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COURT OF APPEALS

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STATE OF WASHINGTON

No. 39778-1-II

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COUNSEL

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

STATE OF WASHINGTON,

Respondent,

v.

Feliz R. Mejia, III,

Appellant

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

The Honorable, Judge Richard F. Hicks
Cause No. 09-1-00547-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred by denying Mejia his right to an open public trial by questioning a potential juror during *voir dire* in chambers without first engaging in a *Bone-Club* analysis on the record.

2. Whether Mejia was denied effective assistance of counsel when defense counsel failed to object to the court's lack of *Bone-Club* analysis on the record.

3. Whether the trial court's admission of a letter, of which the timing of authorship was contested, was an abuse of discretion.

B. STATEMENT OF THE CASE.

1. The State accepts the defendant's statement of the case with the following corrections, clarifications, and additions:

Mejia stated he wrote the letter approximately 18 months prior to the attack; the victim was deployed to Iraq for the majority of that period. [RP 130-31]. Of the four assaults discussed, the third assault occurred just prior to her deployment and the last (the instant charge) occurred shortly after her return from deployment. [RP 130-31]. Mejia stated the letter was one of three written in May 2007 as part of a treatment regimen. [RP 26]. He testified the other two letters were expressions of remorse and provided an explanation for his feelings. [RP 26]. The letter produced was an original; the other letters were not produced. [RP 26, 38-39].

Mejia admitted the letter was both an accurate and meaningful expression of his feelings toward his wife after the third assault where he strangled her until she was unconscious. [RP 29, 49]. Trina Mejia testified, on the night of the attack, she questioned him about his fidelity, and Mejia responded by coming at her looking like he wanted to fight, swearing, and breaking furniture. [RP 131-138, 140-41]. She said she sent the kids upstairs just prior to because she knew they were going to have a fight. [RP 131-138]. She then testified her husband always kept a loaded gun in the house and during the argument, he grabbed her by the throat with one hand and then, with his other hand, put the loaded weapon (with no manual safety mechanism) to her head and told her he was not going to go back to jail. [RP 131-138, 140-41].

She testified, after her husband was apprehended, she began cleaning the house and found the letter in the garage. [RP 156]. She also testified she had searched through Mejia's garage items at least twice prior, the most recent being within the week prior to the assault, and never seen the letter. [RP 159].

Responding officers and the forensics weapons analysts described the type and functionality of the weapon. [RP 194-95, 258, 264].

C. ARGUMENT

1. The State concedes the trial court denied Mejia his constitutional right to an open public trial when it questioned a potential juror during *voir dire* in chambers without first engaging in a *Bone-Club* analysis on the record.

Whether a defendant's constitutional right to a public trial has been violated is a question of law that is subject to de novo review on direct appeal. *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006). The right to a public trial is guaranteed by both the Sixth Amendment to the United States Constitution and article 1, section 10 of the Washington Constitution. *Id.* at 174. The right exists to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996) (citing *Waller v. Georgia*, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))). The United States Supreme Court has stated that "'judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (quoting *Estes v. Texas*, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J.,

concurring)). The remedy for a violation of the right to a public trial is reversal and remand for a new trial. *Strode*, 167 Wn.2d at 222; *State v. Wise*, 148 Wn. App. 425, 433, 200 P.3d 266 (2009).

The right to a public trial is not absolute, however; the courtroom may be closed only for the most unusual of circumstances. *State v. Heath*, 150 Wn. App. 121, 715, 206 P.3d 712 (2009); *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006); *State v. Malone*, 20 Wn. App. 712, 582 P.2d 883 (1978); Likewise, a trivial closure “does not necessarily violate a defendant’s public trial right.” *Brightman*, 155 Wn.2d at 517. A trial court has wide discretion to conduct a trial with “dignity, decorum and dispatch.” *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969); *see also State v. Towne*, 13 Wn. App. 954, 538 P.2d 559 (1975); *State v. Pacheo*, 107 Wn.2d 59, 726 P.2d 981 (1986); *State v. Russell*, 141 Wn. App. 733, 172 P.3d 361 (2007).

The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct a five-factor analysis required by *State v. Bone-Club*. 128 Wn.2d 254, 906 P.2d 325 (1995); *see Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of the closure and the public.
5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d at 258-59.

Following the same-day decisions in *State v. Momah* and *Strode*, whether the application of these factors was mandatory prior to closure of proceedings was unclear. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *Strode*, 167 Wn.2d at 222. Shortly thereafter, the United States Supreme Court decided *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010), quoted *Waller*, and stated that the public trial right "may give way in certain cases to other rights or interest, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Presley*, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 45).

In the instant case, the State concedes, based on the record that 1) the trial court effectively closed the proceedings to the public by removing the questioning to chambers during *voir dire*, 2) the issue was neither one of a ministerial or legal nature and, thus, the right to public trial applied, and 3) the trial court failed to conduct a *Bone-Club* analysis on the record prior to the closing. *Strode*, 167 Wn.2d at 222; *Easterling*, 157 Wn.2d at 171; *Brightman*, 155 Wn.2d at 506; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *Heath*, 150 Wn. App. at 715; *cf. Momah*, 167 Wn.2d at 140; *Wise*, 148 Wn. App. at 425; *State v. Sadler*, 147 Wn. App. 97; 193 P.3d 1108 (2008). The appropriate remedy is to reverse and remand the case for a new trial.

2. Defense counsel was not ineffective for failing to object to the trial court's questioning of a juror in chambers without first engaging in a *Bone-Club* analysis on the record.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d

668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. *State v. Renfro*, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); *State v. Bradbury*, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688-689; see *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." *Strickland*, 466 U.S. at 697.

First, the State submits defense counsel was not deficient for failing to object. As noted, the test for deficiency is not whether defense counsel actually erred, but rather whether counsel's

performance fell below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. In the instant case, the State submits sound trial strategy existed for defense counsel to agree to removal of the juror questioning to chambers. The record indicates that the intent of everyone present, to include defense counsel, was to insulate the potentially contaminated juror from the rest of the venire in an attempt to protect the defendant's right to a fair and impartial trial. One could reasonably view this as a legitimate trial strategy and the fact that the court failed to engage in a *Bone-Club* analysis—the court's responsibility, not the attorneys', does not automatically result in objectively unreasonable performance by defense counsel. To that end, the fact that the objection did not occur to any of the legal professionals present is further evidence that the simple failure to object, even if potentially successful, does not rise to the level of objectively unreasonable performance. The State submits if it were as deficient as Mejia now claims, then either the other attorney or the trial court would have realized the error.

Moreover, *Neidigh* notes that "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." 78 Wn. App. at 71 (internal quotation omitted). Here, the

purpose of the questioning was wholly unrelated to “testimony central to the State’s case[.]” *Id.* Instead, the issue was whether a potential juror saw the defendant in handcuffs. While the issue was important to the defendant’s right to a fair and impartial trial (i.e. whether the potential juror would be biased by the viewing and therefore contaminate the rest of the venire), the questioning was inarguably unrelated to any of the State’s testimony. Rather, the sequestered questioning was the direct result of an effort by all parties involved, particularly defense counsel, to ensure Mejia received a fair and impartial trial. The parties’ and court’s intent was not only unrelated to the State’s evidence, it was directly related to a concerted effort by the court to protect the defendant’s constitutional Sixth Amendment right. This is a legitimate trial strategy and Mejia’s argument on this prong of *Strickland* fails.

Second, when a defendant’s right to a public trial is violated by failing to engage in a *Bone-Club* analysis prior to the closing of fact-finding proceedings, a “structural” error occurs. *Strode*, 167 Wn.2d at 231; *Orange*, 152 Wn.2d at 814. Such an error is presumptively prejudicial. The State submits, however, that the nature of the prejudice presumed by the error is not the same as the prejudice considered by ineffective assistance of counsel. *Pirtle*

notes that prejudice exists in an ineffective assistance of counsel claim where “but for” the deficient performance, the outcome would have been different. *Pirtle*, 136 Wn.2d at 487. Here, the record demonstrates that had counsel objected and the trial court engaged in a *Bone-Club* analysis, the trial result would be the same.

If counsel had raised the objection, only one of two things could have occurred: 1) the court could have engaged in the analysis and still moved the proceedings to chambers following it, or 2) the court could have engaged in the analysis, removed the rest of the venire panel from the proceedings so as to contain the contamination, and then held the proceeding in the open courtroom. In either event, the juror would still have been quarantined, questioned, and subsequently dismissed to protect the defendant in an abundance of caution. Whether that questioning occurred in an open courtroom or in chambers, the outcome of the trial would be unaffected.

The failure to engage in the analysis did not affect the evidence presented to the jury by either counsel, nor did it affect the decision to retain or dismiss the infected juror; a common sense review of the intent of *Strickland's* “but for” rule demonstrates the lack of prejudice to the defendant, even if the failure results in

reversible error on its own merit otherwise. In this case, the prejudice was to the public, not the defendant. In further support, the State was unable to locate a single case where, even lacking objection by defense counsel, a Washington court found trial counsel ineffective for failing to object on exactly this issue.

Seemingly, the court has only found ineffective assistance of counsel where appellate counsel has failed to raise the issue on direct appeal. *Orange*, 152 Wn.2d at 814. This is because, as the *Orange* court stated, “had Orange’s appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in *Bone-Club*, remand for a new trial.” *Id.* No such result would have occurred here if defense counsel had raised the issue during trial. In fact, one could argue that had defense counsel raised the issue, then Mejia would not be eligible for a new trial now. At the very least, however, defense counsel’s failure to raise the issue at trial does not create prejudice of the nature intended by *Strickland*—the outcome of his trial would not have been any different. Thus, the State submits Mejia fails to

satisfy the second prong of *Strickland* for ineffective assistance of counsel.

Because Mejia fails to meet both prongs of *Strickland*, he fails to establish ineffective assistance of counsel and his argument on this issue fails.

3. The trial court did not abuse its discretion in admitting a letter written by Mejia that was reasonably related to his intent to inflict great bodily harm on his wife during the assault.

Only relevant evidence is admissible. ER 402. Relevant evidence is that which tends “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.” ER 401. “Even a minimal logical relevancy is adequate if there exists a reasonable connection between the evidence and the relevant issues.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426 (1994); see *State v. Bebb*, 44 Wn. App. 803, 814, 723 P.2d 512 (1986), *aff’d*, 108 Wn.2d 515, 740 P.2d 829 (1987); 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE, §83, at 170 (2d ed. 1982). Relevant evidence may be excluded if a court deems the prejudicial effect substantially outweighs the probative value. ER 403.

An appellate court reviews, *de novo*, a trial court's admission of evidence using an abuse of discretion standard. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). An abuse of discretion exists where the court's exercise of it is manifestly unreasonable or based on untenable grounds or reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." *Id.*

Mejia contends the trial court abused its discretion by admitting a letter which expressed the defendant's "hate" for the victim no less than three times, as well as his intent to "hurt[]" and "kill[] [her]," because the State could not definitively prove when the defendant wrote the letter. [RP 157]. While Mejia does not deny the authenticity or authorship of the letter, he argues the uncertainty of its timing means its relevance was conjectural at best, thus any potential relevance was substantially outweighed by its prejudicial

value and the resulting error was not harmless. The State disagrees.

First, Mejia alleges he wrote the letter in response to the assault occurring just prior to the instant case. [RP 36]. Notably, the assault preceding the instant charge was the second most-violent (in a series of four assaults on the victim). Thus, the State offered evidence that, at the longest, the letter was written approximately 18 months prior to the attack—the majority of which the victim was deployed to Iraq, and at the soonest, it was written just prior to the attack. [RP 130-31]. The only existing evidence that the letter was potentially written 18 months prior to the instant attack, was Mejia's testimony of such. He stated the letter was one of three written in May 2007 as part of a treatment regimen. [RP 26]. The other two letters allegedly expressed remorse and provided an explanation for his feelings, although they were never produced. [RP 26].

Division One rejected a similar argument in *State v. Jones*, though. In that case, Division One held no abuse of discretion occurred where the trial court admitted Jones' questionably timed palm print found at a crime scene. 26 Wn. App. 551, 552-53, 614 P.2d 190 (1980). The State argued the palm print was relevant to establishing identity, but Jones argued the finding of his print

should be inadmissible because it was from three weeks prior to the murder, and thus, it was not relevant to the events of that night. *Id.* at 553. He argued the inability of the State to prove when the palm print was made should bar the admission of the print. *Id.*

The *Jones* court said, however, that “[t]he relevance and admissibility of evidence are within the trial judge's discretion.” *Id.* citing *State v. Schimmelfennig*, 92 Wn.2d 95, 594 P.2d 442 (1979). “[T]he fact that Jones' palm print was found at the scene of the murder was both relevant and admissible to establish his identity as the killer. Although [he] testified that the print was made [three] weeks prior to the date of death, the jury could disbelieve him.” *Id.* at 553; see *State v. Kendrick*, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987) (no abuse of discretion where trial court admitted photographs of defendant's tattoos depicting stabbings, where the victim was stabbed repeatedly, because the tattoos were relevant to establishing identity and not unfairly prejudicial); cf. *State v. Suarez-Bravo*, 72 Wn. App. 359, 364-65, 864 P.2d 426 (1994) (court abused its discretion where it allowed evidence relating to high-crime level of defendant's residential area because it was not logically relevant to the charges and unfairly prejudicial). In discussing *Jones*, Division Three said the defendant's explanation

for the existence of the palm print “went only to the weight of the evidence[,]” not its admissibility. *Bebb*, 44 Wn. App. at 814.

In *Bebb*, Division Three found admission of Bebb’s statements against his interest proper because, although vague, it was still relevant. 44 Wn. App. 803, 814, 723 P.2d 512 (1986), *aff’d*, 108 Wn.2d 515, 740 P.2d 829 (1987). The *Bebb* court said the statement, “when viewed in conjunction with the other evidence, [had some tendency] to make Mr. Bebb’s guilt more probable.” *Id.* It further stated that

[w]hile the statement does not specifically refer to the shooting of [the victim], it is reasonable to connect the statement with the incident. . . [and] [c]ounsel was free in argument to attack the weight of the evidence by pointing out that the ‘unknown crime’ referred to in the statement could have been a reference to something other than the murder.

Id.

In the instant case, in assessing admissibility the trial court questioned the defendant’s statements and asked, if true, then why was only the letter expressing a deep-seated hatred and intent to kill found in his house; where were the other two letters in the alleged series? [RP 38-39]. The court further questioned why the original letter, addressed to the victim and signed by the defendant, was in the house and not in the treatment provider’s file if the facts

were as Mejia claimed. [RP 38-39]. The State submits one can infer the trial court doubted the veracity of Mejia's claims, but even taking them as true, it determined the timing issue went to the letter's weight, not its ultimate admissibility. [RP 42]. The nature of the evidence was neither unduly inflammatory—no more so than that the court noted the jury would likely hear—nor likely to prevent the jury from making a rational decision. It was directly in line with the evidence deemed admissible in *Jones* and *Bebb* for the same reasons.

The State offered the letter to prove intent to cause great bodily harm. [RP 13]. This was a material assertion which the State needed to establish in order to prove first degree assault while armed with a firearm. [RP 13]; RCW 9A.36.011; RCW 9A.04.110. Mejia claims the court's reasoning, that the letter provided a window "into the mind and subconscious" of Mejia, is unpersuasive. The State submits, however, that Mejia's position is not one the trial court was either required or seemingly inclined, to share. [Appellant's brief, 15]. The court apparently found the probative nature of the letter, regarding the defendant's specific intent, significantly persuasive.

Mejia admitted the letter was both an accurate and meaningful expression of his feelings toward his wife during their relationship, specifically in the wake of the prior domestic violence incident. [RP 29]. Contrary to Mejia's argument then, the letter was expressly relevant to the tendency of making it more or less likely Mejia intended to cause the victim great bodily harm. See ER 401.

As the trial court observed, it is nearly impossible to know a person's specific intent, much less prove it, unless that person actually expresses it—like writing it in a letter, for example. [RP 40]. After finding the letter was authentic by a preponderance of the evidence, the trial court noted the best proof of Mejia's specific intent, otherwise, would be "the pulling of the trigger" (which, unless the weapon misfired or jammed, would have resulted in an entirely different charge). [RP 40].

Regarding the timing and circumstances of the letter, the trial court said,

[T]his letter provides [a] window [into the defendant's mind] even if [his] testimony is taken as completely true. He's admitting the intense hate. If you look at that letter, not only does it have very emotionally charged content, he clearly even loses control of the pen on the paper as the intensity builds and his handwriting deteriorates here, so I agree the letter is very emotionally charged. It is relevant to what the State has to charge insofar as specific intent. . . . The

question becomes is it unduly prejudicial in context of its probative value. Here, I don't know of any other way nor has any other way been suggested to me, to prove the intent in the absence of the actual pulling of the trigger. . . . so I think it has high probative value and, in light of the fact that the State is going to proffer testimony that alleges Mr. Mejia actually put a loaded gun to the head of his wife, this additional evidence isn't any more shocking than that act, if the jury believes it, and so in this case I would admit the letter for the reason offered by the State, to show his intent . . . which appears to have been ongoing. . . . It is an admission against his interest, and I think the remoteness in time, goes perhaps to the weight it should be given.

[RP 41-42]. The evidence demonstrated that the letter was authentic, it was relevant, it was material to the State's case, and while it was prejudicial, it was no more so than the evidence of Mejia choking his wife and putting a loaded weapon (with no manual safety mechanism) to her head while their two children sat upstairs. [RP 131-138, 140-41, 194-95, 258, 264].

The State submits the question of authorship does not, alone, outweigh the probative value of admitting the letter. Rather, the circumstances and timing of the writing went to the weight the trier of fact gave the letter. The defense was free to argue this point during the trial and, indeed, did so. [RP 378]. The fact that the jury did not find Mejia's argument about the circumstances surrounding the letter persuasive only supports the State's theory the letter was

written immediately preceding the attack and not 18 months prior as he claims.

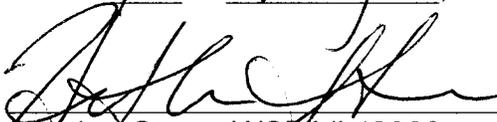
Moreover, even if it was error to admit the letter based on the statements of Mejia during *motions in limine*, it was harmless error because the victim's testimony at trial cast further doubt on Mejia's claims at the suppression hearing. She testified, after her husband was apprehended, she began cleaning the house and found the letter in the garage. [RP 156]. She also testified she had searched through Mejia's garage items at least twice prior, the most recent being within the week prior to the assault, and never seen the letter. [RP 159]. So, even if the trial court erred (which the State maintains is not the case) in admitting the letter based on Mejia's testimony, then the error was harmless because the victim's testimony supported the doubt expressed by the trial court as to the truthfulness of Mejia's claims. While the impact may have been significant, the State submits that, as the court predicted, it was no more impacting than the image presented by the victim of being held by her neck by her husband and with a loaded .40 Glock pistol pointed directly at her head with her children nearby. [RP 131-138, 140-41, 194-95, 258, 264].

In the end, the evidence raised an issue of fact for the jury to decide and weigh in relation to the remainder evidence. The evidence was ample to support the court's finding that the letter was authentic, relevant, material, and substantially more probative than prejudicial in demonstrating the defendant's specific intent. The court admitted it solely for that purpose, defense argued against it for that purpose, and there is no evidence or argument from Mejia that it was improperly used otherwise. Mejia's argument on this issue fails.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 20th of May, 2010.


Heather Stone, VSB# 42093
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

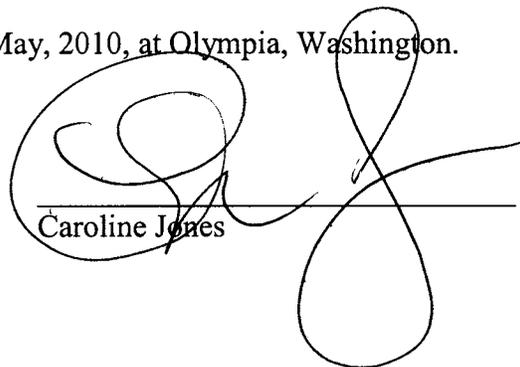
- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE WA 98340-0510

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of May, 2010, at Olympia, Washington.



Caroline Jones