

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY

NO. 37752-7-II

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

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

STEVEN ONG,

Appellant.

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

The Honorable George Wood, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted appellant's convictions because they were more than 10 years old in violation of ER 609(b).

2. Appellant was denied his constitutional right to the effective assistance of counsel when counsel opened the door to damaging evidence for no legitimate tactical reason.

3. In a prosecution for second degree assault based on "intent to commit a felony," the court erred when it instructed jurors on the elements of the underlying felony but omitted an element.

4. The trial court unconstitutionally commented on the evidence by interrupting defense counsel's closing argument.

5. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Because there were no eyewitnesses to the alleged crime, this case was a "swearing match" between the complaining witness and the appellant. Over defense objection, the trial court interpreted the language "date of the conviction" under ER 609(b)<sup>1</sup> to be the date a judgment and

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<sup>1</sup> ER 609 states in pertinent part:

(a) **General rule.** For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be

(continued...)

sentence was entered on remand following a successful appeal on another charge under the same cause number. The court, therefore, ruled appellant's 1995 convictions involving dishonesty were admissible. Did the trial court's erroneous admission of the stale convictions prejudice appellant and require reversal of his convictions?

2. Lacking any legitimate tactical reason, appellant's counsel opened the door to damaging testimony from a police officer suggesting appellant had a prior arrest record. Did counsel's question constitute prejudicially deficient performance and therefore deprive appellate of his constitutional right to effective representation?

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<sup>1</sup>(...continued)

admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

3. Appellant was charged with second degree assault based on intent to commit a felony. Did the trial court err when it instructed jurors on the elements of the underlying felony, indecent liberties, but then misled jurors by omitting the knowledge element?

4. Was the trial court's interruption of defense counsel's legally permissible closing argument, absent any objection by the state, an unconstitutional comment on the evidence, which is presumed prejudicial?

5. Should appellant's convictions be reversed based on cumulative error that denied him a fair trial?

**B. STATEMENT OF THE CASE**

1. Procedural facts

Appellant Steven Ong was charged with second degree assault -- intent to commit a felony<sup>2</sup> (count 1), second degree assault of a child -- intent to commit a felony<sup>3</sup> (count 2), and third degree theft (count 3) for a May 28, 2005 incident involving Jennifer Murphy and her 21-month-old

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<sup>2</sup> RCW 9A.36.021(1)(e) provides, "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [w]ith intent to commit a felony, assaults another."

<sup>3</sup> RCW 9A.36.130(1)(a) provides, "A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person . . . [c]ommits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child."

son D.W. In addition, the state alleged Ong committed count 1 with sexual motivation.<sup>4</sup> CP 99-101, 111-13.

Ong's trial occurred February 25-28, 2008. On counts 1 and 2, the court instructed the jury the predicate felony was indecent liberties<sup>5</sup> against Murphy. CP 69-71, 76 (Instructions 10-12, 17). A jury found Ong of guilty of count 1 and that the crime was committed with sexual motivation. On count 2, the jury found Ong guilty the lesser-degree crime of fourth degree assault. The jury acquitted Ong of count 3. CP 51-55.

The court determined Ong qualified for sentencing under the Persistent Offender Accountability Act (POAA).<sup>6</sup> 7RP<sup>7</sup> 69-73. The court

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<sup>4</sup> RCW 9.94A.835.

<sup>5</sup> RCW 9A.44.100(1)(a) provides, "A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another . . . [b]y forcible compulsion."

<sup>6</sup> Former RCW 9.94A.030(26) (2005) defines "persistent offender" as an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at

(continued...)

therefore sentenced Ong to life imprisonment without the possibility of parole. CP 10-21; RCW 9.94A.570.

2. Trial testimony of state's witnesses

Robert and Linda Speed, Canadians cycling on the Olympic Peninsula, stopped at Railroad Bridge Park on the Dungeness River in Sequim around noon on May 28. 4RP 22. They noticed Ong seated at a picnic table near the bridge over the river. 4RP 23-26. Ong's general appearance made Robert nervous. 4RP 40, 55-56. Linda described Ong as "agitated." 4RP 62, 71. The Speeds descended the riverbank so Linda could soak her feet in the cold river. 4RP 22.

While on the river, Robert heard screams and a woman's voice say "he hit me." 4RP 27, 48-49. Although Robert was initially uncertain whether the commotion was mere horseplay, he concluded the screams were serious. 4RP 29, 46. He noticed two people across the river and saw one of them hurry away. 4RP 29, 31, 46.

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<sup>6</sup>(...continued)

least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted. . . .

<sup>7</sup> This brief refers to the verbatim report of proceedings as follows: 1RP - 7/15/05; 2RP - 7/22/05; 3RP - 2/25/08; 4RP - 2/26/08; 5RP - 2/27/08; 6RP - 2/28/08; and 7RP - 5/8/08. 1RP, 2RP, 3RP, 6RP, and 7RP are bound in a single volume.

Linda was in front of her husband and had a better view of the scene. 4RP 64. She saw Ong teeter across a log toward a beach where a young woman, a child, and a dog were playing. 4RP 65-66, 75. Linda's attention was temporarily diverted but returned to the scene after she heard screaming. 4RP 65-66, 76. At that time, the young woman was holding the child. 4RP 76. Linda did not see Ong touch the woman, the child, or the dog. 4RP 77, 82.

After the Speeds returned to the road, they saw Ong walking and muttering to himself. 4RP 30, 72-74. They debated whether to report their observations or leave the area. 4RP 30. Linda feared Ong, but admitted he did nothing to threaten her.<sup>8</sup> 4RP 79. The Speeds eventually went to the Audubon center and reported their observations to the police. 4RP 31, 68.

May 28 was unseasonably warm and Murphy, the young woman on the beach, planned to meet friends at the park. 4RP 87-88. Murphy saw Ong near the bridge. 4RP 89. Ong was wearing jeans with boxer shorts showing above his waistband and carrying, but not wearing, a shirt. 4RP 90. Murphy and Ong exchanged a friendly greeting. 4RP 90.

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<sup>8</sup> Robert acknowledged his written statement asserting Ong was carrying a knife was inaccurate. He testified he saw only a leather pouch. 4RP 42-43.

Murphy, her son, and her dog walked down a trail to a sandy area near the river. 4RP 91. Murphy folded her skirt up to her knees to sunbathe while D.W. played nearby. 4RP 92. Ong crossed a log to the beach and asked for a cigarette. 4RP 93. Murphy gave him a cigarette but was disappointed Ong approached her because she did not want to be disturbed. 4RP 164. In addition, Murphy found Ong's appearance offensive based on "his looks, the greasiness, the dirtiness[;] he was an older gentleman." 4RP 164.

Squatting in front of her, Ong picked up Murphy's cellular phone and asked if it was a "track phone."<sup>9</sup> 4RP 93. Murphy told him it was not. 4RP 94. When Ong lifted up Murphy's skirt, Murphy pushed his hand away and requested he leave her alone. 4RP 168. Ong then lunged at Murphy, grabbed her mouth and neck, and pushed her to the ground. 4RP 94. Ong tried to lift up Murphy's skirt and shirt, but she resisted and screamed. 4RP 95. Ong told Murphy "if you don't stop I'll kill your fucking son." 4RP 95.

As Murphy continued to scream, Ong released her and lifted D.W. off the ground by the child's neck. 4RP 96, 171. Murphy, who worked for the Navy and was trained in self-defense, punched and kicked Ong, who

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<sup>9</sup> "TracFone" is a "prepaid" mobile phone service provider. See <http://en.wikipedia.org/wiki/Tracfone> (last accessed January 5, 2009).

released D.W. and tackled Murphy again. 4RP 97, 105, 172, 176. They struggled for another minute or two, but Ong eventually let Murphy go. 4RP 98. As Ong departed, he took Murphy's cellular phone, called her a "fucking bitch," and ran away across the log. 4RP 98.

Murphy yelled across the river to the Speeds. 4RP 98, 101, 177. But a man from the park's Audubon center, Erwin Jones, responded to Murphy's cries and contacted the police. 4RP 99, 181, 207. Murphy testified she suffered a "fat lip" and her clothing was soiled. 4RP 99-100. D.W. was not injured. 4RP 103-04, 175. Murphy refused an offer of medical treatment for herself and D.W. 4RP 104-05, 174-75, 188-89.

Deputy John Keegan compiled a six-photo montage and later that day asked Murphy if she was able to identify her assailant. 4RP 153, 256. Murphy was unable to identify anyone, but at Keegan's request she pointed out the two photos that appeared most similar to the man. 4RP 153, 179, 256; 5RP 29. According to Keegan, Ong was one of these two. 5RP 29.

Based on the description Murphy provided, Keegan created a computer-generated sketch. 4RP 154. In addition, Murphy told Keegan her assailant had a tattoo on the left side of his chest with cursive writing underneath and another tattoo on his upper arm. 4RP 155.

Murphy went to court the following Tuesday having learned from the prosecutor's office the man arrested in relation to the incident was scheduled to appear. 4RP 156. When Murphy saw Ong, she was one hundred percent certain he was the man who attacked her.<sup>10</sup> 4RP 156.

Jones, the Audubon center employee, testified when he encountered Murphy she was shaking, crying, appeared disheveled, and had red marks on her face and throat. 4RP 206-07. Jones acknowledged he did not mention the red marks in his contemporaneous written statement to police. 4RP 211-12, 219. Jones testified D.W. also appeared "shaken up" because he did not speak for an hour and a half. 4RP 208. Murphy told Jones a man attacked her and threatened her life. 4RP 207.

Deputy Michael Dick responded to the Audubon center. 4RP 243. Murphy appeared distressed, but Dick noticed no injuries to Murphy or D.W. 4RP 226-28, 246, 252-53. Unlike Jones, Dick noticed nothing remarkable about D.W.'s behavior. 4RP 246.

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<sup>10</sup> The court ruled Murphy was permitted to identify Ong, ruling that even if her previous in-court identification was suggestive, it was admissible under the pertinent factors. 4RP 147-48 (court's discussion of State v. Courtney, 137 Wn. App. 376, 386, 153 P.3d 238 (2007), review denied, 163 Wn.2d 1010 (2008), which cites Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). In making its ruling, the court pointed out defense counsel stated in opening remarks that identification was not an issue in the case. 4RP 149-50.

Later that afternoon, Deputy Keegan learned a man matching the description Murphy provided was arrested about a mile from the park. 4RP 256, 258. As Keegan arrived at the scene, deputies were leading Ong out of the woods to a patrol car. 4RP 258. Ong was arrested after Daniel Tash, the owner of wooded riverfront property, noticed Ong in his backyard and contacted the police. 5RP 128-29.

Keegan took photos of Ong at the police station, which were introduced into evidence. 4RP 267-72. While Ong's pants appear unfastened in the photos, Keegan believed this occurred during a search incident to arrest. 5RP 44-45, 171. Keegan acknowledged he did not provide Ong the opportunity to pull up his pants before photographing him, although he denied deliberately humiliating Ong. 5RP 46.

Ben Sanford was parked in the lot at Railroad Park when he noticed a man with a "distracted" look hanging around. 5RP 67, 95-96. The man, who had a tattoo on his chest, approached Sanford and asked for a cigarette. 5RP 67. About 10 minutes later, the same man emerged from a nearby trail and requested a ride, explaining he fought with his girlfriend and she might call the police. 5RP 68, 76. Sanford described the man's demeanor as "urgent" but not "panicky." 5RP 68. When Sanford declined to provide a ride, the man continued down the road toward the park entrance. 5RP

70-71, 96-97. Sanford heard, but did not see, someone entering the brush bordering the road. 5RP 70-71, 90.

Sanford and another man later participated in a search for Murphy's assailant. 5RP 73-74, 80. Sanford testified that afterward, he saw Murphy at the Audubon center and noticed red marks on her neck. 5RP 75. Sanford acknowledged he did not mention any marks in his written statement to the police. 5RP 82.

3. Defense counsel "opens the door" and moves for mistrial

During Deputy Keegan's testimony, the state moved to admit the photo lineup Keegan prepared. 5RP 18. Defense counsel requested permission to conduct voir dire, which the court granted. Counsel inquired, "[T]he actual photo array that you used, is that an array of photographs?" Keegan responded, "[T]hey're individual photographs, they're taken from the records, the jail records, digital. We have access to different mug shots and we can place them in that via a computer program." 5RP 19.

The jury was excused and defense counsel moved for a mistrial based on Keegan's use of the term "mug shots." According to counsel, this phrase informed the jury Ong had been "in trouble with the law before." 5RP 19-20.

The court denied the motion on two grounds. First, defense counsel opened the door to Keegan's answer based on his prior testimony in an "offer of proof" in which he testified outside the jury's presence that he created the montage using photos he obtained through a computer search of the jail's database. 4RP 135-36; 5RP 21. Second, the court concluded it was "common knowledge" the police use photos in their records to create photomontages. 5RP 22-23.

4. Court's ruling to admit Ong's 1995 convictions of dishonesty.

Before Ong testified, the state moved to be permitted to impeach Ong with his prior convictions for crimes of dishonesty, taking a motor vehicle without permission and second degree burglary.<sup>11</sup> 3RP 46-49; 5RP 110; ER 609. Defense counsel objected the crimes were too old and presumptively inadmissible under ER 609(b). 5RP 112.

On July 6, 1995, Ong was convicted of second degree burglary and taking a motor vehicle without permission, as well as second degree kidnapping and delivery of a controlled substance to a person under 18 years old. Sentencing Ex. 3. Ong was sentenced to 82 months for

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<sup>11</sup> Defense counsel did not dispute the burglary conviction was a crime of dishonesty. "[B]urglary performed with intent to commit theft is a crime of dishonesty." State v. Schroeder, 67 Wn. App. 110, 116, 834 P.2d 105 (1992).

kidnapping, 240 months on the delivery charge, 43 months on the burglary, and 18 months on the motor vehicle charge. Sentencing Ex. 3.

Ong's delivery conviction was reversed on appeal and, on October 29, 1999, he was resentenced based on reduced offender scores to 68 months for kidnapping, 29 months for burglary, and 14 months for the motor vehicle charge. Ex. 41.

The state urged the court to find the 10 years commenced upon entry of the judgment and sentence following the appeal, which was October 29, 1999. The state also argued the 10 years stopped running the date of the alleged crime, not the date Ong was to testify. 5RP 122. Finally, the state argued that because Ong was sentenced under a single cause number, the longest sentencing period of 68 months for kidnapping should be used to calculate the date of release. 5RP 122.

In contrast, defense counsel asserted that in determining the release date under the rule the court was permitted to consider only Ong's sentences involving crimes of dishonesty. 5RP 112. Counsel estimated Ong's 29-month sentence for burglary expired not later than October 1997.<sup>12</sup> 5RP 113. Because more than 10 years elapsed between Ong's release on a

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<sup>12</sup> Because Ong received credit for time served beginning March 17, 1995, his incarceration on that charge would have expired not later than August 17, 1997. Sentencing Ex. 3; Ex. 41.

conviction involving dishonesty and the date of his testimony, the conviction was presumptively inadmissible. 5RP 112.

The court agreed with defense counsel that only the sentence for the crimes of dishonesty should be considered. 5RP 124-25. The court tentatively ruled the trial date, not the date of the alleged crime, was the crucial date. 5RP 123. But the court determined the "date of conviction" was the date Ong's 1999 post-appeal judgment and sentence was filed:

[M]y gut reaction, and again, I haven't had a lot of time to think about it, would be that since it had to come back to re-sentence because the offender score is incorrect that the new conviction date for purposes of determining the ER 609 rule would be under the October [1999 Judgment and Sentence].

Again, that's going to have to be something the Court of Appeals wants to take a look at.

5RP 124. The court therefore determined the two convictions were admissible to impeach Ong's credibility. 5RP 126.

5. Ong's testimony

Ong acknowledged his 1995 convictions for second degree burglary and taking a motor vehicle without permission. 5RP 180. Ong was from Sequim and very familiar with the park. 5RP 180-81. Ong went to the park on May 28 planning to hike along the Dungeness River from the

railroad bridge to the next bridge, which he had never attempted.<sup>13</sup> 5RP 182.

Ong's first priority, however, was to obtain a cigarette. 5RP 183. Ong approached Murphy on the beach and asked for cigarette. 5RP 186. While Ong knelt near Murphy smoking, the two conversed. 5RP 187. Feeling there might be mutual attraction, Ong touched Murphy's knee over her skirt. 5RP 187, 189, 198-99, 225-26. The touch was meant to be friendly and was not sexual in nature. 5RP 200, 225.

Murphy became very upset and pushed Ong's hand away, telling him "don't touch me." 5RP 189. Murphy also yelled profanities. 5RP 189-90. Upset by Murphy's language, Ong responded in kind and left the beach the way he came. 5RP 189-90, 241, 249-50

Back in the parking lot, Ong approached Sanford for a ride, explaining he fought with a girl. 5RP 205. Ong did not recall mentioning the police. 5RP 205. After Sanford declined, Ong contemplated returning home but decided to follow through with his original plan to explore the river. 5RP 206-07, 230-32. Ong did so for the next several hours until he reached Tash's property and determined he could go no further without trespassing. 5RP 206-07, 215-16, 238-39.

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<sup>13</sup> Ong testified he was wearing gym shorts, not boxers, under his jeans in anticipation he might swim. 5RP 209, 234.

Ong denied noticing or taking Murphy's cellular phone. 5RP 195. He also denied touching D.W. or threatening anyone. 5RP 197, 202-03, 227. He acknowledged he had a tattoo on his chest, a flower interwoven with a ribbon and his daughter's name in cursive lettering. 5RP 209-10. He also had a tattoo on his upper arm, an image of trees bearing the word "forest." 5RP 210. Ong acknowledged he wore a hat, bandana, and sunglasses during his contact with Murphy, but he denied attempting to disguise himself. 5RP 235.

C. ARGUMENT

1. THE COURT ERRED WHEN IT ADMITTED CONVICTIONS THAT WERE MORE THAN 10 YEARS OLD IN VIOLATION OF ER 609(b).

Ong was convicted of two crimes of dishonesty in 1995 and completed his sentences by August 1997. He testified in the current proceeding in February 2008, more than 10 years later. The trial court therefore erred when it admitted remote convictions to impeach Ong, in violation of ER 609(b).

There is no indication the court would have admitted the crimes had it understood they were presumptively inadmissible under the rule. And because Ong testified contrary to the complaining witness and his credibility

was thus a crucial issue at trial, admission of these convictions prejudiced him. Reversal of his convictions is therefore required.

a. Introduction to applicable law

Prior convictions are generally inadmissible because they are irrelevant to the question of guilt and are prejudicial, shifting the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Hardy, 133 Wn.2d 701, 706, 710, 946 P.2d 1175 (1997).

ER 609(a) carves out a narrow exception to the general rule. Hardy, 133 Wn.2d at 706. Under ER 609(a), for purposes of attacking the credibility of a testifying defendant in a criminal case, evidence the defendant has been convicted of a crime may be admitted if the crime (1) was punishable by death or imprisonment in excess of one year, and the court determines that the probative value of admitting the evidence outweighs the prejudice to the defendant against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment. ER 609(a); Hardy, 133 Wn.2d at 706-07.

Prior convictions involving dishonesty and false statements that are less than 10 years old are automatically admissible under ER 609(a)(2). State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001). But

"[e]vidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." ER 609(b). In addition, if a conviction is more than 10 years old, it is admissible only if the court determines that the conviction's probative value, as supported by specific facts and circumstances, substantially outweighs its prejudicial effect. ER 609(b); Russell, 104 Wn. App. at 433. Trial courts must make this determination on the record. Id. at 433-34.

Since the Washington rule is identical to Federal Rule of Evidence (FRE) 609(b), this Court may look to federal case law for assistance in its interpretation. See, e.g., State v. Burton, 101 Wn.2d 1, 6, 676 P.2d 975 (1984), overruled on other grounds by State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991).

Finally, if the trial court rules a defendant's prior conviction is admissible and the defendant then chooses to admit the conviction on direct examination, the defendant does not waive the right to appeal the ruling, and the doctrine of invited error does not apply. State v. Watkins, 61 Wn. App. 552, 558-59, 811 P.2d 953 (1991).

- b. The date of conviction, not the entry of a judgment and sentence following an appeal, starts the clock for purposes of the rule.

The court ruled the entry of the judgment and sentence following Ong's successful appeal of a different charge under the same cause number was the "date of conviction" for purposes of ER 609(b). This was error based on the plain language of the rule.

Interpretation of a court rule is a question of law, subject to de novo review. State v. O'Connor, 155 Wn.2d 335, 343, 119 P.3d 806 (2005). In determining the meaning of a court rule, this Court applies the same principles used to determine the meaning of a statute. Id. Absent a contrary statutory definition, words in a statute are given their common meaning and courts may resort to dictionaries to ascertain that meaning. Budget Rent A Car Corp. v. Dep't of Licensing, 144 Wn.2d 889, 899, 31 P.3d 1174 (2001).

The evidence rules do not define "conviction." Black's Law Dictionary defines "conviction" as "[t]he act or process of judicially finding someone guilty of a crime" or "[t]he judgment (as by a jury verdict) that a person is guilty of a crime." Black's Law Dictionary 335 (7th ed. 1999). A "conviction," then, occurs when the jury originally reaches its guilty

verdict or when the court accepts a guilty plea.<sup>14</sup> Based on the plain and ordinary meaning of "conviction," Ong was convicted of the pertinent crimes of dishonesty in 1995, not 1999. Sentencing Ex. 3.

Not only was the trial court's reasoning contrary to the plain language of the rule, a contrary interpretation might produce an absurd result. See LaMon v. Butler, 112 Wn.2d 193, 203, 770 P.2d 1027 (1989) (where possible, statutes should be construed to avoid absurd results). The following hypothetical illustrates this. Assume an accused was convicted under the same cause number and sentenced concurrently to 30 years for murder and 12 months for second degree theft. If the murder conviction were overturned 20 years later, and the court remanded to the trial court to vacate the murder conviction, the judgment and sentence entered on remand under the original cause number could render the theft conviction admissible in a proceeding occurring up to 29 years after a jury found him guilty of that offense.

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<sup>14</sup> This definition is consistent with the definition of "conviction" under the Sentencing Reform Act, chapter 9.94A RCW. According to State v. Chapman, 140 Wn.2d 436, 449, 998 P.2d 282 (2000), the only statutory definition of "conviction" is contained in RCW 9.94A.030(12), which states "conviction" means "an adjudication of guilt pursuant to Titles 10 ["Criminal Procedure"] or 13 ["Juvenile Counts and Juvenile Offenders"] RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty."

- c. Where a defendant receives concurrent sentences, the "date of release" is the date he is no longer serving time on the conviction involving dishonesty.

The plain language of the rule also supports Ong's position that the date of release applies only to the sentence for the crimes of dishonesty, not for other crimes that may have been sentenced concurrently to these crimes.

ER 609(b) gives as one option for the date the clock starts to run the date of "release from the confinement imposed for *that* conviction." (Emphasis added.) Perhaps because the language of the statute is clear, counsel could locate no Washington case that squarely addresses this issue. However, the single case counsel located on this issue addresses the identical federal rule and squarely supports Ong's position.

In United States v. Pettiford, 238 F.R.D. 33, 34 (D.D.C. 2006), the prosecution moved to permit introduction of Pettiford's two prior convictions. First, Pettiford was convicted of second degree murder while armed and released from prison on that offense in 2004. The court ruled that conviction was admissible under FRE 609 because his release occurred within ten years of the current proceeding. Pettiford, 238 F.R.D. at 39.

Second, Pettiford was convicted at the same time of carrying a pistol without a license and the court ordered his sentence on that count to run

concurrent to his murder sentence. According to the court, the admissibility of the second conviction presented a "more interesting question." Id. at 39.

While federal case law dealing with this situation was "virtually non-existent," the legislative history of FRE 609(b) guided the court's analysis. Before enactment of FRE 609(b) in 1974, Congress considered a version of the subsection that would have excluded conviction evidence only if 10 years had elapsed since the witness's release from confinement "imposed for his most recent conviction." Pettiford, 238 F.R.D. at 40 (citing advisory committee's notes (1974)). But the final, current version of Rule 609(b) looks to the date of the precise conviction to be introduced as impeaching evidence under FRE 609(a), not the date of the "most recent conviction," to determine the 10-year limitation period. Accordingly, "[t]he rejection of [the proposed] version makes clear that confinement for one conviction has no effect on calculating the ten years applicable to another conviction.'" Pettiford, 238 F.R.D. at 40 (quoting Charles Alan Wright & Victor James Gold, 28 Federal Practice & Procedure § 6136, at 258-59 n. 14 (1st ed. 1993)).

The court concluded the conviction for carrying a pistol without a license was inadmissible. But for the contemporaneous second-degree

murder plea, Pettiford would have been released from imprisonment on the pistol charge in 1992, which would have made the conviction remote for purposes of the rule. In other words, Pettiford was serving time for both convictions during the first year of his incarceration. After that, his imprisonment was based solely upon his second-degree murder while armed conviction. Id. at 39-40. The court concluded:

Defendant's contemporaneous second-degree murder while armed conviction, which carried with it an extensive sentence, cannot be used to "piggyback" his carrying a pistol without a license conviction into the 10-year limitations period set out in [FRE] 609(b).

Pettiford, 238 F.R.D. at 40. As such, the court determined the latter conviction fell outside of the presumptive 10-year period set out in FRE 609(b). Pettiford, 238 F.R.D. at 40.

The situation here is identical. Whether under a plain language analysis or under the Pettiford court's logic, this Court should conclude the clock started for purposes of ER 609(b) in August 1997 when Ong's sentence on the crimes of dishonesty ended.

- d. The date to which time is measured is the date of the witness's testimony, not the date the alleged current crime occurred.

Ong was convicted of the crimes of dishonesty at issue in 1995 and, after 1997, was no longer confined on those crimes. Moreover, because

the date of testimony, February 27, 2008, not the date of the alleged crime, is the applicable date for purposes of ER 609(b), more than 10 years passed and the convictions are presumptively excluded. See Russell, 104 Wn. App. at 432 ("The 10-year period ends when the conviction is admitted at trial.")<sup>15</sup> Here, more than 10 years passed between Ong's incarceration on those offenses and Ong's testimony and the admission of the convictions. The convictions were therefore presumptively inadmissible.

- e. Ong can show prejudice because the court did not engage in the required balancing test and its ruling occurred based on a mistaken understanding of the applicable law.

The trial court mistakenly determined Ong's 1995 convictions were admissible. Ong anticipates the state will argue the court nonetheless

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<sup>15</sup> As discussed by the parties at trial, Tegland asserts (incorrectly) there is no Washington case law on point. But Tegland also asserts that despite a division of authority, the trend is toward identifying the ending date as the date the witness testifies. 5RP 117; 5A Karl B. Tegland, Washington Practice: Evidence § 609.10, at 498 n. 10 (5th ed. 2007) (citing Whiteside v. State, 853 N.E.2d 1021 (2006); Wright & Miller, Federal Practice and Procedure, § 6136; see Pepe v. Jayne, 761 F. Supp. 338, 342-43 (D. N.J. 1991), aff'd, 947 F.2d 936 (3d Cir. 1991) (date witness testifies); Trindle v. Sonat Marine, Inc., 697 F. Supp. 879 (E.D. Pa. 1988) (date witness testifies); see also United States v. Thompson, 806 F.2d 1332, 1339 (7th Cir. 1986) (date current trial begins); United States v. Cathey, 591 F.2d 268, 274 n.13 (5th Cir. 1979) (date current trial begins); Sinegal v. State, 789 S.W.2d 383, 388 (Tex. App. 1990) (date current trial begins); but see United States v. Foley, 683 F.2d 273, 277 (8th Cir. 1982), cert. denied, 459 U.S. 1043 (1982) (date of the charged offense); State v. Ihnot, 575 N.W.2d 581, 585 (Minn. 1998) (same).

engaged in the necessary balancing under ER 609(b), under which convictions more than 10 years old may be admitted if their probative value substantially outweighs their prejudicial effect. Because the balancing was inadequate and occurred in the context of a misapprehension of the law, such argument should be rejected.

A court abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Under ER 609(b), evidence of a witness' prior convictions for crimes of dishonesty is presumptively inadmissible for impeachment purposes if the convictions are more than 10 years old. A proponent may overcome this presumption with specific facts and circumstances establishing that the probative value of the conviction substantially outweighs its prejudicial effect. ER 609(b); Russell, 104 Wn. App. at 435. But courts should "very rarely and only in exceptional circumstances" deviate from the general rule that such crimes are inadmissible. Id. at 436-38 (quoting United States v. Beahm, 664 F.2d 414, 417-18 (4th Cir. 1981)).

As this Court noted in Russell, ER 609(b) was copied verbatim from FRE 609(b), and the drafters of FRE 609(b) commented that the trial court shall "make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of

the conviction substantially outweighs its prejudicial impact." Id. at 433 (citing S. REP. NO. 1277, at 15 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7061).

The court stated:

Also I want to put on the record that with regard that . . . I don't think I actually weighed the probative [sic] versus prejudice, I think it was inherent in my ruling that I found that it was more probative than prejudicial and I'm making that finding. We're talking the burglary and taking a motor vehicle . . . and I don't think they're over-highly prejudicial to the jury . . . to say that he has those convictions.

5RP 178-79.

But when the trial court engaged in this "balancing" it was operating under the mistaken belief the convictions were presumptively admissible because they fell within the 10-year rule. ER 609(b) is biased toward exclusion more strongly than either ER 609(a) or ER 403. Russell, 104 Wn. App. at 436. Because the court misunderstood the applicable law, it abused its discretion. Quismundo, 164 Wn.2d at 504.

Moreover, it is unclear the trial court would have admitted the convictions had the court understood they were presumed admissible. ER 609(b)'s bias cannot be overcome merely by showing a conviction is for dishonesty or false statement. While such a showing automatically satisfies ER 609(a), which requires a finding that probative value slightly outweighs

unfair prejudice, it does not satisfy ER 609(b), which requires a finding, "supported by specific facts and circumstances," that probative value substantially outweighs unfair prejudice. Russell, 104 Wn. App. at 437. The court made no such finding. Given the silence of the record and the strong presumption against admissibility of such convictions, there is a reasonable probability the outcome would have been different. State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996).

f. Ong was prejudiced by the erroneous admission of the convictions.

The trial court erred in admitting the convictions. Because the error is evidentiary, however, this Court considers whether "within reasonable probabilities," admission of the convictions affected the verdict. Russell, 104 Wn. App. at 438. "At the core of this inquiry is the strength of the other evidence." Id.

In Russell, this Court stated that "[i]n most instances, we would deem the improper admission of convictions [for crimes of dishonesty] highly prejudicial." Id. at 439 n. 32. Based on the "highly unusual strength of the evidence" this Court found the error harmless. Id. at 439. In fact, the evidence in Russell's case -- which this Court characterized as "airtight" -- was much stronger than the evidence against Ong. Id.

Russell was charged with first degree arson for setting a fire at the apartment of his ex-girlfriend, Alsteen. Id. at 426. Russell previously lived with Alsteen at the apartment for approximately one year. A week before the alleged arson, Russell became angry with Alsteen because of a perceived relationship with her neighbor. The police were called. The evening of the alleged arson, after having "a few drinks" elsewhere, Russell entered a tavern wearing a pink shirt and tan pants. He spoke with Alsteen, and an altercation ensued. Bouncers sprayed him with Mace, and he was angry when he left.

He left after 7:49 P.M., when 911 was called, but before 7:54 P.M., when the police arrived. The tavern was seven minutes from Alsteen's apartment. Around 8:00 P.M., a neighbor saw a man wearing a pink shirt and tan pants go up the stairs to Alsteen's apartment. She recognized that man as Russell, whom she knew by sight because he lived in the apartment above hers for about a year. Before 8:11 P.M., when the neighbor called 911, she saw Russell leave and noticed Alsteen's apartment was on fire. When firefighters arrived, no one was home, the front door was open, and the apartment was burning. This Court concluded that with or without Russell's prior convictions for crimes of dishonesty, any jury

would have rejected his claim that he was taking a 30-minute shower at the time of the crime. Id. at 438-39.

On the other hand, the resolution of the present case turned largely on Murphy's versus Ong's credibility. The defense persuasively argued that observers were inclined to judge Ong harshly based on his unsavory appearance. 6RP 34. While some witnesses recalled on the stand they noticed red marks on Murphy's neck, others -- including a police officer who was a trained investigator -- did not recall any such injuries. 4RP 226-28, 246, 252-53. Moreover, while Linda Speed could see the beach and saw Ong approach Murphy and later leave the area, she did not notice any physical contact between the two. 4RP 64-66, 75-76, 82.

In a different vein, other cases have found admission of such convictions harmless where the defendant had other prior convictions that were properly admissible. See State v. Calegar, 133 Wn.2d 718, 729, 947 P.2d 235 (1997) (reversing based on erroneous admission of convictions under ER 609(a) and stating "[c]ases finding [such] errors harmless have turned on the fact that the defendant had other prior convictions that were properly admissible -- a factor not present here"). In the present case, however, Ong had no other admissible prior convictions.

There was, therefore, a reasonable probability admission of evidence that Ong was previously convicted for crimes of dishonesty led the jury to doubt his account of the events at the park that day. Given the prejudicial nature of such convictions and the fact that Ong had no other admissible convictions, this Court should decline to find the court's erroneous admission of the convictions harmless. Reversal of Ong's convictions is, therefore, required. Calegar, 133 Wn.2d at 729.

The state might argue that the error was harmless because evidence of Ong's previous incarceration was introduced through Deputy Keegan's testimony. But evidence Ong was previously incarcerated does not have the same damning effect as evidence that he was previously convicted of crimes of dishonesty. Moreover, as discussed in the following section, the introduction of such evidence resulted from the ineffective assistance of Ong's counsel. Any argument by the state the ER 609(b) evidence was cumulative would only enhance Ong's claim of error on that ground.

2. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE OPENED THE DOOR TO A POLICE OFFICER'S TESTIMONY HE USED "MUG SHOTS," INCLUDING ONG'S, IN COMPILING A PHOTO LINEUP.<sup>16</sup>

Ong was deprived of his right to effective assistance of counsel when his attorney asked a question that opened the door to Deputy Keegan's testimony he compiled the photo lineup using jail records of "mug shots." According to defense counsel, identification was not an issue, so there was no legitimate tactical reason to ask such a question. And because Keegan's earlier testimony outside the jury's presence alerted counsel to the problematic nature of such an inquiry, it was ineffective for counsel to inquire as he did. Because defense counsel's deficient representation prejudiced Ong, this Court should reverse his conviction.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant.

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<sup>16</sup> Ong does not challenge the trial court's denial for the motion for mistrial because, as the trial court correctly noted, the question by Ong's counsel invited the response he complained of in his motion for a mistrial. State v. Miller, 66 Wn.2d 535, 537, 403 P.2d 884 (1965).

Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998). Moreover, "tactical" or "strategic" decisions by defense counsel must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."); Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (in a capital case, counsel's failure to investigate mitigation evidence suggested "inattention, not reasoned strategic judgment"); State v. Ward, 125 Wn. App. 243, 249-50, 104 P.3d 670 (2004) (illegitimate tactical choices may be ineffective assistance).

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Counsel's performance was deficient when he opened the door to Deputy Keegan's testimony that the photographs for the photo lineup were "mug shots" obtained from county jail records. 5RP 19. Defense counsel's opening statements and examination of witnesses revealed to the jury Ong's identity as the man at the park would not be an issue. 4RP 39, 69, 143, 149-50. Moreover, Keegan's prior testimony outside the jury's presence revealed he compiled the photo lineup using the jail's database. Although Keegan did not use the term "mug shots" during this prior testimony, he made it clear he used jail records. 4RP 131-46. Even if Keegan's use of the term "mug shots" surprised counsel, counsel could have had no tactical reason to highlight the fact that Ong's photograph was included in the jail records.

Counsel's actions were not only puzzling, they were also prejudicial. According to the defense theory and Ong's testimony, Ong was unusual in his appearance and habits but simply "misunderstood," in contrast with Murphy's testimony portraying him as a predatory criminal. A prior stay at the county jail raised the specter of prior criminal conduct and was squarely at odds with the defense theory of the case. See State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994) ("The state may not show defendant's prior trouble with the law . . . even though such facts might

logically be persuasive that he is by propensity a probable perpetrator of the crime") (quoting Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948)); cf. 5 Karl B. Tegland, Wash. Prac.: Evidence § 404.10, at 498 (5th ed. 2007) (evidence of prior felony convictions is generally inadmissible against a defendant because it is highly prejudicial and deemed too likely to lead the jury to conclude the defendant is guilty). Because defense counsel's performance was both deficient and prejudicial, Ong was denied his right to effective assistance, and this Court should reverse his conviction.

3. THE COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT INDECENT LIBERTIES MUST BE COMMITTED "KNOWINGLY."

The trial court erred when it denied defense counsel's request to instruct the jury on all elements of indecent liberties, the predicate felony for second degree assault. Although the state may argue the court was not required to instruct the jury on the elements of the underlying felony, once the court did so, it should have included all the essential elements.

When read as a whole, jury instructions must fully inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). At a minimum, to satisfy due process, the jury instructions

must correctly state the law and allow the defense to argue its theory of the case. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006).

The trial court has considerable discretion in formulating jury instructions. State v. Rehak, 67 Wn. App. 157, 165, 834 P.2d 641 (1992). But a criminal defendant is entitled to have his jury appropriately instructed as to any defense theory supported by the evidence. State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). Whether the jury instructions adequately state the applicable law is reviewed de novo. Stevens, 158 Wn.2d at 308.

The sufficiency standard for to-convict instructions is particularly stringent, because these instructions are the yardstick by which the jury measures the evidence and determines guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The constitution places the burden on the state to prove every element of the crimes charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Instructions purporting to list all the elements of a crime must in fact do so. State v. Emmanuel, 42 Wn.2d 799, 819-20, 259 P.2d 845 (1953). Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. Clausing, 147 Wn.2d at 626 (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

A person must act "knowingly" to commit indecent liberties. RCW 9.94A.100(1)(b); State v. Thomas, 98 Wn. App. 422, 989 P.2d 612 (1999). Ong proposed an instruction including this element of the underlying offense. 6RP 7, 13 (defense objection); CP 86-87 (defense proposed instructions 2 and 3, inserting "knowingly" requirement and defining "knowingly" or "with knowledge").

The court rejected Ong's argument and instructed the jury on the elements of second degree assault as follows:

To convict the defendant of the crime of ASSAULT IN THE SECOND DEGREE, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 28, 2005, the defendant assaulted Jennifer Murphy;
- (2) That the assault was committed with intent to commit Indecent Liberties; and
- (3) That this act occurred in the State of Washington.

CP 69 (Instruction 10).

In addition, the court instructed the jury "Indecent Liberties" is a felony and that:

A person commits the crime of INDECENT LIBERTIES when he causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person in fear of being kidnapped or that another person will be kidnapped.

CP 70-71 (Instructions 11, 12).

The trial court's failure to instruct the jury on the knowledge element of indecent liberties was error. Having undertaken to instruct the jurors on the predicate felony, the court was not entitled to mislead the jury as to the elements of that felony. Emmanuel, 42 Wn.2d at 819-20; cf. State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (under "law of the case" doctrine, the state assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction).

In response, the state may argue the court was not required to instruct the jury on the elements of the predicate felony, and by providing the additional information not strictly required, the court could not have erred. Counsel is, however, unaware of any published case explicitly stating such instructions are *not* required when the state alleges second degree assault based on intent to commit a felony. On the other hand,

various unpublished cases cite State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985), a burglary case, in support of this proposition.<sup>17</sup>

Bergeron holds the particular crime a burglar intended to commit inside burglarized premises is not an element of burglary that must be included in the information or jury instructions. 105 Wn.2d 16. But in the case of burglary, "any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." RCW 9A.52.040; Laws of 1975, 1st Ex. Sess., ch. 260, p. 840 (replacing *presumption* of criminal intent with *inference*). No such inference applies here. Moreover, Bergeron does not address the situation in which the court has undertaken to instruct the jurors as to the elements of the underlying offense but does so inaccurately.

Ong also anticipates the state will attempt to argue any instructional error was harmless. But under the circumstances, the state cannot demonstrate the absence of prejudice. Clausing, 147 Wn.2d at 626. Instead, Ong can demonstrate omission of the knowledge requirement likely

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<sup>17</sup> Cf. State v. Hartz, 65 Wn. App. 351, 354, 828 P.2d 618 (1992) (where charge is felony murder, *charging document* need not list elements of underlying felony).

led to juror confusion and precluded Ong from arguing his theory of the case.

Ong testified he touched Murphy's knee and did so in a friendly, non-sexual, manner. 5RP 200, 225. The jury may have convicted Ong of second degree assault based on "intent to commit indecent liberties" finding his touch was "intentional," and even "forcible," but not "knowingly" sexual in nature. Yet to commit indecent liberties, the individual must "knowingly" cause sexual contact to occur. RCW 9.94A.100(1)(b).

Ong's counsel argued that Ong misperceived that Murphy was interested in him romantically, although upon touching her knee, he was quickly disabused of that notion. 6RP 44-45. A proper instruction incorporating the mental element of indecent liberties would have permitted Ong to argue he was not guilty simply because *Murphy* perceived his touch as sexual in nature.

Even if this Court follows Bergeron in determining that, in general, it is unnecessary to instruct the jury on the elements of the underlying felony, the court indeed instructed the jurors on the elements of the underlying felony. Because the court did so, Ong was entitled to a correct instruction on these elements in order to avoid jury confusion. Such an

instruction was necessary for Ong to argue his theory of the case. Because the state cannot affirmatively show the instructional error was harmless, Ong's count 1 conviction should be reversed.

4. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE BY INTERRUPTING DEFENSE COUNSEL'S CLOSING ARGUMENT ABSENT ANY OBJECTION BY THE STATE.

The trial court's interruption of defense counsel's legally permissible closing argument was an unconstitutional comment on the evidence. Because such comments are presumed prejudicial, Ong's convictions should be reversed.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. 4, § 16. The purpose of article 4, section 16 "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted.'" Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971) (quoting Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655, 18 A.L.R.2d 983 (1950)). "To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements." State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

While not identical, the situation in Arensmeyer is instructive and this Court should follow the result in that case. The Arensmeyer court deemed the trial court's interruption of counsel during closing argument - - to say counsel was mistaken as to the evidence -- an unconstitutional comment on the evidence. 6 Wn. App. at 120.

Arensmeyer was charged with "willfully opposing, hindering or delaying a member of the police force in the performance of his official duty." Id. at 117. Evidence as to the age, training, and experience of the police officers involved in the case was at issue. When the court interrupted, defense counsel was interpreting this evidence in a manner favorable to his client, which counsel was permitted to do. Id. at 121. While the trial court was duty-bound to restrict counsel's argument to the facts in evidence, "[t]he court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." Id. Thus, when the trial court interrupted, it commented on the evidence by revealing to the jury what it believed the evidence to mean. Id.

The situation in Ong's case is similar. Defense counsel argued that the evidence supported Ong's theory of the case that Ong only touched Murphy briefly. 6RP 52-53. For example (1) certain witnesses, including

Deputy Dick, did not observe injuries to Murphy or D.W. and (2) Linda Speed heard screaming and saw a man and a woman on the beach, but never saw contact between the two. 6RP 53.

Counsel stated, "Mrs. Speed's testimony that yes, she heard screaming and she saw a man and a woman on the river bank but he never touched anyone, he just left --" 6RP 53. The state did not object. But the court interrupted defense counsel, stating,

Well, the jury's going -- folks again,[<sup>18</sup>] you're the sole judges of what the facts are so disregard any remarks that don't conform to your finding of the facts.

6RP 53.

The court's statement -- the only such interruption during relatively lengthy closing arguments by both parties -- conveyed the court's opinion on the merits of counsel's argument regarding Linda Speed's observations. Even if the court objected to an inference Speed viewed the entire interaction between Murphy and Ong, it was just as likely that defense counsel sought to argue Speed would have noticed a lengthy struggle between Ong and Murphy, had one occurred. Given Speed's testimony that she was in a position to see the beach but did not notice contact

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<sup>18</sup> During the state's closing argument the court instructed jurors they were the sole judges of fact after defense counsel objected that the prosecutor had expressed an opinion. 6RP 31-32.

between Ong and Murphy, the defense should have been permitted to make such an argument. 4RP 64-66, 75-76, 82.

A comment on the evidence is deemed prejudicial and is reversible error unless it affirmatively appears from the record that appellant could not have been prejudiced by the comment. Arensmeyer, 6 Wn. App. at 121-22 (citing State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963)). The court's interruption of counsel's argument while reciting facts and inferences in support of the defense theory clearly conveyed its negative attitude toward the defense interpretation of the facts. This is improper. Arensmeyer, 6 Wn. App. at 121; see also State v. Perez-Cervantes, 141 Wn.2d 468, 491, 6 P.3d 1160 (2000) (court may not exclude defense arguments unless they "misrepresent the evidence or the law, introduce irrelevant or prejudicial matters, or otherwise confuse the jury").

Here, as in Arensmeyer, Ong was prejudiced by the court's unsolicited comment, and reversal is required.

5. THE CUMULATIVE EFFECTS OF THE ERRORS DISCUSSED ABOVE DENIED ONG HIS RIGHT TO A FAIR TRIAL.

It is well settled that in Washington, "The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require

a new trial." State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963);  
see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

In this case, each of the errors asserted above individually requires reversal of Ong's convictions. Should this Court determine, however, that these issues do not individually require reversal, in combination they required reversal of Ong's convictions.

D. CONCLUSION

The trial court improperly admitted Ong's remote, presumptively inadmissible convictions for crimes of dishonesty, a prejudicial error. In addition, Ong received constitutionally inadequate assistance of counsel because counsel's unreasonable actions opened the door to the introduction of prejudicially harmful evidence. And because the trial court's instructions misled the jury, prejudice is presumed. Finally, the court's interruption

of defense counsel in closing argument was an unconstitutional comment on the evidence. For this reason too, prejudice is presumed. This Court should, accordingly, reverse Ong's convictions.

DATED this 14<sup>TH</sup> day of January, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) COA NO. 37752-7-II  
 )  
 STEVEN ONG, )  
 )  
 Appellant. )

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STATE OF WASHINGTON  
2009 JAN 14 PM 4:35

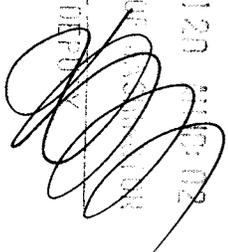
**DECLARATION OF SERVICE**

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 14<sup>TH</sup> DAY OF JANUARY, 2009, 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.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 14<sup>TH</sup> DAY OF JANUARY, 2009.

x Patrick Mayovsky