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IN THE WASHINGTON STATE SUPREME COURT

MATTHEW R. RUTH,
PETITIONER,
VS.
STATE OF WASHINGTON,
Respondent.

PETITION FOR REVIEW
FROM:
COURT OF APPEALS DIVISION I
NO. 56318-1-1

MATHEW R. RUTH
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I. IDENTITY OF MOVING PARTY

Petitioner, Matthew R. Ruth, Pro Se, hereby moves this Honorable Court to Grant Review of the decision made by the Court of Appeals Div. I.

II. CITATION TO COURT OF APPEALS DECISION

Mr. Ruth filed opening brief, and Rap 10.10. The Court affirmed the Conviction on July 31, 2006. The Petitioner ask pursuant to Rap 13.4(3) that all of the Courts opinions be reviewed which are presented in this Petition as issue's 1-11, infringing upon 4,5,6, and 14th Amend. Also pursuant to Rap 13.4(2) Petitioner ask this Court to review Appellates opinion Page 15 in regaurds to issue 9 in this petition. Which is in conflict with State v. Ward, 125 Wn.app.243 (DIV.1 2004). Pursuant to Rap 13.4(2) Petitioner ask this Court to review Courts opinion page 15 which is addressed in this petition as issue 10, this is in conflict with State v. Roche, 114 Wn.app. 424 (Div.1 2002). The petitioner ask this Court to Grant review pursuant to Rap 13.4(1) involving the appeals Court decision on Page 15-16 which is represented in this petition as issue 11, and is contrary to U.S. v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673 (1997); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531 (2004).

III. ISSUES PRESENTED FOR REVIEW

1. The prosecutor violated appellant's constitutional right to confrontation by impeaching him with an alleged inconsistent statement that he was unprepared to present.
2. Appellant was denied his constitutional right to a fair trial where the prosecutor improperly offered an opinion as to appellants credibility and guilt, and where the prosecutor misstated the law of self-defense.
3. Appellant was denied his constitutional right to remain silent when the prosecutor attempted to "impeach" him with his prearrest silence during cross examination and closing arguments.
4. Appellant was denied his constitutional right to effective representation and a fair trial when his trial attorney requested language used in instruction 16, which misstated the law and eased the states burden to disprove appellants self-defense claims.
5. Cumulative error deprived appellant of his right to a fair trail.
6. The Trial Court violated appellants constitutional right to a jury trial by imposing 60-month "firearm" enhancements because in their special verdicts, jurors found only that Ruth was armed with a "deadly weapon."
7. The prosecutor violated appellant's constitutional rights when he entered into evidence extrinsic prejudicial evidence of a medical record involving Renne Woerner.
8. Counsel violated appellant's constitutional rights when he

failed to object to highly prejudicial propensity evidence.

9. Counsel violated appellant's constitutional rights when he failed to request the lesser-included offense jury instruction of second degree assault.

10. Counsel violated appellant's constitutional rights when he failed to object to a photograph of a blanket containing alleged blood and a photograph of an alleged bullet hole; neither of which were accurate representations of what they depicted.

11. The Trial Court violated appellant's constitutional rights when it imposed an enhanced sentence which was based upon no same criminal conduct, and firearm enhancements which violated the sentence by initiative 159. The trial Court exceeded the sentencing guidelines when it imposed community custody that exceeded the guideline sentence.

ISSUES PERTAINING TO ISSUES FOR REVIEW

1. Was the petitioners 6th Amendment rights to confrontation violated by prosecutors conduct?

2. Did prosecutors comments, and mistatement of law violate the petitioners 6th amend. rights to a fair trial, and 5th, and 14th Amend. right to Due Process?

3. Was Ruths 5th amend. Rights to remain silent violated?

4. Was Ruths 6th Amend. rights to effective assistance of counsel violated by proposal of a faulty jury instruction?

5. Did cumilitive error infringe upon Ruths 6th Amend. Right to a fair Trial?

6. Did trial Court infringe upon Ruths 6th Amend. Rights to a jury Trial by imposing a 60m FASE?

7. Did prosecuter infringe upon Ruths 5th, 6th, and 14th Amend. Rights by violating the Motion in Limine?
8. Were petitioners 5th, 6th, and 14th Amend. rights infringed upon when Trial counsel failed to object to propensity evidence?
9. Did counsel render ineffective assistance of counsel infringing upon ruths 6th Amend. right by failing to request a lesserincluded?
10. Did Counsel render ineffective assistance of counsel infringing upon Ruth 5th,6th, and 14th Amend. by failing to challenge the admission of false evidence?
11. Did the Trial Court infringe upon Ruths 6th Amend. Right to a Jury Trial by making findings that the Jury didn't?

iv. STATEMENT OF CASE

On Nov 5, 03 Mr. Ruth was attacked in his own home by two violent drug dealer's while his fiance was in bed.

Mr. Ruth was convicted by two first degree assaults Dec 9, 04.

V. ARGUMENT

THE PROSECUTOR VIOLATED RUTHS CONSTITUTIONAL RIGHT TO CONFRONTATION BY IMPEACHING HIM WITH AN ALLEGED INCONSISTENT STATEMENT THAT HE WAS UNPREPARED TO PRESENT.

The sixth Amend. to the United States Constitution and Washin-
ton Constitution Art 1, §22 gaurantee criminal defendants the
right to confront and cross examine adverse witnesses. State
v. Price, 127 wn.app. 193, 199, n.4, 110 P.3d 1171 (2005). In
this case the prosecutor asked Ruth whether he told a friend
that "you just freaked out, got weirded out, and shot [Eden/Custer]
RP2 279. Ruth denied making the statement, and testified he

told his friend nothing. The prosecutor never called the friend during rebuttal. By asking the question knowing he could not perfect the impeachment, the prosecutor sought to, and did insinuate that Ruth confessed to his friend. This improper tactic violated Rights to confrontation. see State v. yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950); State v. Dickenson, 48 Wn.app. 457, 466, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987); state v. Babich, 68 Wn.app. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993); State v. Johnson, 40 wn.app. 371, 377, 699 P.2d 221 (1985). "A Prosecuter may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." United States v. Silverstein, 737 F.2d 864, 868 (10th cir. 1984); State v. Lopez, 95 Wn.app. 842, 855, 980 P.2d 224 (1999). The prosecutor compounded the eroor by using his "evidence" during rubuttal argument. The prosecutor contended that Ruth shot Eden and Custer because he was angry and knew that if Custer looked through drawers in his trialer he would find his property(no stolen property was ever found). RP@ 310. "That made him mad. that made him paranoid. That freaked him out. That wierded him out. and he pulled out the pistol and shot him." A violation of the right to confront a witness is constituional error. State v. Mcdaniel, 83 wn.app. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011 (1997); State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

The jury believes even insinuations, suggestions, and personal knowledge conveyed by the state when they should believe none.

Berger v. U.S., 295 U.s. 78, 88, 55 S.Ct. 629, 79 L.ed. 13,4 (1935).

In the Courts unpublished opinion page 4-5, they unreasonable conclude that because Ruth went to Poole's house after the shooting (Poole wasn't even home), and testified that being threatened "Totally freaked me out", the prosecutors misconduct was consistent with self-defense. They also concluded the Cross, and rebuttal had nothing to do with each other (They used the exact language).

This should be rejected because being totally freaked out from fear to to two armed drug dealers threatening to kill you, and rape your fiance. Is way different the being Mad, Dillusional, and freaking out, weirding out and shooting people. This is not consistent with self-defense, and can't be said not to be an excact refernce to the improper Cross. RP2 310.

This clearly was a violation of the Petitioners confrontation rights, and Ruth ask this Court to please Reverse his conviction.

2. PROSECUTORIAL MISCONDUCT DURING CROSS EXAMINATION
CLOSING ARGUMENT AND REBUTTAL DEPRIVED RUTH OF HIS
CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The Sixth and Fourteenth Amendment to the U.S. Const. and WASH.CONST.ART. 1, §22 gaurantee a criminal defendant the right to a fair Trail. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 975 P.2d 967, cert denied, 528 U.s. 922 (1999). Prosecutorial misconduct may deprive a defendant of his Constitutional rights to a Fair Trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). statements by a prosecutor may constitute rever-
sible error if the comments were improper and the defendant was prejudiced. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699(1984); Darden v. Wainwright, 477 U.S. 168, 91 L.ed.2d 144, 106 S.Ct. 2464 (1986); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995). Prejud-

ice is shown where there is a substantial likelihood the prosecutors remarks affected the out come of the trial. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert denied, 518 U.S. 1026 (1996). A defendant who fails to object to improper remarks waives the right to assert Prosecutorial misconduct unless the remarks were flagrant and ill intentioned. State v. Russel, 125 Wn. 2d 24, 86, 882 P.2d 887 (1994). When objection is made, and motion for new trail is made on basis of Prosecutorial misconduct Court's review for abusive discretion. State v. Borg, 145 Wn.2d 329, 334036, 36 P.3d 546 (2001). A mistrial is proper only hwne a new trial con cure the misconduct. State v. Henderson, 100 Wn.APP. 794, 799, 998 P.2d 907 (2000).

The prosecutor stated during closing arguments I wouldn't pay any attention to it [Ruths versions] based on the testimony you've heard here. RP2 296. Further despite a no duty to retreat instruction, the prosicutor argued that "if Ruth felt threatened" by Eden and Custer in his own home he could have left, and called the police. RP2311. Defense Objected, pointing out the self-defense instruction. The Trial Court overruled the objection, and refused to give a curative limiting instruction. RP2 311-12. In the Courts Unpublished opiniuon page 10 they rejected the argument stating: "The statement could have been addressed by a curative instruction, he can not establish prejudice." Defense asked for a curative instruction and was denied. Defense asked for a mistrial and was denied. Rp2 316-317. Payton v. Woodford, 299 F.3d 815, 823-24 (9th cir.2002). The State is not allowed to exspress opinions or personal belives about guilt, even if using based on this testimony you have heard tactics. State v. Dhaliwal, 150 Wn.2d.559

577-78, 79 P.3d 432 (2003); State v. Haga, 8 Wn.App.481,491-92,507, P.2d 159, review denied, 82 Wn.2d 1006 (1973); U.S. v. Bess, 593 F.2d 749, 754.

Credibility determinations are for the jury, this was especially prejudicial because this case was a credibility contest. State v. O'neal, 126 Wn.App. 395, 409, 109 P.2d 429 (2004); State v. Junger, 125 Wn.app. 895, 901-02, 106 P.3d 827 (2005); The Court concludes in the unpublished opinion Page 7-8 that the mistatement of law and insinuations of defendant lying, properly challenged Ruths credibility, and instead of misleading, the law challenged if Ruth had a reasonable belief he was being attacked. This makes no sense the Law for 70 years in Washington has allowed one to defend in his own home. State v. Hiatt, 187 Wash. 226, 237, 60 P.2d (1936). The purpose of the instruction was to stop arguments of this nature, and to stop the jury from concluding that very same fact. The Prosecutor's remarks must be set to the jury instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). The supreme Court has been particularly vigilant when reviewing self-defense instructions. State v. Rodriguez, 121 Wn.App. 180, 185, (2004); State v. Lefaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984); Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990). Finally the prosecutr vouched for the credibility of the alleged victims several times See Rp2 294, Rp2 301, RP2 311. This was espieccally prejudicial because this was a credibility contest. State v. Horton, 116 Wn.app. 909, 921, 68 P.3d 1145 (2003); U.S. v. Dispoz-o-plastics, inc, 172 F.3d 275, 287 (3d.Cir. 1999); U.S. v. Loayza, 107 F.3d 257 261(4th Cir. 1997).

The Petitioner ask for review to be granted, and a reversal.

The mistament did mislead, and curative instruction was denied.

3. THE PROSECUTOR VIOLATED RUTHS RIGHT TO REMAIN SILENT WHEN HE COMMENTED ON HIS PREARREST SILENCE DURING CROSS AND CLOSE

The Fifth Amend. to the U.S. Const. provides that no person "shall be compelled in any criminal case to be a witness against himself." State v. Saavendra, 128 Wn.APP. 708, 116 P.3d 1076 (2005). Also Washington Const.ART,1§9 are coextensive with that of the Fifth Amend. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Its well established that references to a defendants post-arrest silence is indictitive of guilt violates Due Process. Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S.Ct. 2240, 49 L.ED.2d 91 (1976); See Miranda v. Arizona, 384 U.S. 436, 468 n.36, 86 S.Ct. 1602, 16 L.ED.2d 694 (1966); Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.ED.2D 86 (1980). Ruth testified the alleged victims are drug dealers. RP2 232-34. Also they talked about robbing people and killing people.RP2 235. The Prosecutor asked on cross why Ruth didn't call the cops for their activities. RP2 263. Ruth responded Drug's were part of his music career, and was scared to call the police. RP2 266. It was also a fact that Ruth ran to his moms house in California with his eye witness girlfriend whom wasn't allowed to testify. The prosecutor used the failure to call police on their activities in conjunction with rubuttal to incinuate Ruth is Guilty for leaving, and in genral for not calling police. RP2 294,311,312.

The Court concludes in there opinion on Page 10. That these remark's, and questions were designed to only impeach Ruths reasonableness to be in fear. The context went far beyond that scope, and bled into Ruth never called the cops when they did drig's, or alleged attack against him, and fiance. Instead he ran, so he is guilty. The Court erred in there conclusion this was offered for Guilt not impeachment. We ask this Court to reverse this conviction.

4. RUTH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL
WHEN HIS TRIAL ATTORNEY PROPOSED A FAULTY JURY INSTRUCTION

Federal and State Constitution guarantee the right to effective representation. U.S.Const.Amend.VI;WASH.CONST.ART,1§22. A defendant is denied this right when his or her attorneys conduct, "(1)falls below a minimum objective standard of reasonable conduct, and (2) there is a probability the outcome would be different but for the attorneys conduct. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88,104 S.Ct. 2052, 2064-65, 80 L.ed.2d 674.

defense proposed WPIC 17.04 using the prejudicial language "GREAT BODILY HARM". The Court Concludes in the unpublished opinion Page 11-12, that since Ruth said he was facing two armed attackers if the jury believed him they would of acquitted. Relying on the jury could conclude "Great Bodily Harm" From Testimony of Ruth.

This is unreasonable the legal standard is fear of "injury". The defendant said he was scared they would kill him, and rape his fiance. That's why when they forced there way, armed into his home before they could pull out gun's and place them in "Great BoDILY HARM" Ruth fired in non-leathal places to stop Harm from occuring. The Jury could conclude that Ruth had no reason to fear "GREAT BODILY HARM' because the alleged victims never fired any shots, so therefore it wasn't self-defense. Had they been properly instructed to the real legal standard of "injury" feared before one can reasonable act in using lawful force which is fear of INJURY. They would have found the defendant did despite no bullets being fired have a reasonable believe to fear injury of himself, and fiance. There fore acquit due to legal force, and not belief of Ruth jumping the gun. The Appellate Court relied on State v. Freeburg 105 Wn.APP. 492,505, 20 P.3d 984 (2001). Freeburg's case is different

he wasn't in his own home to be in fear once they entered, and he claimed shot's were being fired at his head. The Petition ask this Court to grant review, and reverse with proper instructions.

5. CUMALITIVE ERROR DEPRIVED RUTH OF HIS RIGHT TO A FAIR TRIAL

State v. Coe, 101 Wn.2d 772, 788-89,684 P.2d 668 (1984); State v. Perret,86 Wn.app. 312, 322-23, 936 P.2d 426. The above error's, and ones listed below 1-11, constitute cumalitive error. Petitioner ask This HONORABLE Court to reverse his conviction.

6. THE TRIAL COURT VIOLATED RUTHS CONSTITUTIONAL RIGHT TO A JURY TRIAL BY IMPOSING 60-MONTH FASE BECAUSE IN SPECIAL VERDICT FORMS THEY ONLY FOUND RUTH WAS ARMED WITH A DEADLY WEAPON.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Blakely v. Washington, 542 U.S. 296,301, 124 S.Ct. 2531, 159 L.ED.2d 403 (2004). The Statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303

The judge imposed two FASE when the jury only found deadly weapons enhancements. RP3 11. State v. Recuenco, 154 Wn.2d 156, 110 P.2d 188 (2005). The Appellate Courts opinion Page 12-13, rejected this using conflicting opinions between the divisions citing State v. Pharr, 131 Wn.app. 119,124,126 P.3d 66 (2006). State v. Williams, 1228 P.3d 98, 104 (2006), is in conflict with there decision also.

Although the jury instructions defined Fire arm. The actual Special verdict forms only indicated Deadly Weapon, and initiative 159 seperated the FASE from the deadly weapon enhancements. Petitionr ask this Court to grant review, and re-sentence Ruth with findings.

7. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT DELIBERATELY VIOLATED THE COURTS ORDER IN LIMINE TO PROHIBIT THE INTRODUCTION OF EVIDENCE WHICH PREJUDICED THE APPELLANT IN VIOLATION OF HIS FIFTH,SIXTH, AND

FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION.

The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his representation. State v. sullivan, 69 Wn.aap. 167, 847 P.2d 953 (1993). The U.S. Supreme Court ruled "we must reverse a conviction unless we can conclude beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict." U.S. v. Young, 470 U.S. 1, 16, 105 S.Ct. 1039, 1047, 84 L.ED.2d 1 (1989).

In this instant case defenses motion in limine was granted to exclude any alleged assault evidence on a non-testifying witness Renee M. Woerner. VRP 5-6. Then a medical report involving laceration to the above name was entered into evidence, defense objected, and was overruled. VRP 81-83. Defense was overruled, and this document was allowed to go back to the jury in deliberations. The Jury was concerned about the information because they inquired about the statement of Ms. Woerner, dated Dec 10,11, 2003.

On Page 14 of the Courts opinion they claim there was nothing in the Exb. 46 which indicated an assault committed by Ruth. The report indeed did contain information of this nature, the report says in black and white a laceration was inflicted on Ms. Woerners head, and the date is days before the shooting. The Appellate Court is speculating this is non-prejudicial, and not even there. The jury did ask about Ms. Woerners statement, and given the Prosecuters theory that Mr. Ruth just freaked out, weirded out, and started shooting people out of anger. It wouldn't take much to conclude the State was offering this for the proof of bad character whom whom would do this. Thus, a new Trial should be granted absent this evidence, to ensure a confident verdict, Ruth ask this Court to Reverse, and remand for a new Trial.

8. APPELLANTS CONSTITUTIONAL RIGHTS UNDER FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION WERE VIOLATED WHEN DEFENSE COUNSEL ALLOWED THE STATE TO INTRODUCE PROPENSITY EVIDENCE WITHOUT OBJECTION WHICH RESULTED IN APPELLANT BEING CONVICTED WHEN THE JURY LEARNED HE SOLICITED A JAIL HOUSE SNITCH TO KILL BOTH PROSECUTIONS LEAD WITNESSES

The prongs for ineffective assistance of counsel were set above in: Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.ED.2d 674 (1984). When the defendant claims ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); that an objection to the evidence would likely have been sustained; and (3) that the results of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998). It's long been held that there is no question that 'propensity evidence' would be an improper basis to use for obtaining a criminal conviction. Old Chief v. U.S., 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.ED.2d 574 (1997); Michelson v. U.S., 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.ED. 168 (1948).

In the appellate Court unpublished opinion Page 14-15 they state that Ruth met Sheridan (jail house snitch/liar) in jail and asked him to get witnesses to change their statements and disappear for Court. They say this would be admissible under 404(b). Ruth agrees, and this reasoning which was used to reject this argument was never even part of the argument, nor disputed.

In the Rap 10.10 SAG PAGE 9-10, it is clear that Ruth is challenging the following testimony only:

"A-because I don't kill people, sir

"Q- that's what the defendant wanted you to do?

"A-Yes, sir.

"Q-How did he express this to you?

"A-Well, didn't exactly say the word "kill". He said disappear."

(VRP 185)

The word disappear was always used in the context of not coming to trial, not showing up, never KILL. VRP 305-06,313. The argument was that the Jail house liar shouldn't have been allowed to give his personal opinion to that effect of the word kill, or what he thought was meant. This was highly prejudicial propensity evidence, in which directed the jury to unfairly view that evidence. We ask this Honorable Court to reverse this conviction, and disallow that language of "kill" into the new Trial.

9. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE U.S. CONST. WHEN COUNSEL FAILED TO REQUEST A LESSER-INCLUDED JURY INSTRUCTION OF ASSAULT IN THE SECOND DEGREE AFTER HEARING ALL TRIAL TESTIMONY WHICH WOULD HAVE SUPPORTED SUCH A CHARGE.

The standard for ineffective assistance of counsel, has been listed above, See Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.ED.2d 674 (1984). " If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Fernandez medina, 141 Wn.2d at page 455-56. Then a lesser included should be requested. When charging for 1st degree assault it is not only proper to give the lesser included of assault 2 but required. State v. Louthier, 22 Wn.2d 497,504 (1945); Young v. Zant, 677 F.2d 792 (11th cir.1982).

The Court of Appeals in their unpublished opinion Page 15, Unreasonably, and against their own rulings in WARD, find: That it's a reasonable Trial Strategy to not request the lesser included because the defense was self-defense. This should be rejected for the following reasons: In State v. Ward, 125 Wn.App. 243, 249, 104 P.3d 670 (Wash.App.Div.1 2004), This Same Division rejected this line of reasoning in circumstances almost identical to Mr.

Ruths case. "The State also contends that counsels failure to request the instruction was legitimate trial strategy, an "all or nothing" choice to force the jury to acquit on the greater charge and prevent conviction (by compromise or otherwise) on the lesser. We have carefully examined the recordm and must disagree." See Ward, at 249. The Court Goes on to State that because "Wards defense were the same on both the greater and lesser offense (So is Ruths). His theory at Trial was lawful defense of self, and property.....(So was Ruths) An instruction on the lesser included offense was therefore at little or no cast outward." They conclude that if the jury believed Mr. Ward they would acquit of both, disbleif would result in being convicted of the lesser, some 89 months different. In Mr. Ruths case it meant some 22 years difference. This is a double standard they granted a reversal for WARD, but for the same reason denied the petitioners same argument. Further more in the unpublished opinion Page 15. The Court rejected the Argument stating "Giving the defense theory that Ruth acted in self-defense, Counsles strategy was reasonable." as discussed above this was directly rejected in WARD. Further more to instruct on the lesser allows the jury to understand assault better, and defense theory, due to what Great bodily harm is, and isn't, and what substantial bodily harm is, and isn't. Then further more what reckless is, and if defendants act constituted that. This stops the jury from balling up the assault injury into Great bodily harm, and they are able to distinguish what constitutes assault 1, without the lesser, they could believe the injury that was done constitutes Great Bodily harm espieccally since a firearm was used. Even though that reasoning of firearm committing automatically 1st degree assault in State v. Walther, 114 Wn.app. 189, 192-93, 56 P.3d 1001(2002), was rejected.

The self-defense claim also allows the defense to argue the

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theory that at worse out of fear the defendant intentionally assaulted another in his own home thereby recklessly inflicting substantial Bodily harm. Instead of the specific hope, believe, and intent to inflict "Great bodily harm". Thereby resulting in a 22 year less sentence for a first time offender, then what was recieved. Taylor v. Starnes, 650 F.2d 38 (4th Cir. 1981); U.S. v. Hayes, 794 F.2d 1348, (C.A. 9 Cal. 1980); Stevenson v. U.S., 162 U.S. 313, 16 S.ct. 839, 40 L.ED. 986.

The Appellate Courts reasoning is unreasonable, and placed a fantasy legal standard to this claim in context of the argument, See Rap 10.10 SAG PAGE 11-18. The petitioner ask this Honorable Court To reverse this conviction and let the Jury decide, or Re-sentence the Petitioner to two assault 2 w/FASE.

10. APPELLANT RECIEVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 5TH,6TH, AND 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO INTRODUCTION OF FALSE EVIDENCE WHICH CONSISTED OF TWO PHOTOGRAPHS OF THE CRIME SCENE A BLANKET WITH A RED STAIN ON IT AND A HOLE IN THE WALL WHICH WERE NOT WHAT THEY WERE DIPCITED TO BE BY THE PROSECUTOR

The Strickland, test, and Saunders for ineffective assistance of counsel, and failure to object to admission of evidence, have been defined and listed above. All prongs are met in this issue. See Rap 10.10 SAG Page 18-23. The Due Process Clause gaurantees the preservation of material evidence. State v. Stannard, 109 Wn.2d 742 P.2d 1244 (1987) Not the assumption that the evidence once exsisted or exist. In dealing with similiar issues the Court of Appeals has held that before a physical object connected with the commission of a crime may be properly admitted into evidence. It must be satisfacerily identified and shown to be in substantially the same conditions as when the crime was committed. State v. Roche, 114 Wn.app. 424, 59 P.3d 682 (2002); U.S. v. Dickerson, 873 F.2d 1181 (9th. Cir. 1988); Phillips v. Woodford, 267 F.3d 966, 984

(9th.cir.2001); State v. Spadoni, 137 wash. 684,695, 243 P. 854 (1926). Improper admission of evidence is a Due Process violation if it renders the Trial fundamentally unfair. villafuerte v. Stewart, 111 F.3d 616 (9th cir. 1997).

The petitioner showed in the SAG that the picture taken on the Crime date, was not collected, nor tested for D.N.A. then used to prove guilt. EXB. 23,25,26,27,and 28 were not admissible ER 901, See RAp 10.10 SAG PAGE 20-21. Also that the picture of the Hole was by an electrical socket not the headboard, and was taken after the crime date after the scene had been contaminated, and was used in trial to prove guilt. EXB. 29, See SAG PAGE 21-22.

The Court of Appeals Concluded on page 15 in the unpublished opinion: "Because his arguments go to the wieght of the photographs as evidence, not their admissibilty, counsels failure to object cannot constitute deficient performance." This opinion is wrong because the argument is challenging the admissibility of the evidence "whenever a criminal defendant claims ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, the defendant must show two things." See SAG page 19-20. The argument goes into the Saunders test See Supra. This is arguing the admissibility, and satisfying the legal prongs which establish this fact. Listing State v. Roche See Supra, where a picture was ruled inadmissible because the jury couldn't conclude the alleged drugs in the picture were real despite the police doing a field test. This was due to the expert becoming unreliable. Mr. Ruths case is much more prejudicial in this matter.

Mr. Ruths pictures were never tested, and the prosecutor even lied stating there was blood on the blanket which proved Ruth shot victim while posing no threat, and that the hole picture was on the headboard when it was 3-inches off the ground by an electric

socket. The petitioner ask this Honorable Court to please reverse this conviction, and or hold an evidenturary hearing.

11. THE TRIAL COURT VIOLATED APPELLANTS CONSTITUTIONAL RIGHT UNDER THE 5,6, AND 14TH AMENDMENT TO THE U.S. CONST. WHEN AT SENTENCING IT IMPOSED "NO SAME CRIMINAL CONDUCT" HAD OCCURED WHICH THE JURY SHOULD HAVE DETERMINED; AND IMPOSED TWO FIREARM ENHANCEMENTS WHICH EXCEEDED THE STATUTORY MAXIMUM, AND VIOLATED BLAKELY, AND INITIATIVE 159, AND THIRD EXCEEDED SENTENCING GUIDLINES WHEN SENTENCING APPELLANT TO COMMUNITY CUSTODY IN VIOLATION OF BLAKELY, AND RCW 9.94A.505(5).

It is a well known fact that the Statutory maximum is the Standard maximum range post-Blakely. In Blakely the Court clarified its decision in Apprendi, and concluded that the "statutory maximum... is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 124 S.Ct. at 2537. The sixth Amed. gaurentees the right to have the jury determine the fact's of the case beyond a reasonable doubt. The Courts in State v. Cubias, 120 P.3d 929 (wash.2005) Conclude basically because the jury convicts of more than one crime they are finding,without finding distinct and seperate criminal conduct. This logic is flawed because then Judges giving concurrent sentences invade the province of the Jury. Point blank the Superior Court Judges Can't speculate on the jury's findings. In the dissenting opinion Madsen J. say's "The majority is incorrect when it concludes that consecutive sentence imposed under Rcw 9.94A.58991)(9) and (b) do not implicate the Sixth AMEND. and that Apprendi, and Blakely, do not apply." see Cubias at Page 934. This argument was not addressed in the portion of the Appellate Courts opinion concerning this issue see PAGE 15-16. They only addressed Sub b. in the three part argument, See Rap 10.10 SAG PAGE 23-26. The Jury did not find distinct, and seperate criminal conduct, the judges speculate because the jury convicted of the two Assaults they probalbly meant no same criminal conduct. The

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Petitioner was attacked by two armed drug dealer's in his own home shooting them both at the same time. The jury should have as the sixth Amend. gaurantee's found if this constitutes same, or no same criminal conduct. Madison J. dissenting in CUBIAS: "The remaining factors defininf 'same criminal conduct' are not relevant here. but, if they become relevant in another case, they will need to be submitted to a jury." CUBIAS, at 936. This is that case. State v. Hawkins, 53 Wn.APP.598,609,769 P.2d 856 (1989).

The appellate Court addressed Sub. B. on Page 15-16 of there opinion. Stating that the Maximum is Life for assault. This is wrong the defendants maximum is 123, there is no life sentence for the defendants exact same circumstances. Initiative 159 say's it must be ruduced so as not to exceed the underlying maximum. If the Statutory maximum is life then there would be no need for the jury to determine facts that reflect what the sentence can, or can't be, it would be all to the discreation of the judge. See HAWKINS.

Sub c. was not addressed in there opinion, using the same argument as sub b, the Court exceeded it's authority when sentencing community custody over authorized maximum. See RCW 9.94A.505(5), the Custody must not exceed the 123 month maximum.

The Petitioner ask this Court to allow the jury to find same, or no same criminal conduct, or to sentence him to same criminal conduct. Then reduce the underlying sentence so the FASE, and community Custody do not exceed the Statutory maximum for the offenses.

IV. CONCLUSION

The appellate Courts misinterpreted the fact's and law in this case, and ruled contrary to there own Division. The prosecutor infringed upon the petitioners 4th,5th, 6th, and 14th Amendment rigths to the U.S. constitution. By violating his confrontation rights, rights to remain silent, mistating the law, vouching for alleged victims credibility, and calling the petitioner a liar. This was a credibility contest this was pre-judicial.

Petitioners counsel proposed ineffective assistance of counsel by proposing a faulty jury instruction, failing to object to propensity evidence, failure to request a lesser included instruction, and challenge the admission of false, and misleading evidence.

The court erred in giving two FASE when the jury only found deadly weapon, and imposing two FASE, and community Custody over the Statutory maximum, and outside there authority. This is goverened by initiative 159, and RCW 9.94A.505(5).

The petitioner ask this Honorable Court to please Grant review, and reverse this conviction and, or resentence.

RESPECTFULLY SUBMITTED,

Matthew R. Ruth

Matthew R. RUTH

Matthew R. Ruth 879492
C.C.A./F.C.C.
P.O. BOX 6900
Florence, AZ 85232

DATE: 8/22/06

CERTIFICATE OF SERVICE

I, MATTHEW R. RUTH, do hereby certify that a true and correct copy of the foregoing has been mailed prepaid by U.S. postal service to: Washington Supreme Court Temple of Justice P.o. Box 40929 Olympia, Wa 98504-0929, On This 22 day of August, 2006.

I, Matthew R. Ruth, declare under penalty of perjury that the foregoing is true and correct to the best of my belief and ability.

8/22/06
DATE:

Matthew R. RUTH
Matthew R. Ruth 879492
C.C.A./F.C.C.
P.O. BOX 6900
Florence, AZ 85232

APPENDIX

"A"

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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Seattle
98101-4170

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July 31, 2006

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CASE #: 56318-1-I
State of Washington, Respondent v. Matthew R. Ruth, Appellant
Snohomish County, Cause No. 03-1-02451-6

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Page 2 of 2
56318-1-I, State v. Matthew Robert Ruth
July 31, 2006

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish must be filed within 20 days of the date of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable David F. Hulbert
Matthew Robert Ruth

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 56318-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
MATTHEW ROBERT RUTH,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 31, 2006
_____)	

PER CURIAM. Matthew Ruth challenges his convictions for two counts of first degree assault, arguing that several incidents of prosecutorial misconduct and ineffective assistance of counsel deprived him of a fair trial and that firearm enhancements imposed by the trial court violated Blakely v. Washington.¹ Because Ruth fails to demonstrate any prejudicial error at trial and the jury found that he was armed with a firearm during each crime, we disagree and affirm.

FACTS

In November 2003, Matthew Ruth and his girlfriend Renee Woerner lived in a trailer in Snohomish County. Jeremy Custer rented a house nearby on the same property. Following a confrontation in the trailer on the afternoon of

¹ 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004).

November 5, Ruth shot Custer and his friend Drew Eden. The State charged Ruth with two counts of first degree assault with a firearm.

At trial, Custer testified that when he came home that afternoon, Ruth, Woerner and Eden were at his house and he noticed that his headphones were missing. Because he believed Ruth had borrowed his things in the past, such as DVDs, CDs and marijuana, he asked Ruth if he could look in the trailer for his headphones. Ruth agreed and Custer followed Woerner into the trailer. Custer and Woerner sat on the bed while Ruth stayed by the door. When Ruth began shouting that Custer was being disrespectful and accusing him of stealing, Eden also came into the trailer. Despite Custer's efforts to reassure him, Ruth pulled out a gun and began shooting, hitting Custer three times.

Eden testified that when Custer came home, he asked Ruth if he could look in the trailer for his headphones and Ruth agreed. Eden stayed in the house until he heard Ruth shouting from inside the trailer. Eden then approached and entered the trailer and saw Woerner and Custer sitting on the bed with Ruth facing them near the doorway. When Ruth began shooting at Custer, Eden followed Woerner out of the trailer and Ruth shot Eden in the back.

Ruth testified that he moved into the trailer to work with Custer on his music business but later began to believe that Custer's main business was money laundering and illegal drug activity. He claimed that he had seen Custer and Eden with guns and drugs and heard that they had killed people. On November 5, Custer accused Ruth of stealing drugs from him and threatened to rape Woerner and then kill her and Ruth and bury them at a farm. As Custer and

Eden followed Woerner and Ruth into the trailer and pulled out their guns, Ruth grabbed his gun and began shooting to get them to leave.

Following trial, the jury found Ruth guilty of both counts as charged. The trial court sentenced Ruth within the standard range and included two 60 month sentence enhancements for use of a firearm.

Ruth appeals.

DISCUSSION

Right to Confrontation

Ruth first contends that the prosecutor violated his constitutional right to confront witnesses by referring to extrinsic evidence of prior statements to impeach him and then failing to properly introduce evidence of the statements.

In particular, the prosecutor cross-examined Ruth without objection as follows:

Q. . . . Did you tell Donny Poole that you just freaked out, got weirded out, and shot them?

A. I told Donny Poole that.

Q. Did you?

A. No, sir. I did not. I didn't tell Donny Poole anything about my case.

Then, during rebuttal, the prosecutor argued, also without objection,

He shot them because he was angry. He was angry because he knew that Jeremy Custer, if permitted to look through the drawers, would find his property. That made him mad. That made him paranoid. That freaked him out. That weirded him out. And he pulled out the pistol and shot him.

Relying on State v. Yoakum² and State v. Babich,³ Ruth contends that the prosecutor's failure to perfect the impeachment by producing Poole's testimony

² 37 Wn.2d 137, 222 P.2d 181 (1950).

³ 68 Wn. App. 438, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993).

and the improper insinuation that Ruth confessed to his friend allowed the jury to consider the statement as substantive evidence. During cross-examination in Yoakum, the prosecutor repeatedly referred to an apparent transcription of an interview conducted by police to contradict the defendant's trial testimony without properly laying the foundation for impeachment or producing rebuttal testimony concerning the alleged questions and answers of the interview.⁴ The Supreme Court reversed, holding that the effect of the cross-examination "was to place before the jury, *as evidence*, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness," in a manner prejudicial to the defendant's rights.⁵

In Babich, the prosecutor "engaged in protracted impeachment" of one witness and a "less extensive" cross-examination of another witness based on an apparent transcript of conversations allegedly recorded by an informant on a body wire without introducing extrinsic evidence of the conversation to rebut the witnesses denials that the defendant was a known drug dealer.⁶ Then during closing, the prosecutor argued that the defendant was a known drug dealer, citing the body wire conversations which were never introduced into evidence.⁷

These cases are inapposite. Here, Ruth had testified on direct that Custer's threats "totally freaked [him] out," that he started shooting to get Custer and Eden to leave the trailer because he was afraid they were going to kill him and Woerner, and that he went to Poole's house after the shooting. After the

⁴ Yoakum, 37 Wn.2d at 138-39.

⁵ Id. at 144.

⁶ Babich, 68 Wn. App. 445-46.

⁷ Id. at 446..

quoted cross-examination questions and Ruth's conflicting answers, the prosecutor did not mention Poole again. The prosecutor's use of the words "freaked him out" and "weirded him out" in argument did not necessarily suggest or insinuate anything about Poole. Moreover, even if the jury somehow believed that Ruth had made such a statement to Poole, Ruth never denied that he was "freaked out" and that he shot Custer and Eden. Nothing in the prosecutor's question suggested that Poole would testify in a manner inconsistent with Ruth's testimony or claim of self-defense.

On this record, Ruth has failed to demonstrate a violation of his right to confrontation.

Prosecutorial Misconduct

Ruth next argues that his conviction must be reversed based on three incidents of prosecutorial misconduct. In particular, he contends that the prosecutor (1) stated his personal opinion, (2) misstated the law of self-defense, and (3) vouched for the credibility of Custer and Eden. Ruth objected to the first two incidents at trial and the trial court later denied his motion for a mistrial on those grounds.

To prevail on a claim of prosecutorial misconduct, Ruth must show both improper conduct and prejudicial effect.⁸ Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict.⁹ Where the trial court denies a motion for mistrial based on prosecutorial misconduct, we

⁸ State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

⁹ Id.

review the ruling for abuse of discretion.¹⁰ Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.¹¹

First, Ruth identifies as misconduct the prosecutor's statement of personal opinion in closing regarding Ruth's claim that Custer and Eden were drug dealers who killed people and threatened to rape Woerner, "I wouldn't pay any attention to it based on the testimony you have heard here." We review the prosecutor's comments "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given."¹² "[P]rejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion."¹³

After reviewing the elements of the charged crimes, the prosecutor turned to Ruth's testimony and argued,

That's nonsense, Ladies and Gentlemen. The instruction says you and you alone determine the credibility of the witnesses in the case. The judge won't do it for you, I can't do it for you. You have to decide who is telling the truth and who isn't. That's the main function. The other corollary to that is, you can use your common sense. Because just because you're sitting here doesn't mean you threw common sense out the window when you were impaneled as jurors. You can use your collective life experience to sit down and evaluate the various versions of the testimony you heard. And if you do that, you'll have to conclude that the defendant's version of those events is not only preposterous, it's laughable. And frankly, just an

¹⁰ State v. Ray, 116 Wn.2d 531, 549, 806 P.2d 1220 (1991).

¹¹ State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

¹² State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) (citing Russell, 125 Wn.2d at 85-86), review denied, 137 Wn.2d 1017 (1999).

¹³ State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

attempt to blame the victims of this crime for something they didn't do. Don't go that way, Ladies and Gentlemen.

He said that they both entered, kind of chased him and kind of barged in and they both had guns. Although they both testified they don't own guns and never had guns. And that he just started shooting. But as I asked him if they had guns, why didn't they shoot because -- well, because he was so fast he got the drop on them. That doesn't make any sense.

The story about they were going to rape his girlfriend. Do you think those two men were going to do that? You saw them, you heard them. Do you think that they are big-time drug lords intent on wiping out people they didn't like? Again, ludicrous. Ridiculous. I wouldn't pay any attention to it based on the testimony you have heard here.

Rather than a clearly improper expression of personal opinion, our review of the record demonstrates that the prosecutor's argument properly challenged Ruth's credibility based on the evidence presented at trial. Moreover, given the court's instruction, which the jury is presumed to follow, that the jurors must judge credibility of witnesses and disregard any statement by the attorneys not supported by the evidence, the trial court did not abuse its discretion in denying a mistrial on this basis.¹⁴

Ruth next contends that the prosecutor misstated the law and urged the jury to disregard the instruction stating that when a person is in a place he has a right to be and has reasonable grounds for believing he is being attacked, "[t]he law does not impose a duty to retreat." Following the defense argument that Ruth had done the only thing he could do given the circumstances, the prosecutor argued in rebuttal:

The application of force here was disproportionate, excessive and illegal considering what the provocation was. You cannot in your own

¹⁴ State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

home, or in your car, or in the street, shoot down people who haven't threatened you, who haven't approached you with a weapon and are basically sitting there. Don't forget, he was sitting down when he got shot three times. Drew Eden was shot in the back. His belief, if you want to call it that, was not reasonable. He has to reasonably believe. And that means outside looking in. Objectively speaking, was that reasonable? Would a normal, prudent person think under those circumstances that it was reasonable to pull out a pistol and shoot a person three times that hadn't threatened you? Would a reasonably prudent person looking at this think that it was reasonable to shoot someone in the back who hadn't threatened you? No. And you know that because common sense tells you that. The force has to be proportionate to the threat. There was no threat here, so there could be no application of force.

He shot them because he was angry. He was angry because he knew that Jeremy Custer, if permitted to look through the drawers, would find his property. That made him mad. That made him paranoid. That freaked him out. That weirded him out. And he pulled out the pistol and shot him.

To say that the defendant was afraid because of what had gone on, nothing had gone on. We're going back to the Cali cartel theory that Drew Eden and Jeremy Custer were the masterminds of a vast criminal enterprise, and that he was afraid because of that. But there is no evidence of that. None, zip, zero. The only person, apparently, that believed that is the defendant. But it wasn't based on reality. It wasn't based on facts. It wasn't based on anything. Why? Because it's not true. Simply not true.

His word is he saw them armed. They both testified that they don't own firearms. They don't look like guys that pack heat to you, do they? But according to the defendant, he was afraid because they are always with guns and they murder people and they bury them in the pasture.

The only thing he could think to do. I like that. That's what [defense counsel] said. If you recall, the defendant was standing right next to the door, looking into the bedroom, when he pulls out the pistol and starts to blast. The door is right there. If he is so threatened, all he has to do is leave. Call the cops.

[Defense Counsel]: Object. There is an instruction on that. Move to strike.

[Prosecutor]: It's argument.

THE COURT: I agree it is argument. The jurors will make their own determination.

[Defense Counsel]: Ask for a limiting instruction.

THE COURT: No. That's fine. You may proceed.

[Prosecutor]: He didn't have to pull out a gun. The bottom line is, he didn't have to because he wasn't threatened. There were options, in other words.

Just because the defendant believes this, it doesn't mean it's reasonable. [Defense counsel] said it was the only thing he could think of to do. That may be the case. Maybe that was the only thing he could think of to do. But the problem is, based on the circumstances, that was not a reasonable thing to do, that was not a reasonable belief that he was about to get injured. Again, given the facts, he was not entitled to use any force at all.

Rather than misleading the jury and misstating the law by implying that the law required Ruth to leave the trailer rather than shoot Custer and Eden, the record reflects that the main focus of the prosecutor's argument was that Ruth did not have reasonable grounds to believe that he was being attacked. Given the evidence in the case and the entire argument, as well as the trial court's statement, "I agree it is argument. The jurors will make their own determination," Ruth fails to demonstrate prejudicial misconduct or establish that the trial court abused its discretion by denying his motion for a mistrial.

Ruth also contends that the prosecutor improperly vouched for the credibility of Custer and Eden. The prosecutor argued without objection:

You saw Drew Eden. You saw Jeremy Custer. You saw their demeanor on the stand. Do they look like murderous thugs? Did they sound like murderous thugs? Did they act like dealers of pounds and pounds and pounds of drugs? No. To hear the defendant, you would think that Drew Eden and Jeremy Custer were major league criminals, giants of the criminal underworld. So good, so involved, and so connected that the Columbia cocaine cartel would be green with envy.

Jeremy Custer and Drew Eden are fair and impartial normal young men in this day and age. They might smoke a little pot. They are into music. But they are basically good kids. I think you probably would be able to tell that from their testimony. They are not anything remotely even conceivably like the defendant has characterized them in this trial. I urge you to reject the defendant's fantasies. I urge you to carefully consider the testimony of Jeremy and Drew and find the defendant guilty as charged

His word is he saw them armed. They both testified that they don't own firearms. They don't look like guys that pack heat to you, do they? But according to the defendant, he was afraid because they are always with guns and they murder people and they bury them in the pasture.

In each instance, our review of the entire argument indicates that the prosecutor properly urged the jury to make its credibility determinations based on the evidence presented at trial and argued that the testimony supported the State's theory that Custer and Eden were more credible than Ruth. Not only has Ruth failed to demonstrate flagrant and ill-intentioned misconduct, given the jury instructions and the ease with which any confusion regarding the statements could have been addressed by a curative instruction, he cannot establish prejudice.

Right to Remain Silent

Ruth contends that the prosecutor violated his Fifth Amendment right to remain silent by questioning his failure to report the various illegal activities he attributed to Custer and Eden, thereby implying guilt based on his pre-arrest silence. We disagree. The cases he cites do not hold that the State violates the right against self-incrimination by questioning a witness about his silence regarding the alleged crimes of other people when he testifies that those acts form the basis of his reasonable fear of them.¹⁵ The record amply demonstrates that the prosecutor's questions and argument were designed to impeach Ruth's credibility regarding his claimed fear of Custer and Eden rather than to suggest

¹⁵ See, e.g., State v. Easter, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996) (officer's testimony that vehicular homicide defendant was evasive in response to pre-arrest questioning elicited to insinuate guilt and prosecutor's argument emphasizing pre-arrest silence violated Fifth Amendment); State v. Lewis, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996) (recognizing pre-arrest silence is not admissible as substantive evidence of guilt of accused but determining that officer's testimony did not amount to a comment on defendant's silence).

that his silence regarding the alleged unrelated crimes of Custer and Eden supported an inference that he was guilty of the charges against him.

Ineffective Assistance of Counsel

Ruth next argues that he received ineffective assistance of counsel when his attorney requested a self-defense instruction that has been disapproved of by Washington courts. To establish ineffective assistance, Ruth must show both deficient performance and resulting prejudice.¹⁶ Prejudice is established where there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.¹⁷

In particular, based on defense counsel's request, the trial court instructed the jury that, "A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great bodily harm." Another instruction defined "great bodily harm" as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ."

Our Supreme Court disapproved of the use of the term "great bodily harm" in the "act on appearances" instruction in 1997 in State v. Walden, noting that great bodily harm is a distinctly defined element of first degree assault.¹⁸ Division Three of this court held in State v. Rodriguez¹⁹ that a defense attorney's request of the "act on appearances" instruction with the term "great bodily harm"

¹⁶ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).

¹⁷ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

¹⁸ 131 Wn.2d 469, 475 n.3, 932 P.2d 1237 (1997).

¹⁹ 121 Wn. App. 180, 185-87, 87 P.3d 1201 (2004).

constituted deficient performance based on Walden. But the defendant in Rodriguez claimed that he stabbed an unarmed man in self-defense.²⁰ We also note that the pattern jury instruction for “act on appearances” still includes the term “great bodily harm.”²¹

But here, Ruth claimed that he was faced with two armed men threatening to rape his girlfriend and then kill them both. If the jury believed him, it would have believed that he faced a threat of great bodily harm. Because there is no likelihood whatsoever that the requested instruction affected the outcome of the trial, Ruth cannot establish prejudice.²²

Cumulative Error

Ruth next claims that the cumulative effect of trial errors justify reversal. Because he has not established any error, we disagree.

Sentence Enhancement

Relying on State v. Recuenco,²³ Ruth also challenges the five year sentence enhancements imposed for use of a firearm on each count when the special verdict forms referred only to “deadly weapon.” In Recuenco, the trial court based its imposition of a firearm enhancement on the jury’s response to a special verdict form regarding use of a deadly weapon.²⁴ Our Supreme Court reversed and remanded for resentencing on the deadly weapon enhancement,

²⁰ Id. at 183.

²¹ See WPIC 17.04.

²² See, e.g., State v. Freeburg, 105 Wn. App. 492, 505, 20 P.3d 984 (2001).

²³ 154 Wn.2d 156, 110 P.3d 188 (2005) (imposition of firearm enhancement where special verdict form asked jury to determine whether defendant was armed with deadly weapon constituted violation of Blakely v. Washington, 542 U.S. 296, which could never be harmless), reversed, 2006 U.S. LEXIS 5164 (June 26, 2006) (Blakely errors are subject to harmless error analysis).

²⁴ 154 Wn.2d at 159-60.

holding that the imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated his Sixth Amendment right to a jury trial as defined by Apprendi v. New Jersey,²⁵ and Blakely v. Washington.²⁶

In State v. Pharr,²⁷ we distinguished Recuenco because the jury was instructed that it had to find Pharr was armed with a firearm in order to return an affirmative finding to a special verdict form inquiring whether Pharr had a deadly weapon. In particular, the instructions provided:

“For the purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.

A firearm is a weapon or a device from which a projectile may be fired by an explosive such as gunpowder.”^[28]

In light of this instruction, we held that “While the terminology in the verdict form was imprecise, the instruction applicable to the special verdict leaves no room for debate: the jury found that Pharr was armed with a firearm.”²⁹ Unlike the circumstances in Recuenco, the instructions at Pharr’s trial did not lead to a Blakely violation.

Here, the instructions regarding the special verdict forms were virtually identical to that given in Pharr. Another instruction stated “The term ‘deadly weapon’ includes any firearm, whether loaded or not.” As in Pharr, despite the imprecise language of the verdict form, there is no doubt that the jury found Ruth was armed with a firearm, and the instructions did not violate Blakely.

²⁵ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

²⁶ 542 U.S. 296.

²⁷ 131 Wn. App. 119, 124, 126 P.3d 66 (2006).

²⁸ Id.

²⁹ Id.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Ruth argues that by producing State's Exhibit 46, the prosecutor violated a motion in limine prohibiting reference to Woerner's prior allegation that Ruth had assaulted her. Ruth contends that the exhibit contained information that prejudiced him. But the document contained in State's Exhibit 46 labeled "Snohomish Health District" only contains Woerner's name, date of birth, address, phone numbers, the words "Skin Test Type" and some dates. There is nothing on the document referring to Ruth or any charges of assault. He fails to demonstrate error.

Ruth next contends that he received ineffective assistance of counsel when his attorney (1) failed to object to the testimony of Jeremy Sheridan, (2) failed to request a lesser included jury instruction on second degree assault, and (3) failed to object to certain photographs offered as evidence. We strongly presume that defense counsel's conduct constituted sound trial strategy.³⁰ "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal."³¹

Sheridan testified that he met Ruth in jail and Ruth asked him to help him get the State's witnesses to change their testimony or to "disappear." Ruth contends that Sheridan's testimony would have been excluded as improper propensity evidence based on an objection by his attorney. Because such

³⁰ State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); McFarland, 127 Wn.2d at 335.

³¹ State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (citing Strickland, 466 U.S. 668), review denied, 113 Wn.2d 1002 (1989).

evidence would have been admissible under ER 404(b) to show guilty knowledge and absence of mistake or accident despite such an objection, Ruth cannot demonstrate deficient performance.

Regarding a lesser-included instruction on second degree assault, in our view, trial counsel chose not to make such a request as a matter of trial strategy. Given the defense theory that Ruth acted in self-defense, counsel's strategy was reasonable.

The State produced photographs of a bloodstained blanket and a hole in the wall of the trailer alleged to be a bullet hole. Ruth contends that counsel should have objected because the police did not test the blood on the blanket to determine its origin and because the hole was not a bullet hole. But because his arguments go to the weight of the photographs as evidence, not their admissibility, counsel's failure to object cannot constitute deficient performance.

Finally, Ruth challenges his sentence, arguing that his sentence exceeds the statutory maximum for his crimes. The trial court imposed a standard range sentence of 105 months confinement plus a 60 month firearm enhancement on each count to be served consecutively. Ruth contends that the trial court erred by sentencing him to more than 123 months total. But first degree assault is a

class A felony with a statutory maximum of life imprisonment.³² Ruth fails to demonstrate error.

Affirmed.

For the Court:

Ajda, J.

Colman, J.

Everton, J.

³² RCW 9A.36.011(2); RCW 9A.20.021(1)(a).

APPENDIX

"B"

NO. 56318-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW R. RUTH,

Appellant.

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

THE HONORABLE DAVID F. HULBERT, JUDGE

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

**MATTHEW R. RUTH # 879492, C-128
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A. ASSIGNMENT OF ERRORS

1. The prosecutor violated appellant's constitutional rights when he entered into evidence extrinsic prejudicial evidence of a medical record involving Renee Woerner.

2. Counsel violated appellant's constitutional rights when he failed to object to prejudicial propensity evidence.

3. Counsel violated appellant's constitutional rights when he failed to request the lesser-included offense jury instruction of second-degree assault.

3a. Counsel violated appellant's constitutional rights when he failed to object to a photograph of a blanket containing alleged blood and a photograph of an alleged bullet hole; neither of which were accurate representations of what they depicted.

4. The trial court violated appellant's constitutional rights when it imposed an enhanced sentence which was based upon no same criminal conduct, and firearm enhancements which violated the sentence by Initiative 159.

4a. The trial court exceeded the sentencing guidelines when it imposed community placement that exceeded the guidelines sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecutor violated the trial court's order in limine and allowed highly prejudicial evidence to go back before the jury during their deliberations. This evidence consisted of a Health District Report which was a medical evaluation report disguised as an innocuous document which did contain information that Ms. Woerner had been assaulted and required

medical treatment as the result of an altercation with the appellant.

2. Counsel had failed to object during the trial proceedings to the prosecution's inferring that he had attempted to murder both the State's witnesses by making them 'disappear'. This information was entered through a jailhouse informant who appellant's attorney had tried to investigate but the witness refused.

3. Appellant received ineffective assistance of counsel when counsel failed to request a lesser-included jury instruction of second-degree assault after hearing all the trial testimony which supported the existence of second-degree assault and not first-degree assault.

3a. Appellant received ineffective assistance of counsel when counsel failed to object to the introduction of both misleading and highly prejudicial evidence of a photograph of a blanket which the prosecution maintained had blood on it, yet was not collected by the State and sent to the crime lab for analysis. And, a photograph of a hole that the prosecution maintained was a bullet hole that was lodged in appellant's headboard of his bed when, in reality, the hole was in the wall right above an electrical socket.

4. The trial court violated appellant's constitutional rights when it imposed enhancements exceeding the statutory maximum for the same criminal conduct which the jury did not find and should have under Blakely; and appellant received two sentencing enhancements for firearms which exceeded the statutory maximum and again violated Blakely and Initiative

159; and, finally, the trial court also imposed community placement at the expiration of appellant's sentence which again exceeds the statutory maximum and again violates the Blakely doctrine.

B. STATEMENT OF THE CASE

(Appellant adopts counsel's statement of the case as set forth in his brief)

C. ARGUMENT

GROUND-I

THE STATE COMMITTED PROSECUTORIAL MIS-
CONDUCT WHEN IT DELIBERATELY VIOLATED
THE TRIAL COURT'S ORDER IN LIMINE TO
PROHIBIT THE INTRODUCTION OF PROHIBITED
EVIDENCE WHICH SUBSTANTIALLY PREJUDICED
THE APPELLANT IN VIOLATION OF HIS FIFTH,
SIXTH, AND FOURTEENTH AMENDMENT RIGHTS
UNDER THE UNITED STATES CONSTITUTION

Appellant's defense counsel moved to prohibit the introduction of prejudicial extrinsic evidence concerning any testimony pertaining to the alleged uncharged assaults on witness Renee M. Woerner. Counsel's motion was granted prohibiting any references to said materials. See VRP 5-6.

The prosecution then violated the court's order on December 8th, 2004, when it admitted the Medical Reports of State Listed Witness, Renee Woerner, to be included as an exhibit allowing it to go before the jury during their deliberations. Counsel later objected to the introduction of this material and other related exhibits and was ignored by the court. VRP 81-83.

This information was deliberately mis-identified by the prosecution as a Health District Report, inferring that it did not contain prejudicial facts of alleged violent conduct

undertaken by appellant towards State-listed witness Renee Woerner. It was numbered as State's Listed Exhibit #46 on the exhibit list. What this document really contained was domestic violence assault information involving the defendant and Ms. Woerner, who was his girlfriend at the time. It contained information stating that there was a laceration on the back of her head and contusions covering her body that were allegedly caused when she was pushed down by the appellant one week before the shooting took place.

Defense counsel moved to specifically prohibit the introduction of this information, telling the court during the Motion in Limine hearing that:

"Mr. Stephans: There is also information in the discovery provided alleging that Mr. Ruth committed one or more -- I think two or more -- assaults against one of the State's witnesses, Renee Woerner. She is the one person who was present for this incident who was not a shooter or a shootee. Was not shot, did not participate in the shooting. She was Mr. Ruth's girlfriend at the time. These would basically be uncharged criminal matters of prior bad acts shown only for purposes of character. And obviously, would object to any testimony or evidence about these alleged domestic violence assaults.

"The Court: All right.

"Mr. Adcock: That's fine."

Appellant submits that this information was highly prejudicial and that the prosecutor should have not been allowed to back-handedly submit it before the jury. This is even more important in this case because the jury came back with several questions during their deliberations that showed they believe the defendant's version of the facts, when they requested the

the following information from the court: (1) Transcripts of the interview with Renee M. Woerner dated December 10 and 11, 2003; (2) Transcripts of interviews with Jeremy Custer dated November 24, 2003; (3) Transcripts of the interview with Drew Eden dated November 10, 2003. The request to review these documents clearly show that the jury was concerned about the truth of the contents of the misclassified 'Health District Report'.

"Mr. Adcock: What other items of evidence that are important to this case did you collect at the scene? You mentioned the bandana and the shell casings.

"Yes. We also collected the driver's license and the health certificate in the name of Renee Woerner.

"The Clerk: State's Exhibit 46 marked for identification.

"(By Mr. Adcock) Show you what's been marked State's Exhibit No. 46 and ask you to open that container and see if you can identify the contents.

"Driver's license we collected from the drawer. This is the Snohomish Health District Report with Renee Woerner's name on it.

"Thank you.

...

"Plaintiff's exhibit No. 46 Identified

"Mr. Stephens: I'm actually going to object as to relevance at this point. We have the photo of the ID and the other items that put it in context. I don't see the relevance of that testimony."

Counsel was overruled, and the evidence entered and thereafter, allowed to go before the jury prejudicing the appellant's chances at acquittal.

In State v. Sullivan, 69 Wn.App. 167, 847 P.2d 953 (1993), the court held the following in ruling on the violation of

a court's order in limine:

"the purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his representation. Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection."

The issue then turns on what the proper remedy is after a violation has occurred. Counsel must again object before the court again proceeds with the introduction of the evidence. Id. at 171. Counsel did so and was ignored by the court. VRP 82. In another case almost identical to Mr. Ruth's, the court in United States v. Martin, 960 F.2d 59, 62-63 (8th Cir. 1992), held the following:

"We must reverse a conviction unless we can conclude beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict; in other words, the error must be clearly harmless. (citation omitted). Where other evidence was not overwhelming, **and unadmitted exhibit that was sole evidence relating to a material issue was inadvertently given to the jury conviction necessarily reversed.**"

The court went on to hold that they only reverse a conviction if the appellant can show that the purported error undermined the fundamental fairness of the trial proceedings and resulted in a miscarriage of justice, citing United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1039, 1047, 84 L.Ed.2d 1 (1989).

this case presents a comparison to the above situation. Illustratively, the Martin court made the following further distinctions which **do** compare to the appellant's factual situation:

"In the present case Waughn made a general motion in limine, but made no contemporaneous objections to the specific exhibit. (Appellant did). Defense counsel did not ask to review the exhibit at trial when it was offered for admission. (Appellant did and objected). The exhibit clearly had some effect on deliberations as evidenced by the jury's questions about the white substance. (Appellant's jury as well asked questions about this evidence).

Further, the 'wrong' exhibit was introduced at trial, as was done in Mr. Ruth's case. And the appellant has made the argument that prosecutorial misconduct has occurred, which allowed the admission of the 'wrong' exhibit. The prosecutor was present in court when counsel made the initial motion to exclude any references to the mis-named "Health District Record", still he ignored the court's ruling to not allow the introduction of this information. This constitutes misconduct by the prosecutor as well as requiring a reversal of the conviction. See, Phillips v. Woodford, 267 F.3d 966, 984 (9th Cir. 2001) (introduction of false evidence violates due process).

In short, the jury should not have been allowed to learn of facts highly prejudicial to the appellant; the facts that Ms. Woerner had been assaulted by Mr. Ruth requiring a trip to the hospital showed prior bad acts allegedly committed by him, and went along with the State's theory of prosecution that he was an aggressive and violent person and capable of shooting unprovoked both the State's victims.

Accordingly, this conviction should be reversed due to the prejudicial nature of this information, which the prosecution clearly knew should not have been allowed to be viewed by the jury: evidence of a non-testifying witness who was not

allowed to explain the circumstances contained in the "Health District Report".

GROUND-II

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN DEFENSE COUNSEL ALLOWED THE STATE TO INTRODUCE PROPENSITY EVIDENCE WITHOUT OBJECTION WHICH RESULTED IN APPELLANT BEING CONVICTED WHEN THE JURY LEARNED THAT HE HAD ALLEGEDLY SOLICITED A JAILHOUSE SNITCH TO KILL BOTH THE PROSECUTION LEAD WITNESSES

To demonstrate ineffective assistance of counsel, the defendant must show two things: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

Where, as here, the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, State v. Mcfarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. Id., State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998).

In the instant case, counsel failed to object to damaging

and highly prejudicial propensity evidence of alleged collateral uncharged crimes. There was absolutely no reason whatsoever for this error. Nor can it be claimed it was some sort of a 'strategic' decision for the jury to learn that Mr. Ruth had allegedly tried to have both the prosecution's lead witnesses 'disappear', through the use of another party. This, in turn, allowed the prosecutor to argue that initially he had tried to murder both of them, and when that failed, he again tried to do so through the use of a third party jailhouse informant. The following exchange shows the inherent prejudice that took place. During trial defense counsel failed to object to propensity evidence. Therefore, the prosecutor got the following testimony in: (jury trial, page 185)

"Q - I believe that you told me in the conversation I had with you before court that you are a doper and a thief?

"A - Yes, sir.

"Q - You drew the line here?

"A - Pardon me?

"Q - You drew the line here?

"A - Yes, sir.

"Q - Why is that?

"A - Because I don't kill people, sir.

"Q - That's what the defendant wanted you to do?

"A - Yes, sir.

"Q - How did he express that to you?

"A - Well, didn't exactly say the word 'kill'. He said 'disappear'.

"Q - When he said 'disappear,' who was he referring to?

"A - The witnesses.

"Q - That would be....

"A - Jeremy and Drew.

"Q - Okay. How many conversations did you have with the defendant about this?

"A - Over a period of a couple months, numerous.

"Q - Was the tenor of the conversation always the same?

"A - Yes."

A timely objection to this information would have "likely been sustained", since it was highly prejudicial untried collateral crimes evidence, propensity evidence, that is disallowed under the United State's Constitution's Sixth Amendment and the Due Process Clause of the Fifth Amendment.

It has long been held that there is no question that 'propensity evidence' would be an 'improper basis' to use for obtaining a criminal conviction. See, Old Chief v. United States, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Michelson v. United States, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

The above mandates were violated when the prosecution deliberately solicited collateral crimes evidence/propensity evidence from jailhouse snitch Jerimiah Sheridan, that appellant had allegedly requested that he makes both lead prosecution witnesses 'disappear'. He then went on to argue during closing

argument, and misstating the record at times, that appellant was guilty for the commission of the charged offenses by his solicitation of Jerimiah Sheridan to rid the trial of both Jeremy Custer and Drew Eden trial testimony, by insinuations that they be murdered: when that was never any part of the initial charges or evidence against the appellant. See, p. 313 vis-a-vis pp. 305-306 defense counsel's closing arguments.

In light of the above the third prong is established, that the result of the trial would have been different with the omission of this highly prejudicial uncharged crime evidence. And, accordingly, appellant requests the reversal of his conviction.

GROUND-III

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL IN VIOLATION OF THE SIXTH
AMENDMENT OF THE UNITED STATE CONSTITU-
TION WHEN COUNSEL FAILED TO REQUEST A
LESSER-INCLUDED JURY INSTRUCTION OF
ASSAULT IN THE SECOND DEGREE AFTER HEARING
ALL TRIAL TESTIMONY WHICH WOULD HAVE SUP-
PORTED SUCH A CHARGE

In Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), the court set forth a two-part test for determining if an appellant had received ineffective assistance of counsel. First, a defendant has to show that his counsel's performance was deficient and fell below an objective standard of reasonableness. Second, that his counsel's deficient performance prejudiced the defendant. This means that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

These two prongs are satisfied in the instant case by the following facts: Had counsel investigated the law of the case, he would have discovered that the circumstances in this case clearly fit the criteria of second degree assault, and not first degree assault. This difference means that the appellant received a twenty-two-year sentence enhancement by way of improper representation for counsel's failure to request the lesser-included-offense instruction: a difference of twenty-two years can hardly be characterized as being above the standard set forth in Strickland.

Several reasons lead to the conclusion of insufficient evidence to support a legitimate conviction of first-degree assault. First, no medical reports attesting to the severity of actual damage to the victims was introduced. No physicians testified that the victim's wounds constituted the requisite degree of damage to support such a conviction. Counsel should have compelled the hospital reports concerning the actual damage done and supporting medical testimony. Especially, as here, where the only evidence adduced to support the degree of injuries to the victim was given by the victims themselves and police reports which all attested that their wounds were non-life-threatening. The only other 'medical' testimony on this subject came from the prosecutor when he testified that:

"And you will see the medical records also. It's true the kinds of wounds they had are not the kind of wounds that say an injury to an artery or a major vein, he is not going to spurt."

VRP 312-313. The only problem with this is that there were no medical reports entered into evidence that the jury would

be able to see, except for a 'diagram' showing where the bullets went into the victims. Appellant submits that this information does not constitute sufficient evidence to allow a conviction for first-degree assault, and that counsel should have attempted to argue before the court for the use of the lesser-included second-degree assault.

In order to be convicted of first-degree assault, a person must be found to have committed the following acts:

9A.36.011(1)(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

9A.36.011(1)(c) Assaults another and inflicts great bodily harm.

This threshold was not met in the instant case. More accurately, the evidence presented during trial is defined by assault in the second degree:

9A.36.021(1)(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

9A.36.021(1)(c) Assaults another with a deadly weapon.

A review of the relevant case law on this subject discloses what constitutes a second-degree assault when determining the proper application of the 'factual test' to be applied. Starting with State v. Callahan, 87 Wn.App. 925, 943 P.2d 676 (1997), where Mr. Callahan shot Ben Manning in the hand, which is a place more probable of satisfying the "great bodily harm" requirement than in the instant case. Mr. Callahan fled the scene and was later captured and only charged with second-degree assault. In State v. Kidd, 57 Wn.App. 95, 786 P.2d 847 (1990), Mr. Kidd was initially charged with first-degree assault for

shooting two passengers on a bus in the chest and additionally shooting at the police when they arrived and tried to stop him. At jury trial, he was only found guilty of second-degree assault after counsel requested the lesser-included offense jury instruction. Finally, in State v. Rai, 97 Wn.App. 307, 983 P.2d 712 (1999), Sadhu Rai fired five shotgun shells at two people and shot a SWAT Team officer twice with a shot gun in the chest and the elbow. He was charged with first-degree assaults and found guilty of second-degree assaults as his conduct only constituted second-degree assault despite his shooting an individual in the chest.

Application of the factual test is reasonably straightforward. Had counsel requested the lesser-included offense instruction, the appellate court could then view the evidence in the light most favorable to the defendant. State v. Cole, 74 Wn.App. 571, 579, 874 P.2d 878, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994). More specifically, a requested jury instruction on a lesser-included offense or inferior degree offense should be administered "[I]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Fernandez-Medina, 141 Wn.2d at page 455-56.

The evidence in the appellant's case supports the lesser-included offense of second-degree assault.

"In Washington State, a defendant is entitled to an instruction on a lesser included offense if two conditions are satisfied: (1) each of the elements of the lesser offense must be a necessary element of the charged offense, and (2) the evidence in the case must support an inference that

the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)" State v. McJimpson, 79 Wn.App. 164, 173, 901 P.2d 354.

It is not enough that the jury might disbelieve the State's case, there must be evidence supporting the lesser-included offense to convict. There are numerous reasons in the evidence of the instant case to support the lesser-included offense, but not the finding of the jury. The first prong of the McJimpson decision is satisfied as the charge of first-degree assault necessarily includes the elements of second-degree assault. (The legal prong is satisfied); petition for review at 6 ("Every degree of assault is a lesser included offense of all higher degrees of assault")(citing State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)" State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (August 2000).

In the above case, the State charged the defendant with two counts of attempted murder. He was found guilty of the lesser-included offense of assault in the first degree although he severed a person's spine and almost killed two others. The Supreme Court later reversed his conviction on the grounds that he was entitled to a lesser-included offense instruction of second-degree assault. This substantiates even further that trial counsel in this case had a duty to investigate the law and request an instruction for the lesser-included offense. Appellant proposes that the nature of the evidence combined with such an instruction would have resulted in a very different verdict.

The incident happened in the appellant's home while his fiance was asleep in bed. The appellant shot the two invaders

who had accused him of stealing a large amount of drugs from them and his fiance of informing to the police about their activities. The invaders then forced their way into the appellee's home while armed and the appellant shot them in non-lethal areas of their bodies.

One attacker was shot in the lower back/buttocks area when he was moving toward Renee Woerner after saying he was going to rape her. The invaders' stories, police records, and trial testimony gave the jury more than enough reason to believe the appellant was not guilty of felonious behavior or, at worst, was guilty of the lesser-included offense of second-degree assault.

Jeremy Custer, for example, told everyone present after the shooting that he wanted "no cops, no cops". VRP 137 This is shown from police reports and testimony of State's witnesses including Jeremy Custer himself and shows a reason to suppress the true facts of the incident.

State witness Dru Eden stopped Sarah Bryant on her way home from work and who then made the excited utterance that: "I just got shot over dope, I am going to kill him". VRP 114-117; 167-168. And made almost identical statements to the investigator. VRP 171-175.

Finally, petitioner submits that the requisit element of "great bodily harm" to constitute first-degree assault was not proved at trial by the required evidence, which only showed that there was "substantial bodily harm".

The State maintained that because there were four shots

being fired, that that constituted the necessary element of "great bodily harm". This is incorrect as a matter of law, since there is no case law to support this proposition. This finding must be supported by competent medical evidence, doctor's reports, and testimony concerning the actual damage done. In fact, this is why the prosecution did not introduce any such evidence, since they knew that no medical evidence existed that would prove a first-degree assault had occurred.

That this case was only a second-degree assault is further supported by State v. Pierre, 108 Wn.App. 378, 386, 31 P.3d 1207 (2001), where the victim suffered "repeated kicks to the head that resulted in serious brain damage". This was sufficient for the jury to find specific intent to inflict "great bodily harm", because the injuries **were permanant**, and allowed a finding to be made from the results of the wounds. None of the victims in Mr. ruth's case suffered any permanant injuries, and they attested that they only received non-life threatening superficial wounds. VRP 92-93; 136-139. This was especially important when case law states that:

The casual relationship of an accident or injury to the resulting physical condition must be established by **medical testimony beyond speculation and conjecture.**

See, Carlos v. Cain, 4 Wn.App. 475, 481 P.2d 945 (1971).

Simply, these facts were not established during trial.

Counsel should have endeavored after hearing all the evidence to introduce the lesser second-degree assault instruction like in State v. Walther, 114 Wn.App. 189, 192-93, 56 P.3d 1001 (2002), where it was held that even though Mr. Walther had fired

many shots at the victim, this did not constitute in and by itself a first-degree assault. Id. Nor should the prosecutor have been allowed to attest that Mr. Ruth's conduct amounted to a first-degree assault, by his "testifying as a medical expert" State v. McPherson, 111 Wn.2d 747, 761, 46 P.3d 284 (2002). In conclusion, these charges must be reduced to second degree assault, and appellant resentenced with his guideline score of 6 to 9 months, and firearm enhancements of thirty-six months.

SUB GROUND-IIIA

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO THE INTRODUCTION OF FALSE EVIDENCE WHICH CONSISTED OF TWO PHOTOGRAPHS OF THE CRIME SCENE, A BLANKET WITH A RED STAIN ON IT AND A HOLE IN THE WALL WHICH WERE NOT WHAT THEY WERE DEPICTED TO BE BY THE PROSECUTION

The Strickland test has been defined above, petitioner must meet both prongs to obtain relief. Petitioner alleges that counsel's deficient conduct was due to his failure to object to the introduction of highly prejudicial photographs that did not depict what he represented that they did to the jury. And, second, that these photographs were highly prejudicial and inflamed the passions and prejudices of the jury, and mislead them into a finding of guilt.

The first photograph was allegedly taken of a blanket that the State at trial maintained had blood covering it. The blanket was never introduced into evidence, nor were any blood samples taken and it sent to the lab for analysis. Yet the prosecu-

tion was allowed to argue the authenticity of this evidence before the jury without defense counsel's objection.

The second piece of uncollaborated evidence used to convict appellant was a "bullet hole" that was alleged to be the fourth shot fired by him at victim Jeremy Custer, and which had lodged into a headboard of the appellant's bed. The prosecution argued this before the jury without defense counsel's objection. However, the "bullet hole" was not a bullet hole, and was not a hole in the headboard. It was a close-up photograph of a hole in the wall by an electrical socket, three inches up from the ground; and where no bullet was retrieved and no exit mark existed.

These facts were a mischaracterization of the evidence by the prosecution, who knew that it was false, and that it would lead the jury to believe that the appellant had shot at the victim's head to negate the belief that there was no reasonable grounds for appellant to assert a self-defense claim. And, further, would support a finding that he had intent to cause great bodily harm, and to support a finding that appellant had committed a first-degree assault. These erroneous facts also impinged upon the appellant's credibility before the eyes of the jury.

Whenever a criminal defendant claims ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, the defendant must show two things. First, that there was an absence of legitimate strategic or tactical reasons supporting the challenged conduct, State v. McFarland,

127 Wn.2d 322, 336, 899 P.2d 1251 (1995). And second, that an objection to the evidence would likely have been sustained. Id. at 337 n. 4. then a defendant must show that the result of the trial would have been different had the evidence not been admitted. See, State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

In light of the following, there is no legitimate or strategic reasons whatsoever that would allow counsel not to object to the use of this erroneous false evidence that led to his conviction.

THE BLANKET WAS NOT COLLECTED OR PROCESSED

During trial, the detective admitted that she had failed to collect and process the blanket into evidence. Nor was it collected and sent to the crime lab for forensic blood testing. VRP 94. Yet the prosecutor spoke to the jury as if it had been sent and processed correctly and had come back positive for blood evidence. VRP 312-313. She further told the jury that "Exhibits 23, 25, 26, 27, and 28 show the appearance of a blood stain on the comforter". VRP 71-72, 74, 75. Later, in closing, the prosecutor said that "it doesn't matter whether or not the comforter was sent to the lab for analysis because everybody knows he shot these two men. He said so himself, there is no need to prove its anybody's blood." VRP 312-313.

The Due Process Clause guarantees the preservation of material evidence. State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987), not the assumption that the evidence once existed or exists. In dealing with similar issues, the court of appeals has held

that before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. See, State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002); United States v. Dickerson, 873 F.2d 1181 (9th Cir. 1988).

Moreover, it is well settled that the presentation of false and misleading evidence violates the Due Process Clause and may require the reversal of the conviction. Phillips v. Woolford, 267 F.3d 966, 984 (9th Cir. 2001). Under the above citations, it's easily apparent that had a timely objection to the evidence been entered by counsel, that the jury would not have been allowed to receive this false and misleading evidence, the introduction of which led the jury into a finding of guilt since they were under the false assumption that there was real blood on the uncollected and unprocessed blanket. Thus, the outcome of the trial would have been different had counsel properly represented appellant.

THE BULLET HOLE NOT IN THE PROPER LOCATION

During the trial, the lead detective attested to the following concerning the bullet hole:

"Q - Showing you State's exhibit No. 29, what is that?

"A - No. 29 is a hole that is in the wall just above the headboard of the bed towards the left side. It's a hole that we believe is a possible gunshot hole. This was taken after the actual--that date; when I went back to do some additional follow-up photos of it."

The above exchange conclusively shows that a photograph of this "hole" was not obtained contemporaneously with the initial

crime scene investigation. Further, it shows that no forensic investigation was conducted on it. Including one by the ballistics expert. Further, the crime scene had been contaminated by the victim after the shooting had occurred, and before the detective had returned and took the photograph of the bullet hole:

"Q - You remember telling detective Willoth that you believe you saw the bandana a few days after the shooting?

"A - Yeah.

"Q - So you actually went back into the trailer after the shooting?

"A - Um-hum.

"Q - That's yes?

"A - Yes, yes.

Further, this misleading evidence allowed the prosecutor to argue to the jury during closing argument that:

"He took a fourth shot at him, only three hit him. VRP 290. Shot at them four times in total, and claimed that is self-defense. that is not the law of this state, nor should it be. You can't allow people to shoot people, just because, and then just say, hey, it was self defense. And that's what we have. VRP 293.

Appellant submits that there is no legitimate or strategic or tactical reasons that would justify defense counsel's failure to timely enter objections to this erroneous evidence. Based on Stannard, Roche, and Phillips, supra, this information would have been prohibited had only counsel entered a timely objection.

Had the above evidence not been admitted against the appellant, the prosecution could not have argued the erroneous facts before the jury like appellant had "shot Jeremy Custer when he was sitting down", VRP 276, 292-293. Nor could it have

argued that appellant had attempted to murder them, and "by firing four shots" VRP 293 to negate his self defense claim. These facts satisfy the third requirement that the results of the proceedings would have been different had counsel only objected.

In light of the foregoing, appellant respectfully requests that this Honorable Court reverse his conviction or remand for an evidentiary hearing on ineffective assistance of counsel.

GROUND-IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN AT SENTENCING IT IMPOSED 'NO SAME CRIMINAL CONDUCT' HAD OCCURRED WHICH THE JURY SHOULD HAVE DETERMINED; AND IMPOSED TWO FIREARM ENHANCEMENTS WHICH EXCEEDED THE STATUTORY MAXIMUM AND AGAIN VIOLATED BLAKELY AND INITIATIVE 159: AND, THIRD, THE TRIAL COURT EXCEEDED THE SENTENCING GUIDELINES WHEN IT SENTENCED APPELLANT TO COMMUNITY PLACEMENT AGAIN IN VIOLATION OF BLAKELY AND INITIATIVE 159

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted by a jury, and proved beyond a reasonable doubt." Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)(quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The 'statutory maximum' is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant". Blakely, 542 U.S. at 303. This statutory maximum is now defined under a correct computation on a sentencing guideline score sheet, as the statu-

tory maximum. See, Blakely, supra.

Sub.A. At sentencing the judge imposed upon the defendant a sentence beyond that reached by the jury of 'no same criminal conduct.' This exceeded the 'statutory maximum' of 123 months for assault in the first degree with zero criminal history points. With his erroneous imposition of this enhancement, this 123-month sentence was increased to 246 months. Then the judge sentence appellant to 105 months for each assault to be served consecutively which gives the appellant a total of 210 months without the firearm enhancements. This is 87 months over the 'statutory maximum'. Therefore, this is an exceptional sentence in violation of appellant's rights defined in Blakely, and in Washington's courts, Hughes:

"the court held that Blakely's Sixth Amendment right to a jury trial violation 'can never be deemed harmless' because to do so would be to speculate on the absence of jury findings."
State v. Hughes, 154 Wn.2d 118, 148, 110 P.3d 192 (2005)

The only remedy for this is to vacate the sentence and remand for sentencing to remove the erroneous findings of the court.

Sub.B. The trial court also erred in exceeding the 'statutory maximum' with the firearm enhancements. Washington State Initiative 159 states:

"the 1998 legislature required that if the firearm enhancement or the deadly weapon enhancement increases a sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced. As a result in such a case the underlying sentence must be reduced so that the total confinement time does not exceed the statutory maximum. This takes effect for crimes committed on or after June 11, 1998." (emphasis added).

This is a violation of appellants' rights to Due Process of Law as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and his right to have the jury determine his guilt as guaranteed by the jury clause of the Sixth Amendment to the United States Constitution; see also, Washington State Constitution, Article I, section 22. In plain English, the 'statutory maximum' for any crime is only what the jury imposes or what the defendant admits to the court - in this case, 123 months.

"we specifically noted that the statute does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." Harris v. United States, 536 U.S. 545, 563 (2002) (brackets in original).

The sentence in Mr. Ruth's case exceeds the 123-month 'statutory maximum' by the two 60-month gun enhancements. The firearm enhancements were added on top of the 'statutory maximum' for the underlying offense. The enhancement cannot be reduced and, therefore, the underlying offense has to be dropped so the enhancements and sentence together do not exceed the statutory maximum of 123 months for this offense cognizant of appellants' criminal history.

"we find that the word 'maximum' most naturally connotes the greatest quantity of value attainable in a given case". United States v. LaBonte, 117 S.Ct. 1673 at 1677. "In sum, we hold that the phrase 'at or near the maximum term authorized' is unambiguous". LaBonte at 1679. (emphasis added)

The sentencing court erred in exceeding the 'statutory maximum' for the underlying offense which, in this case, is 123 months. The remedy available to the Court is to reduce the underlying sentence so the total sentence, including the

firearm enhancements, does not exceed 123 months in accord with Initiative 159 and the above cited decisions.

Sub.C. the defendant was also given 48 months of community placement to run consecutively upon his release. This exceeds the 123 months statutory maximum of his guideline sentence. Under RCW 9.94A.505(5), the trial court cannot impose such a sentence as this:

"Except as otherwise provided...a court may not impose a sentence providing for a term of confinement of community supervision, community placement, or community custody which exceeds the statutory maximum."

See also, State v. Zavala-Reynoso, 127 Wn.App. 114 (2005).

In Zavala-Reynoso the court interpreted RCW 9.94A.505(5) and held that any community placement sentence cannot exceed the statutory maximum as determined by the guidelines. Appellant is already past his guideline sentence by 207 months. It would be 253 months past his sentence with the community placement sentence being added.

Accordingly, the appellant requests that this Honorable Court do the following: 1. Remove the no same criminal conduct finding that was erroneously made by the trial court judge instead of the jury, 2. Reduce the underlying sentence so that the firearm enhancements do not exceed the statutory maximum to a total sentence amount of 123 months; and 3. Reduce the underlying sentence so that the community placement does not exceed the statutory maximum of 123 months.

D. CONCLUSION

Appellant was prejudiced as stated herein above and received ineffective assistance of counsel. It is respectfully submitted that had a second-degree assault jury instruction been requested by counsel. that he could have only been convicted and sentenced based on the evidence which supported this charge. The overall cumulative trial court errors led to a finding of first-degree assault instead of second-degree assault. Other errors resulted in the appellant being erroneously sentenced outside of the standard timeline guide-range and violated the Blakely doctrine and Initiative 159. Hence, a sentence correction is also warranted. For all these reasons this conviction and sentence should be vacated.

Respectfully submitted,

Matthew R. Ruth
Matthew R. Ruth #879492, C128

E. CERTIFICATE OF SERVICE

I, Matthew R. Ruth, do hereby certify that a true and correct copy of the foregoing has been mailed prepaid by U.S. Postal Service to: Janice E. Ellis, Prosecuting Attorney, Snohomish County, 3000 Rockefeller Avenue, Everett, WA 98201-4046 and Andrew P. Zinner, Attorney for Appellant, Nielsen, Broman & Koch PLLC, 1908 East Madison, Seattle, WA 98122, on this 30 day of January, 2006.

I, Matthew R. Ruth, declare under penalty of perjury that the foregoing is true and correct to the best of my belief and ability.

1/30/06
dated

Matthew R. Ruth
Matthew R. Ruth #879492, C128
Monroe Corrections Complex/WSR
PO Box 777
Seattle, WA 98272-0777

STATE OF WASHINGTON)

)SS

COUNTY OF SNOHOMISH

Subscribed and sworn to, before me, this 30 day of Jan

Susan P. Collins

NOTARY PUBLIC

Susan P. Collins,
My Commission Expires January 22, 2008

