

FILED
JAN 12 2017
WASHINGTON STATE
SUPREME COURT

FILED
Jan 05, 2017
Court of Appeals
Division III
State of Washington

Supreme Ct No. 94031.2

COA No. 32841-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MARCOS A. GALLEGOS, Petitioner

PETITION FOR REVIEW

Janet G. Gemberling
Attorney for Petitioner

Janet Gemberling, P.S.
P.O. Box 8754
Spokane, WA 99203
(509) 838-8585

INDEX

A.	IDENTITY OF PETITIONER.....	1
B.	COURT OF APPEALS DECISION	1
C.	ISSUES PRESENTED FOR REVIEW	1
D.	STATEMENT OF THE CASE.....	2
	1. MR. PINEDA’S TESTIMONY	3
	2. MR. WHALEN’S TESTIMONY	5
	3. MR. VILLA’S TESTIMONY	6
	4. COURT OF APPEALS DECISION	8
E.	ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	8
	1. A CAUTIONARY INSTRUCTION IS NECESSARY TO SAVE THE DEFENDANT FROM THE PREJUDICIAL EFFECT OF UNCORROBORATED ACCOMPLICE TESTIMONY	9
	2. THE DEFENDANT WAS PREJUDICED BY DEFENSE COUNSEL’S FAILURE TO REQUEST THE PROPHYLACTIC ACCOMPLICE TESTIMONY INSTRUCTION	11
	3. ABSENT THE PREJUDICIAL UNCORROBORATED TESTIMONY OF THE ALLEGED ACCOMPLICES, THE EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT THE FINDING OF PREMEDITATION	17
F.	CONCLUSION.....	19

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BINGHAM, 105 Wn.2d 820, 719 P.2d 109 (1986).....	18
STATE V. GENTRY, 125 Wn.2d 570, 888 P.2d 1105 (1995).....	17
STATE V. GROSS, 31 Wn.2d 202, 196 P.2d 297 (1948).....	11, 12
STATE V. HARRIS, 102 Wn.2d 148, 685 P.2d 584 (1984).....	9, 10, 15
STATE V. MIERZ, 127 Wn.2d 460, 901 P.2d 286 (1995).....	12
STATE V. PIRTLE, 127 Wn.2d 628, 904 P.2d 245 (1995).....	17, 18
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	17
STATE V. SHERWOOD, 71 Wn. App. 481, 860 P.2d 407 (1993).....	9

OTHER CASES

STATE V. MOORE, 229 Kan. 73, 622 P.2d 631 (1981).....	11
--	----

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. VI	8, 17
WASH. CONST. art. I, § 22	8

STATUTES

RCW 9A.32.020(1).....	17
-----------------------	----

COURT RULES

RAP 13.4(b)..... 8

OTHER AUTHORITIES

11 WASHINGTON PRACTICE:
WASHINGTON PATTERN JURY INSTRUCTIONS:
CRIMINAL 6.05 (3d ed. 2008) (WPIC)..... 10

BLACK'S LAW DICTIONARY (5th Ed., 1979)..... 11

A. IDENTITY OF PETITIONER

Marco Gallegos asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The opinion filed on October 13, 2016 and the ruling filed on December 6, 2016 denying reconsideration. Copies of the decisions are in the Appendix at pages A-1 through A-30, and B-1.

C. ISSUES PRESENTED FOR REVIEW

1. The only evidence of the defendant's complicity in two murders was provided by three codefendants. Did trial counsel provide ineffective assistance by failing to request a cautionary jury instruction on the reliability of accomplice testimony?
2. The only evidence supporting the finding of premeditation is the testimony of the three individuals who admitted they were present at the murder. Was defense counsel's failure to request the cautionary jury instruction harmless error?

D. STATEMENT OF THE CASE

Police officers found two dead bodies in an abandoned car. (RP 404, 438-39) The victims were identified as Ryan Pederson and John Eby. (RP 432-35, 443-44) Mr. Eby's daughter told officers he had recently been associating with Jose Pineda whom he had planned to meet the evening her father disappeared. (RP 641-43) Using cell phone records for Mr. Pineda and Mr. Eby, officers determined Mr. Eby and Mr. Pineda had exchanged numerous calls on the evening in question. (RP 797-99) The records also disclosed that Mr. Eby's last call and contemporaneous calls from Mr. Pineda had all come from the same general vicinity. (RP 799-800) Mr. Eby's daughter also told officers she and her father had recently visited the residence of Troy Whalen, which was also in that vicinity. (RP 803-04)

Some time after this, officers were investigating an apparently unrelated incident in which Mr. Pineda had assaulted Mr. Eby in Mr. Whalen's garage. (RP 808-809) Executing a search warrant for the garage, they found blood stains, a bullet, and electrical wire similar to the wire that had been wrapped around Mr. Eby's body. (RP 810-11) They later found numerous items that supported the inference Mr. Eby had been killed in Mr. Whalen's garage. (RP 946-47) The officers detained Mr. Whalen. (RP 946-47) Mr. Whalen told them that Heriberto Villa and

Marco Gallegos had been present at the time Mr. Eby was killed. (RP 949)

The State charged Mr. Gallegos, Mr. Pineda, Mr. Whalen and Mr. Villa with two counts of premeditated murder. (CP 1-2)

The State eventually disclosed that Messrs. Pineda, Whalen and Villa had agreed to appear as cooperating witnesses for the State and agreed to severance of the defendants' trials. (SRP 45; CP 124, 323) The charges against Mr. Gallegos were tried to a jury commencing eighteen months after his arrest. (CP 1-2; RP 143-2001)

1. MR. PINEDA'S TESTIMONY.

Mr. Pineda told the jury he bought a car from Mr. Eby in exchange for drugs and cash. (RP 1414) Some of the cash Mr. Pineda paid to Mr. Eby turned out to be counterfeit, so Mr. Pineda had agreed to reimburse Mr. Eby for the counterfeit money. (RP 1414-15)

On the afternoon of December 20 Mr. Villa told Mr. Pineda that Mr. Eby had approached Mr. Campos, a member of a rival gang, and asked to have Mr. Pineda robbed. (RP 1413) Mr. Pineda decided to call Mr. Eby and meet up with him. (RP 1414, 1421-22) His plan was to have Mr. Eby meet them at Troy Whalen's house. (RP 1422) Mr. Pineda

called Mr. Eby, promised to give him the money, and Mr. Eby agreed to meet with him. (RP 1421, 1450)

According to Mr. Pineda, he and Mr. Villa went to Mr. Pineda's home where they encountered Mr. Gallegos. (RP 1423) The three men then drove to Troy Whalen's house. (RP 1425) While they were en route, Mr. Pineda told Mr. Gallegos he was "gonna go talk to somebody about setting, possibly setting me up." (RP 1448) Mr. Pineda testified: "I just basically let [Mr. Gallegos] know I'm gonna talk to [Mr. Eby] about it, you know, and if he's, he comes out lying about it we're gonna jump him." (RP 1456) According to Mr. Pineda, Mr. Gallegos may have acquiesced in this plan. (RP 1449, 1456)

After Mr. Eby, accompanied by Mr. Pederson, arrived at Mr. Whalen's garage they talked and smoked some meth. (RP 1457)

Eventually Mr. Pineda accused Mr. Eby of trying to set him up. (RP 1462) Mr. Eby initially denied the charge, then acknowledged he might have said something like that, but it was before he had gotten to know Mr. Pineda. (RP 1463) Mr. Villa telephoned Mr. Campos who confirmed that Mr. Eby was trying to have Mr. Pineda set up. (RP 1463, 1466)

Mr. Pineda testified that, as soon as Mr. Campos confirmed the allegation, "Mike Eby kind of just took off on me and started punching

me.” (RP 1466) Mr. Pineda told the jury that as Mr. Eby was hitting him he heard a gunshot, Mr. Eby stopped moving, and Mr. Gallegos pulled him off and shot him again. (RP 1471-72)

After dragging Mr. Eby’s body to the middle of the room, Mr. Pineda gave his gun to Mr. Villa and told him to take Mr. Pederson inside the house. (RP 1475, 1481) Mr. Pineda testified: “Mr. Gallegos informed me to inform Mr. Villa to kill Mr. Pederson” and Mr. Pineda told Mr. Villa “[t]hat Mr. Gallegos told me to tell him that he’s gonna have to kill him.” (RP 1492, 1496) According to Mr. Pineda, he, Mr. Gallegos and Mr. Whalen wrapped Mr. Eby’s body and put it in the trunk of his car. (RP 1499)

The plan was to drive Mr. Eby’s car to Roza Dam, shoot Mr. Pederson, pull the car into the water, leave it and go home in the car driven by Mr. Whalen. (RP 1501, 1504) Mr. Villa shot Mr. Pederson, Mr. Pineda put Mr. Eby’s car in drive and then they took off. (RP 1512-13)

2. MR. WHALEN’S TESTIMONY.

According to Mr. Whalen, Mr. Pineda arrived at his home around seven o’clock in the evening of December 20, accompanied by Mr. Villa and Mr. Gallegos. (RP 1301) They went out to his garage. (RP 1303-04)

Some time later he saw Mr. Eby, whom he had met a couple of times before, and Mr. Pederson, whom he had never seen before, walking towards his garage. (RP 1306)

About half an hour later he heard gunshots in the garage. (RP 1307) A minute or two later Mr. Pineda asked him for a sheet or tarp. (RP 1307-08) Mr. Whalen told the jury that after a few minutes he went to the garage where he found Mr. Pineda, Mr. Villa, Mr. Pederson, and Mr. Gallegos, along with Mr. Eby's body wrapped in a sheet. (RP 1309)

Messrs. Pineda, Villa and Pederson all followed him into the back of the house. (RP 1313) Mr. Pineda handed Mr. Villa a pistol, told him to stay there, and went back out to the garage. (RP 1313-14) Eventually Mr. Pineda asked him to drive his car and follow them. (RP 1323) They drove to Rosa Dam, then back towards town, and pulled off the road towards the river. (RP 1328-32) Mr. Whalen heard gunshots. (RP 1333) Messrs. Pineda, Villa and Gallegos got in Mr. Pineda's car and drove to Mr. Whalen's house where he got out and they left. (RP 1336, 1339)

3. MR. VILLA'S TESTIMONY.

Mr. Villa told the jury that although he knew of Mike Eby's effort to set Mr. Pineda up, he didn't know what it was about until Mr. Pineda confronted Mr. Eby in the garage. (RP 1644) He used Mr. Pineda's

phone to call Mr. Campos, and when Mr. Campos confirmed that Mr. Eby had tried to set him up, Mr. Pineda said that was all he wanted to know and hung up. (RP 1644-50) Then Mr. Pineda told Mr. Eby "that he was gonna get messed up after we were done smoking" and tucked in his shirt so his gun was showing. (RP 1650-51) Mr. Eby told Mr. Pineda it wasn't going to go down like that, then swung on him and hit Mr. Pineda so hard they both fell to the ground. (RP 1651) Then, in a split second, four or five gunshots went off. (RP 1651)

According to Mr. Villa, "Mike Eby's swinging on him and within a split second um like 4 or 5 gunshots go out and like um in the time it takes to get like, when the gunshots go off Gallegos had his gun out and I see the last gunshot the muzzle flash from the gun." (RP 1652) "I didn't know none of that was gonna go down it just happened so fast" (RP 1671)

Mr. Pineda got up with his gun out, told Mr. Villa to take Mr. Pederson inside, and gave Mr. Villa his gun. (RP 1680-81) "So I was like kind of basically just doing what they said or what Pineda said." (RP 1683) He confirmed that Mr. Pineda told him to kill Mr. Pederson. (RP 1689)

4. COURT OF APPEALS DECISION.

Defense counsel did not request, and the court did not give, an instruction cautioning the jury as to reliance on accomplice testimony. (RP 1874-85, 1907) The Court of Appeals affirmed Mr. Gallegos's conviction, holding that in light of defense counsel's arguments casting doubt on the veracity and reliability of Messrs. Pineda, Villa and Whalen together with the standard instructions actually given, the record did not demonstrate a reasonable probability that the outcome of the trial would have been different if the jury had been given the cautionary instruction.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another division of the Court of Appeals, or involves a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b).

The federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend. VI; Washington Const. art. I, § 22. The Court of Appeals found that defendant was not prejudiced by defense counsel's failure to request a prophylactic instruction advising the jury to act upon the testimony of accomplices with great caution even though the only evidence supporting the elements of the charged offense consisted of

the uncorroborated testimony of the accomplices. This decision violates the constitutional guarantees of effective assistance of counsel and conflicts with Washington appellate cases holding that “failure to give [the cautionary] instruction is always reversible error when the prosecution relies *solely* on accomplice testimony;” *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984); *State v. Sherwood*, 71 Wn. App. 481, 484-85, 860 P.2d 407 (1993).

1. A CAUTIONARY INSTRUCTION IS NECESSARY TO SAVE THE DEFENDANT FROM THE PREJUDICIAL EFFECT OF UNCORROBORATED ACCOMPLICE TESTIMONY.

Mr. Gallegos contends his lawyer provided ineffective assistance of counsel by failing to request the cautionary instruction and the Court of Appeals incorrectly concluded that the giving such an instruction would not have changed the outcome, in light of other jury instructions and counsel’s closing argument casting doubt on the credibility of accomplice testimony.

The pattern jury instruction provides:

Testimony of an accomplice, given on behalf of the [State] [City][County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the

defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 6.05, at 184 (3d ed. 2008) (WPIC).

Washington courts have repeatedly expressed concern over the reliability of accomplice testimony. *State v. Harris*, 102 Wn.2d 148, 153, 685 P.2d 584 (1984); *State v. Badda*, 63 Wn.2d 176, 181, n. 1, 385 P.2d 859 (1963).

“Whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration.” 102 Wn.2d at 154. Finding that “this case requires us to determine the extent of corroboration necessary to save the defendant from prejudice in the absence of a cautionary instruction” the Court reviewed the rules or guidelines provided in similar cases from several jurisdictions and concluded that failure to give a cautionary instruction is reversible error when accomplice testimony is “wholly uncorroborated” but, when such testimony is “substantially corroborated,” failure to give the instruction may not be reversible error. 102 Wn.2d at 153-55.

In undertaking to clarify the concept of “substantial corroboration,” *Harris* relied in part on the reasoning in *State v. Moore*,

229 Kan. 73, 81, 622 P.2d 631 (1981). The *Moore* analysis used the term “material” to qualify “substantial corroboration.”¹ 229 Kan. at 81, 622 P.2d at 639. “On a scale of full and complete corroboration, substantial material corroboration, slight corroboration, or no corroboration, the record before us fits into the ‘substantial material corroboration’ category.” *Id.*

In *State v. Gross* the court noted that the corroborating evidence “must be as to some material fact” and “is sufficient if it fairly tends to connect the accused with the commission of the crime charged” 31 Wn.2d 202, 216–17, 196 P.2d 297 (1948). The defendant was charged with owning and operating or conducting a gambling game. The accomplices testified that they were working for the defendant when they helped out in the games. *Id.* at 217. The Court found this evidence was corroborated by extensive detailed testimony tending to show that the defendant participated in the games and was involved in hiring and firing the employees. *Id.* The accomplice’s testimony in *Gross* was corroborated by other evidence relating to the “ultimate facts.” The Court held that accomplice testimony need not be corroborated as to every

¹ “Material. Important; more or less necessary; having influence or effect; going to the merits” Black’s Law Dictionary, p. 880 (5th Ed., 1979).

material fact so long as corroboration is provided as to some material fact.
31 Wn.2d at 217.

Harris, Gross and Moore show that “substantial corroboration” must include corroboration of at least some evidence that is “material” to the ultimate facts in the case; corroboration of innocuous facts is not substantial corroborative evidence. In the present case, the accomplice testimony is not “substantially” corroborated.

2. THE DEFENDANT WAS PREJUDICED BY DEFENSE COUNSEL’S FAILURE TO REQUEST THE PROPHYLACTIC ACCOMPLICE TESTIMONY INSTRUCTION.

To prevail on a claim of ineffective assistance of counsel the defendant must show he suffered prejudice as a result of counsel’s deficient performance. *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

Here, material facts would consist of Mr. Gallegos’s presence in Mr. Whalen’s garage at the time of the murder, his possession of the murder weapon, his having fired the shots that killed Mr. Eby or ordered Mr. Villa to kill Mr. Pederson, or his presence at the scene where Mr. Pineda and his accomplices disposed of the bodies. Evidence of these facts was provided exclusively by the testimony of the accomplices.

Evidence Mr. Gallegos accompanied Messrs. Pineda and Villa to Mr. Whalen's garage was provided by Mr. Whalen, Mr. Pineda, and Mr. Villa. (RP 1301, 1447-49, 1545, 1606, 1609) Mr. Pineda testified Mr. Gallegos was aware of, or agreed to, his plans. (RP 1301, 1304) Mr. Villa said Mr. Gallegos was "blocking the door." (RP 1664) Mr. Villa and Mr. Pineda provided the evidence that Mr. Gallegos was armed and that he shot Mr. Eby. (RP 1471-72, 1510, 1551, 1664-67, 1702-03, 1750)

Mr. Pineda testified Mr. Gallegos told people what to do, including disposing of the body and shooting Mr. Pederson. (RP 1487, 1494) Mr. Villa testified Mr. Pineda threw his gun at him and told him to shoot Mr. Pederson and that he was afraid if he didn't do it he would be shot by Mr. Gallegos. (RP 1701-04)

Neither the State nor the court has identified any evidence from other witnesses that corroborates these material facts. Apart from stating that Mr. Pineda had previously known Mr. Eby, the statement of facts in the Respondent's brief relies exclusively on the testimony of the accomplices. (Resp. Br. at 1-6) The State points out that Mr. Eby's daughter testified he was going to meet Mr. Pineda the night he disappeared, that Mr. Pineda owed her father money, and that she heard Mr. Pederson in the car with Mr. Eby. (Resp. Br. at 11; RP 641, 804) Her father testified his son went to Mr. Whalen's house. (Resp Br. at 11) This

evidence does not corroborate any facts relating to Mr. Gallegos's being involved in the events of that evening.

The State notes that Mr. Campos testified that Mr. Eby had solicited him to rob Mr. Pineda, and that he was called that night to confirm this. (Resp. Br. at 11) The State presented phone records showing that Mr. Eby and Mr. Pineda had called him. (Resp. Br. at 11) This evidence corroborates accomplice testimony as to events involving Mr. Pineda but does not corroborate any evidence incriminating Mr. Gallegos. Mr. Pineda's wife testified that she had seen Mr. Gallegos at her home on the evening of the murder and that she had heard him, along with her husband and Mr. Villa, after she had gone to bed. (Resp. Br. at 12) While this is consistent with some of her husband's testimony, it does not corroborate the accomplices' testimony that Mr. Gallegos accompanied Mr. Pineda and Mr. Villa to Mr. Whalen's garage or was involved in any of the events that occurred there.

The State asserts that the pathologist confirmed that Mr. Eby and Mr. Pederson were killed by gunshot wounds, which again fails to corroborate any evidence that Mr. Gallegos was present at the shootings. (Resp. Br. at 12) Similarly the State notes various evidence that shows Mr. Eby was killed in Mr. Whalen's garage, but does not suggest that this has

any tendency to prove Mr. Gallegos's involvement in the murders. (Resp. Br. at 13-14)

Similarly, the Court of Appeals description of the events around the murders appears to be based solely on statements of the accomplices. (Opinion at 3-5) The court attributes some significance to the fact that the pathologist's opinion as to the number of shots fired was consistent with Mr. Villa's testimony as to the number of shots fired. (Opinion at 5) In its analysis of the corroborative value of the non-accomplice testimony, the court notes that physical evidence such as cell phone use and location and materials found in Mr. Whalen's garage were consistent with materials in which Mr. Eby was wrapped. (RP 12-13) The court does not show that any of this evidence corroborates accomplice testimony material to the issue of whether Mr. Gallegos was involved in, or guilty of, the murders.

The record in this case does not include the substantial corroboration necessary to "save the defendant from prejudice in the absence of a cautionary instruction" *Harris*, 102 Wn.2d at 153-54. Because counsel failed to request the prophylactic accomplice testimony instruction, defense counsel failed to prevent the jury's reliance on the prejudicial accomplice testimony. Our courts recognize that accomplice testimony is unreliable and a jury must be warned to consider it with great

caution. The absence of such a warning was clearly prejudicial in the present case.

Apart from the testimony of the three accomplices, each of whom admitted participation in the events immediately surrounding these murders, no evidence implicates Mr. Gallegos. No independent evidence establishes his presence, or possession of the means, opportunity or motive to commit the murders.

The Court of Appeals opinion suggests that the possibility of prejudice was alleviated by defense counsel's closing arguments pointing out the accomplices' motives to lie and the court's instructions as to the weight to be given to each witness's testimony, and the bias or prejudice any witness may have shown, and stating that the jury were "the sole judges" of witness credibility. (Opinion at 13) Needless to say, if these standard pattern instructions were deemed sufficient to cure the prejudice resulting from the uncorroborated testimony of the defendant's alleged accomplices, the rule requiring the court to instruct the jury as to the especially cautious treatment to be accorded such testimony would be wholly unnecessary.

Case law does not clearly establish that, under the circumstances of such a case as this, the court's failure to give the accomplice instruction is reversible error if defense counsel fails to propose and request the

instruction. Nevertheless, in light of the recognized unreliability of accomplice testimony and the complete lack of corroborating evidence, the court should hold that counsel's failure to request the cautionary instruction prejudiced the defense and deprived Mr. Gallegos of the effective assistance of counsel required by the Sixth Amendment.

3. ABSENT THE PREJUDICIAL UNCORROBORATED TESTIMONY OF THE ALLEGED ACCOMPLICES, THE EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT THE FINDING OF PREMEDITATION.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"Premeditation" is " 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.' " *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)). The premeditation required to support conviction of murder in the first degree "must involve more than a moment in point of time." RCW 9A.32.020(1). The time may be very short, provided it is a

sufficient period within which to reflect or deliberate. *State v. Bingham*, 105 Wn.2d 820, 824, 719 P.2d 109 (1986).

Motive, and the planned presence of a weapon necessary to facilitate a killing, are particularly relevant to establish premeditation. *Pirtle*, 127 Wn.2d at 644; *Bingham*, 105 Wn.2d at 827.

All evidence supporting the inference the Mr. Gallegos had a motive to shoot Mr. Eby and Mr. Pederson, or the inference that he planned to have a weapon available to kill these men, is derived from the uncorroborated testimony of the alleged accomplices. The only evidence of motive relates to Mr. Pineda's assertion that he told Mr. Gallegos that Mr. Eby had tried to have a rival gang member rob him and Mr. Gallegos's presumed loyalty to Mr. Pineda, based on their membership in the same gang, and Mr. Villa's testimony that Mr. Eby was assaulting Mr. Pineda immediately before the shooting. The only evidence that Mr. Gallegos had planned to have a weapon available to kill either of these men was Mr. Pineda's testimony that Mr. Gallegos was armed prior to their arrival at Mr. Whalen's garage. Absent their testimony, no evidence supports a finding that Mr. Gallegos killed either of these men with premeditation, and no rational trier of fact could have found this element of the offense beyond a reasonable doubt.

The premeditation element merely provides a simple example of the necessity of instructing jurors to act upon the testimony of accomplices with great caution and to find the defendant guilty upon such testimony alone only if, after carefully considering the testimony, they are satisfied beyond a reasonable doubt of its truth. The same reasoning may be applied to each of the other elements of first degree murder.

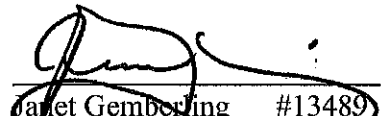
F. CONCLUSION

Mr. Gallegos's first degree murder convictions were based solely on the uncorroborated testimony of the three individuals who were admittedly involved in the murder. He was prejudiced by defense counsel's failure to propose an instruction cautioning the jury to act upon such testimony with great caution and to find the defendant guilty only if satisfied beyond a reasonable doubt as to its truth. This failure constitutes ineffective assistance of counsel. The reasoning of the Court of Appeals is inconsistent with cases requiring the giving of such an instruction in these circumstances.

Review should be granted and the Court of Appeals decision should be reversed.

Dated this 5th day of January, 2017.

Respectfully submitted,


Janet Gemberling #13489
Attorney for Petitioner

APPENDIX A

FILED
OCTOBER 13, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	
Respondent,	)	No. 32841-4-III
	)	(consolidated with
v.	)	No. 34425-8-III)
)	
MARCO ANTONIO GALLEGOS,)	
)	
Appellant.	)	UNPUBLISHED OPINION
<hr style="width: 30%; margin-left: 0;"/>)	
)	
In the Matter of the Personal Restraint of)	
)	
MARCO ANTONIO GALLEGOS,)	
)	
Petitioner.)	

SIDDOWAY, J. — Marco Gallegos appeals his convictions of two counts of aggravated first degree murder and unlawful possession of a firearm. He contends that (1) he received ineffective assistance of counsel when his trial lawyer did not request a cautionary jury instruction on accomplice testimony, (2) insufficient evidence supports one conviction for aggravated first degree murder, and (3) he was denied his constitutional right to a speedy trial. We find no error, and that the evidence was sufficient to support the conviction. For those reasons, and because Mr. Gallegos raises no meritorious issues in a pro se statement of additional grounds or a consolidated personal restraint petition (PRP), we affirm his convictions and dismiss the PRP.

FACTS AND PROCEDURAL BACKGROUND

On December 21, 2012, the Kittitas County Sheriff's Office received a report of a car off the road near a diversion dam on the Yakima River with a body in the back seat. On responding, deputies found Ryan Pederson dead in the back seat of a car that belonged to his friend, Michael Eby. They soon found Mr. Eby's dead body wrapped in a sheet in the car's trunk. Both men had been shot.

About six weeks later, while executing a search warrant for the home of Troy Whalen in connection with a robbery and assault of a friend of Mr. Eby's, detectives located materials similar to those used to wrap Mr. Eby's body. They applied for and obtained another search warrant for evidence related to the murder investigation. After their search yielded a sheet matching the one used to wrap Eby's body, they administered *Miranda*¹ warnings to Mr. Whalen, who agreed to talk and identified Jose Pineda, Heriberto Villa, and another Mexican man he did not know as having been involved in the murders of Mr. Eby and Mr. Pedersen. Mr. Pineda was arrested on February 1 and, after *Miranda* warnings, identified Whalen, Villa, and Marco Gallegos as having been involved.

On February 6, 2013, all four men were charged, as principal or accomplice, with the aggravated first degree murders of Mr. Eby and Mr. Pederson, and alternatively, as to

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

Mr. Pederson, with first degree felony murder in the course of or in flight from a first or second degree kidnapping. Mr. Gallegos was also charged with first degree unlawful possession of a firearm. Trial was set for April 1.

Events leading to the charges

Mr. Gallegos and his three codefendants have a complicated history. Mr. Gallegos and Mr. Pineda were both members of La Raza, a Norteño gang. Mr. Pineda was a drug dealer for the gang. He sold methamphetamine to Mr. Whalen, who was not a member of the gang, but in whose garage Mr. Pineda and others often hung out, and out of which they ran drugs. In exchange for use of his garage, Mr. Whalen was provided with drugs.

Mr. Villa was not a member of the La Raza gang. He and Mr. Pineda were friends because they used to “tag” (paint their graffiti “signatures” on public and private property) together. David Campos, a member of a Sureño gang, a rival gang to the Nortefios, had also been part of the tagging group with Mr. Villa and Mr. Pineda. Mr. Campos and Mr. Villa were friends. And despite being members of rival gangs, Mr. Campos and Mr. Pineda were also friends.

The late Mr. Eby was a drug customer of Mr. Pineda’s. At the time of Mr. Eby’s death, the two had known each other for about eight months, saw each other about once a week, and often did drugs together in Mr. Whalen’s garage. Mr. Eby was not a member of the La Raza gang.

Sometime before December 20, Mr. Pineda learned from Mr. Villa, who had heard from Mr. Campos, that Mr. Eby tried to solicit Mr. Campos to rob Mr. Pineda. Angered by the information, Mr. Pineda decided to confront Mr. Eby. He contacted him on December 20 and, on the pretext that he wanted to pay Mr. Eby \$600 that Mr. Pineda owed, arranged to meet him at Mr. Whalen's garage that evening. Depending on how Mr. Eby reacted to the accusation that he tried to set him up, Mr. Pineda was prepared to "check" Mr. Eby, meaning "jump him . . . [and b]eat him up." Report of Proceedings (RP) at 1452.

Mr. Pineda arranged for Mr. Villa to be at the garage as backup when he confronted Mr. Eby. When Mr. Pineda happened to run into Marco Gallegos that afternoon, he brought him along as well. Mr. Gallegos was a member and front line soldier of La Raza, and people feared him. On that December 20 evening, both Mr. Pineda and Mr. Gallegos were armed, as they usually were.

After arriving at Mr. Whalen's garage on the evening of the 20th, Mr. Pineda and Mr. Villa smoked methamphetamine. Mr. Gallegos, who did not do drugs, waited with them for Mr. Eby. When Mr. Eby arrived, he was accompanied by his friend, Ryan Pederson. Mr. Eby entered the garage and smoked and talked with Mr. Pineda. Mr. Pederson later entered and joined them.

After smoking and talking for a while, Mr. Pineda confronted Mr. Eby about the reported robbery solicitation. At that time, Mr. Gallegos was standing at the door to the

garage, blocking it. Mr. Eby admitted he might have once talked about setting up Mr. Pineda but said that when he got to know him better he decided there was no reason for that. Mr. Pineda asked Mr. Villa to call Mr. Campos and put the call on a speakerphone so Mr. Campos could confirm the solicitation by Mr. Eby. Mr. Villa was able to reach Mr. Campos, who confirmed it was Mr. Eby who tried to set Mr. Pineda up for robbery.

When the phone call ended, Mr. Pineda said to Mr. Eby that "he was gonna get fucked up" and tucked his shirt in to show his gun. RP at 1663. Instead, Mr. Eby preemptively attacked Mr. Pineda. Mr. Eby was able to push Mr. Pineda up against some motorcycles, where he straddled him and struck him in the face, using both fists. After Mr. Eby hit Mr. Pineda hard several times, Mr. Gallegos walked from the doorway to where Mr. Eby was straddling Mr. Pineda, and shot him at point blank range.

Mr. Eby stopped moving and dropped onto Mr. Pineda. Mr. Gallegos grabbed Mr. Eby by the shirt, pulled him off of Mr. Pineda, and shot Mr. Eby two more times. His shots were to the right side of Mr. Eby's head; to his upper right arm, with the bullet passing through the arm and into the chest; and to his mid-chest. The two shots to or through the chest passed through Mr. Eby's heart. The forensic pathologist who later performed an autopsy on Mr. Eby concluded that any of the three shots would have been fatal.

Mr. Pineda claims he never intended for Mr. Eby to get shot and when he asked Mr. Gallegos afterwards why he shot him, Mr. Gallegos answered that it was because Mr. Pineda “was getting fucked up.” RP at 1474.

After Mr. Eby was shot, Mr. Gallegos told Mr. Pineda to tell Mr. Villa to kill Mr. Pederson, so there would be no witnesses. Mr. Pineda understood that it was good to have Mr. Villa “more involved,” to keep him quiet. RP at 1493.

Mr. Eby’s body was loaded into the trunk of his own car and Mr. Gallegos, Mr. Pineda, Mr. Villa, and Mr. Pederson—who was still alive at that point—got into the car and drove to Roza Canyon, which Mr. Whalen suggested as a place where they could leave the car, since no one would be there in December. Mr. Whalen drove there separately in Mr. Pineda’s car.

The two cars reached the area of the Roza diversion dam at around 11:00 p.m. or 12:00 a.m. Upon reaching the destination, Mr. Gallegos, Mr. Villa, and Mr. Pineda got out of Mr. Eby’s car and Mr. Pineda handed his gun to Mr. Villa. Mr. Villa, who would later claim he was afraid that Mr. Gallegos would shoot him if he did not shoot Mr. Pederson, shot Mr. Pederson two times, killing him. Mr. Whalen then drove Messrs. Pineda, Gallegos, and Villa back to his home.

Procedural history

After being charged on February 6, 2013, Mr. Gallegos continuously asserted his

speedy trial rights. Over his continued objection, but with the agreement of at least one of the other defendants, trial was continued on eight occasions, as follows:

<u>Trial date</u>	<u>Date request for continuance was granted</u>
April 1, 2013	March 21, 2013; new date: June 24, 2013
June 24, 2013	June 13, 2013; new date: November 25, 2013
November 25, 2013	November 14, 2013; new date: December 16, 2013
December 16, 2013	December 11, 2013; new date: April 14, 2014
April 14, 2014	April 11, 2014; new date: May 5, 2014
May 5, 2014	April 30, 2014; new date: July 14, 2014
July 14, 2014	Effectively on July 14, formalized on July 18, 2014; new date: August 20, 2014
August 20, 2014	

Between October 4 and December 2, 2013, Mr. Whalen, Mr. Pineda, and Mr. Villa, participated in recorded “free talks” with the State. At a status conference on December 11, 2013, the court and counsel began discussing the *Bruton*² issues that would

² *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). In *Bruton*, the United States Supreme Court held that the defendant’s confrontation rights under the Sixth Amendment to the United States Constitution were violated when he was “powerfully incriminat[ed]” by admission of a pretrial statement of his codefendant, Evans, who did not take the stand at trial. *Id.* at 135-37. It held that the Sixth Amendment violation was not prevented by a limiting instruction that the jury could consider the confession only against Evans. *Id.* at 137.

In *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the Supreme Court validated the use of redactions of a codefendant’s statement, so that it contains no explicit or implicit reference to the complaining defendant, together

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

be present in the event there was a joint trial in which a codefendant who had provided a statement did not testify. Lawyers for the defendants took the position that there was no amount of sanitation of the recorded statements that would make a joint trial possible, and that the cases should be severed.

While the charges had been filed against the defendants jointly and it was their responsibility under CrR 4.4(a)(1) to move to sever, the trial court believed that the issue of severance and any *Bruton* issues could most effectively be resolved by having the State provide the court and the parties with an early, candid assessment of whether a joint trial was possible, and, if so, how it proposed to redact any recorded statements it proposed to offer. In the court's view, an understanding was reached at the hearing that took place on December 11, 2013, that the State would file a preliminary witness list and either concede the severance issue or present its proposal for a joint trial by the time of a January 31, 2014 status hearing. In hearings on January 31 and February 7, 2014, the court scolded the prosecutor for failing to file the requested materials and refusing to address the severance issue until and unless the defendants filed a motion. Frustrated by the delay in bringing the severance issue to a head, the court established a briefing

with a limiting instruction, as means for protecting a criminal defendant's Sixth Amendment rights in most cases. The Supreme Court later held that a defendant's Sixth Amendment confrontation right was not protected where "[t]he blank space in an obviously redacted confession also points directly to the defendant," such that it had the same powerfully incriminating effect as in *Bruton*. *Gray v. Maryland*, 523 U.S. 185, 194, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998).

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

schedule under which the defendants would file motions for severance and those, and any confrontation issues, would be resolved at a hearing on March 7.

The day before the severance hearing, Mr. Pineda and Mr. Whalen entered into agreements with the State to be cooperating witnesses, which the State asserted resolved *Bruton* issues and made severance unnecessary. Mr. Gallegos and Mr. Villa continued to argue that severance would be required in light of Mr. Villa's intent to defend on an allegedly inconsistent basis of diminished capacity, however. On March 28, 2014, the court heard argument on that basis for severance and denied the motion, concluding that Mr. Gallegos and Mr. Villa had not yet demonstrated that their defenses would be inconsistent. Then, on June 26, 2014, after the State conceded that severance of Mr. Villa's and Mr. Gallegos's trials *was* necessary, the court signed an order severing the codefendants' cases. Mr. Gallegos's trial remained set for July 14.

Continuances after the fifth, April 14 trial date were entered for a variety of other reasons. A principal reason was pleas entered into between the State and Mr. Gallegos's codefendants. During this time frame, the State also requested a continuance after belatedly discovering that the forensic pathologist who had performed the autopsies on Mr. Pederson and Mr. Eby was out of the country until August, and it would cost over \$20,000 for the county to fly him to Yakima to testify. The court denied that motion to continue. But after a plea agreement with Mr. Villa was entered on July 14, Mr. Gallegos's seventh trial date, the court granted a final continuance of trial to August 20.

Mr. Gallegos's trial finally began over 18 months after the charges against him were filed. Mr. Whalen, Mr. Pineda, and Mr. Villa each testified about Mr. Gallegos's involvement in the two murders. Although Mr. Gallegos's lawyer challenged the three accomplices' credibility in cross-examination, he did not propose or request a jury instruction cautioning the jury to carefully examine the testimony of an accomplice.

At the conclusion of trial, the jury found Mr. Gallegos guilty on all counts. The court sentenced Mr. Gallegos to life imprisonment without the possibility of parole. He appeals.

ANALYSIS

Mr. Gallegos assigns error to (1) ineffective assistance of counsel where his trial lawyer failed to propose or request an instruction cautioning jurors against placing too great a reliance on testimony by accomplices, (2) the insufficiency of evidence to establish that the murder of Mr. Eby was premeditated, and (3) a violation of his constitutional right to a speedy trial. We address the assignments of error in turn.

I. Mr. Gallegos does not establish prejudice from the absence of a cautionary instruction on accomplice testimony

A Washington pattern jury instruction cautions jurors, consistent with Washington

case law, that the uncorroborated testimony of an accomplice should be carefully examined:

Testimony of an accomplice, given on behalf of the [State] [City] [County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.05, at 184 (3d ed. 2008) (WPIC). Mr. Gallegos's trial lawyer did not propose or request that WPIC 6.05 or any similar instruction be given to the jury. Mr. Gallegos argues this constitutes ineffective assistance of counsel.

We review ineffective assistance of counsel claims de novo, engaging in a two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). First, the defendant must show he received deficient representation. *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995) (citing *Strickland*, 466 U.S. at 688-89). Deficient performance is determined using an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). Second, the defendant must show he or she suffered prejudice as a result of the deficient performance. *Mierz*, 127 Wn.2d at 471 (citing *Strickland*, 466 U.S. at 687). Prejudice will result if “‘counsel’s errors were so serious as to deprive the defendant of a fair trial.’” *Id.* (quoting

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

Strickland, 466 U.S. at 687). “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Id.* (citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A reasonable probability is a probability sufficient to undermine confidence in the outcome; it does not require a showing that the outcome would more likely than not be altered. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (citing *Strickland*, 466 U.S. at 693-94).

If one of the two prongs of the *Strickland* test is absent, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). And “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

The gist of WPIC 6.05 is that accomplice testimony is suspect, and most suspect when it is uncorroborated. The instruction nonetheless permits the jury to consider accomplice testimony “in the light of other evidence in the case” and even to rely on such testimony alone, if, “after carefully considering the testimony, [it is] satisfied beyond a reasonable doubt of its truth.”

The State called over two dozen witnesses during Mr. Gallegos’s trial. While three were accomplices, their testimony was materially consistent. And the collective recount of the accomplices was corroborated by other witnesses who were not accomplices, and by physical evidence, such as evidence of Mr. Eby’s and Mr. Pineda’s cell phone use and location on the night of the murders, and evidence connecting the

materials used to wrap and tie Mr. Eby's body to materials in Mr. Whalen's home and garage.

The jury was aware the accomplices had a motive that might lead them to lie. The evidence established, and Mr. Gallegos's trial lawyer argued, that Mr. Pineda and Mr. Villa initially made inconsistent statements to police, denying any involvement in the murders. Mr. Gallegos's lawyer cross-examined them about deals they made with the State in exchange for testifying against his client. Beyond that, Mr. Gallegos's trial lawyer established that Mr. Pineda and Mr. Villa were close friends—much closer than they were to Mr. Gallegos, implicating a motive to lie to protect one, the other, or each other. He established on cross-examination that Mr. Villa had tried to use Mr. Gallegos as a fall guy once before.

Mr. Gallegos's lawyer highlighted the accomplices' drug use, and the fact that his own client did not use drugs. He elicited evidence on Mr. Villa's power in the La Raza gang, and Mr. Gallegos's lack of power.

Although the jurors were not specially cautioned to closely examine the testimony of accomplices, they were instructed, generally, that they were “the sole judges of the credibility of each witness” and “the value or weight to be given to the testimony of each witness.” Clerk's Papers (CP) at 1169 (WPIC 1.02). They were instructed that “[i]n considering a witness's testimony, [they] may consider . . . any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

fallen on the floor, was sufficient to establish premeditation.” *Gentry*, 125 Wn.2d at 598 (citing *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992)).

In *State v. Condon*, 182 Wn.2d 307, our Supreme Court reiterated the reasoning of *Pirtle* that the fact that a defendant embarked on a robbery with a loaded handgun is sufficient evidence from which a rational jury could find premeditated murder, even if the defendant could not have foreseen the precise event that would cause him to kill. It cited *State v. Miller*, 164 Wash. 441, 447, 2 P.2d 738 (1931), in which the court affirmed a conviction predicated on premeditation where, when Miller entered an office, armed, intending to rob it, and saw two men present, “he may have *very hastily* concluded that it was advisable to dispose of [the decedent] so he would have but one man to contend with.” (Emphasis added.)

In this case, Mr. Gallegos was in Mr. Whalen’s garage, armed, with the intent to provide backup if Mr. Pineda decided to “check” Mr. Eby. This is evidence from which premeditation may be inferred (even though it need not be inferred), in the same sense as premeditation may be inferred where a murder is committed in the course of an armed robbery. A rational juror could find that when it was Mr. Pineda who got “checked,” the murder of Mr. Eby was the unsurprising result of the reason Mr. Gallegos was present and armed in the first place. It could find that the murder was the product of reflection, since, according to Mr. Pineda’s testimony, Mr. Gallegos waited long enough to see that Mr. Pineda was on the losing end of a fight before he proceeded to where Mr. Eby was

may have shown . . . and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.” *Id.*

Where Mr. Gallegos’s trial lawyer ensured that jurors were aware of evidence casting doubt on the credibility of the accomplice testimony and they received the general instruction that they should consider personal interest and bias, Mr. Gallegos fails to demonstrate a reasonable probability that the outcome of trial would have been different had the jury been given WPIC 6.05 or a similar instruction.

II. Sufficiency of evidence to support a finding of premeditation

Mr. Gallegos next argues the evidence was insufficient to support a jury finding that Mr. Eby’s murder was premeditated, focusing on the testimony of Mr. Pineda and Mr. Villa that there was no plan to shoot Mr. Eby, and Mr. Villa’s testimony that the shooting occurred in a “split second.” Br. of Appellant at 23.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of evidence admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (quoting *Salinas*, 119 Wn.2d at 201).

A person is guilty of murder in the first degree when “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

third person.” RCW 9A.32.030(1)(a). A person is guilty of second degree murder if they act with the “intent to cause the death of another person but without premeditation.”

RCW 9A.32.050(1)(a). “The element of premeditation distinguishes first and second degree murder.” *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986).

“Premeditation” has been defined as “‘the deliberate formation of and reflection upon the intent to take a human life’ and involves ‘the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.’” *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)). By statute, the premeditation required in order to support conviction of the crime of murder in the first degree “must involve more than a moment in point of time.” RCW 9A.32.020(1). The time may be very short, provided it is a sufficient period within which to reflect or deliberate. *Bingham*, 105 Wn.2d at 824, 827 (citing *State v. Smith*, 12 Wn. App. 720, 732-33, 531 P.2d 843 (1975), *aff’d*, 88 Wn.2d 127, 559 P.2d 970 (1977)).

Motive, evidence of planning, and the method of killing are particularly relevant to establish premeditation. *Pirtle*, 127 Wn.2d at 644. “The planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury.” *Bingham*, 105 Wn.2d at 827. It has also been “held that evidence showing the victim was shot three times in the head, two times after he had

straddling Mr. Pineda, fired a foreseeably fatal shot at Mr. Eby, and then pulled Mr. Eby off of Mr. Pineda in order to get two cleaner, foreseeably fatal, shots. The evidence was sufficient.

III. Constitutional speedy trial right

Both the United States and the Washington Constitutions provide a criminal defendant with the right to a speedy trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. A defendant's speedy trial rights under article I, section 22 are coextensive with his or her rights under the Sixth Amendment and the analysis is substantially the same. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). This court reviews a defendant's claim that his or her right to a speedy trial was violated de novo. *Id.* at 280-81. If a defendant's constitutional right to a speedy trial is violated, the remedy is dismissal of the charges with prejudice. *Id.* at 282 (citing *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

“It is . . . impossible to determine with precision when the right [to a speedy trial] has been denied.” *Iniguez*, 167 Wn.2d at 282 (alterations in original) (quoting *Barker*, 407 U.S. at 521). “[S]ome pretrial delay is often ‘inevitable and wholly justifiable.’” *Iniguez*, 167 Wn.2d at 282 (quoting *Doggett v. United States*, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). As a result, “any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.” *Barker*, 407 U.S. at 522.

In *Barker*, the United States Supreme Court adopted a balancing test that weighs the conduct of the State and the defendant in order to determine whether speedy trial rights have been denied in a given case. It identified four nonexclusive factors as among those the court should weigh: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial right, and (4) prejudice to the defendant. 407 U.S. at 529, 530. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Id.* at 530.

Delay. Whether delay is presumptively prejudicial is a fact-specific inquiry. *Iniguez*, 167 Wn.2d at 283, 291. Commentators have observed that in speaking of "presumptive prejudice," the Supreme Court appears not to mean a demonstration of actual prejudice or to contemplate a shift to the prosecution of the burden of demonstrating an absence of prejudice, but "[p]robably . . . that a claim of denial of speedy trial may be heard after the passage of a period of time which is, prima facie, unreasonable in the circumstances." 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.2(b) at 129 (4th ed. 2015) (quoting H. Richard Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1385 (1972)). In this connection, a court should consider the length of delay, the complexity of the charges and the reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292. For example, "a tolerable delay for trial on 'an ordinary street crime is considerably less than for a serious,

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

complex conspiracy charge.’” *Id.* (quoting *Barker*, 407 U.S. at 531). Courts also consider whether the defendant was in custody as well as the amount set for bail.

In *Doggett*, the Supreme Court observed that “[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year.” 505 U.S. 652 n.1 (citing 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 18.2(b) at 405 (1984)). Our own Supreme Court has criticized other courts’ reliance on *Doggett*’s reference to a one-year period as an abdication of their duty to engage in a fact-specific inquiry in each case. *Iniguez*, 167 Wn.2d at 292.

Applying a fact-specific approach, considerations here that indicate, prima facie, an unreasonable passage of time are that 18 months is a substantial period, that Mr. Gallegos spent the entire time in custody, and that eyewitness testimony came to be a critical part of the State’s evidence. *Cf. Id.* (The relative importance in a case of eyewitness testimony “underscore[s] the importance of avoiding delays that could result in witnesses becoming unavailable or their memories fading.”). Considerations that indicate, prima facie, that pretrial activity in this case would reasonably take more time than usual are that it involved multiple actors, which *Iniguez* recognized as presenting the potential for greater pretrial delay, *see id.*; the related prospect of negotiations and plea agreements that could transform the character of the case; and, failing that, and with recorded confessions in hand, the State’s understandable effort, if feasible, to prepare for

a joint trial that it (and the law) would favor. Considering all, we find the roughly 18-month delay was sufficient to trigger a full *Barker* examination.

“‘[T]he length of delay is both the trigger for analysis and one of the factors to be considered.’” *State v. Ollivier*, 178 Wn.2d 813, 828, 312 P.3d 1 (2013) (quoting *United States v. Colombo*, 852 F.2d 19, 24 (1st Cir. 1988)). Having determined that the roughly 18-month delay was presumptively prejudicial, we consider “the extent to which [it] stretches beyond the bare minimum needed to trigger judicial examination of the claim.” *Doggett*, 505 U.S. at 652. “[T]he longer the pretrial delay, the closer a court should scrutinize the circumstances surrounding the delay.” *Iniguez*, 167 Wn.2d at 293. Given the circumstances that suggested that pretrial activities would reasonably take longer than usual, the roughly 18-month lapse between arrest and trial in this case is only minimally out of line with other cases with similar complexities. This factor weighs only slightly against the State.

Reason for delay. The second factor is the reason for delay. *Iniguez*, 167 Wn.2d at 284. “[D]ifferent weights [are to be] assigned to different reasons’ for delay.” *Id.* (quoting *Doggett*, 505 U.S. at 657) (alterations original). If the State deliberately causes the delay in order to frustrate the defense, the delay will be weighed heavily against it. *Iniguez*, 167 Wn.2d at 284. “Delay . . . due to institutional dysfunctions attributable to the State” by contrast, weighs less heavily against the State. *Ollivier*, 178 Wn.2d at 837.

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

Delay attributable to mere negligence on the part of the State or overcrowded courts similarly weighs against the State, to a reduced extent. *Iniguez*, 167 Wn.2d at 284.

If the delay is at the defendant's request, or if the defendant agrees to the delay, then he or she is deemed to have waived his or her speedy trial rights as long as the waiver was knowing and voluntary. *Id.* "Because 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant." *Vermont v. Brillon*, 556 U.S. 81, 90-91, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)).

In *Iniguez*, the defendant objected to four continuances. As in this case, some delays were requested by the State because it had already agreed with a codefendant to continue trial and it wanted to try the cases together. *Id.* at 294. Another was due to the State's need to interview witnesses. Yet another continuance was due to the State's discovery that a key witness had left the country and was unavailable for trial. Our Supreme Court determined that "[o]n balance, none of the continuances can be described as unreasonable, especially in light of the 'policy favoring joint trials,' [*State v.*] *Dent*, 123 Wn.2d [467,] 484, [869 P.2d 392 (1994)], and the juggling that trial courts must do to accommodate the schedules of multiple lawyers and multiple witnesses." *Iniguez*, 167 Wn.2d at 294.

In this case, a number of continuances were granted in order to allow the State to prepare for trial. Trial was reset from April 2013 to June 2013, from June 2013 to November 2013, from November 2013 to December 2013, and from December 2013 to April 2014, with the agreement of some other defendants, if not Mr. Gallegos, in order to allow the State to continue investigating and receive additional testing from crime labs. The forensic evidence needed and other investigation and preparation required to prosecute two aggravated murder charges against four defendants can reasonably be expected to require considerably more pretrial work than a typical prosecution.

Mr. Gallegos nonetheless argues that this factor should be weighed heavily against the State because of what he characterizes as gamesmanship on the part of the State over whether trial of the defendants would be severed. He can point to the trial court's unhappiness with the State for failing to candidly assess the need for severance between the December 2013 hearing and early 2014. Nonetheless, other developments in the case during that time frame either changed the complexion of the case or required resolution. They include the cooperation and plea agreements reached with Messrs. Whalen and Pineda; Mr. Villa's retention of an expert and assertion of a diminished capacity defense; the defendants' requests (including Mr. Gallegos's request) to make several motions that would be briefed and ready to be heard in late June 2014, at the earliest; and—prior to the time that Mr. Villa reached a plea agreement—a dispute between him and the State over whether his recorded statement must be produced to Mr. Gallegos.

While the trial court was clearly unhappy with the State's failure to comply with its request that the State prepare an early and candid assessment of whether and how the cases could be jointly tried, it was Mr. Gallegos whom the criminal rules required to make a motion to sever. It was always within his power to do so and thereby to force the State's hand. If any passage of time counts against the State for failing to comply with the trial court's request for a candid assessment of the severance issue, it weighs minimally against the State.

Defendant's assertion of speedy trial right. The third factor identified in *Barker* is whether the defendant asserted his speedy trial right. *Barker*, 407 U.S. at 528-29. Mr. Gallegos demanded a speedy trial and consistently objected to continuances.

The State contends the continuances were requested by Mr. Gallegos's counsel. But the trial court perceived defense counsel as joining in only the request for the first continuance, from April 1, 2013 to June 24, 2013. After Mr. Gallegos complained that his lawyer's agreement to the continuance presented a conflict of interest, Mr. Gallegos's lawyer did not join in any further continuance request.³ Most continuances were either

³ The State argues, incorrectly, that "On March 28, 2014, Gallegos informed the Court that the parties were in ongoing negotiations," citing "CP 182." Br. of Resp't at 29.

The cited record indicates that at the March 28 hearing the court asked whether there were ongoing negotiations. *The prosecutor* responded, "Both counsel have asked me to make offers." CP at 182. But Mr. Gallegos's lawyer disputed that negotiations were ongoing, and stated:

requested by the State or deemed necessary by the court, and the record shows over and over again that Mr. Gallegos personally, and through his counsel, contested the continuances. Mr. Gallegos's opposition to delay was consistent, and it was discussed and emphasized at nearly every hearing. This factor weighs against the State.

Prejudice. The last factor identified by *Barker* is prejudice to the defendant. "Prejudice is judged by looking at the effect on the interests protected by the right to a speedy trial: (1) to prevent harsh pretrial incarceration, (2) to minimize the defendant's anxiety and worry, and (3) to limit impairment to the defense." *Iniguez*, 167 Wn.2d at 295. Unless a defendant has been subjected to extreme delay (more than five years), the defendant must set forth particularized prejudice that would weigh heavily against the State. *Ollivier*, 178 Wn.2d at 842-44.

Here, the actual prejudice alleged by Mr. Gallegos is that delay enabled the State to fortify its case against him by persuading codefendants to testify as cooperating witnesses. But experience tells us that often, the impetus for agreement to cooperate is an

We're two weeks out for trial. We're over a year into it, and we've never had an offer. For the court to ask if negotiations are ongoing, there really haven't been. Nor do I think there will be meaningful negotiations with regard to Mr. Gallegos. I think the only offer that we will conceivably get is plead guilty to murder. I know that he's not going to take that.

Just to be frank with the court, I'm not real concerned with trying to have time to settle the case. I don't think it's going to happen. I think that all the issues that are outstanding should have been resolved by now.

CP at 191.

upcoming trial date, not the mere passage of time. Mr. Gallegos offers no evidence or argument why, if there had been an earlier firm trial date, his accomplices would not earlier have become cooperating witnesses. His suggestion that Messrs. Whalen, Pineda, and Villa would not have testified against him if the trial occurred earlier is not only speculative, but doubtful. This factor weighs in favor of the State.

On balance, the circumstances leading to roughly an 18-month delay in Mr. Gallegos's trial do not support a finding of a speedy trial violation of constitutional magnitude that would justify dismissal with prejudice of the charges against him.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds for review (SAG), Mr. Gallegos raises a number of alleged errors, some related, which we consolidate where appropriate.

*Prior conviction stipulation.*⁴ Mr. Gallegos argues he received ineffective assistance of counsel when his trial lawyer suggested he sign a stipulation for the unlawful possession of a firearm charge. The record includes Mr. Gallegos's stipulation that "defendant has [a] prior conviction for a serious offense." CP at 405-06. Mr. Gallegos argues that by stipulating, he conceded his guilt on the homicide charge. He requests an evidentiary hearing in order to determine how much prejudice he suffered as

⁴ SAG no. I, at 3.

a result of counsel's purportedly deficient performance.⁵

The stipulation signed by Mr. Gallegos conceded one element of the crime of possession of a firearm, but did not concede he had committed that crime, let alone that he had committed homicide. Where a prior conviction is an element of a charge and can be proved, it is a common defense practice to stipulate to the conviction, thereby avoiding presentation to the jury of more damaging details of the prior offense. Trial counsel's performance was not deficient.

*Accomplice instruction.*⁶ Mr. Gallegos alleges the court's instruction to the jury regarding accomplice liability deprived him of his due process right to have every element of the offense established beyond a reasonable doubt. He argues that in combination with the complained-of stipulation on the firearm charge the instruction created prejudicial error.

As just explained, there was no stipulation to the firearm charge.

The instruction on accomplice liability, appearing at Clerk's Papers 1177 and based on WPIC 10.51, is an accurate statement of the law.

We see no way in which the stipulation, the jury instruction, or both in combination, can be contended to have deprived Mr. Gallegos of his due process right or

⁵ SAG no. III, at 3; SAG no. VI, at 14.

⁶ SAG no. II, at 4.

prejudiced him. Even where error is claimed in a SAG, we do not consider it if it is unsupported by argument or citation to legal authority. RAP 10.3(a)(6).

Gang evidence. Mr. Gallegos argues that the admission of gang evidence at his trial requires reversal. It was the State's theory that the motive for Mr. Pineda's threatened assault of Mr. Eby was that Mr. Eby solicited a member of a rival gang to rob Mr. Pineda, and, when Mr. Eby began beating Mr. Pineda, that Mr. Gallegos was motivated by gang allegiance to protect Mr. Pineda by shooting Mr. Eby. Just before the pretrial hearing held on August 20, 2014, Mr. Gallegos's lawyer conceded that gang evidence was admissible. Mr. Gallegos asserts his lawyer's concession impinged on Mr. Gallegos's decision making authority⁷ and requests an evidentiary hearing in order to determine whether his trial lawyer was ineffective.⁸

To the extent Mr. Gallegos is alleging ineffective assistance by his trial lawyer⁹ in conceding the admissibility of the evidence, the record reflects the concession was prompted in part by the lawyer's belief the evidence would be ruled admissible, but also by strategic self-interest:

It's, you know, this, this is a case where you can't really separate the testimony without involving the gang evidence and, and it cuts both ways. There's portions of that are very helpful to us and, and, you know, interplay between, you know, Villa and Pineda and different things and the different, you know, things that happened not involving Mr. Gallegos.

⁷ SAG no. V, at 11.

⁸ SAG no. VI, at 14-17.

⁹ SAG no. IV, at 8; SAG no. V, at 11.

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

RP at 98. Recall that Mr. Gallegos's lawyer elicited evidence that it was Mr. Villa, not Mr. Gallegos, who had power in the La Raza gang. Additionally, the record reflects the fact that Mr. Gallegos has conspicuous gang-related tattoos on his face. Even Mr. Gallegos's SAG states, "Mr. Gallegos has tattoos alllover [sic] his face and a mongol haircut." SAG at 12. According to the record, he is proud of the tattoos and did not want to attempt covering them during trial.

As a trial-tactic decision, conceding the admissibility of the gang evidence was within the trial lawyer's authority. And Mr. Gallegos fails to demonstrate that the concession was not legitimate trial strategy. He also fails to demonstrate that the court would have excluded the evidence but for his lawyer's concession. He fails to demonstrate either prong required to establish ineffective assistance of counsel.

Alibi witness. Mr. Gallegos makes references to having received ineffective assistance of counsel because his trial lawyer did not interview certain witnesses. Because the issue involves factual allegations outside the record of this appeal, his remedy is to seek relief through a personal restraint petition. *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

Affirmed.

PERSONAL RESTRAINT PETITION

Mr. Gallegos seeks relief from personal restraint imposed for his convictions at

No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

issue in the direct appeal. As part of the judgment and sentence, the court imposed legal financial obligations (LFOs) totaling \$13,514.15. They include \$11,764.15 in restitution, a \$500.00 crime penalty assessment (victim's penalty assessment), a \$200.00 filing fee, \$600.00 for court appointed counsel, a \$100.00 DNA¹⁰ collection fee, a \$250.00 jury fee, and a \$100.00 crime lab fee.

Citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), Mr. Gallegos claims for the first time by collateral attack that the sentencing court unlawfully imposed the LFOs because it failed to consider his present or future ability to pay. Because he is alleging a nonconstitutional error, he must show that a fundamental defect in his sentence attributable to the LFOs has inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

In *Blazina*, the court held that RCW 10.01.160(3) requires the sentencing judge to engage in an individualized inquiry on the record into the defendant's current and future ability to pay before imposing discretionary LFOs. 182 Wn.2d at 837, 839. But RCW 10.01.160(3) does not apply to mandatory LFOs. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). With the exception of the \$600.00 court appointed attorney recoupment and the \$250.00 jury demand fee¹¹, all of the LFOs imposed on Mr. Gallegos

¹⁰ Deoxyribonucleic acid.

¹¹ The discretionary or mandatory character of the jury demand fee remains unclear. See *State v. Clark*, No. 32839-2-III, slip op. at 4 (Wash. Ct. App. Sept. 8, 2016), http://www.courts.wa.gov/opinions/pdf/328392_pub.pdf.

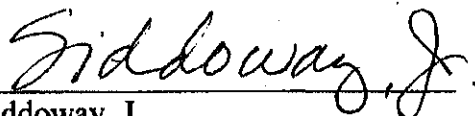
No. 32841-4-III (consol. w/ No. 34425-8-III)
State v. Gallegos

are mandatory. RCW 7.68.035; RCW 36.18.020(2)(h); RCW 43.43.7541; RCW 43.43.690(1).

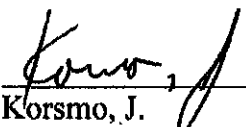
With respect to the two discretionary LFOs, since Mr. Gallegos did not object to the trial court's finding that he had the present and future ability to pay, he has not preserved the asserted error for appeal. RAP 2.5(a). Because Mr. Gallegos's lifetime sentence without the possibility of parole means that the LFOs will never hinder his reentry into society, we decline to exercise our discretion to review his challenge to the trial court's failure to comply with RCW 10.01.160(3).

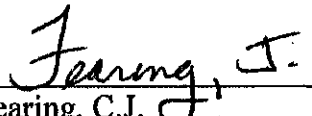
We dismiss the petition as frivolous under RAP 16.11(b) and RCW 10.73.140.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, J.

WE CONCUR:


Korsmo, J.


Fearing, C.J.

APPENDIX B

FILED
DECEMBER 6, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 32841-4-III
	)	(consolidated w/ no. 34425-8-III)
Respondent,)	
)	
v.)	
)	
MARCO ANTONIO GALLEGOS,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
)	
Appellant.)	

THE COURT has considered Appellant's motion for reconsideration, and the record and file herein, and is of the opinion the motion should be denied. Therefore, IT IS ORDERED, the motion for reconsideration of this court's decision of October 13, 2016, is hereby denied.

PANEL: Judges Siddoway, Korsmo, Fearing

FOR THE COURT:



GEORGE B. FEARING, Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
	)	No. _____
Respondent,)	
	)	COA No. 32841-4-III
vs.)	
	)	CERTIFICATE
MARCOS A. GALLEGOS,	)	OF MAILING
)	
Petitioner.)	

I certify under penalty of perjury under the laws of the State of Washington that on January 5, 2017, I served a copy of the Petition for Review in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

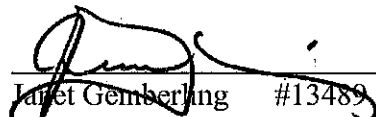
Tamara Hanlon
tamara.hanlon@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on January 5, 2017, I sent a copy of the Petition for Review in this matter by pre-paid first class mail addressed to:

Marco A. Gallegos
#345959
Washington State Penitentiary
1313 N. 13th
Walla Walla, WA 99362

Signed at Spokane, Washington on January 5, 2017.

Janet Gemberling, P.S.


Janet Gemberling #13489
Attorney for Petitioner