

NO. 35702-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
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**STATE OF WASHINGTON**, Respondent,

v.

**LARRY DWAYNE BLACKWELL**, Appellant.

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APPELLANT'S BRIEF

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*P.M. 7-15-2007*

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## **I. ASSIGNMENTS OF ERROR**

1. Blackwell was deprived of effective assistance of counsel when his trial counsel failed to object to the introduction of testimony suggesting that Blackwell was a drug dealer and drug user.
2. The trial court erred by permitting the witnesses to testify that Blackwell was a drug dealer and drug user.
3. The trial court erred by convicting Blackwell of second degree assault without sufficient evidence that Blackwell assaulted Bucenski.
4. Cumulative error deprived Blackwell of a fair trial.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was Blackwell deprived of effective assistance of counsel when his attorney failed to object to testimony that he was a drug dealer and user where such evidence had no relevance to the crimes charged and was extremely prejudicial to the defense?
2. Did the trial court erred by permitting Kanamu to testify that Blackwell was a drug dealer and to the drug "lifestyle" over

defense objection where such evidence had no relevance to the crimes charged and was extremely prejudicial to the defense?

3. Was Blackwell's defense prejudiced by the trial court's erroneous admission of testimony calling him a drug dealer?
4. Has the State provided sufficient evidence that Blackwell assaulted Bucenski where Bucenski never testifies that she was threatened by Blackwell or that Blackwell pointed a gun at her?
5. Did cumulative error deprive Blackwell of a fair trial where the combined prejudice of the errors at trial so compromised his defense that he could not receive a fair trial?

### **III. STATEMENT OF THE CASE**

*Procedural History:*

Larry Dwayne Blackwell, together with co-defendant Lisa Kanamu, was charged with one count of first degree assault, one count of second degree assault, and one count of unlawful possession of a firearm in the second degree. CP 7-8. Three prior trials on these charges ended in mistrial. The first mistrial was declared because, in closing argument, the prosecutor commented on the defendants' right to remain silent. RP 3/14/05 24. The second mistrial resulted from juror misconduct. RP 6/13/05 46-47. The third trial ended in a hung jury. RP 4/28/06. This

appeal is taken from the fourth jury trial, which resulted in convictions on all three counts. CP 11, 12, 13. Blackwell was sentenced to 279 months for first degree assault, 73 months for months for second degree assault, and 50 months for unlawful possession of a firearm in the second degree. CP 23. This appeal timely followed.

*Factual History:*

On July 6, 2004, David Vicenzi was found with a gunshot wound in his girlfriend's home. RP 671-72. Vicenzi's girlfriend, Diana Bucenski, had fled the scene, leaving neighbors to call the police. RP 735, 375, 390.

Vicenzi told police that a man and woman he later identified as Blackwell and Kanamu had come into his room that night, broke down his door, and shot him while he attempted to break out a window. RP 720.

In his trial testimony, Vicenzi embellished his story. In this version, Vicenzi was in bed with Bucenski when he saw Kanamu at the door. RP 965. He stood up and asked why they were there. RP 965. Kanamu turned to Blackwell, who was still in the hallway, and said "Look, Honey, they're both here." RP 965. Blackwell came into the room and "doused [them] both with beer like it was holy water and threw the bottle at [Vicenzi]," missing him. RP 967.

Vicenzi then pushed Blackwell into the hall and closed the door.

RP 967. Vicenzi began to break out the window with a pillow to create an escape route. RP 967. Then Vicenzi stopped trying to escape, picked up the beer bottle, opened the door, and threw it at Blackwell and Kanamu. RP 967.

Vicenzi testified that then Blackwell came back into the room with Kanamu. RP 968. Kanamu handed a gun to Blackwell. RP 968. According to Vicenzi, Blackwell then pointed the gun at Bucenski (Bucenski disputes this). RP 968. Bucenski backed up, saying, "Don't shoot" (again, Bucenski's version differs). RP 969. Then, Vicenzi says that he ran over to them, and Kanamu said to Blackwell, "Just shoot him." RP 968. Blackwell pointed the gun at Vicenzi and fired. RP 968. Blackwell, Bucenski, and Kanamu all left, and Vicenzi crawled to the living room to call 911. RP 975.

The police were suspicious of Vicenzi's version of events, because his story and injuries did not match up with the evidence at the scene. RP 751, 765. Blood spatter on the walls suggested that someone else had been injured, possibly by a knife found in the entry, near Vicenzi. RP 751, 765, 752. The bedroom door had not been kicked in as Vicenzi claimed, but rather broken from the inside. RP 741.

Eventually, police located Bucenski. According to Bucenski, on the night of the shooting she heard voices inside her house. RP 359-60. Then Blackwell and Kanamu walked into the room. RP 365. Vicenzi closed the door on them and attempted to break out the window for escape. RP 367-8. Bucenski testified that Blackwell and Kanamu then entered the room yelling at Vicenzi about a stolen gun and jewelry. RP 365. She said she confronted Blackwell, who told her to “Shut the fuck up, Bitch.” RP 366. Bucenski said that Kanamu then handed a gun to Blackwell, saying “Shoot him, honey,” and Blackwell shot Vicenzi. RP 367. Blackwell and Kanamu immediately left. RP 373. Bucenski then left Vicenzi on the floor and ran away without ever calling the police. RP 375, 390.

Bucenski and Vicenzi gave different theories for why Blackwell and Kanamu would want to shoot Vicenzi. Bucenski testified that Blackwell and Kanamu had a dispute with Vicenzi over a stolen gun. According to Bucenski, she had told Blackwell and Kanamu that her boyfriend, Vicenzi, had stolen a gun Blackwell had left with her. RP 337. Bucenski testified that Blackwell was not very upset about the gun, but Kanamu was very upset. RP 340-41. In retribution, Bucenski helped Kanamu to steal Vicenzi’s car, which Kanamu then sold. RP 345, 1255.

According to Vicenzi, Blackwell had never shown animosity toward him and he had never seen Blackwell's gun or taken it. RP 991, 993. Vicenzi thought the shooting might have been due to a dispute over a car Blackwell had borrowed and had not returned on time. RP 994.

Kanamu testified in her own defense. She admitted that she had stolen and sold Vicenzi's car in payment for her stolen gun. RP 1255. After that, she felt that she had been fairly compensated for the gun and was not angry at Vicenzi anymore. RP 1255. Kanamu said that she and Blackwell left the area before the shooting to start a new life. RP 1258. She denied any involvement in the shooting. RP 1258.

The defense challenged Bucenski and Vicenzi's versions of the shooting. A crime reconstruction expert testified that the blood spatter evidence at the scene was inconsistent with Vicenzi and Bucenski's stories and Vicenzi's injuries. RP 1139-40, 1143. There were blood stains and spatters on the walls indicating some sort of stabbing or bludgeoning. RP 1139-40. The bullet holes appeared to have come into the bedroom through the wall, rather than from a gun fired within the bedroom, as Vicenzi and Bucenski claimed. RP 1135. Unfortunately, the expert was hampered by the fact that the blood evidence was not preserved by the police for further analysis. RP 1135.

During the course of the trial, the State questioned Bucenski and Kanamu about their drug use and their lifestyle. The witnesses were permitted to testify repeatedly that Blackwell had supplied drugs to them and Vicenzi. RP 303-4, 328-29, 1309-19. During closing argument, the State argued that the defendants “live in a different world than the average, reasonable person,” and that this “lifestyle” and the guns that were a part of it were the explanation for this crime. RP 1370.

Ultimately, the jury convicted Kanamu and Blackwell on all three charges.

#### **IV. ARGUMENT**

##### **ISSUE 1: BLACKWELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO TESTIMONY THAT HE WAS A DRUG DEALER AND USER.**

Both the federal and state constitutions guarantee the accused’s right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her 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, 687-88, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Defense counsel was deficient for failing to object to Bucenski's testimony that she bought drugs from Blackwell and that Blackwell gave crack cocaine to Vicenzi. RP 328-29, 344.

It is well established that evidence of other crimes, wrongs, or acts must be excluded at trial unless shown to be relevant to a material issue and to be more probative than prejudicial. ER 404(b); *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). Attempts to use such evidence must be evaluated under ER 404(b), which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

The trial court must engage in a three-part analysis prior to admitting evidence under ER 404(b). First, the court must identify the purpose for which the evidence is being admitted. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is "whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the

existence of an identified fact more or less probable. *Saltarelli*, 98 Wn.2d at 361-62. Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice. *Saltarelli*, 98 Wn.2d at 362-63.

The State has the burden of proving the existence of the prior bad act and the defendant's connection to it by a preponderance of the evidence. *State v. Norlin*, 134 Wn.2d 570, 577-78, 951 P.2d 1131 (1998). "In a doubtful case, the scale must tip in favor of the defendant and the exclusion of the evidence." *State v. Meyers*, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

Bucenski was permitted to repeatedly testify that she had purchased drugs from Blackwell and that Blackwell sold drugs to Vicenzi. RP 303-4, 328-29. This evidence had no relevance to the charges against Blackwell and should have been excluded. Had defense counsel objected to its admission, the trial court would have been required to engage in the three-part inquiry and would have been required to suppress it.

During his examination of Bucenski, the prosecutor spent a great deal of time flushing out what he would refer to in closing as Blackwell and Kanamu's "different world" of dealing drugs and owning guns. RP 1370. The State asks Bucenski to describe her relationship with

Blackwell, and Bucenski replies: "I didn't have one, really. I mean, you know, if he had drugs on him that I was going to buy, that would be it."

RP 303. The State then goes on into further detail with Bucenski:

Q Did you also do amphetamine with Mr. Blackwell?

A Yes.

Q How often did you do meth with him?

A Quite a few times. Not every time, quite a few.

Q Was Ms. Kanamu his supplier?

A I don't know what in particular as to who—I assumed they were like anybody else married, a team effort.

Q Did you purchase drugs from Mr. Blackwell as well?

A Yes.

RP 303-4. Then, the State goes even further into detail about the drugs

Bucenski says she got from Blackwell:

Q How was [Vicenzi] compensated [for the loan of his car to Blackwell]?

A [Blackwell and Kanamu] had given him a baggy of drugs.

Q What kind of drugs?

A Well, I found out shortly after they gave it to him that it was crack cocaine.

Q Did you get any drugs?

A Yes.

Q What kind of drugs did you get?

A Methamphetamine.

Q And was that, as you say, compensation for the fact that he had the car longer than was given to him?

A Yes.

RP 328-29.

Had the court assessed the purpose for admitting the evidence, under the first part of the test, it could only have found that there was no legitimate purpose for allowing evidence that Blackwell had sold and used drugs. This was not a drug crime. The only purpose for such evidence was an illegitimate one—showing that Blackwell was a person of dubious character.

Under the second part of the test, had the court assessed the relevance of this evidence, it could only have found it to be irrelevant to Blackwell's involvement in the crimes charged. This evidence was irrelevant to any element of the charged crimes. If the State sought to show that Bucenski had knew Blackwell, she could have testified to that without going into drug activity.

Finally, under the third part of the inquiry, even if the court had somehow found the evidence logically relevant, the probative value must still be considered in light of the resulting prejudice. That prejudice was substantial. As the Washington Supreme Court recognized:

The impact of narcotics addiction evidence “upon a jury of laymen [is] catastrophic . . . . It cannot be doubted the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics . . . .”

*State v. Lefelver*, 102 Wn.2d 777, 783-84, 690 P.2d 574 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *see also State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974) (“evidence of drug addiction is necessarily prejudicial in the minds of the average juror”). If evidence of drug usage is “catastrophic” and “necessarily prejudicial,” evidence of drug dealing is exponentially more so.

It is clear that defense counsel in this case realized the damaging nature of this testimony, as evidenced by his motions in limine to exclude evidence that drugs were found in the room when Blackwell was arrested and defense counsel’s later objection to similar testimony by another witness. Nor could counsel have been surprised by the time Bucenski made the statements for the second, third, and fourth time.

Moreover, there is no strategic reason for defense counsel to fail to object to this testimony. Even if counsel did refrain from objecting to the first instance for fear of highlighting the testimony for the jury, by the second time the jury heard Blackwell called a drug dealer, it was certainly highlighted for them. Then, they heard it again, again and again. There

was simply no valid tactical reason to sit silently through the repeated references to Blackwell's drug activities.

**ISSUE 2: THE TRIAL COURT ERRED BY PERMITTING KANAMU TO TESTIFY OVER DEFENSE OBJECTION THAT BLACKWELL WAS A DRUG DEALER.**

The State continued to pursue its theory that this crime could be entirely explained as a product of a drug lifestyle during cross-examination of co-defendant Kanamu. The State was permitted to ask Kanamu repeatedly about her drug dealing activities and Blackwell's over defense objection. The following exchange took place during the State's cross-examination of Kanamu:

Q So why did you have a firearm?

A As I testified previously, because of the lifestyle that I lived, the fact that I was in a drug life and there were times that I was on my own, I had it for protection. It was never fired. I had never used it, but I had it just in case I needed it.

Q What is the lifestyle you're referring to, dealing drugs?

A Using, dealing, being around those types of people, yes.

Q In dealing drugs, you recognize that a firearm may become necessary because it's a dangerous thing to do, correct?

A It could be.

Q There are other drug dealers out there who are very serious about their drug dealing, correct?

A Yeah.

Q And people get killed over transactions in drugs, correct?

A Um, sometimes.

Q And people obviously kill people in conflict over drug issues?

A It's been known to happen.

Q And so people who deal in drugs generally possess firearms, correct?

A Not necessarily.

Q Well, as evidenced by you. You are—

A Myself, personally, I possessed a firearm, yes.

Q You were a drug dealer who carried a firearm?

A Yes.

Q Your husband of a few days before the incident was also a drug dealer, correct?

MR. SEPE: Objection, Your Honor, 404(b), inadmissible. It's been ruled on.

MR. GREER: No. This has been discussed by witnesses in this case. Drug suppliers.

...

THE COURT: . . . I don't recall any objections with respect to [Bucenski's] testimony that she got drugs from Mr. Blackwell, so I think the evidence is already before the jury that at least with respect to her, he, you know, sold drugs.

. . . And given that I believe that Ms. Bucenski previously testified that Mr. Blackwell provided her with drugs, I'm going to allow Mr. Greer to ask the question . . .

Q Ms. Kanamu, where I left off, was your husband, Mr. Blackwell, also dealing drugs, correct?

A At times.

RP 1309-1319. The only purpose of this testimony appears to be a set-up for the State's closing argument, where the prosecutor argued that shootings like this are normal for drug dealers. (See full quote below, p. 16).

As discussed above, evidence of prior bad acts, especially prior acts of drug dealing, are highly prejudicial and are generally barred by ER 404(b) unless substantially probative of some relevant issue. *See Lefelver*, 102 Wn.2d at 783-84. Whether or not Blackwell is a drug dealer is irrelevant to the identity of the person who shot Vicenzi.

Again, the trial court failed to go through the three-part analysis required for admitting 404(b) evidence. Once again, a witness was led by the State to testify that Blackwell dealt drugs without the State being required to establish that allegation by a preponderance of the evidence. This error compromised the trial and requires reversal of the convictions.

**ISSUE 3: BLACKWELL SUFFERED PREJUDICE DUE TO THE ERRONEOUS ADMISSION OF TESTIMONY THAT HE HAD BEEN A DRUG DEALER.**

a. *Trial counsel's failure to object prejudiced Blackwell.*

To establish prejudice, Blackwell need only show a “reasonable probability” that but for counsel’s error, the result of the trial would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Blackwell has made a sufficient showing. Had counsel made a timely motion in limine to exclude evidence of Blackwell’s drug dealing, the trial court would have been required under the law and evidence to grant the motion. Moreover, the court could not have denied defense’s later motion to exclude later testimony by Kanamu that Blackwell had sold drugs on the basis that defense counsel had not objected to Bucenski’s testimony.

*b. Blackwell was prejudiced by the combination of Kanamu and Bucenski’s testimony portraying him as a drug dealer.*

Allowing the repeated testimony that Blackwell had allegedly used and dealt drugs to be put before the jury allowed the State to argue to the jury that this incident is consistent with the character of a drug dealer. During closing, the prosecutor argued that the jury should believe Vicenzi, even though his explanation for why a man and woman he hardly knew would shoot him made absolutely no sense. The explanation, according to the prosecutor, is that Blackwell and Kanamu were drug dealers:

And, you know, it seems silly to the average reasonable person that someone would steal somebody's car over something like [a stolen gun]. Well, they can't call the police, right, because they're felons because they're not allowed to have the gun to begin with, and **they live in a different world than the average, reasonable person. They deal drugs.** They have guns, they have involvement in things that the average person doesn't consider, and taking a gun is a big deal in their world. The atmosphere of what's happening at that time is apparent. **The degree of irrational thought that comes with drug use, that comes with drug dealing, goes without saying.**

(emphasis added) RP 1370. Again, later in argument, the prosecutor comes back to this argument: "Drug dealers. I've discussed that to an extent. The atmosphere, the fact that Lisa had a gun . . ." RP 1375. The prosecutor highlights the unfairly prejudicial testimony to the jury, using it for precisely the purpose that requires its exclusion—character.

The only issue in this case was the identity of the man who shot Vicenzi and allegedly threatened Bucenski. The case boiled down to the credibility of Vicenzi and Bucenski as witnesses versus the credibility of Kanamu and Blackwell, who had been portrayed as drug dealers.

There is a cloud hanging over the stories Vicenzi and Bucenski told, filled as they were with contradictions with each other and with the physical evidence. Even the investigating officers testified that Vicenzi's story and injury was inconsistent with the evidence they saw at the scene. RP 749, 765, 774, 777. Officer Rock testified that the bedroom door had

not been kicked in as Vicenzi said—rather it looked like someone had been slammed up against it from the inside. RP 741. In addition, both Officer Rock and Officer Houser stated that the blood spatters on the walls and door frames were not consistent with Vicenzi's injuries and indicated another person had suffered injury that night. RP 749, 765, 774, 777. They were so concerned about these inconsistencies that they reported it to their superiors and put it in their report. RP 751, 765. Interestingly, the officers' perception of the scene is the same as the defense expert, who testified that the blood spatter on the walls indicated some kind of stabbing wound or a bludgeoning. RP 1139-40. Because the State did not preserve any of this evidence, there is no way to know for sure what happened.

Yet despite these contradictions and unanswered questions, the jury may not have been able to focus on it due to the prejudicial testimony regarding the "drug lifestyle." Although credibility determinations are left to the jury, the jury cannot fully exercise their judgment when the picture is distorted by prejudicial extraneous evidence, such as calling the defendant a drug dealer repeatedly. Having repeatedly been told that Blackwell was a drug dealer, there is a reasonable probability that the jury rejected his alibi defense based on a judgment of his character.

The improper admission of Bucenski and Kanamu's testimony to uncharged prior bad acts undermines confidence in the outcome of the proceedings below. Blackwell's convictions should therefore be reversed.

**ISSUE 4: THERE IS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT BLACKWELL ASSAULTED BUCENSKI.**

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Blackwell was charged with committing second degree assault against Bucenski. A defendant commits second degree assault when he or she assaults another with a deadly weapon. RCW 9A.36.021(1)(c). An assault is defined as either: (1) "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented," *Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910); or (2) to place another in reasonable apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm, *State v. Frazier*, 81 Wn.2d 628, 631,

503 P.2d 1073 (1972).<sup>1</sup>

The State was required to prove beyond a reasonable doubt that Blackwell either: (1) intended to inflict bodily injury on Bucenski with the present ability to inflict it; or (2) intended to create in Bucenski an apprehension and fear of bodily injury and in fact caused Bucenski to have a reasonable apprehension and fear of bodily injury. The State failed to meet its burden of proof in this case.

The only evidence to support the State's claim that Blackwell assaulted Bucenski came from Vicenzi's lately-amended version of the crime. Vicenzi testified at trial that when Blackwell and Kanamu entered the room, Blackwell had first pointed the gun at Bucenski. RP 968. Vicenzi said that Bucenski's response was to back up and say "Don't shoot." RP 969. According to Vicenzi, it was only then that Blackwell turned the gun on him and shot. RP 968.

Yet Vicenzi's version of events on the night he was shot differed significantly. Vicenzi told Officer Rock that Blackwell broke down the door and immediately shot him while he was breaking out the window. RP 720. There is no reference to a threat to Bucenski.

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<sup>1</sup> Because "assault" is not defined in the statute, courts resort to the common law for definitions. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942); *State v. Krup*, 36 Wn. App. 454, 457, 676 P.2d

Bucenski herself seems not to have noticed that the gun was ever pointed at her. She testified that Blackwell and Kanamu entered the room yelling at Vicenzi about a stolen gun and jewelry. RP 365. Kanamu then reportedly handed Blackwell the gun and he shot Vicenzi. RP 366-67. Vicenzi then fell to the ground and Blackwell and Kanamu left. RP 373. According to Bucenski, the only comment directed to her was when Blackwell told her to "shut up." RP 366. The one consistency between the two versions of events is that Blackwell and Kanamu were focused on Vicenzi, shot him, and then left the scene without ever laying a hand on Bucenski.

Even the prosecutor did not seem convinced that Bucenski was ever in danger or fear. He argued to the jury that she was actually involved in the crime. In closing argument, the prosecutor said:

You know, and I want to discuss for a little bit [Bucenski's] motivation for not wanting to talk because, very frankly, it's clear from this evidence she feels guilty because she had involvement in this case.

RP 1367. Then, he goes even further, arguing not that Bucenski was threatened, but that she was involved:

Then you have the fact that only David [Vicenzi] is harmed. That's significant. If these people are there at this home on Fife Street, they're there for one person, and who

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507, *review denied*, 101 Wn.2d 1008 (1984). *See also* RCW 9A.04.060 (common law provisions supplement criminal statutes).

is it that's being accused of stealing this gun? David. Who is participating in this? Diana [Bucenski]. **They don't touch a hair on Diana, just tell her to shut up.** They go after David, and that's who they hurt. They don't shoot the witness; they don't shoot Diana. She would clearly testify against them. They don't harm her and, guess what, she doesn't volunteer any information; she runs away.

RP 1371-72. The prosecutor never argues to the jury that he has met his burden of showing that Bucenski was assaulted.

The State did not provide sufficient evidence that Blackwell intended to inflict bodily injury on Bucenski, or that he intended to cause Bucenski to fear bodily injury to herself. No reasonable jury would have convicted Blackwell on these facts.

**ISSUE 5: CUMULATIVE ERROR DEPRIVED BLACKWELL OF HIS RIGHT TO A FAIR TRIAL.**

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996). In this case, all of the errors combined to enhance the unfair prejudice to the appellant, and his convictions should be reversed even if the court should find that the errors do not individually require reversal.

Evidence that a defendant deals drugs is highly prejudicial and inflammatory evidence. Yet, in this case, the jury was allowed to hear two witnesses testify that Blackwell dealt drugs and was a drug user even though this fact was irrelevant to any issue before the jury. Moreover, the Prosecutor then compounded the prejudice by arguing to the jury that Blackwell and Kanamu were drug dealers and part of a lifestyle that leads to incidents such as this. Essentially, the State argued that being a drug dealer made it more likely that Blackwell committed these crimes.

If this court finds that any of the individual instances of Blackwell being portrayed as a drug dealer is, alone, insufficient grounds to grant him a new trial, this court should find that the cumulative prejudicial effect of all of the testimony deprived Blackwell of his right to a fair trial.

## **V. CONCLUSION**

Blackwell was deprived of effective assistance of counsel when his trial counsel failed to object to the introduction of highly prejudicial and irrelevant evidence that Blackwell was a drug dealer. This error was compounded when the trial court permitted, over defense objection, the State to introduce further testimony that Blackwell had sold drugs through another witness. The introduction of this irrelevant and inflammatory evidence so prejudiced Blackwell's credibility with the jury, that it

deprived him of a fair trial. Therefore, his convictions should be reversed and he is entitled to a new trial.

Furthermore, the State failed to provide sufficient evidence that Blackwell assaulted Bucenski either through intent to inflict bodily harm, or by the intent to create a reasonable fear of bodily harm. This error requires the reversal of Blackwell's conviction of second degree assault.

This court should vacate Blackwell's convictions on all charges.

DATED: July 4, 2007

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CERTIFICATE OF SERVICE

I certify that on July 4, 2007, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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