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EMP

No. 62772-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDU BERHAN,

Appellant.

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

The Honorable Jeffrey Ramsdell

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. In Mr. Berhan's trial on a charge of robbery in the first degree, the trial court erred and violated due process in admitting evidence of prior alleged theft (shoplifting) incidents committed by the defendant.

2. The trial court erred in denying the defense request for a lesser included offense jury instruction on the crime of second degree robbery.

3. In the alternative, defense counsel provided ineffective assistance of counsel if he waived objection to the trial court's denial of his request for an instruction on the lesser included offense of second degree robbery.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in admitting evidence of prior alleged shoplifting incidents committed by the defendant, under any ER 404(b) exception, where the State's offer of proof failed to establish that the alleged incidents constituted evidence of identity or motive, or any non-propensity purpose.

2. Whether the trial court abused its discretion in denying the defendant's request for voir dire testimony by the witness attesting

to the alleged prior shoplifting incidents proffered as ER 404(b) evidence, where the occurrence of the prior incidents was a highly disputed factual issue, because there were no internal store reports or police reports of the alleged incidents, the only evidence of the alleged prior incidents was the claim of the complainant repeated in the State's trial brief, and the where the witness had an identified motive to fabricate the prior incidents?

3. Whether the error in admitting the ER 404(b) evidence prejudiced the outcome of Mr. Berhan's trial.

4. Whether the trial court erred in denying the defendant's request for an instruction on the lesser included offense of second degree robbery on ground that the "factual prong" of the lesser included offense analysis was not satisfied.

5. Whether the defendant's counsel, despite proposing written jury instructions on the lesser included offense of second degree robbery, acquiesced in the trial court's reasoning that the "factual prong" of the lesser included offense analysis was not satisfied, and therefore waived the error, or whether counsel maintained his request for the instruction.

6. Whether, if defense counsel waived the instructional error, counsel provided ineffective assistance of counsel.

C. STATEMENT OF THE CASE

The defendant, Abdu Berhan, was charged with first degree robbery of watches from a K-Mart store on Aurora Ave. North in Seattle, taken from the person of loss prevention officer Samuel Steiner by threat of force and display of a firearm. CP 4-5.

According to the affidavit of probable cause, K-Mart loss prevention officer Steiner approached the defendant inside the store, believing he was engaged in shoplifting. The loss prevention officer claimed that the defendant told him that he had a gun, said "Don't fuck with me," and showed Steiner the butt of a handgun in his pants. CP 2.

At trial, the defendant admitted to entering the K-Mart to steal wristwatches, but specifically denied being in possession of a firearm, telling Steiner that he had a firearm, showing the loss prevention officer a firearm or part of a firearm, or expressly or impliedly threatening Steiner with a firearm. 1/14/09RP at 58, 65-66. The defendant was later observed by police walking down the block from the K-Mart store into a restaurant. 1/13/09RP at 12-14. A trail of evidence was located along the path that the defendant

followed after he exited the store. 1/13/09RP at 22-24, 56-58 (testimony of Seattle police officers Nicolas Bowns and Terry Whalen). Wristwatches were located in the restroom of the restaurant where Mr. Berhan was arrested, along with his keys; the defendant's coat, his gloves, and a pair of pliers were also located. 1/13/09RP at 22-35 (testimony of Officer Whalen).

The defendant was searched upon his arrest and did not have any firearm. 1/13/09RP at 50 (testimony of Officer Randall Higa). No firearm of any kind was ever located anywhere. 1/13/09RP at 52. No witness, other than the loss prevention officer, claimed that they heard the defendant say he had a gun or saw the defendant display a gun.

Mr. Steiner testified that he was working his job as a loss prevention officer at the K-Mart, when, around 7:45 p.m., he saw the defendant inside the store. Mr. Berhan was in the watch and towel display area of the store, pushing a shopping cart of pillows. Steiner approached the defendant. Recognizing Steiner, the defendant threw his trenchcoat down -- the coat into which he had been secreting watches from the store display -- and left the store. Steiner followed the defendant, who yelled to Steiner something to

the effect of, "I swear to God, I've got a gun. Don't fuck with me." According to Steiner, the defendant lifted his coat to display the pistol grip of what appeared to be an automatic handgun. The defendant then ran away, heading south down Aurora Avenue. Steiner called 911 to report the robbery.

Around 8 p.m., Seattle Police Officers located the defendant walking southbound on Aurora Avenue around 126th Street four blocks south of the K -mart. The defendant went into a restaurant and officers followed, spotting the defendant walking out of the women's restroom.

The trial court denied the defense request for a jury instruction on the lesser included offense of second degree robbery. 1/14/09RP at 78. The jury convicted Mr. Berhan of first degree robbery as charged and did not reach the lesser included offense of third degree theft. CP 64.

The defendant had an offender score of zero, and was given a standard range term of incarceration of 31 months. CP 68-75. Mr. Berhan appeals. CP 65.

D. ARGUMENT

- 1. EVIDENCE OF THE LOSS PREVENTION OFFICER'S CLAIM THAT MR. BERHAN HAD SUPPOSEDLY ENGAGED IN PRIOR UNREPORTED SHOPLIFTING OR ATTEMPTED SHOPLIFTING INCIDENTS AT THE K-MART STORE WAS NOT PROPERLY ADMITTED IN HIS ROBBERY TRIAL UNDER ER 404(b), AND ITS ADMISSION PREJUDICED THE VERDICT.**

The loss prevention officer claimed prior to trial that Mr. Berhan had shoplifted, or attempted to shoplift, wristwatches from the K-Mart store 8 or 9 times in the past. There were no internal store reports documenting these alleged incidents, or any police reports attesting to their occurrence. 1/8/09RP at 29. The trial court admitted evidence of the alleged incidents, which unfairly and inaccurately portrayed Mr. Berhan as a person with a propensity to steal. In a close case, where the evidence that Mr. Berhan used force or a threat of force by threatening the loss prevention officer with a firearm was sharply disputed by the defendant's trial testimony, and where the jury had to decide between competing accounts by the parties on this critical element, this unfairly prejudicial evidence, which was plainly not admissible under ER

404(b), more probably than not affected the verdict. 1/8/08RP at 38-40.

In addition, at the outset of the ER 404(b) hearing, the State's trial brief and pre-trial argument was inadequate as an offer of proof of the prior incidents, where their occurrence was disputed by the defense, where the trial court is required in its ER 404(b) analysis to find by a preponderance of the evidence that the prior incidents actually occurred, and where the defendant's request for voir dire testimony from the witness was denied. CP 7 (Defense trial memorandum); 1/8/08RP at 31.

Reversal is required.

a. The State's ER 404(b) offer of proof; defense requests for voir dire examination of the ER 404(b) witness, Steiner. In a pre-trial ER 404(b) hearing, the prosecutor described allegations by the loss prevention officer that he had repeatedly seen Mr. Berhan in the K-Mart store in the last five or six months before the alleged robbery. 1/8/09RP at 29. In those alleged incidents, Mr. Berhan supposedly was pushing a shopping cart with towels inside it, and grabbed watches from the display counter, placing them inside the folds of the towels. 1/8/08RP at 29. Steiner "believed"

that the defendant broke the watch cases with a tool or his hand, and then leave the store. 1/8/08RP at 29. Later, the prosecutor stated that Steiner had once “actually seen the defendant and watched him do this act.” 1/8/08RP at 29. The State had previously asserted that the officer saw this occur 8 or 9 times. Id. The State asserted that the defendant once laid out watches and watch cases on a counter and left the store. 1/8/08RP at 38.

The State offered the prior alleged incidents for a scattershot series of reasons: as showing “common scheme [of theft], motive,” “modus operandi” for theft, and identity, 1/8/08RP at 28, all on ground that the evidence was “distinctive to the . . . loss prevention officer, 1/8/08RP at 29-30, that it was admissible as going to common scheme as “evidence of a design or common scheme of stealing,” 1/8/08RP at 30, and under “modus operandi” on ground that this was a “signature way of committing a crime.” 1/8/08RP at 30. The prosecutor asserted that the theft and attempted theft incidents were highly similar to the current offense alleged. 1/8/08RP at 30.

Defense counsel pointed out that Mr. Steiner had indicated to the defense that he had never before actually caught the

defendant doing any of these acts before, and counsel thrice requested voir dire of the complainant for purposes of the ER 404(b) issue. CP 7 (Defense trial memorandum); 1/8/08RP at 31. Counsel also noted that there was no prior police report or any store report of any of these claimed prior incidents, and that they were based solely on the statements of Steiner. 1/8/08RP at 31.

In addition, during argument on in limine motions it was noted that Steiner had been informally disciplined by his K-Mart employer for previously making a “bad stop,” either without adequate cause to believe that a customer had been stealing, or by confronting a customer in violation of store “LPO” (loss prevention officer) policy. 1/8/08RP at 10-11; Supp. CP ____, Sub # 69 (State’s trial memorandum, at p. 12, moving to suppress all evidence of any disciplinary action by K-Mart against Samuel Steiner or the reason for the termination of his employment at K-Mart). In addition, there was some active question whether Steiner had violated K-Mart LPO policy by chasing after the defendant when he exited the store, instead of following him to see where he went. 1/18/08RP 12-13. Defense counsel’s request for Steiner’s employment

records was not responded to by K-Mart. 1/8/08RP at 11-12, 39-40.

Defense counsel also argued that the proffered ER 404(b) evidence, even if it had actually occurred, and even if it met a substantive ER 404(b) exception, was more prejudicial than probative. 1/8/08RP at 36.

The State responded that there was no need for voir dire of Mr. Steiner unless there was some claim by the defense that he was “making this all up” – essentially the very contention that the defense had raised. 1/8/08RP at 35. The defense noted it might accept an offer of proof by the State in lieu of voir dire testimony by Mr. Steiner, 1/8/08RP at 31-32, but ultimately argued that the State’s offer of proof was inadequate. 1/8/08RP at 36-37.

The trial court did note differences between the State’s trial brief and the prosecutor’s contentions of the similarities between the alleged prior incidents and the current allegations. The State’s trial brief indicated that the current incident involved pillows in the

shopping cart, and there was no mention of watches. 1/8/08RP at 33; see Supp. CP ____, Sub # 69.¹

The trial court ruled, however, that the past incidents were admissible under ER 404(b) for purposes of “identity,” to show why the officer approached Mr. Berhan in circumstances where no theft appeared to be occurring, and to explain the defendant’s “motive in fleeing from the location,” stating as follows:

Looking at Evidence Rule 404(b), number one, one of the things we always call it is whether or not evidence of bad acts can come in. It actually refers only to acts. They don’t have to be bad acts in order to fall within the aegis of 404(b). So, basically what we’re looking towards here is whether or not evidence of prior behavior is admissible to show some relevant purpose such as opportunity, intent, preparation, plan, et cetera, as listed under the rule. And the reason for the rule is to make sure that we don’t inappropriately convict people of conduct based on prior conduct. In this particular case, it seems abundantly clear to me that this prior behavior is relevant for a number of different things separate

¹The State’s trial brief stated that in the current alleged incident, the loss prevention officer saw Mr. Berhan

In the watch and towel display area of the store, pushing a shopping cart of pillows. Steiner approached the defendant. Possibly recognizing Steiner, the defendant walked out of the store.

Supp. CP ____, Sub # 69 (State’s trial brief, at p. 3). Watches were later recovered from a women’s restroom in a nearby restaurant where the defendant was arrested, and broken watch cases were located in the K-Mart. Id. (State’s trial brief, at p. 4.)

and apart for showing conformity. Number one, it's relevant to whether or not this is indeed the same person. And as you pointed out, if Mr. Steiner has seen this gentleman in the store on several occasions, seven of which were uneventful, as you pointed out, an indication that he'd been in the store before so he was known to Mr. Steiner, that's all appropriate evidence for that nonpropensity purpose of showing identity. Number two, I think it's admissible to demonstrate why Mr. Steiner took what otherwise seems like inappropriate action in approaching the defendant. Just pushing a cart around with towels and pillows in it, there's nothing inappropriate about that. And, otherwise, we have evidence that the loss prevention officer is approaching a customer for no apparent reason. So I think it's admissible for that rationale. And, lastly, I also think it's admissible because it provides evidence of the defendant's motive in fleeing from the location, because, otherwise, that's totally inexplicable as well because he has a gentleman approaching him while he's pushing a cart with pillows and towels in it and then he just takes off out of the store. Evidence of flight is admissible to show consciousness of guilt. And in this particular case, absent some evidence to explain why he took a powder when this gentleman approached him, it doesn't make any sense. So, I'm going to find that the prior conduct of the defendant at the store and his presence there is admissible for a nonpropensity reason under 404(b). I also find that the probative value is not substantially outweighed by the danger of unfair prejudice. I think it's appropriately admissible.

1/8/08RP at 38-40. The trial court on request by the State made a finding that the prior incidents occurred, relying on the prosecutor's representations of Steiner's claims, but also agreed with the

prosecutor's argument that the jury could simply believe or disbelieve Steiner's testimony at trial. 1/8/08RP at 35, 42.

b. Prior act evidence is inadmissible except where a prescribed evidentiary analysis is followed and where the evidence substantively is admissible for a non-propensity purpose. Under ER 404(b), evidence of a defendant's prior crimes or prior bad acts will not be admissible if the ultimate effect of such evidence is to merely encourage the jury to conclude that the defendant's past conduct shows a bad character or "propensity" to commit acts such as the crime charged. ER 404(b); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Such evidence may be admissible if it is offered, and is relevant and material, to prove other matters, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

In order to admit prior bad act evidence under ER 404(b), the trial court must first find by a preponderance of the evidence that the misconduct occurred. State v. Guzman, 119 Wn. App. 176, 182, 79 P.3d 990 (2003).

The trial court must then identify a proper non-propensity purpose for which the evidence is offered, and determine if the

evidence is relevant to prove an essential element of the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). To avoid error, the trial court must identify the purpose and relevance of the evidence on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

Finally, the trial court must then balance the probative value of the evidence against the prejudicial effect, also on the record. State v. Lough, 125 Wn.2d at 853. In order to be admissible, even if it is relevant to a non-propensity issue, the offered evidence must carry probative value that outweighs its prejudicial effect. State v. Hernandez, 99 Wn. App. 312, 321-22, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000).

When a court admits evidence of other wrongs under ER 404(b), it must give the jury a limiting instruction. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).²

c. The trial court erred in refusing to direct voir dire of the witness where the actual occurrence of the alleged prior incidents was disputed by the defense. The necessary first step in a trial court's ER 404(b) analysis is determining, by a

²Mr. Berhan's counsel specifically requested that no limiting instruction be given. 1/14/09RP at 54.

preponderance of the evidence, that the alleged incidents occurred. State v. Guzman, *supra*, 119 Wn. App. at 182; *see also State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) (“[T]he party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred”) (citing, *inter alia*, State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993); State v. Tharp, 96 Wn.2d 591, 593-94, 637 P.2d 961 (1981); State v. Bythrow, 114 Wn.2d 713, 719, 790 P.2d 154 (1990)).

In this respect, it has been said that trial court decisions to conduct or not conduct a hearing to take testimony as to alleged prior acts are left to the court’s sound discretion. *See State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). The Supreme Court’s decision in Kilgore abrogated this Court’s opinion in State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015, 911 P.2d 1343 (1996) (trial court is required to hold evidentiary hearing to determine whether alleged ER 404(b) uncharged acts actually occurred).

In Kilgore, the Supreme Court affirmed Division Two’s rejection of this Division’s well-reasoned decision in Binkin, *supra*.

See State v. Kilgore, 107 Wn. App. 160, 189, 26 P.3d 308 (2001), review granted, 145 Wn.2d 1032, 41 P.3d 485 (2002). Before Kilgore's child molestation and child rape trial, the State proffered ER 404(b) evidence that Kilgore had also engaged in uncharged acts of sexual misconduct with the named victims. Kilgore argued that because the trial court must find that the uncharged criminal acts occurred, by a preponderance of the evidence, the court must conduct an evidentiary hearing before admitting them, at which he should be permitted to cross-examine the State's ER 404(b) witnesses. Kilgore, 147 Wn.2d at 290.

The trial court disagreed with Kilgore's contention that it must conduct an evidentiary hearing and indicated that it could determine the admissibility of the proffered evidence based upon the State's offer of proof. According to the State, all of the evidence summarized in its offer of proof was admissible because it showed Kilgore's lustful disposition. The trial court concluded that the evidence was admissible. Kilgore, 147 Wn.2d at 290-91.

In affirming most of Kilgore's convictions (others were reversed on grounds not pertinent here), the Court of Appeals rejected the defense argument based on Binkin that the trial court erred in declining to hold an evidentiary hearing to determine

whether the alleged uncharged acts occurred. Kilgore, 147 Wn.2d at 295. In Binkin, this Court of Appeals had held that where the existence of a prior bad act was contested, the trial court should have conducted a pretrial hearing so that it could hear the testimony and determine whether it was credible so as to support the necessary preponderance finding. State v. Binkin, 79 Wn. App. at 289 (citing State v. Stanton, 68 Wn. App. 855, 865, 845 P.2d 1365 (1993) (“uncharged act must be proved by a preponderance of evidence before it can be admitted under ER 404(b)”); and Benn, supra, 120 Wn.2d at 653, 845 P.2d 289 (“trial court’s preliminary finding” that a prior bad act was proved by a preponderance of the evidence will be upheld only if supported by substantial evidence)).³

On review in Mr. Kilgore's case, the Supreme Court abrogated this Court's Binkin holding, which the Court described as a per se rule that an evidentiary hearing is required before the trial court can find that the ER 404(b) acts occurred. Kilgore, 147 Wn.2d at 295. The Court thus left this issue to the trial court's

³See also State v. Barragan, 102 Wn. App. 754, 760, 9 P.3d 942 (2000) (Division Three) (citing Binkin approvingly and indicating that “[t]he better practice” when a prior bad act is contested is to hold an evidentiary hearing to determine, by a preponderance of the evidence, whether the uncharged crimes occurred).

discretion, but the Supreme Court's reasoning under the specific facts of Kilgore's appeal, shown when it praised Division Two's citation to a foreign decision, fails to specifically apply to Mr. Berhan's case.

In the Court of Appeals' decision in Kilgore, the Court had found persuasive the Minnesota Supreme Court decision of State v. Kasper, 409 N.W.2d 846 (Minn. 1987), in which the Minnesota court reasoned that the trial court could base its decision on a State's offer of proof because the State has an ethical duty to give an accurate offer of proof, and that a trial court is always free to grant relief if the evidence adduced at trial is not what the prosecutor led the trial court to expect. Kilgore, 147 Wn.2d at 293 (citing Kilgore, supra, and Kasper, 409 N.W.2d at 847). In the present case, however, given the defense's multi-faceted reasons for challenging the credibility of Steiner's claims, the trial court was tasked to perform the critical first step of the ER 404(b) analysis in a way that meant the court was not looking to see merely if the alleged misconduct fit an ER 404(b) exception, or even merely to see if there was prima facie evidence of the misconduct – i.e., whether on its face it met an exception. Rather, the ER 404(b) standard required the trial judge to determine not just “what

specifically” happened in order to rule upon the admissibility of the evidence, but whether the alleged shoplifting incidents happened, and whether they happened as attested to. This preliminary factual determination necessarily involved weighing evidence, and judging credibility, when there was a material dispute, as here.

The Kilgore Court, also, in agreeing with Division Two that voir dire testimony was not mandated in Kilgore’s trial, relied on further reasoning that was case-specific -- the ER 404(b) voir dire testimony would apparently have been lengthy and adherence to a per se rule under Binkin would have required the child complainants to testify, and be cross-examined, about sexual abuse twice.⁴ Neither of these concerns was in the slightest presented with regard to voir dire testimony by the loss prevention officer in the present case.

⁴The Kilgore Court stated:

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial. We should be slow, therefore, to allow defendants to confront the witnesses twice, particularly where testifying just once can be a difficult experience for any witness.

(Emphasis added.) State v. Kilgore, 147 Wn.2d at 294-95.

In Kilgore, the Supreme Court ultimately emphasized that its abrogation of the prior Binkin decision was simply a ruling that voir dire testimony in ER 404(b) cases is not mandated:

We recognize, as did the Court of Appeals, that there may be instances where the trial court cannot make the decision it must make based simply on an offer of proof. In such cases, it would be entirely proper for the court to conduct an evidentiary hearing outside the presence of the jury. The decision whether or not to conduct such a hearing, though, should be left to the sound discretion of the trial court.

State v. Kilgore, 147 Wn.2d at 295. Under Kilgore, the trial court's ruling refusing a brief evidentiary hearing was an abuse of discretion.

d. Under *Kilgore*, the trial court's ruling refusing an evidentiary hearing was an abuse of discretion. Appellant of course accepts Kilgore as the law, despite serious infirmities in the Supreme Court's decision -- beginning with the Court's somewhat inaccurate description of this Court's ruling in Binkin as mandating a per se rule, and the Court's failure to consider the emphasis that this Court placed on the material dispute raised by the defense as to whether the offer of proof was credible.

In the present case, under a straight analysis of the issue at hand under the law of Kilgore, the trial court in Mr. Berhan's case

abused its discretion. A court abuses its discretion in admitting ER 404(b) evidence if the questioned decision is exercised on untenable grounds. State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002); Carson v. Fine, 123 Wn.2d 206, 221, 867 P.2d 610 (1994); see generally State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, fair procedure in deciding the parties' contest of a crucial pre-trial evidentiary issue required a brief hearing and voir dire testimony, based on unquestionably viable concerns from the defense on the credibility of the ER 404(b) witness' claims which were not outweighed by any reasonable assertion of delay or some lengthy "mini-trial." The case sub judice is one in which Mr. Berhan offered specific, well-grounded reasons why an evidentiary hearing and voir dire testimony from the complainant was required to properly assess the credibility of the claims of prior bad acts. As the defense argued, there were good faith reasons, already fully outlined herein, to doubt Steiner's claims. First, there were no in-store K-Mart incident reports, nor any police reports, substantiating the loss prevention officer's claims of the defendant's alleged prior shoplifting attempts, that were ever generated. The State produced no witness that testified that Steiner even ever told

any K-Mart employee or manager that the defendant had allegedly repeatedly entered the store 8 or 9 times and shoplifted and attempted to shoplift items. Secondly, the officer had a specific reason to fabricate the alleged prior incidents, since in the current incident he had approached the defendant and accused him of stealing without any basis other than his loitering in the jewelry area of the store, in violation of K-Mart policy.

In addition, as the trial court partly noticed, a comparative review of the affidavit of probable cause, the State's trial brief, and the prosecutor's oral offer of proof on their face showed significant contradictions in the State's and the loss prevention officer's descriptions of these alleged prior acts. See CP 2 (affidavit of probable cause); Supp. CP ____, Sub # 69 (State's trial brief); 1/8/08RP at 10-29. The State, for its part, disagreed that Steiner could be making up the claims – thus the issue was joined. See Kilgore, 147 Wn.2d at 297 ("Given Kilgore's total failure to provide the court with any basis upon which he would challenge the State's evidence, the trial court did not err in denying the evidentiary hearing") (Johnson and Sanders, JJ, concurring in result only).

Furthermore, the Kilgore Court's allowance that a trial court may yield to a concern that such hearings will result in "mini-trials"

is simply not applicable to the present case, where the evidence proffered was – though critically important – not lengthy in the least. See Kilgore, 147 Wn.2d at 293. Hearings of this sort in ER 404(b) cases are routinely held in cases where the proffer is far more extensive. The State cannot tenably claim that the defense request for voir dire testimony from the complainant was going to be some unwieldy, lengthy, trial-delaying procedure.

There was also a serious concern that the loss prevention officer may have made up the prior incidents as an excuse for why he violated K-Mart store policy in chasing after the defendant, who had not been observed stealing anything. 1/8/08RP at 10-12, 31, 35, 39-40. Quite unbelievably, the loss prevention officer had made no written or oral reports to his employer about a supposed repeat shoplifter who had stolen or attempted to steal watches 8 or 9 times in the past. In these circumstances, which are vastly different than Kilgore, it was an abuse of discretion for the court to not hold a hearing to take voir dire testimony of the witness before making its preponderance ruling.

e. The facts of the prior alleged shoplifting incidents failed to meet any exception to the ER 404(b) bar in Mr. Berhan's robbery prosecution, or admissibility for any other non-propensity purpose. Notably, the State conceded during the discussion of its proposed ER 404(b) evidence that its argument for admission of the alleged prior shoplifting incidents was dependent on the defense being one of general denial as opposed to an admission of theft and a denial of the use or threat of force necessary for robbery. 1/8/08RP at 30.

However, the defense trial memorandum which was filed January 8 prior to that day's hearing on the parties' in limine motions, prior to the State's concession cited above, and which was before the parties and the trial court,⁵ made clear, inter alia, that the defense was requesting not only a jury instruction on the lesser offense of second degree robbery, but also an instruction on the lesser offense of third degree theft. CP 8 (arguing for a lesser included offense instruction of third degree theft pursuant to State

⁵The trial court noted at the start of the January 8 hearing, "I have copies of the pretrial motions and briefing that you have both provided." 1/8/08RP at 3. The court then stated, apparently rejecting the defense's written motion for an evidentiary hearing on the ER 404(b) issue, that it did not believe the in limine motions required testimony. Id. The defendant of course later again argued, twice, that voir dire of Mr. Steiner was required. 1/8/08RP at 31.

v. Satterlee, 58 Wn.2d 92, 361 P.2d 168 (1961)). The defense strategy was not general denial, but was a concession of theft, rendering ER 404(b) evidence of prior alleged shoplifting irrelevant to any essential disputed element of the crime charged, as the State noted.

Introducing prior crime evidence has the tendency to portray the accused as a person with criminal tendencies, and therefore to deprive the accused of his presumption of innocence. State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987). Therefore, before any evidence of prior crimes, wrongs, or acts can be admitted at a criminal trial, the evidence must be shown to be "logically relevant to a material issue before the jury" rather than merely to show criminal character. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

In State v. Saltarelli, the Washington Supreme Court reaffirmed that the "material issue" in question must not be one based on propensity reasoning. The Saltarelli court stated:

In no case, however, regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.

Saltarelli, at 362. Here, the prosecutor's offer of proof simply failed to meet the basic requirement that the proffered bad acts must be relevant to prove an essential element of the crime charged, using other than non-propensity reasoning. The defendant admitted that he had committed theft of the wristwatches as early as prior to the very ER 404(b) in limine ruling at issue.

Additionally, as a whole, the State's legal arguments were too muddled and riddled with errors in reasoning to justify any sound basis for admission. When the court pointed out that several differences, in the State's various descriptions of Steiner's observations of the defendant's conduct in the store, were significant, 1/8/08RP at 33, the prosecutor appeared to abandon any contention of "common scheme" (which the court did not cite as a reason for its ruling⁶) and instead then argued that the prior

⁶The absence of a finding on a matter upon which the State bears the burden of proof constitutes a failure of the State to convince the court of that matter. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Here, the trial court ruled that the alleged prior bad acts were admissible, inter alia, for purposes of identity, but reasoned that this was so because the officer had seen Mr. Berhan in the store before, without making any finding of common scheme. 1/8/08RP at 39.

incidents of five or six months previously were admissible as “res gestae.” This was plainly untenable.⁷

Absent this exception, the trial court was required to identify some other, proper non-propensity purpose for which the evidence could be admitted, and to determine if the evidence was relevant to prove an essential element of the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The trial court ruled the past incidents were admissible under ER 404(b) for purposes of (1) “identity,” since the officer had seen the defendant in the store before, (2) to show why the officer approached Mr. Berhan in circumstances where no theft openly appeared to be occurring, and (3) to explain the defendant’s “motive in fleeing from the location.” 1/8/08RP at 38-40.

⁷“Res gestae” is defined as “[t]he events at issue, or other events contemporaneous with them.” BLACK’S LAW DICTIONARY 1335 (8th ed.2004). See also State v. Brown, 132 Wn. 2d 529, 634, 940 P.2d 546 (1997):

Evidence of other misconduct may be admissible under the res gestae exception “[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings.” 1 McCormick on Evidence § 190 at 799 (4th ed. 1992). See State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981) (other misconduct admissible “in order that [the jury] have the entire story of what transpired on that particular evening”).

State v. Brown, 132 Wn. 2d at 634.

But none of these reasons meets the basic requirement of materiality to an essential element of the robbery crime charged.⁸ The court rejected the State's claim of similarity of the incidents, and therefore the court's reasoning regarding identity only warranted testimony from the loss prevention officer that he had seen the defendant in the K-Mart store before. There was no reason to admit evidence to "explain" why the officer approached Mr. Berhan in the store, as there was never any argument that the defendant had improperly been targeted. And with regard to "motive" to flee, the evidence of flight, as the court did correctly reason existed in the case, spoke for itself, as evidence of consciousness of guilt – a matter, in further fact, which was conceded and therefore when the defendant admitted as part of his defense strategy prior to trial that he had entered the store to steal watches. Neither the prosecution, nor the Court, could point to any reason why the allegations of prior alleged shoplifting were in any way admissible to prove any essential element of the robbery crime charged.

⁸The essential elements of first degree robbery as charged in the amended information are set forth at RCW 9A.56.190-.210 and in jury instruction 13. See Part D.2.c., infra; CP 38.

Ultimately, the State failed to persuasively show how evidence of the prior incidents was "logically relevant to a material issue before the jury" in his prosecution for robbery in the first degree. State v. Robtoy, 98 Wn.2d at 42. Without such relevance, the evidence only suggested to the jurors that Mr. Berhan had a propensity to commit theft, which makes the evidence inadmissible as ER 404(b) character evidence. Saltarelli, at 362. The fact that the defendant tried to steal watches in a prior incident does not show that he committed robbery – an offense of threatened physical force.

Instead, the State's prior act evidence carried persuasive force merely on the basis of a theory that Berhan had a propensity to act in a certain criminal way. He was also a dishonest person who could be counted on to lie – and the effect of this aura of dishonesty was that Mr. Berhan was surely lying when he denied threatening the officer with a firearm. This former implication, and this reasoning, is forbidden by ER 404(b). See Saltarelli, 98 Wn.2d 358, 362; 1 McCormick On Evidence § 190, at 811 (4th ed.1992). Therefore, the trial court abused its discretion in admitting the ER 404(b) evidence and the evidentiary ruling should be reversed.

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995) (abuse of discretion in admitting evidence requires reversal of ruling).

f. Even if relevant to a non-propensity issue, any minimal probative value of the evidence of the prior alleged shoplifting incidents did not outweigh its unfair prejudice. In order to be admissible, even if it is relevant to a non-propensity issue, the probative value of prior bad act evidence must outweigh its prejudicial effect. State v. Hernandez, 99 Wn. App. at 321-22. Thus where admission of evidence of prior bad acts is unduly prejudicial, the minute peg of relevancy is said to be obscured by the dirty linen hung upon it. See Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 Harv.L.Rev. 954, 983 (1933).

The precise test is that, when balanced, the probative value of prior bad act evidence must substantially outweigh its inherently prejudicial propensity effect. State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997) (“The trial court properly weighed the probative value of the testimony against its prejudicial effect and concluded its probative value substantially outweighed its prejudicial effect.”). And the trial court must conduct the

probity/prejudice balancing test on the record. State v. Jackson, 102 Wn.2d at 693-94.

The ER 404(b) rule, requiring exclusion if probative value does not outweigh prejudice, is mandatory. United States v. Preston, 608 F.2d 626, 639 n. 16 (5th Cir.1979) (citing 22 Wright & Graham, Federal Practice and Procedure: Evidence §§ 5224, at 323-24 & n. 9), cert. denied, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980). Furthermore, in marginal cases, the prior bad act evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, the trial court again abused its discretion, by failing to correctly weigh any probative value against the unfair prejudice of the prior shoplifting incidents. The prior alleged incidents carried a high degree of unfair prejudice to Mr. Berhan. The court made a summary statement that prejudice was outweighed, without any actual weighing of these factors. 1/8/08RP at 39-40. Given this failure of analysis, the balancing of probity and prejudice of the evidence cannot be assumed to be any greater than equivocal, requiring that the admission or exclusion of the prior incidents

should have been resolved in favor of the defendant. State v. Smith, 106 Wn.2d at 776.

Substantively, given that the prior incidents bore no relevance to a material issue, portraying the defendant as a dishonest thief in a case where shoplifting was conceded, carried only unfair prejudice. The trial court in this case abused its discretion by resolving the prejudice balancing process in favor of the State and in admitting evidence of the alleged prior incidents. This was evidentiary error.

g. The error was not harmless. Evidentiary errors under ER 404(b) are reversible if, within reasonable probabilities the outcome of the trial would have differed had the error not occurred. State v. Jackson, 102 Wn.2d at 695. This is the non-constitutional error harmless test. Here, the harm resulting from the court's admission of the facts of the alleged past incidents compared to the current allegations, and its incorrect conclusion that they met the legal standard for admissibility under ER 404(b), surely affected the jury's deliberation in a case where the jurors should have judged the case on the credibility of the parties, not Mr. Berhan's prior acts. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668

(1984); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997) (both stating that question of reversible error is whether error affected the verdict).

Additionally, in some cases, erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. 14; Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). But likewise, mere compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. Id. (citing Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984)). Due process is violated where the admission of evidence was arbitrary or so prejudicial that renders the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986). In this case where theft was conceded, the State and the trial court's faulty analysis

permitted introduction of wholly useless prior act evidence that carried no probity in assisting the jury's truth-finding function.

2. THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A LESSER INCLUDED OFFENSE INSTRUCTION ON THE CRIME OF SECOND DEGREE ROBBERY (ROBBERY WITHOUT DISPLAY OF A FIREARM).

a. Mr. Berhan requested that the jury receive an instruction on the lesser included offense of second degree robbery. Following the close of evidence, Mr. Berhan requested that the trial court instruct the jury on the lesser included offense of second degree robbery. 1/14/09RP at 75. He proposed a written lesser included offense instruction. CP 16, 17, 18, 19, 20, 21, 22. Although the trial court believed that the instruction was not factually required because the defendant testified he did not realize Mr. Steiner was a K-Mart employee, the defendant's counsel noted that there was evidence to the contrary. 1/14/09RP at 77.

b. Where the evidence would permit a jury to rationally find a defendant guilty of a legally-included lesser offense and acquit him of the greater offense, he is entitled to a jury instruction on the lesser offense. Generally, the defendant may

only be convicted of offenses contained in the indictment or information. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989); State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). Pursuant to statute, however, the defendant “may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” RCW 10.61.006; State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998).

When requested, a party is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged in the case (the “legal prong”); and (2) the evidence in the case supports an inference that the lesser offense was committed (the “factual prong”). State v. Berlin, 133 Wn.2d at 548 (overruling State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996)); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). This is the Workman test.

c. The lesser included offense instructions proposed by Mr. Berhan satisfied the legal prong of the Workman Test. Per State v. Plakke, 31 Wn. App. 262, 267, 639 P.2d 796 (1982),

among other decisions, second degree robbery is legally a lesser included offense of first degree robbery because all the elements of the former are necessarily contained in the latter. The essential elements of first degree robbery as charged in the amended information, which cited RCW 9A.56.190. and .200, are as follows:

First, RCW 9A.56.190 defines robbery:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Second degree robbery is "robbery." RCW 9A.56.210. RCW

9A.56.200 defines first degree robbery as follows, in pertinent part:

- (1) A person is guilty of robbery in the first degree if:
 - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - * * *
 - (ii) Displays what appears to be a firearm[.].

The "legal prong" of the Workman test was plainly satisfied. See also RCW 10.61.003, providing that a jury "may find the defendant

not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto[.].

d. The requested instruction also satisfied the “factual prong” of the *Workman* test. The question whether the factual prong of the Workman lesser-included offense analysis is a matter left to the trial court's discretion. State v. Bosio, 107 Wn. App. 462, 464-65, 27 P.3d 636, 637 (2001) (trial court's decision on the factual prong "is a matter of discretion that will not be disturbed on review unless there is a clear showing of abuse of discretion"); State v. Hernandez, *supra*, 99 Wn. App. at 319.

And where a matter is within the trial court's discretion, the lower court's determination will not be disturbed by the reviewing court unless “no reasonable person would take the view adopted by the trial court.” State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979) (citing State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

However, first, in applying the factual prong of the Workman test, the trial court must view the supporting evidence in the light most favorable to Mr. Berhan, the party requesting the instruction. See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d

1150 (2000). The rule is that a lesser included offense instruction should be given “[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. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)). It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The trial court plainly understood that the legal prong of the lesser included offense test of State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) was satisfied. However, the court ruled that the factual prong of the test was not satisfied because Mr. Berhan testified he did not realize that Mr. Steiner was a K-Mart loss prevention officer. 1/14/09RP at 75. The court appeared to reason that the robbery statute, which requires that the defendant unlawfully take “personal property from the person or in the

presence of another . . . against the person's will by the defendant's . . . threatened use of force," meant that the defendant did not threaten force against the person to whom the property belonged. 1/14/09RP at 76.

This analysis was erroneous, and under a correct analysis, Mr. Berhan was entitled to have the jury instructed on second degree robbery; therefore, reversal is required.

The complainant's testimony established that the defendant threatened force against him, after Mr. Steiner had seen Mr. Berhan breaking open watch cases and putting them in the pockets of his trench coat. When the defendant saw the loss prevention officer approaching him (to conduct, in Steiner's words, a "prevention recovery"), Mr. Berhan threw the trench coat down and said repeatedly, "you can have it, you can have it." 1/14/09RP at 21-23. The defendant plainly realized that Steiner was a store employee and that he had been caught. Indeed, Steiner then began running after Berhan, and he turned around, whereupon – according to Steiner - Berhan told him he had a gun, and displayed the handle of a handgun. 1/14/09RP at 25.

This constitutes evidence that Mr. Berhan threatened force toward Steiner, the store loss prevention officer. It is more than adequate to constitute robbery. See State v. Blewitt, 37 Wn. App. 397, 680 P.2d 457 (1984) (employee of owner of stolen property had implied responsibility of exercising control over employer's property as against all others; thus, when property was taken from the control of the employee, a robbery occurred). But Berhan's own testimony denied that he was in possession of a handgun, and in fact no gun was ever recovered. Thus the evidence allowed the jury to find that only second degree robbery was committed.

The trial court erred as a matter of law in holding that evidence supporting the elements of the lesser crime must come from the defendant. Although affirmative evidence must support the issuance of the instruction, the evidence in support of a lesser-included offense need not have been produced by the defendant in a presentation of a defense case. Fernandez-Medina, 141 Wn.2d at 456. Instead, the trial court must consider all the evidence as a whole to determine whether it supports the instruction. Id. Thus, an instruction requested by the defendant may be warranted even where it contradicts the defendant's theory of the case. Id. at 456-

58, affirming State v. McClam, 69 Wn. App. 885, 850 P.2d 1377 (1993). The Fernandez-Medina Court adopted the rule expressed by the Court of Appeals in McClam, *supra*. Fernandez-Medina, 141 Wn.2d at 461. In McClam, the Court stated,

[a]lthough there must be affirmative evidence from which the jury could find the facts of the lesser included offense . . . there is no requirement in case law that the evidence must come from the defendant or that the defendant's testimony cannot contradict the evidence.

McClam, 69 Wn. App. at 889.

In the present case, the trial erred in deciding that Mr. Berhan, the appellant, had failed to demonstrate that a reasonable jury could reasonably infer that he had only committed second degree robbery. Viewed in the light most favorable to Mr. Berhan, the evidence at trial supported the inference that he was guilty of second degree robbery. Based on the evidence, the factual prong of the Workman lesser included offense test was satisfied in this case, and the trial court abused its discretion in ruling to the contrary. See State v. Bosio, 107 Wn. App. at 464-65; State v. Hernandez, 99 Wn. App. at 319.

e. The failure to instruct the jury on second degree robbery prejudiced Mr. Berhan. Because the trial court abused

its discretion in holding that the jury could not rationally find the defendant guilty of simple robbery, the trial court erred in refusing to instruct the jury on the lesser offense, since the proposed instructions met Workman's legal and factual prongs. Fernandez-Medina, 141 Wn.2d at 461-62. Therefore, this Court must reverse Mr. Berhan's conviction for first degree robbery. Fernandez-Medina, 141 Wn.2d at 462.

f. If defense waived the issue, counsel was ineffective.

Mr. Berhan had a right to the effective assistance of counsel at his trial. See U.S. Const., amends. 6 and 14; Wash. Const., art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct. 2052 (1984); see also United States v. Cronin, 466 U.S. 648, 653-54, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). Defense counsel's somewhat cryptic response to the trial court's pondering of its question whether a lesser included offense instruction was required might be interpreted by an ungenerous reader as a waiver of the request for the lesser included offense instruction on second degree robbery that counsel sought by means of his proposed jury instructions. See 1/14/09RP at 77. If this was waiver, Mr. Berhan's counsel provided ineffective assistance.

To prevail on a claim of ineffective assistance of counsel, a defendant must show, first, that his counsel's performance was deficient. To establish this first prong of Strickland, the defendant must show "counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). If defense counsel's conduct may be deemed legitimate trial strategy or tactics, it will not be considered deficient. Thomas, 109 Wn.2d at 229-30.

The second prong requires a showing that there is a reasonable probability that the deficient performance of counsel influenced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability that the outcome was materially influenced is one sufficient to undermine the reviewing court's confidence in the verdict. Thomas, 109 Wn.2d at 226.

If defense counsel waived a viable instructional issue and the waiver was the result of ineffectiveness of counsel, review is not precluded. See State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). In this case, counsel's waiver, if there was waiver,

was deficient performance. And for the reasons outlined above the absence of the lesser included offense instruction prejudiced the defendant.

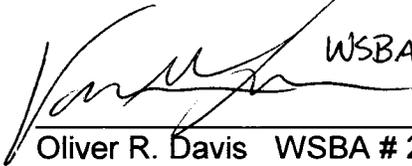
The defense acquiescence to the court's legal reasoning cannot be characterized as a "tactical" decision. Certainly, the decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. State v. Hassan, ___ P.3d ___, 2009 WL 2031864 (Wash. App. Div. 1, July 13, 2009) (NO. 61756-7-I). In Hassan, this Court noted that the circumstances of trial showed the defense was pursuing an objectively reasonable, tactical, all-or-nothing strategy. Hassan, at pp. 6-7. But in this case, the circumstances are doubly inconsistent with a tactical decision – present counsel recognized the need for a lesser included offense instruction throughout trial, by proposing written instructions on second degree robbery and orally requesting the instruction at the end of trial, and counsel pursued a trial strategy designed to effect this effort, but then "caved" at the first sign that the trial court had doubts on the legal issue.

This case therefore does not fall within the reasoning of Hassan. Here, defense counsel's successful request for a lesser included offense instruction on the offense of third degree theft plainly indicates that counsel was not pursuing some "all or nothing" strategy with regard to the first degree robbery charge, hoping to gain outright acquittal on that crime as the sole count. 1/14/09RP at 84; CP 19-22 (defense proposed instructions on third degree theft). Compare State v. Barragan, supra, 102 Wn. App. at 762, wherein the Court of Appeals presumed that counsel – who never even initiated the process of requesting a particular limiting instruction to which the defense was entitled – had made a tactical decision from the outset of trial not to request the instruction because to do so would have emphasized the damaging evidence of the defendant's prior misconduct. Barragan, 102 Wn. App. at 762.

E. CONCLUSION

Based on the foregoing, Mr. Berhan respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 31st day of July, 2009.

 WSBA 37611

Oliver R. Davis WSBA # 24560
Attorney for Appellant
Washington Appellate Project - 91052

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62772-4-I
v.)	
)	
ABDU BERHAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON
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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710