

NO. 36093-4-II

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ARDEN GIBSON,

Appellant.

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

The Honorable Sergio Armijo, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS (CONT'D)

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct in closing argument denied appellant his right to a fair trial.

2. The trial court erred in admitting evidence that the complaining witness had previously obtained an abortion pursuant to appellant's demands.

3. Appellant was denied the right to effective assistance of counsel where trial counsel failed to object to the admission of unduly prejudicial evidence of a violation of a pre-trial no-contact order, and also introduced the complaining witness' hearsay statements of that served no other purpose than to affirm her accusations.

Issues Pertaining to Assignments of Error

1. Was the prosecutor's closing argument, accusing appellant of trying to "hijack" the justice system and committing an "attack directly on how we live as a society," prejudicial misconduct?

2. Was the prosecutor's closing argument so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct?

3. Did the trial court err when it admitted a letter from appellant to the complaining witness in which he discussed his previous demand that she get an abortion?

4. Did the admission of this evidence prejudice Gibson's right to a fair trial?

5. Did trial counsel make an adequate objection to the admission of this evidence where he objected based on relevance?

6. Assuming trial counsel did not adequately object to the abortion evidence, was trial counsel's performance deficient?

7. Was trial counsel's performance deficient when he failed to object to evidence that appellant had violated a pre-trial no-contact order?

8. Was trial counsel's performance deficient when he offered letters written from the complaining witness which affirmed her accusations?

9. Is there a reasonable probability that trial counsel's errors, either individually or cumulatively, affected the result of the trial?

B. STATEMENT OF THE CASE

The case against Arden Gibson began with the State charging two offenses: second degree assault against Howard Ohelo, and fourth degree assault (domestic violence) against Suzanne Younker. CP 1-2; RCW 9A.36.021, .041. The State alleged Gibson, on July 11, 2006, entered

Younker's residence, an apartment which Gibson and Younker had shared, but which the State alleged Gibson had vacated the day before. CP 3-4. The State alleged Gibson then struck Younker and pushed her to the ground. CP 3-4. The State further alleged that, at some point during the altercation, Gibson began swinging a fire poker at Ohelo. CP 3-4.

On December 5, 2006, the State added charges of first degree burglary and residential burglary, on the theory that Gibson had moved out of the residence and was therefore trespassing. CP 5-7. These charges were ultimately dismissed mid-trial after Younker testified that Gibson still had a continuing possessory interest in the apartment. CP 57-58; RP 158-69, 254.

Gibson also faced two charges of witness intimidation added on January 22, 2006, after defense counsel curiously brought the evidence for the charges to the State's attention, informing the prosecutor that Gibson and Younker had been corresponding with one another while Gibson was incarcerated at the jail. CP 8-11, RP 24. The two counts were based on conduct alleged to have occurred over two separate time periods: July 11, 2006 to August 31, 2006 (Count I) and September 1, 2006 to October 1, 2006 (Count II). CP 12-15. Trial commenced on January 25, 2007. RP 2.

1. Trial Testimony

Ohelo did not appear at trial, and the jury ultimately acquitted Gibson of second degree assault. CP 49. Younker did appear and testify, asserting Gibson had burst into the apartment and pushed her to the ground. RP 110-11. After Younker gave the jury her version of events, the prosecutor asked if she had also told one of the responding officers that Gibson had struck her in the face. RP 112. At that point Younker said Gibson had struck her with a closed fist after she had gone to lock her dog up in the bedroom. RP 112-13. Younker also testified Gibson had brandished a fireplace poker at Ohelo while commanding him to, "get out of my house!" RP 114. She further testified that, at some point, Ohelo was outside the apartment calling to Gibson to come outside and "knuckle up". RP 112.

Sergeant Jennifer Mueller responded to the scene and found Ohelo in a fairly calm state of mind, but with an "obvious wound" on the left side of his face, and limping. RP 70-71. Mueller also testified that she contacted Younker at a nearby gas station. RP 68-69. She observed redness to Younker's face, but did not take any pictures. RP 77.

Gibson testified denied assaulting Younker or Ohelo. Gibson admitted "pushing [Younker] out to the way", but only in response to her

pushing him without provocation as he came into the house to retrieve his belongings. RP 262. Gibson testified that upon entering the apartment he witnessed Younker and Ohelo forging checks, and dialed 911 to report their criminal activity. RP 262. At that point, Ohelo, who appeared to be intoxicated, jumped up, grabbed the fireplace poker and said, "what are you doing?" RP 262. Gibson "charged at" Ohelo in self-defense, causing him to leave the apartment. RP 262. Gibson, not interested in an altercation, then left the scene. RP 262. Gibson testified that Ohelo sustained his injuries when he ran out of the apartment, into the dark night, and collided with a tree. RP 265.

2. Letters between Gibson and Younker

In regard to the charges of Witness Intimidation, the State introduced nine letters Gibson wrote to Younker while he was detained in jail pending trial. Exhibits 5A-5I, RP 140-52. Gibson admitted authorship. RP 268. In the letters, Gibson: informed Younker his attorney told him she should "not [] answer any of the paperwork" (Exhibit 5I, 8/2/06); told her he would "hook you and dude up" once released (Exhibit 5A, 8/18/06); told her "my freedom and future is in your hands, don't fuck around fucker" (Exhibit 5A); urged her to "stand strong with me baby" (Exhibit 5E, 7/23/06); and made various apologies to Younker for "some of the things

I said and did"; "causing you so much pain", "putting you through this", and "what I did". (Exhibits 5E, 5F, 5G, 5H, respectively). In a letter dated September 12, 2006 (the only letter charged under Count II), Gibson threatened to inform others about Younker's check forging activities if she or Ohelo appeared in court to testify. (Exhibit 5D).

The rest of what is contained in the letters consists of Gibson's banal professions of love for Younker. Aside from the portions enumerated above, little in the letters would catch the reader's interest or attention, and little would offend an average person's sensibilities. One notable exception occurred where Gibson wrote, "I would have still been with you if you had kept that baby, and I'm truly sorry I told you to get rid of the baby if you wanted to be with me . . .". (Exhibit 5E).

During Younker's testimony, the State moved to introduce all nine letters as one exhibit. Defense counsel objected based on a lack of foundation and relevance. RP 132. The Court called a short recess and heard argument. RP 133. The prosecutor argued every letter was admissible as a "pattern of conduct" and relevant to the broad time periods the State had elected to charge. RP 133. The State also noted many letters contained Gibson's admissions that were relevant to prove the assault charges. RP 134-35.

Defense counsel conceded portions of Exhibits 5D and 5I were relevant; i.e., Gibson's threat to reveal Younker's criminal activities and his urging her not to answer "any paperwork". RP 135. Defense counsel argued, however, that Gibson's various apologies were not specific to the incident and could have been made in reference to anything. RP 136-37. The Court granted the State's motion to admit all of the letters, noting counsel's objection. RP 139. As the letters were introduced during Younker's testimony, defense counsel reiterated his objection to each letter, except with regard to Exhibits 5A, 5D and 5I. RP 144-53. The portion of Exhibit 5E, which referenced Younker's abortion, and Gibson's demand that she obtain one, was admitted into evidence over defense counsel's objection.

3. Evidence of Pre-Trial No-Contact Order

Although Gibson was not charged with a violation of a no-contact order, the State introduced a pre-trial order that restrained Gibson from having direct or indirect contact with Younker at the time of his correspondence with her. Exhibit 20; RP 132, 300. Trial Counsel did not object based Evidence Rule 404(b), or on any other ground. RP 132, 300. The prosecutor vigorously cross-examined Gibson regarding this order and his repeated violations of it, again without objection from defense counsel.

RP 279-81. The prosecutor also noted Gibson's disregard for the no-contact order in its closing argument, again without objection. RP 321, 323.

4. Trial Counsel's Admitting into Evidence Younker's Prior Consistent Allegations of Assault.

Some of the evidence against Gibson was introduced not by the State, but by defense counsel. Specifically, counsel offered, and the Court admitted, a letter from Younker to Gibson in which she stated: "You said you would never hit me and you did, and it seemed like you had no problem doing it." Exhibit 10, p. 3. She also accused Gibson of breaking her phone on the night of the incident, an allegation he denied at trial. Exhibit 10, p. 1; RP 262-66. Defense counsel offered Younker's letters into evidence on the theory that her loving sentiments were relevant to show that Gibson did not assault her; *i.e.*, that she would not still love him if the assault had occurred. RP 55-56. Additionally, counsel noted her letter dated July 12th showed she already intended not to testify, even before any of Gibson's letters. Exhibit 10, p.2; RP 55-56. Counsel argued that this demonstrated she did not feel threatened by Gibson after the incident. RP 55,56. Counsel's strategy, however, failed to account for the fact that Younker's state of mind was not an element of the intimidation charges, and that it was sufficient that Gibson "attempt to induce" Younker not to

cooperate by means of a threat, regardless of how she perceived it. CP 12-15.

5. Closing Argument

The prosecutor began his closing argument with a review of the evidence, and arguments about the relative credibility of Younker and Gibson. As the prosecutor neared the conclusion of his argument, however, he directed the jurors' attention away from the facts of the case, instead inciting their sense of moral outrage:

Now, on first impression, Ms. Younker is the victim of Counts V and VI. But that's not what we're talking about here, is it? You were brought in here last week, you're brought in here as jurors. The first thing the Court tells you is the whole system upon which we base our criminal justice system is put in the hands of jurors because it is the safest place for it to be.

What he tried to do was hijack that. It is an attack on the entire court system. It is an attack, not just on the judge or the prosecutor or anything like that. It is an attack directly on how we live as a society. We've also lived with the idea of you have to be able to count on witnesses coming in here and telling people what happened because the alternative is simple. The alternative is there is no justice system and it's all taken care of on the street. And that's why this crime is important. That's why these letters are important. And that's why there's a no-contact order to prevent him from doing these things.

RP 323.

The jury returned a verdict of not guilty on count I, guilty as to count II, guilty of lesser-included offense of witness tampering as to count v, and guilty of witness intimidation as to count VI.

C. ARGUMENT

1. THE PROSECUTOR'S MISCONDUCT IN ARGUING GIBSON HAD "HIJACKED" AND "ATTACKED" THE JUSTICE SYSTEM DENIED GIBSON A FAIR TRIAL.

A prosecuting attorney is the representative of the sovereign and the community and it is therefore his duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). This duty includes an obligation to prosecute impartially and seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process. U.S. Const. amend. 14; Const. art. 1, § 3; *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "[T]he touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury. . . ." *Id.*; *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Therefore, "the ultimate inquiry is not whether the error was harmless or

not harmless, but rather did the impropriety violate the [accused's] due process rights to a fair trial." *Davenport*, 100 Wn.2d at 762.

To prevail on a claim of prosecutorial misconduct an appellant must show both improper conduct and a substantial likelihood the misconduct affected the jury's verdict. *United States v. Young*, 470 U.S. 1, 12, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even where defense counsel does not object, such misconduct may be reviewed for the first time on appeal if it is "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Dunaway*, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987); *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978); *State v. Case*, 49 Wn.2d 66, 74-75, 298 P.2d 500 (1956).

As outlined below, state and federal courts have considered these issues with varying results. Whether a prosecutor's comments cross the line, and whether reversal is required, are questions that courts have analyzed by reviewing the particular facts of each case and the prosecutor's closing remarks taken as a whole.

A prosecutor's "deliberate appeal to the jury's passion and prejudice" constitutes prosecutorial misconduct. *State v. Belgarde*, 110 Wn.2d at 507-

08. In *Belgarde*; the prosecutor made remarks in closing argument, not objected to by defense counsel, that Belgarde was "strong in" the American Indian Movement (AIM) and that its members were a "deadly group of madmen" and "butchers that kill indiscriminately." *Belgarde*, 110 Wn.2d at 507. Because these remarks were highly prejudicial and had a substantial likelihood of affecting the verdict, the Court mandated a new trial. *Id.*

In Gibson's case, the prosecutor did not introduce facts outside of the evidence, nor did he accuse Gibson of being affiliated with a terrorist group, as in *Belgarde*. Rather, the prosecutor incited the jury's passions: Gibson's alleged conduct was an "attack on how we live as a society". RP 323. Exhortations of this kind -- to decide a case based on passion or to send a message - are prohibited just as much as the fear-mongering in *Belgarde*. *United States v. Young*, 470 U.S. at 18; *United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982); *State v. Finch*, 137 Wn.2d 792, 839-42; 975 P.2d 967 (1999); *State v. Coleman*, 74 Wn. App. 835, 876 P.2d 458 (1994); *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 118 (1989); *State v. Clafin*, 38 Wn. App. 847, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985).

Courts have only permitted prosecutors to call upon juries to act as "the conscience of the community" so long as their remarks are not

designed to inflame the jurors' passions. *Kopituk*, 690 F.2d at 1342-43; *Finch*, 137 Wn.2d at 841. While such appeals are not impermissible *per se*, they become so when the prosecutor attempts to emotionalize the process. *Id.*¹

Here, the prosecutor's comments were far from measured, as he accused Gibson of "hijacking" the justice system and committing "an attack directly upon how we live as a society." RP 323. The prosecutor went on to say that, if Gibson's type of conduct were permitted to stand, there would be "no justice system and it's all taken care of on the street." RP 323. The prosecutor's remarks, with images of terrorism and street

¹ Courts have taken a similar approach in a related context, where the prosecutor improperly urges the jury to "do its job", or implies that a not guilty verdict would be a violation of the jurors' oath. *See, United States v. Young, supra* at 18; *State v. Coleman, supra*, at 838. Such violations are considered one of the most egregious forms of misconduct. *Coleman*, at 840. In *Young*, the prosecutor, in addition to vouching for the credibility of his witnesses, called upon the jury to "do its job". *United States v. Young*, 470 U.S. 17-19. The Court condemned this action, declaring it to have "no place in the justice system" and expressed its concern that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18. However, because the prosecutor's comments came in response to improper conduct by defense counsel, and because the evidence against *Young* was very strong, the Court concluded the prosecutor's comments were unlikely to have affected the verdict. *Id.* at 18-20. Similarly, in *Coleman*, the Court found prosecutor's improper argument (a not guilty verdict would violate the jurors' oaths) was tempered by a number of other remarks suggesting the jurors were free to render whatever decision they saw fit. *Coleman*, at 838.

violence, were designed to inflame the jury. As such, they were sufficiently flagrant and ill intentioned that no curative instructions could have remedied their effect.

Gibson's case is therefore unlike the case of *State v. Finch, supra*, where the prosecutor's appeal to the jury to act as the "conscience of the community" contained no inflammatory imagery and was tempered by his simultaneously urging that the case be decided based on the evidence. *Finch*, 137 Wn.2d at 840. Gibson's case is likewise distinguishable from *Bautista-Caldera, supra*, where the prosecutor, in a child-sex case, urged the jury:

ladies and gentlemen, do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf. Thank you.

Bautista-Caldera, at 195. While Court condemned this line of argument as an attempt to "exhort[] the jury to send a message to *society*", it declined to reverse the conviction, because the prosecutor's immediately preceding remarks had urged the jury to decide the case based on the evidence. *Id.* at 195.

In contrast, this prosecutor's remarks bear more similarity to the impassioned and un-tempered remarks made in *State v. Acker*, where, in

another child-sex case², the prosecutor argued that laws prohibiting sexual assault against children "are only as good as the juries that are willing to enforce them" and that the child witnesses "had the courage to come in here and tell you about it. Give them some justice folks." *State v. Acker*, 265 N.J.Super. 351, 355, 627 A.2d 170, 172, *cert. denied*, 634 A.2d 530 (1993), The Court in *Acker* held these remarks clearly improper and reversed the conviction, a decision cited with approval in *Coleman*. *Id.* at 172; *Coleman, supra*, at 838. Although the prosecutor in *Acker* committed additional misconduct, the Court expressly held that "that argument alone had the clear capacity to deprive defendant of his constitutional right to a fair trial." *Acker*, 627 A.2d at 173.

The line between *Bautista-Caldera* and *Acker* is somewhat difficult to distinguish. The difference appears to hinge on an analysis of whether the prosecutor's improper remarks were tempered with contemporaneous proper arguments to decide the case based solely on the evidence. *See, Coleman*, at 841; *Bautista-Caldera*, at 195. In Gibson's case, however, the prosecutor's inflammatory remarks were not tempered. RP 320-24. Instead, the prosecutor invoked images of violence and lawlessness to make

² While the charges in Gibson's case do not involve allegations of sexual abuse, they nevertheless involve issues of domestic violence, itself a very emotional topic for many jurors.

each juror feel a personal stake in the verdict. Essentially, the prosecutor urged that a vote of not-guilty was a vote for anarchy. No cautionary instructions would have obviated such an emotional call to arms. Although the prosecutor's remarks only referenced the witness intimidation charges, they likely affected the jury's verdict on all charges because they essentially called upon the jury to punish Gibson's affront to our system. Given the impassioned nature of the prosecutor's remarks, it is quite likely that the jury felt a sense of personal, emotional outrage against Gibson when it rendered its verdicts.

2. THE TRIAL COURT IMPROPERLY ADMITTED UNFAIRLY PREJUDICIAL EVIDENCE THAT YOUNKER HAD PREVIOUSLY OBTAINED AN ABORTION PURSUANT TO GIBSON'S DEMANDS.

The Washington Supreme Court has recognized that evidence of witness's prior abortion is extremely prejudicial, and should be excluded absent a very strong showing of relevance. ER 403; *Kirk v. Washington State University*, 109 Wn.2d 448, 462, 746 P.2d 285 (1987). In *Kirk*, a former cheerleader sued Washington State University in a personal injury action. She was awarded damages based, in part, on clinical depression resulting from her injuries. The university appealed the trial court's exclusion of Kirk's prior abortions, arguing that such evidence was a possible cause of the depression. The Court disagreed, declaring that,

"[t]he prejudicial nature of this evidence is beyond question. The judge particularly noted the attitudes of the community regarding abortions influenced his decision to exclude the evidence." *Id.*

As outlined earlier, Exhibit 5E, a letter written by Gibson to Younker, contained a passage where Gibson expressed his regret for pressuring Younker into getting an abortion. The passage revealed that Gibson had given Younker an ultimatum: the relationship would end unless she terminated her pregnancy. Presumably as a result, Younker did, in fact, have an abortion. While Gibson's defense attorney did not specifically voice concerns regarding this passage, he did move to exclude Exhibit 5E in its entirety, as part of his motion to exclude the bulk of the letters on relevance grounds. RP 133-39, 144-53.

Generally, objections must state specific grounds so that the court is informed and the opposing party has an opportunity to correct the error. *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991). A "relevance" objection will preserve a claim on appeal that the evidence, though marginally relevant, should have been excluded under ER 403 as unduly prejudicial, although it will not preserve a claim under ER 404(b). *State v. Suarez-Bravo*, 72 Wn. App.

359, 364-65, 864 P.2d 426 (1994); *State v. Kendrick*, 47 Wn. App. 620, 634, 736 P.2d 1079 (1987).

Here, in spite of defense counsel's objection, the Court undertook no real analysis, nor did it appear to review the proposed exhibits. RP 133-53. Rather, the Court simply stated, "I don't know. I'll let you both argue whatever you're going to argue." RP 139.

Exhibit 5E contains no information probative to the charges, except the statement "I know I brought [being in jail] upon myself" and arguably, where Gibson apologized for "some of the things I said and did." Exhibit 5E, at 1-2. But the probative value was marginal because the apologies were duplicated in other letters where Gibson apologized for "puttying you through all this bullshit" (Exhibit 5G, at 1) and declared, "I can only apologize so much for what I did and I'm paying dearly for it." (Exhibit 5H.) Even assuming that Exhibit 5E contained relevant, non-cumulative evidence, such relevance was clearly outweighed by the extreme prejudice the jury must have felt against Gibson when they learned he had pressured Younker into getting an abortion.

Given the extreme prejudice this passage would have engendered, the Court should have excluded Exhibit 5E, pursuant to defense counsel's objection. Alternatively, the Court could have redacted Exhibit 5E to

remove the prejudicial reference.³ Its failure to do so was an abuse of discretion.

The erroneous admission of ER 403 evidence requires reversal if there was a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Here, the admission of evidence, in a domestic violence assault case, that Gibson had pressured Younker into getting an abortion, quite probably affected the jury's decision. The jury's decision on the assault charge hinged on a credibility dispute between Younker and Gibson, with no physical evidence to support the charges. This evidence very likely swayed the jury to Younker's side out of sympathy.

³ Defense counsel had earlier opposed redaction when he offered Younker's letters into evidence, stating:

They cut both ways, your Honor. I can't very well say I'm going to try to use these letters and then try and ask certain things be left out. My client understands that these letters cut both ways. If you want something in, we're going to have to open these letters up to full scrutiny. I understand there's some statements in there that cut both ways. I'm not seeking to have these just put in piecemeal.

RP 61-62. Counsel's arguments, however, were exclusive to the letters he was offering; those written by Younker to Gibson. Defense counsel's acknowledgement that redaction was improper for Younker's letters was not an acknowledgement that redaction was similarly improper for Gibson's letters.

3. TRIAL COUNSEL FAILED TO ADEQUATELY OBJECT TO THE ADMISSION OF PRIOR BAD ACTS EVIDENCE AND INTRODUCED EVIDENCE THAT ONLY SERVED TO AFFIRM YOUNKER'S ACCUSATIONS.

The state and federal constitutions guarantee effective assistance of counsel. U.S. Const. amends. 6 and 14; Const. art. 1, § 22; *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). A conviction would be reversed for ineffective assistance of where trial counsel's deficient performance prejudiced the accused. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's performance is deficient where it falls below an objective standard of reasonableness and was not undertaken for legitimate reasons of trial strategy or tactics. *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88; *Saunders*, 91 Wn. App. at 578.

a. As Trial Counsel Failed to Adequately Object to the Abortion Evidence, His Performance Was Deficient and Prejudicial as to Count II.

Defense counsel's failure to object to evidence of other bad acts or to prejudicial evidence generally, can deny the right to effective assistance. *State v. Dawkins*, 71 Wn. App. 902, 863 P.2d 124 (1993); ER 404(b).

Assuming this Court finds that trial counsel failed to adequately object to the admission of Exhibit 5E, his performance was deficient. No legitimate strategy would have justified admitting this evidence. As outlined above, there is a reasonable probability this unfairly prejudicial evidence affected the jury's verdict on Count II.

b. Trial Counsel's Failure to Object to Evidence that Gibson Violated a Pre-Trial No-Contact Order, Prejudiced the Count II Verdict.

Whether a pre-trial no-contact order was in place at the time of Gibson's communications with Younker had no relevance to any of the charges in the case. It did not make it more or less likely that Gibson assaulted Younker, and did not make it more or less likely that he intended to intimidate her with his letters. Instead, the State used this evidence to argue Gibson was a bad individual, with no respect for the law, who was "not going to let courts tell him what to do". RP 321.

Again, trial counsel's failure to object to irrelevant and unfairly prejudicial evidence was not a legitimate tactic. Because defense counsel's performance was deficient, the jury learned that Gibson repeatedly violated a court order. Because there is a reasonable probability, the jury followed the prosecutor's argument to consider Gibson's "law breaking ways", Gibson was prejudiced by counsel's deficient performance.

c. Trial Counsel Was Ineffective When He Offered Younker's Letters Into Evidence, Wherein She Accused Gibson of Assault.

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 916-17, 68 P.3d 1145 (2003). Here, counsel's introduction of Younker's letters was wholly without reason. Counsel's stated strategy -- the letters showed Younker still loved Gibson, therefore making it somehow less likely that he assaulted her -- was tremendously naive and out of touch with most people's common understanding that victims of domestic violence may remain attached to their aggressors. RP 55-56. In fact, Younker's letters evidence this exact dynamic where she wrote, "[y]ou said you would never hit me and you did, and it seemed like you had no problem doing it." Exhibit 10, p. 3. According to Younker, Gibson hit her but she still had feelings for him, and it was this evidence that defense counsel introduced to the jury, in spite of the fact that it was clearly inadmissible hearsay.

Counsel's additional reasons for offering the letters demonstrated his clear ignorance of the elements of the crime with which his client was charged. Counsel argued that Younker's letter of July 12 indicated that she always intended not to come to court, and therefore would not have

perceived Gibson's communications as threatening. RP 55-56. Counsel was apparently ignorant, however, that RCW 9A.72.110 merely requires an "attempt to induce" a witness not to cooperate, making Younker's state of mind irrelevant.

By admitting these letters, defense counsel instead affirmed Younker's testimony at trial. Again, it is quite probable that this evidence affected the jury's verdict on the assault charge.

d. Trial Counsel's Cumulated Errors Deprived Gibson of a Fair Trial.

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 154, 822 P.2d 1250 (1992). Given defense counsel's numerous errors, court cannot have confidence that his performance did not affect the jury's verdict.

D. CONCLUSION

This Court should reverse Gibson's conviction and remand for a new trial.

DATED this 17th day of September 2007.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36093-4-II
)	
ARDEN GIBSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE *yun*

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

THAT ON THE 17TH DAY OF SEPTEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ARDEN GIBSON
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SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF SEPTEMBER, 2007.

x *Patrick Mayovsky*