

NO. 45411-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAN ALLEN PHILLIPS  
Appellant.

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

The Honorable Kevin Hull, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove an essential element of assault in the first degree, namely the identity of the assailant.

2. The trial court abused its discretion by joining the solicitation charges with the assault charges.

3. The trial court abused its discretion by joining the solicitation charges with each other.

4. The trial court abused its discretion by denying the motion to sever the charges.

5. Trial counsel was ineffective for failing to timely move to sever the charges during trial as required under CrR 4.4, when he preliminarily, thrice moving to sever the charges before trial.

6. Trial counsel was ineffective for failing to move to suppress the evidence of the other counts ER 401, ER 402, ER 403, and ER 404.

7. Phillips was Denied His Right To a Fair Trial Where the Trial Court Prohibited Cross Examination of a Witness to show Bias.

Issues Presented on Appeal

1. Did the state fail to prove that Mr. Phillips shot the victim where no one saw the shooter and Contraro identified the shooter as Phillips' nephew Brandon?

2. Did the court abuse its discretion in denying the motion to sever charges where the evidence was not cross admissible and overly prejudicial?

3. Was counsel ineffective to failing to timely move to suppress the evidence during trial where counsel thrice sought to suppress the evidence by moving to sever the charges pretrial?

4. Was counsel ineffective to failing to timely move to suppress the evidence during trial under the evidence rules, where his motion to sever was based in large part on the rules of evidence; ER 401, ER 402, ER 403, and ER 404(b)?

5. Was Phillips denied his due process right to cross examine Brandon Phillips to demonstrate his bias by the trial courts denial of the opportunity to question Brandon on his Prior DV Assault with a Deadly Weapon charge?

B. STATEMENT OF THE CASE

a. Procedural Summary.

Dan Phillips was initially charged with assault in the first degree, DV, unlawful possession of a firearm in the second degree, and murder in the first degree by solicitation, DV. Phillips was charged by second amended information with the above offenses in addition to adding a

firearm enhancement to the first degree assault charge, a second murder in the first degree by solicitation, DV, and a DV assault in the fourth degree. DV 32-48. Phillips was convicted as charged in the amended information. CP 377-388.

Pretrial, counsel challenged the search warrant, the reliability of the confidential informant (CI), speedy trial, and moved to sever the solicitation charges from the assault charges. CP 11-19; RP 2, 8 (February 8, 2013); RP 29-41, 50, 54, 65, 90. The court denied the motions. RP 48, 49, 94, 100.

b. Assault Testimony

Contraro lived with Phillips for 9 out of the 10 years of their relationship. RP 948. One evening sometime after Contraro had moved out of Phillips home and ended their relationship, she drove to Phillips house intending to fill his truck with gas. RP 953. On arrival Contraro kissed Phillips and asked for the truck keys to get gas. Contraro described this interaction as “friendly”. RP 953-954. Brandon, Phillips nephew confronted Contraro and told her that no “hoes” were allowed and that she had to leave. RP 954.

Since Brandon had taken Phillips truck keys, he was the one to give Contraro the truck ignition key but not the gas cap key. RP 954. Contraro did not realize that she needed the gas cap key until she reached the gas station. RP 954-55. When Contraro returned to the house and told Phillips she did not

have the gas cap key, Phillips yelled and said that he had given her the gas key. RP 954-55. Contraro yelled back and flicked the single key at Phillips who became angry at this gesture. RP 954-55. Phillips and Brandon started yelling at Contraro to tell the truth even though Brandon knew that he had only given Contraro the ignition key. RP 956.

Phillips went to the back room and returned with a .300 Savage hunting rifle. Id. Phillips put the gun to Contraro's head, heart and legs and then fired into the ground. RP 957. After that shot was fired, Contraro curled up into a ball, shut her eyes and covered her head with her hand. From this position she heard a struggle and an argument between Brandon and Phillips. Id. During the struggle and argument a second shot was fired into Contraro's leg, but she did not see the shooter. RP 957, 973. Contraro later heard Brandon and Phillips discussing taking her into the woods. RP 960-961. Phillips told Brandon to put a tourniquet on Contraro's leg to stop the bleeding. RP 958. Phillips backhanded Contraro three to four times and then decided to take her to the hospital. RP 959.

Contraro repeatedly told Phillips she did not want to go to the hospital but wanted to be left alone to die. RP 960. After unsuccessfully searching everywhere for his truck keys, Phillips decided to use Contraro's truck. With Contraro's hands over Phillips neck, Phillips gripped Contraro's belt to move

her to the truck. RP 961. Phillips put Contraro down in the living room. because Contraro could not the take pain when being moved. RP 962. As Phillips continued to look for the truck keys, Contraro told him to check the loveseat where she had been seated.

During this time, Contraro also texted her nephew Tanner and said, "I'm going to be leaving in a few minutes". RP 962-3. Phillips told Contraro that she really needed to get to the hospital and again picked her up and tried to move her, but again, Contraro said she could not take the pain. RP 962. Contraro dug her fingernails into Phillips neck to get him to put her down because the movement was too painful. RP 1000. Phillips told Contraro that he loved her and needed to get her to the hospital. RP 962-63, 1001.

Once inside the truck, Phillips tried to drive away but Contraro yelled at Phillips to stop because her leg was hanging out the door. RP 964. Contraro passed out when Phillips got stuck trying to get the truck onto the road. RP 965. Phillips became angry and left after Contraro told him she could not drive while he tried to push the truck. RP 964-965.

While Phillips was gone, Contraro called 911. Contraro testified that she was afraid Phillips would "finish the job:" if he saw her calling 911. RP 965. When Phillips was gone, the tourniquet broke loose and Contraro called Tanner and told him "he shot me". RP 966. Contraro called 911 and told the

operator that Brandon shot her. RP 969, Ex 11.

Contraro explained to the jury that Brandon had harassed and terrorized her and her children over the years and that she did not have good relationship with him because she had obtained a restraining order against Brandon's son. RP 982-983. Brandon also cursed and called Contraro ugly names right before the shooting. RP 995-996. During trial Contraro testified that she thought maybe Phillips shot her. RP 970. Contraro had ten surgeries to repair her knee from the gunshot wound and to regain her ability to walk RP 971-972.

Brandon Phillips was given transactional immunity in exchange for his testimony. RP 923. Brandon was present the night Contraro arrived to get gas for Phillips but denied being involved in the shooting. RP 921-922, 932. Brandon admitted to giving Contraro only the ignition key and to not informing Phillips that he, Brandon was responsible for Contraro not having the gas key. RP 926, -928. Brandon did not at any time call 911 to report the incident because he testified that he did not have a phone. RP 938. Brandon also did not assist Contraro at any time after she was shot. RP 932.

Trial counsel was not permitted to cross examine Brandon on his 2009 DV assault with a weapon charge that was reduced to unlawful possession of firearm based on Brandon shooting his rifle into Ann Phillips backyard in her

presence while he was under the influence of alcohol. RP 104-107.

c. Motion to Sever

Defense counsel moved to sever the charges on three separate pre-trial dates. RP 2, 8; RP 29-41, 50, 54, 65, 90. Defense argued that the two new solicitation charges should have been severed from the assault charges because the evidence regarding the Phillips family dysfunction was overly prejudicial and not relevant to the solicitation charges. RP 90-91. The defense also argued that the defenses were inconsistent for each charge and introduction of the assault defenses and testimony would prejudice Phillips assault case. RP 93-94.

Your Honor, the argument that Mr. LaCross has put forth is that the two charges of this charge of solicitation and the charge of assault are distinct and separate, and to combine them together would confuse the jury and prejudice my client in regards to the assault charge.

Counts are not the same or similar in character, nor do they constitute part of a single scheme or plan as required by the joinder. Again, assault -- the assault charge is separate and distinct from the charge of solicitation when my client was in jail. While the charges may be for murder, they are two distinction actions. CrR 43 says, "Joinder of offense is appropriate only when the charges are, one, the same or similar character, even if not part of a single scheme or plan; or, two, are based on the same conduct or on a series of acts connected together constituting parts of a single scheme or plan." This is clearly not the case in the two charges here, Your Honor. The joinder -- the argument that Mr. LaCross has

made is if joinder is appropriate, the counts must be severed. Criminal Rule 4.4(b) provides that the Court shall sever charged offenses when, quote, the Court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. This is clearly the case in this case, Your Honor. They need to be severed because the jury is going to be prejudiced by the fact that there is another charge of solicitation which would imply that my client is guilty of the first charge and is trying to keep potential witnesses from testifying in regards to that action. Well, I think one can infer that's here, but that's not the case. The prejudice doesn't come from a fact that the parties may all be the same. The prejudice comes from the fact that we don't know the family background dysfunction of Mr. Phillips and his brothers and sisters, and they are -- some of the people that are involved in this solicitation is his brother, his nephew and his -- I believe his sister was named as well, as well as Ms. Contraro, who happens to be the victim in the assault case. We don't know what the motivation would have been if the allegations are, in fact, true, but the dysfunction of my client's family is definitely at play, and so the reasons that he may want to get rid of his family members could be completely different than the charges that have to do with the assault. In fact, what my client stated In fact, what my client stated is that he was really upset with his family members that nobody would help him save Ms. Contraro, and they just kind of abandoned him. So we have an issue of disfunction [sic]in the family. It has nothing to do with his charges of assault against Ms. Contraro, and the parties that he was allegedly going to have killed have nothing to do with that action either. So while it may be helpful to the prosecutor's case, it's very prejudicial to my client's case. The Court must determine whether a trial involving both counts would be so manifestly prejudicial to outweigh the concern for judicial economy. If the State is going to argue judicial economy for these two cases, I think the Court really needs to look at the prejudicial cost to my client and the jury's ability to discern between the two. And I think that is where the real concern here comes is that it combines the two cases, that is seems similar, but the motivations may be

distinct and separate. The jury may not be able to pull that out. And then the defenses that my client may have for the two separate charges could be separate and distinct and not in any way similar. The case is very prejudicial if you keep the two cases together, and it creates a higher risk that the jury will accumulate evidence to find guilt. And that is not We are trying to find the truth. And again, as Mr. LaCross stated, under the circumstances presented in this case, the mere identity of the same victim in both charges can suggest to the jury an ongoing attempt to kill the victim directly by way of an alleged assault and indirectly by way of the alleged solicitation. So what Mr. LaCross is arguing is that by combining these two and allowing -- charging him with attempted murder on the victim, Ms. Contraro, on the assault charge and then having him -- trying the solicitation charge at the same time where he is again accused of trying to murder Kelly Contraro a second time might infer to the jury that he, in fact, wanted to kill her since he tried to kill her -- solicit her murder for a second time. He didn't accomplish it the first time, so he is going after it a second time. It is prejudicial, Your Honor. It's plain and simple, it's prejudicial, and it -- the cases are distinct. And to combine them is -- for judicial economy is a misjustice for my client. The defenses are going to be different.

RP 89-93.

The Court denied the motions citing *State v. Bryant*, 1 RP 97. Defense counsel did not renew the motion to sever during trial.

d. Suppression of Other Suspect's Priors

Over defense objection, the court suppressed evidence that Brandon

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1 89 Wn.App. 857, 950 P.2d 1004 (1998) (review denied, 137 Wbn.2d 1017, 978 P.2d 1100 (1998)).

Phillips (Brandon)<sup>2</sup> was convicted of unlawful possession of a firearm for shooting at a family member. RP 105-106.

Phillips argued he should be able to cross examine Brandon on this prior incident because it was relevant to his defense, and because he has a right to cross examine witnesses on their prior criminal history. RP 107-109. The prosecutor argued that the evidence was inadmissible under ER 404(b). RP 110-111. The court denied the motion, ruling that although the probative was not outweighed by the prejudice it was not relevant. RP 107, 111.

The issue of issue of cross examination of Brandon on priors was raised again during trial and the trial court ruled:

That was addressed in motions in limine, and there are no impeachable crimes for which Brandon Phillips can be impeached on **or any crimes which would be admissible by questioning of either party.**

RP 916 (Emphasis added).

e. 911 Call

During the 911 call, Contraro responded to a question regarding who shot her with “I don’t know.” (Exhibit 11 pages 395-396. During a different 911 call from Contraro’s nephew Tanner Kunph, he too told dispatch that Contraro informed him that she did not know who shot her. Id. Minutes later

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<sup>2</sup> For ease of differentiation between Dan Phillips and Brandon Phillips, Dan will be

in the conversation Contraro told dispatch she thought Brandon shot her. (Exhibit 11 pages 395-396). When asked again about whether Brandon was the shooter, Contraro murmured in the affirmative. (Exhibit 11 pages 700-701).

f. Solicitation Testimony

In exchange for release from incarceration, Gino Puglisi, a cell mate of Phillips agreed to act as an informant for the state for count III, a solicitation to commit murder charge. RP 738, 769, 829-30, 838-39. With Puglisi's assistance, the police planned to have Phillips call a predetermined cell phone number to discuss with Puglisi the previously agreed to murder of Kelly Contraro which Phillips had asked Puglisi to commit RP 733, 819, 821, 824, 825. RP 733. Phillips and Puglisi set up a time to call, and the police recorded the conversation in which Phillips and Puglisi discussed the details of the plan for the murder. RP 825 Exhibit 11 (recorded telephone conversation). At the designated time for the call, Phillips and his unit were in lockdown. To get Phillips to make the telephone call, the police created a ruse by having the jail staff inform Phillips that he had a family emergency and needed to call a cell phone number provided by the police. RP 721-722.

Unaware, Phillips called the cell phone number and spoke to Puglisi

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referred to as "Phillips, and Brandon will be referred to as "Brandon".

who answered the call in the presence of the police and while the conversation was being recorded. RP 773. Puglisi testified that he gave Phillips the telephone number and the jail staff testified that they gave Phillips the telephone number. RP 773, 840.

For count IV, the police used an informant named Marvin Howell who was a cellmate of Phillips for three weeks. RP 806. Howell reported that during one of many conversations in jail, Phillips said he shot his girlfriend. RP 806-807. Several weeks after this conversation, after Phillips saw Contraro in court, Phillips

told Howell he wanted Contraro dead and would give him land if he would do the job. RP 808-809. In exchange for this testimony, Howell's 110 months sentence for violation of a no contact order was reduced to 48 months. RP 806, 812-813.

C. ARGUMENTS

1. THE STATE VIOLATED MR. PHILLIPS' DUE RPOCESS RIGHTS BY FAILING TO PROVE BEYOND A REASONABLE DOUBT THAT DAN PHILLIPS ASSAULTED MS. CONTRARO.

- a. Standard of Review

Constitutional questions are reviewed de novo. *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). Evidence is sufficient to support a

conviction, if viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Turner*, 103 Wn.App. 515, 520, 13 P.3d 234 (2000).

b. Due Process Requires the State Prove Beyond a Reasonable Doubt Each Essential Element of the Crime Charged.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In this case, to prove assault in the first degree under RCW 9A.36.011, the state was required to prove beyond a reasonable doubt:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; ....

Id. The issue in this case is the sufficiency of the evidence that Mr. Phillips was the shooter.

c. The State Failed to Prove Dan Phillips Was the Shooter.

In this case, the state failed to prove that Dan Phillips was the shooter. Both Dan Phillips and Brandon Phillips were present during the time of the shooting and according to Ms. Contraro, Brandon was the only person who was hostile and aggressive towards her immediately before the shooting. RP 982-983, 987, 989. Moreover, Brandon never liked Ms. Contraro and had always been hostile towards her and her children, at times “terrorizing” them, because Contraro had a no contact order against Brandon’s son. Id. Contraro told the 911 operator and the police that Brandon shot her. RP 969; EX 11.

There were no eyewitnesses and Brandon testified that he did not see the shooter and that he was not the shooter. RP 921-922, 932. The state can prove assault in the first degree with a firearm when someone identifies the shooter. *State v. Johnson*, 90 Wn.App. 54, 73-74, 950 P.2d 981 (1998). In *Johnson*, the victim identified the shooter, and a witness testified that she observed the victim’s mother hitting Johnson and telling him that he shot her son, to which Johnson responded with an apology. *Johnson*, 90 Wn.App. at 60-61. The victim testified that Johnson shot him the first time in the knee

after threatening to “bust a cap”, and shot him the second time after threatening to kill him and shoot up his mother's house if he told the police. The victim also described Johnson's gun as a large caliber revolver that was found in Johnson's girlfriend's house two days after the assaults. *State v. Johnson*, 90 Wn.App. at 73-74. Based on the corroboration that Johnson was the shooter, the Court upheld first degree assault conviction. *Id.*

Here by contrast, there were no eye witnesses to the shooting and the weapon was never found. Moreover Ms. Contraro identified Brandon as the shooter, and Brandon not Mr. Phillips was angry with Ms. Contraro the night of the shooting. This evidence is far less than the eyewitness testimony identifying the shooter and the recovery of the retrieved weapon in *Johnson*.

Contraro and Brandon were the state's only witnesses in the assault. Contraro testified that Brandon committed the assault and Brandon testified that he did not commit the assault. There was no other evidence implicating Phillips over Brandon in this charge. This evidence was simply insufficient to establish guilt beyond a reasonable doubt. For this reason, Phillips requests reversal of the assault charges and dismissal with prejudice.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY JOINING THE SOLICITATION CHARGES WITH EACH OTHER AND WITH THE ASSAULT CHARGES, AND BY DENYING PHILLIPS'

MOTION TO SEVER THE SOLICITATION  
CHARGES FROM EACH OTHER AND  
FROM THE ASSAULT CHARGES.

The prosecutor charged Phillips with one count of assault in the first degree, one count of unlawful possession of a firearm in the second degree and one count of solicitation to commit murder, each with a firearm enhancement and a domestic violence allegation CP1-9. Six months later, the state added a second count of solicitation to commit murder, and an assault in the fourth degree charge with a firearm enhancement and a domestic violence allegation CP 49-60. The trial court denied the defense challenge to the joinder and denied the motion to sever the solicitation charges from each other and from the assault charges. CP 12-19; RP 100.

a. Standard of Review

Denial for a motion to sever is reviewed for abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990); *State v. Huynh*, 175 Wn.App. 896, 908-910, 307 P.3d 788 (2013). The failure of the trial court to sever counts is reversible upon a showing that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Bythrow*, 114 Wn.2d at 717-718.

b. Joinder and Severance Rules

While CrR 4.3(a) authorizes joinder of counts where the offenses are of a similar character, joinder must not be used to prejudice or embarrass a defendant. *State v. Bythrow*, 114 Wn.2d at, 718; *State v. Smith*, 74 Wn.2d 744, 754, 446 P.2d 571 (1986), *vacated in part on other grounds*, 408 U.S. 934, 33 L.Ed.2d 747, 92 S.Ct. 2852 (1975), *overruled on other grounds in State v. Grisby*, 85 Wn.2d 758, 539 P.2d 680 (1975). Consequently, CrR 4.4(b) provides that a motion for severance **shall** be granted if the court determines that severance will promote a fair determination of the defendant's guilt or innocence as to each offense.

When considering a severance motion, the trial court must consider if any prejudice is sufficiently mitigated by: (1) the strength of the State's case on each count; (2) the clarity of the defenses; (3) instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994).

Here, the prejudice from joinder is the inescapable likelihood that the jury: (1) used the evidence of the solicitations to infer guilt on the assaults and the other solicitations; (2) likely used the cumulative evidence of all of the crimes to find guilt on each charge because four out of five charges involved the same victim; and (3) likely used the evidence of the multiple crimes to

infer criminal disposition. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Bythrow*, 114 Wn.2d at 718. The court abused its discretion in denying the motion to sever because the charges tried together created a near impossibility for Phillips to obtain a fair determination of his guilt or innocence on each offense. *Bythrow*, 114 Wn.2d at 717.

i. The Variability of the Strength of the State's Case on Each Count Favored Severance.

Where the evidence is not uniformly strong, severance may be necessary to ensure the defendant receives a fair trial. *State v. Hernandez*, 58 Wn.App. 793, 800, 794 P.2d 1327 (1990) (*overruled on other grounds by State v. Kjorsvik*, 117 Wn.2d 93, 99, 812 P.2d 86 (1991)). The concern is that when “the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.” *Hernandez*, 58 Wn.App. at 801.

In *Hernandez*, the defendant was charged with three robberies of three different businesses on three different dates. *Hernandez*, 58 Wn.App. at 800. Each charge was based on eyewitness testimony that varied as to reliability. Id. The evidence in count one was strong which mitigated any prejudice

against joinder in that count, while the evidence on the other two counts “was somewhat weak”, creating a likelihood of “significant prejudice” *Id.* The Court held that when “the prosecution tries a weak case or cases together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.” *Hernandez*, 58 Wn.App. at 801. On this basis the Court reversed the two weaker charges. *Id.*

Here, the specific prejudice to Phillips is the same as in *Hernandez* because the strength of the state’s cases on each charged varied, which likely led the jury to rely on the stronger cases to find guilt in the weaker. Specifically, the state could not prove beyond a reasonable doubt, that Phillips was the shooter because there was no eyewitness to the assault and Contraro identified Brandon as the shooter. By contrast, if the jury found the informants credible, the solicitation charges were stronger. Following, *Hernandez*, because the strength of the cases was variable, it is likely that the jury was impermissibly influenced in finding guilt in the assault charge based on evidence from the solicitation cases. The danger from joinder of the counts outweighed the considerations of judicial economy. *Bythrow*, 114 Wn.2d at 721 (citing *U.S. v. Brady*, 579 F.2d 1121, 1128 (9th Cir.1978)).

ii. The Clarity of Defenses Was Equivocal  
Which Weighed in Favor of Severance.

When the defense to each charge is different, there is a greater likelihood that the jury will be confused than with identical defenses. *Russell*, 125 Wn.2d at 64; *Sutherby*, 165 Wn.2d at 885. In *Sutherby*, defense counsel was ineffective for failing to move to sever possession of child pornography from child rape charges and molestation charges where the defense to the pornography was unwitting possession and the defense to the rape and molestation was mistake or accident and neither was admissible to prove the other crimes. The Supreme Court reversed and remanded for a new trial because the failure to move to sever denied Sutherby his right to a fair trial by presenting the jury with the opportunity to conflate the evidence and find guilt based on an inference of culpability from evidence unrelated to each charge. *Sutherby*, 165 Wn.2d at 885-887

Here, the prejudice to Phillips is similar to the prejudice in *Sutherby* because Phillips' defense to each charge was different. Phillips articulated a self-defense to the assault in the first and fourth degree, and general denial in the other charges. RP 93-94. The presentation of these different defenses ran the risk of confounding the jury because the jury could have rejected one defense based on inadmissible evidence from another charge.

Specifically, in the first degree assault charge, without any evidence of the solicitation, the jury was presented with evidence that Contraro named Brandon as the shooter and Phillips tried to help take Contraro to the hospital. By adding the evidence of the solicitation charges, Phillips could not obtain a fair trial on the assault charges because of the likelihood of conflating the issues and defenses.

iii. Jury Instructions Informing Jury to Consider Each Case Separately Did Not Mitigate the Prejudice From Joinder.

Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *Sutherby*, 165 Wn. 2d at 883. This danger of prejudice exists even if the jury is properly instructed to consider the crimes separately. *See State v. Harris*, 36 Wn.App. 746, 750, 677 P.2d 202 (1984). The trial court gave Jury instruction number 2 which directed the jury to consider each count separately.

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count **should** not control your verdict on *any* other count.

(Italics in original, bold added). This is the standard instruction approved of in *Bythrow*, 114 Wn.2d at 723. The use of the term “should” in

the instruction in *Bythrow* is not particularly forceful in its directive to the jury because it simply asks the jury not to consider evidence of one crime in another, rather than prohibiting the jury from deciding the charges based on another charge.

In *Bythrow*, the Supreme Court upheld a trial court's denial of severance of two robbery charges where the trial was relatively short, different witnesses testified concerning different offenses, the issues and defenses were simple and distinct, and the court properly instructed the court to consider each charge separately. *Bythrow*, 114 Wn.2d at 723.

The Court in *Bythrow* decided that the above instruction was sufficient to prevent the jury from considering the other charge in determining guilt across charges in a simple, straightforward case. *Bythrow*, 114 Wn.2d at 721. Providing an instruction is not however dispositive in Phillips' case because unlike in *Bythrow*, Phillips case was complex, it involved five counts, four very serious and unrelated to the others, and Phillips trial lasted for close to two weeks: August 28, 2013 to September 10, 2013, excluding pretrial and sentencing. RP 1-1195.

Moreover, the evidence of each charge was not presented separately, and the evidence of the other charges was sufficiently gruesome when considered together to stimulate an impermissible emotional response from the

jury. *Bythrow*, 114 Wn.2d at 723. Notwithstanding the court giving a limiting instruction, “[w]hen evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

In *Sutherby*, the court gave the same limiting instruction in a child molestation and child pornography case. Notwithstanding the instruction, the Court held that if counsel had made the motion to sever, the trial court would have had to grant it to protect Sutherby’s right to a fair trial,. *Sutherby*, 165 Wn.2d 885-887.

As demonstrated in *Sutherby*, providing a limiting instruction is not dispositive because while such an instruction is intended to prevent the jury from considering the other charges, it does not always succeed. *Harris*, 36 Wn.App. at 750. In *Harris* the Court reversed two joined rape cases where the court gave a limiting instruction, because the evidence of each rape would not have been cross admissible in the other on any basis, and specifically, although the charges were similar, the evidence did not rise to the level of common scheme or plan under ER 404(b). *Harris*, 36 Wn.App. at 750-752.

The limiting instruction in this case while standard under *Bythrow*, did not ensure Phillips a fair trial because as in *Harris*, and *Sutherby*, an instruction is not fool proof and here the evidence of each crime was likely to

stir the emotions of the jury in disregard of the limiting instruction.

The evidence would not have been cross admissible because the assaults were not relevant to the solicitations, the solicitations were not relevant to each other and all crimes were inadmissible under ER 404(b) and ER 403. As in *Harris* and *Sutherby*, the instruction likely failed to protect Phillips against prejudice from the jury considering the evidence of the other charges to find guilt of each charge.

iv. The Charges Were Not Cross Admissible.

The evidence of the solicitation would not have been cross admissible in the assault cases because it was not relevant under ER 401, and was overly prejudicial under ER 403. Under *Harris*, *Sutherby* and ER 404(b), the solicitation evidence in the assault charge was no different from inadmissible ER 404(b) propensity evidence designed to make Phillips appear to be a criminal type. *Sutherby*, 165 Wn.2d at 886-887.

Under ER 404(b) evidence of other crimes, wrongs or acts is not admissible to prove character or show action in conformity therewith. ER 404(b). Even though the evidence may not be cross-admissible, this alone does not establish an abuse of discretion in denying a motion to sever. *Bythrow*, 114 Wn.2d at 720, 790 P.2d 154. Rather Phillips must show

prejudice. *Bythrow*, 114 Wn.2d at 718. The prejudice to Phillips as discussed supra, is the likelihood that the jury would infer guilt based on propensity.

In *Hernandez*, discussed supra, the Court held that the three robberies would not have been admissible at separate trials on each count under ER 404(b) to prove the “identity” of the assailant because “[e]vidence of other crimes is relevant on the issue of identity **only** if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.” *Hernandez* 58 Wn.App. at 798-799 (citing, *State v. Smith*, 106 Wn.2d 772, 777, 725 P.2d 951 (1986)).

In Phillips case there was nothing “so unique” about the commission of any of the crimes to permit evidence of another to prove identity. In each of the solicitation cases, Phillips allegedly made a request for someone to cause the death of Contraro. In the assault charges, someone shot a gun after an argument, and in the possession charge, a felon possessed a firearm. These facts are generic and would not have been admissible in separate trials, thus cross-admissibility in Phillips case was not a “prejudice mitigating factor. *Hernandez*, 58 Wn.App.at 799.

The failure to sever prejudiced Phillips right to have a fair determination of his guilt or innocence of each offense. CrR 4.4(b). *Bythrow*,

114 Wn.2d at 717.

c. Counsel Ineffective

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To establish ineffective assistance, an appellant must show deficient performance and prejudice. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The presumption of adequate performance is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130.

Furthermore, trial strategy “must be based on reasoned decision-making,” and there must be some indication in the record that counsel was actually pursuing the alleged strategy. *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007); *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”).

i. Failure to Renew Motion to Sever.

Defense counsel was ineffective for failing to renew his motion to sever during the trial. CrR 4.4(a). This rule provides:

Timeliness of Motion— Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. **Severance is waived by failure to renew the motion.**

(Emphasis added). Under the plain language of this rule, a defendant's failure to renew his severance motion “before or at the close of all the evidence” results in a waiver where, the defendant (1) moved for severance before trial began, and (2) the trial court denied this pretrial severance motion. *State v. Jones*, 93 Wn.App. 166, 171 n.2 968 P.2d 888 (1998) (quoting CrR 4.4(a)(2)). A motion to sever before trial does not satisfy this rule requiring a motion to sever at trial. CrR 4-4(a)(2); see also, *State v. McDaniel*, 155 Wn.App. 829, 857–59, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010) (trial counsel’s failure to renew motion to sever firearm charges during trial waived severance

issue).

Here, trial counsel moved to sever the charges on February 8, 2013, March 27, 2013, August 21, 2013. After the jury was empaneled on August 28, 2013, counsel did not however renew the motion during trial. Under ER 4.4(a)(2) counsel waived the issue by failing to renew the motion to sever. *Accord, McDaniel*, 155 Wn.App. at 857–59.

There is no tactical advantage to be gained from thrice moving to sever charges pretrial, and filing written motions, but failing to renew the motion as required under CrR 4.4(a)(2). This failure was an error of constitutional magnitude because trial because trial on multiple counts was so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Bythrow*, 114 Wn.2d at 718.. Had counsel renewed the motion, the trial court would likely have granted it because it was clear that the evidence of the other counts was overly prejudicial and only used to establish propensity.

In *Sutherby*, the State Supreme Court reversed the convictions based on ineffective assistance of counsel for failing to move to sever the charges of child pornography and child rape and molestation charges. *Sutherby* 165 Wn.2d at 884-887. The Supreme Court held that there was “no indication of any possible advantage to the defendant in having a joint trial on all charges, and Sutherby was prejudiced because the evidence was not cross admissible,

and had counsel moved to sever, the trial court likely would have granted the motion, with the result that the outcome at a separate trial on child rape and molestation charges would likely have been different. *Sutherby* 165 Wn.2d at 884-887.

The Court further explained that based on the inflammatory nature of the crimes, it was likely that the evidence of the child pornography would not have been admissible at a separate trial for child rape and molestation and vice versa because the other crimes did not relate to a material issue or intent, and a defendant must only be tried based on evidence for the offenses charged. *Sutherby* 165 Wn.2d at 887.

Here, while Phillips attempted to move to sever, he failed by not following the rules. His motion, like that in *Sutherby* would have been granted because the charges were not cross admissible and there was no tactical reason not to properly move to sever during trial after thrice moving to sever before trial. Under *Sutherby*, counsel here was ineffective for failing to properly move to sever the charges.

- ii. Failure to Move to Suppress under Evidence Rules 401, 402, 403, 404(b).

Counsel's written and motions to sever did not mention the evidence rules, and did not address a motion to suppress under ER 401, 402, 403 or 404. RP 100; CP 12-19. Some of the considerations for a motion to sever overlap with a motion to suppress under the evidence rules, but failure to object to the admission of inadmissible evidence on all proper grounds can deprive an accused person of effective assistance when it is not based on sound trial strategy. *Nichols*, 161 Wn.2d at 14-15.

1. Under ER 401, The Solicitation Evidence Was Not Relevant to the Assault Case.

The solicitation charges bore no relation to the assault charges and were simply not logically relevant. *State v. Breijer*, 172 Wn.App. 209, 289 P.3d 698 (2012) (Evidence is "relevant" if a logical nexus exists between the evidence and the fact to be established).

The state Supreme Court in *State v. Finch*, 137 Wn.2d 792, 822, 975 P.2d 967 (1999), held that in certain circumstances, a defendant's hostility after the commission of a crime may be relevant to show that the hostility existed at the time of the crime, but **only** if the later hostility was evidence of hostility at the time the crime was committed. *Finch*, 137 Wn.2d at 822, (citing, *White v. Commonwealth*, 360 S.W.2d 198, 202 (Ky.Ct.App.1962)).

In *Finch*, the Court permitted admission of a letter the defendant wrote 6 weeks after committing a murder, in which he made hostile comments about the victim and admitted to murdering her. *Finch* is distinguishable from Phillips case because here, there was little to no evidence that Phillips was hostile towards Contraro before, during or at the time of the assault, and the evidence in support of the solicitation charges did not amount to an admission of guilt to the assault.

*Wigmore on Evidence*, explained that the danger of admitting after the fact evidence is that the “potential for error is that the prior emotion may have been brought to an end before the time at issue, and the subsequent one may have been first produced since that time.” *Finch*, 137 Wn.2d at 822 (citing, *White* 360 S.W.2d at 202, *quoting*, *Wigmore on Evidence*, Third Ed., Vol. II, sec. 395, p. 349)).

Phillips case is an example of how using post-incident information can turn the “potential for error” into error. The Court in *White* held inadmissible for the purpose of proving intent to kill, the defendant’s statement after the victim’s death that “[w]e ought to go back and kill Earnst (Turner) and Junior (Watkins)”. *White*, 360 S. 2d at 202. The Court citing *Wigmore* explained that the evidence is only relevant if it shows intent to kill at the time of the

commission of the crime, but is irrelevant if it only show an intent to kill at a later time. *Id.* The Court aptly held explained:

We think that the hostile declaration was not reasonably calculated to indicate anything more than that **the defendant had eventually reached a homicidal frame of mind** toward Turner and Watkins; or possibly it might indicate that, having learned that Jett was dead, the defendant *now* considered it advisable to kill Turner and Watkins.

*Id.*

Here, in Phillips case, the evidence of the solicitation ,if attributable to Phillips, was similarly, no more than evidence that 2-3 months after the assault, Phillips reached a homicidal state of mind. These alleged acts did not tend to prove intent to assault at the time of the commission of the assault.

In *State v. Beadle*, 173 Wn.2d 97, 265 P.3d 863 (2011), the Supreme Court reversed a trial court's admission of the child victim's after the fact, in-court emotional breakdown as irrelevant to the determination of the defendant's guilt, and identified the evidence as improper bolstering. *Beadle*, 173 Wn.2d at 121 (citing, *Cunningham v. State*, 801 So.2d 244, 246-247 (2001)). Under ER 403, the Court also deemed the evidence "more prejudicial than probative, if probative at all." *Beadle*, 173 Wn.2d at 121-22; ER 403, 401.

The evidence in Phillips case of the solicitations after the fact, was irrelevant to the determination of guilt of the assaults and severely prejudicial

“bolstering” evidence. Evidence of other types of serious crimes against the same victim is certainly as prejudicial and bolstering as the evidence of a child’s breakdown , because both distract from the actual evidence in support of the crime charged, and are used to encourage the jury to convict based on irrelevant evidence. Similar to *Beadle*, an allegation of solicitation 1-2 months after an assault does not tend to prove culpability for the later assault, any more than a child’s emotional breakdown in court does not make the defendant more or less culpable of the crime charged. *Beadle*, 173 Wn.2d at 121.

Also, here, when examining the timing of the facts in support of the solicitations, it is evident that the solicitations appeared to stem from Phillips anger at being wrongfully accused of the assault by Brandon, and Contraro’s inability or unwillingness to help Phillips. RP 809. This solicitation evidence relates to a later state of mind, not relevant to intent at the time the assaults were committed. *Id.*

Because the evidence of the solicitation was not relevant, it was inadmissible under ER 402. Because the evidence was prejudicial it was inadmissible under ER 403, and because the evidence was impermissible propensity evidence, it was inadmissible under ER 404(b). The admission of evidence of the other charges, denied Phillips his right to a fair trial.

2. Evidence Not Admissible  
Under ER 404(b).

ER 404(b) is a categorical bar to admission of evidence of prior misconduct for the purpose of proving a person's character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The purpose of the rule is to prohibit the admission of such evidence to show that the defendant is a “criminal type” and thus likely guilty of committing the crime charged, while allowing its admission for other, legitimate purposes such as proof of motive or intent. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

To admit evidence of other crimes under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648–49, 904 P.2d 245 (1995).

In *Harris*, this Court reversed a conviction for rape where the trial court initially denied a motion to sever multiple rape counts that were of the same or similar character. The Court however held that the later motion should

have been granted because the evidence of the other rape was not admissible under ER 404(b) as part of a common scheme of plan. While the rapes were “similar”, this was not sufficient to be considered part of a common scheme or plan, and the evidence was overly prejudicial under ER 403. *Harris*, 36 Wn.App. at 204-206.

Here, the evidence of the solicitation in the assault case was not admissible under an ER 404(b) exception. The charges were not were not part of a common scheme or plan, and there was no legitimate purpose for admitting the other charges and trying the cases together. Rather the sole purpose was to permit the jury to find guilt based on the propensity evidence.

A. The Solicitation Charges.

The solicitation charges like the rapes in *Harris* were similar, but they were not part of a common plan or scheme sufficient to be admissible under ER 404(b). In *Harris*, the two rape victims each voluntarily entered Harris’ car and Harris drove them to a location against their will to commit the rapes. *Harris*, 36 Wn.App.at 305. Here, Phillips allegedly made two different telephone calls to two different people and asked them to kill Contraro in exchange for land. RP 808-809. 821. This evidence was similar, but as in *Harris*, it was not so unique to be considered part of a common scheme or plan; it was impermissible propensity evidence that was unduly prejudicial

requiring remand for reversal and a new trial.

3. Under ER 403 Even Relevant Evidence Must Be Suppressed When Overly Prejudicial.

In determining whether the probative value of evidence outweighs its unfair prejudice, a court should consider the availability of other means of proof and other factors. *Powell*, 126 Wn.2d at 264. When evidence is unduly prejudicial, ‘the minute peg of relevancy is said to be obscured by the dirty linen hung upon it.’ *State v. Turner*, 29 Wn.App. 282, 289, 627 P.2d 1324 (1981). A trial court should resolve doubts as to admissibility in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Here, as discussed supra, there were no prejudice mitigating factors and the failure to move to suppress under the rules of evidence cannot be considered legitimate trial strategy. There was also no logical tactical reason for failing to move to suppress under ER 401, ER 402, ER 403, and ER 404(b), because the evidence was inadmissible under those rules. If the trial court had been given the opportunity to make a ruling under these evidence rules, it likely would have reconsidered its denial of the motion to sever which would have altered the outcome of the case. For these reasons, Phillips right to a fair trial was violated and this Court should reverse and remand for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PHILLIPS THE OPPORTUNITY TO CROSS EXAMINE BRANDON REGARDING HIS PRIOR CHARGE OF DV ASSUALT WITH A WEAPON.

a. Standard of Review on Evidentiary Rulings.

A trial court's evidentiary rulings are reviewed for abuse of discretion.

*State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999).

b. Standard of Review of Sixth Amendment Confrontation Clause Violations and Article 1, Section 22 Violations.

This Court reviews violations of the state and federal confrontation clauses de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876, (2012); *State v. Medina*, 112 Wn.App. 40, 48, 48 P.3d 1005 (2002).

c. Constitutional Provisions.

The Sixth Amendment to the United States Constitution and Constitution article I, section 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Russell*, 125 Wn.2d at 73. This right applies under the following limits: (1) the evidence sought to be admitted

must be relevant and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *See Washington v. Texas*, 388 U.S. 14, 16, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); *State v. Gallegos*, 65 Wn.App. 230, 236–37, 828 P.2d 37 (1992).

d. Harmless Error Test

A constitutional error is harmless only where the untainted evidence is so overwhelming that “the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.2d 640 (2007).

e. Phillips Was Prejudiced By The Trial Court's Ruling That He Could Not Cross Examine Brandon on His Prior Assault Charge To Show Bias.

Bias of a witness is subject to cross-examination at trial, and is always relevant to discredit the witness and affect the weight of the testimony. *Davis*, 415 U.S. at 316. In *Davis*, the State's primary witness was a juvenile who lived near where a stolen safe was found. The witness was on probation after being found guilty of burglary, but the defendant was not permitted to cross-examine the witness about his probation status or his prior convictions. *Davis*, 415

U.S. at 317-318.

The Alaska Supreme Court held that despite the limitations on cross-examination, the defendant was permitted to sufficiently develop the issue of bias. But the United States Supreme Court disagreed, holding that “counsel was unable to make a record from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial.” *Davis*, 415 U.S. at 318. The United States Supreme Court reversed because Davis was denied his constitutional right to explain why the juvenile witness (Green), a potential suspect, might have been biased or otherwise partial, which prevented jury from being able to “make an informed judgment as to the weight to place on Green's testimony which provided ‘a crucial link in the proof . . . of petitioner's act.’” *Davis*, 415 U.S. at 317-18.

Here, Brandon had reason to fabricate because he was a possible suspect, a felon present at the scene, implicated in an argument with Contraro, and he had a past history of aggression towards Contraro. RP 982-983, 995-996. But counsel could not cross examine on these issues, because the court prohibited any questions regarding his status as a felon. RP 906-909. The accuracy and truthfulness of Brandon’s testimony were key elements in the state’s case against Phillips. The trial court’s denying Phillips the right to fully cross examine Brandon to reveal his vulnerability as a felon with a history of

domestic violence, gun violence, was a violation of Phillips' right to effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis*, 415 U.S. at 318.

The absolute right to cross-examine a witness for the purpose of showing bias, prejudice is not a new concept. *State v. Cerenzia*, 134 Wn. 500, 236 P. 80 (1925); *State v. Robbins*, 35 Wn.2d 389, 213 P.2d 310 (1950). In *State v. Wills*, 3 Wn.App. 643, 476 P.2d 711(1970), the entire case against the defendant was based upon circumstantial evidence and the state's strongest evidence came from witness Dobbins, whom the defense was not allowed to fully cross-examine regarding the dismissal of charges against him to show bias. *Wills*, 3 Wn.App. at 712. The Court held that the trial court erred in completely prohibiting the defendant from cross-examination of Dobbins regarding the circumstances of the dismissal of the charges against him so that the jury could consider and weigh his testimony in its proper perspective. *Wills*, 3 Wn.App. at 713.

Here, Brandon did not have charges dismissed like Dobbins, but he was under immunity. This fact along with Brandon's past history was important under *Davis* and *Wills*. Phillips had the constitutional right to explain Brandon's criminal history to demonstrate why Brandon was a

potential suspect, who might have been biased or otherwise partial and who cast attention from himself onto Phillips. The jury was only informed that Brandon had obtained prosecutorial immunity for testifying but they did not know why. Under *Davis*, and *Wills*, Phillips was entitled to cross examine Brandon on his criminal history to demonstrate his bias.

f. Reversible Error.

Constitutional error is presumed to be prejudicial and the State has the burden of proving the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In determining whether constitutional error is harmless, Washington courts use the “overwhelming untainted evidence test” to decide whether it appears beyond a reasonable doubt that a fact finder would have reached the same result in the absence of the error. *Guloy*, 104 Wn.2d at 425.

Here, the error was not harmless because the untainted evidence did not lead to a finding of guilt beyond a reasonable doubt just as in *Davis* where the witness's testimony was “a crucial link in the proof ... of petitioner's act “*Davis*, 415 U.S. at 317.

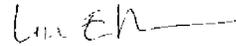
D. CONCLUSION

Mr. Phillips respectfully requests this Court reverse his convictions on the assault charges and dismiss with prejudice and/or remand for a new trial on all charges based ineffective assistance of counsel, violations of ER 401, ER

402, ER 403, ER 404 and CrR 4.3 and CrR 4.4

DATED this 4th day of July 2014.

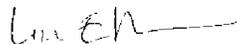
Respectfully submitted,



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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office Schrawyer, Lewis [schrawyer@co.clallam.wa.us](mailto:schrawyer@co.clallam.wa.us) a true copy of the document to which this certificate is affixed, on July, 4, 2014. Service was made by electronically to the prosecutor and to Dan Allen Phillips DOC # 785463 Washington State Penitentiary 1313 13<sup>th</sup> Avenue Walla, Walla, WA 99362 by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**ELLNER LAW OFFICE**

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Happy 4th!

Sender Name: Lise Ellner - Email: [liseellnerlaw@comcast.net](mailto:liseellnerlaw@comcast.net)

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