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NO. 34351-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROY KENNETH STILLWAGON, II,

Appellant.

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

The Honorable Anna M. Laurie, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's refusal to give a cautionary instruction regarding accomplice testimony denied appellant a fair trial.

2. The court's failure to give a limiting instruction regarding evidence of prior domestic violence denied appellant a fair trial.

3. Trial counsel's failure to propose a limiting instruction for evidence admitted under ER 404(b) denied appellant effective assistance of counsel.

4. Trial counsel's failure to propose an effective limiting instruction regarding evidence relevant solely to the witness's credibility denied appellant effective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant and a co-defendant were charged with first degree felony murder, first degree robbery, and first degree burglary. Appellant was also charged with assault of the co-defendant. The co-defendant pled guilty and testified against appellant. Although much of the co-defendant's testimony was corroborated, the portion describing appellant's participation in the charged acts was not. Under the circumstances, was it reversible error for the trial court to refuse

appellant's requested instruction cautioning the jury regarding the use of accomplice testimony?

2. The court admitted evidence of prior domestic violence between appellant and a key state witness. Although the court ruled that the evidence was admissible to help the jury assess the witness's credibility in light of inconsistent behavior, it never instructed the jury as to the limited purpose for the evidence. Did the court err in admitting evidence of prior domestic violence without an adequate limiting instruction?

3. If the court was not required to give a limiting instruction unless one was requested by defense counsel, did counsel's failure to request a limiting instruction deny appellant effective representation?

4. Over defense objection, the court admitted evidence of telephone calls the state's witness had received from appellant's friend after appellant was arrested. The court ruled that the calls were relevant to the witness's credibility, because she had testified she remained afraid of appellant. There was no evidence that appellant was connected to the calls, however, and defense counsel proposed a limiting instruction. Where the proposed limiting instruction failed to limit the jury's use of the evidence to determining the witness's credibility and instead permitted the

jury to infer that appellant had threatened the witness, was appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On August 31, 2005, the Kitsap County Prosecuting Attorney charged appellant Roy Kenneth Stillwagon, II, with one count of first degree felony murder, acting as a principal or accomplice. CP 1-7; RCW 9A.32.030(1)(c); RCW 9A.08.020(2)(c). In an amended information filed October 10, 2005, the state added charges of first degree robbery, first degree burglary, and unlawful possession of a firearm. Firearm allegations were included on the burglary and murder charges. CP 25-30; RCW 9A.56.200(1); RCW 9A.56.190; RCW 9A.52.020; RCW 9.41.040(1)(a); RCW 9.94A.602.

The case was joined for trial with the case against co-defendant Lucas Johnson, and on November 4, 2005, the state filed a second amended information. CP 142-49. The information alleged that Johnson and Stillwagon committed or attempted to commit either first degree robbery or first degree burglary, and in the course of, in furtherance of, or in immediate flight from the crime, Johnson or Stillwagon caused the death of Leonard William Brown, III. CP 142-43. The information charged Johnson and Stillwagon as accomplices in the robbery of Brown

and the burglary of Brown's residence. CP 144-45. In addition, the information charged Stillwagon with first degree assault against Johnson, and unlawful possession of a firearm. CP 146-48; RCW 9A.36.011(1)(a) and/or (c). Firearm allegations were included on the murder, robbery, burglary, and assault charges. CP 142-48; RCW 9.94A.602.

The case proceeded to jury trial before the Honorable Anna Laurie. During the course of jury selection, Johnson entered a plea agreement and pled guilty to reduced charges, and the trial proceeded solely as to Stillwagon. See 8RP<sup>1</sup> 6. The jury entered guilty verdicts as well as special verdicts that Stillwagon or an accomplice was armed with a firearm during the murder, burglary, robbery and assault. CP 470. The court abated the robbery conviction and corresponding firearm enhancement, concluding the robbery was necessary to establish the felony murder charge. CP 471; 17RP 26. The court concluded that the burglary, robbery and murder encompassed the same criminal conduct and therefore merged the burglary with the murder when calculating Stillwagon's offender score. 17RP 26. The court imposed standard range concurrent sentences on the murder, burglary, and firearm possession

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<sup>1</sup> The Verbatim Report of Proceedings is contained in 17 volumes, designated as follows: 1RP—9/16/05; 2RP—10/7/05; 3RP—10/14/05 (a.m.); 4RP—10/14/05 (p.m.); 5RP—10/21/05; 6RP—11/15/05; 7RP—11/28, 11/29, 12/2/05; 8RP—12/7, 12/8, 12/12, 12/13, 12/15/05; 9RP—12/19/05; 10RP—12/20/05; 11RP—12/21/05; 12RP—12/22/05; 13RP—12/27/05; 14RP—12/28/05; 15RP—12/29/05; 16RP—1/3, 1/4/06; 17RP—1/20/06.

convictions, consecutive to the sentence on the assault conviction, with three consecutive firearm enhancements, for a total of 773 months confinement. CP 473.

Stillwagon filed this timely appeal. CP 479.

2. Substantive Facts

At 7:00 on the morning of August 26, 2005, Patrick Crowthers found the body of his roommate, Leonard Brown, lying on the floor near the front door of their house. Brown was wearing only boxer shorts, there was blood on the floor around him, he was not moving, and he was cold to the touch. 12RP 656, 659. Crowthers called 911. 12RP 657. An autopsy revealed that Brown had died of a gunshot wound to the chest around 2:00 a.m. 9RP 218, 223. A single shell casing was found in the grass near the front porch, and several drops of blood were found in the entryway of the house and in Brown's bedroom. 12RP 672, 728, 733, 735. Police also found cocaine sitting on top of a trunk at the foot of Brown's bed. 12RP 726, 801. Police dusted for fingerprints and sent the blood samples and shell casing to the crime lab for analysis. 12RP 742. Although no fingerprints were ever identified, the blood was found to match samples from Lucas Johnson. 12RP 780; 14RP 1076.

Around 9:00 on the evening on August 25, 2005, Lucas Johnson, Antoine Murkins, and Kevin Buchin went to Brown's home to buy some

cocaine. 10RP 298-99. Brown refused to sell to them. He knew Johnson had recently been arrested on drug charges and thought he might be working for the police. Brown did not know Buchin and had the same concern about him. 10RP 299-300. As they were leaving Brown's house, Johnson asked Buchin to wait by the car, while he and Murkins went back to talk to Brown. 10RP 302. Brown again refused to sell Johnson any cocaine, but he gave Johnson a small amount free of charge, and Johnson and Murkins left. 10RP 304.

Johnson was very angry that Brown would not sell him cocaine, and he told Murkins they should just beat Brown up and take his drugs. 10RP 305. Murkins told Johnson he would not do that, and Johnson seemed frustrated that he could not get what he wanted. 10RP 305.

Over the next few hours, Johnson used the cocaine Brown had given him and drank about six beers and nine shots of alcohol. 11RP 512, 600. Johnson was addicted to cocaine and was desperate to obtain more, and Brown was the only source he knew of to get the cocaine he needed. 11RP 516. He made several calls trying to locate someone who could buy cocaine from Brown for him, but he was unsuccessful. 10RP 306-07;

11RP 616. Eventually he called Kenny Stillwagon<sup>2</sup>, seeking his help. 11RP 513-14.

Johnson and Stillwagon were close friends, and they had been spending a lot of time together. 11RP 505; 14RP 1145. Johnson had introduced Stillwagon to his good friend Heather McEntee, and she and Stillwagon were currently dating. 9RP 141; 11RP 571. Stillwagon agreed to help his friend. 14RP 1153.

Stillwagon was in his apartment with McEntee when Johnson called. 14RP 1150. When McEntee asked Stillwagon about the call, he told her Johnson had tried to buy drugs from Brown but Brown would not sell him any because he thought Johnson was a snitch. Johnson was upset about that, and he and Stillwagon were going to go to Brown's house to intimidate him and get the drugs Johnson wanted. 9RP 80.

After Stillwagon told McEntee about his conversation with Johnson, he made a phone call trying to locate a gun for Johnson to use. 9RP 81. Murkins testified that Stillwagon called him around midnight wanting to know what had happened with Brown and why Brown would not sell Johnson cocaine. 10RP 309. Stillwagon asked if Brown had any guns, and Murkins told him he did not think so. 10RP 310. When he

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<sup>2</sup> Appellant's name is Roy Kenneth Stillwagon, II. Witnesses referred to him as "Kenny."

asked why Stillwagon wanted to know, Stillwagon said if he ever decided to rob Brown he did not want to get shot. 10RP 311.

Stillwagon then called Johnson, asking when he was going to arrive and saying he just wanted to leave and get it over with. 9RP 82. Johnson arrived around 1:00 or 1:30. 9RP 83. Stillwagon asked Johnson if he had anything to protect himself, and Johnson said he had his baseball bat in the car. They talked about going to Brown's house to intimidate him. 9RP 85. Stillwagon and Johnson then went into the bedroom. When they came back out about ten minutes later, they had changed into dark long-sleeved clothing. 9RP 85-86. They were still talking about going over to Brown's house. 9RP 87. Stillwagon went back into the bedroom and got a bandana, a mask, and his gun. 9RP 88. When McEntee asked Stillwagon why he needed to bring a gun, he assured her he did not plan to use it but was only bringing it for protection. 9RP 90. Stillwagon and Johnson left the apartment about five minutes later. 9RP 92.

McEntee fell asleep on the sofa after they left. Stillwagon woke her up when he returned, telling her to remain calm. Johnson then showed her that he had been shot through the arm. When she asked what happened, Stillwagon told her they had gone to Brown's house and knocked on the door. When Brown opened the door and saw Johnson, he tried closing the door again. Johnson pushed the door open and Brown hit

Johnson in the face. Johnson fell backwards, and Stillwagon pulled the trigger. The bullet went through Johnson's arm and into Brown's chest. 9RP 94.

McEntee testified that Johnson told her he knocked on the door hoping Brown would agree to sell him cocaine and that Stillwagon told her the gun went off accidentally. 9RP 150, 174. McEntee then saw Johnson pull \$700 out of his wallet, saying he had gotten it at Brown's house. 9RP 136, 156-57. He and Stillwagon split the money, each taking \$350. 9RP 101.

Johnson was in pain and asked Stillwagon to go to his house to get some muscle relaxers. 9RP 97. While he was gone, Johnson told McEntee that if anyone asked her about what had happened, she should deny knowing anything about it. 9RP 98.

Later that morning, Johnson and Stillwagon went to Johnson's house. Johnson had called his mother, who had some medical training, and asked her to come over and treat his wound. Johnson's mother Rene Massoth, her boyfriend Stan Purser, and Johnson's younger sister Chelsea came to the house. 11RP 556-57. Stillwagon told Chelsea that he had accidentally shot Johnson, and he apologized. 13RP 967. Stillwagon showed Purser a gun and told him the gun was going to disappear. 13RP 975.

At some point, Stillwagon had gathered up the clothing and shoes he and Johnson had been wearing the night before and put them in plastic garbage bags. 9RP 117-18; 14RP 1172-73. Johnson and Stillwagon asked Purser to take the two garbage bags with him and burn the items. Stillwagon gave Purser the bags, and Purser put them in the back of his car where they stayed for the next week or two. 13RP 972, 981. He did not destroy the bags because he learned that someone had been murdered and he thought the bags might be related. Instead, he hid the bags in the woods. 13RP 983.

Around 10:30 p.m. on August 26, Murkins went to Stillwagon's apartment. 10RP 311-12. Stillwagon said he needed to talk to Murkins, and they went into the laundry room and then out onto the roof. 10RP 314-15. Stillwagon told Murkins he had made a mistake and something had gone wrong. 10RP 315. He said he and Johnson had gone over to Brown's house. They knocked on the door, and when Brown opened it, Brown and Johnson got into a scuffle. Brown punched Johnson, Johnson fell back into Stillwagon, and the gun accidentally went off. He said the bullet went through Johnson's arm and into Brown's chest. 10RP 316. Stillwagon told Murkins that he and Johnson then looked for drugs and money. They did not find any drugs, but they found \$700 cash. 10RP 318. Murkins testified that Stillwagon told him this because they were

good friends, he believed it was an accident, and he did not know what to do. 10RP 318. Murkins was not able to give him any advice. Id.

Efren Murrieta was married to Stillwagon's cousin and was a good friend of Stillwagon's. 13RP 855. Early on Sunday August 28, Murrieta drove Stillwagon to Johnson's house to pick up Stillwagon's backpack. 13RP 864. Stillwagon gave Murrieta the bag, which contained his gun, and told him to keep it. 13RP 866; 14RP 1184. Stillwagon knew that, as a convicted felon, he was not supposed to have a gun, and he did not want police to find the gun in his possession. 14RP 1184. Murrieta locked the bag with the gun in the back of his truck, and the next day he drove to a wooded area in Mason County and hid the gun case under a stump. 13RP 867, 888.

Johnson first spoke to the police about the incident the afternoon after Brown was killed. He told the police he had heard that Brown had been shot, but he did not mention his involvement. 11RP 560. The next day he went to the police station for an interview. He told the police he had been to Brown's house earlier in the evening on August 25 with Murkins and Buchin, but he did not tell them about going back later. 12RP 683. Two days later, on August 29, the police asked him to come to the station and go over his statement again. 11RP 569; 12RP 684. At that point, Johnson told police that he and Stillwagon had gone to Brown's

house to rob him, and during the robbery Stillwagon had shot Johnson and Brown. He later learned that Brown had died. 12RP 686. Johnson was arrested following the interview. 12RP 678.

Stillwagon was arrested that same day outside his apartment. 12RP 812. He was brought to the police station and taken to an interview room. Stillwagon told the officers he had been home with McEntee from about 7:00 on August 25 for the rest of the night. 15RP 1237. He told the police he had recently sold a Glock 9mm for \$350, and that was the only gun he owned. 15RP 1236. When he was informed that he was under arrest for murder and robbery, Stillwagon yelled out "robbery." 12RP 689.

On September 9, Murrieta led the police to the location where he had hidden the bag Stillwagon left in his truck. 13RP 851. Police recovered the bag, which contained a .40 caliber Smith and Wesson handgun and three magazines of ammunition. 12RP 759. Crime lab scientists determined that the bullet that killed Brown and the shell casing found in Brown's yard had been fired from that gun. 13RP 934, 941. No DNA or fingerprints of comparison value were found on the gun or ammunition. 12RP 790-91; 14RP 1093, 1095.

Police met with Purser at his home on September 10. Purser admitted hiding two plastic bags of clothing in the woods near his home,

and he led police to the bags. 14RP 1015-16. The bags contained several items of clothing with Johnson's blood on them, including a shirt with a hole through the left sleeve. 14RP 1021-22, 1081, 1085. Neither Johnson nor Stillwagon could be excluded as a source of DNA found on one of the shirts. 14RP 1088. Stillwagon was a possible contributor to a DNA mixture found on a bandana in one of the bags, and his blood was found on a mask. 14RP 1099-1100, 1102.

Johnson and Stillwagon were charged with first degree felony murder, first degree robbery, and first degree burglary. Stillwagon was also charged with first degree assault against Johnson and first degree unlawful possession of a firearm. CP 142-49. The cases were joined for trial. 5RP 19.

After jury selection had begun, Johnson entered a plea agreement with the state. 8RP 6. In exchange for reduced charges, he agreed to testify against Stillwagon. 11RP 674. Under the agreement, the state dropped all the charges against Johnson except the murder charge, which was reduced to second degree murder. The agreement also resolved Johnson's pending cocaine delivery charge. 11RP 576. The state agreed not to file additional charges or school zone enhancements and agreed that Johnson could serve his sentence on the drug charge concurrently with his murder sentence. 11RP 623-24. Thus, as a result of his agreement to

testify against Stillwagon, Johnson was looking at a sentencing recommendation of 20 years, rather than the 51 years he faced on all the potential charges against him. 11RP 576, 625.

Johnson testified that part of the reason he pled guilty was to accept responsibility for his actions. He quickly added, however, that he did not really have anything to do with the murder. He just played a part in Brown's death because if he had not come up with the plan to rob Brown, Brown would still be alive. 11RP 583-84.

According to Johnson, when he could not get Brown to sell him cocaine, he called Stillwagon and asked him if he wanted to go over to Brown's to rob him. Johnson said that Stillwagon was all for it and kind of wanted to do it. 11RP 514-15. Stillwagon called him several times, asking when he was going to arrive and if they were really going to rob Brown. 11RP 522-24.

Johnson testified that they left Stillwagon's apartment around 1:30 and drove in his car to Brown's house. 11RP 532, 534. They did not really have a set plan when they left, but their basic idea was to try to force Brown to sell them cocaine. 11RP 537-38. They did not intend to bust down Brown's door. Johnson decided once they parked on Brown's street that he would just see if Brown would reconsider his decision not to sell Johnson cocaine. According to Johnson, he told Stillwagon this plan

when they got out of the car and walked to Brown's house. 11RP 539. He told Stillwagon to let him do the talking. 11RP 540.

When they arrived at Brown's, they left the mask, bandana, and baseball bat in the car. Johnson did not see Stillwagon's gun but believed he still had it with him. 11RP 538-39.

Johnson testified that when Brown opened the door, he was not happy to see Johnson and asked what he was doing there. Johnson said he wanted to know if Brown would sell him cocaine since Kevin was no longer with him, and Brown refused. 11RP 541. Then Johnson threatened Brown, saying he could come in and take it if he wanted to. Brown responded by punching Johnson in the face and trying to close the door. According to Johnson, he then heard the gun go off. He spun around and Stillwagon went past him, and when he turned around Brown was on the floor, and Stillwagon was standing in the entryway holding the gun. 11RP 543.

At that point, Johnson entered Brown's house and searched his bedroom for cocaine. When he failed to find any, he went back and shouted at Brown as Brown lay on the floor. Brown did not answer, so they left. 11RP 544-45. Johnson testified that Stillwagon stood by the door in the entryway the entire time Johnson was in the house. 11RP 546.

Johnson testified that he did not notice that he had been shot until they were leaving Brown's residence. 11RP 547, 550. Johnson told Stillwagon he had been shot and asked Stillwagon why he had fired the gun. Johnson testified that Stillwagon said he did not know, and that everything had gotten crazy. 11RP 550. According to Johnson, Stillwagon did not say anything about the shooting being an accident. 11RP 550.

They drove from Brown's house back to Stillwagon's apartment, where Stillwagon gathered their clothes and put them in garbage bags. 11RP 551, 555. Although McEntee testified that Johnson pulled the \$700 from his wallet and divided it with Stillwagon, Johnson claimed that Stillwagon took the money from Brown's house. He did not see Stillwagon take it, and he had testified that Stillwagon never left the entryway. Nonetheless, Johnson testified that Stillwagon pulled out \$700, asked him if getting shot was worth \$350, and handed him the money. 11RP 583.

Johnson testified that the next time he saw Stillwagon after his arrest was in a holding cell waiting to be brought to court for trial. 11RP 568, 581. According to Johnson, Stillwagon told him that if he took the stand, he planned to say he was not at Brown's house. Johnson said they

also discussed what had gone wrong, and Stillwagon commented that if he had not shot Johnson, they would not have gotten caught. 11RP 582.

Johnson was not the only witness who received consideration from the state in exchange for testimony against Stillwagon. Murkins, Murrieta, and Purser all entered immunity agreements. And a bail jumping charge against McEntee was dismissed when she talked to the police.

When the police first contacted McEntee, she told them she did not know anything about Brown's death and that she, Stillwagon, and Johnson had been at Stillwagon's apartment the whole night. 9RP 108, 146. Later that week, when she was late to a court date on a misdemeanor charge, the prosecutor filed a bail jumping charge against her and a warrant was issued for her arrest. Her lawyer arranged for her to talk to the police about the Brown investigation, and at that point McEntee gave a statement consistent with her testimony at trial. The bail jumping charge was then dismissed. 9RP 111-12.

When Murkins first talked to the police, he lied about the reason he went to Brown's house with Johnson on August 25. He was on probation and did not want the police to know he had gone there to buy cocaine, so he said they just went to ask Brown if he was going to play pool with them. 10RP 342-43. After giving a complete statement to the police,

Murkins entered an immunity agreement with the state, which guaranteed he would not be charged with a probation violation if he testified against Stillwagon. 10RP 345.

Similarly, when police first spoke to Murrieta, he denied any knowledge of where the gun was located. Police then told him they had heard from other people that he had hidden a gun, and he faced a felony charge of rendering criminal assistance. They assured Murrieta that they would not arrest him if he helped them and they would inform the prosecutor he had cooperated. Murrieta then agreed to show them where he had hidden the gun. 13RP 850-51. Murrieta was given immunity in return for his testimony at trial. 13RP 871-72.

Finally, when the police first contacted Purser, he did not tell them anything about the bags of clothes. He knew the police were investigating Brown's death and that the bags were still in his car at the time, but he said nothing. 13RP 985-86. After Purser hid the bags, Johnson's mother called the police and told them he had done so. 13RP 987. The police contacted Purser and told him he could be facing charges for interfering with the investigation. 13RP 998. Purser then admitted hiding the bags and helped the police locate them. 13RP 1002. Purser, too, received immunity from the state in exchange for his testimony. 13RP 986.

Stillwagon testified at trial that he and Johnson were good friends, and when Johnson called asking for his help, Stillwagon agreed to help him. 14RP 1152. He and Johnson left his apartment around 1:00 or 1:30 in Johnson's car. 14RP 1156. After they had driven five or six blocks, however, he told Johnson to pull over. 14RP 1158, 1160. Stillwagon believed that if he committed a serious felony, it would be his third strike and he would face life in prison without parole. 14RP 1159. So he told Johnson he could not take part in Johnson's plan, and he got out of the car. He did not take his gun with him because he did not think it was a good idea for a felon to be walking around Bremerton at that hour of the morning. 14RP 1161. He did not talk about the gun with Johnson and did not think about leaving it for Johnson to use. Id.

Stillwagon walked back to his apartment and waited outside for Johnson to return. 15RP 1162-63. When Johnson returned about 20 minutes later, he said there had been an accident and he had messed up pretty badly. Johnson told Stillwagon he had gotten into a scuffle with Brown and he pulled out the gun. The gun went off, and the bullet went through Johnson's arm and into Brown's chest. 14RP 1164. Johnson told Stillwagon he had looked for drugs and never found any but he had found some money. 14RP 1165.

Stillwagon testified that he and Johnson decided to tell McEntee that Stillwagon had accidentally shot Johnson in the course of taking drugs from Brown. 14RP 1167. Johnson told Stillwagon that he had known McEntee a long time and he trusted her. He thought if they told her that story, it would never go any further. Stillwagon agreed to go along, because Johnson was his friend and he had asked for Stillwagon's help. 14RP 1167.

Stillwagon did not think the lie he had told McEntee about being involved would go any further, but later that day, Johnson asked Stillwagon to lie to his family as well. 14RP 1172, 1176. Thinking he was helping out his friend, Stillwagon told Johnson's sister he had accidentally shot Johnson. 14RP 1177.

After he learned that Brown had died, Stillwagon thought about telling the truth, but he did not want to implicate his friend in a crime. 14RP 1173, 1180. He talked to Murkins about Brown later that night, asking for advice. Stillwagon was still trying to figure out what to do, and he felt caught up in the initial story, so he stuck to it when talking to Murkins. 14RP 1189-90.

Stillwagon testified that he had never heard of felony murder before he was charged with it in this case. He thought if he told people the shooting was an accident, he would not get in trouble, so he was willing to

say he accidentally shot Johnson and Brown, even though it was not true. 14RP 1190, 1207-08, 1216. He did not intend to implicate himself in a murder he did not commit. 15RP 1242.

C. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO GIVE THE REQUESTED CAUTIONARY INSTRUCTION REGARDING ACCOMPLICE TESTIMONY DENIED STILLWAGON A FAIR TRIAL.

Defense counsel proposed WPIC 6.05, the standard instruction regarding the testimony of an accomplice. CP 360. That instruction reads:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 Washington Practice, WPIC 6.05, at 136 (2nd ed. 1994).

The state objected to the instruction, arguing that it was not mandatory since Johnson's testimony was corroborated. 15RP 1259, 1262. Defense counsel argued that since accomplice testimony was critical to the state's case, it was appropriate for the jury to hear the cautionary instruction. 15RP 1263. The court declined to give the instruction, however. The court noted that there was quite a bit of corroboration, although there was no physical evidence corroborating

Stillwagon's presence at the scene. 15RP 1264. It ruled that in light of the strength of the corroboration, the instruction was not necessary to aid the jury in examining the evidence and that the instruction directing the jury to examine the motives and biases of all the witnesses was sufficient. 15RP 1264. The court felt it was possible the proposed instruction would confuse the jury. Id.

Courts have long recognized the pitfalls presented when an alleged accomplice testifies against a criminal defendant and the need to caution juries regarding the questionable reliability of such testimony. State v. Harris, 102 Wn.2d 148, 153, 685 P.2d 584 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988); United States v. Paniagia-Ramos, 251 F.3d 242, 245 (1<sup>st</sup> Cir. 2001). In fact, a defendant may be convicted solely on the uncorroborated testimony of an accomplice only if the jury is sufficiently cautioned to subject the accomplice's testimony to careful examination. Harris, 102 Wn.2d at 153 (citing State v. Carothers, 84 Wn.2d 256, 269-70, 525 P.2d 731 (1974)).

In Harris, the Washington Supreme Court made it clear that a cautionary instruction should be given whenever the state relies on accomplice testimony, and it set forth the circumstances under which the failure to do so requires reversal:

(1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

Harris, 102 Wn.2d at 155. Consistent with the Supreme Court's holding in Harris, the Committee's note on use for WPIC 6.05 states that the instruction should be used "in every case in which the State relies upon the testimony of an accomplice." 11 Washington Practice, WPIC 6.05 at 136 (Note on Use).

In Harris, the defendant was charged with first degree robbery. He admitted participating in the robbery but presented a defense of diminished capacity. His three co-defendants testified against him at trial pursuant to plea agreements, and each testified that Harris was neither physically nor mentally impaired at the time of the robbery. Harris, 102 Wn.2d at 150-51. Harris requested WPIC 6.05, cautioning the jury on use of accomplice testimony, but the trial court refused to give the instruction. Id. at 151.

On review, the Supreme Court noted that the accomplices' testimony that Harris was not impaired was substantially corroborated by

the arresting officers, who testified that they noticed no odor of intoxicants and no difficulty with Harris's stability, coordination, or speech. Thus, the trial court did not err in failing to give the cautionary instruction. *Id.* at 156.

In this case, on the other hand, the critical portions of Johnson's testimony were uncorroborated. Only Johnson testified that Stillwagon was at Brown's house when he was killed. No other witness saw Stillwagon there. Although there was a significant amount of physical evidence placing Johnson at the scene, the state could offer no physical proof to back up Johnson's claim that Stillwagon was there. Stillwagon's fingerprints were not found anywhere, despite Johnson's claim that Stillwagon took \$700 from Brown.<sup>3</sup> And Stillwagon's DNA was not found on anything collected at the scene. 14RP 1111.

The state argued that Johnson's testimony was corroborated by McEntee, Murkins, and Purser, who testified that Stillwagon told them he accidentally shot Johnson and Brown. 15RP 1261. This argument overlooks the crucial detail that Johnson testified that when he and Stillwagon discussed the shooting as they were leaving Brown's house, Stillwagon admitted firing the gun and never said it was an accident.

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<sup>3</sup> This claim was not only uncorroborated, it was directly contradicted by McEntee, who testified that Johnson had the \$700 in his wallet and split it with Stillwagon. 9RP 136, 156-57.

11RP 550. Testimony from other witnesses that Stillwagon said he accidentally shot Johnson and Brown does not corroborate Johnson's version of events. Rather, it corroborates Stillwagon's testimony that he told people the gun went off accidentally as a favor to Johnson, and never intended to implicate himself in a crime he did not commit.

Although much of Johnson's testimony was corroborated, the portion critical to the state's case was not. Without evidence to corroborate Johnson's testimony that Stillwagon did not get out of the car but instead accompanied him to Brown's house where he shot Brown and Johnson, a cautionary instruction was required. In light of the importance of Johnson's testimony to the state's case and its impact on the jury if believed, the jury should have been cautioned to subject his testimony to careful examination and to act on it with nothing less than great caution.

While due process does not guarantee a perfect trial, both the state and federal constitutions guarantee all defendants a fair trial. U.S. Const. amend 5; U.S. Const. amend 14; Const. art. 1 § 3; see State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981) (a defendant is entitled to a trial free from prejudicial error). The court's failure to give the necessary cautionary instruction made it impossible for Stillwagon to receive a fair trial, and reversal is required.

2. ADMISSION OF EVIDENCE OF PRIOR DOMESTIC VIOLENCE WITHOUT AN APPROPRIATE LIMITING INSTRUCTION DENIED STILLWAGON A FAIR TRIAL.

- a. **The trial court's failure to instruct the jury on the limited use of evidence admitted under ER 404(b) was prejudicial error requiring reversal.**

McEntee testified at trial that when Johnson and Stillwagon told her about the shooting, she tried to call the police but Stillwagon stopped her, saying everything was going to be fine. 9RP 96. She felt like she could not do anything, and she did not know what would happen to her if she called the police. 9RP 96. She also said she lied to the police when they first contacted her, telling them she did not know anything about Brown's death, because she was afraid of Stillwagon. 9RP 108-09.

McEntee explained her fear by testifying that around the first week of August, Stillwagon was drunk and had become jealous. He grabbed her by her throat, pulled her hair, and bit her neck. She was screaming and crying as he did this. 9RP 103.

Defense counsel had moved to exclude this evidence prior to trial, arguing that it was of limited probative value. Given the tendency of evidence of domestic violence to evoke an emotional response, the evidence was more prejudicial than probative and should be excluded under ER 403. 6RP 209, 212. The state argued that the evidence was

admissible under ER 404(b) because it would help the jury assess McEntee's credibility. The prosecutor pointed out that the defense would be entitled to a limiting instruction to ensure the jury did not focus on Stillwagon's propensity for violence. 6RP 203-07. The court agreed with the state, ruling that the evidence was relevant to the credibility of a key witness, was not unduly prejudicial, and would be allowed. 6RP 216-18. The court gave no instruction limiting the jury's use of this evidence, however.

While ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime, evidence of prior acts may be admitted for other, limited purposes. State v. Cook, 131 Wn. App. 845, 849, 129 P.3d 834 (2006); ER 404(b). Evidence admitted under ER 404(b), must not only serve a legitimate purpose and be relevant to an element of the crime charged, but on balance, the probative value of the evidence must outweigh its prejudicial effect. State v. DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003).

Here, the trial court ruled that evidence of the prior domestic violence was admissible to explain McEntee's statements to the police which might otherwise appear inconsistent with her trial testimony. CP 326. This has been recognized as a legitimate purpose under ER 404(b).

Cook, 131 Wn. App. at 851; State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996).

The trial court has discretion to admit evidence of prior domestic abuse when the balancing test is satisfied, provided the court gives an adequate limiting instruction. Cook, 131 Wn. App. at 853. The instruction must allow the jury to use the evidence in assessing the witness's state of mind at the time of the inconsistent acts, while restricting the jury from using the evidence to show the defendant's propensity to commit the charged act. Id. Without an adequate limiting instruction, it is error to admit evidence of past domestic violence under ER 404(b). Id. at 854.

In Cook, the defendant was charged with third degree assault against his girlfriend. The victim initially reported that Cook had broken her finger, but she testified at trial that her finger was broken in an accident. 131 Wn. App. at 847. Over defense objection, the trial court admitted evidence of six previous incidents of domestic abuse between her and Cook. The trial court ruled that the evidence was admissible because the victim's credibility was a central issue in the case. Id. at 848. It instructed the jury that the evidence of prior domestic violence was admitted for the limited purpose of assessing the witness's credibility. Id. at 849.

On appeal, this Court held that when a victim behaves inconsistently with the report of abuse, evidence of prior domestic violence by the defendant may be admissible under ER 404(b) to explain the witness's state of mind at the time of the inconsistent behavior. 131 Wn. App. at 851. Such evidence should not be considered by the jury for the generalized purpose of assessing the jury's credibility, however. Id. Unless the jury is instructed accurately as to the appropriate use, it may infer from evidence of prior abuse that the defendant has a propensity for such behavior and likely acted in accordance with that propensity in committing the charged crime. Id. at 853-54. Thus, it was error for the court to admit evidence of Cook's prior domestic violence against the victim without an adequate limiting instruction. Id. at 854.

In this case, as in Cook, the court admitted evidence of Stillwagon's prior domestic violence without instructing the jury as to the appropriate use of that evidence. As in Cook, this was reversible error.

The court's error requires reversal if there is a reasonable probability the evidence affected the outcome of the trial. Cook, 131 Wn. App. at 854 (citing State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002)). Such is the case here. Stillwagon was charged with first degree assault against Johnson. In order to prove that charge, the state had to show beyond a reasonable doubt that Stillwagon fired the gun

intending to inflict great bodily harm. CP 445 (Instruction 26). Although there was evidence that Stillwagon said the gun accidentally went off, there was no direct evidence that Stillwagon fired the gun intentionally. Only Johnson testified that he was present when the gun was fired, and he did not see Stillwagon shoot. 11RP 538, 543, 607. Moreover McEntee testified that Stillwagon brought his gun with him when he left his apartment because he was concerned about protecting himself and he had no intention of using it. 9RP 90. It is reasonably likely that the jury relied on Stillwagon's propensity for violence, as demonstrated by the prior assault against McEntee, to conclude he intentionally fired the gun at Brown and was guilty of first degree assault. This is precisely what ER 404(b) is intended to prevent. The court's failure to instruct the jury regarding the limited use of this evidence requires reversal.

**b. Trial counsel's failure to propose a limiting instruction denied Stillwagon effective assistance of counsel.**

The state may respond, notwithstanding the holding in Cook, that the trial court is not required to give a limiting instruction when admitting evidence of prior domestic violence unless such an instruction is requested by the defense. If this Court should agree with that argument, then defense counsel's failure to propose a limiting instruction in this case constitutes ineffective assistance of counsel.

The federal and state constitutions guarantee criminal defendants the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1994).

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (counsel was ineffective in failing to propose an instruction that would have allowed counsel to argue that defendant's intoxication negated mens rea element of felony flight). Here, counsel was ineffective in failing to propose a limiting instruction.

When the trial court admits evidence which is otherwise inadmissible for a limited purpose, a limiting instruction is both "proper and necessary." State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (citing State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)). See also ER 105 (court is obligated to give proper limiting instruction when requested). "[I]t is of vital importance that counsel have the benefit of the instruction to stress to the jury that the testimony was admitted only

for a limited purpose and may not be considered as evidence of the defendant's guilt." State v. Aaron, 57 Wn. App. 277, 281, 878 P.2d 949 (1990).

The court below admitted evidence that Stillwagon previously assaulted McEntee. Although the court clearly indicated it was admitting this prejudicial evidence solely to aid the jury in assessing McEntee's credibility in light of her inconsistent statements, defense counsel failed to ensure that the jury understood the limited purpose for which the evidence could be used. Because a limiting instruction was proper and necessary, counsel's failure to request one constitutes deficient performance.

Counsel's deficient performance cannot be excused as trial strategy. Where evidence would have gone unnoticed by the jury, a reasonable attorney could conclude that an instruction reminding the jury of the evidence would be more harmful than helpful. See, e.g., State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993). That was not the case here. McEntee initially testified that she was afraid when Stillwagon told her not to call the police because he had "previously grabbed [her] and stuff." 9RP 96. The state did not leave it at that, however. The prosecutor returned to the subject and had McEntee describe the prior incident in detail. 9RP 103. Defense counsel knew this harmful testimony was coming and that the state would not let it

go unnoticed. Counsel's failure to ensure that the jury understood there was only one legitimate use for the evidence could not be part of a legitimate trial strategy.

As discussed above, the absence of an appropriate limiting instruction created the very real possibility that the jury based its verdict on Stillwagon's propensity for violence rather than evidence that he actually committed the assault. There is a reasonable probability that counsel's deficient performance affected the outcome of the trial, and Stillwagon was denied effective assistance of counsel.

3. TRIAL COUNSEL'S PROPOSAL OF A LIMITING INSTRUCTION WHICH FAILED TO LIMIT PREJUDICIAL EVIDENCE IN ANY MEANINGFUL WAY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

McEntee testified that, although Stillwagon had been arrested and remained in jail pending trial, she was still afraid of him. 9RP 158-160. When defense counsel cross examined McEntee about her continued fear of Stillwagon, she admitted that she had had no contact with him since he was arrested. 9RP 176. The prosecutor then asked her on redirect if she had been contacted by any of Stillwagon's friends. 9RP 179. Over defense counsel's objection, she answered that Murrieta had called her a couple of times. 9RP 179.

The jury was then excused, and defense counsel renewed his objection to testimony about Murrieta's phone calls, arguing that since there was no evidence connecting them to Stillwagon, they were unduly prejudicial and would encourage the jury to speculate that Murrieta had called McEntee at Stillwagon's direction. 9RP 180-81, 186. The court noted that the witness had been questioned in detail about her fears and found that the calls had some probative value as to the basis for her fears. It also found that the prejudice was minimized because defense counsel had opened the door to the evidence by asking if she had had any direct contact with Stillwagon; the state was therefore permitted to ask if she had had indirect contact. 9RP 187.

At defense counsel's request, the court instructed the jury that

[The prosecutor] is about to elicit some hearsay from [McEntee]; that is, she is going to testify about what someone else said. You are not to consider what she tells you this other person said as offered for the truth of the matter that was asserted, but rather only for its effect on her as the listener to those statements.

9RP 189, 192.

McEntee then testified that she had received two phone calls from Murrieta since Stillwagon's arrest. In the first call he said that Stillwagon's fact finding hearing was coming up and asked if she wanted to be present. He also asked for her home telephone number, saying he wanted to pass it along to Stillwagon. He called her a second time a few

weeks later, at 1:00 a.m., saying he wanted to talk with her. When she told him she was tired, he asked for directions to her house so that he could come see her later. McEntee testified she never provided either her phone number or directions because Murrieta's calls made her feel really uncomfortable. After the second call, she called the police because she was afraid Murrieta would find her address. 9RP 193-94. McEntee testified that Murrieta never said that Stillwagon had asked him to call her. 9RP 195.

While evidence that a witness is testifying despite fear of recrimination might be relevant to the witness's credibility, it could also lead the jury to conclude that the witness is fearful of the defendant. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). If there is evidence that the defendant threatened the witness or caused his fear, this conclusion by the jury is supported by the evidence. Id. (evidence that defendant threatened witness normally admissible as substantive evidence of guilt). But where there is no connection established between the defendant and the witness's reluctance to testify, the jury should be instructed to consider the evidence only as to the witness's credibility. Id.

Here, the court permitted McEntee to testify about phone calls she had received from Murrieta to explain why she was fearful about testifying. 9RP 187. Although there was no evidence that Stillwagon was

connected with these calls, the evidence was presented so as to raise the inference that they were made on Stillwagon's behalf and McEntee was justifiably frightened of Stillwagon. Defense counsel recognized the harmful effect of this inference and, when the court overruled his objection to the evidence, requested a limiting instruction. Unfortunately, the instruction requested by counsel and given by the court failed to limit the jury's use of this evidence in any meaningful way.

The court's instruction prohibited the jury from considering the truth of Murrieta's statements and informed the jury that Murrieta's calls were being admitted to show their effect on McEntee. This instruction focused the jury's attention on McEntee's fears without explaining that they were relevant only to her credibility. Moreover, it did nothing to prevent the jury from drawing the conclusion that Murrieta made the calls, and thus created McEntee's fear, at the behest of Stillwagon.

As discussed above, a criminal defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. Amend. 6; Wash. Const. art. 1, § 22; see § C.2.b, supra. By proposing a useless limiting instruction, counsel denied Stillwagon that right. Any reasonably competent counsel would have asked the court to instruct the jury that the evidence could be used only to assess McEntee's credibility and not to infer Stillwagon's guilt. There was no tactical reason for

requesting the failed limiting instruction; it was simply incompetence on the attorney's part.

Moreover, counsel's deficient performance prejudiced the defense. Stillwagon did not dispute McEntee's testimony that he told her he had accidentally shot Johnson and Brown. In fact, he testified that he told her that as a favor to Johnson, who had actually done the shooting. 14RP 1167. The state had no physical evidence indicating that Stillwagon had done the shooting or even that he was ever at Brown's residence. But because the jury was permitted to infer that Stillwagon had threatened McEntee, through Murrieta, regarding her testimony, it is likely the jury disregarded Stillwagon's explanation, believing he would not have threatened McEntee unless he were guilty. There is a reasonable probability counsel's failure to request an appropriate limiting instruction affected the outcome of the case, and reversal is required.

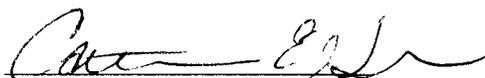
D. CONCLUSION

The trial court's refusal to give a cautionary instruction regarding accomplice testimony and its failure to give a limiting instruction regarding evidence of prior domestic violence denied Stillwagon a fair trial. In addition, trial counsel's failure to propose necessary and appropriate limiting instructions constitutes ineffective assistance of

counsel. This Court should reverse Stillwagon's convictions and remand for a new trial.

DATED this 29<sup>th</sup> day of August, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written in a cursive style.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Roy K. Stillwagon, II*, Cause No. 34351-7-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
August 29, 2006

FILED  
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