42425-8

~~No. 42428-2-II~~

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

STATE OF WASHINGTON,
Respondent,

v.

JEFFREY A. STRICKLAND,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: Gerald R Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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Procedural Background

The defendant was charged by Information on February 28, 2011, with two counts of Assault in the First Degree, RCW 9A.36.011(1)(a)(c). Each count carried an allegation that the defendant or an accomplice was armed with a firearm. RCW 9.94A.533(3)(CP 1-3). The arraignment was held on March 7, 2011. Identical charges were filed against co-defendant Michael A. Kerby. The charges against each defendant arose out of the same incident. A trial date was set for April 26, 2011.

On March 22, 2011, the State filed a Motion to Join the Defendants for Trial on the basis that each defendant was charged with accountability for each offense charged (CP 18-19). The State supported this with a Memorandum of Authorities (CP 20-31). On March 30, 2011, the State filed a Motion and Declaration for Good Cause Continuance of the trial based upon the necessity of completing the crime laboratory analysis of the evidence submitted from the investigation (CP 32-34). The trial court granted the Motion for Joinder and found good cause on the record to continue the trial date (CP 35, RP 4/4/11 p 12-15). The original trial date of April 26, 2011, was continued to June 28, 2011.

Prior to trial defendant Strickland filed a Motion in Limine regarding the use of the out-of-court statements of co-defendant Kerby. The State filed its response setting forth those statements that it

intended to use at trial. The Court, following hearing, limited the statements that the State could introduce in its case in chief (RP 4/4/11 10-12, 47).

On June 27, 2011, the day before trial, the defendant asked for a continuance. The defendant asked to hire Dr. Loftus on the issue of eye witness identification. It was his apparent intention to have Dr. Loftus testify about the effects of alcohol on a person's ability to make an identification (RP 6/27/11 p 34). The Court denied the Motion to Continue.

The matter proceeded to trial, commencing on June 28, 2011. During deliberation the jury passed out a question. The Court, without consulting counsel, responded that the jury "must be guided by the instructions given to you by the Court" (CP 73-74). The jury returned a verdict of guilty on each count with a finding that the defendant or accomplice was armed with a firearm on each count.

Factual Background

Testimony of Eugene Savage

Eugene Savage and Dan Ivy were in Aberdeen working on a construction project. They were friends and co-workers (RP 32). Mr. Savage recalled that they had dinner at a restaurant in town that evening and then went to Mac's Tavern (RP 34-35). While there, Mr. Savage went outside for a smoke and saw both defendants standing outside (RP 35-36, 53). He addressed them in Spanish. Both defendant's became angry with

him for speaking to them in Spanish. At one point, Mr. Savage told them to "shake the sand out of their pussy" (RP 37, 56-58). Mr. Savage testified that during this time his friend, Dan Ivy came outside (RP 57).

Mr. Savage testified that both defendants taunted them and told them that they needed to "go around the corner" to settle the matter (RP 38, 42). He remembers that he and his friend, Dan Ivy, followed the defendant and Kerby, walking toward the parking lot on the side of the building (RP 61). Savage testified that at this point, he saw a muzzle flash coming from the direction of defendant Strickland and heard his friend state, "I've been shot" (RP 38-39, 61). Dan Ivy walked past him to go inside. Mr. Savage approached Strickland who then shot him in the leg (RP 64-67). Mr. Savage recalled that Kerby was standing immediately next to defendant Strickland when he was shot in the leg (RP 71-72).

Testimony of Dan Ivy

Dan Ivy testified that he and his friend, Eugene Savage, went to Mac's Tavern. Ivy wanted to hear his friend's band (RP 85). Ivy saw both defendant Kerby and defendant Strickland in the bar playing pool. He did not speak to them (RP 85-87). Ivy testified that Kerby appeared to him to be over six foot tall and approximately weigh 200 lbs. (RP 125)

After a time Mr. Ivy looked around and realized that Mr. Savage had gone outside. He looked out the window and saw that defendant Strickland and Savage were "in each other's face," having an argument (RP 88). Once outside, it was apparent to him that both Strickland and

Kerby were upset with Mr. Savage about being "disrespected" because Mr. Savage had addressed them in Spanish (RP 89-90). At one point, Ivy heard defendant Kerby tell defendant Strickland "we're not going to tolerate this disrespect" (RP 91-92, 94).

Eventually, Mr. Ivy thought he had the matter calmed down and he told Mr. Savage that it was time to go (RP 92-93, 95). He walked to his car that was in the parking lot. Once he got to the car, he realized that Mr. Savage was not with him (RP 95-96). As he turned around and walked back he heard a woman's voice saying, "shoot his ass" (RP 97). At that point he saw defendant Strickland "pull up his arm with a gun" and shoot at him. He saw that Strickland was wearing a black pouffy jacket. Defendant Strickland shot Ivy in the chest (RP 97-99). Mr. Ivy then walked into the bar to get help and did not see anything further outside (RP 100).

Testimony of Jeri Chrisman

Jeri Chrisman was defendant Kerby's girlfriend. At the time of the incident they were living together in Aberdeen. (RP 350). On the day of the shooting, she had been working at a local convenience store. She went off shift around 8:00 p.m. She caught a ride from her friend, Candace Genn to the bowling alley in Aberdeen where she met defendant Kerby (RP 353). She and Ms. Genn noticed that Kerby had a taser (RP 354-355, 337-38). After a short time, defendant Kerby packed up his bowling bag and the taser (RP 346). They left the bowling alley and went back to her

house where she changed. During this time she observed defendant Kerby folding a handgun into a towel (RP 355-356, 428).

Chrisman testified that the two of them left the house and went to the Nordic Inn where they met up with defendant Strickland. From there they went to Mac's Tavern (RP 357-58). After they were there for a while, she followed defendant Kerby and defendant Strickland outside the tavern (RP 360-61). At this point, they bumped into Eugene Savage who said something to Strickland in Spanish. Kerby became upset and talked about how Savage was disrespecting his friend (RP 361-62). A short time later she saw Dan Ivy came out of the bar. Kerby addressed Ivy saying that Savage was disrespecting his friend. There was talk about taking it to the alley (RP 364-65). She recalled at this point that Kerby pulled out the taser and sparked it. (RP 365).

Ms. Chrisman then heard defendant Kerby making threats, saying he was going to shoot "the mother f...er" (RP 366). She saw Kerby pull a gun out of his waist band (RP 366-67). At this point, she ran off. She heard gun shots and turned to see that Ivy and Savage had been shot (RP 367-68).

Testimony of Michael Murphy

Michael Murphy testified that he had come to the bar with his friends, arriving around 9:30 to 10:00 p.m. (RP 523). He saw defendant Kerby and defendant Strickland playing pool inside the tavern but did not talk to them (RP 524). After a short time he went into the bathroom.

When he came out, he saw that Dan Ivy and Eugene Savage were outside. He went to the door and saw that defendant Kerby, defendant Strickland and Jeri Chrisman were also outside (RP 527). Ivy and Savage were talking to Strickland and Kerby. At one point he heard defendant Strickland say, "let's go find a dark alley and we'll take care of this." He heard Dan Ivy respond with words to the effect that "they didn't need a dark alley to take care of this." (RP 530).

Murphy heard Chrisman yelling that "it just wasn't worth it." At this point he saw Kerby and Strickland turn to walk off. Chrisman told him that she was going to walk to Billy's Restaurant (RP 530). Murphy turned to go back into the bar when he heard gun shots (RP 530-531). Dan Ivy walked into the bar with his hands covering his chest and told Murphy that he'd just been shot (RP 531). Mr. Murphy never saw Kerby or the defendant again that night.

Testimony of defendant

Defendant Strickland testified at trial. He stated that he was 5' 6 ½" and weighed 160 lbs. (RP 7/1/11 p 48). The defendant testified that, he, Kerby and Jeri Chrisman arrived at Mac's Tavern around 9:45 to 10:00 p.m. that evening (RP 7/1/11 50-51). He denied wearing a jacket. He denied that the jacket found in the alley containing his loan check from the college belonged to him. He claimed that he had given the check to defendant Kerby to cash (RP 7/1/11 49-50).

Before the shooting, while he was in the bar, Strickland was texting Natasha Jensen (RP 359, RP 7/1/11 66-67). The defendant acknowledged that he went outside to have a smoke with Kerby and Jeri Chrisman. When they went outside Savage and a man in a cowboy hat (Murphy) were already outside (RP 7/1/11 56, 68). He recalled that when they walked outside Kerby addressed Savage asking him "what's up?" Strickland heard a response in Spanish from Mr. Savage that he took as unfriendly (RP 7/1/11 66-67, 69). He specifically recalled Savage using the word "pussy" and the two of them asking Savage why he was being disrespectful (RP 7/1/11 70-73). He described Savage as being a little bit angry with a raised voice (RP 7/1/11 71).

According to Strickland the situation calmed down (RP 7/1/11 59). He thought that the "situation was over." They shook hands (RP 7/1/11 59-60, 73). According to Strickland he began to walk away when he heard shots. He ran off and did not return (RP 7/1/11 61). Strickland did acknowledge that throughout all this time both he and Kerby were carrying tasers (RP 7/1/11 71-72).

Testimony of Natasha Jensen

Natasha Jensen was Jeri Chrisman's neighbor. She had received a text from the defendant asking her to come pick him up (RP 7/1/11 12, 76). She was unaware that there had been a shooting. She went looking for him down by the Chehalis River Bridge but could not find him (RP 7/1/11 12-13). She did see the police cars by Mac's Tavern. Jensen

testified that she received a second text message from Strickland and eventually met up with him in the Safeway parking lot (RP 7/1/11 13, 76-77).

The defendant acknowledged calling Natasha Jensen after the shooting. She was to pick him up by the Chehalis River Bridge. She couldn't find him so he called her again and arranged for her to meet him at the Safeway parking lot (RP 7/1/11 p 76). He told her "I heard someone was shot." When asked how he knew, Strickland told her "somebody I knew had been at the bar" (RP 7/1/11 77-78).

She gave Strickland a ride over to an area near Aberdeen High School. Eventually, the vehicle was stopped and Strickland was arrested (RP 7/1/11 14-15 RP 210).

Testimony of Erin Souther

Defendant Kerby fled the scene in a motor vehicle that had been parked in the parking lot near the tavern. He made several phone calls to his ex-girlfriend, Erin Souther (RP 298-99). When she finally answered the phone Kerby instructed her to take her car out of the driveway so that he could put his into her garage (RP 299-301). Kerby told her that he wanted to get a room at the beach and that he had had a fight with Jeri Chrisman (RP 301). Eventually, Kerby and Ms. Souther ended up at a motel in Ocean Shores where they spent the night (RP 302-03).

Ms. Souther drove back to Aberdeen in the morning. The defendant told her that he wanted to go to California (RP 303-304). She

was contacted by the police that morning and eventually told them that Kerby was in Ocean Shores (RP 306-307). Kerby was arrested later that day (RP 484-86).

The Aberdeen Police Department conducted the crime scene investigation. The firearm was never recovered. A partial DNA profile was obtained from shell casings found at the scene. Marianne Clark, a Forensic Scientist, testified at trial that the DNA profiles obtained from defendant Strickland and defendant Kerby were excluded as possible contributors to the partial profile found on the shell casings (RP 516). A down jacket was found in an alley near Mac's Tavern and the off ramp of the Chehalis River Bridge(RP 475-76). Inside the pocket of the jacket investigators found a check from Grays Harbor College payable to defendant Strickland (RP 479-80).

RESPONSE TO ASSIGNMENTS OF ERROR

There was no violation CrR 3.3 (Response to Assignment of Error 1-4).

There was no violation CrR 3.3. On March 30, 2011, the State filed a Motion for Good Cause Continuance (CP 32-34). This was supported by the Declaration of Gerald R. Fuller regarding the necessity of completing the analysis of evidence that was submitted to the Washington State Patrol Crime Laboratory. A hearing was held on April 4, 2011, in which the State provided further evidence concerning a reasonable time for the completion of the analysis by the crime lab (RP 4/4/11 p 3). The

State outlined the evidence that needed to be analyzed (RP 4/4/11 page 5-6). Following argument, the trial court found good cause for continuance and set the trial date for June 28, 2011 (RP 4/4/11 pages 13-14). At the time of the hearing neither defendant offered any explanation concerning how he might be prejudiced by this continuance. There has yet to be any explanation of prejudice suffered by either defendant.

CrR 3.3(f)(2) provides as follows:

> *Motion by the Court or party.* On motion of the Court or party, the Court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his of her defense. The motion must be made before the time for trial has expired. The Court must state on the record or in writing the reasons for the continuance . . .

The decision to grant a continuance rests in the sound discretion of the trial court and will not be disturbed absent of manifest abuse of discretion. An abuse of discretion occurs only if the discretion is exercised on untenable grounds or for untenable reasons. State v. Nguyen, 131 Wn.App. 815, 129 P.3d 821 (2006). The trial court commits an abuse of discretion only if it can be said that the decision was manifestly unreasonable. State v. Woods, 143 Wn. 2d 561, 23 P.3d 1046 (2001).

In the case at hand, the trial court had a valid reason for granting the continuance. Based on the evidence the judge had at the time, he knew that this evidence might be helpful to the State or, on the other hand, might provide exculpatory evidence to the defendant. He said so on the record

(RP 4/4/11, P 12-14). In fact, the DNA examination excluded both the defendant and Kerby as the source of the profile found on shell casings at the scene.

In Woods, supra, counsel for the defendant moved for a continuance over the defendant's objection in order to complete scientific testing of the evidence. The court in Woods found that it was not in abuse of discretion for the trial court to grant that request. Woods, supra, 143 Wn.2d at P 580. Why should the result be any different when a request for continuance is made, on the same basis, by the State?

Despite the unsubstantiated allegations of the defendant, there is nothing in the record to support a claim of governmental mismanagement. Furthermore, to this date, the defendant has not alleged that he was prejudiced in any way in the presentation of his defense by the continuance of the trial date.

This assignment of error must be denied.

The trial court properly denied the defendant's Motion for Severance. (Response to Assignments of Error 14-17).

1) The state may introduce out-of-court statements of a defendant as governed by CrR 4.4(c).

In U.S. v. Bruton 391 U.S. 123, 88 S.Ct. 1620 (1968) the United States Supreme Court held that the use, in a joint trial, of a co-defendant's out-of-court statements implicating the other defendant violates of the defendant's right to confront witnesses under the Sixth Amendment to the

United States Constitution. Stated in another way, admission of a co-defendant's extrajudicial statement that inculpates the other defendant violates that defendant's Sixth Amendment right to confrontation if a defendant does not have the ability to cross examine the co-defendant who made the out-of-court statement. Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056 (1986).

These principles have been incorporated into CrR 4.4 (c):

> **Severance of defendants.**
>
> (1) A defendant's motion for severance on the ground that an out-of-court statement of a co-defendant referring to him is inadmissible against him shall be granted unless:
> (1) The prosecuting attorney elects not to offer statement in the case in chief: or
> (ii) Deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

The Washington courts have applied the principles of Bruton when interpreting CrR 4.4(c). Severance is required only where a non testifying co-defendant's out-of-court statement refers to the defendant and is used by the State. State v. Cotten, 75 Wn.App 669, 690-91, 879 P.2d 971 (1004). Bruton requires severance only when the out-of-court statements of the co-defendant expressly, or by direct inference from the statement incriminate the co-defendant. State v. Campbell, 78 Wn.App. 813, 819-20, 901 P.2d 1050 (1995). Stated another way, a severance is required only when a non testifying co-defendant's out-of-court statements refer to the defendant and are used by the State. State v. Melton, 63 Wn.App. 63,

67, 817 P.2d 1413 (1991) review denied 118 Wn.2d 1016, 827 P.2d 1011 (1992). (Reference to non-testifying co-defendant was redacted).

In Cotten, witnesses testified concerning out-of-court statements of Cotten's co-defendant, Baldassari. Those statements were admissible because the court determined that none of the testimony concerned any out-of-court statements of Baldassari which "...implicated, named, or even acknowledged the existence of Cotten as an accomplice." Cotten, 75 Wn.App. at page 691.

The following language from Cotten is helpful to understand the principles involved. Cotten 75 Wn.App. At page 691:

> The only way in which Cotten is implicated by the out-of-court statements is through linkage with other evidence presented by the state. The fact that the state links a non-testifying co-defendant's confession to other evidence to the defendant's complicity in the crime is not, however, a sufficient reason to exclude the testimony under Bruton . . .

Out-of-court statements of a defendant that only implicate a co-defendant by inference are outside the scope of Bruton. State v. Medina, 112 Wn.App.40, 49, 48 P.3d 1005 (2002).

The trial court was careful at the pre trial hearing to identify the statements that it was going to allow (RP 4/4/11 pages 10-12). The out-of-court statements of Michael Kerby were introduced through the testimony of Sergeant Art Laur, the detective sergeant who interviewed Kerby. The State was careful to eliminate any reference to co-defendant Strickland. The testimony of Sergeant Laur is set forth below. (RP 579).

A. I explained to Mr. Kerby that I had been told by transporting officers that he was wished to talk with the detective.
Q. Did he – what did he say to that?
A. When I told him that, he said that he made a comment that he never saw a gun, or touched one. (RP 579-80).
A. I asked him if he was aware that two people had been shot at Mac's Tavern.
Q. What did he say?
A. He stated that, no, he did not - - was not aware of that, but he had heard that the bartender was stating that two shots had been fired, with two different guns, inside the bar.
Q. Go ahead.
A. And then he stated that he was standing outside and that as he stood there.
Q. I am - - back up. Did he tell you, I didn't do anything?
A. Yes. He did. He stated that he saw a tall Mexican man walk by him. He was grabbing his chest and he stated also that he didn't see any blood or any bullet holes or anything.
Q. Did he say where the man went?
A. Walked into the bar.
Q. Did you ask him what he did at that point?
A. Yes. He stated that he got into his vehicle and drove to Erin Souther's home. (RP 581-582).
Q. So, at some point you took a break?
A. Yes, we did.
Q. And, did you get him something to drink, or?
A. I left the room and allowed him to sit there solo.
Q. And when you came back from that break, do you remember Mr. Kerby making a remark?
A. Mr. Kerby was a little bit agitated at

that point, and he said to me that he didn't pull the trigger. (RP 582)

Q. As part of your questioning, did you ask him to tell him that you would like him to be truthful.

A. Yes, I did. And at that point there was a change in his demeanor. He actually leaned down, put his hands on his head, and then I asked him if he had a gun in his hands at any point during this incident, and he said at one point he did, but then he got rid of it.

Q. Go ahead. Did he say anything more?

A. He said the gun never went off in his hand. He didn't do anything wrong, and if we asked the little Mexican guy, he can't state who actually pulled the trigger.

Q. I see. And at some point did Mr. Kerby as you if you were in a position to make a deal for him?

A. Yes, he did. I explained to him I could not negotiate a deal.

Q. And at some point, then, did you try to clarify when he would have had the gun in his hands?

A. Yes. I wanted to clarify with him at one point he had the gun in his hands. And at that point he stated to me that there was no gun. The only thing he had was a taser. I then asked him about him changing his story, and he stated that he didn't shoot anybody, and if there was a gun, he got rid of it. (RP 581-583)

CrR 4.4 does not require that the out-of-court statements of defendant Kerby be redacted to the point where they "eliminate any prejudice" to the defendant. Kerby's admission that he was present and had a taser was certainly prejudicial to the defendant when presented along

with other evidence placing the defendant Strickland at the scene with his friend, defendant Kerby. Kerby's statements, however, are only about his conduct. There is no reference of any kind to Strickland. Likewise, it was certainly prejudicial to defendant Strickland to have the jury hear that defendant Kerby denied hearing any shots. Once again, there is no reference of any kind to Strickland.

That being said, the purpose of CrR 4.4(c) is not to eliminate all prejudice to the defendant from the out-of-court statements of a co-defendant. The purpose of the rule is to avoid any problem under the Confrontation Clause. The purpose is to avoid the situation where the officer is allowed to testify concerning statements made by defendant Kerby regarding the conduct and statements of defendant Strickland when defendant Strickland cannot cross examine Kerby. There was never a reference to Strickland in Kerby's statements. The court was careful to avoid any testimony that could possibly be a reference to Strickland.

This court is invited to compare the testimony herein to that found in State v. Larry, 108 Wn.App 894, 34 P.3d 241 (2001). In Larry, the court affirmed the introduction even though there were references to the "driver," that the evidence showed to be defendant Larry. State v. Larry, 108 Wn.App. 894, 905, 34 P.3d 241 (2001). Likewise, this is not a case in which the written statement is admitted with the defendant's name simply deleted. Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998).

The testimony of Sgt. Laur concerning Kerby's confession was linked to other evidence in the case. This is not sufficient to support a severance or to show a Confrontation Clause violation. Cotten, supra, 75 Wn.App. at page 691.

No limiting instruction was requested. In any event, there was no necessity for a limiting instruction. The purpose of the limiting instruction is to insure that any possible reference to the defendant in the co-defendant's confession (e.g., "me and a few other guys," Larry, supra, at p 903) is not considered as evidence against the defendant. There was no such reference herein. In fact, the jury was instructed in the language of WPIC 3.03 that each defendant's case was to be considered separately and the verdict as to a particular count or defendant should not effect the verdict on the other defendant or count.

Any alleged error for failure to give limiting instruction is harmless beyond a reasonable doubt on the facts of this case. The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been "significantly less persuasive" had the proper evidence been excluded. Schneble v. Florida, 405 U.S. 427, 432, 92 Sup. Ct. 1056, 31 L.Ed 2d 340 (1972). A violation of Bruton v. U.S., supra may be harmless error. U.S. v. Eskridge, 164 F.3d 1042 (7th Cir. 1998).

The courts have set forth several factors that may be used to assist in determining whether error is harmless in a particular case. Delaware v.

Van Arsdall, 475 U.S. 673, 684, 106 Sup. Ct. 1431, 89 L.Ed.2d 674 (1986). As set forth in Eskridge, supra, at P 1044:

> The Supreme Court set out several factors to assist in determining whether error is harmless in a particular case. Those factors include: (1) the importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case.

The court in Eskridge found harmless error. In Eskridge the trial court allowed introduction of a co-defendant's written statement, implicating Eskridge, but simply eliminated any direct reference to Eskridge, by replacing his name with the word "another." This was an obvious violation of the rule in Bruton. Nevertheless, the court in Eskridge, found using the Van Arsdall analysis, that introduction of the statement was harmless beyond a reasonable doubt.

Similarly, in Fogg v. Phelps, 579 F.Supp. 2d 590 (2008). The reviewing court found that it was error to allow a witness to testify at trial concerning conversations the witness had with a co-defendant when the out-of-court statements of the co-defendant clearly implicated defendant Fogg. The court in Fogg, held, however, that it was not an abuse of discretion for the state court to determine that the violation was harmless error.

The error, if any, for failing to give the limiting instruction is far less egregious that an actual violation of Bruton, allowing the jury to hear a co-defendant's statements regarding the defendant's conduct at trial. In the case at hand, first of all, there was no written statement. There were no written documents with redactions. Defendant Kerby did not once, in the statements related to the jury, mention Strickland's name, acknowledge Strickland's presence at the shooting, or try to account for Strickland's activity at the scene of the shooting. Kerby's statements pertained solely to his own conduct.

There was never an argument made by the State that Kerby's denials meant that Strickland must have been the shooter. The argument made was that even though Kerby denied having the firearm, he could still be found guilty as an accomplice. The argument made was that the circumstantial evidence, Kerby having been seen with the gun and Strickland having been identified as the shooter, meant that Kerby could have given Strickland the firearm. There was never an argument made that Kerby, by his statements, was implicating Strickland as the shooter. The court is invited to review the State's final argument (RP 7/1/11 132-45, 146-47).

The jury was entitled to consider Kerby's statements, along with the other evidence admitted at trial. Such consideration is not a violation of Bruton and does not constitute the violation of the defendant's rights under the Confrontation Clause. Cotten, supra.

The conflicting defense strategies did not require severance.

Likewise, the fact that the two defendants may have had antagonistic defenses is not a basis for severance. Separate trials are not favored. State v. Grisby, 97 Wn.2d 492, 506, 647 P.2d 6 (1982). The grant or denial of a motion for separate trials of defendants who have been joined for trial is entrusted to the sound discretion of the trial court and will not be disturbed absent of manifest abuse of discretion. Grisby, supra 97 Wn.2d at page 507. In order to be entitled to a severance a defendant must demonstrate that a joint trial would be "so manifestly prejudicial as to out weigh the concern for judicial economy" State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). A defendant asking for severance must point to specific prejudice. Grisby, supra, 97 Wn.2d at page 507.

The fact that the interests of all the participants in a crime conflict does not require the court to grant each of the several participants a separate trial. State v. Davis, 73 Wn.2d 271, 438 P.2d 271,290, 348 P.2d 185 (1968); State v. Johnson, 147 Wn.App. 276, 284, 194 P.3d 1009 (2008).

> Grisby presented a factual scenario in which "one [or more] of the defendants sought to escape conviction by placing the guilt on his co-defendant." *Wade R. Habeeb,* Antagonistic Defenses as Ground for Separate Trials of Co-Defendants in Criminal Case, 82 ALR 3d 245, 260 (1978): See Grisby, 97 Wn.2d at 508. Federal courts have held that severance is not required on this basis alone and the Grisby court adopted the federal standard. 97 Wn.2d at 508.

> Thus, the rule in Washington is that "the desire of one defendant to exculpate himself by inculpating a co-defendant is insufficient to [compel separate trials]. *In re Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004).

Other cases have provided examples in which courts have found that it was not an abuse of discretion to deny severance based on allegations of antagonistic defenses. State v. Medina, 112 Wn.App 40, 53, 48 P.3d 1005 (2002) (multiple defendant's assaulted the victim at the same time). State v. Larry, 108 Wn.App 894, 911, 34 P.3d 241 (2001) (defendant Varnes argued that he never formed the intent to kill and that his co-defendant, Larry, "called the shots.") See also, State v. Grisby, 97 Wn.2d at 508. In Grisby, defendant Frazier and defendant Grisby both admitted that they went to the victim's apartment to complain about the drugs that he had sold them. Defendant Frazier admitted that he had opened fire on the apartment's occupants and wounded co-defendant Grisby. Defendant Frazier stated that he emptied a gun, dropped it and fled. Defendant Grisby stated that he was unarmed and left when shots were fired. The court in Grisby found that it was not an abuse of discretion to deny severance.

This assignment of error must be denied.

The court properly instructed on accomplice liability. (Response to Assignment of Error 10-13).

To begin with, it is important for the Court to have a full understanding of the testimony presented at trial. The actions of the

defendants prior to their arrival at Mac's Tavern, their conduct together inside and their conduct together outside before and during the shooting clearly establish evidence to support accomplice liability for defendant Strickland.

Defendant Strickland and defendant Kerby were friends (RP 7/1/11 49, RP 357-58). Defendant Kerby and Ms. Chrisman picked Strickland up earlier in the evening at the Nordic Inn in Aberdeen (RP 357-58). They were inside the tavern, together playing pool (RP 85-87). At one point in the evening, the two of them were together standing outside Mac's Tavern (RP 35-36, 53).

They both shared the same prejudices. They both became angry when Mr. Savage addressed Strickland in Spanish (RP 56-58). Defendant Strickland and Savage were seen to be "in each other's face," having an argument (RP 88). Defendant Kerby was heard telling defendant Strickland "we're not going to tolerate this disrespect" (RP 91-92, 94).

Both defendants were armed with tasers. At one point, defendant Kerby pulled out his taser and sparked it (RP 354-55, 337-38, RP 7/1/11 71-72). Defendant Strickland was heard to say "let's go find a dark alley and we'll take care of this" (RP 530). At the time of the shooting, they were standing immediately next to each other (RP 72). Dan Ivy was shot in the chest. He identified Strickland as the shooter (RP 99). Mr. Savage saw the muzzle flash but did not see who shot Ivy. Savage heard his friend say that he'd been shot, and then saw defendant Strickland and

Kerby standing immediately adjacent to each other, a short distance away as Mr. Ivy walked into Mac's Tavern (RP 39).

In short, there was ample evidence that both defendants were in this together. They were standing close together at the time of the shooting. It was dark outside. There was evidence from which the jury could conclude that either defendant actually fired the gun. The defendant acknowledges this. (Brief of Appellate P 34).

In any event, accomplice liability is not an alternative means. State v. McDonald, 138 Wn.2d 680, 687-88, 981 P.2d 443 (1999):

> These cases have turned, however, upon alternative means of *principal* liability: for example, premeditated murder and felony murder as alternative means described in a jury instruction of committing first degree murder. See State v Fortune, 128 Wn.2d 464, 909 P.2d 930 (1996). In contrast, we have never before held that accomplice liability qualifies as an alternative means of committing a single offense also presented on the basis of principal liability. Were we to have done so, we would contradict our holdings concerning the nature of accomplice liability:
>
> The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. *The elements of the crime remain the same.*
>
> State v. Carothers, 84 Wn.2d 256 264, 525 P.2d 731 (1974).

The Court in McDonald specifically rejected the notion that there must be substantial evidence that the defendant acted both as a principle and as an accomplice. McDonald, 138 Wn.2d 688-89. The Court in McDonald cited to State v. Munden, 81 Wn.App. 192, 197, 913 P.2d 421 (1996), characterizing the Court's holding as follows, McDonald, 138 Wn.2d at p 689.

> Munden involved a defendant who was convicted of second degree burglary as an accomplice, despite the fact that "the State's evidence tended to show that he and two others accomplished the burglary as principals." Munden, 81 Wn.App. At 193. Because the evidence did not *exclude* the possibility that he had acted as an accomplice, the court noted that accomplice liability was supported and "to say that accomplice liability is not an alternative means does not alter our analysis in the present case." Munden, 81 Wn.App. At 197.

It is not a defense that he may not have known defendant Kerby had a firearm. State v. Davis, 101 Wn.2d 654, 657-58, 682 P.2d 883 (1984):

> As to the substantive crime, the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the pre-planned illegality.

Similarly, the firearm enhancement may be found by the jury if the defendant or an accomplice is armed. The defendant need not know that his co-defendant was armed. State v. Bilal, 54 Wn.App 778, 781-82, 776 P.2d 153 (1989).

Furthermore, there is ample evidence that the defendant acted with knowledge that his actions would promote or facilitate the assaults. This court may take into account the relationship between the two defendants. The court can then consider the nature of the argument and the reason for this shooting. Finally, the evidence supports the fact that defendant Strickland "called out" Mr. Ivy and Mr. Savage to settle the matter in the parking lot.

The accomplice liability statute is not overbroad. Defendant Strickland is not being punished for the words that he said during the confrontation. The words are evidence of his complicity with defendant Kerby. The words are evidence that the defendant acted with knowledge that he was promoting or furthering the charged crimes. See State v. Ferguson, 164 Wn.App 370, 376, 264 P.3d 575 (2011):

> In State v. Coleman, 155 Wn.App 951, 961, 231 P.3d 212 (2010), *rev. den.*, 170 Wn.2d 1016 (2011), Division One of this court held that Washington's accomplice liability statute is not unconstitutionally overbroad. The court reasoned:
>
> > The accomplice liability statute Coleman challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. Therefore, by the statute's text, its sweep avoids protected speech activities that are not

> performed in aid of a crime and that only consequentially further the crime.
>
> Coleman, 155 Wn.App at 960-61. Because the statute's language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of Brandenburg. Agreeing with and adopting Division One's rationale in Coleman, we also hold that the accomplice liability statute is not unconstitutionally overbroad.

This assignment of error must be denied.

The trial court properly denied the defendant's Motion to Continue the Trial. (Response to Assignments of Error 5-9).

The admission of expert witness testimony on the issue of eye witness identification is within the sound discretion of the trial court. The Supreme Court has set forth the standard. State v. Cheatam, 150 Wn.2d 626, 647, 81 P.3d 830 (2003):

> ...Where eye witness identification of the defendant is a key element of the State's case, the trial court must carefully consider whether expert testimony on the reliability of eye witness identification would assist the jury in assessing the reliability of eye witness testimony. In making this determination, the Court should consider the proposed testimony of the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are the same race, whether the defendant displayed a weapon, the effect of stress, etc. This approach corresponds with the rules for admissibility of relevant evidence in general and admissibility of expert testimony under ER 702 in particular.

The Court of Appeals in Cheatam specifically refused to adopt standards set forth by the Court of Appeals in State v. Moon, 45 Wn.App. 692, 696, 726 P.2d 1263 (1986). The Court of Appeals had held in Moon that it was an abuse of discretion to exclude expert testimony on eye witness identification where the identification of the defendant is the main issue at trial, the defendant presents an alibi defense, and there is little or no other evidence linking the defendant to the crime.

Moon involved a situation in which the victim was abducted by a stranger. Cheatam involved a situation in which the victim was raped and only had the opportunity to see the victim's face for about five seconds while being threatened with a knife. The Court in Cheatam held that the trial court did not abuse its discretion in refusing to allow eye witness identification. Cheatam, 150 Wn.2d 649:

> The subjects that Cheatam identifies as requiring expert testimony are the effects of stress and violence, weapons focus, lighting, and cross-racial identification. Dr. Loftus would have testified that stress and violence render memory less accurate. Depending on the facts of a given case, this testimony may be very helpful to a jury's assessment of credibility. Here, however, M.M. testified that she realized that she would need to memorize the face of her attacker in order to identify him later, and that she carefully examined his face in order to do so. Additionally, on the day of the rape, M.M. met with a sketch artist, producing a drawing of the defendant that was nearly photo perfect. Thus, in this case, Dr. Loftus' testimony would have had only marginal relevance and would have been debatable help to the jury.

On the facts of this case, it is immediately apparent that eye witness identification would not have been particularly helpful. This is not a situation in which the victims only got a momentary glance at defendant Strickland and defendant Kerby. In fact, the four of them were outside the bar for a period of time, arguing. This is not an alibi defense. Both defendants were there arguing with Savage. There is no dispute that defendant Strickland was at the scene. There's not an issue of cross-racial identification. There is not an issue regarding the victim focusing on the weapon. Neither saw the weapon, or knew there was a weapon until it was fired. Mr. Ivy and Mr. Savage just knew that they had been shot. They each identified the defendant as the shooter. (RP 40, 91). Defendant Strickland and defendant Kerby are very different in stature. The defendant is 5' 6 ½ ". Kerby is over six feet tall.

While there is evidence that Mr. Savage was highly intoxicated, the effect of alcohol on perception is widely understood. Expert testimony on this issue would be minimally helpful. The offer of proof had to do with the need for Dr. Loftus to speak to the effects of alcohol on perception (RP 6/27/12, p 34-36). Is is necessary to have expert witness testimony to explain that alcohol effects a person's perception of events?

In any event, Mr. Savage explained what he saw and the difficulty with his identification because of the location of the persons who were present. He did not see My Ivy get shot. My Ivy was standing with his back to Savage in front of the shooter. (RP 39). Savage testified that he

saw Kerby and Strickland standing side by side as Mr. Ivy, who had been shot, walked past him. (RP 39). When Mr. Savage walked toward them, he was shot. He did not see the firearm, but saw the muzzle flash. He was about ten feet away from both the defendant and Kerby when he was shot. Mr. Savage believed that it was defendant Strickland who shot him (RP 40).

In short, it was not an abuse to discretion on the facts of this case for Judge Godfrey to deny a continuance for the purpose of attempting to retain Dr. Loftus for expert witness testimony on eye witness identification.

This assignment of error must be denied.

The defendant received effective assistance of counsel. (Response to Assignment of Error 18-22).

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance in resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 Sup. Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance must be deemed to have fallen below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1999). Furthermore, even if there were found to be deficient performance by counsel for the defendant, the defendant must show prejudice i.e., that there was a reasonable probability that the outcome would have been different had the representation been

adequate. State v. Brett, 126 Wn. 2d 136, 198-99, 892 P.2d 29 (1995), *cert. den.*, 516 U.S. 1121 (1996).

On the issue of failure to give a limiting instruction regarding defendant Kerby's out-of-court statement, as indicated previously, such an instruction was not required on the facts herein. In any event, failure to give such an instruction was harmless error. The defendant was not prejudiced. The statements that were admitted made no reference of any kind to defendant Strickland or to "another person" or, for that matter, to anyone else who was present at the shooting or than the "tall Mexican" "(Ivy) and the "short Mexican" (Savage).

On the issue of the proposed eye witness identification, as indicated previously, the judge properly denied the motion. This is not the kind of case that eye witness testimony, such as that presented by Dr. Loftus, would have been particularly helpful.

Finally, regarding accomplice liability, the court properly instructed on accomplice liability. State v. McDonald, supra.

This assignment of error must be denied.

The trial court judge did not violate an "appearance of fairness" (Response to Assignment of Error 23-27).

The State has no dispute with the status of the law regarding appearance of fairness. The trial court judge, obviously, has the obligation to avoid the appearance that he is biased or prejudiced against a party. State v. Dugan, 96 Wn.App. 346, 354, 979 P.2d 885 (1999). In order to

prevail under such claim, the defendant must provide some evidence of the judge's actual or potential bias. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172 (199). The defendant is required to make a threshold showing of "some evidence" of actual or potential bias. Tatham v. Rogers, ____ Wn.App ____, 283 P.3d 583 (2012).

There is no serious claim here that Judge Godfrey was actually biased or gave the appearance of being biased against a particular party. He did not, for example, have any personal interest in the investigation or prosecution of this matter. State v. Madry, 8 Wn.App 61, 504 P.2d 1156 (1972); State v. Dugan, 96 Wn.App 346, 979 P.2d 885.

The defendant relies, primarily, on remarks made by Judge Godfrey made during the pre-trial hearing and one remark made by the judge during trial (RP 6/27/12 P 32-43, 419). The conduct of Judge Godfrey does not remotely raise an issue concerning appearance of fairness. He certainly did nothing to convey to the parties or to the jury his opinion as to the guilt or innocence of defendant Strickland.

His comments concerning his assessment of legal arguments presented to him are not evidence of actual or potential bias. The State would suggest a review of the record indicates that the judge was uniformly blunt and spoke his mind about issues to all the parties, not just defendant Strickland. See State v. Carter, 77 Wn.App. 8, 888 P.2d 1230 (1995); State v. Gonzales-Morales, 91 Wn.App. 420, 958 P.2d 339 (1998).

This assignment of error must be denied.

The defendant was not prejudiced by the Court's response to the jury question. (Response to Assignment of Error 29-31).

The State acknowledges that a defendant has a constitutional right to be present at all stages of the proceedings, including a trial judge's consideration of jury questions. State v. Ratliff, 121 Wn.App. 642,646, 90 P.3d 79 (2004). Pursuant to CrR 6.15(f)(1) such communication may only occur with all counsel and the trial judge present. That being said, the alleged misconduct of the judge is harmless error. So long as the Court's answer to the question is "negative in nature and conveys no affirmative information" there is no prejudice to the defendant and the error is harmless. State v. Allen, 50 Wn.App. 412, 419, 749 P.2d 702 (1988).

In State v. Langdon, 42 Wn.App. 715, 713 P.2d 120, rev. den. 105 Wn. 2d 1013 (1986), the jury sent out a question. The Judge, without consulting counsel responded "you are bound by those instructions already given to you." Langdon, 42 Wn.App 717. The instruction given to the jury in this case is nearly identical to that of the Court in Langdon.

This assignment of error must be denied.

The State properly proved the defendant's offender score. (Response to Assignment of Errors 35-41).

The State acknowledges that it has the obligation to prove the defendant's prior criminal history by preponderance of the evidence at a sentencing hearing. RCW 9.94A.530(1) Despite the defendant's objection

to certain of his prior convictions, the record amply supports proof of each of the prior crimes found by the judge at the time of the sentencing.

To begin with, the Court had the entire file before it. This included the Information charging the crimes and a separate sheet entitled "Warrant Information" setting forth all the known information concerning the defendant including the name, date of birth, social security number, and Department of Corrections number (CP 3). At sentencing, the Court admitted a copy of his defendant case history (DCH). This is prepared by the Judicial Information System from documents submitted by the courts. That defendant case history listed convictions for the two current offenses and all convictions listed in the Judgment and Sentence. The DCH also contained all the identifying information for the defendant. That information is identical to the Warrant Information filed with the Judgment and Sentence. The State also admitted a copy of Department of Corrections documents containing the name, doc number, photo and finger prints of the defendant.

Also, included with this document were copies of all the prior Judgment and Sentences as follows: (CP 100-185).

Burglary in the Second Degree Grays Harbor County Cause Number **07-1-308-1**. Date of sentence October 1, 2007. The face page contains his name and date of birth. The identification page contains the defendant's name and Department of Corrections number.

Attempted Theft in the First Degree Grays Harbor County Cause Number **05-1-512-5**. The Court had before it a Judgment and Sentence dated October 31, 2005, containing the defendant's name and date of birth.

Residential Burglary King County Cause Number **02-1-028267-6**. The Court had a copy of the Judgment and Sentence entered on November 25, 2002. The Judgment and Sentence contained the defendant's name, date of birth and the Washington State SID number corresponding to the SID number on the defendant case history.

Attempt to Elude & Taking a Motor Vehicle without the Owner's Permission King County Cause Number **00-1-06197-4**. The Court had a copy of the Judgment and Sentence which contained the defendant's name, date of birth and Washington State SID number.

Robbery in the Second Degree King County Cause Number **99-1-3116-1**. The Court had a copy of the Judgment and Sentence entered July 2, 1999. The Judgment and Sentence had his name, date of birth and Washington State SID number on it. The cause number corresponded to the entry on the defendant case history.

Unlawful Possession of a Firearm in the Second Degree King County Juvenile Cause Number **97-8-6500-5.** The Court had a copy of the Judgment and Sentence which included the defendant's name and date of birth. The cause number corresponded to the entry on the defendant case history.

Taking a Motor Vehicle without the Owner's Permission King County Juvenile Cause Number **95-8-5340-0**. The Court had a copy of the Judgment and Sentence dated August 31, 1995. The Judgment and Sentence contained the defendant's name and date of birth. The cause number corresponded to the entry on the defendant case history.

Taking a Motor Vehicle without the Owner's Permission Skagit County Juvenile Court Cause Number **96-8-776-4**. The Court had a Judgment and Sentence containing the defendant's name and date of birth. The cause number corresponded to the entry on the defendant case history.

Taking a Motor Vehicle without the Owner's Permission King County Cause Number **95-8-5340-0** date of sentence August 31, 1995. The Judgment and Sentence contains the defendant's name and date of birth. The documents reflect that probation granted in that cause was revoked on August 17, 1995. The cause number corresponded to the entry on the defendant case history.

Attempt to Elude a Pursuing Police Vehicle - Taking a Motor Vehicle without the Owner's Permission Pierce County Juvenile Court Cause Number **95-8-1803-1**. The Court had a copy of the Judgment and Sentence containing the defendant's name and date of birth. The information on the Judgment and Sentence corresponds to the entry on the defendant case history.

It is difficult to understand what more the defendant would ask the State to prove. Certainly the evidence of the prior convictions was established by a preponderance of the evidence.

The defendant alleges, further, that the Court failed to determine whether two of the Judgments contained criminal history that should have been treated as "same criminal conduct." In King County Cause 06-1-01697-4 and Pierce County Cause 95-1-1803-1, the defendant was convicted of Attempt to Elude and Taking a Motor Vehicle without the Owner's Permission. As a matter of law, these convictions are not "same criminal conduct." Simply stated, when viewed objectively, the intent for Taking a Motor Vehicle without the Owner's Permission is to take or to drive away with another persons motor vehicle. The intent for Attempting to Elude a Pursuing Police Vehicle is the intent to elude the police. These two crimes do not have the same intent.

Similarly, the two crimes do not involve the same victim. The victim of the crime of Taking a Motor Vehicle without the Owner's Permission is the vehicle's owner. State v. Webb, 112 Wn.App. 618, 624, 50 P.3d 654 (2002). The victim of the crime of Attempt to Elude is the

pursuing officer and any civilians who may be in danger by the defendant's attempt to get away. Webb, supra, 112 Wn.App. 624.

This assignment of error is without merit.

CONCLUSION

The defendant's convictions must be affirmed.

DATED this 2 day of October, 2012.

Respectfully Submitted,

By: Gerald R Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/ws

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

STATE OF WASHINGTON, Respondent, v. JEFFREY A. STRICKLAND, Appellant.	No.: 42428-2-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 3rd day of October, 2012, I mailed a copy of the Brief of Respondent to Backlund & Mistry, Attorneys at Law, P.O. Box 6490, Olympia, WA 98507, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 3rd day of October, 2012, at Montesano, Washington.

Barbara Chapman

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563