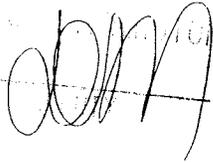


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COURT OF APPEALS

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STATE OF WASHINGTON  
BY 

40512-1-II

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

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State of Washington  
Respondent

v.

**RYAN R. JACKSON**  
Appellant

40512-1-II

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On Appeal from the Superior Court of Pierce County

Cause No. 09-1-00177-4

The Honorable Susan K. Serko

---

**BRIEF OF APPELLANT**

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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. The evidence was insufficient to identify Appellant as the guilty party.
2. Appellant was unlawfully seized in violation of art 1, § 7 and the Fourth Amendment.
3. The court erroneously denied a mistrial when Appellant was observed in shackles by identifying witnesses, forcing Appellant to choose between fundamental trial rights in violation of Const. art. 1 § 22 and the Fifth Amendment.
4. The court failed to ensure juror unanimity in violation of Const. art. 1 § 22 and the Fifth Amendment.
5. Appellant was denied effective assistance of counsel in violation of the Sixth Amendment.
6. The State violated the confrontation clauses of Washington Constitution article I, section 22 and the Sixth Amendment.
7. The court prevented Appellant from presenting a complete defense in violation of Const. art. 1, § 22 and the Sixth Amendment.
8. The court erroneously admitted irrelevant evidence under ER 404(b) and failed to balance probative value versus prejudice.
9. The court diminished defense counsel in the eyes of the jury in violation of Sixth Amendment right to effective counsel.
10. The cumulative effect of error denied Appellant a fair trial in violation of Const. art 1, § 22 and the Fifth Amendment.

B. Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to prove that a person who attempted to rob the alleged victims was Appellant?
2. Did the police have lawful grounds to seize Appellant?
3. Was a mistrial necessary to preserve Appellant's fundamental trial rights after he was observed in shackles by identifying witnesses?
4. Could some jurors have convicted Appellant based on an uncharged incident, rather than the charged offense?
5. Did Appellant receive ineffective assistance of counsel where defense counsel:
  - (a) Failed to seek suppression of evidence obtained in Jackson's unlawful search and seizure?
  - (b) Failed to object to numerous prejudicial evidentiary errors?
6. Did evidence erroneously admitted over defense objections deny Appellant a fair trial?
7. Did excluding written statements that were not offered for their truth and that were relevant to the vital issue of witness credibility deny Appellant's right to present all relevant, admissible evidence in his defense?
8. Did the court violate ER 404(b)?
9. Did making defense counsel repeat a futile ER 404(b) objection in front of the jury gratuitously diminish counsel's credibility and effectiveness?
10. In the event the Court concludes that no single error requires reversal, did the cumulative weight of error deny Appellant a fair trial?

III. **SUMMARY OF THE CASE**

Appellant, Ryan Raynard Jackson, bore a superficial resemblance to a description the police had received of a black man wearing a blue and white shirt who tried to rob Kelly Crithfield on a Tacoma street at 2:00 a.m. on September 19, 2009. The police seized Jackson at 3:15 a.m. as he stood in a group of four or five men who were conversing in an alley. In a single-suspect field show-up, Crithfield identified Jackson as the man who had tried to rob him at gunpoint a few blocks away.

Jackson asserts the following reversible errors: Jackson was seized without sufficient grounds; the evidence was not sufficient to support his conviction; the trial court should have declared a mistrial when the in-court identifications were irreparably compromised; the court failed to give a necessary unanimity instruction; defense counsel rendered ineffective assistance that resulted in a miscarriage of justice.

IV. **STATEMENT OF THE CASE**

Kelly Crithfield dialed 911 at 2:00 a.m. on the morning of September 19<sup>th</sup>, 2009. RP 40. He reported that two men had accosted him and Jerry Little and tried to rob them. Crithfield said one of the men brandished a gun while demanding money. RP 38-42. Instead of complying, Little ran into the street and starting yelling for help from the

people walking nearby, and Crithfield called 911. RP 39-40. Both would-be robbers fled in a black vehicle that drove by and picked them up. RP 42. About 45 minutes later, while Crithfield and Little were sitting on the steps of Crithfield's nearby apartment, the same two men walked by, appeared to recognize Crithfield and Little, and again drove away in the black vehicle. RP 41-42.

City of Tacoma Police Patrol Officer Douglas Billman responded to Crithfield's 911 call after the first encounter. Crithfield testified, "I believe I told [the police] that [the gunman] was a 30-year-old African American male with a blue and white checkered short-sleeved shirt, collared shirt." Billman called in this description to an operator who included it in a CAD<sup>1</sup> report. This was broadcast to alert officers to be on the lookout for "two black males in their 30's one wearing a blue and white plaid shirt and dark blue pants." Billman did not mention a white tank top or tennis shoes. RP 167. The police were also told to be on the lookout for the suspects' black vehicle. RP 168.

Crithfield told Billson the gunman was about 5' 8" tall. RP 167. Little said he was 5' 7". RP 81, 89. Little particularly noticed the man's slight, youthful build. RP 80.

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<sup>1</sup> Computer Assisted Dispatch. RP 161.

At 3:15 a.m. Billman and Officer Shaun Spencer approached a group of four or five men standing and talking in an alley a few blocks away. One of them was Jackson. RP 106. Jackson was 45 years old, barely 5' 5" tall, and balding. RP 117, 130, 154, 234. His shirt was blue and white, but it was not checkered. It was striped. RP 153. Billman told Jackson he needed to talk to him. Jackson started to walk away, but Billman ordered him to stop. RP 141. Billman and Spencer detained Jackson until Crithfield arrived. RP 142.

The police paraded Jackson for Crithfield's inspection. Jackson was next to a police patrol car, in handcuffs, and illuminated by a blaze of floodlights. RP 44-45, 134. Crithfield was "100% certain" Jackson was the gunman. RP 126. (Little had driven home after the second sighting and refused to come to the show-up. RP 85.)

On February 2 and 3, 2010, Jackson was tried by jury on a single count of attempted first degree robbery. CP 1. His defense was a general denial. CP 4, 26.

At trial, Crithfield and Little contradicted each other's stories. Crithfield said the man came up from behind and walked in between himself and Little — twice. RP 48. Little said the man was standing in front of them and they walked up to him. RP 78. Crithfield said the gun was pointed directly at his stomach. RP 39. Little first said the gun was

pointed directly at him. RP 80. Then he changed his mind and said the gunman pointed the gun only at his own self. RP 81. Little could tell the difference between a pistol and a revolver, and this gun looked like a revolver. RP 82. Crithfield's trial testimony contradicted what he testified he said to Billman. He now remembered that the robber, who was standing only a foot away from him, was only a couple of inches shorter than his own 6' 1". RP 49.

Crithfield and Little both gave written statements at the scene. Crithfield's was almost illegible and Little's was completely illegible. Defense counsel wanted these statements admitted on the issue of credibility. Both men claimed to have drunk just a couple of beers at the tavern where they socialized from 10:30 p.m. to closing time, but two police officers gave evidence suggesting both were somewhat impaired. Both men exuded the odor of intoxicants. RP 155. Crithfield looked and smelled like he had been drinking. RP 87. Crithfield also was "kind of loud like people get when they drink a little bit." RP 156.

The court admitted the statements for illustrative purposes only. They were shown to the jury from a distance, but the jurors were not allowed to read them. RP 111, 113.

Robert Ochoa testified. He had been approached by Jackson and another black male as he was getting out of his car with his friend, Tucker.

RP 130. Jackson asked for a beer from a six-pack Ochoa was carrying, but Ochoa refused. Jackson then asked Ochoa for a cigarette. Ochoa gave him one but did not have a light. Jackson started pulling things out of his pockets looking for his lighter, and inadvertently displayed a gun. Ochoa, who was familiar with handguns, thought it looked like a .25 caliber semi-automatic pistol. RP 131. Ochoa said, “like, whoa,” but Jackson assured him he was not threatening him with the gun, he had not meant to show it. RP 131. Jackson’s companion walked away when the gun came out. RP 131. Jackson then asked Ochoa for some change, and Ochoa gave it to him. Ochoa said he gave the money as a free gift that had nothing to do with the gun. RP 133. Then a homeless person joined the group, and Jackson yelled at him to back off. RP 132. Ochoa suggested that he put the gun away before he got in trouble, and Jackson tucked it in his waistband just as the police showed up. RP 132.

The police allowed Ochoa to leave, but came back when he saw the police had Jackson and the homeless man in handcuffs. RP 134. He told the police what had happened.

Ochoa is the one person known for certain to have actually interacted with Mr. Jackson. He estimated Jackson’s height as 5’ 5”, which corresponds to Jackson’s driver’s license. RP 117, 154.

Over a defense ER 404(b) objection (RP 117-21), the court admitted Ochoa's evidence under the res gestae exception, to "complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." RP 122. The court did not balance the probative value of this against its potential for unfair prejudice or its tendency to show propensity. Defense counsel did not ask for a limiting instruction and the jury did not receive one. RP 130.

Officer Billman testified that Crithfield told him the gunman was wearing a blue and white checkered shirt with short sleeves. RP 42. This description corresponds to the CAD<sup>2</sup> report Billman later read into evidence: "Two black males in their 30's one wearing a blue and white plaid shirt and dark blue pants." RP 167.

When he testified without consulting the CAD, however, Billman thought he recalled Crithfield describing the suspects as "two black males about 30 years of age," the smaller wearing a "blue and white striped shirt with blue Dickie type pants." RP 102. This corresponds to Billman's later description of Jackson when he was arrested. Billman testified on direct that when he seized Jackson at the Ochoa scene, he was wearing "the blue and white shirt, the white tank top, sleeveless tank top, the dark pants, and the tennis shoes." RP 141. On cross, Billman described

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<sup>2</sup> Computer Assisted Dispatch. RP 161, Ex. 7 and 8.

Jackson's clothes as a blue and white striped Pendleton shirt, a sleeveless tank top, dark blue Dickie type pants and some dark tennis shoes. RP 153.

Officer Jepson also described Jackson at the show-up, but his testimony was no help at all. Jepson first said Jackson had on a blue and white plaid flannel-type shirt, but then he said it was a blue and white "striped flannel, plaid, pattern-type shirt." RP 126-27.

Officer Spencer's testimony was bizarre. He thought he responded to Sixth and St. Helens at 2:00 a.m. that night. RP 57, 58. This would have been Crithfield's location. RP 38. But, after reading his report, Spencer discovered he actually responded to the Ochoa location at 501 South 7<sup>th</sup>, where police contacted Jackson at 3:16 a.m., not 2:00 a.m. RP 58, 59, 166. Spencer also thought Exhibit 6 was a report he wrote himself. RP 57. In fact, it was Crithfield's statement. RP 111, 158. Spencer testified that a second suspect was shown to the victims (plural) at the show-up but that the victims could not identify him. RP 58, 63. In reality, Crithfield came to the show-up alone and was shown only a single individual. RP 44, 52, 85. Spencer first said he had no contact with Ochoa and Tucker. RP 63. Then he said he was present when both Ochoa and Tucker identified Jackson. RP 64.

After both sides rested, defense counsel alerted the court to an apparent due process violation outside the courtroom. An officer had

transported Jackson to court in shackles. As they entered the courtroom, they walked past the lay witnesses sitting outside. The court voir-dired the officer and learned that Crithfield, Little and Ochoa had all seen Jackson in shackles before they testified. RP 193, 199.

All three had made courtroom identifications of Jackson. RP 45, 85, 135. This put trial counsel in a quandary. RP 194. On the one hand, the jury needed to know the in-court identifications were compromised. On the other hand, Jackson would be prejudiced by informing the jury he was in custody and had been transported in shackles. The problem was particularly troubling with respect to Little, who had not seen the suspect since the incident the previous September. RP 194.

Counsel moved for a mistrial. The court denied the motion. Never having heard of a case where a mistrial was granted because the witnesses saw the defendant in shackles, the judge thought the Court of Appeals should take care of it. RP 194.

In closing, arguments, the prosecutor made numerous references to the Ochoa/Tucker. For example: “We know that the defendant, Ryan Jackson, was absolutely the man that confronted Mr. Ochoa....We also know that Ryan Jackson was in possession of this BB gun.... So we know that Ryan Jackson is the person who confronted Mr. Ochoa, we know he had this gun, and we know that he was wearing the blue and white plaid

shirt that all the witnesses described.” RP 220. And: “We know for sure that Mr. Jackson was the man who confronted Mr. Ochoa” RP 226. Then, after some discussion about the Crithfield/Little incident: “... and he’s got a gun in his pocket, and he asked Mr. Ochoa for change and some other things even though the encounter was a little different than what Mr. Crithfield an Mr. Little went through.” RP 226. The jury receive no instruction limiting its consideration of the Ochoa testimony, and the court gave no unanimity instruction. CP 22-42.

During deliberations, the jury inquired: Was the gun the only evidence submitted that we are allowed to see? RP 245. The court referred the jury to their instructions. RP 246. The only exhibits shown to the jury during the trial besides the gun were the written statements of Crithfield and Little. Supp. CP \_\_\_\_, Exhibit List.

## V. ARGUMENT

### 1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

The evidence is not sufficient to support a conviction unless a rational fact finder could find the essential elements of the crime beyond a reasonable doubt from the evidence as viewed in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A

sufficiency challenge assumes the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. A conviction based on insufficient evidence cannot be retried, and this Court will dismiss with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Basing a conviction on insufficient evidence is an error of constitutional magnitude that can be raised for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995); *State v. Colquitt*, 133 Wn. App. 789, 795-96, 137 P.3d 892 (2006). A sufficiency challenge is of constitutional magnitude because Due Process requires the State to establish every fact necessary to prove guilt beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

On this record, no reasonable juror could have found beyond a reasonable doubt that the man who accosted Crithfield and Little was Jackson. While there is no doubt that Jackson was the man who talked to Ochoa some time later, the evidence tying Jackson to the Crithfield/Little incident crumbles under the weight of the conviction. Consider:

The State's own evidence showed that Crithfield was 6' 1" tall and Jackson was only 5' 5". These are absolute numbers, not estimates based on possibly stale memory. Yet the jury was asked to believe that Crithfield looked down at this person standing barely a foot away and

failed to notice (a) that he was a full 8” shorter than himself or (b) that he was balding. The only reasonable inference is that, if the man who accosted Crithfield was in fact Jackson, Crithfield would have told the police to look not just for a black guy, but for a short, balding, black guy.

Similarly, assuming the truth of the evidence from both Crithfield and Little, the jury would have to find that the would-be robber positioned himself on the sidewalk in front of the two men, and at the same time came up behind them and intruded himself between them. He then pointed the gun directly at Crithfield’s stomach, directly at Little, and directly at himself, all at the same time. The only reasonable inference is that this testimony is insufficiently reliable to overcome reasonable doubt.

Likewise, if the jury believed both Little and Ochoa, it would have to find that a single gun was displayed at the two locations and that this gun looked simultaneously like a revolver and like a semi-automatic pistol. Ochoa claimed greater familiarity with guns than did Little, but both said they could distinguish between the two basic gun types.

The police witnesses muddied the identification evidence even more. First, assuming the truth of Officer Billman’s testimony, Billman must have X-Ray vision to be able to discern, as he approached Jackson and Ochoa, that the vest or tee Jackson was wearing under his Pendleton-type (i.e., probably not see-through) sleeved shirt was a sleeveless one.

And, based on the aggregate testimony of all the witnesses, the jury would have to find that Officer Jepson's garbled testimony actually nailed the description of Jackson's shirt: it was simultaneously checkered, striped, and patterned, sort of.

The State's evidence is replete with similar mutually exclusive contradictions. Accordingly, on this record, no reasonable juror could find beyond a reasonable doubt that Crithfield and Ochoa encountered the same person that night.

The Court should reverse Jackson's conviction and dismiss the prosecution with prejudice.

2. JACKSON WAS UNLAWFULLY  
SEIZED IN VIOLATION OF WASH. CONST.  
ART. 1, § 7, AND THE FOURTH AMENDMENT.

The exclusionary rule mandates the suppression of all evidence obtained when a person is unlawfully seized. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Washinton recognizes no good faith exception to this rule. *State v. Adams*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, Slip Op. 82210-7, filed August 19, 2010, WL 3259874, at page 2. Our

state Constitution<sup>3</sup> encompasses the Fourth Amendment's guarantee against unreasonable searches and seizures but is broader than the Fourth Amendment.<sup>4</sup> Const. art. 1, § 7; *Harrington*, 167 Wn.2d at 663. The Appellant bears the burden of proving he was seized in violation of art. 1, § 7. *Harrington*, 167 Wn.2d at 664, citing *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

Here, the police unconstitutionally seized Jackson. Therefore, all evidence obtained during the seizure would have been suppressed if trial counsel had filed a suppression motion under CrR 3.6. *Please see Issue 6.*

A seizure occurs whenever a reasonable person in the individual's position would feel he was being detained. *Harrington*, 167 Wn.2d at 663, citing *State v. O'Neill*, 148 Wn.2d 564, 581, 62 P.3d 489 (2003). This standard is "a purely objective one, looking to the actions of the law enforcement officer...." *Id.*, quoting *Young*, 135 Wn.2d at 501.

The police may conduct a *Terry* investigative stop<sup>5</sup> if they have a reasonable suspicion of criminal activity, the seizure falls within the class of limited intrusions that can be justified without probable cause, and the

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<sup>3</sup> Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

<sup>4</sup> U.S. Const. amend. IV says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

<sup>5</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

government's interest justifies the scope of the intrusion in light of the particular circumstances. *State v. Belieu*, 112 Wn.2d 587, 593-594, 773 P.2d 46 (1989). The initial interference with a citizen's freedom of movement must be justified at its inception. *Belieu*, 112 Wn.2d at 595-596, citing *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Jackson was seized as soon as Billman approached him in the group of men on the street. Jackson started to go on his way, but Billman immediately ordered him to stay put. RP 141. There were insufficient grounds, however, to justify a lawful seizure.

According to Little, there were lots of people walking around the streets of downtown Tacoma that night. RP 81. And, by his own testimony, Billman was on the lookout for a black man in his thirties, 5' 8" tall, and wearing a checkered shirt. RP 167. Jackson was 45 years old. RP 150-51. His height was a mere 5' 5." RP 130, 154. And he was not wearing a plaid shirt, but a striped one. RP 153. In other words, all Jackson had in common with the Crithfield suspect was that he was a black man in a blue and white shirt who happened to be in the vicinity. That is not a sufficient reason for the government to seize a Washington citizen, and no white man would have been detained on such flimsy grounds.

A timely CrR 3.6 motion would have resulted in the suppression of the BB gun and Crithfield's identification. Without that evidence, the prosecution could not have been sustained. *Please see Issue 5, Jackson's ineffective assistance of counsel claim.*

The appropriate remedy is to reverse.

3. THE COURT ERRED IN DENYING A  
MISTRIAL WHEN IDENTITY WITNESSES  
SAW JACKSON IN SHACKLES.

Based on the testimony of a custodial security officer who transported Jackson to and from court, the judge concluded that Jackson was paraded in shackles past Little, Crithfield and Ochoa as they waited outside the courtroom before they testified. RP 199. Each of these three witnesses made an in-court identification of Jackson as the man he had encountered five months before. RP 45, 85, 135.

Defense counsel moved for a mistrial. Counsel explained to the court the unavoidable dilemma created by this astonishing breach of protocol. RP 194. Jackson was forced to choose between (a) giving the jurors crucial information without which they could not competently assess the reliability of the in-court identifications; and (b) tainting the jury with the prejudicial knowledge he was in custody and officially

deemed deserving of the public humiliation of being transported in chains.  
RP 194.

The court did not see a problem. The judge elected to leave the jurors in ignorance and proceed to a verdict. RP 194. This was reversible error, because it forced Jackson to choose between two fundamental constitutional rights.

Criminal defendants have a fundamental constitutional right to be tried by jurors who do not know they are being held in custody. *State v. Gonzalez*, 129 Wn. App. 895, 897, 120 P.3d 645 (2005). Failure by a court to protect this right destroys the presumption of innocence.

*Gonzalez*, 129 Wn. App. at 898. Therefore, the remedy for a prejudicial breach of adequate transportation protocol is to reverse the conviction and remand for a new trial. *Id.*

Defendants have an equally fundamental right to present to the jury all relevant, admissible evidence in their defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993). This right is a “fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). “Evidence is relevant if it has any tendency to make any fact that

is of consequence to the case more or less likely.” ER 401; *State v. Clark*, 78 Wn. App. 471, 477, 898 P.2d 854 (1995).

The State cannot force a defendant to sacrifice one constitutional right in order to exercise another. *State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001). That is what the court did here.

Jackson was forced to choose between his right to an unbiased jury and his right to apprise the jury of facts essential to a fair evaluation of critical identification evidence. The fact that eye-witnesses who purported to identify Jackson from five months ago just saw him shackled in the hallway five minutes ago is relevant evidence. It has a tendency to make less likely the reliability of those identifications.

The State cannot claim this error was harmless, because identity was the sole disputed issue in this case. Ochoa’s in-court identification was superfluous for reasons already discussed — Jackson was arrested at the scene. With Crithfield and especially Little, however, exposing them to a black male in shackles right before they testified was highly likely to have contaminated their in-court identifications, causing them unwittingly to identify that man in court, rather than a man who confronted them in the nighttime five months ago. Little, it should be remembered, went home and stayed there before the show-up identification. It would be nothing

short of miraculous if his in-court identification were not compromised by the protocol breach.

Regardless, Jackson was entitled to impart this information to his jury to be weighed in the context of all the evidence. This is a clear case where a mistrial should have been granted, and this Court should vacate the judgment and sentence.

#### 4. THE COURT FAILED TO ENSURE A UNANIMOUS VERDICT.

Given the highly tenuous evidence from Crithfield, Little, and the police officers, the only way twelve jurors could return a guilty verdict is if some of them were persuaded by the evidence, argument of counsel, and the court's instructions, to convict based on the testimony of Robert Ochoa, the only credible witness in the bunch.

Most significantly, the trial court failed to instruct the jurors (a) not to consider Ochoa's testimony as substantive evidence in the Crithfield matter, and (b) that they must be unanimous as to which set of facts constituted the elements of the crime. Defense counsel did not propose a limiting instruction as required by CrR 6.15, but absence of juror unanimity is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Accordingly, it may be raised for the first time on appeal. *In re Det. of*

*Sease*, 149 Wn. App. 66, 75, 201 P.3d 1078, *review denied*, 166 Wn.2d 1029 (2009); *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

The Court reviews the adequacy of jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Instructions are sufficient if substantial evidence supports them, they permit each party to argue its theory of the case, and, when read as a whole, they inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999).

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple incidents, each of which could comprise the elements of a single charge, either the prosecution must elect which incident it is relying on as the basis for the conviction or the court must instruct the jurors that they must unanimously agree upon a single incident that the State proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to do this is reversible constitutional error, because some jurors may have relied on one incident while other jurors relied on another, resulting in a lack of unanimity on all the elements and rendering the conviction invalid. *Kitchen*, 110 Wn.2d at 411. Merely emphasizing one

incident to a greater extent than another does not constitute an election.

*State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007).

Here, because of the prosecutor's repeated switching back and forth during closing argument between the Crithfield incident and the Ochoa incident, the record does not inspire the requisite confidence that twelve jurors convicted Jackson based on the same facts. The prosecutor did tell them the Crithfield incident satisfied the elements of the crime, but the jurors were never told not to base their verdict on the Ochoa incident. The prosecutor's flip-floppy argument was, at best, confusing. Because of this, the lack of limiting or unanimity instructions fatally compromised Jackson's constitutional right to a unanimous verdict.

Failure to give a unanimity instruction cannot be harmless error if any rational juror could have entertained a reasonable doubt that the State proved the crime based on either of the potentially culpable scenarios. *Kitchen*, 110 Wn.2d at 405-06, 411. Here, rational jurors could have entertained reasonable doubt that the testimony of Crithfield and Little was sufficient to convict.

The record suggests that at least one juror did entertain such doubt. The jury asked to see the illegibly scrawled statements of Crithfield and Little. (Since those statements were the only exhibits the jurors saw besides the gun, the query from the jury room must have referred to

Exhibits 5 and 6 which were admitted as illustrative only and did not go back.) The jury had been invited to infer from the handwriting in exhibits that Crithfield and Little drank more than two beers before leaving the tavern. This corroborated the testimony of the police officers who testified that the pair looked, smelled, and sounded intoxicated.

In light of this, and the irreconcilable contradictions between the men's stories, it is highly probable that some or all of the jurors were questioning the credibility of these two witnesses.

By contrast, as the prosecutor repeatedly emphasized, there was no question that Jackson was the person who confronted Ochoa, that Jackson repeatedly asked Ochoa to hand over items of property and that Jackson displayed what appeared to be a gun which he did put completely away until after Ochoa gave him some change. A reasonable juror could infer that, regardless of Ochoa's touching faith in human nature, Jackson in fact approached him with the intent of taking what he could by force or intimidation and that he took a substantial step before being figuratively disarmed by Ochoa's kindness. This would constitute attempted first degree robbery as defined in Instructions 5–9, CP 29–33. One of the police witnesses actually testified that the Ochoa incident was an armed robbery in which the victims positively identified the perpetrator. RP 58.

Because the instructions did not limit the jury's consideration of Ochoa's testimony, it is reasonably likely that some jurors returned a guilty verdict based on Jackson's having displayed a gun while asking Ochoa for money. Reversal is required.

#### V. JACKSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). This Court's standard for evaluating effectiveness of counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail, Appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland*, 466 U.S. at 693-94. Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Generally, a claim of deficiency resting on counsel's failure to

object will succeed if appellant can satisfy this court that an objection likely would have been sustained. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Conduct that can be characterized as legitimate trial tactics or strategy cannot be the basis for an ineffective assistance of counsel claim. *Aho*, 137 Wn.2d at 745. Failing to preserve an issue for review with a timely objection is per se prejudicial if an objection likely would have been sustained. *State v. DeSantiago*, 149 Wn.2d 402, 413, 68 P.3d 1065 (2003); *Saunders*, 91 Wn. App. at 578.

Jackson's trial counsel was both deficient and prejudicial in the following instances.

(a) Here, no conceivable legitimate strategy can explain counsel's failure to bring a CrR 3.6 motion to challenge the grounds for Jackson's seizure and to suppress the resulting evidence, i.e. the gun and Crithfield's identification. Counsel simply failed to notice that the police had no lawful basis to seize Jackson and did not seek suppression under CrR 3.6. This was deficient performance that prejudiced Jackson by failing to preserve an issue on which Jackson should have been entitled to seek reversal as a matter of right.

If a claim of unlawful search and seizure is not raised in a CrR 3.6 motion to suppress, the unlawfully-obtained evidence is properly admitted and there is no error. *State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d

603 (2009). But the issue may be raised in the context of an ineffective assistance claim if the record is insufficient to establish the illegality and show the outcome probably would have been different if counsel had challenged the seizure. *Id.* In this case, defense counsel was ineffective for not arguing the CrR 3.6 motion, but the record arguably contains all the facts this Court needs to review the legality of the seizure.

*Please see Issue 2 for the substantive search and seizure argument.*

(b) In addition to neglecting to bring a suppression motion based on Jackson's unlawful seizure, counsel failed to prevent multiple instances of damaging evidence from coming to the attention of the jury in violation of the rules of evidence. This evidence affected the outcome of the trial, and, by failing to object, counsel failed to preserve these issues for appeal.

Interpretation of the rules of evidence is a question of law that is reviewed de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). An out-of-court statement is inadmissible hearsay if it is offered to prove the truth of the matter asserted, even though it was made by a person who is now an in-court witness, presently under oath, observable by the trier of fact, and subject to cross-examination. *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003). Even if properly admitted as an exception to the hearsay rule, an out-of-court statement may not violate

the Confrontation Clause. *State v. Neal*, 144 Wn.2d 600, 608, 30 P.3d 1255 (2001).

Counsel waives any objection to the erroneous admission of damaging evidence unless a timely objection is made. *DeSantiago*, 149 Wn.2d at 413; *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). In egregious circumstances, however, where testimony central to the State's case is erroneously admitted, the failure to object constitutes incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Deficient performance is established if the Court can discern no legitimate reason not to object. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, 262 (2010).

Improperly admitted evidence is harmless unless it affected the verdict. *State v. Allen*, 50 Wn. App. 412, 423, 749 P.2d 702 (1988). But Appellant establishes reversible error by demonstrating a reasonable probability the result of the trial would have been different but for counsel's errors. *Thomas*, 109 Wn.2d at 226. A showing of a "reasonable probability" the verdict was affected is sufficient to undermine confidence in the conviction and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective

reasonableness standard overcomes the otherwise strong presumption that counsel's representation was effective. *Thomas*, 109 Wn.2d at 226.

Statements of witnesses at a crime scene offered to explain why the police pursued an investigation do not fall into any admissible category of hearsay. The subjective motivations of the police are not an issue in controversy and are therefore not relevant. ER 401; *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

(i) Crithfield testified to inadmissible hearsay. Instead of asking him what the would-be robber looked like, the prosecutor asked:

Q: "And do you recall what you told the officers the man looked like?" To which Crithfield replied:

A: "I believe I told them that it was a 30-year-old African American male with a blue and white checkered short-sleeved shirt, collared shirt."

This is unmitigated hearsay. ER 801(c). What Crithfield presently believed he told the police six months ago was irrelevant. The jury needed to learn what the person looked like from Crithfield's trial testimony based on his personal knowledge and current recollection of the event.

Counsel's failure to object to this inadmissible hearsay was deficient performance. Competent counsel is expected to know and argue the law. *Kyllo*, 166 Wn.2d at 865-69 (case law); *State v. McGill*, 112 Wn.

App. 95, 100-02, 47 P.3d 173 (2002) (authority for an exercise of discretion). Moreover, allowing the prosecutor to get away with this prejudiced Jackson, because it is by no means obvious from this record that Crithfield could have testified under oath that he remembered what anyone was wearing six months before, or anything else, for that matter. For the same reason, no legitimate trial tactic can explain why counsel would ignore this violation.

(ii) Officer Spencer testified to out-of-court statements allegedly made by two individuals — Robert Ochoa and another man called James Tucker<sup>6</sup> — regarding their interaction with Jackson that same night. In the following exchange between the prosecutor (Q) and Spencer (A) Spencer testified that both these people identified Jackson:

Q: There were two incidents that occurred that night?

A: Yes ma'am.

Q: And were Mr. Ochoa and Mr. Tucker involved with the second of the two incidents?

A: Yes, ma'am.

Q: And were you present when Mr. Ochoa and Mr. Tucker were asked to identify someone?

A: Yes, ma'am.

Q: And did they make an identification?

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<sup>6</sup> RP 130.

A: Yes, ma'am.

Q: Who did they identify?

A: The defendant.

RP 65.

The out-of-court statements of both Ochoa and Tucker are classic hearsay. ER 801(c). Spencer had no personal knowledge of what Ochoa and Tucker saw, and none of the exceptions provided in ER 803 and 804 would permit a jury to hear such testimony.

Arguably, since Ochoa would later testify, it would be legitimate strategy not to interpose a hearsay objection to statements the jury would hear anyway. But Tucker did not testify, which made introducing his identification through Spencer a *Crawford* violation.<sup>7</sup>

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. Washington’s Confrontation Clause is found in Article 1, section 22, which guarantees the right of persons facing criminal prosecution to meet witnesses face to face. These Clauses exclude testimonial hearsay from criminal trials unless the declarant is unavailable and the defendant has had an opportunity to cross-examine. *Crawford*, 541 U.S. at 68. A

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<sup>7</sup> *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The court later ruled that the jury could not hear anything Tucker said. RP 144.

statement is “testimonial” if the declarant would reasonably expect it to be used prosecutorially. *Crawford*, 541 U.S. at 52. Statements made during interrogation by police officers “fall squarely within the classification of testimonial statements.” *Crawford*, 541 U.S. at 53; *State v. Saunders*, 132 Wn. App. 592, 601, 132 P.3d 743 (2006).

The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). A confrontation clause violation is harmless only when the untainted evidence is overwhelming. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *Edwards*, 131 Wn. App. at 615. The applicable harmless error standard is that set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Brecht v. Abramson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1995). Error is presumed prejudicial and it is the State’s burden to prove the error was harmless. *State v. Welchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). That is, this Court must be confident that it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The error is not harmless if “there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *Id.*

Tucker’s alleged statement to Spencer was clearly testimonial. The State cannot show that the testimonial hearsay of Tucker was

harmless beyond a reasonable doubt, and the untainted evidence is far from overwhelming. To the contrary, this error was highly prejudicial because Ochoa would later testify that Jackson committed no crime against him or Tucker. He asked for a beer and accepted Ochoa's refusal with good grace; he asked for a cigarette, which Ochoa gave him, inadvertently displaying a gun while emptying his pockets in search of his lighter, which was neither intended nor perceived as a threat; then he asked for spare change, which Ochoa freely gave him. But Spencer testified that the Ochoa incident was an armed robbery of which the victims positively identified the perpetrator. RP 58. The alleged corroboration of Spencer's false characterization by the absent Tucker would make the jury more likely to convict Jackson of the charged crime.

Moreover, the prosecutor elicited this testimony in violation of the court's pretrial order in limine. Anticipating this precise due process violation, defense counsel specifically moved to prohibit the State's police witnesses from gratuitously introducing inadmissible hearsay gathered in the course of their investigations, and the court granted the motion. RP 12. Eliciting testimony in violation of a court's pretrial order in response to a defense motion in limine is flagrant misconduct. *State v. Fisher*, 165 Wn. 2d 727, 746, 202 P.3d 937 (2009). Defense counsel did not object.

This error was highly prejudicial, because, standing alone, the testimony of Crithfield and Little was far from compelling. Their barely legible written statements and the professional observations of both Billman and Jepson showed they were both pretty drunk. RP 155, 156. Also, there were enough major contradictions between their stories to cause any reasonable juror to think twice before convicting a man on their evidence. This made the inadmissible and unconstitutional Spencer testimony sufficiently harmful to require reversal and a new trial.

6. EVIDENCE ERRONEOUSLY ADMITTED  
OVER DEFENSE OBJECTIONS ALSO  
PREJUDICED JACKSON.

An additional prejudicial evidentiary error occurred to which defense counsel did object.

Evidentiary rulings are reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). But a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. *State v. Petrina*, 73 Wn. App. 779, 787, 871 P.2d 637 (1994). And whether or not constitutional rights were violated is a question of law that we review novo. *State v. Elmore*, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004).

(a) Officer Spencer used Crithfield's out-of-court written statement purportedly to refresh his own memory of the events. The court erroneously admitted this testimony over a defense objection. RP 58.

ER 612, does not expressly limit writings used to refresh memory to the witness's own writings. But reviewing another person's written statement would refresh the witness's memory only as to the out-of-court declarant's statement, not anything the witness personally observed. Here, after 'refreshing his memory' from Crithfield's out-of-court written statement to police, Spencer testified to Crithfield's out-of-court version of what happened, not anything Spencer witnessed himself.

Moreover, ER 612 permits the opposing party to introduce into evidence relevant portions of any writing that is used to refresh an adverse witness's memory. Jackson's counsel made several attempts to admit Crithfield's written statement into evidence. RP 112, 114. The court erred in keeping the statement out.

To the extent counsel failed to cite ER 612 in support of admitting the statement, his performance was deficient and prejudicial. Defense counsel and the prosecutor clearly were equally convinced that it would help Jackson if Crithfield's statement was available to the jurors during deliberations. RP 111-113. To the extent these errors added to the cumulative prejudice, they denied Jackson a fair trial. *Please see Issue 9.*

(b) The prosecutor blatantly induced Officer Billman to read from inadmissible CAD reports under the guise of refreshing his memory.

In examining a trial witness, counsel may hand him a writing to inspect for the purpose of refreshing his memory, so that, when he testifies, he does so on the basis of his own recollection, not the writing. *State v. Coffey*, 8 Wn.2d 504, 508, 112 P.2d 989 (1941) (citing cases) (cited in *State v. Huelett*, 92 Wn.2d 967, 972, 603 P.2d 1258 (1979), Wright, J. dissenting. It is error to introduce otherwise inadmissible evidence under the pretext of refreshing a witness's recollection. *U.S. v. Morlang*, 531 F.2d 183, 191 (1975), quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, 60 S. Ct. 811, 849, 84 L. Ed. 1129 (1940), and citing McCormick, EVIDENCE, 2nd Ed. § 9.

In Jackson's trial, a particularly egregious violation of this rule occurred when the prosecutor introduced inadmissible hearsay through Officer Billman's reading of CAD reports. The prosecutor asked Billman what items Jackson had on his person. Billman answered — without hesitation or equivocation — that Jackson had just the BB gun and his ID. The prosecutor nevertheless asked Billman to read certain lines from the report, then repeated the question. This time, Billman answered that Jackson also had a beer with him. RP 149. This was a clear instance of

refreshing memory without apparent reason to do so, for the purpose of eliciting inadmissible hearsay from a report.

A few minutes later the prosecutor had Billman actually read aloud from two CAD sheets. Defense counsel objected to this, but the Court allowed it. RP 162. Billman then blatantly read the reports into the record, saying: “I assume I would have to look here. I was on scene, it looks like about 02:01.” “Oh, wait a minute. Excuse me, it’s 02:27, I apologize, I couldn’t read it. It showed the dispatch is at 02:01, sorry.”

The prosecutor then took Billman to a different page, and he began to read from that also. Billman balked momentarily when asked to read something that occurred before he arrived at the scene. RP 163-64. He then continued reading that he remained on the scene until 04:05. RP 165. Then he reads more. RP 165-66. Finally, the prosecutor asked:

Q: And does the CAD record when Mr. Crithfield was brought to the scene to make his identification?

A: Yes, it does.

Q: And what time is that?

A: 3:24.

RP 166.

This was a flagrant violation of ER 612 regarding refreshing a witness’s memory from a writing. The prosecutor substituted out-of-court

statements by Billman (and also by an anonymous functionary<sup>8</sup>) for the officers' actual testimony.

The CAD reports are hearsay for which no exception exists. This prejudiced Jackson, because the State needed the CAD reports to bolster the admissibility of the Ochoa evidence under the ER 404(b) res gestae exception based on closeness in time. (Please see Issue 9.) Reversal is required.

(c) The court erroneously admitted Ochoa's testimony in violation of ER 404(b).

"There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted." *State v. Smith*, 103 Wash. 267, 174 P. 9 (1918).

The court admitted Ochoa's testimony over Jackson's ER 404(b) challenge. The judge thought this evidence was somehow relevant as res gestae to establish why the officers stayed in the area. RP 109. This was error because the motives of the police are not something the State needs to prove. *Edwards*, 131 Wn. App. at 614. Moreover, the evidence was

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<sup>8</sup> RP 167.

not necessary to establish the charged offense. The crime charged was complete in itself. There was simply no reason to confuse the jury with other acts that were not even criminal and may not even have involved the same suspect, but in which the positive identification of the accused lacked the credibility problems of the alleged victims of the charged offense. Moreover, while the Ochoa incident had little or no probative value, it was extremely prejudicial because it suggested to the jury that some sort of crime spree was going on, or at least that Jackson had a propensity to rob people at gunpoint.

The State may argue the Ochoa evidence was admissible to show identity. But this would require a showing that the two incidents were so unique that mere proof that the suspect acted in a certain way in the uncharged incident created a high probability that he also committed the act charged. That is, the uncharged act must be so unique and distinctive as to be like a signature. *State v. Irving*, 24 Wn. App. 370, 374, 601 P.2d 954 (1979), *review denied*, 93 Wn.2d 1007 (1980); E. Cleary, MCCORMICK ON EVIDENCE § 190, at 449 (2d ed. 1972).

That is not the case here. Certain aspects of the alleged Ochoa incident bore some similarity to the Crithfield/Little incident. But few big-city residents have not experienced a more or less scary incident

exactly like this. There was nothing particularly unique about either of the alleged incidents here.

The court also failed to balance the de minimis probative value of this evidence against its potential to create an impermissible inference. RP 113. Without an articulated balancing process on the record, this Court may decide the issue of admissibility from the record as a whole. *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

The potential for unfair prejudice was huge, even if the Ochoa testimony were relevant and probative. Any probative value of the Ochoa evidence was vastly outweighed by the likelihood the jury would use the evidence for an impermissible purpose. Admitting it was reversible error. Finally, in another instance of ineffective assistance, when the ER 404(b) objection was overruled, defense counsel failed to request a limiting instruction.

If prior bad acts evidence is admitted, the jury should receive both an explanation of the purpose for which it is admitted, and a cautionary instruction to consider it for no other purpose. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The defense must ask for the limiting instruction. *State v. Tharp*, 27 Wn. App. 198, 208, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 96 (1981).

Here, the court admitted the highly prejudicial testimony of Ochoa for the sole purpose of establishing *res gestae*, the story of the crime. An uninstructed jury inevitably would regard this as highly probative evidence that Jackson was guilty of the charged offense involving Crithfield and Little. Accordingly, counsel's failure to request a limiting instruction was deficient performance and extremely prejudicial. As discussed in Issue 4 above, the failure to instruct the jury to limit its use of this testimony had devastating consequences for the defense. Jackson should receive a new trial.

(d) In addition, besides prejudicing Jackson directly by admitting damaging and inadmissible hearsay through the back-door, the prosecutor's excessive zeal in calculatedly violating the evidence rules constituted objectionable misconduct.

Prosecutors represent the people, and we expect them to conduct themselves accordingly in the presentation of evidence, acting lawfully and impartially in the interest solely of justice. *Fisher*, 165 Wn. 2d at 746. As quasi-judicial officers, prosecutors have a duty to "subdue their courtroom zeal for the sake of fairness to a criminal defendant." *Id.*

Here, the prosecutor clearly knew hearsay from police reports was inadmissible hearsay, because she argued strenuously to keep out Crithfield and Little's written statements. The Court also was aware of

this: Prosecutor: “Usually reports are not admitted.” Court: “True.” RP 53. This exchange unmistakably tags the prosecutor’s conduct as flagrant and ill-intentioned misconduct that is reversible without an objection. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). It also illustrates that defense counsel was behind the curve in failing to be on top of this issue and jumping in with objections.

Jackson was prejudiced. Reversal is required if the misconduct denied Jackson a fair trial. *Fisher*, 165 Wn. 2d at 749.

7. EXCLUDING CRITHFIELD’S WRITTEN STATEMENT VIOLATED DUE PROCESS BY PREVENTING JACKSON FROM PRESENTING RELEVANT EVIDENCE IN HIS DEFENSE.

This Court reviews de novo whether a trial court misapplied the law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). This includes interpretation of evidence rules. *DeVincentis*, 150 Wn.2d at 17.

Wash. Const. art 1, § 22, and the Sixth and Fourteenth Amendments guarantee criminal defendants a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Generally, all evidence having any tendency to make the existence of a material fact more or less probable is relevant. ER 401, 402. The threshold is very low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Persuasiveness is to be determined

solely by the trier of fact. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). *State v. Mak*, 105 Wn.2d 692, 716-17, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Accordingly, excluding relevant evidence must serve some legitimate state interest. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006).

The linchpin of Jackson's defense was to highlight the extremely questionable credibility of Crithfield and Little, and defense counsel offered their written statements as substantive evidence on the issue of credibility. RP 112. It was prejudicial error for the trial court not to admit them.

The court may erroneously have thought the written statements were hearsay. They were not, because they clearly were not offered to prove the matter asserted. ER 801(c). Rather, they were offered for comparison with each other and with the live testimony, and their probative value lay solely in the differences between the various accounts given by the declarants.

The State cannot claim this was harmless. Excluding the written statements prevented Jackson from presenting a complete defense. This is a constitutional error such that prejudicial is presumed unless the State can

show it was harmless beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 425-26.

The State cannot make this showing as illustrated by the inquiry from the jury regarding these exhibits during deliberations. The jurors' complaint about not receiving these exhibits strongly suggests they were thinking along the lines suggested by the defense. Thus, Jackson was clearly prejudiced, because the error apparently affected the verdict.

8. THE COURT NEEDLESSLY MADE  
DEFENSE COUNSEL LOOK BAD IN FRONT  
OF THE JURY.

Defense counsel objected to Ochoa's testimony as inadmissible prior bad acts evidence under ER 404(b). The court engaged in extensive analysis on the record before concluding finally and unequivocally that Ochoa could testify under the "res gestae" exception that allows evidence of similar acts that are sufficiently close in time as to be part of the story of the charged crime. Inexplicably, the court then instructed counsel to repeat his objection in front of the jury in order to make a record and preserve the issue. RP 121. When counsel did so, the court curtly stated "overruled" without explanation. RP 130.

In ruling on a motion in limine, the court may, in its discretion, request losing counsel to repeat his objection at the time the evidence is

offered. *Fisher*, 165 Wn.2d at 748, citing *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Justice is served by allowing the court to reconsider pretrial rulings in light of later-developed evidence. But gratuitously requiring defense counsel to object in front of the jury to a ruling the court just issued and which the court has no intention of reconsidering was an abuse of that discretion. There was absolutely no point to repeating the ER 404(b) objection, because counsel had already made his objection on the record.

This was one more instance of gratuitous prejudice to the defense. Ochoa's evidence would seem manifestly relevant to the jury, so that they would think the defense was trying to hide something. Moreover, the court's apparent off-hand dismissal of the objection suggested it was meritless and would diminish Jackson's counsel in the eyes of the jury. RP 121, 130.

#### 9. CUMULATIVE ERROR DENIED JACKSON A FAIR TRIAL.

The cumulative error doctrine applies where no single error warrants reversal, but the weight of several errors denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). That is the case here. Cumulative error may warrant reversal, even if each error standing

alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It is possible for defense counsel's actions to render the process so unreliable that no specific showing of prejudice is required – prejudice is presumed. *State v. Webbe*, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). A presumption of prejudice arises where, as here, the adversarial process breaks down. *United States v. Cronin*, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Jackson's trial was tainted with numerous egregious violations of the constitution and the evidence rules. Even if the Court were to discount their individual prejudicial effect, the cumulative prejudice denied Jackson a fair trial. Mr. Jackson deserves a new trial.

V. CONCLUSION

For the foregoing reasons, Mr. Jackson asks this Court to reverse his conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

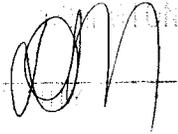
Respectfully submitted this 20<sup>th</sup> day of August, 2010.

A handwritten signature in black ink, appearing to read "Jordan B. McCabe", written over a horizontal line.

Jordan B. McCabe, WSBA No. 27211  
Counsel for Ryan R. Jackson

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BY 

**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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Date: August 20, 2010

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