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No. 65517-5-I

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

Skagit County No. 09-1-00675-9

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STATE OF WASHINGTON,

Respondent,

v.

JOHN GALLAGHER,

Appellant.

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APPELLANT'S OPENING BRIEF

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**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Assignments of Error**

1. The trial court erred in permitting expert opinion testimony without any notice to the defense or an adequate foundation, and in submitting an expert witness instruction to the jury, which lent undue credibility to the unqualified testimony of a police officer about the danger of firing warning shots into the ground.

2. The trial court erred in refusing to grant a one day continuance and allow the defense to call a critical witness to verify that the Defendant did have significant, visible injuries shortly after his arrest to corroborate his claim of self-defense and reasonable use of force.

3. The actions of the trial court in failing to grant a brief continuance, and of defense counsel in failing to investigate and present critical evidence, created a situation where the Defendant was deprived of effective assistance of counsel.

4. The trial court erred in refusing to submit a missing witness jury instruction where one of the two alleged victims did not appear to testify at trial and only the State had the power to enforce its subpoena and require her attendance.

**B. Issues Pertaining to Assignment of Error**

1. Whether it violates due process and a defendant's right to a fair trial for the prosecution to present expert opinion testimony without prior disclosure or notice to the defense. [Assignment of Error 1.]

2. Whether it violates the discovery rule, CrR 4.7, for the State to fail to provide notice and a summary of expert opinion testimony prior to trial. [Assignment of Error 1.]

3. Whether it was error for a police officer to be allowed to testify as an expert "that ricochet shots that are often just inches off the ground travel a long distance along the ground," even though he has no training, expertise or experience in ballistics. [Assignment of Error 1.]

4. Whether it was error for the court to submit an expert witness instruction, over defense objection, where the State gave no notice to the defense about the expert opinion testimony, and the witness was not qualified as an expert. [Assignment of Error 1.]

5. Whether it violated due process and the defendant's right to a fair trial to refuse the defense a one day continuance in order to locate, interview and present testimony from a public defender who met with the Defendant in jail, witnessed and discussed his injuries with him. [Assignment of Error 2.]

6. Whether the defense was forced into a situation, through lack of preparation and based on the judge's refusal to grant a one day continuance, that resulted in constitutionally ineffective assistance of counsel. [Assignment of Error 3.]

7. Whether the trial court erred in refusing a defense request to submit a missing witness instruction to the jury where the State had subpoenaed but failed to compel the attendance of one of the alleged victims as a witness. [Assignment of Error 4.]

## **II. PROCEDURAL BACKGROUND**

The Defendant, John Gallagher, was originally charged with two counts of Second Degree Assault without a firearm or deadly weapon allegation. CP 1-2. However, at the Omnibus Hearing, the State gave notice of its intent "to file firearm allegations" in connection with each of the two counts after the defendant chose to contest the charges at trial. RP (11/20/09) at 3, CP 12-13.

At a subsequent hearing on January 27, 2010, the defense filed "a supplement to a motion to compel discovery" along with an amended witness list. RP (1/27/10) at 4. The defense advised the court: "There is significant discovery and interviews outstanding," which included the Defendant's "booking photograph" and "a motion for deposition" or interviews of "the alleged victims, Ms. Lumby and Ms. Lilly. We have

tried in earnest to locate them and do not have their information as well as interviews with the State's law enforcement officers." RP (1/27/10) at 5. Counsel also noted that the prosecutor had cancelled a police officer interview just the night before because "he needed to be present." *Id.* at 5-6.

In light of these problems, counsel expressed concerned about her ability to provide effective representation for her client:

Ultimately I want to be able to effectively represent Mr. Gallagher. And I can't do that, Your Honor, if I am in the position of interviewing witnesses a day or two before trial.

*Id.* at 6. Accordingly, the defense requested a deadline for all interviews "or in the alternative a deposition if that's required." *Id.* The prosecutor responded that he was unable to find "one of the alleged victims . . . If we can find her we can find her. If we can't we'll proceed accordingly." *Id.* at 7.

When the trial was scheduled to begin on March 30, 2010, the State requested a continuance because the defense had just provided an "amended notice of defenses" to include the defense of another, namely the Defendant's wife, "and defense of property." RP (3/30/10) at 12. The motion was denied and the case proceeded to trial. *Id.* at 13-14.

Before resting, the prosecutor announced he would not be calling Tami Lumby, the alleged victim in Count I. RP (3/31/10) at 81. The

defense moved to dismiss that count based on her inability to confront and cross-examine her. *Id.* at 89-90. The prosecutor argued there was sufficient evidence to proceed forward based on the testimony of the other woman. *Id.* at 90. The judge denied the motion. *Id.* at 91.

During deliberations, the jury asked to hear the 9-1-1 tape again and it was played. *Id.* at 164-65. The jury also sent out a question asking to “clarify as to this specific case with regard to Instruction No. 14, the definition of malicious trespass and malicious interference.” RP (4/1/10) at 166. Defense counsel pointed out that a definition of malice and maliciously was contained in Instruction 15, but the judge noted: “There is no real definition of trespass in the WPICs.” *Id.* Defense counsel indicated she was “going to propose that we define trespass.” *Id.* at 167. The court referred to WPIC 65.02, defining trespass. *Id.* at 168. Ultimately, everyone agreed not to utilize the definition and let the jury just “use their common sense.” *Id.* at 169.

On April 5, 2010, the jury found the defendant guilty of one count of second degree assault in Count II and made special findings that he was armed with a firearm in connection with that conviction. CP 72, 75. However, the jury was unable to reach a verdict on Count I. CP 44. On June 4, 2010, the Defendant was sentenced to 42 months imprisonment but was released on bail pending appeal. CP 76-84. The defendant filed a

timely Notice of Appeal on June 4, 2010. CP 86-87. At the time of sentencing, the court entered an Order of Indigency for purposes of appeal.

### **III. FACTUAL BACKGROUND**

The defendant, John Gallagher and his wife Marty live in a rural setting near Concrete, Washington. The Defendant testified that Tami Lumby, one of the alleged victims and her son Jared had been staying in a room in the Gallagher home after John Gallagher was laid off indefinitely from his job. Both John Gallagher and his wife Marty are disabled, so Lumby was supposed to clean the house in exchange for living there. RP (3/31/10) at 94-95.

However, Lumby was a source of constant conflict in the home so she moved out in the middle of August, leaving some of her property and two vehicles “that were stuffed full of belongings of hers.” *Id.* at 95. She also took some of the Gallagher’s property, and when Mr. Gallagher “asked her for the cell phone back. She was upset. She threw it, broke a hole in the wall, broke three oil lamps in the hall.” *Id.* at 96. She also hit him in the chest several times, and began “cussing, swearing, throwing things.” *Id.*

Lumby continued to cause problems so, as Gallagher testified:

Every time before she left I told her you're going to call first. I want someone here when you are here, even if it's the police that need to be there. That was the first time she broke the lamps. And every time after that I repeated the same thing, to call first.

*Id.* at 99. Gallagher and his wife contacted a friend of Lumby named Craig "and we talked with him to let him know if Tami comes over she's got to call first." *Id.* at 101. They also gave Craig a list of items that they expected Lumby to return to them. *Id.* at 101-102.

On August 27, the Gallaghers were sitting on the porch having their morning coffee when Lumby

came flying backwards in her van into my driveway, popped out, and grabbed some stuff out of the side of it, came and walked toward my wife and I at the porch with a handful of stuff. . . . Threw it down at our feet and basically said that we could all fuck off.

*Id.* at 102. "She literally threw it hard on the top step, said here's your fucking stove." RP (3/31/10) at 145. Gallagher "tried to stay as calm and cool as possible as far out of her way as possible." *Id.* at 148. She had not called to let them know she was coming so he approached her and "told her to get off the property now. You are not welcome here. Just leave. Call before you come back. I will have the cops here." *Id.* at 103.

Gallagher testified that he did not even use obscenities but, when he approached her, Lumby "kicked me as hard as she could in my balls," then Gallagher was "grabbed by the other girl behind my neck and was

getting pulled backwards. . . . The other girl grabbed me by my neck and started pounding her fist in the side of my neck, started pounding on my side.” *Id.* at 103-104. The other woman, Bobbi Lilly,

kicked my right leg behind me. I went down to the ground at that time. She came and jumped up on top of me. She was jumping up and down on my knees, trying to poke out my eyeballs with her thumbs, broke my glasses; to be honest literally kicked the shit out of me. I was afraid of her because I had never seen anybody like that. And to be ordering somebody off your property I didn’t think it was the right thing to make someone paralyzed and blind, you know.

*Id.* at 104. Gallagher described the assault as follows:

When she kicked me I bent over forward and the other girl grabbed me by the neck and started pounding on my neck and my side, kicked my right leg up from under the metal and jumped on top of my knees, jumped up and down. My glasses were up, thumbs in my eyes, jumping up and down on me like a demon, telling me to burn, I’m dead, and all the rest of this business. And I got the hell out of there, got my gun, and got her off my property, sir.

*Id.* at 157-58. “The beating took a minute or two” and he had to “fight my way loose.” *Id.* at 158-59. He “didn’t know what mind state they were in. They were very scary.” *Id.* at 182.

Gallagher “screamed, I’m going to get my gun, and I ran back into the house.” *Id.* at 25. At this point he felt “threatened for my life.” *Id.* But when he “told Tami I’m going to get my gun. She started laughing

and said she would burn me out.” *Id.* at 160. “I believe they were strung out on something.” *Id.* at 163.

At this point, Gallagher “ran in the house and got the gun.” *Id.* at 105. He felt the need to arm himself because

She just tried to make me paralyzed and blind for telling her to leave my driveway. I was attacked, brutally attacked. I’m personally handicapped. And my wife is handicapped. To be brutally attacked on my own property I could nothing else to protect it.

*Id.* at 109-110. He described his disability as follows:

Two-thirds of my left shoulder socket has been removed so my arm fades in with the muscle tissue. I can’t reach behind or overhead. I have a fifteen pound limit.

*Id.* at 110-111. His wife

has what is called cerebral tuma cerebri. She gets fluid on the brain and had to put a valve in her brain and to her belly and drain the excess fluids. If she bends over she could totally go out cold and be that way for a few hours. It’s kind of scary thing.

*Id.* at 111.

He retrieved his gun from underneath his bed and “started loading it on my way to the front door.” *Id.* at 106. He was “very worried” about his wife who “was still in the driveway with those two girls who just got done beating the hell out of me.” *Id.* at 106. When he got outside his house he

stood on the first step down by the front porch because I figured it would make a louder echo and possibly intimidate her more than a regular rifle would. I didn't have a shotgun. And I announced for her to leave the property, get off the property now. You are not welcome, and I fired a shot.

*Id.* at 106-107. Lumby responded by yelling "Fuck you asshole." *Id.* at 107.

Gallagher testified that he

just couldn't believe what just happened. I was beat to a pulp. Someone is trying to paralyze me, blind me. I'm going to do whatever I can to get them out of my way. So I walked over and went to the far side of the truck away from where she fired another shot, told her to get off the property. That's where I swore at her. I told her: You have to get the fuck off the property now.

*Id.* at 107-108. In response,

she grabbed the tire iron or something she had by the Toyota truck and went back by the van and white pickup truck . . . I wasn't sure if she was going to throw it at me. She was heading towards the white truck. And I was worried about what she might grab out of the white truck. She did keep continuing to threaten me. She kept telling me she was going to burn me down and kick my ass, you know, and it's like for what? I told her to get off my property

*Id.* at 108.

Every shot was "aimed at the ground" safely away from both women "because I didn't want to hurt anybody." *Id.* at 120. "I said get off my property now, kaboom. And I fired a warning shot." *Id.* at 164.

He testified: “Every shot was calculated, not aimed at anybody or to do any physical harm to anybody. I made sure of that when I shot it, sir. I’m a responsible gun owner.” *Id.* at 165. He told the police that what he did “was not reckless” because he knew exactly where he was aiming and was not trying to hurt anyone. *Id.* at 178. “I was not out to harm any person. I don’t ever want to be responsible for another life and Tami knew that.” *Id.* at 179. “I actually proceeded through all of this very calmly.” *Id.* at 175.

He was “happy” when Tami Lumby got out her cell phone because he assumed she was calling 9-1-1 and “this is finally going to be over . . . because she’s calling 9-1-1 screaming . . . and then I shot the fifth shot because I knew the 9-1-1 operator would tell her to leave, leave now.” *Id.* at 170.

He explained that he did not take time to call 9-1-1 because he “was too worried about protecting myself and my wife.” *Id.* at 121. Lumby “kept rambling on, cussing and swearing and not leaving the property.” *Id.* He fired warning shots “to get her out of there so she couldn’t attack me again before the police had arrived.” *Id.* at 122. After the women left, Gallagher “took the rifle and hung it up on the side of the house for the police officer to see when they got there.” *Id.* at 39.

Marty Gallagher testified that, after the attack, her husband’s

eyes were bloody and there were no whites left. He had scratches. He had bruises all over. I did not get a chance to totally check him out the way I wanted to before the police showed up, and they wouldn't let me see him afterwards.

*Id.* at 59. Marty Gallagher estimated that the whole incident lasted “about eight or ten minutes,” and it did not become hostile until Lumby dumped the camping stove on the porch “probably about two or three minutes into it.” RP (4/1/10) at 21. “She was cussing at me and threatening to burn my house down and all sorts of stuff.” *Id.* at 23.

The Defendant's wife also verified that the day Lumby had “moved out two weeks earlier . . . she threw a phone at John.” *Id.* at 33-34. “There's a big hole in the wall and she broke three oil lamps. I had that lamp oil all over my bookcase and my carpet.” *Id.* She confirmed that both she and her husband “had gone to her boyfriend's house, Craig, and left a list of things that we wanted her to return that she had taken from the house and to let her know that she was not allowed on the property again without a phone call.” *Id.* They wanted to know in advance “because we were going to either call the police and have them there to witness her moving or we were going to have a family member there to witness her moving because she kept causing fights.” *Id.* at 35.

Marty Gallagher also confirmed that, when Lumby arrived with a second woman they had never met before, Lumby angrily approached and

threw a vacuum cleaner down on the porch where she and her husband “were sitting on the front porch, smoking a morning cigarette.” RP (4/1/10) at 35. “John got up and he said: That’s it. I want you off the property; I want you off now.” *Id.* at 36.

When John Gallagher approached Lumby, Marty Gallagher watched as Lumby “kicked him in the balls. He went down. Both the girls were on top of him.” *Id.* “She was hitting him, and he was trying to push her away. . . . I don’t remember seeing him hit her.” *Id.* at 52. “By the time I got there they were standing back up and Bobbi was choking him. I pulled her off and told her it was none of her business and to stay out of it, and then I separated John and Tami.” *Id.*

“That’s when John went in and got the gun, fired it into the ground and said: Get off the property now.” *Id.* at 37. He fired five shots “and her usual response was: Fuck you, asshole.” *Id.* at 37. “I was dumbfounded and I couldn’t believe that she . . . wouldn’t leave because she knew he wouldn’t hurt her.” *Id.* at 38. Marty Gallagher did not witness John using any profanities toward them. *Id.* at 38-39.

Tami Lumby defied her subpoena and never appeared in court to testify. However, her friend Bobbi Lilly did appear and her testimony largely corroborated the Gallaghers’ version of events. She testified that Lumby “was like pushing him away and pulling stuff out of her vehicle

and like tossing it on the ground. I was picking it up and putting it in her van.” RP (3/30/10) at 18. She “didn’t see what was happening when I was loading the van.” *Id.* at 41. She did verify that Gallagher fell to the ground at some point during the struggle. *Id.*

At this point, according to Lilly, Gallagher went into his house and returned with a bolt action rifle and continued yelling at them “get off the property.” *Id.* at 23. “Tami yelled that she wasn’t leaving without her belongings; so I got out and started loading her stuff up.” *Id.* Gallagher fired several shots although Lilly did not see where they went. *Id.* at 24-27. “He just continued to yell for us to leave.” *Id.* at 25.

After the last shot, Lumby “turned around and walked to John. . . . Stepped towards John and told him if you want to shoot me, motherfucker, go ahead and shoot me because I don’t care about dying.” *Id.* at 28. Lilly did not hear John Gallagher making any threats. *Id.* Lilly finally got Lumby into the van and they called 9-1-1 as they left. RP (3/30/10) at 28.

A nearby camper, Martin Watkins, was riding his bike in the area when he heard the gunshots and rode his bike to the scene. *Id.* at 47-49. He saw “a gentleman standing there with rifle holding it down at the ground.” *Id.* at 51. The man “had a rifle down by his leg, fired straight down into the ground.” *Id.* at 53-54. He heard Gallagher telling them “For

the last time, get off my property,” but did not hear any “colorful language.” *Id.* at 56, 59.

Deputy Sheriff Brad Holmes was on patrol the morning of August 27, 2009, when he received a radio call that “a female . . . had an altercation with her former roommate or landlord, possible shots had been fired.” RP (3/30/10) at 16. He arrived at a grocery store where Lumby and Lilly flagged him down. *Id.* at 17-18. After speaking with them, he and several other deputies proceeded half a mile to the Gallagher residence and called the Defendant on his phone. *Id.* at 19-20. Gallagher told them “that he would disarm his firearm and would step onto his porch.” *Id.* Deputy Holmes could see him on the porch, unloading a rifle and hanging it “on some kind of hook on the side of his house.” *Id.* at 21. The Defendant “stepped away from the front porch” and Deputy Holmes approached and confirmed that he was unarmed. *Id.* at 23-24.

When Holmes asked what happened, Gallagher “stated that Tami Lumby had come onto his property. He wanted her to leave . . . there was a confrontation . . . a physical altercation came out between them where she had thrown several punches at him.” *Id.* at 24. Sheriff’s deputy Kyle Wiggins “secured the rifle, the magazine, and ammunition.” *Id.* at 69. He overheard Gallagher

say words to the effect that Ms. Lumby wouldn't leave and there was some sort of physical altercation. And so he went into the house and retrieved the firearm that he had later hung that firearm on the nail before we arrived.

*Id.* at 72-73. The rifle was unloaded. *Id.* at 77. Deputy Wiggins did not observe any physical injuries on either of the women. *Id.* at 79.

Gallagher explained to Deputy Holmes that, after being attacked “he ran into his house, got a firearm, came out on his porch and fired warning shots.” *Id.* He explained that “he wanted them to leave the property, giving them warning shots so they could leave.” *Id.* at 25. He made it clear “it was not his intent to hit them or else he would have.” *Id.*

According to Holmes, Gallagher seemed confused as to why the police were there and denied that he was being reckless by firing warning shots because “he hit exactly where he was aiming.” *Id.* at 26. He was fully cooperative with the police and showed them exactly where he had shot, and where the women had been standing. *Id.* at 26-29; 35-36.

Gallagher testified that he walked Deputy Holmes “through where the shots were fired,” but he was never given an opportunity to explain the full extent of the altercation and his injuries. RP (3/31/10) at 130. “When I tried to tell him I was attacked over on the side of my driveway he said we already understand there's been an altercation.” *Id.* at 131.

After listening to his explanation, Deputy Holmes “determined a crime had been committed. I advised him that he was under arrest. I placed him into handcuffs, started to escort him off of the property.” RP (3/30/30) at 37. Mr. Gallagher told the deputy “to feel free to take anything I needed; go anywhere on the property.” *Id.* Accordingly, Deputy Holmes seized the rifle and collected “four spent rifle rounds” from the scene. *Id.* at 38, Ex. 11. Deputy Holmes reiterated that Gallagher was fully cooperative. *Id.* at 41.

Deputy Holmes did not take any photographs of Mr. Gallagher, and he did not “recall” Mr. Gallagher indicating that he suffered any injuries. *Id.* at 50-51. Deputy Rhonda Lasley interviewed Gallagher’s wife, then transported the Defendant to the Skagit County Jail. *Id.* at 60. She described Gallagher as “a little animated about what had happened. But he wasn’t aggressive . . . .” *Id.* at 64-65. She did not “observe any torn clothes or injuries on Mr. Gallagher’s person.” *Id.* at 61. She did not recall Mr. Gallagher asking her to take photos, but “remember[s] telling him a booking photo would be taken.” *Id.* at 63. The booking photo was identified as Exhibit 12. *Id.* She also confirmed that there were no visible injuries on Ms. Lumby or Ms. Lilly. *Id.* at 64.

Gallagher insisted that he told the female officer

how Tami jumped up and down on my leg, kicked me in the crotch. She tried to poke my eyes out. She said the jailhouse will take photos. . . . They took a mug photo, told me any other photos would be up to my lawyer to take.

RP (3/31/10) at 134. He described his injuries as follows:

Both my elbows were scratched and bleeding. My knees were scratched and bleeding and very well bruised. My groin area swelled up and turned a little purple.

*Id.* at 134.

He told the jailers about his injuries and “also wrote a note for the health doctor in jail, please check me out, get photos taken of my injuries.”

*Id.* at 137. However, “a doctor didn’t check me out” even though he “was beat up pretty bad. I had massive headaches. I had a sore groin.” *Id.* At the jail he “told them my knees were jumped on, my neck pounded on. . . .

And my eyes were gouged. . . . I said she kicked me in the balls.” *Id.* at 138. However, the officers did not take notes or photographs. *Id.* “I was

requesting photos of my own self-defense because I evidently got the shaft and ended up in jail.” *Id.* at 139. He requested medical help during his six

days in jail by filling “out a form.” *Id.* “I got no response to the injuries.”

*Id.* at 140.

Marty Gallagher also kept

trying to tell [the female officer] about the fight. She didn’t want to hear it. She wanted to know about the shots only. . . . At the end I did tell her at the end that

there was a fight and she beat him up. His eyes were full of blood, and I said that to her.

RP (4/1/10) at 40. She wrote in the police report “that they got into a physical fight.” *Id.* at 42.

Gallagher sought medical attention from Dr. Mary Ramsbottom after he was released from jail. RP (4/1/10) at 17.

#### **IV. DISCUSSION**

##### **A. Improper Opinion Testimony**

When Deputy Holmes was called to the witness stand, he testified that he had been with the sheriff’s office for eight years and had previously worked with the Burlington Police Department. RP (3/30/10) at 15. He was asked about his “training and experience” and discussed the 440 hours of state academy training he received along with “at least 40 hours a year in training, if not normally more than that,” providing details about the kinds of training he received. *Id.* at 15-16.

Then, without any discussion of his qualifications in ballistics, Deputy Holmes provided expert opinion testimony, stating “we are trained that ricochet shots that are often just inches off the ground travel a long distance along the ground.” *Id.* at 48. This testimony made the defendant’s actions seem unreasonable and not the actions of a “reasonably prudent person.”

The defense objected to the inclusion of the expert witness instruction, State's No. 4, because there was no indication in the omnibus application of expert testimony and the defense was not given notice. *Id.* at 105. The judge included the expert witness instruction, over the defense objection. *Id.* at 114, CP 51, Instruction 4.

In closing argument, the prosecutor's constant refrain, which he repeated time and time again, was that: "A reasonably prudent person would not do these same things that he did with that firearm under the same or similar conditions." RP (4/2/10) at 135. In support of this argument, he asserted:

This is a man who is not safe with a gun. Think about it. What does a reasonably prudent person do? You know, those bullets don't just stop when they hit the ground. The idea is you are kicking things up, I assume, and it's ricocheting. **You heard the officer testify when you shoot them into the ground they stay low.**

*Id.* at 136 (emphasis added).

He then argued that these actions by the defendant endangered "other houses" and the bicyclist "Mr. Watkins driving by. You've got vehicles driving by." *Id.* He repeated the argument that Gallagher created a danger for cars that were "driving by and neighbors and so forth . . . probably a good fortune no one was killed or seriously injured here." *Id.* at 137. Over the following pages, to the very conclusion of his argument,

the prosecutor repeatedly hammered this theme home to the jury, asserting that “a reasonably prudent person” would never fire the gun this way due to the danger created for the alleged victims and everybody in the neighborhood. *Id.* at 138-139.

This argument was based solely on the improper expert opinion testimony of Deputy Holmes. He testified on direct that “We are trained that ricochet shots that are often just inches off the ground travel a long distance along the ground.” *Id.* at 48. Obviously, this testimony was highly damaging to the defense because it improperly supported the definition of assault by establishing “a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury,” and it drastically undercut the definition of self defense by establishing that the defendant was not acting “as a reasonably prudent person” in the amount of “force [he] may employ.” *See* Instructions 9 and 12, CP 56.

This improper opinion testimony also undercut the definition of lawful force set forth in Jury Instruction 14 defining use of force as “lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person’s possession, and when the force is not more than is

necessary.” *Id.* For similar reasons, the testimony of Deputy Holmes and the expert witness instruction undercut the definition of “necessary”:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) *the amount of force used was reasonable to effect the lawful purpose intended.*

*Id.*, Jury Instruction 16 (emphasis added), CP 64.

The expert witness jury instruction, which was given over a defense objection, added the court’s seal of approval and a great deal of weight to this testimony. That instruction provides:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

CP 51, Instruction 4.

The inclusion of this testimony, especially when coupled with the expert witness instruction, provided highly prejudicial and incompetent testimony for the jury.

**B. Violation of Discovery**

This testimony violated the most fundamental aspects of the discovery rules since the prosecution had never provided any notice it was going to be offering opinion testimony, nor was the subject matter even disclosed in police reports.

Criminal Rule 4.7 makes clear that “the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney’s possession or control no later than the omnibus hearing,” which specifically includes:

Any reports or statements of experts made in connection with the particular case, including the results of physical or mental examinations and scientific tests, experiments, or comparisons;

CrR 4.7(a)(1)(iv). The prosecutor must also disclose relevant evidence if it is reasonably possible that the evidence will be used during any phase of the trial. *State v. Dunivin*, 65 Wn.App. 728, 733, 829 P.2d 799 (1992). The prosecutor must resolve doubts regarding disclosure in favor of sharing the evidence with the defense. *Id.*

Failure to comply with discovery rules can also constitute a violation of a defendant’s right to due process. *State v. Bartholomew*, 98 Wn.2d 173, 205, 654 P.2d 1170 (1982), *rev. ’d on other grounds*, 463 U.S. 1203 (1983). A new trial should be granted if “the defendant has been so

prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.” *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1993).

In a number of cases, our courts have held that dismissal pursuant to CrR 8.3(b) is a proper remedy for untimely discovery by the prosecution even prior to trial because it would force the defendant to waive his speedy trial rights and seek a continuance. In *State v. Stephans*, 47 Wn.App. 600, 736 P.2d 302 (1987), the court reasoned that dismissal is appropriate where there has been:

a showing of some governmental misconduct or arbitrary action materially infringing upon a defendant’s right to a fair trial. The purpose of the rule is to ensure that, once an individual has been charged with a crime, he or she is treated fairly.

*State v. Stephans*, 47 Wn.App. 600, 603, 736 P.2d 302 (1987). And in *State v. Sulgrove*, 19 Wn.App. 860, 863, 578 P.2d 74 (1978), the court stated:

It should be noted that governmental misconduct need not be of an evil or dishonest nature; simple mismanagement also falls within such a standard.

*Accord: State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980); *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990).

The very purpose of the discovery rules is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the

Government. *See State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1073 (1993); *State v. Bradfield*, 29 Wn.App. 679, 682, 630 P.2d 494, *rev. denied*, 96 Wn.2d 1018, 643 P.2d 882 (1981). This is exactly what happened here when, without notice to the defense in the middle of trial Deputy Holmes was suddenly asked to present expert opinion testimony which was critical to the State's theory that Mr. Gallagher used excessive force. As already noted, this became the primary theme of the prosecution's closing argument, with specific references to the improper and unfounded opinion of Deputy Holmes.

**C. The Expert Was Not Qualified to Provide Opinion Testimony**

Title 7 of the Washington Rules of Evidence requires that the witness be "qualified as an expert by knowledge, skill, experience, training, or education," before providing testimony "in the form of an opinion . . . ." *See* ER 702. Moreover, opinion testimony requires an appropriate basis or foundation. *See* ER 703.

None of this was provided in the course of Deputy Holmes' testimony, which was undoubtedly given tremendous weight by the jury because of his status as a police officer for many years. The mere fact that Deputy Holmes had been "trained that ricochet shots that are often just

inches off the ground travel a long distance along the ground,” did not qualify him to express an opinion on the subject.

In *State v. Swagerty*, 60 Wn.App. 830, 810 P.2d 1 (1991), the Court held that, in a prosecution for statutory rape, the trial court properly excluded testimony of a counselor who had a degree in sociology and would have testified to the effects of alcohol on the defendant. Even though the expert in that case “was an alcohol counselor,” the court excluded his testimony because he had no specific “training in toxicology, pharmacology, psychology, chemistry or physics.” *Id.* at 836.

The same is true here, where the subject of ballistics is highly specialized and this deputy had merely been informed during his training of the subject matter of his opinion. That is absolutely insufficient to qualify him as a ballistics expert.

**D. Missing Witness Instruction**

The defense moved to dismiss Count I involving Tamie Ann Lumby based on defense counsel’s inability to confront and cross-examine her. RP (3/31/10) at 89-90. The prosecutor confirmed that Ms. Lumby had been subpoenaed: “Her residence has been served with it. We have made numerous phone calls, left numerous messages. We served her by certified mail as well, which was rejected or not picked up. So we have

made every attempt or not every attempt but significant attempts calling her as late as yesterday afternoon, . . . .” RP (3/31/10) at 7-8.

The defense argued the implications of Lumby not appearing to testify and that Ms. Lilly lied or perhaps did not see the full extent of the attack against Gallagher. *Id.* at 144-47. The prosecutor insisted there was sufficient evidence to proceed based on the testimony of the other woman and the trial judge agreed:

The confrontation clause is implicated when statements by someone outside of court are offered against the defendant and the defendant doesn't have the opportunity to cross-examine the speaker about those statements. The confrontation clause isn't implicated just because the victim doesn't testify. . . . Which is why this 9-1-1 tape is an issue because it's Ms. Lumby's out-of-court statements, and she's not testifying in court. So the confrontation clause is implicated in that analysis. But is not implicated just because she didn't show up here in court so long as there's other adequate information to support the charge, which there is. Ms. Lilly's version of what happened here is more than sufficient to support a charge of assault in the second degree. And, quite frankly, if that's all there was at this point I wouldn't be instructing the jury on self-defense. So the motion to dismiss Count I is denied.

*Id.* at 91.

At the conclusion of the trial, the defense took exception to the judge's refusal to give the Defense Proposed Instruction 11, the pattern missing witness instruction. She argued that the prosecutor “was able to contact the victim and to arrange an interview.” *Id.* at 106. She

complained that she wanted Mr. Johnson to assist her in issuing a subpoena duces tecum to Lumby, but he refused. *Id.* at 107. The prosecutor responded that he provided Lumby's address and the defense did interview her and he provided her phone number. *Id.* at 108. However, the defense complained that Ms. Lumby would not provide an address when she conducted the defense interview. *Id.* at 109. Still, the judge refused to give the missing witness instruction. *Id.* at 112.

In *State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968), the Court held:

It has become a well established rule that for evidence which would properly be part of a case that is within the control of the party whose interest it would naturally be to produce it, and, . . . he fails to do so, the jury may draw an inference that it would be unfavorable to him.

*Id.* at 276 (quoting *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 346, 109 P.2d 542 (1941)). In *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), the Washington State Supreme Court noted that this instruction is applicable in a "majority of jurisdictions" to "permit the missing witness inference in criminal cases where the defense fails to call logical witnesses." *Id.* at 486 (numerous citations omitted). Certainly, the alleged victim in Count I was a "logical witness," and the prosecution had subpoenaed her and had the power to compel her attendance at trial, even

by arresting her if she refused to respond, yet took no action despite the defense objection and motion to dismiss that count.

Stated another way, the instruction applies to any witness who would “ordinarily and naturally testify” in the case. *State v. McGhee*, 57 Wn.App. 457, 462-63, 788 P.2d 603, *rev. denied*, 115 Wn.2d 1013 (1990). *Accord: State v. David*, 118 Wn.App. 61, 66, 74 P.3d 686 (2003); *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). As noted in *Davis*, the evidence must indicate that it is “reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.” 73 Wn.2d at 276-77.

Admittedly, the instruction is required only when the witness is “peculiarly available” to one of the parties. *State v. David, supra*, 118 Wn.App. at 67 (*quoting State v. Davis*, 73 Wn.2d at 277). Conversely, the missing witness doctrine does not apply if the witness is equally available to both parties. *State v. Blair*, 117 Wn.2d at 490. However, a witness is not “equally available” merely because he or she is physically present or subject to the subpoena power. *State v. Davis*, 73 Wn.2d at 276. The witness’ availability may depend, among other things, upon his or her relationship to one of the parties. *Davis*, 73 Wn.2d at 277.

In this case, Tamie Lumby had called the police, cooperated with the investigation and had been subpoenaed by the prosecution. Only the police had the power to arrest her and force her to appear in court. Thus, all the requirements for the missing witness instruction were met and it was reversible error to deprive the defense of the benefit of this instruction.

**E. The Failure to Produce Evidence to Corroborate Gallagher's Injuries**

In closing argument, the prosecutor argued that Gallagher was not really injured because “he didn’t tell them to the injuries. He didn’t tell them to either of the deputies.” RP (4/2/10) at 132. The prosecutor displayed the booking photo to the jury and, despite its poor quality, he claimed that it shows no injuries. *Id.*

The defense wanted “the opportunity to interview the jail personnel who actually entered this information to create this document” concerning the extent of Gallagher’s injuries and his request for treatment and photographs. *Id.* at 61. The prosecutor did not have “the person who talked to Mr. Gallagher” in jail. *Id.* He did offer to bring in Sergeant Coakley, the custodian of jail records, but the defense complained

I don’t know if that is the complete record. And I don’t know if Sergeant Coakley is not the person who entered the information, could indicate that. . . . He could testify that he printed this out, but I don’t know that he can

indicate that this is complete or accurate. . . . I am speculating about what he could offer as foundation without having had the opportunity to interview him. And I know I would have to be afforded that.

*Id.* at 62.

The prosecutor offered to “inquire if Deputy Stewart is over there. . . . He would be the one that took the information down.” *Id.* at 63. The court noted: “He would be the obvious witness to call.” *Id.* The prosecutor advised the court that Sergeant Coakley “possibly has a medical file there but we did not, and specifically did not, try to get into that medical file.” *Id.* at 64. Defense counsel complained: “I do need the opportunity to interview him before, and I do need to eat lunch today. I didn’t do that yesterday, and it didn’t go over well last night.” *Id.* at 65. The court pressured both counsel to work this out, stating: “I’m intending that you argue this case this afternoon.” *Id.*

Deputy Stewart arrived but the defense did not have time over the noon hour to interview him. *Id.* at 67-68. Defense counsel requested more time to find a witness to rebut the testimony of Deputy Stewart, who apparently was going to testify that Mr. Gallagher did not report injuries to him. *Id.* at 69-70. The defense argued:

So I want to inform the court of that now and Mr. Weyrich of that now, and that rebuttal witness would be someone from OAC [the Office of Assigned Counsel]. I have not been able to identify yet whether it’s Lettie or

Carmen. It's most likely one of those two who interviewed John Gallagher, according to this document on 8/28, the day after he was booked in. . . . They've made notations on what is their normal referral form regarding his injuries and his request for a photo.

*Id.* at 70. Defense counsel stated "it was Lettie who was the OAC person. She is out until Monday." *Id.* at 71. Defense counsel was in possession of a document that noted "the defendant states he was attacked by her and her friend, needs photos taken. . . . And I'm losing a lot with this victim with this witness not being present." *Id.* at 71-72.

Deputy Barry Stewart testified in rebuttal that he booked Gallagher into jail on August 27, 2009. *Id.* at 77. He stated there was nothing unusual about Gallagher's medical condition other than the fact that he did have "a history of shoulder problems that you recorded" from "traumatic injury." *Id.* at 80. He did not complain of any pain and was not disoriented. *Id.* at 81. Defense counsel requested a recess until Monday because

I have determined after some more thought, and I have had some limited amount of time to process this information, but stipulating without at least interviewing Ms. Alvarez, in my opinion is, at this point, ineffective. . . . I need to do research on discovery violations and possible *Brady* material. I need to prepare for the 3.5 hearing. I need to discuss the options with my client as it relates to some corresponding results of some of these issues. . . . I learned in my interview just before we came back in to start the testimony of Deputy Stewart, he indicated that he does believe, and this was based on

reviewing the report, he didn't remember much at all. That he does believe that he took the booking photo, but the report indicates that there was another deputy, a Deputy Dillaman, who actually, during the booking process, did a strip-search of Mr. Gallagher. . . . I, at this point, would also like an opportunity to interview Deputy Dillaman. I have no idea of his availability. Those are just a few of the reasons that I would make a request at this time for a recess until Monday. . . . But I do believe these are all issues that I must address to provide him with effective representation.

*Id.* at 86.

The prosecutor complained that he was surprised to hear the Defendant testify about such extensive injuries. "They could have asked for the jail records if they thought they were important. . . . I see no reason to continue this matter on until Monday." *Id.* at 86-87. The court responded "I have to confess I am a little confused, Ms. Wilson." *Id.* at 87.

Defense counsel explained that she needed time to do "research on discovery violations and possible *Brady* material," and complained about the poor quality of the booking photo "because it was in the email I did not have the ability to enlarge it and it was indicated to me that that was the best photo that I could have." *Id.* at 88. Defense counsel wanted a recess until Monday to give her "the opportunity to interview Ms. Alvarez who is not available to me until that date." *Id.* at 89. She noted:

I'm not suggesting that it's the State's fault. I'm suggesting that it is essential for effective representation of Mr. Gallagher. And I do believe that I will submit to the Court that it is ineffective for me to stipulate to her testimony or to some stipulation with respect to Ms. Alvarez without evening interviewing her on this subject. Now Mr. Weyrich has raised an issue as to whether or not I should have done that at some point prior and I submit to the court that it is only necessary because Mr. Weyrich has requested to call a rebuttal witness, Deputy Stewart.

*Id.* at 90. The judge denied the request for recess until Monday to interview Ms. Alvarez and “perhaps then call her as a witness instead of a stipulation.” *Id.*

Defense counsel then requested a shorter continuance at least until the next day, which was Friday. *Id.* Defense counsel stated “that I believe I need to discuss with my client and explain to him in order to make a determination if there are other motions that I would like to make.” *Id.* at 91. The judge was “not impressed because of the entire civil motions calendar starting at 9:00 a.m. tomorrow morning and the continuation of the trial from San Juan County tomorrow at 1:30.” *Id.* Defense counsel replied: “Your Honor, I feel my duty is to Mr. Gallagher. . . . And I am not making this request haphazardly or purely as a tactic, I'm doing in [sic] an effort to provide effective representation to Mr. Gallagher.” *Id.*

The court then granted a continuance “until tomorrow morning” and complained about the inconvenience to the jury. *Id.* at 90-92. The

court questioned whether the defense had made any attempts to call Ms. Alvarez and defense counsel responded “My investigator made them on my behalf because that’s what I instructed her to do. . . . She was told that Lettie was not available until Monday.” *Id.* The court asked: “Well, why didn’t you pursue that with a little more vigor?” *Id.*

Defense counsel was concerned because: “We have a bell that’s been rung here, and we need to discuss that.” *Id.* The court responded: “Well you can make a motion for a mistrial if you want to.” *Id.* at 95-96. The prosecutor rested and the judge advised the jury “unfortunately we were still in the middle of what I would consider the glitch.” *Id.* at 97-98.

The next day, Friday, April 2, 2010, defense counsel again expressed “concern” about “what has already occurred. At this point I would make a motion that the entire testimony be stricken. . . . But my concern is not only what limited information was disclosed on the stand by Deputy Stewart but his presence here is sort of akin to the definition of an assertion can also be conduct and the inference that can come from that.”

RP (4/2/10) at 99. Defense counsel was specifically concerned about

inferences that are drawn from what wasn’t given; for example, scrapes and scratches, leg or headaches, etc., could be the inference that’s drawn from that specific testimony. . . . The second question is with respect to pain. And Deputy Stewart indicated that Mr. Gallagher indicated his response was no. . . . And he went on to explain that he books people in the jail. He takes photos

of them. He checks them for injuries, taking care of their general needs, if they need anything while they are there, inferences to that as well.

*Id.* at 100. “It’s the contradictive [sic] statement that they heard early of the evidence in the form of testimony from Mr. Gallagher.” *Id.* at 100-101.

The judge read from the transcript:

With respect to the pain part, the question was: What was the second one that you look for?

Answer: Does the person complain of pain?

Question: And what was that? What answer did you place there?

Answer: No.

In order to be a problem with 3.5 there has to be an interrogation. This doesn’t elicit any interrogation. It says: What was the second one that you look for? Does the person complain of pain?

*Id.* at 101-102. The court ruled “that’s not a 3.5 issue. This guy is not asking questions. He’s making observations about Mr. Gallagher or things that Mr. Gallagher complains about. So those are not a problem with respect to 3.5.” *Id.* at 102. Defense counsel complained that “if there is not a 3.5 issue then here it is the issue I have. I did not have an opportunity to cross-examine Deputy Stewart.” *Id.* at 103. She could

have “clarified in cross-examination” what all of his testimony meant. *Id.* at 103.

The prosecutor then agreed to have the court tell the jury to disregard all of Deputy Stewart’s testimony. *Id.* at 104. The judge advised the jury “not to consider” the testimony of Deputy Stewart “in any way.” *Id.* at 114. However, the defense was not allowed time to call the public defender, who was not available until Monday, and who could have corroborated the extent of Gallagher’s injuries.

(1) **The trial court erred in refusing to grant the defense a short continuance to interview and call a critical witness to the defendant’s injuries**

It is fundamental that

The Due Process clause of the Fourteenth Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense.

*California v. Trombetta*, 467 U.S. 479, 485 (1984). *Accord: Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Both the Sixth Amendment to the United States Constitution and article 1, Section 22 of the Washington State Constitution require that courts allow defendants to present evidence that is relevant to their case. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Washington cases have clearly held that it is an abuse of discretion to exclude evidence

that is “crucial to the central contention of a valid defense.” *State v. Brown*, 48 Wn.App. 654, 660, 739 P.2d 1199 (1987) (reversing rape conviction for the improper exclusion of evidence that the victim had taken LSD).

In *State v. Eller*, 8 Wn.App. 697, 508 P.2d 1045 (1973), the Court held that the refusal to grant a defendant’s motion for a continuance in order to procure the attendance of a prospective witness was reversible error. Relying on article 1, section 22 and Amendment 10 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, the Court reasoned “that persons charged with a crime have a constitutional right to compulsory process to bring to trial witnesses deemed necessary for the defense.” *Id.* at 702 (citing *State v. Edwards*, 68 Wn.2d 245, 412 P.2d 747 (1966) and *Washington v. Texas*, 388 U.S. 14 (1967)).

This has been recognized more recently in *State v. Downing*, 151 Wn.2d 265, 87 P.3d 1169 (2004), where the Court reasoned:

In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.

*Id.* at 273 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; and CrR 3.3(f)). And, in *State v. Williams*, 84 Wn.2d

853, 855, 529 P.2d 1088 (1975), the Court held it was abuse of discretion to deny a continuance based on a lack of due diligence where the defense had shown it exercised due diligence in attempting to procure the testimony.

Our courts have also recognized “that failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case.” *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975) (citing *State v. Cadena*, 74 Wn.2d 185, 443 P.2d 826 (1968)). The denial of a motion for continuance is reversible where the trial court’s decision “is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

In this case, the denial was clearly an abuse of discretion. In closing, the prosecutor argued that Mr. Gallagher was really not injured and, therefore, he did not act lawfully because his use of force was excessive. On this record, it is clear that the defense was caught by surprise in questioning police officers who either had no recollection, or a very limited recollection of the Defendant’s injuries, and his requests to have them photographed.

The defense was also surprised, or perhaps unprepared to subpoena the correct medical records from the jail, and to interview the attorney

from the office of assigned counsel who met with the Defendant shortly after his arrest and witnessed his injuries and his request to have them photographed.

Thus, the Court should either reverse because the denial of a one day continuance was an abuse of discretion, or because it forced the defense into a position of providing ineffective assistance of counsel, as defense counsel repeatedly stated on the record.

**(2) The standard for ineffective assistance of counsel**

The Sixth Amendment guarantees the right to the effective assistance of counsel. *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). To prevail on such a claim, a criminal defendant must show (1) that trial counsel's performance was defective; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Decisions by defense counsel that are based on inadequate trial preparation, factual investigation, or inadequate legal research can never be deemed tactical choices and are therefore "defective" *per se*. *See, e.g., Eldridge v. Atkins*, 665 F.2d 228, 236-37 n.5 (8<sup>th</sup> Cir. 1981) (decision made as accommodation to inadequate trial preparation is not a strategic choice), *cert. denied*, 456 U.S. 910 (1982); *People v. Hayes*, 229 Ill.App.3d 55, 593

N.E.2d 739, 744, 170 Ill.Dec. 850 (Ill. App. 1992) (decision attributable to misapprehension of law is not strategic). *See also In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (counsel ineffective for failing to prepare for trial).

Under Supreme Court precedent, even strategic decisions are entitled to deference only if they are “made after thorough investigation of law and facts.” *See Strickland*, 466 U.S. at 690. “Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision.” *Foster v. Lockhart*, 9 F.3d 722, 726 (8<sup>th</sup> Cir. 1993). *See also Jones v. Wood*, 114 F.3d 1002, 1010-12 (9<sup>th</sup> Cir. 1997); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9<sup>th</sup> Cir. 1994).

## V. CONCLUSION

The cumulative effect of allowing highly prejudicial and incompetent expert testimony without prior notice to the defense, of denying the defense an opportunity to obtain the testimony of a critical witness concerning the Defendant’s injuries, the failure to give a missing witness instruction, and defense counsel’s lack of preparation in the absence of a brief continuance, clearly requires a new trial. Moreover, the prejudice of these errors is evident from the fact that the jury was only able to reach a verdict on one of the two charges.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of January, 2011.



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RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

**PROOF OF SERVICE**

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 24<sup>th</sup> day of January, 2011, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Skagit County Prosecuting Attorney  
Attention: Appeals  
Courthouse Annex  
605 S. Third  
Mount Vernon, WA 98273

And mailed to Appellant:

John Gallagher  
(Address withheld)

DATED at Seattle, Washington this 24<sup>th</sup> day of January, 2011.

  
\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

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