

65803-4

65803-4

NO. 65803-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID GILLUM,

Appellant.

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

The Honorable Michael Hayden, Judge

BRIEF OF APPELLANT

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JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The appellant was convicted of an uncharged alternative means of committing first degree assault in violation of his rights under the federal and state constitutions.

2. The trial court violated the appellant's due process right to present evidence on his own behalf.

3. The trial court erred in permitting the State to examine a witness regarding telephone records that did not fall under an exception to the rule against hearsay.

4. In the alternative, defense counsel was ineffective for opening the door to testimony about the telephone records.

5. Defense counsel was ineffective for opening the door to admission of the shooting victim's recorded statement to police.

6. The trial court failed to appear impartial when it decided sua sponte it must admit the victim's statement.

7. The trial court erred in denying the appellant's motion for a new trial based in part on the ineffective assistance of counsel.

8. The court erred in instructing the jury it must be unanimous to answer the firearm special verdict.

Issues Pertaining to Assignments of Error

1. The appellant was charged with first degree assault based on assault with a firearm, but the court instructed the jury only on the "great bodily harm" alternative means. Did this instruction cause the appellant to be convicted of an uncharged alternative means?

2. Where the trial court summarily ruled that the appellant's father could not testify as a rebuttal witness because he sat through portions of the trial, was the appellant denied his constitutional right to present witnesses?

3. Did the trial court err in permitting a detailed examination of a witness regarding his phone records where the State failed to lay a sufficient foundation for admission of the records?

4. In the alternative, was defense counsel ineffective for opening the door to admission of the phone records?

5. After pointing out inconsistencies between the shooting victim's testimony and his statement to police, defense counsel asked the victim a question suggesting that the statement was altogether different from the victim's testimony. Was trial counsel ineffective for opening the door to the entirety of the shooting victim's emotional, audio taped hearsay statement to police?

6. Did the trial court violate the requirement that it appear impartial when it informed the parties, absent State objection, that admission of the victim's recorded statement was necessary to correct the impression left by defense counsel's question?

7. A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury it must be unanimous to answer "was not" to the special verdict?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged David Gillum with first degree assault for shooting his uncle, Tyrome Lee (Lee). CP 1-3. The State charged Gillum under RCW 9A.36.011(1)(a), an assault "with a firearm or . . . by any force or means likely to produce great bodily harm or death." CP 1. The State also alleged the crime was committed with a firearm. CP 1.

The assault instructions, unlike the charge, referred to RCW 9A.36.011(1)(c), the "inflict[ion of] great bodily harm" prong of the statute. The jury returned a guilty verdict and answered "yes" to the

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 3/23/10; 2RP – 3/24/10; 3RP – 3/25/10; 4RP – 3/29/10; 5RP – 3/30/10; 6RP – 3/31/10; 7RP – 4/1/10; 8RP – 4/6/10; 9RP – 5/12/10; 10RP – 6/8/10; 11RP – 6/11/10; and 12RP – 6/30/10.

firearm special verdict. CP 77-78, 85-86. The court sentenced Gillum within the standard range including 60 months for the firearm enhancement. CP 119-26.

2. Trial proceedings and substantive facts

a. Pretrial ruling

Gillum moved to admit evidence of his uncle's federal convictions for drug trafficking, leading to nearly 20 years of incarceration and release only six months before the shooting. 1RP 38-41. Gillum wished to introduce the criminal history to undermine Lee's credibility and, in particular, his claim he was at the scene of the shooting because Gillum's mother, Vicky Owens, and grandmother, Minnie Lee, asked Lee to mentor Gillum to encourage him to live a crime-free lifestyle. 1RP 42-43, 46-47, 56. The court ruled that introduction of such evidence would open the door to Lee's understanding of the family's concerns about Gillum's criminal involvement, as well as other family members' criminal pasts. 1RP 68-70.

b. Trial testimony

Lee had been incarcerated off and on since the 1970s for crimes like assault and drug trafficking. 6RP 114. Tyrome Lee, Jr., Lee's son, had helped arrange for his father to move to North Carolina to start a new

and hopefully crime-free life after his release from a federal halfway house in 2008. 6RP 58, 89-90.

Around 2007, Lee arranged to sell the house his mother, Minnie, lived in so he would have income upon his release. This caused serious conflict between Lee and Minnie, as well as Lee and his sister Vicky, because the women thought the house belonged to Minnie. 6RP 61-63; see also 5RP 101 (detective's testimony).

After release from federal custody, however, Lee was anxious to spend time with Minnie, whose health was rapidly declining. 6RP 118-19. Lee visited Seattle in March 2009 with the goal of taking Minnie to North Carolina for an extended visit, in part because he did not feel his sister was treating Minnie well. 6RP 120.

Lee complained sister Vicky and nephew Gillum were "spoiled" by the rest of the family, and their sense of entitlement led to the dispute over the home sale. 6RP 125-26, 185. The family likewise perceived Gillum as virtuous and "special." 6RP 125-26.

Lee was therefore surprised when Minnie suggested Lee take Gillum to North Carolina to keep him out of trouble. 6RP 128-29. He surmised Minnie turned to him because, despite his criminal past and long incarceration, Lee was the "backbone" of the family. 6RP 130, 173. For example, Lee claimed Minnie raised Gillum in the house he bought for his

mother. 6RP 175. Lee also lavished money on family members even while in prison. Lee declined to explain the source of the cash. 7RP 21. In other words, Lee theorized, Vicky and Minnie viewed him as Gillum's father figure. 6RP 179-80.

Lee specifically claimed Gillum was involved in prostitution. 6RP 131-32, 181. He said Gillum wanted to use proceeds of the home sale to invest in the drug trade, but lacked the necessary "street" experience. 6RP 127, 139, 182.

The day of the shooting, Minnie essentially ordered Lee to come to Vicky's south Seattle rental house to speak with Gillum. 6RP 134. When Lee arrived at Vicky's house, however, Vicky and Minnie had left. Vicky's husband, Lamonte Owens, was there, as were Lee's nephews Gillum and Thomas Lee, Jr. (Thomas). 6RP 134-36.

Lee sat down with Thomas, Lamonte, and Gillum. 6RP 138. Lee told Gillum his behavior was a disappointment to the family. 6RP 139. Lee also accused Gillum of failing to look after Vicky and Minnie properly. 6RP 139. When Gillum responded in a disrespectful manner, Lee called Gillum a "little punk." 6RP 141.

According to Lee, Gillum said, "[I'll] show you" and made a phone call, telling the person on the other end to "bring that over here." 6RP 145. Meanwhile, nephew Thomas stepped toward Lee as if he was

going to draw a weapon, but Lee warned Thomas that he would “shove [any weapon] up [Thomas’s] ass.” 6RP 145. Lee went outside for a moment with Gillum and Thomas but returned to the house to wait for Minnie to return. 6RP 146; 7RP 23.

Lee eventually tired of waiting and decided to leave. 6RP 147. Once outside, he saw Gillum across the street, Thomas on the curb, and Gillum’s friend Najee in a small white car parked nearby. 6RP 148, 150.

Lee taunted Gillum, “You [aren’t] gonna do nothing to me.” Najee said, “[C]ome on David.” 6RP 151. Suddenly, Gillum pulled out a gun and shot Lee twice. 6RP 152-54. Lee fell into the planting strip in front of Vicky’s house. 6RP 159. Gillum ran to Najee’s car. 6RP 156. After prompting from Gillum, Thomas dove into the car as it sped away. 6RP 156.

Lamonte recalled hearing gunshots from outside shortly after Lee left. 6RP 26. He looked out and noticed Lee had moved his car and the brake lights were on. 6RP 28-29, 52. Lamonte went outside and asked if Lee heard the shots. He then learned Lee had been shot. 6RP 28-29, 45. Lee told Lamonte he didn’t know who shot him. 6RP 46. Lamonte suggested calling 9-1-1, but Lee insisted Lamonte drive him to a hospital instead. 6RP 28-29. Lamonte drove to PacMed not realizing it was no longer a hospital. 6RP 29.

Neighbor Sam Simone heard gunshots and went outside his house to investigate. 4RP 35. Simone observed a man who appeared to be in pain trying to get into a car. 4RP 35. Simone heard that man tell another man not to call 9-1-1. 4RP 35. After Simone returned to his house, he heard a car speed away. 4RP 41-42.

Virginia Anderson lived near Simone. She heard loud talking outside and saw four black men standing in front of a house down the street. 4RP 106. Anderson thought the men were just “horsing around” until she heard three “pops.” 4RP 107-08. She looked outside again and saw two of the men running toward a car. The third stood near a fourth man, who was on the ground. 4RP 108. The third man dove into the backseat of the car, which then sped away. 4RP 109. A fifth man came down from the porch, helped the man who had been on the ground into a car, and drove away. 4RP 110-12.

Miche Baker-Harvey, another neighbor, provided a similar account to that of Anderson. 4RP 157-59, 163, 175. Her daughter, Hazel, testified she looked out the window after hearing shots and saw a white car speeding away. A man, who was limping, yelled “help me,” and another man assisted him into a gold-colored car. 8RP 23-26.

The man driving the gold-colored car was Lamonte. 6RP 161. Lee testified he drifted in and out of consciousness on the way to the

hospital, but at one point he noticed the car had stopped and Lamonte was on the phone telling Vicky that Gillum shot Lee. 6RP 162. Lee was unable to muster the coordination to dial his son's phone number but pretended he was talking to his son because he was worried Lamonte wished him harm and was purposely driving slowly. 6RP 164; 7RP 33-34.

Meanwhile, Detective Brandon James followed Lamonte and Lee's speeding car to the PacMed building. 2RP 125-27. While Lamonte ran to the front doors, James approached the car and saw Lee reclining in the passenger seat. 2RP 129-30. Lee said he had been shot and was having trouble breathing.² 2RP 131. He did not identify the shooter. 2RP 144. When medics arrived, Lee told a medic he knew who shot him but would not identify the shooter. 5RP 27.

Eighteen days after being shot, Lee called police to ask about the case. 5RP 45, 92. The following day, Lee gave a taped statement to Detective Eugenio Ramirez identifying Gillum as the shooter. 5RP 50-51, 82-84; Exs. 76, 77. At trial, Lee said he initially chose not to reveal the shooter's identity because he thought it best to handle the matter within

² Tom Pham, a trauma physician at Harborview, testified Lee suffered gunshot wounds to his hip and back. 5RP 132. Dr. Pham suspected Lee's trouble breathing was caused by either a punctured lung or air leaking into his chest cavity, which can cause a lung to deflate and potentially cause death if left untreated. 5RP 155

the family. 6RP 166-67. He changed his mind once he realized his mother and other family members sided with Gillum.³ 6RP 170. He suspected his mother and sister planned the shooting. 5RP 87-88; 6RP 180; 7RP 35.

Minnie and Vicky disagreed with Lee's claims. Minnie testified she never asked Lee to advise or assist Gillum because Gillum was not in legal trouble. 7RP 89-90. In any event, Minnie would not have asked Lee to mentor Gillum because of his criminal past and poor life choices. 7RP 90. Minnie characterized her son as "out for himself." 7RP 79. Contrary to Lee's testimony, Vicky, not Minnie, cared for Gillum as a child. 7RP 99-100.

Vicky provided similar testimony: Gillum was not in legal trouble and she would never choose Lee as a mentor because, while she loved her brother, he made poor decisions. 7RP 102-03, 109. Moreover, Lee was not a significant influence in Gillum's life. Finally, she and Gillum's father raised Gillum, not Minnie. 7RP 102.

Lee and Vicky's brother, Jerome, testified he visited Lee in prison in September 2009. 7RP 120. Lee told him he was shot from behind and wasn't sure who shot him, but thought it was either Lamonte, Najee,

³ Curiously, Lee also testified he waited to contact the police until obtaining his mother's blessing to do so. 6RP 170.

Thomas, or Gillum. 7RP 120. Jerome acknowledged he previously served time in prison for a drug conviction for an incident that also involved Vicky and Lee. 7RP 122. Vicky had also been in prison. 8RP 56.

c. Telephone records

Lee's son, Tyrome Lee, Jr. (Lee Jr.) testified he learned the identity of the culprit but did not contact the police. 6RP 73-74. Four or five days after the shooting, Lee Jr. called Gillum to ask why Gillum shot his father. 6RP 75. Gillum was "remorseful" and said he didn't know. 6RP 75. A few weeks later, Gillum's attitude had changed; he called and asked Lee Jr. why certain family members were "snitching." 6RP 75.

During trial, defense counsel asked Lee Jr. if he had phone records to corroborate his testimony regarding the calls with Gillum. 6RP 106. To that point, phone records had not been mentioned. Lee Jr. said he was in the process of obtaining the records from Qwest. 6RP 106.

The State re-called Lee Jr. a few days later. 8RP 46. Over several defense objections, Lee Jr. testified he obtained the phone records that proved there were calls to and from Gillum.⁴ 6RP 110-13; 7RP 3-9, 72-78, 8RP 46-47; Ex. 78. The records showed an eight-minute call at 2:45

⁴ The phone was registered under the name of Lee Jr.'s fiancée.

a.m. two days after the shooting to a phone number Lee Jr. recognized as Gillum's. 8RP 49. The records showed Lee Jr. made additional short calls to Gillum and Gillum's girlfriend's phones. 8RP 49. The records also showed a series of calls to and from Gillum about two weeks later. 8RP 51.

d. Trial court's appearance of partiality

Defense counsel cross-examined Lee regarding discrepancies between his statement to police 19 days after the shooting and his testimony at trial. Contrary to Lee's recorded statement, for example, Lee denied telling Detective Ramirez "they," i.e., Gillum, Najee, and Thomas, were "all" shooting at him. 6RP 189-92; 7RP 23; cf. Exs. 76 at 6 (transcript) and 77 (audio recording). Lee also explained his statement that, unlike Gillum, "my kids are gangsters" meant not that his biological children were gang members but that some neighborhood kids who looked up to him were involved in gangs. 7RP 13; Ex. 76 at 8. Lee blamed inconsistencies between his testimony and his recorded statement on his unstable emotional condition at the time. 7RP 28-29, 67.

Concluding his cross-examination, counsel asked if it was "fair to say" Lee's testimony was significantly different than his March 2009 statement. 7RP 44. The State did not object to the question. Lee maintained that his stories were consistent. 7RP 44.

While the jury was out, the court asserted that defense counsel's concluding question was overly broad and asked "what both counsel . . . suggest that we do, if anything at this point." 7RP 46-47, 51, 57. The court commented there was some question as to whether the transcript was accurate because large portions were marked "unintelligible" and suggested the parties rely on the audiotape. 7RP 47. The court also noted its opinion that the statement was, in fact, largely consistent with Lee's testimony. 7RP 50.

While defense counsel disputed his concluding question opened the door to playing the statement, the prosecutor told the court she wished to play selected portions totaling roughly half of the recorded statement to rebut defense counsel's assertion. 7RP 55-57. After the court told the State it would play the whole statement or very specific selections, however, the State requested the whole statement be played. 7RP 60.

The statement was played for the jury, preceded by a limiting instruction that the jury could use the statement only to assess Lee's credibility on the stand. 7RP 62. In the statement, a very emotional Lee describes the shooting incident to Detective Ramirez. At one point, Lee breaks down and leaves the room wailing and sobbing. Ex. 76 at 7; Ex. 77.

e. Defense's proposed and rejected rebuttal testimony

Before trial, the State moved to exclude witnesses and noted the defense listed two family members then sitting in the courtroom as potential witnesses. 1RP 2, 34. The trial court granted the motion. 1RP 34. Defense counsel later asked those who were listed as witnesses to leave the courtroom. 1RP 34.

Gillum's father was not listed by either party as a possible witness. But to rebut Lee's testimony that he was the de facto head of Gillum's family, defense counsel asked to call Mr. Gillum to testify that instead, he provided for his son. 8RP 15-17. The court precluded the testimony, finding Mr. Gillum had been a spectator during trial. 8RP 17.

3. Motion for new trial

After the verdicts, Gillum, now represented by new counsel, moved for a new trial primarily based on ineffective assistance of counsel. The motion was based in large part on an assertion that defense counsel failed to investigate and call certain witnesses. CP 89-113; 10RP 2-3, 14-20, 34-35, 39. After hearing original defense counsel's testimony as to that claim, the trial court denied the motion. 11RP 43-45; CP 127.

C. ARGUMENT

1. DISMISSAL OF THE FIRST DEGREE ASSAULT CONVICTION IS REQUIRED BECAUSE GILLUM WAS CONVICTED OF AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME.

Gillum's first degree assault conviction and the accompanying firearm enhancement should be reversed because he was convicted of an uncharged alternative means of committing the crime in violation of his constitutional rights.

U.S. Const. amend. 6 and Const. art. 1, § 22 (amend. 10) require charging documents to notify an accused of the charges he must defend against. State v. Kjorsvik, 117 Wn.2d 93, 97-98, 812 P.2d 86 (1991). When an information alleges only one alternative means of committing a crime, it is reversible error to consider other means by which the crime could have been committed, regardless of the evidence admitted at trial. State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003); State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). This is because "[o]ne cannot be tried for an uncharged offense." Id.

Under RCW 9A.36.011(1), a person is guilty of first degree assault if, with intent to inflict great bodily harm, he:

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

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

The State charged Gillum with first degree assault based on subsection (a), “[a]ssault[of] another with a firearm [and] force or means likely to produce great bodily harm or death, to wit: a pistol.” CP 1. But the court instructed the jury on subsection (c), the “inflicts great bodily harm” prong. CP 77 and 78 (Instructions 8 and 9, attached as an appendix); see also 8RP 96 (State’s closing argument). These constitute separate and distinct means of committing the crime. State v. Pierre, 108 Wn. App. 378, 383-84, 31 P.3d 1207 (2001).

Gillum was prejudiced because the jury could only have found him guilty based on the uncharged means. Bray, 52 Wn. App. at 34; see State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007) (prejudice found and reversal required where jury could have convicted based on either charged or uncharged means). The remedy is dismissal of the charge and the accompanying enhancement. Id. at 344.

2. THE TRIAL COURT VIOLATED GILLUM'S RIGHT TO CALL WITNESSES WHEN IT PRECLUDED HIS FATHER FROM TESTIFYING.⁵

The State's case depended on shooting victim Lee's testimony. Gillum's father was therefore a crucial defense witness, because he would have challenged Lee's credibility in a way that Gillum's mother, as a member of the crime-ridden Lee family, could not. The trial court's prohibition on the father's proposed testimony because he had been a spectator at trial violated Gillum's constitutional rights to due process and to call witnesses for his defense.

a. Gillum has a fundamental right to present witnesses for his defense.

The right to compel witnesses is guaranteed by the Sixth Amendment article I, section 22. Taylor v. Illinois, 484 U.S. 400, 412-13, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). And while not explicitly stated therein, the right to have jurors hear a witness's testimony is "grounded in the Sixth Amendment." Taylor, 484 U.S. at 409.

The right to call witnesses has also long been recognized as essential to due process. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct.

⁵ Defense counsel's motion for a new trial touches on Gillum's father's exclusion in reference to an ineffective assistance claim but does not claim the trial court erred in excluding the testimony. CP 102-03.

1038, 35 L. Ed. 2d 297 (1973). A defendant's right to compel the attendance of witnesses is "in plain terms the right to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). This right is "a fundamental element of due process of law." Id. Courts must jealously guard a criminal defendant's right to present witnesses in his defense. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A criminal defendant's right to present witnesses is also an "essential attribute of the adversary system itself." Taylor, 484 U.S. at 408. The Court explained in Taylor:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

Id. at 408-09 (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). A trial court order excluding the testimony of a material defense witness directly implicates not only the defendant's constitutional right to offer testimony on his own behalf, but also the integrity of the adversary system itself.

- b. Violation of a ruling excluding witnesses does not warrant the drastic remedy of denying an accused the right to present witnesses.

It is within the court's discretion to exclude witnesses from the courtroom until after they have testified. ER 615;⁶ State v. Dixon, 37 Wn. App. 867, 877, 684 P.2d 725 (1984). The rule specifies no sanction for its violation.

No Washington case has addressed this issue in the context of the defendant's constitutional right to present a defense. However, federal courts interpreting the similar federal rule⁷ have adhered to the general rule that a defense witness may not be excluded solely for violating a ruling excluding witnesses. See, e.g., State v. Burton, 101 Wn.2d 1, 6, 676 P.2d 975 (1984) (this Court may look to federal case law for assistance in its interpretation of certain state rules), overruled on other grounds by State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991).

In United States v. Gibson, the court stated:

If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is

⁶ ER 615 states in relevant part, "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

⁷ Federal Rule of Evidence 615 states, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely. . .

675 F.2d 825, 835-36 (6th Cir. 1982) (quoting Holder v. United States, 150 U.S. 91, 92, 14 S. Ct. 10, 37 L. Ed. 2d 1010 (1893)). The Fifth Circuit has also noted “it is generally true that a witness should not be disqualified for this reason alone.” Calloway v. Blackburn, 612 F.2d 201, 204 (5th Cir. 1980) (discussing violation of the witness sequestration rule).

Under the federal cases, the remedy of preclusion is justified only when there is a “knowing intelligent waiver” or “consent, procurement, or knowledge on the part of defendant or his counsel.” Id. at 204 (quoting Braswell v. Wainwright, 463 F.2d 1148, 1155 (5th Cir. 1972)); Gibson, 675 F.2d at 836 (citing United States v. Kiliyan, 456 F.2d 555, 560 (8th Cir. 1972); Taylor v. United States, 388 F.2d 786 (9th Cir. 1967); United States v. Bostic, 327 F.2d 983 (6th Cir. 1964); United States v. Schaefer, 299 F.2d 625 (7th Cir. 1962)).

Washington courts apply the same general principles when a State’s witness violates ER 615. Dixon, 37 Wn. App. 867. In Dixon, the trial court permitted the State’s witness to testify despite violation of ER 615. Id. at 876. On appeal, the court held there was no abuse of discretion primarily because the prosecutor claimed he had not anticipated the witness would be called to testify and there was no bad faith. Id. at 877;

see also State v. Bergen, 13 Wn. App. 974, 977-78, 538 P.2d 533 (1975) (two State's rebuttal witnesses were permitted despite their hearing the defendant's testimony because there was no evidence of bad faith).

As a leading commentator summarized, "Refusal to permit the offending witness to testify is regarded as a drastic remedy, but one which may be invoked if the witness violates the court's order with the connivance or knowledge of a party or counsel." 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice §615.5, at 628-29 (5th ed. 2007).

This Court should hold that more than an innocent violation of ER 615 is required before the defendant may be prevented from presenting his case. The extreme sanction of excluding a material defense witness should be limited to situations of demonstrated bad faith or collusion.

- c. The court abused its discretion and violated Gillum's right to present a defense by excluding testimony undermining Lee's credibility.

A court abuses its discretion when that decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "[D]iscretion does not mean immunity

from accountability.” Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994).

The court’s decision to exclude Gillum’s father’s testimony was manifestly unreasonable because there was no evidence of bad faith or collusion by Gillum or his attorney. United States v. Torbert, 496 F.2d 154, 158 (9th Cir. 1974) (“[I]t is ordinarily an abuse of discretion to disqualify a witness unless the defendant or his counsel have somehow cooperated in the violation of the order.”); Dixon, 37 Wn. App. at 877. As shown here, defense counsel did not originally intend for the father to testify. 1RP 2, 34. The need for such rebuttal testimony became apparent only after Lee asserted he provided support for his sister’s family. 8RP 15-17; 10RP 14, 32-36. Although Vicky testified similarly to the testimony Gillum’s father could have provided, the State raised the specter of her criminal record only late in the trial. 7RP 122; 8RP 56.

Pickel v. United States, 746 F.2d 176 (3d Cir. 1984) is instructive because it demonstrates witness exclusion is proper only in rare cases. In that case, a State’s witness violated the sequestration order at a hearing on a petition to enforce an Internal Revenue Service summons. Id. at 179-80. As a sanction, the court quashed the summons. Id. at 181, 182. On the government’s appeal, the Third Circuit held the trial court abused its discretion in quashing the summons for three reasons. Id. at 182-83.

First, the court failed to consider the range of remedies available under FRE 615. Id. at 182. Second, there was no evidence the witness was acting “other than unilaterally” in violating the exclusionary order. Id. Finally, there was no evidence of prejudice to the opposing party. Id.

The same reasoning applies here. The trial court failed to consider the availability of other remedies for violation of ER 615 before imposing the most severe sanction. 8RP 15. Additionally, there was no evidence of collusion by either Gillum or his counsel. And as in Pickel, the State made no showing it would be prejudiced by admission of the father’s testimony. Without such evidence, exclusion of the witness was not within the range of discretionary choices available and the court abused its discretion. Pickel, 746 F.2d at 182-83; Neal, 144 Wn.2d at 609.

Even assuming *arguendo* the court had discretion to exclude a critical defense witness without evidence of collusion, the court abused its discretion because it failed to consider whether less drastic options were available. When a court fails to recognize the scope of its discretion, no valid exercise of discretion exists. See State v. McGill, 112 Wn. App. 95, 98-99, 47 P.3d 173 (2002) (reversing standard range sentence because trial court mistakenly believed it had no authority to grant an exceptional sentence); Pickel, 746 F.2d at 182.

Potential sanctions for violating ER 615 include holding the witness in contempt, instructing a jury about the violation, allowing vigorous cross-examination and/or comment in closing argument by counsel regarding the witness's opportunity for collusion, refusing to permit the testimony, and dismissing the charges. 5A Teglund §615.5 at 627-30; Pickel, 746 F.2d at 182.

The trial court considered only one of these possible remedies: exclusion of a crucial defense witness. 8RP 15. The court abused its discretion by imposing this severe sanction without considering other options in light of Gillum's fundamental right to present a defense. Pickel, 746 F.2d at 182-83.

d. The error requires reversal of Gillum's conviction.

An error affecting a defendant's Sixth Amendment right to compel attendance of witnesses is of constitutional magnitude and will be considered harmless only if the State can show beyond a reasonable doubt that the jury would have reached the same result without the error. Maupin, 128 Wn.2d at 928-29. Violation of the right is presumed prejudicial and the burden is on the State to prove the error was harmless beyond a reasonable doubt. Id.

The State cannot prove the error was harmless in Gillum's case. Because there was no physical evidence or other corroboration, the State's

case rested on Lee's and his son's credibility. The defense's primary theory was that Lee's testimony was not credible starting with his stated reason for his presence at Vicky's house: to mentor the troubled Gillum at the family's request. For Lee's testimony to be credible, he had to explain why, despite his long incarceration, ample criminal history, and conflicts over the sale of the house, the family would rely on Lee to guide Gillum away from a purported life of crime. One of the principal reasons Lee supplied was he financially supported Vicky's family, even providing housing to Gillum. 6RP 130, 173-75, 179-80; 7RP 22.

With Vicky impeached by her criminal past late in the trial, Gillum's father's testimony became essential to undercutting Lee's claims. The State cannot prove beyond a reasonable doubt that the jury would have convicted Gillum had it heard testimony further undermining Lee's already shaky credibility. Because the trial court erred in excluding the testimony, a new trial is required.

3. THE COURT ERRED IN ADMITTING TESTIMONY REGARDING THE DETAILS OF PHONE RECORDS CORROBORATING TYROME LEE JR.'S TESTIMONY.

The trial court overruled a number of defense objections to the introduction of Lee Jr.'s phone records, including hearsay and foundation. The court reasoned that because the phone company sent the records to Lee Jr., they were presumptively accurate. 7RP 72-78. But following

Gillum's new trial motion, the court ruled that because the *physical* records themselves were not admitted into evidence, they were only used to refresh Lee Jr.'s memory consistent with ER 612, and therefore no error occurred. 10RP 27-32, 40. But because it was error to permit the State to examine the witness regarding the details of the records, and because the error was not harmless, a new trial is required.

- a. The telephone records were not admissible under the business records exception to the rule against hearsay.

A court abuses its discretion when it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A court's evidentiary ruling may likewise be an abuse of discretion if it is based upon facts that are not supported by the evidence. State v. Ramires, 109 Wn. App. 749, 757, 37 P.3d 343 (2002).

Hearsay is a statement other than one made by a declarant while testifying at trial offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay. ER 802.

RCW 5.45.020 is an exception to the rule against hearsay. It authorizes the admission of otherwise inadmissible records, provided they are made and kept in the ordinary course of business. State v. Hines, 87 Wn.App. 98, 100, 941 P.2d 9 (1997). RCW 5.45.020 provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Computer-generated evidence is generally hearsay and is admissible only if it falls within one of the established exceptions to the hearsay rule. State v. Kane, 23 Wn. App. 107, 111, 594 P.2d 1357 (1979) (citing Roberts, A Practitioner's Primer on Computer-Generated Evidence, 41 U.Chi.L.Rev. 254 (1973-74)). Courts apply a three-prong test for the admissibility of computer-generated evidence: (1) a showing the electronic computing equipment is standard; (2) proof that the entries were made at or near the time of the happening of the event and were made in the regular course of business; and (3) foundation testimony sufficient to convince the trial court that such evidence is trustworthy. Kane, 23 Wn. App. at 111-12 (citing Seattle v. Heath, 10 Wn. App. 949, 520 P.2d 1392 (1974)). These requirements track those of RCW 5.45.020, with the additional requirement that the proponent prove that the computer equipment is standard if a question as to its reliability is raised. Kane, 23 Wn. App. at 112.

While RCW 5.45.020 is a statutory exception to hearsay rules, it does not create an exception for the foundational requirements of identification and authentication. State v. DeVries, 149 Wn.2d 842, 547, 72 P.3d 748 (2003). The records need not be identified by the same person who made them: Identification by an employee who has personal knowledge of the recording of the information is generally sufficient, as is the testimony of the custodian of the record or the person who supervised its creation. 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.42, at 106-07 (5th ed. 2007). Contrary to the court's ruling, however, Lee Jr.'s testimony that the phone company sent the bills to his fiancée does not satisfy the foundation requirements for admission of the records. Id.

- b. The court erred when it ruled the State did not admit the records but properly used them to refresh memory.

ER 612 allows a witness to use a writing to refresh his or her memory for the purpose of testifying, provided that (1) the witness's memory needs refreshing, (2) opposing counsel has the right to examine the writing, and (3) the trial court is satisfied the witness is using the notes to aid rather than supplant his own memory. State v. Williams, 137 Wn. App. 736, 750, 154 P.3d 322 (2007). As the Supreme Court has warned,

[A] distinction must constantly be borne in mind between (1) refreshing recollection, and (2) a past recollection recorded. In the former situation . . . the notes or memoranda used by the witness are not placed in evidence, but are used to trigger his psychological mechanisms of recognition and recollection, enabling the witness to then testify from his own memory. The testimony is the evidence, the writing is not. With respect to past recollection recorded, the notes or memoranda are the evidence.

State v. Huelett, 92 Wn.2d 967, 968-69, 603 P.2d 1258 (1979).

Although the court ruled the phone records were properly used to refresh Lee Jr.'s memory, the record is to the contrary. Rather than satisfying necessary requirements, the State essentially had Lee Jr. read the records to the jury even though the testimony did not meet the "past recollection recorded" criteria either. 8RP 47-51; Huelett, 92 Wn.2d at 968-69. Contrary to the court's late ruling, the testimony as to the precise timing and details of the phone calls went well beyond the bounds of ER 612.

c. Defense counsel did not "open the door" to the telephone records.

The term "opening the door" is used in two contexts:

(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* §103.14, at 66-67 (5th ed. 2007). Like other evidentiary devices, the "open door" rule must give way to constitutional concerns such as the right to a fair trial. State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307, 315 (2008) (citing State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (constitutional concerns trump strict application of court rules); see also Frazer v. Downey, 12 Wn. App. 374, 380-81, 529 P.2d 1105 (1974) (even where party opens door to otherwise inadmissible area of inquiry, court should not disregard rules of evidence). Here, the phone records were not admissible because the State failed to lay the proper foundation. Thus, defense counsel could not have opened the door to their admission. Frazer, 12 Wn. App. at 380-81.

d. The erroneous admission of the evidence prejudiced Gillum and requires reversal.

When a court errs by admitting hearsay that does not fall within an exception, this Court must consider whether the evidence, within reasonable probabilities, affected the outcome of the trial. Dixon, 37 Wn. App. at 875.

There is a reasonable probability testimony regarding the contents of phone records affected the outcome of Gillum's trial. The court permitted the State to introduce details of the timing of the phone calls to

bolster Lee Jr.'s claim that Gillum acknowledged responsibility for the shooting. Other than shooting victim Lee's testimony, the calls were the only evidence establishing Gillum was the shooter. In this credibility contest otherwise lacking physical evidence, such detailed records prejudiced Gillum's defense. See, e.g., State v. Kilgore, 107 Wn. App. 160, 26 P.3d 308 (2001) (where credibility was a central issue at trial, court erred in suppressing evidence that called into question the State's physical evidence and such error was not harmless), aff'd, 147 Wn.2d 288, 53 P.3d 974 (2002). This Court should, therefore, reverse Gillum's conviction.

- e. In the alternative, defense counsel was ineffective for permitting introduction of the phone record based on his cross-examination of the witness.

Assuming *arguendo* that defense counsel "opened the door" to the records, Gillum was deprived of his right to the effective assistance of counsel when his attorney asked Lee Jr. if he had phone records to corroborate his testimony. Until then, phone records were not mentioned. Because counsel's question risked the prejudicial introduction of corroborative evidence, it was ineffective for counsel to inquire as he did. And because counsel's deficient representation prejudiced Gillum, this Court should reverse his conviction.

The Sixth Amendment and article 1, section 22 guarantee the right to effective representation. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998). Moreover, "tactical" or "strategic" decisions by defense counsel must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."); State v. Ward, 125 Wn. App. 243, 249-50, 104 P.3d 670 (2004) (illegitimate tactical choices may be ineffective assistance).

An accused suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Counsel's performance here was deficient. Counsel probably did not expect the answer he received from Lee Jr. But in a case that hinged on credibility, it was dangerous to ask a question to which counsel clearly did not know the answer and thereby open the door to phone records that would have been difficult for the State to otherwise introduce. Counsel's actions were not only puzzling, they were, as discussed above, prejudicial. Because defense counsel's performance was both deficient and prejudicial, Gillum was denied his right to effective assistance, and this Court should reverse his conviction.

4. DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO LEE'S ENTIRE RECORDED STATEMENT, AND THE COURT'S SUA SPONTE RULING TO ADMIT THE STATEMENT VIOLATED THE REQUIREMENT THAT JUDGES APPEAR IMPARTIAL.

Not content to point out specific inconsistencies between Lee's testimony and his statement to police, defense counsel asked if it was "fair to say" Lee's testimony was significantly different than his March 2009 statement. 6RP 188-95; 7RP 44. The State did not object, but the court ruled that the improperly broad nature of the question permitted the State to play, if it chose, the entire recording. 7RP 44-60.

Defense counsel was ineffective for opening the door to admission of the entire statement. Alternatively, the trial court violated the appearance of fairness doctrine, revealing its bias for the State, by ruling sua sponte that the entire statement should be admitted even where the State did not object.

- a. Counsel's overly expansive cross-examination opened the door to admission of the victim's emotional statement to police, depriving Gillum of a fair trial.

An accused establishes ineffective assistance when he shows (1) counsel's performance was deficient; and (2) there is a reasonable probability that the deficient performance prejudiced him. Thomas, 109 Wn.2d at 225; Strickland, 466 U.S. at 694.

Having pointed out a few significant inconsistencies between Lee's prior statement and his testimony, defense counsel was not content to wait until closing argument to argue Lee changed his story. Instead, counsel asked a question suggesting Lee changed his entire story. 7RP 44. While the police statement was hearsay and not until then admissible, it arguably became admissible because the State was entitled to rebut defense counsel's suggestion.

The trial court correctly ruled the question opened the door to Lee's statement. As the court noted in State v. Gefeller:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

76 Wn.2d 449, 455, 458 P.2d 17 (1969).

By asking an dangerously broad question rather than waiting to argue the point, counsel engaged in an unreasonable tactic. Ward, 125 Wn. App. at 249-50. Defense counsel's overreaching exposed jurors to an emotional Lee again describing his nephew's betrayal. And while the statement contained some arguably defense-friendly facts (for example, Lee did not consider Gillum to be gang affiliated, unlike "[his] kids" and Lee apparently disapproved of Gillum's career choice to be a police officer⁸), the court provided a limiting instruction that prohibited the jury from considering this helpful evidence. 7RP 61-62. For these reasons, counsel's question was strategically unreasonable and prejudiced Gillum.

- b. The court's ruling to admit the entire statement violated the appearance of fairness doctrine.

Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a biased judge or one whose impartiality may be reasonably questioned. State v. Ra, 144 Wn.

⁸ Ex. 76 at 3-4, 7-8; Ex. 77.

App. 688, 704-05, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995).

More specifically, a trial court should not enter into the “fray of combat” or assume the role of counsel. Ra, 144 Wn. App. at 705 (quoting Egede-Nissen v. Crystal Mountain, Inc., 93 Wn. 2d 127, 141, 606 P.2d 1214 (1980)). The trial court did just that in Gillum's case. Despite the prosecutor's decision not to object to trial counsel's unreasonably broad question, the court insisted corrective action was required. This was not the judge's job; it was up to the prosecutor to object to the question if she wished.

Ra is instructive on this point. The Ra Court held the trial judge failed to appear impartial when he made disparaging comments about Ra and then proposed theories for the State to use to admit ER 404(b) evidence. Ra, 144 Wn. App. at 705. As in Ra, Gillum's trial judge revealed its partiality when without objection, it invited the State to

introduce Lee's entire statement. 7RP 44-60. As in Ra, moreover, the court aligned itself with the State and gave the appearance of bias, invalidating the proceedings as a whole. Reversal is, therefore, required. Madry, 8 Wn. App. 61 (reversing and remanding for new trial based on appearance of partiality).

5. THE COURT'S FLAWED UNANIMITY INSTRUCTION FOR THE DEADLY WEAPON SPECIAL VERDICT REQUIRES VACATION OF THE SENTENCE ENHANCEMENT.

The court's firearm special verdict instruction incorrectly required the jury to unanimously determine whether or not Gillum was armed with a deadly weapon at the time of the offense. CP 81 (instruction 12). The sentencing enhancement should, accordingly, be vacated.

- a. Instruction 12 incorrectly apprised the jury of the relevant law.

The court gave the following special verdict instruction:

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

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime.

A firearm is a weapon or device from which a projective may be fired by an explosive such as gunpowder.

CP 82 (Instruction 13).

The court also incorrectly instructed jurors that their decision had to be unanimous:

You will also be given [a special verdict form]. If you find the defendant guilty. . . , you will then use the special verdict form[] and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 81 (Instruction 12) (emphasis added).

- b. Gillum may raise this claim for the first time on appeal, and the improper instructions require reversal.

To find the State has failed to prove an allegation that would increase the defendant's maximum allowable sentence, a unanimous decision is not required. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010) (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)). Instruction 12, which stated all 12 jurors must agree on an answer to the special verdict, was therefore an incorrect statement of the law. Bashaw, 169 Wn.2d at 147.

This error may be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3); Bashaw, 169 Wn.2d at 147-48 (applying constitutional harmless error analysis); see also State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) (it is “well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal”).

Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). To find an instruction error harmless, the reviewing court must conclude beyond a reasonable doubt that the verdict would have been the same without the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). As in Bashaw, “[t]he error . . . was the procedure by which unanimity would be inappropriately achieved.” Bashaw, 169 Wn.2d at 147. Moreover, “[t]he result of the flawed deliberative process tells [a reviewing court] little about what result the jury would have reached had it been given a correct instruction.” Id. “[W]hen unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” Id. at 147-48.

The facts in Bashaw demonstrate that, as in that case, the error here cannot be considered harmless. The Bashaw court addressed two distinct

claims each relating to three school bus route enhancement special verdicts. 169 Wn.2d 133. As to the first claim, the Bashaw court found the trial court abused its discretion in admitting testimony relating to a measuring wheel that was not shown to be reliable. Id. at 143. As to two of three counts, however, the Court considered the error harmless because there was sufficient evidence to show the drug sales well under the 1,000-foot range triggering the enhancement (100 to 150 feet). Id. at 138, 144.

Despite finding the error harmless as to the first claim, the Court was compelled to reverse the enhancements as to the other two counts. Id. at 147-48.

Here, as in Bashaw, but for the “flawed deliberative process,” jurors may not have reached unanimity on Gillum’s firearm special verdict.⁹ Id. at 147. The sentencing enhancement should, therefore, be vacated. Id. at 148.

⁹ The court instructed the jury on the “infliction of great bodily harm” prong of the statute only. CP 77-78 (instructions 8 and 9); RCW 9A.36.011(1)(c).

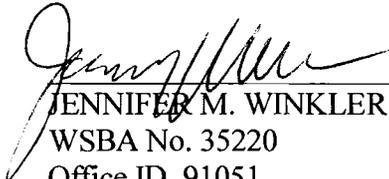
D. CONCLUSION

For the foregoing reasons, this Court should reverse Gillum's conviction and remand for a new trial. In any event, reversal and vacation of the firearm special verdict is required.

DATED this 9th day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JENNIFER M. WINKLER
WSBA No. 35220
Office ID. 91051

Attorneys for Appellant

APPENDIX

No. 8

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another and inflicts great bodily harm.

No. 9

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 5, 2009 the defendant assaulted Tyrome Lee;

(2) That the defendant acted with intent to inflict great bodily harm;

(3) That the assault resulted in the infliction of great bodily harm upon Tyrome Lee; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65803-4-1
)	
DAVID GILLUM,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID GILLUM
 11433 60TH AVENUE S.
 SEATTLE, WA 98178

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF FEBRUARY, 2011.

x Patrick Mayovsky

2011 FEB -9 ... 4:40
COURT OF APPEALS
STATE OF WASHINGTON