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65978-2

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON,
Respondent,
v.
Jeffery C. Marble
Appellant.

No. 65978-2-1
STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

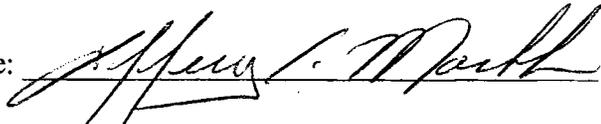
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MAY 19 2011

Nielsen, Branan & Koch, P.L.L.C.

I, Jeffery C. Marble, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

A brief summary of additional grounds is attached to this statement.

Date: 5/6/11 Signature: 



RULE OF APPELLATE PROCEDURE 10.10
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(a) Statement Permitted. A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.

(b) Length and Legibility. The statement, which shall be limited to no more than 50 pages, may be submitted in handwriting so long as it is legible and can be reproduced by the clerk.

(c) Citations; Identification of Errors. Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

(d) Time for Filing. The statement of additional grounds for review should be filed within 30 days after service upon the defendant/appellant of the brief prepared by defendant/appellant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant/appellant of the substance of this rule. The clerk will advise all parties if the defendant/appellant files a statement of additional grounds for review.

(e) Report of Proceedings. If within 30 days after service of the brief prepared by defendant/appellant's counsel, defendant/appellant requests a copy of the verbatim report of proceedings from defendant/appellant's counsel, counsel should promptly serve a copy of the verbatim report of proceedings on the defendant/appellant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant/appellant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

(f) Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant/appellant's pro se statement.

[December 24, 2002]

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Additional Ground #1

The point being addressed here is excessive bail. According to Ballentine's Law Dictionary, 3rd Edition, excessive bail is defined:

TEXT: An imposition prohibited by both the United States Constitution and state constitutions, being bail set at an amount higher than reasonably calculated to insure that the accused will appear to stand trial, considering the factors of the ability of the accused to give bail, the nature of the offense charged, the penalty for the offense charged, the character and reputation of the accused, the health of the accused, the kind and strength of the evidence, the probability of the accused appearing at trial, the forfeiture of other bonds, and whether the accused was a fugitive from justice when arrested.

The aspects of the definition text will be compared to a case with similar charges. The comparison case is Washington State v. Earnest Chavez. The charges for both cases are assault in the first-degree with a deadly weapon (DV). Marble was looking at less time than Chavez, because Marble had zero felony points. Chavez at the not only had previous felony points and a history of violent assault, and had spent time in California at San Quentin for a similar crime. Marble's character and reputation was at least as good, if not better than that of Chavez. Marble was at least as healthy as Chavez. There was stronger evidence against Chavez, in that there were additional witnesses to the actual assault, and they had the knife with his fingerprints on it. Marble had an extremely high probability of appearing at trial, since he had had no prior problems with law enforcement at all. Marble had no forfeiture of bond, and he was not a fugitive from justice when arrested. Chavez's bail was set at \$75,000 while Marble's bail was set at \$2,000,000. Marble tried on several occasions to get the bail reduced, and each time was denied. The issue was brought up and is on record both from court and trial. This comparison has clearly fulfilled every aspect of the very definition of excessive bail. Had Marble been able to arrange bail, he would have had the opportunity to find adequate counsel, and been able to prepare an unhampered preparation of a defense, and the trial would likely have turned out very differently. (See Additional Ground #5). Therefore, not only was Marble's amendment VIII right violated, but it in turn caused the violation of amendment VI, due process. Marble even tried to have the issue dealt with before trial by filing a Personal Restraint Petition that was dismissed because Marble had not exhausted all other avenues, i.e. having counsel address the issue, counsel however refused as indicated in the court

records. Marble did everything possible available to him to address the violation, and was denied at every turn, despite the fact that it clearly fits the very definition of excessive bail. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. (*Stack v. Boyle*, 342 US 1,96 L. Ed. 3, 72 S. Ct. 1 (1951)). This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right is preserved, the presumption of innocence would lose its meaning. (*Hudson v. Parker*, 156 US 277,285, 39 L ed 424, 426, 16 S Ct 450 (1895)). This was denied Marble, not to mention an unhampered preparation of a defense and by so doing, violated his amendment VI right.

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Bail and Recognizance 7.5 - proceedings to reduce bail - necessity of speedy relief.

Relief in proceedings to reduce bail must be speedy to be effective.

Bail and Recognizance 6 - before conviction - purpose.

The traditional right to bail before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right is preserved, the presumption of innocence would lose its meaning.

Bail and Recognizance 7.5 - before conviction - excessive bail.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. The practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.

Bail and Recognizance 7.5 - before conviction - excessive bail.

To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.

Appeal and Error 77 - order denying motion to reduce bail - appealability.

An order denying a motion to reduce bail is appealable as a "final decision" of the district court within the meaning of 28 USC 1291.

Additional Ground #2

The point being addressed here is prosecutorial misconduct. Nowhere in the charging documents against the defendant, were guns mentioned. Guns were not used in the commission of the alleged incident, none of the guns were loaded, nor were they anywhere within reach. Prosecution used the issue of guns in her closing arguments not just mentioning them once or twice, but mentioning them more than a dozen times, using the existence of the guns as an argument for intent to the jury. Intent being the key issue for proving assault in the first-degree. The fact of the existence of the guns in the house has absolutely no relevance to the case. They were legally owned, and the only reasonable and logical conclusion to referencing the guns more than a dozen times, was simply to prejudice the jury against the defendant. In *Washington State v. Odom* 8 Wn. App. 180;504 P.2d 1186;1973, the appellate court reversed a charge of assault in the first-degree, because:

“It could not have been said with a substantial assurance that the presumed fact, a specific intent to kill, would more likely than not, have flown the fact that defendant was in possession of an unlicensed pistol.”

And, in the current case, there were no guns in the defendant’s possession, and therefore an argument supporting intent from the existence of guns on the premises was improper, whether they were in cases or not. So, not only was using the guns as an argument for intent improper, and a procedural error, but mentioning them more than a dozen times during closing arguments was highly prejudicial. (3RP 228-29, 3RP 259). This was a clear and blatant attempt to influence and prejudice the jury. The next aspect of prosecutorial misconduct is misrepresentation of evidence. The prosecution used various aspects of the fanny pack to build another argument for intent. The prosecution stated:

“What was the significance about it? There’s no blood on it. There’s no blood on the fanny pack. He wasn’t wearing it when he was beating her. He took that fanny pack off and he put it down on the ground where he dropped it before he attacked her, because he knew what he was going to do.” (3RP 228).

The actual evidence as testified to by the lead detective, detective O’Hara:

“...and it’s the fanny pack that Mrs. Marble said he was wearing during the incident.” (3RP 191 lines 21-23).

The evidence states the defendant was “*wearing during the incident*” which is very different from “*He took that fanny pack off and he put it down on the ground where he dropped it before he attacked her, because he knew what he was going to do.*”

This is a clear misrepresentation of the established facts. Now, the prosecution's statement that "*There's no blood on it.*". Where is the evidence to support this statement? There is none. The Everett police department did not process any blood evidence. (3RP 214 lines 4-6). Was the fanny pack entered into evidence? No. Was there a blood evidence report entered into evidence stating there was no blood on the fanny pack? No. She even made this statement twice to emphasize the point. There was no evidence to support her statements, but there was however evidence to the contrary. The lead investigator on the case, detective O'Hara's testimony states; "...he was wearing [it] during the incident.", which actually indicates that blood would have been found on the fanny pack, had it been tested. The prosecution has not only misrepresented facts, but expounded upon those misrepresentations to build an entire argument for intent, the key issue for a conviction of first-degree assault. These statements, without question, altered the jury's perception of the facts and their relevance to the case. In addition, as indicated in Additional Ground #5, counsel was ineffective, and because counsel did not object and argue these issues, that further bolstered the perceived validity of the misrepresented evidence. The prosecutor's misrepresentations undermined the fundamental fairness of the trial and contributed to a miscarriage of justice. (United States v. Carter, 236 F.3d 777 (6th Cir. 2001)). Under the decisions of the Supreme Court, a due process violation may occur when the prosecution mischaracterizes the earlier sworn testimony of a witness.

Constitutional Law 840 – due process – false evidence

A conviction secured by the use of false evidence must fall under the due process clause where the state, although not soliciting the false evidence, allows it to go uncorrected when it appears.

Constitutional Law 840 – due process – false evidence

Under the due process clause, a new trial is required in a criminal case if false testimony introduced by the state, and allowed to go uncorrected when it appeared, could in any reasonable likelihood have affected the judgement of the jury.

Additional Ground #3

The point being addressed here is insufficient evidence regarding the charge of assault in the first-degree. The primary requirement for first-degree assault is intent. As indicated in Additional Ground #2, prosecution's arguments regarding intent were fraught with errors, so any conviction based on those errors is improper. The very evidence used to argue intent has been invalidated, both by precedent, and by testimonial evidence, so without this evidence, there is insufficient evidence to prove intent beyond a reasonable doubt. Especially considering the "victim's" own testimony, she stated that she "...got the defendant up...got him to the bathroom...to clean up Jeffery..." (3RP 82 lines 17-22, 3RP 95 lines 1-4) indicating she was controlling the situation. Also, "...he was hitting himself in the head..." (3RP 78 lines 1-3), and that he [defendant] was slumped over her, collapsed several times (3RP 83), and that "...he was grunting and growling." (3RP 95 lines 15-18). Specific intent is defined as intent to produce a specific result. What was the specific result the defendant intended while all this was transpiring? The "victim" also states that she was "...trying to prolong the incident until Gavin got home." (3RP 97). This again indicates that the "victim" was controlling the situation. The "victim" also has a history of self-mutilation (3RP line 24 to 3RP line 5). Expert testimony also indicated that many of the "victim's" wounds could have been self-inflicted. These statements cast serious doubt as to the intent aspect of assault in the first-degree. In addition, there is no physical evidence connecting the defendant to the alleged weapon. The Everett police department never tested the alleged weapon for fingerprints. (3RP 213 lines 19-22). Contrary to the claim of the "victim", the only other witness, Mr. Gavin Dunne-Marble never saw the alleged weapon in the defendant's hand. (3RP 109). The prosecution's argument regarding intent has already been proven to be either irrelevant and erroneous, or misrepresenting the evidence. Therefore the heavy burden of proof beyond a reasonable doubt for the intent aspect of assault in the first-degree has not been met, and the court should therefore dismiss the assault charge with prejudice, due to insufficient evidence.

Additional Ground #4

The point being addressed here is insufficient evidence regarding the deadly weapon enhancement. There was no fingerprint evidence entered into evidence connecting the alleged weapon to the defendant, because there was none. The Everett police department never tested the alleged weapon for fingerprints. (3RP 213 lines 19-22). In addition to no fingerprint evidence, additional evidence should be considered. The “victim” has a history of self-mutilation. (3RP 97-98). The only other witness to the incident contradicts the “victim’s” testimony, indicating that when he entered the bathroom the defendant not only did not have the weapon in his hand, but also had his back to the witness and could not have seen him, as the “victim” testified. (3RP 109). This same witness, Mr. Gavin Dunne-Marble, also testified that the defendant was “limpish”, only “made noises”, and that it appeared the “victim” was holding up the defendant. (3RP 110-11). There is also expert testimony indicating that many of the “victim’s” wounds could have been self-inflicted. Since there is no physical evidence directly linking the defendant to the alleged weapon, and considering the defendant was grunting, growling, collapsing, and incoherent, and the “victim’s” history of self-mutilation, the heavy burden of proof beyond a reasonable doubt was not satisfied, and the deadly weapon enhancement should therefore be reversed.

Additional Ground #5

The point being addressed here is ineffective assistance of counsel. Despite the defendant's many requests, counsel never required the prosecution to test the alleged weapon for fingerprints, (3RP 213 lines 19-22), and the blood evidence for the fanny pack. (3RP 214 lines 4-6). CL 46.4 – The sixth amendment guaranty of assistance of counsel – ethical practice limitations “...counsel must hold prosecution to its heavy burden of proof beyond a reasonable doubt...”, and CL 46.6 – denial of counsel – inherent unfairness “...fails to subject the prosecution's case to meaningful adversarial testing...” United States v Cronin 466 US 648, 80 L Ed 2d 657, 104 S Ct 2039 (1984). Also, not only did counsel fail to argue the points addressed in the attached brief, but counsel also failed to argue the issues addressed and previously stated in Additional Grounds #1, #2, and #3. Counsel also failed in several other areas as well, those include, but are not limited to: discovery violations, not discussing strategy with the defendant, failing to present character witnesses (Rule 404 (a)(1)), and failing to present evidence regarding the defendant's injuries, and medical conditions. Regarding the discovery violations, according to Washington Criminal Practice and Procedure Vol. 12 §1319 “...require disclosure to the defendant...”. The defendant had requested a copy of the discovery from the first day counsel was retained. Counsel said he would give the defendant a copy, but he never did, even though he was asked on numerous occasions. In addition, counsel never went through the discovery with the defendant. As a matter of fact, the first time the defendant saw any of the images that were presented as evidence at trial, was during the trial when they were projected onto the screen. Counsel did not discuss strategy with the defendant, all counsel would say was that his strategy would become evident in his closing arguments. That is far too late to make any adjustment to strategy when the trial is all but over. Counsel also failed to present any of the defendant's injuries and medical conditions as evidence at trial. The defendant's medical records indicate injuries including soft tissue and skeletal trauma, rhabdomyolysis caused by severe soft tissue damage, dysarthria from possible stroke, acute renal failure brought on by the rhabdomyolysis, and suffered from an altered mental state of unknown etiology. This evidence, had it been presented, could easily have affected the jury's decision specifically

regarding knowledge and intent, both basic requirements for first-degree assault. The medical records were available to counsel and he was asked many times to present the injuries in trial. Counsel's failure on so many levels satisfies both the deficiency requirement, as well as the probability of a different result with effective assistance requirement. (Strickland v Washington, 466 US 668, 104 C Ct 2052, 80 L ed 2d 674 (1984)).

Additional Ground #6

The point being addressed here is the photographic images that were introduced into evidence. According to CrR 4.7 (a)(1)(v) “...the prosecuting attorney shall disclose to the defendant...” the photographic images that were admitted into evidence. The defendant never saw those images as indicated in Additional Ground #5. The defendant should have been allowed to view those images *prior* to the omnibus hearing, as clearly stated in CrR 4.7 (a)(1), this did not happen, and is a clear violation of the rules of discovery. In spite of the fact that counsel stipulated to all of the images being entered as evidence, the fact that the defendant had never seen any of the images of the “victim”, and discovery was violated, the images should be ruled as inadmissible as evidence. Also, because the defendant had never seen any of the images, he had no opportunity to question both the authenticity and origins of those images. Were those images photographs developed directly from the negatives as required by Evidence Law and Practice (Rule 1002. Requirement of original, specifically 1002.5)? Or, were those images taken from digital images that could have been edited or altered? Digital images can easily be edited and modified, and require authentication to prove that they are true and unedited, by an independent unbiased expert witness, who has had time to examine and certify their authenticity. This was not done. Since it has already been established that counsel was ineffective and the prosecution misrepresented evidence, it is certainly reasonable to question both the origin and authenticity of the images that were introduced as evidence. Also, according to CrR 4.7 (h)(7)(i), and *State v. Ramos*, 83 Wn. App. 622, 636, 922 P.2d 193 (1996), due to the mismanagement of discovery, dismissal of all charges, due to discovery violation has precedent.

Additional Ground #7

The point being addressed here is the defendant's right to a speedy trial. Marble had agreed to sign the first five (5) trial continuances. Counsel was retained on January 2, 2010. While Campbel was cited on May 28, 2010, there had already been five continuances, and counsel had already had five months to prepare a defense. Counsel had also assured the defendant that he would be ready for trial in April of 2010. The defendant refused to sign the 6th & 7th continuances, but they were granted anyway, to allow the defense time for a "prepared and proper defense". Through each of the previous five continuances, the prosecution claimed to be waiting on additional evidence and charges from the United States Attorney's Office, right up to the trial. Whatever evidence and charges the U.S. Attorney's office had or didn't have had no bearing on the charges that were already filed, and, if any charges are ever filed, that would then be a federal case and again have no bearing on the current case and charges. So, the prosecutor's arguments for continuances were irrelevant. Therefore the continuances granted on both May 18, 2010, and July 2, 2010, were both unjustly granted, based on grounds that had no relevance, and therefore violated the defendant's sixth amendment constitutional (speedy trial) right.

Additional Ground #8

The point being addressed here is that the prosecution failed to indicate in the charging information that the alleged assault was unprovoked. In *Washington State v. Ackles*, 8 Wash. 462,464,36 P. 597 (1984). Jury conviction was improper because there was no allegation in the charging information that the defendant's assault was unprovoked. Assault with a deadly weapon with intent to do bodily harm, requires an allegation in the information that the defendant's assault was without provocation. There was no such allegation in the charging information that the defendant's assault was unprovoked.

Conclusion

Due to the nature and extent of the issues and errors addressed here, including, constitutional rights violations, amendments 5, 6, & 8, discovery violations, ineffective assistance of counsel, prosecutorial misconduct, misrepresentation of evidence, and procedural errors. This case did not grant Marble the fundamental fairness required, both by the constitution, and the spirit of the law. The type of errors that occurred in this case should never have occurred. Had there not been discovery violations, misrepresentation of evidence, prosecutorial misconduct, and had Marble not had excessive bail, he would have had the opportunity to find and retain effective counsel, and been permitted the unhampered preparation of a defense, this case would likely have had a very different outcome. Due process was not observed. A fair and speedy trial was not observed. I therefore respectfully request that all charges and convictions be dismissed with prejudice, or, failing that, all charges and convictions be vacated or reversed and the defendant be granted release on his own recognizance until such time as he may be found guilty at a fair and just trial, if such guilt can be found. Thank you.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65978-2-1
)	
JEFFREY MARBLE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF MAY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MAY 2011.

x Patrick Mayovsky

