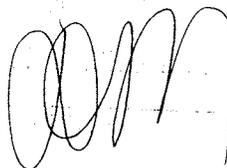


STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

BY: 

STATE OF WASHINGTON

Respondent,

No. # 35702-0-11

v.

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

LARRY D. BLACKWELL

(your name)

Appellant

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

Additional Ground 1

SEE ATTACHED

Additional Ground 2

SEE ATTACHED

If there are additional grounds, a brief summary is attached to this statement.

Date: 11.18.07

Signature: Larry Blackwell

ADDITIONAL GROUNDS RAISED

Appellant raises the following grounds for the Court's consideration and decision:

I. FIRST ADDITIONAL GROUND

Ineffective Assistance of Trial Counsel

- A. Trial counsel was ineffective by failing to object to known perjured testimony offered by the Peosecutor on behalf of the State.
- B. Trial counsel was ineffective by failing to object to improper jury instructions of first degree assault and propose correct instructions.
- C. Trial counsel was ineffective by failing to propose an available lesser included instruction to second degree assault.
- D. Trial counsel was ineffective by failing to object to Prosecutor's improper argument.

II. SECOND ADDITIONAL GROUND

Former Jeopardy.

Appellant was twice put in jeopardy of being convicted of first degree assault as charged in Count 2, when, following acquittal of that charge in the third trial, it was submitted to the jury in the this trial.

III. THIRD ADDITIONAL GROUND

Improper Jury Instruction.

The jury was improperly presented with jury instructions for first degree assault in Count 2 when, because of former jeopardy, appellant could be convicted with no more than second degree assault.

AUTHORITIES AND ARGUMENT

FIRST ADDITIONAL GROUND

- I. APPELLANT'S TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO EXERCISE THE CUSTOMARY SKILL AND DILIGENCE OF A REASONABLY COMPETENT ATTORNEY WHERE IT WAS REASONABLY PROBABLE THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT ABSENT THESE ERRORS.

All defendants in criminal prosecutions have the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. Art. I, §22; Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984); State v. Henderson, 129 Wn.2d 61, 77 (1996).

To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that this deficiency prejudiced him. Strickland, 466 U.S. at 687-88. Representation is deficient if it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35 (1995). Put another way, counsel must exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances or his performance is deficient. State v. Visitacion, 55 Wn.App. 166, 173 (1989). Prejudice results if there is a reasonable probability that but for the deficiency the trial result would have been different. McFarland, 122 Wn.2d at 335; Visitacion, 55 Wn.App. at 173.

During Appellant's trial, his counsel's performance was deficient in many areas. One of these, that he failed to object to highly prejudicial testimony that Appellant was a drug dealer, has been presented in Appellant's Opening Brief. Other serious instances of deficient performance are presented infra.

A. APPELLANT'S TRIAL ATTORNEY WAS INEFFECTIVE BY FAILING TO OBJECT TO THE PROSECUTOR ELICITING KNOWN PERJURED TESTIMONY.

A prosecutor has a duty not to present testimony that he knows to be false. White v. Ragen, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); U.S. v. Thomas, 987 F.2d 1298 (7th Cir. 1993) (cert. denied 501 U.S. 926). In deed, a prosecutor who procures false testimony may be subject to prosecution under subornation of perjury. U.S. v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (cert. denied 527 U.S. 1024); U.S. v. Derrick, 163 F.3d 799 (4th Cir. 1998) (cert. denied 526 U.S. 1133).

Here, the witness had testified in previous trials, and it was known by both attorneys that she had testified falsely. Because of this, both attorneys had a duty to the court, and to the defendant, to ensure that she testified truthfully or not at all. Here, both attorneys failed in this duty. There can be no reasonably competent reason for Appellant's trial attorney not to raise this issue. His performance was thereby deficient.

B. APPELLANT'S TRIAL ATTORNEY WAS INEFFECTIVE BY FAILING TO OBJECT TO INSTRUCTIONS SUBMITTED BY THE STATE IN COUNT TWO CHARGING THE JURY WITH FINDING THE DEFENDANT GUILTY OF FIRST DEGREE ASSAULT.

The State submitted jury instructions in count two for first degree assault, despite the fact that Appellant was charged with only second degree assault. Appellant's trial attorney did not object to these instructions nor did he propose correct ones. He was thereby ineffective.

This trial was Appellant's fourth on charges arising out of the same incident. During a previous trial, Appellant was acquitted of first degree assault on count two. The State acknowledged this during charging by the fact that Appellant was charged in count two with second degree assault. Even though he was charged with only second degree assault, the State submitted instructions, including a "to convict" jury instruction and verdict form.

Improper jury instructions can be grounds for reversal. State v. Severns, 13 Wn.2d 542, 548 (1942); State v. Smith, 131 Wn.2d 258, 265 (1997)*. Since there can be no reason for a defense attorney to agree to submit jury instructions allowing the jury to convict his client of a more serious degree of the crime charged, failure to object to such instructions must be considered deficient performance.

* Appellant has searched the legal library at the Washington State Penitentiary for Federal Court citations. This library does not maintain the correct materials. Appellant asks the court to consider this issue under both State and Federal authorities.

C. APPELLANT'S TRIAL ATTORNEY WAS INEFFECTIVE BY FAILING TO SUBMIT JURY INSTRUCTIONS ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL POSSESSION OF A FIREARM IN COUNT TWO.

It is reversible error not to give a lesser included offense instructed where appropriate and requested by the defense. Keeble v. U.S., 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973); State v. Lyon, 96 Wn.App. 447 (1999). Unlawful display of a firearm is a lesser included offense to second degree assault based upon the pointing of a firearm at the alleged victim. State v. Fowler, 114 Wn.2d 59 (1990); State v. Ward, 125 Wn.App. 243 (2004); State v. Baggett, 103 Wn.App. 564 (2000). Where, as here, the facts presented at trial would have allowed the jury to convict the Appellant of unlawful possession of a firearm, counsel was ineffective not to propose such an instruction. State v. Ward, 125 Wn.App. 243; State v. Pittman, 134 Wn.App. 376 387-90 (2006).

Here in count two, Appellant was charged with second degree assault based on him allegedly pointing a pistol at another person. There was no testimony that he intended to harm her and she was in fact not injured. Under these facts the jury could have convicted the Appellant of unlawful display of a firearm, a far less serious offense. There was no tactical reason for defense counsel not to propose such an instruction. His performance was deficient.

II. HAD IT NOT BEEN FOR APPELLANT'S TRIAL ATTORNEY' DEFICIENT PERFORMANCE. INDIVIDUALLY AND/ OR IN COMBINATION. THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT.

Where counsel's deficient performance brings the outcome of the trial into question, or raises a reasonable probability that but for the deficient performance the outcome would have been different than counsel was ineffective. Strickland v. Washington, 466 U.S at 694; State v. McFarland; 122 Wn.2d at 335; State v. Visitacion, 15 Wn.App at 173. Appellant has raised five specific examples of counsel's deficient performance (one in Opening Brief, and four others herein). Appellant asserts that each of these individually denied him a fair trial and affected the outcome of it. Additionally, Appellant asserts that if these examples of deficient performance do not individually negate the validity of the trial, then in combination they certainly do.

First, as fully briefed in Appellant's Opening Brief, it was deficient performance for counsel to allow testimony that Appellant sold drugs to Bucenski and Vicenzi. Although supposedly offered for to prove identity, given the extremely prejudicial nature of such evidence, it was error for counsel not to object to it's use. Limited testimony, that the alleged victims had known Appellant for a certain amount of

time, without mention of drugs would have served the legitimate purpose of the evidence without the prejudice. Not only did Bucenski testify to this evidence, she did so several times. Had Appellant's attorney objected, and had the court conducted an evidentiary hearing pursuant to ER 403 and 404(b), the evidence would probably have been excluded. This error was compounded by the Prosecutor's misconduct during closing argument as discussed below. Without such prejudicial evidence, the outcome of the trial would also probably have been different and therefore, by failing to do so Appellant's trial attorney was ineffective.

Second, Appellant was prejudiced by counsel's deficient performance of failing to object to the Prosecutor offering known perjured testimony. Bucenski had testified in the previous trials in this matter. She had testified falsely in them. The Prosecutor knew this to be false yet called her as a witness again, to elicit this false testimony. That the Prosecutor told the jury during closing arguments that this testimony was false does not correct his misconduct. The way he did so was to call a witness who he knew would lie, at least in part, then tell the jury what he believed to be true and what he believed to be false. This is misconduct.

State v. Reed, 102 Wn.2d 140, 145 (1984); State v. Horton, 116 Wn.App. 909, 921 (2003). When, as here, it becomes clear

that the Prosecutor is expressing a personal opinion as to the veracity of a witness and not merely arguing inferences, the error is prejudicial. State v. Swan, 114 Wn.2d 613 (1990).

At the very least Appellant's attorney should have objected and had the judge conduct a hearing. Had this situation been fully explored outside the presence of the jury, it is highly probable that the court would have excluded the testimony in its entirety rather than rely on the Prosecutor to discern for the jury which parts were true or false. Without Bucenski's testimony it is very unlikely that Appellant would have been convicted.

Third, Appellant was prejudiced by the submission of first degree assault in count two. He was put at risk of conviction of this in violation of his rights against double jeopardy, and even though the jury did not convict on that charge and instead convicted only of second degree assault, it cannot be said that the submission of the charge did not influence the jury's deliberations and verdict. We certainly cannot have faith that it did not. See, Price v. Georgia, 398 U.S. 232, 331-32, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

Fourth, where, as here there is no tactical advantage for Appellant's trial attorney not to submit lesser included offense instructions for unlawful display of a firearm, and where the penalty for that offense was substantially less than that for second degree assault, it is prejudicial not

to submit those instructions provided that there were facts presented at trial allowing the jury to convict on that lesser offense. State v. Pitman, 134 Wn.App. at 387-90.

Testimony at trial was that Appellant displayed two pistols. One he allegedly pointed at the victim named in count one. This person was eventually shot. The other pistol he allegedly pointed in the vicinity of the person named as the victim in count two. This person was never harmed or threatened. Under these facts, the jury could have convicted Appellant of unlawful display of a firearm. Therefore it was ineffective of counsel not to propose such an instruction.

Fifth, Appellant was prejudiced by the Prosecutor's closing argument. The Prosecutor several times attempted to appeal to the prejudices and fears of the jury, by casting Appellant as a "drug dealer". This phrase and argument was repeatedly made by the prosecutor. Had this argument not been allowed, it is more likely that Appellant would have been tried for the offenses he was charged with, rather than (as apparently the Prosecutor intended) being tried for being a drug dealer. This emotional appeal, made just prior to the jurors beginning their deliberations, prejudiced the defendant and affected his right to a fair trial.

III. CONTRARY TO FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS APPELLANT WAS TWICE PUT IN JEOPARDY OF BEING CONVICTED OF FIRST DEGREE ASSAULT IN COUNT TWO.

Both the United States and Washington State constitutions contain the guarantee of protection against double jeopardy. U.S. Const. Amend. V; Wash. Const. Art. I, sec. 9. Both constitutions protect their citizens from abuses of government power by limiting that power in three situations: (1) from being prosecuted a second time for the same offense following acquittal; (2) from being prosecuted a second time for the same offense following conviction; (3) from being punished multiple times for the same offense. State v. Linton, 156 Wn.2d 777, 783, (2006); State v. Graham, 153 Wn.2d 400, 404 (2005).

The underpinning of these protections is the principle that the state "with all its resources and power" should not be allowed to make repeated attempts to convict or punish an individual for an alleged offense. Green v. U.S., 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). This is particularly important in instances where a defendant is acquitted. "The primary goal of barring reprosecution after acquittal is to prevent the state from mounting successive prosecutions and thereby wearing down the defendant", Justices of Boston Mun. Court v. Lydon, 466 U.S. 82, 91, 98 S.Ct. 2187, 75 L.Ed.2d 65 (1978), and "subjecting him to embarrassment, expense and ordeal, and compelling him to

live in a continuing state of anxiety and insecurity." Green, 355 U.S. at 187. Further, repeated prosecutions following acquittal "enhance[s] the possibility that even though innocent, [a defendant] may be found guilty." Green, 355 at 188.

The principle of prohibiting retrial following acquittal is of such importance that an actual verdict of acquittal is not always required to invoke the protections of the double jeopardy clause. Green, 355 U.S. at 188. Where a jury has been given a full opportunity to convict and does not do so and it is not clear from the record that the jury was deadlocked, a verdict of acquittal may be implied. Price v. Georgia, 398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); State v. Schoel, 54 Wn.2d 388, 394 (1954). Typically, this principle of "implied acquittal" is evoked when a jury considers multiple charges such as lesser included offenses or degrees, and convicts on the lesser while leaving the verdict form blank as to the more serious offense. This is what happened here.

In a previous trial on this same cause, the jury was silent as to the charge of first degree assault on count two and convicted the Appellant of the lesser degree offense of assault in the second degree. The verdict was accepted and the jury was dismissed. Since it was not clear from the record that the jury was hopelessly deadlocked on the more serious charge, the verdict acts as an implied acquittal.

Price, 398 U.S. at 329; Schoel, 54 Wn.2d at 394.

Yet despite this, Appellant was again put in jeopardy of being convicted of first degree assault when the State submitted jury instructions and verdict form for that offense in count two. That the Appellant was formally charged with only second degree assault does not invalidate this issue. The charge was submitted to the jury, which to the jury could be no different than if Appellant had been formally charged and arraigned with that offense. The jury, following the court's instructions, could have returned a guilty verdict, thereby unconstitutionally convicting the Appellant of first degree assault. The Appellant was placed in jeopardy.

To say that such a verdict would have been invalid because Appellant had not been formally charged may be true, but Appellant would still stand convicted and sentenced. To say that someone would have caught the error and corrected it is pure speculation and raises the question, "Who?" The Prosecutor didn't catch it, he submitted the instructions. Appellant's attorney didn't catch it. The trial judge didn't even catch it, he read the instructions to the jury. In fact, no one caught the error until Appellant raised it here in this Statement of Additional Grounds.

Appellant was twice put in jeopardy of being convicted of first degree assault in count two. There have been four jury trials on this count. Appellant has already had to

endure the rigors of trial four times. If this is remanded for new trial, it will make five. Instead, count two should be dismissed with prejudice.

IV. EVEN IF THE SUBMISSION OF FIRST DEGREE ASSAULT IN COUNT TWO IS NOT A VIOLATION OF DOUBLE JEOPARDY PROTECTIONS, THOSE IMPROPER INSTRUCTIONS REQUIRE REVERSAL OF THE CONVICTION.

It was error to submit jury instructions for first degree assault in count two. Appellant asserts that such instruction constituted a charging of Appellant with that offense in violation of his right against twice being put in jeopardy of conviction of that offense. However, even if this is not so, the submission of those instructions without formally charging Appellant is an error of constitutional magnitude which may be raised for the first time on appeal, and if not structural error, it is subject to the constitutional harmless error test. See, State v. Smith, 131 Wn.2d 258 (1997); State v. Cubel, 109 Wn.App. 362 (2001); State v. Hanson, 59 Wn.App. 651 (1990).

An improperly constructed "to convict" instruction cannot be the basis of a constitutional conviction, and a conviction obtained via such a defective instruction must be vacated. Smith, 131 Wn.2d at 263. Such an error is presumed to be prejudicial. The burden is upon the State to prove that the error was so "trivial, or formal, or merely academic" and "in no way affected the outcome of the case." Smith, 131 Wn.2d at 264, (quoting State v. Wanrow, 88 Wn.2d 221, 237

(1977), emphasis in original). The State must prove the error harmless beyond a reasonable doubt.

In other words the State must prove that the inclusion of those instructions and the verdict forms could have no effect on the decision of the jury, that the submission of the more serious charge could not have influenced their decision on the less serious one. However, this argument was rejected by the U.S. Supreme Court. Price v. Georgia, 398 U.S. at 331. To a similar situation where following acquittal on murder and conviction of manslaughter in the first trial, the State, following reversal on appeal retried the defendant of murder with a lesser included offense of manslaughter, the jury again convicted of manslaughter the Court stated: "we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." Price, at 331.

The error caused by submitting the erroneous charge to the jury is presumed prejudicial, and since it cannot be said that it could not have affected the jury's deliberations it is not harmless. Reversal is required. As stated in the previous issue, this was the fourth trial on this matter that Appellant has undergone. This will be the second reversal due to prosecution error or misconduct. The court should dismiss this count rather than remand for new trial.