

NO. 40645-4-II

FILED
COURT OF APPEALS
DIVISION II
10 OCT -5 PM 2:43
STATE OF WASHINGTON
BY CA
DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

WILLIAM GREGORY BERGQUIST, Appellant

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson
Pierce County Superior Court Cause No. 09-1-03093-8

BRIEF OF APPELLANT

By:

Barbara Corey
Attorney for Appellant
WSB #11778
902 S. 10th Street
Tacoma, WA 98405
(253) 779-0844

TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u>	1-3
B.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	3-4
C.	<u>STATEMENT OF THE CASE</u>	4-17
	1. <u>Procedural Facts</u>	
	2. <u>The State’s Version of the Case</u>	
	3. <u>The Defendant’s Version of the Case</u>	
D.	<u>LAW AND ARGUMENT</u>	17-47
E.	<u>CONCLUSION</u>	47-48

TABLE OF AUTHORITIES

Cases

<u><i>Butcher v. Marquez</i></u> , 758 F.2d 373, 376 (9 th Circuit 1985) -----	19
<u><i>Burks v. United States</i></u> , 437 U.S. 1, 17-18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) 46	
<u><i>Crawford v. Washington</i></u> , 541 U.S. 36, 124 S.Ct 1354, 158 L.Ed.2d 177 (2004)-----	21
ER 404(b)-----	1, 20, 22, 41
<u><i>Gregory</i></u> , 159 Wn.2d at 841 -----	35
<u><i>Harrington v. California</i></u> , 395 U.S. 250, 251-52, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969)-----	42
<u><i>In re PRP of Davis</i></u> , 152 Wn.2d 647, 721, 101 P.3d 1 (2004)-----	29
<u><i>In re Pers. Restraint of Lord</i></u> , 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964-----	47
<u><i>James v. Robeck</i></u> , 79 Wn.2d 864, 869, 490 P.2d 878 (1971) -----	23
<u><i>Sofie v. Fibreboard Corp.</i></u> , 112 Wn.2d 636, 656, 771 P.2d 711 (1989)---	23
<u><i>State v. Barrow</i></u> , 60 Wn.App. 869, 809 P.2d 209 (1991)-----	26
<u><i>State v. Belgarde</i></u> , 110 Wn.2d 504, 508, 755 P.2d 174 (1988) -----	34
<u><i>State v. Black</i></u> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987)-----	23
<u><i>State v. Cienfuegos</i></u> , 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) citing <u><i>Strickland v. Washington</i></u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) -----	18
<u><i>State v. Coe</i></u> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984) -----	46
<u><i>State v. Cummings</i></u> , 31 Wn.App 427, 642 P.2d 115 (1982)-----	28
<u><i>State v. Davenport</i></u> , 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)-----	34
<u><i>State v. Delmarter</i></u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)), <i>aff'd</i> , 166 Wn.2d 380, 208 P.3d 1107 (2009) -----	44
<u><i>State v. Dolan</i></u> , 118 Wn. App. 23, 329, 73 P.3d 1011 (2003) -----	24
<u><i>State v. Engel</i></u> , 166 Wn.2d 572, 576, 576, 210 P.3d 1007 (2009)-----	44
<u><i>State v. Garrett</i></u> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994) -----	19
<u><i>State v. Gregory</i></u> , 158 Wn.2d 759, 858, 147 P.3d 1201 (2006) -----	34
<u><i>State v. Guloy</i></u> , 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986) -----	43
<u><i>State v. Hilliard</i></u> , 122 Wn.App. 433, 93 P.3d 681 (2003) -----	32
<u><i>State v. Hodges</i></u> , 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003)-----	46
<u><i>State v. Jerrels</i></u> , 83 Wn.App. 503, 508, 925 P.2d 209 (1996)-----	26
<u><i>State v. Kilgore</i></u> , 147 Wn.2d 288, 53 P.3d 974 (2002) -----	41
<u><i>State v. Langford</i></u> , 67 Wn.App. 572, 837 P.2d 1037 (1992) -----	45
<u><i>State v. Lord</i></u> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991)-----	19

<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.2d 396 (2007) cert. denied, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008)-----	24, 25
<u>State v. Padilla</u> , 69 Wn.App. 295, 299, 846 P.2d 564 (1993)-----	26
<u>State v. Papadopoulos</u> , 34 Wn.App. 397, 400, 662 P.2d 59, rev. denied, 100 Wn.2d 1003 (1983)-----	26
<u>State v. Reed</u> , 102 Wn.2d 140, 147, 684 P.2d 699 (1984)-----	34
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing <i>State v. Partin</i> , 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977))-----	44
<u>State v. Sargent</u> , 40 Wn.App. 340, 343-46, 698 P.2d 598 (1985)-----	26
<u>State v. Stith</u> , 71 Wn.App. 14, 19-20, 856 P.2d 415 (1993)-----	26
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981)-----	32
<u>State v. Theroff</u> , 25 Wn. App. 590, 593, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980))-----	44
<u>State v. Thomas</u> , 109 Wn.2d 222, 230, 743 P.2d 816 (1987)-----	29, 44

Statutes

RCW 9A.36.010(1)(a)-----	45
RCW 9A.36.011(1)(a)-----	46
Wash. Rev. Code, sec. 9A.04.110(6)-----	38

Other Authorities

WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 9 (2d ed. 1994) (WPIC)-----	23
WPIC 10.01; RCW 9A.080.010(1)(a)-----	45

Rules

ER 609-----	28
ER 609(a)(2)-----	19
ER 803-----	30

Constitutional Provisions

Sixth Amendment of the United States Constitution-----	21
WASH. CONST. Art. I, §§ 21, 22; U.S. CONST. Amend. VII-----	23

A. ASSIGNMENTS OF ERROR:

1. Should this court reverse Mr. Bergquist's conviction for first degree assault with a deadly weapon where trial counsel was constitutionally ineffective?

a. Was trial counsel constitutionally ineffective for failing to impeach the state's chief witness for a conviction for trafficking in stolen property where the trial court had ruled that conviction admissible and credibility was the central issue at trial?

b. Was trial counsel constitutionally ineffective failing to object to ER 404(b) evidence that alleged victim Taylor found a white powdery substance on his car's gas tank and likely in the gas tank where that could not be linked to Mr. Bergquist?

c. Was trial counsel constitutionally ineffective for failing to object to testimony that Mr. Bergquist allegedly told Melissa Raisbeck that she needed to perform a sexual favor for him where this "evidence" was irrelevant, incompetent, and inadmissible under ER 404(b)?

d. Was trial counsel constitutionally ineffective for adducing improper opinion testimony from the lead detective that he arrested Mr. Bergquist in this "urgent" case because he feared Mr. Bergquist's "domestic violence" conduct would escalate?

e. Was trial counsel constitutionally ineffective for failing to object to the lead's detective that he believed the defendant to be guilty?

f. Should this court reverse the defendant's conviction where the lead detective failed to stop playing Mr. Bergquist's taped statement thereby improperly informing the jury that Mr. Bergquist had prior assault convictions?

g. Was trial counsel constitutionally ineffective for failing to investigate this case?

h. Was trial counsel was ineffective for failing to object to the prosecutor's continued use of the term "stabbing" where that was not true and where the degree of possible inflicted injury was the chief difference between assault one and assault two?

2. Did the trial court abuse its discretion when it refused to admit "res gestae" evidence regarding Raisbeck's misconduct toward Mr. Bergquist where that evidence was intimately tied to the charges and

3. Should this court reverse Mr. Bergquist's conviction where the prosecutor's repeated acts of misconduct denied him a fair trial?

4. Should this court reverse Mr. Bergquist's conviction where the State failed to prove beyond a reasonable doubt that he committed the crime of first degree assault with a deadly weapon?

5. Is Mr. Bergquist entitled to relief under the cumulative error doctrine?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A defendant is guaranteed constitutionally effective assistance of counsel. Where trial counsel's conduct is so deficient that trial counsel is no longer acting as the defendant's attorney and where that conduct results in enduring prejudice to the defendant, the defendant is entitled to a new trial.

2. A defendant's prior convictions are admissible only in limited circumstances. Where the state impermissibly places those convictions before the jury, the defendant is entitled to a new trial.

3. A criminal defendant is entitled to defend his case by placing before the jury all relevant facts of the charges. Where the trial court fails to admit essential evidence admissible under the "res gestae" rule, the defendant is entitled to a new trial.

4. A prosecutor represents all of the people, including the defendant. Where the prosecutor's conduct so flagrantly and ill-intentioned that it resulted in an enduring and resulting prejudice to Mr. Bergquist.

5. When the State fails to prove a criminal charge beyond a reasonable doubt then the defendant is entitled to the remedy of dismissal with prejudice.

6. When a trial is flawed with numerous errors, none of which individually provides the basis for relief, the cumulative effect thereof entitles the defendant to a new trial.

C. STATEMENT OF THE CASE.

1. Procedural Facts:

On June 29, 2009, the State of Washington charged William Gregory “Greg” Bergquist with the crime of Assault in the First Degree. CP 1. State alleged that the defendant turned a bed sheet into a cape that read “Capt Save a Ho”, went to the residence of Don Taylor to hang it on a fence. The State alleged that a physical altercation between Greg and Taylor ensued. The State further alleged that during the altercation Greg lacerated Taylor’s torso using a utility knife.

Michael Underwood entered a Notice of Appearance to represent Greg on July 1, 2009 and July 9, 2009. CP 7, 12-13.

The trial began on March 22, 2010 before the Honorable Brian Tollefson in the Pierce Count Superior Court. RP 1. Greg had endorsed self defense. RP 4; CP 14 (OH order).

Prior to the trial, the court ruled that Greg could use Mr. Taylor's 2007 conviction for tracking in stolen property for impeachment. RP 4-5. The court ordered that Greg could not question Melissa Raisbeck about her prior bad acts of stealing from Greg and his mother. RP 9.

Throughout the trial, the deputy prosecutor referred the to the victim's superficial knife wound as the result of "stabbing". RP 33, 34, 35, 36,

Defense counsel and the prosecutor entered a stipulation regarding the admissibility of Greg's statement to police. RP 39-41.

During trial, Taylor testified that he noticed a white powdery substance in the gas spout of his Chevrolet Blazer. RP 80. Taylor did not know who might have put the substance there. RP 80. The Blazer had a locking gas cap. RP 82.

Defense counsel failed to object to this testimony. RP 80.

Although the court allowed Det. Davis to play a taped statement that Greg had made. However Det. Davis failed to stop the tape at the court ordered spot. RP 167-168. The inadmissible portion of the tape concerned prior assaults attributed to Greg. RP 237.

Upon learning when the State would rest its case, trial counsel stated that he would start his case the next day. RP 205. Defense

counsel stated that he likely would call three witnesses: Derosia, Barbara Bergquist, and Greg. RP 231.

Defense counsel reserved opening. RP 37.

After the State rested its case, defense counsel made a motion to dismiss for lack of evidence that Greg had inflicted great bodily harm on Taylor. RP 226. The State responded that it had to prove that Greg assaulted Taylor and that the assault either was committed with a deadly weapon or by force or means likely to cause great bodily harm or death as well as that the defendant acted with intent to inflict great bodily harm. The prosecutor continued to assert that Taylor had been stabbed in the torso. RP 228-29

The court denied the defense motion to dismiss. RP 231.

After the State rested, defense counsel Mike Underwood gave an opening statement. RP 243-44.

Trial counsel failed to investigate the case and therefore did not call witnesses whose testimony was relevant and exculpatory to Greg.

Although Detective Davis had testified about his opinion that there was an escalating domestic violence relationship between Greg and Raisbeck, the trial court granted the State's objection and struck testimony that the Bergquists previously had obtained a no-contact order against Raisbeck. RP 262.

After closing arguments during which the State repeatedly mischaracterized the evidence, the jury returned a guilty verdict.

After denying Greg's motion for a new trial, the court sentenced him to 277 months on Count I and 48 months for a Deadly Weapon Enhancement for a total of 325 months in the Department of Corrections. CP 205-218.

Greg timely filed this appeal. CP 219

2. The State's Version of the Case:

On June 20, 2008, Don Taylor lived with his mother Angie Thompson and his girlfriend Melissa Raisbeck at the mother's residence. RP 45. That residence was located at 4509 South Thompson, Tacoma. *Id.*

The backyard of the residence had a little fence which went to the corner of the neighbor's yard and across the back of the Thompson property. RP 48-49.

Shortly after midnight on June 20, 2009, Taylor heard a noise from the back of the residence where a vehicle was parked. RP 53. Taylor initially thought the noises had been made by squirrels or birds. RP 53. Taylor heard the fence open and concluded that someone had entered the yard. RP 54.

Taylor went into the back yard, where there was a motion detector light. RP 54-55. The motion detector light, when activated, would stay on

for 4-5 seconds. RP 91. The Taylor backyard was flooded with light throughout this incident. RP 91-93. Although Taylor initially said that the back yard was dark, he was mistaken. RP 92.

When he checked to see what was going on, Taylor saw an individual whom he later identified to be Greg peeking out from the corner of the garage. RP 56.

Taylor did not call the police because he “wanted to assess the situation and see what was going on.” RP 60. Taylor also did not feel threatened. *Id.*

Taylor saw Greg by the gate and then Taylor opened the gate. RP 61. As Taylor opened the gate, he asked Greg what was going on. RP 96. Greg did not respond and Greg came after him. RP 61, 96.

Taylor thought that Greg had something behind his hands. RP 61. Greg tried to toss whatever he had into the air. RP 61, 96, 98. When Taylor tried to subdue Greg he saw something in the air. RP 62. Greg threw something white at Taylor. RP 62. Greg then came at Taylor who ducked down and swung at Greg. RP 61, 98. At that moment, Taylor swung at Greg. RP 63.

Greg fell to the ground. RP 63.

Greg never opened the gate. RP 93. Greg never opened the garage. RP 93. Taylor went out into the ally to see what was happening. RP 93.

Taylor then went for the other guy. RP 63. The other man came at him with his hands up in the air. RP 64. Taylor was uncertain whether the other man hit him. RP 65.

Greg then came at Taylor from behind and caught him in the ribs. RP 66. Taylor later learned that he had been grazed with knife. RP 66.

Soon thereafter Greg and his companion fled down the street. RP 67.

Taylor later went to the hospital where, according to him, he was treated for his stab wound by undergoing surgery for “four and a half hours, something, three and a half hours. RP 68.

While Taylor was in the hospital, Raisbeck showed him photos on her cell phone. RP 72. Taylor recognized Greg’s picture as his assailant. RP 72.

Taylor claimed to have recognized Greg from his “distinctive blue eyes.” RP 108.

Jason Smith, a firefighter/paramedic for the Tacoma Fire Department, responded to the aid call. RP 119, 121 He contacted Taylor who was frantic and who related that he was attacked when he went into his home. RP 122. Smith treated Taylor for a laceration not a puncture wound. RP 123. Taylor did not appear short of breath, his pulse oxymetry was 100% without being on oxygen, his lung sounds were clear and equal

on both sides, and his chest rise was equal. RP 123. Neither Smith nor Taylor believed that there had been any penetrating knife wound. RP 123.

Smith described the laceration as 6-8 inches in length, in contrast to a stab wound which is generally the width of a knife. RP 127. The laceration was more of a slice sideways than the result of any vertical movement. RP 129.

Had Smith known that the laceration had not penetrated Taylor's rib cage, he would not have considered it a very serious wound. RP 130. However, at the hospital, doctors needed to surgically explore to ensure that there was no other damage. RP 130

Taylor told Smith that he did not know who had inflicted the laceration. RP 125. Taylor stated that he had been in a wrestling match with two people and that one of the people stabbed him and ran. RP 125.

After Taylor was discharged from the hospital, he noted some white powdery substance down the spout of his Blazer. RP 80. After this, the Blazer would start and stop when Taylor drove it. RP 80. His car had a locking gas cap and it was locked on June 20, 2008. RP 80, 85. Taylor believed that "somebody" put the substance in his gas tank. RP 86.

Det. Davis later looked at Taylor's car and saw no evidence that anything had been placed in the gas tank although the detective concluded

that “potentially there was something that could have been put there.” RP 181.

Sometime after Taylor had identified Greg from Raisbeck’s phone photos, Tacoma Police Department (TPD) Detective Dan Davis showed Taylor a photo line-up RP 77, 153. Not surprisingly Taylor identified Greg from the detective’s photo line up. RP 77, 153.

Taylor also gave a statement to the detective. RP 79. Det. Davis not only spoke to Taylor but also to his girlfriend Melissa Raisbeck. RP 142. After speaking to Taylor and Raisbeck about her former boyfriend Greg, Det. Davis concluded that Greg was the most likely suspect. RP 143.

Taylor and Raisbeck spoke to Det. Davis at the police station. RP 143-144. Taylor and/or Raisbeck gave Det. Davis the bed sheet from the fence. RP 145-46

Det. Davis spoke to “witnesses” who claimed that Greg had made the cape. RPP 151.

Det. Davis also spoke to Derosia on June 23, 2090. RP 155. Derosia told Davis that he and Greg had acted in self-defense. RP 157. Derosia explained that the cape idea was a prank and that they simply intended to hang the cape on the fence. RP 157. Derosia related that while

they were hanging the cape, they were confronted by Taylor. RP 157.

Derosia explained that the physical confrontation then occurred. RP 157.

Det. Davis testified (regarding Taylor): “My take on it is, what I understand Mr. Taylor to say, and I believe he said this from day one, all along he’s been consistent . . .” RP 197. Det. Davis could not and did not reconcile Taylor’s contradictory statements that it was dark outside his house when the alleged assault occurred. RP 206-07.

Det. Davis also testified that he viewed the case as urgent because there were underlying issues between Raisbeck and Greg and that he “didn’t feel real comfortable have him [Greg] out there . . .” RP 209. Det. Davis also opined that events could escalate between the parties and that “these are people that I don’t know, and they have lifestyles – and I’m speaking about Mr. Bergquist and Ms. Raisbeck, and I’m giving my opinion , I guess, that they have lifestyles that kind of lead to these types of situations.

RP 209-210.

3. The Defendant’s Version of the Case.

Greg and his mother Barbara Bergquist had been victims of Raisbeck for several years. RP 268. Although Raisbeck lived with them for two years, Barbara had to kick her out of their residence because she

had stolen so many things. RP 268. The Bergquists did not allow her to drive any of their vehicles after they kicked her out. RP 268.

Despite this history, Greg kept taking Raisbeck back and getting her out of trouble. RP 285. By June 2009 Greg was tired of this. RP 285.

On June 19- 20, 2009, Walter Derosia had been with Greg the night of the charged events. RP 283. Derosia worked with Greg to remodel a unit in an apartment building that the Bergquists owned. RP 282. After they finished work that day, they went to Mr. Ladd's apartment for a visit. RP 284. One of the subjects they discussed was Greg's ex-girlfriend Melissa Raisbeck. RP 285. Greg talked about how he repeatedly had to get her out of trouble, RP 285 .

Just for fun, the men used a bed sheet and made a cape. RP 285, 285. They wrote "Capt Sav-A-Ho" on the cape. RP 285. The language referred to Greg's repeated efforts to rescue Ms. Raisbeck from trouble. RP 285. The men took pictures of each other wearing the cape. RP 286. They decided to hang the cape on a fence at Taylor's residence. RP 286-87.

They drove to Taylor's neighborhood, parked their car and then walked to Taylor's house. When they reached the Tyler residence, Greg hung the cape over the gate. RP 288, 291. Derosia then told Greg that they

needed to leave because Derosia could see someone coming out of the Taylor property. RP 288, 289.

Greg never went into the Taylor yard. RP 327.

As the man later identified as Taylor came out of the house, Greg started talking to him. RP 312. Greg said to Taylor, "Hey, man, what's going on? . . .Do you want to talk about this?" RP 292. Then Taylor struck Greg. RP 292. After Taylor hit Greg, Greg fell almost to the ground. RP 292.

Taylor then assumed a fighting stance and threatened: "Come on, I'll take you both on." RP 293.

Greg had done anything to Greg up to that point. RP 293. Derosia did not see Greg cut Taylor. RP 294, 323.. However Derosia knew that Greg had cut Taylor because Greg said so. RP 295.

Greg had a utility knife that night. RP 295. Greg used the knife for construction work, as in cutting drywall, sheet rock, carpet. RP 295-96

Greg and Derosia then ran down the alley toward Derosia's car. RP 300.

The day before this event, on June 19, 2008, Barbara Bergquist called the police to report that her Ford Explorer was missing. RP 245-46. Neighbors told her that Raisbeck and a man had stolen the car.

When Greg returned home, Barbara Bergquist immediately noted that he had serious injuries. She took Greg to the hospital on June 20, 2008. RP 246. Shortly after midnight on June, 2008, she opened the door and found Greg. RP 249-50, She observed that he was in “total shock”, was pure white and had an obvious injury to his cheek. RP 250. Greg did not want to go to the hospital at that time. RP 258. However, Barbara took Greg to the hospital the day after the alleged assault. RP 250.

Greg was unable to open his mouth. RP 251. He had surgery on his jaw which was then wired shut.. RP 251.

At the time of this incident Greg had prosthesis in his left arm because he had a dislocated shoulder that required surgery. RP 252. Due to this injury Greg was unable to lift his arm very high up. RP 252.

When he returned home during the early hours after this event, he told his mother than he had cut Taylor with a knife. RP 257. Greg told his mother than he had acted in self-defense in order to push the man so that Greg could flee. RP 263.

Sometime later, TPD Det. Davis asked Derosia to the police station. RP 300. Derosia went to the station and answered questions for the detective. RP 301. Derosia was afraid that he would be charged with a crime just as Greg had been. RP 319. Det. Davis had assured him that he would not be arrested. RP 320.

After the event, Greg did not want to call the police. RP 324. Although Derosia believed that Greg acted in self-defense, he did not tell that to the police until after Greg was arrested. RP 325-26.

Det. Davis did not Mirandize Derosia prior to taking his statement. RP 154-55.

Det. Davis recontacted Derosia on June 22, 2009 to take a more detailed statement. RP 158-59. Derosia provided a consistent statement. RP 159.

On June 26, 2009, Det Davis arrested Greg at the Taste of Tacoma while Greg worked. RP 159. Police told Greg that he was under arrest for assault. RP 160. Police advised Greg of his constitutional rights. RP 161. Greg agreed to provide a taped statement. RP 168.

In that taped statement, Greg repeatedly told the detective that Taylor had stolen his truck and tools. RP 168. He also repeatedly stated that he had been assaulted. RP 178.

Det. Davis arrested Greg based on the statements of Taylor and Raisbeck. RP 179.

When police contacted Melissa Raisbeck about the truck, she stated that she had permission from Greg to borrow the vehicle. RP 169. Raisbeck told police that she did not return the vehicle because Greg told

her than when she returned it she would have to give him a sexual favor.
RP 170.

When Greg was arrested, he had a utility knife on his person. RP 172-73. Det. Davis seized the knife although he did not know whether that knife had anything to do with the assault. RP 174

Det. Davis submitted the utility to determine whether there was any blood on it. RP 173. There was not. RP 173.

Det. Davis spoke to Barbara Bergquist, Greg's mother, on several occasions. RP 186. He opined to her that he did not think that Taylor had been involved in the theft of the Bergquist car. RP186-87.

Det. Davis described Taylor's wound as a laceration rather than a stab wound. RP 190-91.

Det. Davis noted that Taylor initially stated that he had not seen anything in Greg's hands. RP 193. Taylor later changed his story to allege that he had seen a knife in Greg's hand. RP 196.

D. LAW AND ARGUMENT:

The Fourteenth Amendment prevents any state from depriving any person of life, liberty, or property without due process of law. In addition, Article 1, section 3 of the Washington State Constitution provides: "No person shall be deprived of life, liberty or property without due process of law."

The due process of law guarantee requires that a person charged with a crime be tried according to the law in such cases and assures that in such trial and proceedings, the accused is deprived of no rights to which is entitled.

In the instant case, and for reasons set forth below, Mr. Bergquist was denied his constitutional rights under the due process clause of the Fourteen Amendment. He therefore is entitled to the relief requested herein.

1. THIS COURT SHOULD GRANT THE DEFENDANT'S MOTION FOR NEW TRIAL WHERE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN HIS REPRESENTATION OF MR. BERGQUIST.

Washington has adopted the two-part *Strickland* test to determine whether a defendant is entitled to relief based upon the ineffective assistance of trial counsel. *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first show that counsel's performance was deficient. The defendant must then show that this deficient performance prejudiced the defense, such that the result of the trial was unreliable. *Id.* at 226-27 (quoting *Strickland*, 466 U.S. at 687). The second prong may be proved by showing that but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* at 229. The reasonableness of counsel's representation is viewed in light of all of the circumstances. *State v. Lord*,

117 Wn.2d 829, 883, 822 P.2d 177 (1991). A claim of deficient performance cannot be based on matters of trial strategy or tactics. Cienfuegos, 144 Wn.2d at 227. There is a strong presumption that counsel's representation was effective. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (quoting *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Circuit 1985)). This presumption is subject to the limitations noted below.

a. Trial counsel was constitutionally ineffective for failing to impeach the state's chief witness for a conviction for trafficking in stolen property where the trial court had ruled that conviction admissible and credibility was the central issue at trial.

Crimes of dishonesty may be used to impeach witness testimony. ER 609(a)(2). The rule provides: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted ... only if the crime ... (2) involved dishonesty or false statement, regardless of the punishment."

At the outset of the case, the court ruled that the defendant could impeach Mr. Taylor with a 2007 conviction for trafficking in stolen property. RP 4-5. Indeed, at time of trial, Taylor was serving his sentence in the Department of Corrections. Prior to Taylor's testimony, the State

persuaded the trial court to permit Taylor to testify while attired in non-prison attire. The State obviously did so to enhance Taylor's credibility.

Where the court had ruled that the defendant could impeach Taylor with that conviction, trial counsel had no legitimate strategic or tactical to fail to so impeach him.

Because the State's case rested on Taylor's credibility and his assertion that he was "stabbed" by the defendant who was not acting in self-defense, trial counsel should have made every effort to impeach him. The probative force of a prior conviction for trafficking in stolen property was immense. Failure to use Taylor's prior conviction as impeachment, whether intentional or due to carelessness, so prejudiced the defendant as to render unreliable the results of the trial.

b. Trial counsel was constitutionally ineffective failing to object to ER 404(b) evidence that alleged victim Taylor found a white powdery substance on his car's gas tank and likely in the gas tank where that could not be linked to Mr. Bergquist.

ER 404(b) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

In this case, the State offered, and trial counsel did not object, to Taylor's unfounded assertions that someone, by inference Mr. Bergquist, had poured some type of white powder into his gas cap when Taylor was

hospitalized. This evidence did not satisfy any test for admissibility. This is so because even if Taylor's assertions were true, there was not a scintilla of evidence to link Mr. Bergquist with this prior bad act.

The only purpose of this evidence was to persuade the jury that Mr. Bergquist was a dastardly fellow who not only would stab Taylor but attempt to ruin his car when Taylor was hospitalized.

Because the credibility of the witnesses, Taylor v. Mr. Bergquist, was the critical issue in this case, trial counsel's failure to object to this evidence was inexcusable and so prejudiced the defendant as to render unreliable the results of the trial.

c. Trial counsel was constitutionally ineffective for failing to object to testimony that Mr. Bergquist allegedly told Melissa Raisbeck that she needed to perform a sexual favor for him where this "evidence" denied the defendant his constitutional right to cross-examine Raisbeck and was otherwise inadmissible hearsay.

The Sixth Amendment of the United States Constitution guarantees to criminal defendants the right to be confronted with the witnesses against him. In addition Article I, section 22 of the Washington Constitution also guarantees criminal defendants the right to confront and cross-examine witnesses against them.

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct 1354, 158 L.Ed.2d 177 (2004) the United States Supreme Court held that the confrontation clause bars "admission of testimonial statements of a

witness who did not appear at trial unless he was unavailable to testify, and the defendant has had a prior opportunity for cross-examination.” *Id.* at 53-54.

In this case, the prosecutor adduced evidence that Raisbeck refused to return the Bergquist vehicle. Detective Davis testified that Raisbeck told him that she declined to return the car because Mr. Bergquist informed her that she would have to perform “a sexual favor” upon the return.

This statement testimonial because Raisbeck made the statement to a police detective to justify her failure to return the Bergquist car. Further, the State’s failure to call Raisbeck denied Greg any opportunity to cross-examine declarant Raisbeck about it.

In addition to violating Greg’s constitutional right to cross-examine witnesses against him, the evidence was inadmissible for several reasons: (1) the testimony, even if admissible, was at least double hearsay; (2) there was no legitimate purpose for the admission of the evidence under ER 404(b), *supra*.

Rather the prosecutor offered this evidence to reinforce the State’s theory that Greg is a dastardly fellow who would not only assault a man but also would demand sexual favors from women.

Trial counsel's failure to object to more "smear" evidence caused indelible prejudice to Greg and so prejudiced the defendant as to render unreliable the results of the trial.

d. Trial counsel was constitutionally ineffective for adducing improper opinion testimony from the lead detective that he arrested Greg in this "urgent" matter because he feared that "domestic violence" would escalate.

The role of the jury is to be held "inviolable" under Washington's constitution. WASH. CONST. Art. I, §§ 21, 22; U.S. CONST. Amend. VII. The right to have factual questions decided by the jury is crucial to the right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). To the jury is consigned under the constitution "the ultimate power to weigh the evidence and determine the facts." James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). In virtually every jury trial, the jury itself is instructed that "[i]t is your duty to determine which facts have been proved in this case from the evidence produced in court." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 9 (2d ed. 1994) (WPIC).

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).⁹ Such testimony violates the defendant's constitutional right to a jury trial and infringes upon the jury's

fact-finding role. State v. Dolan, 118 Wn. App. 23, 329, 73 P.3d 1011 (2003).

In the instant case, the State likely introduced and trial counsel then pursued evidence regarding the timing of Greg's arrest. Of course, this evidence was irrelevant. ER 401. Further, the evidence was extremely prejudicial to Greg.

Not only did the evidence usurp the jury's fact finding function, but the evidence also permitted the detective to testify about his personal opinion regarding the defendant's dangerousness.

The Washington Supreme Court has condemned the use of "operative fact" evidence explaining why police took some action. In State v. Mason, 160 Wn.2d 910, 162 P.2d 396 (2007) cert. denied, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008), a police detective detailed for the jury the evidence he had gathered from the defendant's apartment, explaining why he took each item because the non-testifying witness had told him the significance of it. The Washington Supreme Court expressed its disapproval of admitting such statements under the theory that they were not being used for the truth of the matter asserted. "Mason correctly notes that courts ought to guard against any 'backdoor' admission of inadmissible hearsay statements." Mason, 160 Wn.2d at 921. "[W]e are not convinced a trial court's ruling that a statement is offered a purpose other than to prove

the truth of the matter asserted immunizes the statement from Confrontation Clause analysis.” Id., at 922. The Court found it unnecessary to decide whether the admission of these statements violated the Confrontation Clause because it found that Mason had waived his right to complain. Id.

In this case, the detective did not attempt to “backdoor” hearsay evidence but instead the detective was able to “back door” his opinion regarding Greg’s alleged escalating domestic violence under the guise of testifying about the urgency of his arrest.

In the instant case, the detective testified that he viewed the case as urgent because there were underlying issues between Raisbeck and Greg and that he “didn’t feel real comfortable have him [Greg] out there . . .” RP 209. Det. Davis also opined that events could escalate between the parties and that “these are people that I don’t know, and they have lifestyles – and I’m speaking about Mr. Bergquist and Ms. Raisbeck, and I’m giving my opinion , I guess, that they have lifestyles that kind of lead to these types of situations.” RP 209-210.

Significantly the detective’s negative was directed only against Greg. Moreover the detective unequivocally told the jury that Greg, not Raisbeck, was the problem. The detective further condemned Greg as having a life style that resulted in violence, particularly domestic violence.

Of course, neither Raisbeck nor Greg testified at trial. There was no evidence that the detective had any admissible evidence about their alleged tumultuous relationship. Since Raisbeck did not testify there was no evidence about domestic violence with Greg. Likewise, Greg did not testify. Thus there was no competent evidence upon which the detective could have based his inadmissible testimony.

Again there is no legitimate tactical or strategic reason for defense counsel to acquiesce in the admission of this evidence. Trial counsel's failure to act thus caused indelible prejudice to Greg and so prejudiced the defendant as to render unreliable the results of the trial.

e. Trial counsel was constitutionally ineffective for failing to object to the lead's detective's testimony that he believed the defendant to be guilty.

Neither the prosecutor nor any state's witness may express personal opinions as to the credibility of defense witnesses. *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, rev. denied, 100 Wn.2d 1003 (1983); *State v. Sargent*, 40 Wn.App. 340, 343-46, 698 P.2d 598 (1985) reversed on other grounds, 111 Wn.2d 641 (1988); *State v. Jerrels*, 83 Wn.App. 503, 508, 925 P.2d 209 (1996); *State v. Barrow*, 60 Wn.App. 869, 809 P.2d 209 (1991); *State v. Stith*, 71 Wn.App. 14, 19-20, 856 P.2d 415 (1993); *State v. Padilla*, 69 Wn.App. 295, 299, 846 P.2d 564 (1993).

As noted in the previous section, no witness may testify to his opinion that the defendant is guilty. In this case, Detective Davis did just that.

First, Davis testified that after speaking to Taylor and Raisbeck, he concluded that Greg was the most likely suspect. RP 143. Then, knowing full well that this case was a credibility contest between Taylor and Greg, the detective affirmed that he believed Taylor because he had been consistent in his statements. RP143, 206-07. The lead detective's testimony surely had great influence on the jury. After all, the experienced homicide and assault detective must possess superior ability to solve crimes. RP 137.

Trial counsel failed to object to and move to strike this impermissible evidence. Again there is no legitimate tactical or strategic reason for defense counsel to acquiesce in the admission of this evidence. Trial counsel's failure to act thus caused indelible prejudice to Greg and so prejudiced the defendant as to render unreliable the results of the trial.

f. Trial counsel was constitutionally ineffective for failing to object to the detective's failure to comply with the court's order when playing the Greg's taped statement where the detective's inaction informed the jury of Greg's prior convictions.

Washington courts have held that a defendant is entitled to a new trial where the jury hears inadmissible evidence. For example, in State v.

Cummings, 31 Wn.App 427, 642 P.2d 115 (1982), the court held that the defendant was entitled to relief when the jury received in admissible information about the defendant's past criminal record.

Further, admission of this evidence violated ER 609. ER 609 limits evidence of prior convictions to impeachment purposes. Evidence of a prior incarceration for any other purpose highlights a defendant's prior conviction in an impermissible way.

Although the jury must make its decision based on the evidence adduced at trial, the jury does not determine whether testimony is substantive evidence, inadmissible evidence, or evidence admitted for some other purpose.

Further, admission of this evidence violated ER 609. ER 609 limits evidence of prior convictions to impeachment purposes. Evidence of a prior incarceration for any other purpose highlights a defendant's prior conviction in an impermissible way.

In this case, the trial court's ruled that the detective needed to stop the defendant's taped statement prior to any discussion of the defendant's prior convictions which included assault. The detective failed to do so, thereby alerting the jury to this inadmissible evidence. As a result, the jury heard completely inadmissible evidence.

Again there is no legitimate tactical or strategic reason for defense counsel to acquiesce in the admission of this evidence. Trial counsel's failure to act thus caused indelible prejudice to Greg and so prejudiced the defendant as to render unreliable the results of the trial.

g. Trial counsel was ineffective for failing to investigate and call witnesses whose testimony would have been exculpatory for the defendant.

The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics. *But this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations. See State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987) (emphasis added).

Moreover, the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory. *In re PRP of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). While defense counsel is not required to interview every possible witness, the failure to interview witnesses who may provide corroborating testimony may constitute deficient performance. *Id.* at 739.

In this case, the defendant made defense counsel aware of the potential witness of Holly Williams. Ms. Williams lives just a couple of blocks from Don Taylor. It takes just a few minutes to walk from her house to Taylor's house. (See Appendix A)

Holly Williams was an important witness who would have testified that she saw the defendant and Mr. Derosia before and after the alleged incident. She would have testified that the men informed her that they intended to hang the sheet on the fence of Don Taylor's residence. She would have testified that they told her that they would do so only if it appeared that no one was home. She would have testified that the men wanted to play a joke.

Ms. Williams also would have testified that the men returned to her home after their trip to Don Taylor's house. The defendant was in obvious pain from his broken jaw and also was in state of extreme distress and emotion. The defendant appeared to Ms. Williams to be in a state of shock. The defendant spontaneously uttered words to this effect: "I can't believe what happened. First the guy steals my truck and then he attacks me!" Further, Ms. Williams would have testified that she saw no blood on either the defendant or Don Taylor.

Ms. Williams' 17 year old daughter Stephanie also was present when the men returned from the Don Taylor residence. She witnessed the state of mind of the defendant and also observed his injuries.

In this case, the defendant's excited utterances would have been admissible under ER 803, which provides for the admission of a statement relating to a startling event made which the defendant was under the stress

of excitement caused by the condition or event. The statements would have corroborated the claim that Don Taylor started the fight by striking the defendant in the jaw, thereby breaking it.

Further, Ms. Williams' statement that the defendant and Derosia talked about the stolen Ford Explorer prior to going to the Taylor house corroborates the testimony of Derosia. This is so because Derosia testified that when the defendant first saw Taylor, he asked, "So do you want to talk about this?" This reference was to the stolen vehicle. Derosia recalled that he thought the conversation was about the theft of the defendant's truck and tools. Derosia testified that at that time, Taylor punched the defendant in the jaw.

h. Trial counsel was ineffective for failing to object to the prosecutor's continued use of the term "stabbing" where that was not true and where the degree of possible inflicted injury was the chief difference between assault one and assault two.

See Argument 4 (prosecutorial misconduct), below.

Again, there was no reasonable tactical or strategic reason not to object to the prosecutor's repeated and erroneous mischaracterizations of Taylor's injuries. This failure to object likely impressed upon the jury the conclusion that Taylor was stabbed.

But for this error, there is a reasonable probability that the outcome of the trial would have been different. Had the jury disbelieved Taylor, the jury likely would not have convicted the defendant.

2. THE TRIAL COURT ABUSED IT DISCRETION WHEN IT REFUSED TO ADMIT “RES GESTAE” EVIDENCE REGARDING THE THEFT OF THE BERGQUIST VEHICLE WHERE THOSE WHERE THOSE ACTS SET THE CHARGED EVENTS INTO MOTION.

The “res gestae” doctrine provides for the admission of evidence that is necessary for a complete description of the crime charged or constitutes proof of the history of the charged crime. *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981). Although many of the cases deal with the admission of prior bad acts by the defendant, the cases are clear that a party is entitled to put on evidence that completes the story of a crime or to provide the immediate context for events close in time and place to the charged crime. *State v. Hilliard*, 122 Wn.App. 433, 93 P.3d 681 (2003).

Of course, the party opposing the admission of such evidence is entitled to a limiting instruction so that the fact finder does not misuse the evidence.

In this case, the State was allowed to adduce testimony that Raisbeck told Det. Davis that she had not returned the Bergquist vehicle because Greg had instructed her that she would need to perform a sexual favor when she

did so. The State thus placed into issue whether Raisbeck had stolen Greg's truck and tools.

Nevertheless the court refused to permit the defendant to put on evidence about this issue. The defendant could have put on eyewitnesses to Raisbeck's theft of the vehicle.

This defense testimony would have corroborated the defendant's statements that he and Derosia went to the Taylor residence not only to hang the cape but also to check whether the stolen vehicle and tools were there. The defendant was entitled to establish that it was reasonable to check at the Taylor residence for the stolen vehicle and tools because his ex-girlfriend and Don Taylor were seen stealing the vehicle days earlier.

The erroneous exclusion of this evidence prohibited the jury from hearing evidence that corroborated Taylor's testimony regarding the statements made by the defendant to Taylor. The erroneous exclusion of evidence prohibited the jury from knowing the context in which the incident occurred. Had the jury known that the Bergquist vehicle had been stolen in close proximity to the event, the jury likely would have believed Derosia testimony about how the incident occurred.

The defendant had endorsed witnesses to this theft, including Barbara Bergquist whose testimony is corroborated by the declarations of Camille Gibson and Michael Jaros'z. (Appendix B). The declarations do not

specifically identify any stolen vehicle. However, when read in conjunction with the trial testimony of Barbara Bergquist, the declarations clearly describe the same event.

3. THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT WHEN HE REPEATEDLY REFERRED TO TAYLOR'S LACERATION AS A STAB WOUND WHERE THE NATURE OF THE INJURY WAS RELEVANT TO THE DEGREES OF ASSAULT AND ALSO WHERE HE DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AS WELL AS ER 404(B) BY ADDUCING EVIDENCE REGARDING ALLEGED THREATS OF SEXUAL DEMANDS MADE BY THE DEFENDANT.

The prosecuting attorney represents the people and is presumed to act with impartiality “in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. *Id.*, at 841; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the

misconduct is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” incurable by a jury instruction. *Gregory*, 159 Wn.2d at 841.

In this case, although defense counsel failed to object to the numerous acts of prosecutorial misconduct, the defendant now establishes that the misconduct was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been cured by a jury instruction.

a. The prosecutor purposefully referred to Taylor’s injury as a stab wound or stabbing where that characterization was contrary to the evidence in this case and where the prosecutor’s conduct was designed to mislead the jury.

By the time of trial, the parties knew that Taylor’s injury was a laceration caused by a swipe of the knife. The paramedic, the only medical witness called by the prosecutor, affirmed this. The paramedic described the injury as “an approximate six-to-eight inch laceration, more of a laceration than a puncture wound.” RP 123. The paramedic specifically stated that the injury was not a stab wound. RP 127. As the result of his injury, Taylor received some external stitches over the laceration. RP 129. In fact, the paramedic testified, “If I knew it had not penetrated his rib cage, I would say, you know, it’s not very serious.” RP 130. Even Det. Davis believed it was a

laceration rather than a stab wound. RP 190. Nevertheless the prosecutor repeatedly referred to the injury as a “stab wound.”¹

For example, the prosecutor asked Derosia:

-“You knew he had just stabbed a guy?” (RP 324)

-“You were at the scene when the person gets stabbed, right?” (RP 325)

-“You never told the police or the detective that you saw Mr. Bergquist face-off with Mr. Taylor, did you? . . . Stand right in front of each other and stab him?” (RP 326)

The prosecutor continued this line of questioning with Det. Dan

Davis:

-“Before speaking to Mr. Taylor, had any of the initial responders or yourselves identified the person believed to have stabbed Mr. Taylor?” RP 141.

- “I want to talk specifically about Mr. Taylor and his version of what happened the night he got stabbed.” RP 144.

- “And describe e what Mr. Taylor told you about how he was stabbed?” RP 194

- “Again then, Mr. Taylor said that this blow or this stab came to his left side, correct?” RP 195

-“Did Mr. Bergquist at any time during the course of your investigation indicate that the two men Mr. Taylor when he was stabbed?” RP 215

- “So, as far as the information that you’ve discovered during the course of your investigation, is there a single piece of evidence that supports the notion that the two men were facing each other when Mr. Bergquist stabbed him?” RP 215

¹ NOTE: This brief contains only a few of the times that the prosecutor referred to the injury as “a stab wound” rather than a laceration.

- “But did Mr. Derosia tell you whether or not he knew that Mr. Bergquist was the one who stabbed Mr. Taylor?” RP 218

The prosecutor also repeatedly used the term “stab” or “stabbing” in his closing argument; a few examples are included:

-“You don’t go over to someone else’s home in the middle of the night, provoke an altercation, *stab the man in the chest* . . . RP 364

- “Mr. Taylor walked out of his houseand then was stabbed.” RP 364

The prosecutor obviously chose to refer to the laceration as “a stabbing or stab wound” throughout the trial because he wanted to impress upon the jury that the defendant intended to inflict great bodily harm. Under the law, the nature of the injury is the difference between assault in the first degree and assault in the second degree.

The prosecutor continued in closing to mischaracterize the evidence. See the argument regarding the capabilities of the box-cutter knife, *supra*. Further, the prosecutor argued regarding whether the defendant intended to commit great bodily harm: “I’m going to suggest to you that when you take a knife and you stab somebody in the chest, your intent is to inflict great bodily harm.” RP 367. “Why else do you take a knife out and stab somebody in the chest?” RP 368. “So, it’s clear, the amount of force Mr. Bergquist employed in this case when he decided he was going to pull out his knife and stab an unarmed man . . . “ RP 371. There are innumerable

other instances where the prosecutor reiterated time and again that the defendant “stabbed” Mr. Taylor.

The prosecutor’s purposeful conduct was designed to mislead the jury into convicting the defendant of assault in the first degree.

The defendant was charged with assault in the first degree. The to-convict instruction required the state to prove, inter alia, that (1) on or about 6/20/09, the defendant assaulted Don Taylor; (2) That the assault was either committed with a deadly weapon OR by a force or means likely to produce great bodily harm or death; AND (3) that the defendant acted with intent to inflict great bodily harm.

The court’s instructions also provided, “Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.”

In this case, the prosecutor failed to prove that the defendant intended to inflict great bodily harm. A weapon is "deadly" if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm. Wash. Rev. Code, sec. 9A.04.110(6).

The statute provides that the determination whether an implement is a deadly weapon is intensely fact specific. In this case, the state lacked

evidence to establish that the box-cutter knife possessed by the defendant at the incident was a deadly weapon.

First, the box-cutter knife that the defendant may have used was not recovered. Thus there could be no testimony as to whether the blade was so worn down as not to extend far beyond the edge of the implement. The deadliness of the box-cutter knife depends on the condition of the blade. A fresh blade has greater reach and likely could be used to stab someone. A worn blade would not. The fact that Taylor suffered only superficial injury (a skin cut which required stitches and no internal injury) suggests that the blade was not fresh and instead was greatly worn down.

The only person who “testified” that the box-cutter knife was a deadly weapon was the prosecutor, who argued in closing that the box knife could be used “stab somebody, you can cut an artery, go right through the rib cage to the lungs, to the spleen, to the liver, just like the medic told us.” RP 367. However, the medic did not so testify. The paramedic testified to general injuries that might result from a stabbing but did not examine the box-cutter knife and certainly did not testify that the box-cutter knife was capable of inflicting the injuries described by the prosecutor. In fact, no other witness so testified.

Similarly there was no evidence that the defendant's intent was to inflict "great bodily harm" (required for first degree assault) as opposed to "substantial bodily harm" (required for second degree assault).

First degree assault required the state to prove that the defendant *intended* to inflict "great bodily harm", defined as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ."

Intent is not proven by consequence. Yet that is exactly what the state argued. The prosecutor averred that the victim's numerous stitches established that the defendant intended to inflict "great bodily harm." The number and location of the stitches surely are relevant to the definition of "significant serious permanent disfigurement". There is no evidence that the defendant intended to inflict that level of harm, even assuming *arguendo* that that the stitches fulfilled the statutory definition of "great bodily harm."

The facts of the case equally suggest that (*rejecting for the sake of argument the claim of self-defense*) that the defendant committed assault in the second degree. To prove second degree assault, the state had to prove that the defendant intended to inflict "substantial bodily harm" which means "bodily injury which involves a temporary but substantial disfigurement, or

which causes a temporary but substantial loss or impairment of any bodily part or organ, or which causes a fracture of any bodily part.” On these facts, the defendant’s apparent act of swiping Taylor with the box-cutter establishes that his intent, at most, was to inflict “substantial bodily harm.”

By repeating and falsely using the terms “stab and/or stabbing”, the prosecutor intentionally tried to mislead the jury to convict the defendant of first degree assault. The prosecutor’s misconduct constitutes reversible error.

b. The prosecutor violated ER 404(b) by offering incompetent evidence regarding: prior bad acts committed by the defendant without obtaining a pretrial order regarding its admissibility and in violation of his right to cross examine witnesses.

i. The prosecutor impermissibly adduced ER 404(b) in violation of the evidentiary rules and case law and also to the extreme and enduring prejudice of the defendant.

A party who intends to offer ER 404(b) evidence must first obtain an order allowing the evidence. The trial court makes such a ruling outside the presence of the jury. *E.g., State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

In this case, the prosecutor failed to obtain any prior ruling from the court before adducing evidence regarding the stolen vehicle. The prosecutor first improperly (and without objection from trial counsel, see argument 1) adduced evidence of inadmissible hearsay from Ms. Raisbeck about her

failure to return the stolen car. The prosecutor next adduced inadmissible double hearsay wherein the detective testified to Ms. Raisbeck's statements about statements made by the defendant. Ms. Raisbeck's inadmissible hearsay statements recounted that she would have returned the vehicle had the defendant not demanded sexual favors. P 169-170.

The admission of this evidence was grossly prejudicial to the defendant. It allowed the state to portray the defendant as some sort of madman who went around assaulting people and demanding sexual favors from women. Evidence that the defendant was the kind of person who would demand sexual favors as a condition of a vehicle loan was damning to his character and also unfairly prejudicial to the defendant. The prosecutor committed misconduct by adducing that evidence.

ii. The prosecutor violated the defendant's right to confront witnesses by intentionally adducing inadmissible hearsay statements from Ms. Raisbeck, a witness on the state's witness list.

Both the state and federal constitutions guarantee defendants the right to confront and cross examine adverse witnesses. Wash. Const. art. I, sec. 22; U.S. Const. amend. VI. A violation of the defendant's rights under the confrontation clause is constitutional error. *Harrington v. California*, 395 U.S. 250, 251-52, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). Constitutional error is presumed to be prejudicial and the state bears the burden of proving

that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986).

In this case, the court ruled that the defendant could not present evidence regarding the theft of a vehicle owned by the Bergquist. That vehicle was stolen by Ms. Raisbeck and Mr. Taylor. That theft, inter alia, set in motion the events of this case.

After the court ruled that the evidence was inadmissible, the prosecutor ignored the ruling. The prosecutor asked Det. Davis to recount inadmissible hearsay statements by Ms. Raisbeck. Some of these statements included the defendant's alleged sexual demands to her.

Ms. Raisbeck was not called by the prosecutor although she was named on the state's witness list. (Appendix C) The prosecutor intentionally adduced this evidence through Det. Davis rather than call Ms. Raisbeck, a witness who had a lot of troubling background issues related to the defendant.

The prosecutor's conduct violated the defendant's fundamental constitutional right to cross-examine. Trial counsel's failure to object does not mitigate the prejudice to the defendant or waive the argument. The state cannot prove that the error was harmless.

4. THIS COURT MUST RESERVE THE DEFENDANT'S CONVICTION FOR FIRST DEGREE ASSULT WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THAT CONVICTION.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 576, 210 P.3d 1007 (2009). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from.” *Id.* (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). “Circumstantial evidence and direct evidence are equally reliable” in determining the sufficiency of the evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009) .

In this case, the State was required to prove that Greg assaulted Taylor with a deadly weapon or by a force or means likely to produce great bodily harm or death; that Greg acted with intent to inflict great

bodily harm, and this act occurred in the State of Washington. RCW 9A.36.010(1)(a).

The State failed to prove that Greg acted with intent to cause “great bodily harm”. That element is defined as “bodily injury that creates a probability of death”. WPIC 2.04; *State v. Langford*, 67 Wn.App. 572, 837 P.2d 1037 (1992).

A person acts intentionally when “with the intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” WPIC 10.01; RCW 9A.080.010(1)(a).

In this case, the State failed to prove that Greg acted with intent when he cut Taylor. Greg’s lack of intent is established by the swiping motion of the cur and also by the lack of serious injury to Taylor.

Had Greg intended to cause “great bodily harm”, he would have thrust the utility knife directly at Taylor. Certainly Greg could have thrust the utility knife into an eye, throat, etc. The superficial swipe injury inflicted in this case, even when viewed in the light most favorable to the State, fails to rise to guilt beyond a reasonable doubt as determined by a reasonable person.

Assault in the first degree is defined by statute, in relevant part, “A person is guilty of assault in the first degree if he or she, *with intent to inflict great bodily harm: ...*” RCW 9A.36.011(1)(a) (emphasis added). To uphold Greg’s first degree assault convictions, the State was required to prove that Greg with (1) intent to inflict great bodily harm, (2) assaulted (3) another (4) with a deadly weapon.

In this case, the State failed to prove that Greg acted with the requisite intent.

If the evidence against Greg was not sufficient to support the guilty verdict, then the Double Jeopardy Clause requires reversal and remand for judgment of dismissal with prejudice. *Burks v. United States*, 437 U.S. 1, 17-18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978))

5. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative error doctrine applies when several errors occurred at the trial court level, none of which alone warrants reversal, but the combined errors effectively 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 (2004); *see also State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). *Breimon* bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. *In re Pers.*

Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

In this case, the defendant is entitled to relief under the cumulative error doctrine. Greg's right to a fair trial was prejudiced where his attorney was so ineffective as to fail to impeach the State's chief witness with his admissible conviction for trafficking in stolen property, failed to object to opinion evidence that the defendant was guilty and that he had a propensity to commit violent crimes as well as to fail to object to inadmissible hearsay. The prosecutor's conduct likewise deprived the defendant of a fair trial. The prosecutor purposefully adduced inadmissible evidence and also repeatedly mischaracterized Taylor's injuries.

The detective's failure to obey the trial court's instructions regarding the taped statements caused the jury to hear evidence that the defendant had prior convictions. None of this evidence could have placed before the jury unless and until the defendant testified.

The sum total of these errors entitled the defendant to relieve under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, Mr. Bergquist respectfully asks this court to reverse his conviction for assault in the first degree while armed with a deadly weapon.

In the event that the court agrees that the State failed to prove the charge beyond a reasonable doubt, the court must order the case dismissed with prejudice.

DATED this 4th day of October, 2010.

Respectfully submitted,



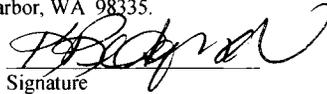
BARBARA COREY, WSBA#11778
Attorney for Appellant William Gregory

FILED
COURT OF APPEALS
DIVISION II
10 OCT -5 PM 2:43
STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger, a copy of this Document to: Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946, Tacoma, Washington 98402 and to the Appellant, William Bergquist, U.S. Mail, Postage Pre-Paid, at 108 Point Fosdick Drive NW, Gig Harbor, WA 98335.

10-5-10
Date


Signature

APPENDIX A

DECLARATION OF HOLLY WILLIAMS

1
2 1. I am Holly Williams. I am over the age of 18 and am competent to make this
3 declaration.

4 2. I know the defendant in this case and have for some time.

5 3. On the night of this incident, I was at my home, just a couple of blocks from the Don
6 Taylor residence. Sometime after dark, the defendant and Mr. DeRosia arrived at my residence.
7 They were in light-hearted moods and showed me the "Captain Save a Ho" cape and expressed
8 their intentions to go to someone's house and hang it over the fence as a joke. They stated that
9 they were not going to hang the cape if it appeared that anyone was home or if there were any
10 lights on. They then left for the residence. They returned about 5-10 minutes later. The
11 defendant was in obvious pain from his broken jaw and also was in state of extreme distress
12 and emotion. The defendant appeared to be in a state of shock. The defendant spontaneously
13 uttered words to this effect: "I can't believe what happened. First the guy steals my truck
14 and then he attacks me!" It was difficult for the defendant to speak because he was in so
15 much pain from his jaw. I saw no blood on either the defendant or Don Taylor. After a few
16 minutes the men left my house.
17

18 4. After I knew that this case had been charged, I was contacted by the defendant's
19 attorney. He stated that he knew that I had information about the incident and that he would
20 call me as a witness at trial. I asked him when he wanted to interview me and he said that he
21 would interview me minutes before I testified. He told me that he would call me as a witness
22 on either Monday March 29 or Tuesday March 30.
23
24
25

DEFENDANT'S MOTION
FOR NEW TRIAL

Page 16 of 19

BARBARA COREY, ATTORNEY, PLLC
901 South "I" St, #201
Tacoma, WA 98405
253.779.0844

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

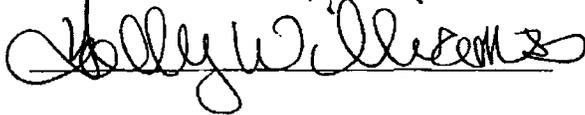
5. I was surprised to learn that I would not be a witness in the case. I found this out only after the case was over. I was never interviewed in this case nor was I informed by the defendant's attorney that I would not be a witness.

6. I have later learned that I was not even on the defendant's witness list.

7. My daughter Stephanie was present for the visits by the gentlemen. She also witnessed everything and I told the attorney that she would be a good witness too.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED IN TACOMA, WASHINGTON ON APRIL 15, 2010.



APPENDIX B

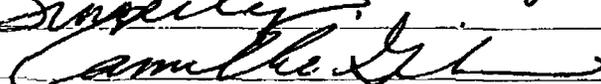
To Whom it May Concern:

4/19/2010

I declare, under penalty of perjury of the laws of the State of Washington, that this Declaration is true and correct, to the best of my knowledge and belief.

On June 15, 2009, at approximately five o'clock we arrived home and saw a gray haired man, with a scruffy beard in a silver Honda stop in our driveway. A woman, we know as Melissa got out and marched briskly down our lane. A few minutes later, she sped past me at approximately 50 miles per hour spitting gravel all over me & my son standing only a few feet away. She almost hit our neighbor, Kurt Ball who was walking his dog past the top of our driveway.

Much to our disbelief no one ever contacted us about this matter. Mr Underwood, William Bergquist's attorney, never at any time, contacted or interviewed either of us.

Sincerely,


Michael & June

APPENDIX C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



09-1-03093-8 33429718 STLW 12-24-09

FILED
IN COUNTY CLERK'S OFFICE
A.M. DEC 24 2009 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STORR, COUNTY CLERK
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
WILLIAM GREGORY BERGQUIST
Defendant(s).

NO. 09-1-03093-8

LIST OF WITNESSES

TO: WILLIAM GREGORY BERGQUIST, defendant, and
TO: MICHAEL JOSEPH UNDERWOOD, his/her attorney

The following is a list of witnesses in the above entitled cause for JURY TRIAL on 1/12/2010

- | | |
|--|--|
| CHRISTOPHER RADY | DON CARPENTER TAYLOR |
| JASON SPENCER | MELISSA BROOKE RAISBECK |
| MINDY TANNER | THOMAS FERRER, MD |
| WALTER GEORGE DEROSIA | WILLIAM JONES |
| ASKINS, AUBREY
TACOMA POLICE DEPARTMENT #914 | BENBOE, MAX
TACOMA POLICE DEPARTMENT #249 |
| COCKCROFT, BRANDON J
TACOMA POLICE DEPARTMENT #58 | DAVIS, DANIEL
TACOMA POLICE DEPARTMENT #322 |
| HUBACHEK, MICHELE
LAW ENFORCEMENT SUPPORT AGENCY #0 | MUSE, WILLIAM
TACOMA POLICE DEPARTMENT #268 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Severson, Denise
LAW ENFORCEMENT SUPPORT AGENCY #0

WILLRICH, STEFANIE
TACOMA POLICE DEPARTMENT #274

Dated this 22 day of December, 2009.

Mailed ~~faxed~~ received copy this 24
day of December, 2009.

To: MICHAEL JOSEPH UNDERWOOD

By: Angel Suarez

MARK LINDQUIST
Prosecuting Attorney

By: TERRY LANE
Deputy Prosecuting Attorney
Washington State Bar # 16708