

COURT OF APPEALS
DIVISION II

NO. 35057-2

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STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY KELLY, APPELLANT

CORRECTED BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle
Superior Court Cause No. 05-1-00889-1

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR. 1

1. The defendant was denied his constitutional right to effective assistance of counsel 1

2. The trial court abused its discretion when it failed to grant the defendant’s requested continuance motion where defense counsel had not yet retained an investigator or otherwise prepared for trial. 1

3. The trial court erred by giving a missing witness instruction proposed by the prosecution and used against the defendant, thereby denying him his constitutional right not to present any defense or defense witnesses.1

4. The prosecutor committed misconduct when he violated the court’s order regarding the use of the evidence of the Ang burglary, urged the court to consider impermissible evidence at sentencing, and withheld Brady evidence. 1

5. The defendant is entitled to a new sentencing before a different judge when the prosecutor violated the “real facts” doctrine at sentencing? 1

6. The defendant is entitled to reversal and remand because of cumulative error below. 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. 2

1. Is the defendant entitled to relief under the cumulative effect trial counsel’s performance constitutes ineffective assistance of counsel? 2

2. Did the trial court abuse its discretion when it denied the defendant’s requested continuance motion where defense counsel repeatedly argued that he had not yet had time to prepare for trial and where defense counsel’s lack of preparation denied the defendant his constitutional right to effective assistance of counsel?. 2

- 3. Did the trial court err by giving a missing witness instruction proposed by the prosecution and used against the defendant, where the prosecution failed to meet foundational criteria for the instruction and thereby successfully shifted the burden of proof to the defendant? 2
- 4. Did the prosecutor commit misconduct by violating the court’s ruling that admitted evidence of the Ang burglary only for impeachment purposes and instead using the evidence as ER 404(b) evidence?. 3
- C. STATEMENT OF THE CASE. 3
 - 1. Procedure. 3
 - 2. Facts. 15
- D. ARGUMENT. 22
 - 1. The Defendant was denied his constitutional right to effective assistance of counsel 23
 - 2. The trial court abused its discretion when it failed to grant The defendant’s requested continuance motion where Defense counsel had not yet retained an investigator or Otherwise prepared for trial. 33
 - 3. The trial court erred by giving a missing witness instruction proposed by the prosecution and used against the defendant thereby denying him his constitutional right not to present any defense or defense witnesses. 35
 - 4. The deputy prosecutor committed misconduct when he violated a court order restricting the use of evidence of the Ang burglary to impeachment evidence; the deputy prosecutor instead impermissibly used the evidence for ER 404(b) purposes. 39
 - 5. Violation of the “real facts” doctrine at sentencing mandates resentencing before a different judge. 43
 - 6. Cumulative error requires remand of this matter to the Superior court for a new trial. 44
- E. CONCLUSION. 45

TABLE OF AUTHORITIES

Cases

Federal

<u>Boyde v. Brown</u> , 404 F.3d 1159, 1176 (9 th Cir., 2005).....	25
<u>Cooper v. Fitzharris</u> , 586 F.2d 1325, 1333 (9 th Cir. 1978)(en banc), cert. Denied, 440 U.S. 974, 59 L.Ed.2d 793, 99 S.Ct. 1542 (1979).....	25
<u>Mak v. Blodgett</u> , 970 F.2d 614, 622 (9 th Cir. 1992).....	25
<u>McQueen v. Swanson</u> , 498 F.2d 207, 217 (8 th Cir. 1974).....	26
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984).....	24, 28
<u>United States v. Tucker</u> , 716 F.2d 576, 583 n. 16 (9 th Cir. 1983).....	26

State

<u>In re Pers. Restraint of Lord</u> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	4, 43
<u>State v. Baker</u> , 56 Wn.2d 846, 859-60, 355 P.2d 806 (1960).....	36
<u>State v. Becker</u> , 32 Wn.2d 54, 64, 935 P.2d 1321 (1997).....	34
<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	30, 35, 36
<u>State v. Cardenas</u> , 74 Wn.2d 185, 443 P.2d 826 (1968).....	32
<u>State v. Contreras</u> , 57 Wn. App. 471, 788 P.2d 1114, rev denied, 115 Wn.2d 1014 (1990).....	30, 35
<u>State ex rel, Caroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	32
<u>State v. Davis</u> , 73 Wn.2d 271, 279-280, 438 P.2d 185 (1968).....	36
<u>State v. Davis</u> , 141 Wn.2d, 798, 837, 10 P.3d 977 (2000).....	28
<u>State v. Downing</u> , 151 Wn.2d 265, 273, 87 P.3d 1169 (2004).....	32
<u>State v. Eller</u> , 84 Wn.2d 90, 95, 524 P.2d 242 (1975).....	33

<u>State v. Ervin</u> , 158 Wn.2d 746, 757, 147 P.3d 567 (2006)	39
<u>State v. Gregory</u> , 158 Wn.2d 759, 866, 147 P.3d 1201 (2006)	38
<u>State v. Greiff</u> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000)	43
<u>State v. Grisby</u> , 97 Wn.2d 493, 511, ___ P.2d (198_)	22
<u>State v. Hurd</u> , 127 Wn.2d 592, 594, 902 P.2d 651 (1995)	32
<u>State v. Hughes</u> , 106 Wn.2d 176, 195, 721 P.2d 902 (1986)	38
<u>State v. Levy</u> , 156 Wn.2d 709, 719, 132 P.3d 1076 (2006)	34
<u>State v. Lord</u> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991)	25
<u>State v. Luvene</u> , 127 Wn.2d 690, 701, 903 P.2d 960 (1995)	38
<u>State v. Mak</u> , 105 Wn.2d 692, 726, 718 P.2d 407 (1986)	38
<u>State v. McFarland</u> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)	25, 28
<u>State v. McNeal</u> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)	25
<u>State v. Miles</u> , 73 Wn.2d 67, 70, 436 P.2d 198 (1968)	22
<u>State v. Peyton</u> , 29 Wn. App. 701, 712, 650 P.2d 1362 <i>rev. denied</i> , 96 Wn.2d 1024 (1981)	38
<u>State v. Pryor</u> , 115 Wn.2d 445, 454-55, 799 P.2d 244 (1990)	42
<u>State v. Stenson</u> , 132 Wn.2d 668, 705, 940 P.2d 1239 (1998)	24
<u>State v. Tierney</u> , 74 Wn. App. 346, 351-52, 872 P.2d 1145 (1994)	42
<u>State v. Weber</u> , 159 Wn.2d 252, 278, 149 P.3d 646 (2006)	43
<u>State v. Williams</u> , 84 Wn.2d 853, 855, 529 P.2d 1088 (1975)	32

Constitutional Authority

U.S. Const., amend, VI	23, 24, 32
Wash. Const., art I, sec. 22	23, 32

Rules and Regulations

ER 404(b) 8-9, 23, 40
RCW 9.94A.500..... 40

Other Authority

WPIC 5.2.34
WPIC 5.2035

A. ASSIGNMENTS OF ERROR:

1. The defendant was denied his constitutional right to effective assistance of counsel.
2. The trial court abused its discretion when it failed to grant the defendant's requested continuance motion where defense counsel had not yet retained an investigator or otherwise prepared for trial.
3. The trial court erred by giving a missing witness instruction proposed by the prosecution and used against the defendant, thereby denying him his constitutional right not to present any defense or defense witnesses.
4. The prosecutor committed misconduct when he violated the court's order regarding the use of the evidence of the Ang burglary, urged the court to consider impermissible evidence at sentencing, and withheld Brady evidence.
5. The defendant is entitled to a new sentencing before a different judge when the prosecutor violated the "real facts" doctrine at sentencing?
6. The defendant is entitled to reversal and remand because of cumulative error below.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Is the defendant entitled to relief under the cumulative effect trial counsel's performance constitutes ineffective assistance of counsel?
 - a. Did trial counsel fail to provide effective assistance of counsel when he failed to hire an investigator until after the trial had started?
 - b. Did trial counsel fail to provide effective assistance of counsel when he conducted voir dire suggesting that he would present a mental defense when in fact he had not received or reviewed the defendant's medical reports and also had not even consulted with an expert?
 - c. Did trial counsel fail to provide effective assistance of counsel when he failed to object to the prosecutor's misuse of impeachment evidence which the prosecutor used to establish that the defendant was guilty of an uncharged burglary?
 - d. Did trial counsel fail to provide effective assistance of counsel when he failed to object to the missing witness instruction?
 - e. Did trial counsel fail to provide effective assistance of counsel when he failed to object to the trial court's consideration of matters outside the "real facts" doctrine during sentencing?
2. Did the trial court abuse its discretion when it denied the defendant's requested continuance motion where defense counsel repeatedly argued that he had not yet had time to prepare for trial and where defense counsel's lack of preparation denied the defendant his constitutional right to effective assistance of counsel?
3. Did the trial court err by giving a missing witness instruction proposed by the prosecution and used against the defendant, where the prosecution failed to meet foundational criteria for the instruction and thereby successfully shifted the burden of proof to the defendant?

4. Did the prosecutor commit misconduct by violating the court's ruling that admitted evidence of the Ang burglary only for impeachment purposes and instead using the evidence as ER 404(b) evidence?

C. STATEMENT OF THE CASE:

1. Procedure.

The State of Washington charged Timothy Michael Kelly, appellant herein, in Pierce County Superior Court cause 05-1-00889-1 with the crimes of burglary in the first degree, assault in the second degree, possessing stolen property in the first degree, attempted theft in the first degree, and unlawful possession of a controlled substance. CP 1-5.

Prior to trial, several different attorneys appeared in the case and were allowed to withdraw. CP 6, 9, 12, 16, 17. Trial counsel Philip Bolland entered the case on January 30, 2006. CP 17.

Mr. Bolland moved to continue the trial date on several occasions in order to allow him adequate time to prepare for trial. CP 8, 18, 20. Trial commenced on April 12, 2006. RP 1, 3.

At that time, defense counsel informed the trial court that he was not ready to proceed to trial. RP 3. Mr. Bolland noted that he had received the case, along with two other cases against the defendant, on January 31, 2006. RP 3. He noted that his formal appearance occurred on February 2, 2006 and that the first pretrial hearing occurred on February 9, 2006. RP 3-4.

Mr. Bolland further emphasized that he had his first "substantial contact" with the defendant on February 9, 2006. RP 4.

Defense counsel informed the court that he had difficulty finding an investigator to work on the case and stated on the first day of trial that, "I think we're finally at the point where we hired a new investigator." RP 4, 120.

In addition, defense counsel argued, "I haven't had time, Your Honor, in essentially the two months that I have been meaningfully representing Mr. Kelly, to prepare an adequate defense. I haven't had time to send my investigator out to investigate witnesses and to mount any sort of meaningful defense." RP 4. Mr. Bolland continued, "The problem is, I haven't done the work I need to do in order to really find out the true position Mr. Kelly is in with regard to all of these cases." RP 5.

Defense counsel clarified, "The bottom line is, Your Honor, that I haven't even spoken to my investigator about this case . . ." RP 5.

Defense counsel pleaded with the court to grant him more time to prepare for trial. RP 6. Mr. Bolland told the court that, although the case had been filed for some time, "as far as I'm concerned, this case is about 68 days old." RP 6. The prosecutor had provided approximately 771 pages of discovery. RP 16. Defense informed the court that he could not recall any other situation where he had had a case for about 60 days and received so much pressure to go to trial. RP 6. Defense counsel flatly informed the court that he would be ineffective if trial commenced at that time. RP 6.

Defense counsel summarized, "It's a tough case. I need to take it seriously and do a thorough job." RP 7.

In addition, defense counsel informed the court that he would be out of the country in Ukraine from April 20 – 30. RP 7, 8.

Defense counsel informed the court that the defendant had been a victim in an attempted murder case. In that incident, he had suffered significant head trauma and had been in a coma. RP 11. Defense counsel intended to get those records to determine what role those head injuries may have played in this case. RP 11.

The prosecutor opposed any continuance, informing the court that he viewed the case as a straightforward one for which the prosecutor did not see any defense. RP 11. Later on, when the court allowed the prosecutor to admit evidence of another burglary, the Ang burglary, for impeachment purposes, the prosecutor noted that he had failed to provide to trial counsel all of the police reports pertaining to the Ang burglary. RP 696. In addition, the prosecutor produced numerous items for impeachment that went far beyond what was needed for impeachment and also had not been provided to the defense. RP 725. The prosecutor brought to court as part of his rebuttal case “GIS maps, aerial maps of the Kitsap Peninsula, the relevant area, both the Richards’ neighborhood and then the area where the Angs’ residence is to show the relation and distance between the properties. RP 725.

The court denied the motion for continuance and agreed to stop the proceedings to permit defense counsel to travel to Ukraine. RP 17-19. Defense counsel made this trip during the middle of the trial. RP 597.

During jury selection, Juror No. 1 informed the court that the statement of the case as related by the court “just vaguely rings a bell.” RP 81. Juror No. 10 reported that his home had been burglarized approximately 10 years ago. RP 92. During that burglary, the juror lost valuables and money and experienced damage to his residence and vehicle. RP 92. Juror No. 3 reported that his residence had been burglarized more than 20 years ago. RP 94. Juror No. 17 reported that his residence had been burglarized more than 20 years ago. RP 97. Juror No. 15 reported that her garage had been burglarized within the last year and that items had been stolen. RP 98.

Juror No. 13 reported that his son had been the victim of a home invasion burglary, robbery, and assault. RP 99.

Juror No. 43 reported that his son had used methamphetamines several years ago and that experience would affect his ability to be fair. RP 103. That juror was excused. *Id.*

Juror No. 40 related her daughter had been a meth user and stated that she still could be fair. RP 107.

Juror No. 17 reported that her niece had used meth and that it had been difficult for the family to deal with. RP 107.

Juror No. 18 related that her ex-daughter in law was a drug user and that her children had been taken away from her. RP 110.

Juror No. 20 stated that the family home had been burglarized and that they were “very pleased” with Pierce County Sheriff’s Department response. RP 147.

Juror No. 7 reported that her sister had been murdered in 1988 and that the Pierce County Prosecuting Attorney's Office did "a good job" on the case. RP 157-58.

Defense counsel failed to ask Juror No. 13 questions about his potential bias based on his son's victimization in a home invasion robbery case where the son had been seriously injured. RP 177-79. Defense counsel failed to question Juror No. 7, whose sister was murdered in 1988 and who stated that the Pierce County Prosecutor's Office did a good job in that case. RP 157.

During jury selection, defense counsel used only one peremptory challenge. RP 227.

After voir dire and immediately prior to opening statement, defense counsel renewed his motion for continuance. He re-emphasized to the court that he had not had adequate time to prepare the case. RP 299. Defense counsel at that time noted an objection to any reference to a booking photo that the police may have used to identify the defendant. RP 299.

Defense counsel also raised the topic of the scope of the evidence that could be admitted regarding the Suburu, which was the stolen property alleged in Count 47. Defense counsel's argument was so unclear that the court stated, "I'm sorry, I am not quite sure what you are asking, then." Defense counsel replied, "You know, frankly, either (sic) am I, Your Honor." RP 302.

On April 13, 2006, the State moved to exclude as irrelevant evidence of head injury and/or diminished capacity because the defendant had not

endorsed a defense of diminished capacity. RP 118. In response, defense counsel stated that he had not yet reviewed the medical records or consulted an expert to evaluate the defendant. RP 119. Later that day, defense counsel informed the court, “We now officially have an expert on the case.” RP 120. The court granted the State’s motion to exclude but stated that the matter could be revisited if and when the defense had more information. RP 120.

The prosecutor then informed the court that there was “the possibility of extensive 404(b) evidence, depending on the nature of the cross-examination of the State’s witnesses and the defense theory. Just as an offer of proof, I will let the court know that Mr. Kelly is believed to be a prolific burglar, probably in the triple digits. We have cases pending on burglaries; I realized in reviewing this case that we have roughly at least three more burglaries that were done at the time of this burglary, one, actually, that occurred 20 minutes before it, that the State can file and will file depending on the posture of these cases. And then there are other cases. There’s a time line beginning in February that does all the way through this month with a list of burglaries where Mr. Kelly is linked. So, that may extensively increase the time on this trial, depending on their admissibility and the context of questioning and the defense. RP 126.

The court instructed the prosecutor to inform the defense if the prosecutor made a decision regarding the ER 404(b) evidence. RP 128.

In opening statement, the prosecutor used photographs, which then were not placed in the record. RP 314, 315. The prosecutor also informed the

jury that it was his personal opinion that the jury would be convinced beyond a reasonable doubt that the defendant had committed all six charged crimes. RP 324.

Throughout the trial, the prosecutor repeatedly asked witnesses to testify regarding photos and other items of physical evidence that had not been offered or admitted. RP 330¹, 331², 335³

Prior to the testimony of the complaining witnesses, Ken and Sue Richard, defense counsel informed the prosecutor and court at sidebar that he did not believe it was necessary to interview these witnesses. RP 350. Midway through Mr. Richard's testimony, defense counsel did ask for "a few moments with him to ask him a few questions." RP 350.

The prosecutor also instructed Mr. Richard to draw a picture and then elicited testimony about this unnumbered exhibit, which was not identified for the record. RP 335-36. Mr. Richard testified at length about this exhibit. RP 336-37, 342, 343, 345.

After eliciting testimony about the un-admitted exhibits 1-4 as well as the picture, the prosecutor then offered exhibits 5-47. RP 347. Defense counsel had no objection to the admission of any of these exhibits. RP 347.

The prosecutor then offered exhibits 1-4, which were admitted without objection. RP 352.

¹ Exhibits 1, 2, 3, 4.

² Exhibits 2, 1.

³ Exhibit 4.

Defense counsel failed to object to speculative testimony from Deputy Myron that none of the tools found in a car (unknown which car) in the Richard garage belonged to the Richard family. RP 573.

Immediately prior to the defendant's testimony (and the day after defense counsel returned from his vacation to Ukraine), defense counsel informed the court that he finally had acquired the defendant's medical records documenting head trauma sustained in the attempted murder. RP 612. Defense counsel observed that the records were in the possession of the prosecutor's office since they had charged and litigated that case in 2002. RP 612.

During his testimony, the defendant told the prosecutor that he had wanted to call Lou as a witness. RP 683. The defendant stated that he had not been able to reach Lou within the few days prior to his testimony. RP 684. The defendant also stated that he believed that Lou was trying to find Ken. RP 684. Lou reportedly had been unable to find Ken. RP 684. The defendant, who was in custody, told the prosecutor that he had an idea where Lou might be. RP 704.

During direct examination of the defendant, trial counsel elicited testimony that the defendant had been in custody since his arrest in this case. RP 652.

During cross-examination of the defendant, the prosecutor moved for the admission of evidence regarding the Ang burglary. RP 684-86. The prosecutor argued that the evidence would rebut the defendant's contention

that he was with Ken earlier that day as well as his testimony that he had injured his wrist while contemplating suicide on February 17, 2005. RP 684-85. The intruder into the Ang residence entered through a broken and supposedly left blood on the window. RP 685. That alleged blood was never verified to be human blood much less the defendant's blood. RP 685. Likewise, the prosecutor presented no testimony that the wound to the defendant's wrist appeared to be fresh. Passim.

The prosecutor had not provided the police reports to the defense and asked leave of the court to obtain them. RP 686.

Defense counsel noted that the State had not charged the defendant with the Ang burglary. RP 686. Defense counsel also noted that the prosecutor had never linked the suspected blood on the Ang window to the defendant, despite having more than one year to do that. RP 688.

The court noted that the essential fact determining admissibility was the timing of the Ang burglary and whether it contradicted the defendant's testimony. RP 688. The prosecutor responded:

I wouldn't have, obviously, made the motion had I not believed that the timing can be established. As I recall, the burglary occurred literally moments before the Richard case. The impression I have is that the defendant came directly from the Angs to the Richards residence to burglar another place.

RP 689. The prosecutor then checked his reports and informed the court that the Richard residence was burglarized sometime between 11:30 a.m. and 2:30 p.m. on February 18, 2005, and the Ang burglar alarm went off at 12:34 that day. RP 691.

The prosecutor informed the court that he wanted to use the evidence to rebut the defendant's claims about where he was, when he was in possession of the car, how the injury was sustained. RP 694.

The court ruled that the prosecutor could adduce evidence regarding the Ang matter. RP 696. The trial court admitted the evidence solely for impeachment purposes. RP 688-89, 693, 696.

The defendant testified on May 1, 2006, the day after his attorney returned from a trip to Ukraine. RP 597, 643.

Defense counsel also failed to require the discussion regarding jury instructions to occur on the record in open court and in the presence of the defendant. RP 739. In addition, defense counsel failed to the missing witness instruction, which was inapplicable as a matter to law. RP 740-44. Defense counsel proposed only one instruction, that is, the voluntary intoxication instruction. RP 741-42.

Defense counsel failed to object to the missing witness instructions.

During rebuttal argument, the prosecutor argued that the defendant in fact had committed the Ang burglary and that it was the defendant's blood on the broken glass there. RP 814. The prosecutor did not use the evidence for impeachment evidence. Passim.

In addition, the prosecutor argued that defendant failed to produce Lou and Ken as witnesses because their testimony would have been unfavorable to the prosecutor. RP 819.

During jury deliberations, the jury sent a question to the court. The jury inquired:

“In considering the crime of stolen property in the first degree, Count 4, is this charge limited to the Suburu only or may other items of property be considered? 1. Property from the Ang residence. 2. The backpack and its contents found on the back lawn, Plaintiff’s Exhibit 6.”

RP 833.

The jury subsequently convicted the defendant of all charges. CP 86-91.

At the sentencing hearing, the prosecutor urged the court to impose the high end of the standard range. The prosecutor’s recommendation urged the court to consider improper factors in violation of the “real facts” doctrine of RCW 9.94A.500. The prosecutor asked the court to consider the Ang burglary, which the prosecutor belatedly stated was admitted for ER 404(b) purposes. The prosecutor stated:

“The court obviously heard a great deal of testimony and argument regarding other crimes, 404(b) evidence, we learned that the defendant was very likely the person the individual who burglarized the Ang residence moments, if not maybe a half-hour before he went to the Richards residence to victimize them. The Dawson’s vehicle was stolen from her garage, her keys were inside her residence. The defendant was in possession of that stolen car less than 24 hours later at the Richards residence. Mr. Kelly has had a long and profitable career at the expense of members of the community of Pierce County and I think it’s time that he be punished accordingly.”
RP 6/2/06 14.

In addition to Mr. Richard spoke regarding the impact of this crime on himself and his wife. He also discussed the impact of the crime on his entire

neighborhood and informed the court that 24 families received property back from the items recovered from his vehicle. RP 6/2/06 15.

Defense counsel failed to object to the presentation of the information. He apparently did not know about the “real facts” doctrine. RP 6/2/06 14-16.

The court then sentenced the defendant to the high end of the standard range, all sentences to run concurrently. CP 95-108.

At the conclusion of the sentencing hearing, the prosecutor asked the court to clarify one ruling: “The court did admit ER 404(b) evidence regarding the Ang burglary, and it was implicit in the court’s ruling, and I can’t recall frankly where the court did the 403 balancing test at that time, and I’m asking the court to make a ruling on the balancing of the prejudicial effect versus the probative value of the evidence.” RP 6/2/06 28.

The court declined the prosecutor’s invitation and invited the prosecutor to provide a transcript addressing this ruling. The court observed that it had clearly determined that the probative value outweighed the prejudicial effect. However, the court noted “That’s not going to satisfy the court of appeals because they want me to go into greater detail, so I invite the state to comb the record and remind me as to what the factors were at that time.” RP 6/2/06 29.

The prosecutor declined the court’s invitation to develop the record on this evidentiary ruling. Passim.

The defendant thereafter timely filed this appeal. CP 109-111.

2. Facts.

In 2002, the defendant was a victim of an attempted murder. RP 643. He was beaten with a paint can, kicked on, and stomped on until he went into a coma. RP 643-44. The assault affected his hearing, memory, and balance. RP 644. As a result of his injuries, the defendant's life changed. RP 643. He could not longer pursue his education or maintain employment. RP 643. At the suggestion of his brother, the defendant tried methamphetamine to relieve his pain after his doctor refused to prescribe more percocet. RP 644-45. The methamphetamine worked well. RP 645. The defendant took methamphetamine until February 18, 2005. RP 645.

On February 17, 2005, the defendant made a suicidal gesture and sliced his wrist. RP 653-54. He used a box knife to do this. RP 677. After doing this, he wrapped the wound with an Ace bandage. RP 678. He put a glove over the bandage because the bandage was falling off. RP 678. He did not put a glove on his other hand. RP 679. The bleeding had stopped before the trip to Gig Harbor on February 18, 2005. RP 683.

During the early morning hours of February 18, 2005, the defendant went with his friend Lou Michael to get some methamphetamine. RP 645, 658. They went to a motel in South Tacoma to contact an individual known as Ken. RP 646. Lou knew Ken and believed that he could purchase methamphetamine from him. RP 646.

Ken told the men that he did not have any methamphetamine, but that he planned to get some later in the day. RP 646. Ken asked the defendant to

help him drive a car out to his family's house where he planned to exchange the car for another one. RP 646-47. The car Ken asked the defendant to drive was a white Honda. RO 647. Ken drove a black Suburu. RP 647. The defendant agreed to help him because he wanted methamphetamine. RP 647.

The men drove to Gig Harbor. RP 647-48. The men stopped at an Alberton's store where the defendant bought a coffee at an espresso stand. RP 648. While he did that, Ken left for a brief period of time. RP 648.

The defendant ingested some meth after he drank his latte. RP 648. He was under the influence of the drug. RP 648.

After Ken returned, the two men drove out to a residential area and stopped at the bottom of a hill. RP 648-49. Ken instructed the defendant to leave the white car at the bottom of the hill. RP 648-49. The defendant got into the Suburu with Ken and drove to a house. RP 649. Ken went into the house after he unlocked the door. RP 649. Ken then opened the garage and gave the defendant the keys and asked him to park the Suburu in the garage, remove the bags from the Suburu and put them in the red SUV (Ford Explorer). RP 649. Ken's bags were backpacks. RP 649. Ken gave the defendant the keys to the SUV. RP 650. The defendant put the bags in the SUV, started it, and then waited for Ken. RP 650. It took the defendant about a minute to move the bags. RP 669.

While the defendant was helping Ken in the garage, Ken was in the house. RP 650. The defendant never left the garage. RP 654. At one point,

Ken entered the garage to ask the defendant if he was ready to go and then Ken went back into the house. RP 654, 669.

While the defendant waited in the SUV, he was attacked by a man, who pulled him out of the car and then started hitting and punching him. RP 650. A woman joined in the fracas. RP 650. They repeatedly hit the defendant and also grabbed his testicles. RP 650.

This attack occurred minutes after Ken went back into the house. RP 670. The defendant did not resist and instead tried to protect his head from injury. RP 651, 698-99. The defendant was knocked out during the altercation. RP 651. The defendant later regained consciousness at the Pierce County Jail. RP 652.

Since his arrest and incarceration on February 18, 2005, the defendant had no contact with Ken. RP 652.

The occupants of the residence where the defendant was apprehended told a different story to police. According to their version, on February 18, 2005, Ken Richard returned to his Gig Harbor residence after running some errands with his wife Susan Saltmarsh-Richard. RP 332. When they returned to their residence, they noted that someone else's car was parked in their garage. RP 333-34. As Mr. Richard looked into his garage, he observed "a blur" come out of the house. RP 334, 336. The "blur", apparently a person, went between the two cars in the garage. RP 337. Mr. Richard did not see the person but rather was struck over the head with a package. RP 337. The person then struck Mr. Richard with his fist and the package. RP 338. The

person then started running and, as he ran, struck Mrs. Saltmarsh-Richard in the face. RP 338. Mr. Richard chased the person around the property, both outside and inside. RP 339. As the person ran toward the back door, he again struck Mrs. Saltmarsh-Richard, who fell to the floor. RP 340. At some point, the person “whipped” that package back at Mr. Richard and hit him in the upper chest and face area. RP 340-41. The package was a backpack that the Richards had purchased for traveling. RP 341.

The person meanwhile had entered the Ford car and started the engine. RP 341. Mrs. Saltmarsh-Richard grabbed hold of the door and was able to keep it from closing. RP 341. Mr. Richard helped her open the door all of the way and he grabbed the person’s head. RP 341. The person fell to the garage floor. RP 341.

At that time, a physical fight ensued. RP 3. RP 341. Mr. Richard fell on top of the person and hoped to subdue him. RP 341-42. However, Mr. Richard found it to be “much like fighting superman.” RP 342. The person proved difficult to fight. RP 342. The person reached for Mr. Richard’s hair and also grabbed Mrs. Saltmarsh-Richard’s hair so that they all three fell to the ground. RP 342. The person also bit Mr. Richard. RP 342. Mr. Richard sustained some bruising and had some hair pulled out. RP 379. His face became black and blue. RP 381. The bruising had resolved and faded within two weeks. RP 382. His wife noted that his injuries comprised a black and blue eye and also two bitten fingers. RP 427.

Mrs. Saltmarsh-Richard grabbed the person's testicles and squeezed them several times. RP 343-44, 413. At that point, Mr. Richard obtained control of the person. RP 344.

Mr. Richard told his wife to go for help. RP 344. Neighbors arrived and helped Mr. Richard control the person until police arrived. RP 346. They noted that the person wore fuzzy gloves. RP 342.

The backpack contained items from the Richard residence. RP 373. However, police did not know whether the backpack was found in the Suburu or in the Richard's Ford Explorer. RP 578. In addition, police found a bag with some tools such as hammers, pry bars, flashlights, etc., in a bag in one of the cars in the Richard garage. RP 572. However, police did not recall from which vehicle these items were taken. RP 572.

Sue Saltmarsh-Richard sustained some injury to her leg. RP 383, 420. She also had some bruising on her face for perhaps a week and a half. RP 384.

Mr. Richard had no idea how many people may have been in his residence during the incident. RP 389. He agreed that there may have been at least one other person in the garage that he could not have seen. RP 394.

There no signs of any forced entry into the residence. RP 393. The police could not find any forced entry into the residence. RP 394, 578. The police did not dust anything for fingerprints. RP 394, 579.

The Suburu that was parked in the Richard garage on February 18, 2005, belonged to Becky Dawson. RP 463-64. It had been stolen the day before. RP 465.

Keys to the Richard residence had been distributed to the neighboring Abo family, a young man who cared for the lawn, a cleaning woman. RP 481, 482, 483.

The defendant was taken into custody by responding police officers. RP 522-23. The defendant stated that the Suburu did not belong to him and David Charvat. RP 543. Police identified the defendant as Timothy Kelly based on a photograph. RP 544.

The defendant stated that he had not been inside the house. RP 555. He also stated that he had been walking around the neighborhood. RP 556.

The area was primarily residential, although Kopachuck Middle School was a mile away and several mom-and-pop stores were within a couple of miles. RP 576.

The defendant had methamphetamine on his person when he was arrested. RP 587.

Lyn Gordon, a close neighbor to the Richard family, went outside her residence on February 18, 2005, because she heard screeching tires. RP 635. The screeching tires came from the cul de sac on which the Richards resided. RP 635-36. Shortly thereafter Ms. Gordon saw three sheriff's vehicles go toward the Richard residence. RP 636.

Gordon paid especial attention to one of the cars, a white car with oxidized paint. RP 637. The car appeared to be an older two-door car. RP 640. A young man drove that car. RP 637. Gordon described him as fair-skinned, with short dark hair, and did not appear to be a "big fellow." RP 637.

Gordon had never seen this car before and she spoke to a couple of sheriff's deputies about it. RP 637.

In addition to the burglary at the Richard residence, police responded to another vandalism charge that later was determined to be a burglary. The owner of that residence, Ms. Ang, testified that on February 18, 2005 between noon and 1 p.m., she received a phone call that her home security alarm had been activated. RP 709. She immediately went to her residence and saw broken glass. RP 710. The door was open. RP 710. She observed that items had been stolen, including her jewelry box. RP 710. She identified items in State's Exhibits 57 and 59 as items from her residence. RP 771. Once again, the prosecutor elicited testimony from the exhibits prior to their admission. RP 711.

PCSD Deputy Wulick responded to the Ang residence and saw some blood on the glass. RP 715. He did not document this alleged blood in any police report. RP 719. The blood was never tested to determine if it was human blood and, if so, whether it matched the defendant's blood type. Passim. The deputy entered the Ang residence and tried to determine if items had been taken, but he was not able to do so. RP 715. He left the Ang residence to respond to the call from the Richard residence. RP 716. Wulick

drove to the Richard residence with his lights and sirens on while speeding and going through lights. RP 716. It took him about 9 minutes to get to the Richard residence. RP 716.

The Angs did not report that anything had been taken from their residence until the next day. RP 717.

D. ARGUMENT:

It is well-settled in Washington that a criminal defendant, although not entitled to a perfect trial, is entitled to a fair one. *State v. Grisby*, 97 Wn.2d 493, 511, 647 P.2d, 6 (1982), citing, *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

In this case, the defendant received a trial that was far from fair. The plethora and gravity of his counsel's mistakes denied him a fair trial. His attorney repeatedly and candidly informed the court that he was not prepared for trial. His trial counsel, who had been assigned the case for only 68 days prior to trial, did not hire an investigator unless after the trial commenced. In addition, although trial counsel asked questions in voir dire suggesting that the defense would offer a mental defense, trial counsel had not received and/or reviewed the defendant's medical records prior to trial much less hired an expert to evaluate the defendant. During the middle of the trial, trial counsel left the country for a trip to Ukraine. Trial counsel received the medical reports after he returned from Ukraine and immediately before the defendant's testimony. At that point, trial counsel could not make any use of the belatedly received materials. Trial counsel failed to subpoena a witness whose location

was known to the defense even though that witness would have corroborated the defendant's testimony. Trial counsel failed to object to a missing witness instruction. Trial counsel failed to object to the consideration of matters outside the "real facts" doctrine at sentencing. Trial counsel did not function as counsel within the meaning of the Sixth Amendment and Washington Const., art. I, sec. 22.

The prosecutor, who is both a minister of justice and an advocate for his client, violated the court's order on the purpose of the impeachment evidence and caused the jury to view that evidence as substantive evidence. After the sentencing, he attempted to clean up the record by asking the trial court to enter an order stating that the evidence had been admitted pursuant to ER 404(b) and the trial court had conducted the requisite balancing test prior to making its decision. The trial court declined to make those findings.

The trial court focused more on getting the matter to trial and ensuring that defense counsel left on his trip to Ukraine than on ensuring that the defendant received a fair trial with representation by competent counsel.

For these reasons, and based on the arguments contained herein, this court must reverse the defendant's convictions and remand the matter for a new trial.

1. The defendant was denied his constitutional right to effective assistance of counsel.

Effective assistant of counsel is guaranteed under the federal and state constitutions. See U.S. Const., amend, VI; Wash. Const., art. I, sec. 22. This

right was comprehensively discussed in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984).

In *Strickland*, the U.S. Supreme Court observed that the right to counsel is crucial to a fair trial because “access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution. 466 U.S. at 685 (citations omitted). Any claim of ineffective assistance must be judged against this benchmark: “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” 466 U.S. at 686.

To prove ineffective assistance of counsel, an appellant must show that (1) trial counsel’s performance was deficient; and (2) the deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1998). Put another way, the defendant must show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. 466 U.S. at 687. The prejudice requirement is satisfied by a showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* In other words, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. Reasonable

probability is defined as “a probability sufficient to undermine confidence in the outcome.” *Id.*

Although the reviewing court indulges a strong presumption that counsel’s representation falls within the wide range of proper professional assistance, the defendant may overcome that presumption by showing that trial counsel had no legitimate strategic or tactical rationale for his conduct. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The American Bar Association has described the role of defense counsel:

The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused’s counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to the law.
ABA Standard 4-1.1(b).

Further, the courts recognize that a defendant is entitled to relief based on cumulative ineffectiveness. *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc), cert denied, 440 U.S. 974, 59 L.Ed.2d 793, 99 S. Ct. 1542 (1979). In a cumulative ineffectiveness analysis, prejudice is established by the sheer number and gravity of counsel’s errors. *Mak*, supra. Put another way, unlike a claim of ineffective assistance based on a single claim, a meritorious claim of cumulative impact from trial counsel’s multiple deficiencies establishes prejudice. *Boyd v. Brown*, 404 F.3d 1159, 1176 (9th Cir., 2005). In this case,

the defendant argues not only that trial counsel's individual mistakes comprise reversible error but also that the cumulative effect of the errors more than satisfies any definition of ineffective assistance of counsel.

a. Trial counsel was ineffective for failing to conduct a thorough investigation of facts surrounding the charge and possible defenses.

The duty to investigate is part of a defendant's right to reasonably competent counsel. "The principle is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." *United States v. Tucker*, 716 F.2d 576, 583 n. 16 (9th Cir. 1983). "The most able and competent lawyer in the world can not render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense." *McQueen v. Swanson*, 498 F.2d 207, 217 (8th Cir. 1974).

The ABA states the duty as follows:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. ABA Standard 4-4.1.

Trial counsel candidly informed the court that he had not had time to prepare for trial in the 68 days that he had the case prior to the first day of trial. Trial counsel candidly admitted that he had not even hired an investigator prior to the start of trial. Trial counsel candidly admitted that although he believed that the defendant may well have suffered from head

trauma that impaired his psychological state at the time of the alleged crime, trial counsel had not received or reviewed the records and also had not consulted an expert. Trial counsel had no theory of the defense, filed no pretrial motions, and failed to secure the presence of available witnesses.

Trial counsel's numerous deficiencies left the defendant with a completely unprepared attorney who was his attorney in name only.

Further, trial counsel had evidence to corroborate the defendant's account of the incident. First, Lyn Gordon's observations of the white car screeching through the neighborhood after the Richard burglary was discovered corroborated the defendant's account of how he arrived in the neighborhood. That is, the defendant and Ken drove two cars, the black Suburu and the white car, to the Richards' neighborhood. In addition, the fact that there was no known point of entry into the residence corroborated the defendant's testimony that Ken entered the residence with a key. Next, trial counsel should have emphasized that there was not a scintilla of evidence that the defendant entered any portion of the house other than the garage. The police took no fingerprints and did not look for any other trace evidence that likely would have confirmed the presence of Ken. In addition, Mr. Richard corroborated the presence of Ken when he testified that it was possible that there was another person in the garage (other than the defendant and the Richards) when he grabbed the defendant.

Regarding the Ang burglary, trial counsel should have strenuously argued that there was no physical evidence linking the defendant to that

residence. Although police saw something that looked like blood at the residence, police failed to presume even a simple presumptive blood test. In addition, assuming that the substance observed was blood, police failed to make any attempt to link the defendant to that blood. Trial counsel should have argued that the presence of the Ang property simply affirmed that when Ken left the defendant at the latte stand, Ken left to burglarize the Ang residence. Further, the defendant's residual head trauma accounted for his comatose condition after the beating by the Richards.

Had defense counsel adequately investigated the case he would have recognized that there was a viable defense to the charges. Had he presented that defense, he would have discharged part of his important obligation to this client.

b. Trial counsel was ineffective for failing to exercise peremptories in voir dire where there was no legitimate tactical reason.

Reviewing courts allow trial counsel considerable latitude in making tactical decisions. *Strickland*, 466 U.S. at 689. To establish that counsel was ineffective for not peremptorily excusing jurors, the defendant must show that counsel's decision was not strategic or tactical. *McFarland*, 127 Wn.2d at 336. In the context of voir dire, defendant must use all of his peremptories or he cannot show prejudice. *State v. Davis*, 141 Wn.2d, 798, 837, 10 P.3d 977 (2000).

In the instant case, trial counsel made little, if any, use of his peremptory challenges. He challenged a single juror and left on the jury many

individuals who were unsuitable for this case. For example, he did not challenge a juror who thought that the case “just vaguely rings a bell.” RP 81. In this case the alleged victim Ken Richard had made numerous statements to the media. RP 390-91. Trial counsel had a duty to examine this witness to determine what knowledge he thought he possessed about the case. The odds are great that had he done so, trial counsel would have learned that the juror had information about the case that was unfavorable to the defendant. In addition, there is no legitimate strategic or tactical reason for trial counsel not to have pursued this inquiry and/or ensured that this juror did not remain on this case.

Trial counsel failed to challenge several jurors who knew individuals who were addicted to methamphetamine and who had very negative views about methamphetamine users. RP 101, 110. He failed to challenge a juror whose son had been the victim of a home invasion robbery and who had been injured. RP 99, 177-79. Given the personal biases of the jurors against meth users, trial counsel should have examined these prospective jurors to ascertain their ability to be fair and also should have ensured that they did not remain on the jury.

It is significant that all of the voir dire record is before this court. There was no jury questionnaire. Given the totality of the voir dire record, it is clear that trial counsel either did not know how to conduct voir dire or was so completely unprepared that he was ineffective. The use of a single peremptory challenge in a case where potential jurors expressed possible

knowledge of this case, had been victims or burglaries or had close family members and friends who had been victims, and had personal experiences that biased them against individuals who used methamphetamine cannot be attributed to reasonable or legitimate strategic or tactical decisions.

c. Trial counsel was ineffective for to object to the missing witness instruction.

For the reasons argued in section 3 below, trial counsel should have objected to the use of the missing witness instruction. CP 47; WPIC 5.20. This instruction permitted the prosecutor to argue that the defendant had not called Lou Michaels or Ken as witnesses because their testimony would have been unfavorable to him. The giving of the instruction was incorrect as a matter of law because the prosecutor could not establish the necessary foundation for the instruction. *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991); *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990).

The instruction was unwarranted because defense counsel had made no effort to locate the witnesses. Although the defendant had some contact with Lou during the trial, defense counsel left for Ukraine and did nothing to secure their presence. It should go without saying that an incarcerated defendant must rely on his counsel to subpoena witnesses. Thus, the instruction should not have been given because there was no showing that the witnesses were uniquely available to the defense.

In addition, defense counsel failed to argue the obvious point that the alleged missing witnesses very well may not have testified because of their

potential legal jeopardy. Both of the witnesses would have had to admit illegal methamphetamine usage.

d. Trial counsel was ineffective for failing to object to the prosecutor's misuse of impeachment evidence where the prosecutor used the evidence as ER 404(b) evidence in violation of the court's order.

For the reasons set forth in section 4 below, trial counsel should have objected to the prosecutor's violation of the court's order limiting the use of evidence regarding the Ang burglary.

Without objection from the defense, the prosecutor put on his entire Ang burglary case against the defendant. The prosecutor's evidence went far beyond the impeachment evidence ruled admissible by the court. In addition, defense counsel did not even have the opportunity to review all of the police reports and materials regarding the Ang burglary until seconds before the prosecutor adduced the evidence at trial. Trial counsel failed to grasp the purpose of the evidence and also to insist on the prosecutor's compliance with the trial court's limitation of the purpose of the evidence.

That the purpose of the evidence confused the jury is evident from the question sent out during deliberations, where the jury asked if property from the (uncharged) Ang burglary could be used for the possession of stolen property count. RP 831.

e. Trial counsel was ineffective for failing to object to the admission of information outside of the real facts doctrine at sentencing.

As argued in Section 5 below, trial counsel should have objected to the impermissible information adduced by the prosecutor at sentencing. The trial

court considered this impermissible information when it imposed a sentence at the high end of the standard range.

f. Trial counsel was ineffective for eliciting testimony from the defendant that he had been incarcerated since his arrest.

The Washington courts have held that a defendant is entitled to a new trial when the jury sees him in shackles. *Personal Restraint Petition of Davis*, 152 Wn.2d 647, 694-96, 101 P.3d 1 (2004). The rationale for the rule is that the jury may well conclude that a restrained defendant is too dangerous to be allowed to sit unrestrained. *Id.*

There is no principal reason for not applying that analysis when a jury is informed that a defendant is in custody and has been in custody for nearly two years awaiting trial. Based on the knowledge that the defendant has been in jail pending trial, the jury reasonably could speculate that the defendant was too dangerous to be in the community, that he had a lengthy criminal record, etc. All such speculation would be detrimental to the defendant.

Although trial counsel apparently asked the question to explain to the jury that the defendant had not had contact with Ken since the date of this incident, defense counsel should have instructed his client to just say "no". Evidence that the defendant had been in jail ever since the date of the charged crime could not have benefited the defendant. There is no legitimate tactical reason for eliciting such evidence.

Given the presumption of prejudice that arises from such knowledge, trial counsel was ineffective for putting this fact before the jury. This ineffectiveness requires a new trial.

2. The trial court abused its discretion when it failed to grant the defendant's requested continuance motion where defense counsel had not yet retained an investigator or otherwise prepared for trial.

A defendant has the constitutional right to effective assistance of counsel. U.S. Const., amend, VI; Wash. Const., art. I, sec.22.

The trial court's decision on a motion to continue is reviewed under an abuse of discretion standard. *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004) citing, *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995).

Even so, the trial court nevertheless may be found to have abused its discretion depending on the particular facts of the case. Thus, the court has held that the trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Downing*, 151 Wn.2d at 27. The trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Downing*, 151 Wn.2d at 274-75, citing, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The courts have recognized "that failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case." *Downing*, *id.*, citing *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975), citing *State v. Cardenas*, 74 Wn.2d 185, 443 P.2d 826 (1968). Denial of a continuance may violate a defendant's

right to compulsory process if the denial prevents the defendant from presenting a witness material to his defense. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1975).

In this case, the trial court abused its discretion when it denied the defense motion to continue. Defense counsel candidly and repeatedly informed the court he was not ready to prepare. RP 3, 4,, 5, 6, 7. He noted that he had had the case for only 68 days and that he had two other serious cases regarding the same defendant. Defense counsel stated that he wanted to examine the cases globally in order to understand the defendant's situation and make appropriate recommendations to him. RP 6. In addition, defense counsel did not even hire an investigator until *after* the case was called for trial. RP 4. Further, defense counsel did not interview the State's witnesses until after the trial had started. RP 4. Defense counsel also prepared the jury in voir dire for the possibility of a mental defense based on the defendant's severe brain trauma sustained in an attempted murder, yet defense counsel had not received or reviewed the medical records and did not have an expert. RP 211-216. Moreover, defense counsel failed to call a witness who would have corroborated the defendant's account of the day when the defendant had communicated with that witness and knew how to contact him. RP 704-705, 11, 119, 120. In addition, the prosecutor provided reports to defense counsel during the trial. Instead of working on the case, defense counsel took a trip to Ukraine during the middle of the trial and returned to finish the case after a lengthy flight and in a physically tired state. Trial counsel's state concerned

the judge, who remarked that trial counsel must be “disoriented, at best” and asked whether he could proceed. RP 597. Although the prosecutor initially informed the court that the case was simple and straightforward, the prosecutor changed his tune when it came to the admission of the impeachment evidence. RP 693. The prosecutor explained that he had a good week’s worth of rebuttal on this point. RP 693. The prosecutor still had not given the defendant all of the reports relating to this matter. RP 686, 694, 696. Had trial counsel had sufficient time to prepare, he would have been able to remedy these deficiencies and provide the quality of representation guaranteed by the constitutions of the United States and the State of Washington.

Ironically, when denying defense counsel’s continuance motion, the trial court stated that it was “absolutely committed” to defense counsel’s overseas vacation. RP 17-19. The trial court should have shown the same level of commitment to the defendant’s right to due process and effective assistance of counsel.

3. The trial court erred by giving a missing witness instruction proposed by the prosecution and used against the defendant, thereby denying him his constitutional right not to present any defense or defense witnesses.

Instructional error is generally deemed waived by trial counsel’s failure to object unless the use of the instruction “invades a fundamental right of the accused.” *State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006), citing *State v. Becker*, 32 Wn.2d 54, 64, 935 P.2d 1321 (1997). In this case, defense counsel admittedly failed to object to the missing witness instruction,

but his failure to do so deprived the defendant of his constitutional right to effective assistance of counsel and impermissibly shifted the burden of proof to him.

The law in Washington provides that the “missing witness” instruction, WPIC 5.2, may be applied against the defense. *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). That instruction provides:

If a party does not produce the testimony of a witness who is within the control of or peculiarly available to that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would be unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

WPIC 5.20.

However, the proponent of the missing instruction must establish the foundation for this instruction. Although the courts have identified several factors which must be satisfied if the instruction is to be given, the appellant herein discusses only those factors that apply to his case.

First, the prosecutor must establish that the defendant was able to produce the witness and the defendant’s testimony unequivocally implies that the absent witness could corroborate his theory of the case. *Blair*, citing *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114, *rev. denied*, 115 Wn.2d 1014 (1990).

For a witness to be “available” to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as

ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging. *Blair*, 117 Wn.2d at 490.

Second, the prosecutor must establish that the unexplained failure to call the witness creates a suspicion that there has been a willful attempt to withhold competent testimony. *Blair*, 117 Wn.2d at 488, citing *State v. Baker*, 56 Wn.2d 846, 859-60, 355 P.2d 806 (1960). This requirement has been interpreted to mean that the party against whom the instruction was sought “would not knowingly fail to call the witness in question unless the witness’s testimony would be damaging.” *Blair*, *supra*, citing *State v. Davis*, 73 Wn.2d 271, 279-280, 438 P.2d 185 (1968).

Third, the missing witness instruction should not be given where the witness’s testimony, if favorable to the party who failed to call the witness, would necessarily be self-incriminatory. *Blair*, 117 Wn.2d at 489-90.

In this case, the trial court erred when it gave the missing instruction. First, there was no showing that the witnesses were available to the defense. The prosecutor asked in closing:

Where is Ken? Where is Lou? Mr. Kelly himself testified that he’s still in contact with Lou, that’s he probably home with his kids. He’s talked to him several times. He’s asked Lou, presumably, to locate Ken. Well, even Lou’s not available to testify about what’s been going on here?

You as jurors, as jurors can use that to access Mr. Kelly’s credibility, the credibility of his case, his theory. Why aren’t those people here? Maybe they don’t exist or maybe they wouldn’t testify to corroborate what’s been claimed.

RP 619-20. Contrary to the prosecutor's argument, the defendant did not know Ken and had just met him the morning of the charged crimes. RP 646. Although the defendant had known Lou since 2003, he had been unable to reach him during the time immediately prior to the trial. RP 683-84. In addition, Lou had been looking for Ken without success. RP 684. Further, the defendant had been in custody for nearly two years and his ability to locate witnesses thus was greatly hampered. RP 683-84, 704-05. Further, his trial attorney did not obtain an investigator to work on the case until *after* the matter was assigned for trial. RP 4. As of the first day of trial, defense counsel had not sent the investigator out to interview any witnesses or otherwise assist in the defense. RP 5. In addition, trial court went on a trip to Ukraine during the middle of the trial and clearly was not giving direction to any investigator during that time.

Next, the missing witness instruction should not have been given because the witnesses' testimony would be self-incriminatory if they testified favorably to the defendant. Had the witness Lou been called at trial and testified favorably to the defendant, he would have testified that he uses methamphetamine and that in the early morning hours of the date of the alleged crime, he intended to purchase more methamphetamine. Lou would have testified that he drove to the Knight Motel with the defendant for the express purpose of purchasing methamphetamine. This testimony would have been damning to Lou. Further, had Ken been available to testify, and assuming that his testimony would have been favorable to the defendant, Ken

would have had to admit to possessing a stolen car, to burglarizing the Ang residence and then the Richard residence. Ken's testimony would have been extremely incriminating for Ken.

Application of the law to the instant case affirms that the trial court should not have given the missing witness instruction. Obviously the appropriateness of the instruction requires a fact-specific analysis. In this case, use of the instruction was reversible error.

Moreover, the prosecutor did not establish that the defendant, rather than Ken, was the individual at the residence. The evidence showed that someone may have cut themselves entering the residence through a window. The police never performed even a presumptive test to determine whether the substance blood and, if so, the defendant's blood. The defendant had been in custody for an extended period of time and the prosecutor very easily could have obtained a court order for his blood to be used for comparison purposes.

4. The deputy prosecutor committed misconduct when he violated a court order restricting the use of evidence of the Ang burglary to impeachment evidence; the deputy prosecutor instead impermissibly used the evidence for ER 404(b) purposes.

The appellate court will reverse a conviction for prosecutorial misconduct when there is a substantial likelihood that the prosecutorial misconduct affected the jury. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). The prosecutor's violation of a court order may require reversal of a conviction. *State v. Gregory*, 158 Wn.2d 759, 866, 147 P.3d 1201 (2006). This is so

where the prosecutor's violation of the court order is blatant. *Id.* When defense counsel fails to object at trial, the prosecutor's misconduct cannot constitute reversible error unless it is so flagrant that no instruction could have cured it. *State v. Peyton*, 29 Wn. App. 701, 712, 650 P.2d 1362, *rev. denied*, 96 Wn.2d 1024 (1981). The defendant has the burden of proving such prejudice. *State v. Hughes*, 106 Wn.2d 176 195, 721 P.2d 902 (1986). If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.*

In the instant case, the trial court limited the use of evidence about the Ang burglary to impeachment, that is, to show that the defendant was not at the coffee stand prior to going to the Richard residence. RP 696. The court stated that "it appears that the State has evidence which would directly contradict a critical portion of the defendant's testimony, so I can't see how the State is not entitled to bring it up." *Id.*

The prosecutor did not use the evidence to impeach the defendant's testimony. To the contrary, the prosecutor used the evidence as ER 404(b) evidence to attempt to prove to the jury that the defendant had committed the Ang burglary.

The prosecutor's use of the evidence so confused the jury that they sent out a question during deliberations wherein they asked if the Ang property was the basis for the possession of stolen property charge. CP 831.

Although a jury normally is deemed to follow the court's instructions and the court had given a limiting instruction for the Ang burglary evidence, the jury obviously did not understand that instruction. State v. Ervin, 158 Wn.2d 746, 757, 147 P.3d 567 (2006). Thus they wanted to use the Ang burglary evidence as a basis for the stolen property conviction. Their confusion is directly attributable to the prosecutor's misuse of the evidence.

Although the court instructed the jury that they could not so use the evidence, the court could not mitigate the jury's conclusion that the defendant prosecutor's purposeful effort to transmogrify impeachment evidence into evidence of other misconduct pursuant to ER 404(b).

The prosecutor flagrantly and intentionally misused the evidence as ER 404(b) evidence and then went so far at the conclusion of the trial as to ask the court to enter an order that the evidence had been admitted as ER 404(b) evidence after the court conducted the appropriate balancing test. RP 28, 6/2/06. The trial court declined to permit such manipulation of the record. Id.

In addition, the prosecutor misused the evidence at the sentencing hearing by emphasizing to the court there were "victims" of uncharged crimes for which the defendant was responsible. RP 6/2/2006 7. The prosecutor urged the court to consider evidence that was clearly outside the "real facts doctrine" of RCW 9.94A.500. The prosecutor informed the court that James Driscoll was present and that he was "one of the victims on an uncharged count." Id. In addition, the prosecutor informed the court of the presence of two other people who were community board members for the Richards'

neighborhood. These individuals wanted to explain to the court “how this crime has essentially impacted and victimized that neighborhood because of the nature of the incident.” RP 6/2//2006 8. The prosecutor urged the court to permit the community board members to speak because “the community is the victim of this crime due to its high publicity and the nature of the invasive home burglary.” RP 6/2/2006 8. Amazingly, even after the trial court informed the defense that it would not consider information beyond the “real facts” doctrine, the prosecutor persisted in putting this information before the court. The prosecutor argued:

The court obviously heard a great deal of testimony and argument regarding other crimes, 404(b) evidence. We learned that the defendant was very likely the individual who burglarized the Ang residence moments before, if not maybe a half our before he went to the Richards residence to victimize them.

The Dawson’s vehicle was stolen from her garage, her keys were in her residence. The defendant was in possession of that stolen car less than 24 hours later at the Richards residence. Mr. Kelly has had a long and profitable career at the expense of members of the community of Pierce County and I think that it’s time he be punished appropriately. RP 6/2//06 14.

This misconduct affected the trial court which then imposed the high end of the standard range. RP 6/2/2006 27. But for the prosecutor’s zeal in encouraging the court to consider the improper information, the trial court may have imposed a sentence below the high end.

Finally, the prosecutor committed misconduct by failing to provide potential *Brady* evidence to the defendant. The instant case is unique because the Pierce County Prosecutor’s Office had tried the case where the defendant

had been the victim of the attempted murder. RP 612. Because the prosecutor knew that the defendant had suffered severe head trauma and that trial counsel needed the medical records that the prosecutor in fact possessed, the prosecutor was obliged to provide this potentially exculpatory discovery to the defense.

5. Violation of the “real facts” doctrine at sentencing mandates resentencing before a different judge.

The real facts doctrine of the Sentencing Reform Act prohibits the trial court from considering at sentencing facts probative of uncharged or more serious crimes when those are not part and parcel of the current offense. *State v. Tierney*, 74 Wn. App. 346, 351-52, 872 P.2d 1145 (1994).

In this case, the prosecutor urged the court to consider at sentencing the evidence that the defendant was “very likely” the person who burglarized the Ang residence. RP 6/2/06 14. In addition, Ken Richard asserted that the property recovered at his residence belonged to 24 other individuals. RP 15 (6/2/06).

This information clearly was not part and parcel of the current offense and should not have been offered to the trial court as sentencing considerations

In addition, the trial court’s finding that the defendant poses a “significant danger to the community”⁴ lacks factual support in the record. Such a finding is analogous to the finding of “future dangerousness” in a sex crimes case. In those cases, the finding of “future dangerousness” required

⁴ RP 6/2/06 27.

both a history of similar acts and evidence that the defendant is not likely to be amenable to treatment as prerequisite evidence. *State v. Pryor*, 115 Wn.2d 445, 454-55, 799 P.2d 244 (1990). In the instant case, there was no evidence to support the trial court's finding of future dangerousness.

Because the trial court relied on inadmissible evidence of other crimes as well as an unproven finding of future dangerousness to justify imposition of the high end of the standard ranges, the defendant is entitled to a new sentencing hearing before another judge.

6. Cumulative error requires that remand of this matter to the superior court for a new trial.

Under the cumulative error doctrine, the aggregate effect of numerous errors may deny a defendant a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868, P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 688 (1984). This is true even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 278, 149 P.3d 646 (2006), citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

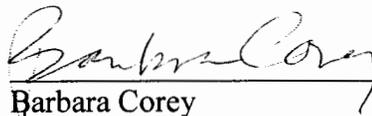
In the instant case, the defendant's trial was fatally tainted by the ineffectiveness of his trial court, the trial court's abuse of discretion in denying defendant's meritorious motions for continuance, the use of an improper missing witness instruction, prosecutorial misconduct, the trial court's consideration of improper information at sentencing, and also cumulative error.

Reversal and remand for new trial is required to ensure that the defendant receives his constitutional right to a fair trial and quality of justice guaranteed by the constitutions.

E. CONCLUSION:

For the foregoing reasons, the defendant respectfully asks this court to reverse his convictions below. Alternatively, the defendant asks this court to remand this matter for a new sentencing hearing before a different judge.

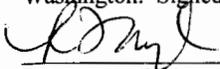
DATED THIS 19th day of June 2007.



Barbara Corey
Attorney for Timothy Michael Kelly
WSB#11778

Certificate of Service:

I hereby certify that on June 19, 2007, I provided via ABC Messenger a true and correct copy of this brief to Deputy Prosecuting Attorney Kathleen Proctor of the Pierce County Prosecuting Attorney's Office and also provided via U.S. Mail a true and accurate copy of this brief to Timothy Kelly at Stafford Creek Correctional Center, Aberdeen, Washington. Signed this 19th day of June, 2007 in Tacoma, WA.



Rebecca L. Taylor

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