

NO. 36993-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

AKEEL NESBITT,

Appellant.

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DIVISION II  
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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 07-1-01020-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED September 2, 2008, Port Orchard, WA *R Sutton*  
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether counsel was ineffective for attempting to show that Nesbitt's accomplices were testifying only to preserve their plea deals?
2. Whether the trial court abused its discretion in excluding evidence regarding testifying accomplice Johnson's desire to see his family where the relevance, if any, of the evidence was minimal?
3. Whether the trial court properly excluded from evidence jailhouse-snitch Singer's six-year-old juvenile conviction for third-degree theft?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Akeel Nesbitt was charged by information filed in Kitsap County Superior Court with first-degree robbery with a deadly weapon of 85-year-old James Jones, and two counts of second-degree assault committed during the robbery, one for the actual macing of Charmie Walker, and one for putting Walker in fear of being shot with a gun. CP 15.

Nesbitt was tried with his co-defendant Shawn Wells. Two additional accomplices, Bobby Johnson and James Waymire pled guilty and testified against their partners in crime. The jury convicted Nesbitt of the robbery and the macing assault and acquitted him of the remaining assault. The jury

acquitted Wells on all charges. 9RP 976-82.

**B. FACTS**

James Jones was 85 years old. 2RP 125. He was the owner/operator of True Services custodial service. 2RP 126.

In October 2006, Jones was at his business establishment interviewing three job applicants. 2RP 127. He was in his office interviewing one of them. 2RP 127. He heard his secretary scream in her office. 2RP 127. There was a man standing there, and the man he was interviewing ran out, and then a scuffle ensued. 2RP 127. Jones got on the phone. 2RP 127. Another man came in and came behind Jones's desk and grabbed the telephone out of his hand, and then yanked it out of the wall. 2RP 127. Jones fell over "because [the intruder] wasn't nice." 2RP 127. Jones cut his hand on the man's knife when he fell over. 2RP 127. Jones tried to get the man, but he could not get up. 2RP 127.

The office manager screamed that they were outside. 2RP 128. Someone called 911, and the police quickly showed up and tried to find the intruders. 2RP 128.

The man who the hit Jones said, "Give me all your money," and grabbed Jones's wallet out of his pocket. 2RP 128. It seemed like the knife was coming at him when the man grabbed the wallet. 2RP 129. Jones had a

credit card and some cash in his wallet. 2RP 129. Jones had to have treatment for the cut on his hand. 2RP 134.

Jones was frightened when the man came at him with the knife. 2RP 135. Jones was unable to identify any of the men. 2RP 135.

Jones did not recognize Nesbitt's name, but did recognize him as someone who had been into his business a few times to either apply for a job or talk to the office manager. 3RP 219. He did not recall hiring him, but it had been a long time; he may have given him the odd job. 3RP 220. He did recall Nesbitt coming in and talking to the office manager the day of the robbery. 3RP 236. He did not see him talking to the other men, but he could not see into the waiting area from his office. 3RP 236. Nesbitt came in and helped him up after the robbery. 3RP 236. The knife was small. 3RP 237. Jones did not recall if the robber had any piercings. 3RP 239. He might have told the detective that he did. 3RP 239. Not unusual for people to come by looking for work, although they usually did not get past the front office. 3RP 240.

He received a call from Olympic College that they had his wallet. 3RP 221. The money and cards were all gone. 3RP 221. At some point Nesbitt came by and told Jones that someone was using his gas card to buy gas. 3RP 222, 224. Jones was left with the impression that Nesbitt wanted to

be paid for the information. 3RP 224. He may have paid Nesbitt to wash his car or something like that. 3RP 226.

James Waymire was 25. 3RP 153. He pled guilty to first-degree robbery. 3RP 153. It was his first offense. 3RP 153.

Waymire committed the robbery with Nesbitt, Wells, and Johnson. 3RP 153-55. Waymire worked with them at Labor Ready. 3RP 155. They sometimes hung out at his friend Jim's house near the Bremerton ferry terminal. 3RP 158.

Waymire pleaded guilty to first-degree robbery. 3RP 158. The State agreed to recommend an 18-month sentence. 3RP 159. The standard range was 31 to 41 months. 3RP 160. Part of the deal was that he had to testify. 3RP 161. That was part of the "cooperation agreement." 3RP 161.

On October 10, Waymire, Johnson, Wells and Nesbitt were at Labor Ready, waiting for work. 3RP 163. They did not get any, so they decided to leave. 3RP 163. They decided that they needed to figure out how to get some money so they could "do something." 3RP 164. Nesbitt was the driver and said they would get some money. 3RP 165. Waymire assumed someone owed Nesbitt some. 3RP 165. Waymire did not realize what he was talking about until they got to True Services. 3RP 165.

They parked around the corner from it. 3RP 166. Nesbitt said the

man there, whom Nesbitt identified as “Mr. Jones,” had a lot of money. 3RP 166. Nesbitt said there were only two people working there and it would be easy to just take it. 3RP 166. Nesbitt said he had worked there in the past. 3RP 167. Waymire was not keen on the idea, but Nesbitt threatened to “put [him] in the hospital if he did not participate. 3RP 167. Wells did not want to go in either. 3RP 168. Nesbitt did not threaten Wells, only Waymire. 3RP 168. Nesbitt’s plan was for one of them to “take care of” the woman at the desk, and for one of them to take Jones’s wallet. 3RP 169. Nesbitt said he would act like he was a witness. 3RP 130. That way he could throw the police off their trail. 3RP 191. Nesbitt would give the police inaccurate descriptions of the robbers. 3RP 191. Nesbitt wanted to do it that way because he knew Jones and assumed he would recognize him. 3RP 191.

At first, just Johnson, Wells and Waymire went in. 3RP 172. They asked the woman for applications like they were looking for a job. 3RP 172. Johnson and Waymire pretended to fill out the applications, and Wells read a magazine. 3RP 172.

After a while, Nesbitt came in and started talking to the woman. 3RP 173. The woman appeared to recognize Nesbitt. 3RP 174. Then Nesbitt went to leave, and, when he was out of the woman’s sight, mouthed to them to quit wasting time and “do it now.” 3RP 173, 176.

So Wells went to the desk where the woman was. 3RP 170. Wells had a can of mace that he got out of Nesbitt's car. 3RP 170.

Johnson had the knife. 3RP 171. Waymire and Johnson went into the back room where Jones was. 3RP 170. First they talked to him for a while about the jobs for which they were purportedly applying. 3RP 177. Then they heard the woman scream from the other room. 3RP 177. Jones reached for his phone. 3RP 179.

Waymire pulled the phone cord out of the wall so that Jones could not call the police. 3RP 178. Jones appeared scared. 3RP 179. Jones swung his cane at them and tried to get up and Waymire grabbed him and told him to be quiet because they just wanted to take his wallet and get out. 3RP 180-81. Waymire held Jones's arms behind his back so he could not hit them. 3RP 180. Jones's wallet was in his back pocket, so Waymire had to lay him on the floor to get to it. 3RP 180. Waymire held Jones while Johnson took his wallet. 3RP 172. Johnson searched Jones's pockets and got his wallet. 3RP 181. They told Jones to stay on the ground and fled. 3RP 181.

From the other room he could hear Wells telling the woman to be quiet. 3RP 183. As they were running out, Nesbitt came in the front door and said he was going to call 911. He acted like he was walking in on the robbery, and called 911 on his cell phone. 3RP 183.

Waymire did not see or hear Nesbitt while they were robbing Jones. 3RP 184. Waymire, Johnson and Wells ran out the front door as Nesbitt came in, got in the car and took off. 3RP 184-85. It was Nesbitt's car and was parked around the corner. 3RP 185. Nesbitt had given Wells the keys already. 3RP 185. The plan was to meet Nesbitt at the KFC afterward. 3RP 185. It was a few blocks away. 3RP 185. Wells drove, Waymire was in the passenger seat and Johnson was in the back. 3RP 186.

When they started going through the wallet at the KFC parking lot, they discovered there was only \$11 in it. 3RP 187. They used the money to buy some marijuana. 3RP 187. It took about 20 minutes from Nesbitt to join them because he had to stay and talk to the police. 3RP 188.

Nesbitt told Waymire to take off his piercings because he had told the police one of the robbers had piercings. 3RP 189. He also told him to take his hoodie off. 3RP 189. Waymire threw it out of the car in an alley near Safeway. 3RP 190. Then they drove around a bit. 3RP 192. Nesbitt was driving and Wells had gotten into the back seat. 3RP 192.

They went and bought some marijuana and smoked it. 3RP 192. After that they all went home. 3RP 194. Nesbitt was kind of upset because they did not get as much money as he had hoped. 3RP 194. They felt bad because they had done all that for only \$11, and felt bad when they realized

how old Jones was. 3RP 195. When he got into the car, Nesbitt took the wallet and stuffed into a side console in the car. 3RP 196. Eventually they threw it away. 3RP 196. Waymire mostly only saw the others at Labor Ready after that. 3RP 197. They never hung out together again. 3RP 198. They never talked about the robbery. 3RP 198.

They chose Jones to rob because Nesbitt said he had a lot of money. 5RP 281. Waymire did not actually see the knife that Johnson used. 5RP 281. Waymire knew Johnson had and used the knife, however. 5RP 281.

Waymire was arrested July 12 in front of his apartment. 5RP 281. They told him he was being arrested for first-degree robbery, and took him to the police station. 5RP 282. He initially lied to the detective when he was questioned, and said that he did not know what was going on. 5RP 282. But when the detective told him he was “already caught,” he became scared and confessed. 5RP 282. The detective showed him a photo lineup and he identified Wells. 5RP 284. He also picked Nesbitt and Johnson from two additional photo arrays. 5RP 285. Waymire had his first court appearance a few days later. 5RP 286. At the second appearance he saw Wells and Nesbitt. 5RP 286. Wells called Waymire a snitch. 5RP 287.

Bobby Johnson testified that he also worked at Labor Ready. 5RP 423. He had just recently met Wells and Nesbitt. 5RP 426. He had known

Waymire for about a month. 5RP 427.

Johnson did not see Wells or Waymire before he left Labor Ready with Nesbitt. 5RP 429. They met up with them at Jim's house where they went and smoked some pot. 5RP 429. They were at Jim's house when Nesbitt first brought up the idea of a robbery. 5RP 429. Nesbitt said a business where he used to work had a lot of money on hand. 5RP 429. Nesbitt said the man's name was Jones. 5RP 430.

The plan was to go in with weapons and take the money from the people in the business. 5RP 430. Johnson and Waymire were supposed to take the money from Jones. 5RP 431. Wells would spray the woman with mace. 5RP 431. Then Nesbitt would walk in and wait for the police so he could give false descriptions of the other three. 5RP 431. The plan was Nesbitt's. 5RP 432.

Nesbitt drove to the scene, and Waymire drove away. 5RP 432. Nesbitt went in first to see how many people were there. 5RP 434. He came out and said there were two. 5RP 434. Johnson, Waymire, and Wells were all scared and hesitant. 5RP 435. Johnson wanted to stay in the car and be the getaway driver. 5RP 435.

All four of them went into the building together. 5RP 439. Johnson had a pocket knife with a four-inch blade. 5RP 437. He gave another knife

just like it to Waymire. 5RP 437. Wells had a can of mace that Johnson gave him. 5RP 438.

Nesbitt asked Jones if he could use the phone in the lobby. 5RP 439. He went back into Jones's office to talk to him. 5RP 439. Johnson and Waymire filled out applications. 5RP 439. Wells just stood there behind them. 5RP 439. They filled out the applications at the counter. 5RP 440. Nesbitt came out and made a phone call. 5RP 440. He stayed on the phone the whole time, for about 15 minutes or so. 5RP 441.

After filling out the applications, Johnson and Waymire went into Jones's office where Waymire began talking with Jones. 5RP 443. Johnson stood by the door. 5RP 443. Johnson was still standing by the door when he saw Wells spray the woman. 5RP 445. Her could not actually see her but saw Wells spray into the window where she was. 5RP 446. She screamed. 5RP 446.

Jones went for the phone and started swinging it at Waymire. 5RP 447. Waymire cut the phone line and threw Jones to the floor. 5RP 447. Waymire had the knife out when he moved on Jones. 5RP 449. Johnson was holding his knife in his hand. 5RP 449. Waymire held Jones down and Johnson emptied his pockets. 5RP 449. Johnson did not think that he cut Jones. 5RP 450.

After getting the stuff from Jones's pockets, Johnson and Waymire ran out. 5RP 452. Nesbitt was still in the lobby and ran after them, swinging like he was going to hit them. 5RP 452. Wells ran out with them. 5RP 453.

Waymire drove, Johnson got in the passenger seat, and Well got in the back. 5RP 453. They went to the KFC. 5RP 454. The wallet contained a bunch of credit cards, but only \$11.00 in cash. 5RP 454. Then they waited for Nesbitt. 5RP 455. They were pretty mad over how little money they got. 5RP 455.

Wells left before Nesbitt got back. 5RP 455. After he showed up, Nesbitt had them follow him with the car while he walked because he was afraid the police were still watching them. 5RP 456. They did that for about 20 minutes and then Nesbitt got in the car. 5RP 456.

They used the money to buy some marijuana after they got back to Jim's house. 5RP 457. Waymire contacted someone who brought the marijuana over. 5RP 458. They hung out for an hour or so. 5RP 458. Johnson and Waymire left on foot and went to the house of a friend of Waymire. 5RP 459.

Detectives Davis and Harker contacted Johnson in June and told him that they had probable cause to believe he was involved in the robbery. 5RP 461. Johnson admitted that he was. 5RP 461. He was not able to recognize

Wells from the photo array because in the picture Wells had long blond hair, while when Johnson knew him he had short hair, glasses and a goatee. 5RP 463. He did recognize him when he first saw him in court. 5RP 463. He described Waymire as having a bunch of piercings in his face. 5RP 464.

Johnson pled guilty to first-degree robbery. 5RP 466. The State agreed to recommend 32 months. 5RP 467. He also had a pending burglary charge. 5RP 468.

Michael Singer testified that he did not know Wells. 6RP 729. Singer met Nesbitt in the jail. 6RP 729. They were talking and learned that they were both facing robbery charges. 6RP 730. Nesbitt said he had masterminded the crime himself and that he was the getaway driver with his car, and that they were going to split the proceeds. 6RP 730. He also said that he committed the crime with Billy or Bobby and another white guy. 6RP 731. Nesbitt said the people from True Services would be sorry for calling the police. 6RP 732. Singer did not have any agreement with the State. 6RP 732.

The State's final witness was Charmie Walker, who was the office manager for Jones. 6RP 750. She opened the office at 9:00. 6RP 752.

Sometime after that Nesbitt came in. 6RP 752. He did not work for True Services, but had done some errands for Jones in the past. 6RP 752.

Jones had said that he would be hiring him eventually. 6RP 753.

Nesbitt sat on the couch in the lobby. 6RP 753. Then three more people came in. 6RP 753. Nesbitt asked her who they were. 6RP 753. She told him she did not know, but she thought they were with him since they came in less than five minutes later. 6RP 753. Two of the others asked for applications. 6RP 754. The third sat in the lobby, just out of her sight. 6RP 754. They filled out the applications and then gave them back to her. 6RP 756. Then all three of them left. 6RP 757. Nesbitt left as well. 6RP 757.

Nesbitt went to the left and the other three went right. 6RP 757. Nesbitt was smoking and she told him he needed to step away from the building. 6RP 757. She thought the other three had left. 6RP 757.

After a while, however, they returned. 6RP 757. Nesbitt was still in front of the building. 6RP 758. The third one, who had not asked for an application, asked her where the restroom was. 6RP 758. She got up to show him and he sprayed her in the face. 6RP 758. It burned and she could not open her eyes. 6RP 759. She screamed. 6RP 760. He came through the door and kept following her as she backed up toward her desk. 6RP 760. She could not see. 6RP 761. She heard Nesbitt telling him to get off of her, and "Don't shoot her." 6RP 761. She also heard Jones scream in the other room. 6RP 761. Then the assailant took off running. 6RP 762. The others

ran out too. 6RP 762.

Nesbitt went in and checked on Jones. 6RP 762. She heard Nesbitt ask if Jones was okay, and then she heard him tell Jones that they needed to call 911. 6RP 763. Nesbitt called the police. 6RP 763.

One of them had piercings on his lip and eyebrow. 6RP 765. The other one was short with short hair. 6RP 765. She did not see the third one, who sprayed her. 6RP 765. He was slim and “normal height.” 6RP 766.

A few weeks later Nesbitt returned to the office. 6RP 767. He said he wanted to talk to Jones about the robbery, because he knew someone that was using Jones’s gas card. 6RP 767. Nesbitt said it was one of the robbers, who was named “Bobby.” 6RP 767.

She asked Nesbit how he knew him, because she asked him the day of the robbery whether Nesbitt knew any of them, and he had said he did not. 6RP 768. Nesbitt said he did not know them, but that he had gotten the card from someone else that he knew. 6RP 768. He had the card with him. 6RP 768.

Nesbitt came back again, and this time he said he had another person with him that knew who was involved in the robbery. 6RP 770. Jones was not in, so the person left a note for Jones. 6RP 770. Nesbitt wanted Jones to pay for the information. 6RP 771.

When Nesbitt yelled “Don’t shoot her” it made Walter think that the assailant had a gun. 6RP 773. It scared her. 6RP 773. Nesbitt said they took his wallet. 6RP 773. She did not see that happen. 6RP 774. Nesbitt chased them out the door, but came right back. 6RP 774.

### III. ARGUMENT

#### A. COUNSEL WAS NOT INEFFECTIVE FOR ATTEMPTING TO SHOW THAT NESBITT’S ACCOMPLICES WERE TESTIFYING ONLY TO PRESERVE THEIR PLEA DEALS.

Nesbitt argues that counsel was ineffective for not objecting to the admission of language from the testifying accomplices’ plea agreements that required the accomplices to testify truthfully. This claim is without merit because counsel was the one who admitted the agreements into evidence, and in doing so was clearly following the reasonable strategy of arguing that the agreement meant nothing more than that the accomplices’ testimony could not deviate from the “official” version of the offense.

In order to overcome the strong presumption of effectiveness that applies to counsel’s representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v.*

*Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances, will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been

admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). The first showing corresponds to *Strickland*'s performance prong, and the latter two, to the prejudice prong.

Nesbitt is certainly correct that counsel *could have* objected to the admission of Johnson's and Waymire's plea agreements without the redaction of the "testify truthfully" clauses. *See State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003). He cannot show, however, that counsel has no legitimate strategic or tactical reason for not objecting.

Indeed, during Waymire's testimony, the trial court raised the issue itself, citing to *Green* and other cases. 5RP 274-79. Nesbitt's counsel specifically declined to object:

MR. WEAVER: Your Honor, I have read the case *State versus Green*. I've also read the Plea Agreement in this case. I think the language in *Green* was significantly different than the language in this case. I'm not raising an objection.

5RP 279. Wells's lawyer chose not to object as well. *Id.*

To the contrary, counsel himself, *not the State*, introduced the agreements into evidence. 4RP 363, 5RP 567. Counsel's theory quickly became clear during his cross-examination of Waymire: Waymire had gotten a very good deal, and that to keep that deal he had to stick to his original story *regardless* of its veracity.

Counsel began by eliciting the terms of the "deal" that Waymire

received. He went over the potential further charges and enhancements. 5RP 367-69. Waymire acknowledged that his standard range 31 to 41 months, and that it could go as high as 6 ½ years with the additional charges and enhancements. 5RP 370-71. The State had agreed to recommend a mitigated exceptional sentence of 18 months or 1 ½ years. 5RP 371.

Counsel then got Waymire to concede he was testifying at trial because he did not want to lose that deal. 5RP 372. Counsel then hammered on the “fully and truthfully” requirement, suggesting that whether Waymire satisfied that provision was largely in the discretion of the State:

Q. Now, the State’s over here. They’re represented by Ms. Dennis. She’s the one who’s going to decide whether you’re testifying fully and truthfully, right?

A. Yes.

Q. If she thinks you’re not testifying fully and truthfully you lose the benefit of the deal.

A. That’s correct.

Q. Okay. And you know that?

A. Yes.

Q. And so it’s in your best interest to try and keep as close as possible to the story that you told Detective Harker on July 12 as you possibly can; is that right?

A. Well to tell the truth, yeah.

\* \* \*

Q. And you said that you and Bobby and Shawn Wells and Akeel Nesbitt did this robbery together; is that right?

A. Yes I did.

Q. And if you deviate from that story today you lose the

benefit of the deal; is that right?

A. Yes.

Q. I'd like to go down a little bit. Quote, "The defendant agrees that his or her statements provided to law enforcement and described in discovery are truthful and accurate."

You've already agreed that what you told Detective Harker is the truth, so that's our measure. If you don't tell the truth you lose the benefit of the deal, and what you told Detective Harker is the truth. That's our measuring stick. Is that right?

A. I guess, yes.

Q. Okay. And I'm going to keep reading. "A deviation from those facts in future testimony would be a breach of the Plea Agreement."

You have to testify to what you told Detective Harker.

A. Yes.

Q. And if you don't, the prosecutor can come back and tag you with the five and half to six and a half years that we just talked about.

A. That's correct."

5RP 373-74.

Counsel followed the same strategy with accomplice Bobby Johnson, as well. He first brought out that despite a potential exposure to 98 months in prison, the State would be recommending 32 months. 5RP 568-73. Counsel then turned to Johnson's cooperation agreement, which differed somewhat from Waymire's, and argued, at length, that "the truth" was what State said it was:

Q. Now there's a clause here that says the defendant, that's you, agrees to provide the state with a written summary

of expected testimony that is truthful and accurate and will be the basis of the cooperation agreement, and to provide this summary to the state before entry of the a guilty plea. Do you see that sentence?

A. Yes.

Q. Furthermore, the defendant agrees to the terms of a separate document entitled "Cooperation Addendum to Plea Agreement," which is attached hereto and incorporated herein. Do you see that?

A. Yes.

Q. So let's go to the last page. This is the Cooperation Addendum to the Plea Agreement. You signed this, right?

A. yes.

Q. This is a separate document that's an addendum to the Plea Agreement. And it has ten paragraphs; is that right?

A. Yep. Yes.

Q. You might want to keep it on that page, because I'm going to ask you a lot of questions about those ten paragraphs.

And in those ten paragraphs you were specifically – uses the word specifically – specifically agree that ten things are true. Is that right?

A. Yes.

Q. And you know that if you deviate from these ten things that you're going to lose your Plea Agreement?

A. Yeah.

Q. And you could be facing up to 98 months in prison?

A. Yes.

Q. So let's talk about those ten things. You agree that you were involved in the robbery of the True Services janitorial business on October 10<sup>th</sup>, 2006; is that right?

A. Yes.

Q. And you know that you have to come in here and testify to that.

A. Yes.

Q. And you have?

A. Yes.

Q. Number 2, your accomplices are Shawn Wells, James Waymire and Akeel Nesbitt; is that right?

A. Yes.

Q. You know you have to say that or you lose your deal?

A. Yes.

Q. Number 3, Akeel Nesbitt planned to quote, play the part – it's got little quotations, I like that – play the part of the victim, stay behind to misdirect the police.

A. Yes.

Q. You have to say that, otherwise you lose your deal; is that right?

A. As far as I know.

Q. Okay.

No. 4, Shawn Wells – this guy right here – he wielded a can of mace spray that he used to subdue Charmie Walters. [sic] Do you know who Charmie Walters [sic] is?

A. I wasn't aware of her name until after the incident, but yes.

Q. It's the secretary of the business?

A. Yes.

Q. So if you don't say that Shawn Wells wielded the can of spray, the mace, then you lose your deal?

A. Yes.

Q. No. 5, the defendant – that's you – and James Waymire confronted James Jones, robbing him of his wallet by force and armed with knives; is that right.

A. Yes.

Q. Number 6, that you did not know Shawn Wells well – nice tongue twisting there – that you did not know Shawn Wells well before committing the robbery together?

A. Yes. Q. Number 7, that you have not seen

Shawn Wells since committing this robbery together? A.

Yes. Q. Number 8, when the defendant – that’s you – was shown a black and white photo montage of Shawn Wells’s picture by detectives several months after the robbery he did not recognize Wells because of the differences in facial hair and length of hair, but when you saw him in court and/or the jail he recognized him as an accomplice.

That’s a nice sentence there. Did you write that sentence?

A. No.

Q. Okay. But you signed that that’s what you were going to say in court, right?

A. Yes.

Q. Number 9, all of the above is the truth, and the defendant agrees that if it is not true then he would be in breach of this Plea Agreement.

A. Yes.

Q. Number 10, the defendant will testify truthfully to all of the above as well as to any other questions asked, and his testimony will be truthful. If it is determined that [SRP 577] any of his testimony is untruthful, he agrees [sic] would be in breach of this Plea Agreement.

A. Yes.

SRP 574-

And of course counsel’s theory was also that their original stories were not true, as the following exchange with Waymire suggests:

Q. Now we’ve already established that this is about what, nine months after the robbery. At this point you know that someone has talked.

A. Yes.

Q. Right? Because Detective Harker knows too much. Isn’t that right?

A. Yes.

Q. So you decide that you have a choice to make. You could either go along with this story or you can deny it.

A. Right.

Q. And you decide to go along with this story.

A. Yes.

5RP 341-42. Counsel also questioned Johnson's statement to the police:

Q. So a guy you have never met sitting in a room of a guy's house you've never met is going to call yet another guy you've never met and another guy that you barely know to go do this robbery; is that right?

A. Yeah.

5RP 502.

Finally, this theory was one of the centerpieces of counsel's closing argument. He began with the theory that when the police approached Johnson and asked him about the robbery after he and Nesbitt, who were already in jail on other charges, had a disagreement, Johnson began "weaving a tale" because he thought Nesbitt has turned him in. 8RP 918. Counsel then asserted that the police, by asking Waymire leading questions, fed Johnson's story to Waymire. 8RP 914.

Then, counsel further expounded, once they had committed to their stories they have to stick to them or be perceived as liars. 8RP 931. Thus, counsel argued, "their obligation [was] to tell the same story they told to Detective Harker. ... If the original story is a lie, then every story after that

has to be a lie. These individuals cannot deviate from their story.” Counsel then tied this theory directly to the “testify truthfully” language:

I love the language in the Plea Agreement with Mr. Johnson. The defendant, Mr. Johnson, agrees that his statements provided to the prosecutor and law enforcement are truthful and accurate, and that he will testify consistently with them.

Specifically he agrees that, and then there are ten paragraphs that he specifically says that has to testify to this. If he deviates from it then he loses his deal and he gets the 80 to 98 months that he’s looking at.

This is not a motive to testify. It’s a motivation to continue to lie. A lie that started on June 29<sup>th</sup><sup>[1]</sup> and continues to this day.

8RP 931-32.

Counsel was thus far from having no tactical or strategic reason for not objecting and for himself introducing the agreements himself. The “testify truthfully” was one of the cornerstones of his case:

Mr. Waymire, Mr. Johnson have a bridge to sell. Well, they did. They don’t any more. They’ve already sold it. They sold it to the Kitsap County prosecutor’s office. They sold it for between a quarter and a third of the time that they should have gotten. The bridge has been bought.

Here is the question for you. It is going to be resold to the 12 people on this jury? Because if you buy their stories you might as well be buying the Brooklyn Bridge.”

8RP 932-33.

Nor can it be said that this strategy was unreasonable. There is no

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<sup>1</sup> June 29 was the date of Johnson’s first statement to the police.

other evidence explaining why Waymire and Johnson would falsely testify against Nesbitt and Wells. Presumably counsel was unable to find any plausible and admissible evidence that showed such a motive. The theory that he did present, and forcefully, was that Waymire and Johnson told the police what they wanted to hear, and then having gotten sweet plea deals, they were bound by those deals to stick to the original stories under threat of significantly greater punishment. Nesbitt fails to show that counsel's strategy was unreasonable.

Additionally Nesbitt fails to show prejudice. Even if counsel had interposed a successful objection to the introduction of the agreements during direct examination by the State, and not introduced them himself, the State would have been entitled to introduce them once the defense attacked the witnesses' credibility. *Green*, 119 Wn. App. at 24. Plainly he cannot show prejudice. *Green*, 119 Wn. App. at 25 (applying the similar non-constitutional harmless error standard: "Because the agreement would have been admitted anyway, it is not within reasonable probabilities that the outcome of Green's trial was materially affected by introduction of the agreement on direct instead of during redirect.") This claim should be rejected.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE REGARDING JOHNSON'S DESIRE TO SEE HIS FAMILY WHERE THE RELEVANCE, IF ANY, OF THE EVIDENCE WAS MINIMAL.**

Nesbitt next claims that the trial court erred in excluding evidence that Johnson's wife was pregnant. This claim is without merit because the evidence was irrelevant to Johnson's credibility.

Under ER 401, "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the theory was that Johnson's desire to be with his wife and child was a motivating factor with respect to his trial testimony. 5RP 531. Nesbitt fails to point to any evidence that ties this desire to his statements to the police or to his plea agreement. As such the evidence is of questionable relevance at best.

Moreover, as the trial court ruled, and slight probative value of this evidence would clearly be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 5RP 532. Contrary to Nesbitt's speculation that the trial court was mysteriously applying a closing argument standard, the trial court was obviously applying

ER 403.

Finally, even if the court abused its discretion, any error would clearly be harmless error. A trial court's evidence exclusion of evidence "that does not result in prejudice to the defendant is not grounds for reversal." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error "is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois*, 133 Wn.2d at 403.

Wife and unborn child or not<sup>2</sup> it is safe to assume that most individuals do not wish to spend more time in jail or prison than they have to. The jury could presumably figure this out. Moreover, there was ample impeachment of Johnson, an admitted robber, burglar, and car thief, and his motives and reasons for testifying. The addition of this small and obvious additional fact would unlikely have swayed the outcome of the case. This claim should be rejected.

**C. THE TRIAL COURT PROPERLY EXCLUDED FROM EVIDENCE JAILHOUSE-SNITCH SINGER'S SIX-YEAR-OLD JUVENILE CONVICTION FOR THIRD-DEGREE THEFT.**

Nesbitt next claims that that the trial court abused its discretion in

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<sup>2</sup> Johnson did testify as to his recent marriage and his wife's pregnancy; only further questioning was excluded. SRP 477-78.

refusing to allow him to impeach Singer with evidence of a six-year-old juvenile conviction for third-degree theft. This claim also lacks merit.

Under ER 609(d), evidence of juvenile adjudications is generally not admissible. The court may, however, in a criminal case allow evidence of a juvenile conviction against an adult witness if the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. The trial court here properly determined that such Singer's 2001 theft in the third degree conviction fell within the rule, rather than the exception. 6RP 632.

Singer also had *recent* adult convictions for making a false or misleading statement to a police officer, second-degree burglary, and second-degree robbery. 6RP 733-34, 738-39-40. Nesbitt went into great detail on the circumstances of these offenses. The third-degree theft committed when Singer was 13 years old, 6RP 686, would hardly have further damaged his credibility. The trial court properly declined to apply the exception under ER 609(d).

Moreover, any error would be harmless. In addition to the other offenses noted above, Singer's testimony was so inconsistent with that of the other witnesses as to be useless. As Nesbitt gleefully pointed out in closing argument, the State did not even mention Singer in its closing. 8RP 929. This claim should be rejected.

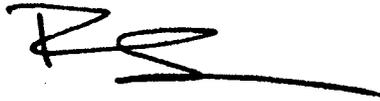
**IV. CONCLUSION**

For the foregoing reasons, Nesbitt's conviction and sentence should be affirmed.

DATED September 2, 2008.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', written over a horizontal line.

RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

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