendant's theory is the fact that in the Voir Dire V-11 stated that the burden of proof beyond a reasonable doubt on the part of the State should remain very high. Given the totality of her responses it is clearly understandable that V-11 was struck, and therefore has no negative impact on defendant's Batson claim. In regard to the other prosecution peremptory challenges, quite the opposite is true. V-5, a woman who eventually became juror

number 1 (V-5/J-1), revealed during Voir Dire that she was or had a close relative who was a victim of some type of crime. (JVD-64). V-17, 18, 23, 30, all of whom were men, had the same response (JVD-64) but were struck by the prosecution. V-5/J-1 also revealed that she knew or associated with members of law enforcement in the community, her specific response being that she was married to a police officer for twenty years and had step-children who were police officers. (JVD-31). V-12, 23, 30, all of whom were men, had the same response (JVD-31, 107, 30, 64) but were struck by the prosecution. (V-30 is a retired park ranger which is an arm of law enforcement). V-27/J-3, a man, and V-25/J-11, a woman, both revealed that they did not support the use of force in order to protect one's property. (JVD-102, 110). V-22, a man, agreed with that belief (JVD-110) but was struck by the prosecution. V-27/J-3, a man, and V-8/J-13, a woman, revealed that they had been victims of a threat by another person. (JVD-73, 76). V-22, a man, was also a victim of a threat by another person. (JVD-74). Clearly a pattern appears given the fact that all the men struck from the venire made the same responses as the women who went on to form the jury. Without a doubt there was "something more" that caused all the men to be victims of the prosecutor's peremptory challenges. It would require the grandest of coincidences to have the man to woman ratio that exists to occur without some other thing, "something

More”, to be the cause of such a great disparity in gender. It is implausible that some gender neutral condition caused such an awkward balance in gender, and so the court should find in favor of the defendant regarding his Batson challenge to the process that produced the jury. It could be concluded that given the woman juror’s responses and the fact that they as females are more vulnerable to violence and therefore more sensitive to it, that the defendant was sure to get convicted of a violent crime against a woman regardless how weak or circumstantial the evidence.

## CONCLUSION

Defense counsel ineffectively assisted the defendant on the charge of witness tampering, ineffectively assisted the defendant regarding medical testimony given at trial, and ineffectively assisted the defendant in selecting a non-biased jury. The court abused its discretion when for untenable reasons and on untenable grounds the court failed to answer the question of law posed by the jury. The jury rendered a guilty verdict without having evidence proving beyond a reasonable doubt that the defendant was guilty.

For these reasons and the arguments presented herein, Plus since Miss Elliott was the aggressor and testified in open court to robbing Terr MacMillan of his enclosed trailer with \$30,000.00 in construction tools the

day before and was in the process of loading up the rest of Terr MacMillan and his Mother's personal property in to her Tahoe from his storage unit when Mr. MacMillan arrived at the scene, the day of this incident (1-VRP-67)-(1-VRP-69)

The Appeals Court should see how it was morally and ethically wrong to charge Terr MacMillan in the first place. To save face in the public's eye the prosecutor Edwin Norton and the whole of the Skagit County Prosecutors Office should not file any response brief or give an oral argument in this Appeal.

The defendant respectfully requests that the Court of Appeals to vacate the defendant's convictions on all charges without any new trial. To also dismiss with prejudice and Terr MacMillan be released from prison immediately, and/or any other remedy or action the court finds appropriate.

RESPECTFULLY SUBMITTED this, the 9 day of May 2011



Terr MacMillan, Appellant

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